Preliminary Discovery and Attachment of Assets in International Arbitration

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New York Law Journal, March 28, 2016 -- In Civil Procedure 101, law students learn a usual course of procedure that begins with the filing of a suit, proceeds through discovery, and concludes in a trial and possibly an appeal. Enforcement of a judgment through that effort is considered, if at all, to arise at the end of the process. In the years since the 2008 financial and economic crisis, however, ensuring at the outset of a case that a judgment ultimately will be enforceable has taken on new salience. This is particularly true in cross-border disputes, in which the assets against which enforcement will be sought are often located overseas in the hands of parties whose U.S.-facing business might not be enough to ensure their compliance.

Ensuring enforceability requires counsel and clients to move the question from the end of the process to the beginning, and to determine whether a judgment or award can and will in fact be paid before the costs of the process are undertaken. To do so effectively sometimes requires preliminary discovery of assets and preliminary encumbrance of those assets. Different jurisdictions, of course, have different rules and different tools on offer. As this article describes, New York also authorizes such steps in certain circumstances, although the jurisprudence on these points remains somewhat thin.

Preliminary Discovery of Assets in Aid of International Arbitration.

New York law permits pre-action discovery under CPLR §3102(c), which provides: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony."

No New York Court has addressed whether the statute extends to actions outside the United States; however, language from the Supreme Court's decision in Matter of Murray v. Society for Worldwide Interbank Financial Communication suggests that it does. In Murray, the petitioner sought pre-action discovery against the respondent for use in framing a complaint to be filed against the Bank of New Zealand in an action that would be commenced in New Zealand. Although the court ultimately denied the petitioner's motion on other grounds, it rejected the respondent's argument that the court lacked jurisdiction to order discovery under §3102(c) for an action that would be commenced outside the United States.

Relying on the fact that the Supreme Court is the court of general jurisdiction, but with little additional reasoning, the Murray court determined that "though it is uncontroverted in this proceeding that New York courts do not have jurisdiction to adjudicate claims of fraud against the Bank of New Zealand, it does not follow that they lack power to order discovery in an action to be commenced in New Zealand." At a minimum, Murray supports an argument
that CPLR §3102(c) is not limited to pre-action discovery for New York-based actions alone.

Historically, CPLR §3102(c) has been relied on for pre-action discovery in circumstances "where it is absolutely necessary for the protection of the rights of a party," including discovery for the purposes of pre-action injunction or attachment proceedings. Courts considering CPLR §3102(c) applications apply an "extraordinary circumstances" test. The decision in Weisz v. Weisz provides a good example of the analysis. In Weisz, the petitioner sought to discover the respondent's financial records for use in a child support arbitration proceeding where the respondent was claiming the inability to pay based on income listed on his prior tax filings. The Weisz court granted the petitioner's application for pre-action discovery based primarily on the fact that the tax records relied upon by the respondent, a self-employed individual, showed $175,000 in negative income for the preceding tax year. The court's decision to permit pre-action discovery based on these suspicious documents indicates, importantly, that indicia of fraud can satisfy the "extraordinary circumstances" test for CPLR §3201(c).

A mechanism for pre-action discovery also exists under federal law in 28 U.S.C. §1782, which permits a federal court, in its discretion, to order discovery for use by an "interested person" in a proceeding before a "foreign or international tribunal." The Second Circuit applies a three-part test for discovery applications made pursuant to §1782:

1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign tribunal, and (3) the application is made by a foreign or international tribunal or any interested person.

In addition to these factors, federal courts are guided by the same principles applicable to typical civil discovery.

As a threshold matter, there is an open question as to whether the language "before a foreign tribunal" in §1782 encompasses private foreign arbitration proceedings. The weight of nationwide precedent holds that the statute does extend to international arbitration; however, the Second Circuit has not ruled on this question, and district courts within the circuit have recently reached divergent conclusions.

Assuming that §1782 will support an application for an international arbitration proceeding, one must then show that the requested discovery is "for use" in a foreign proceeding. The Second Circuit has defined "for use" to require that (1) there actually is a foreign proceeding (or one is in real contemplation); and (2) the foreign proceeding is adjudicative in nature. For example, in Jiangsu S.S. Co. v. Success Superior, the petitioner filed a motion under §1782 for pre-action discovery related to foreign attachment proceedings and possibly for use in a contemplated arbitration enforcement proceeding. The Jiangsu court denied the application for discovery on the basis that the petitioner had failed to show that the request would be "for use" in a foreign proceeding, relying on Second Circuit precedent that "neither pre-judgment attachment nor post-judgment enforcement proceedings are 'adjudicative' in nature."
Equally problematic for practitioners is the decision in *In re Asia Marine Pacific*,¹⁰ which rejected the petitioner’s pre-action discovery petition on the basis that §1782 did not encompass foreign arbitrations, and also on the basis that the request for subpoenas targeted records from several banks for the purpose of proposed attachment proceedings was improperly overbroad. However, *Asia Marine* can be distinguished on several grounds. First, in denying the application, the court focused on the petitioner’s failure to put forth any basis for believing the respondent may have had accounts at any of the named banks—rather, the court noted, the petitioner’s application could only be described as a “fishing expedition.”¹¹ Second, the court explained that the petitioner did not demonstrate that the requested information—possible bank accounts—would be “for use” in the contemplated foreign arbitration proceeding (even assuming that §1782 extended to such a proceeding).

**Preliminary Attachment of Assets in Aid of International Arbitration.**

Once assets or property have been identified, attachment may be the next step in ensuring enforcement of an arbitral award. New York law establishes a mechanism to obtain pre-action relief for foreign arbitrations in CPLR §7502(c), which provides in pertinent part:

> [T]he supreme court … may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state … but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.

Key to securing provisional relief under this statute is satisfying the same factors that are necessary to obtaining pre-action relief in a civil case. Thus, in addition to showing that an arbitration award may be rendered ineffectual absent the requested attachment or injunction, an application for relief must also establish the traditional equitable criteria: (1) irreparable harm, (2) likelihood of success in arbitration, and (3) a balance of equities in favor of the moving party.¹² Failure to establish any of these elements will result in the denial of preliminary relief.¹³

*Matter of Sojitz v. Prithvi Information Solutions*¹⁴ is one of the leading cases addressing preliminary attachment of international property in aid of arbitration under CPLR §7502(c). In *Sojitz*, the petitioner moved for an order of attachment against several of the respondent's assets in connection with the petitioner's stated intention to commence an arbitration proceeding against the respondent in Singapore. In support of attachment, the petitioner argued that it would take time to form the tribunal, and that the respondent might dissipate the assets in that time—particularly given that the respondent had already taken actions to move funds out of the reach of the petitioner. The Supreme Court agreed and granted an order of attachment to permit the petitioner to attach funds located in New York that belonged to one of the respondent's clients who in turn owed payment to the respondent. On appeal, the Appellate Division affirmed the order of attachment, noting that the petitioner adequately had demonstrated that the arbitration award
would otherwise be rendered ineffectual without the provisional relief of attachment in light of the respondent's actions. The Appellate Division also rejected the respondent's argument that the court lacked personal jurisdiction over the funds because the respondent lacked the necessary minimum contacts with New York. The court concluded that the attachment was constitutionally sound because it was made for purposes of security, and not to gain personal jurisdiction over the respondent itself. Sojitz is thus significant in that it permits a party to attach assets in New York to secure payment in anticipation of a foreign arbitration, provided the party can demonstrate its entitlement to provisional relief under CPLR §7502(c).\(^1\)

Federal case law involving attachment proceedings related to international arbitration proceedings is scant; however, federal courts do grant preliminary injunctive relief in those circumstances under Rule 65 of the Federal Rules of Civil Procedure. For example, in *AIM International Trading v. Valucine S.p.A.*,\(^2\) the plaintiff brought an action that included claims for breach of contract and fraud, but shortly thereafter, the defendant instituted a separate international arbitration proceeding. The Valucine court granted the plaintiff's application for a TRO, and later a preliminary injunction, that prevented the foreign defendant from, among other things, selling products under trademarks established by the agreement between the parties during the pendency of the international arbitration proceedings. In granting the preliminary injunction, the Valucine court applied the traditional equitable factors in determining whether preliminary relief would be appropriate: whether the plaintiff would suffer irreparable harm and whether the plaintiff demonstrated a likelihood of success on the merits or serious questions going to the merits.

**Conclusion.**

An unenforceable arbitral award, secured at considerable expense, is worse than no award at all. Accordingly, counsel advising clients in pre-arbitration settings should "flip the script" and attempt to determine at the outset whether an award will ultimately be of value. That process may be aided by preliminary discovery of an adversary's assets, and if successful, perhaps also by preliminary attachment of such assets. Although New York provides for such measures, the jurisprudence is relatively scant. As more clients and counsel apprehend the potential importance of these steps, however, one may expect that, over time, the law will become the subject of more attention and development.

**Endnotes:**

1. 2012 N.Y. Misc. LEXIS 5380 (Sup. Ct. 2012). It should be noted that CPLR §3102(e) provides for discovery for an "action pending in another jurisdiction." However, it does not appear that this provision has been applied in pre-action circumstances.
2. Id. at *4.

Pre-action discovery under the statute is also appropriate to ascertain who the proper parties to an action should be, but not where the discovery appears to be nothing more than a "fishing expedition" to determine whether a viable cause of action exists. See, e.g., *Liberty Imps. v. Bourguet*, 146 A.D.2d 535, 536 (App. Div. 1989); *Matter of
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5. Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012).


11. At least one district court in the Second Circuit has permitted a similar request for subpoenas directed at banks that the petitioner believed "most likely" to have the documents the petitioner sought. In re Application of Hornbeam, 2014 U.S. Dist. LEXIS 183856 (S.D.N.Y. Dec. 24, 2014).


13. E.g., id. (denying preliminary relief based on finding that the petitioner had failed to show a likelihood of success on the merits in arbitration).


15. This does not mean that attachment always can be effected on funds located in New York to secure a foreign arbitration proceeding. In Matter of International Legal Consulting v. Malabu Oil & Gas, 35 Misc.3d 1203(A) (N.Y. Sup. Ct. 2012), the court rejected a petitioner's attempt to attach assets in a United Kingdom bank account, that was not held in the respondent's name or on its behalf, through service on a New York branch of the same bank. The Malabu Oil court held "the service of an ex parte order of attachment in aid of a pending arbitration on a bank in New York does not encompass branches of the bank located in foreign jurisdictions, where the arbitration is pending in a foreign jurisdiction and involves a dispute between non-U.S. entities having no relationship with New York or even the United States." Id.


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