# The Evolving Standards for Provisional Remedies in Aid of Arbitration

by George Bundy Smith and Thomas J. Hall

When a claimant commences arbitration, an initial focus may be to ensure that the arbitral award ultimately will be enforceable. As we explained in our Feb. 21, 2014 column, CPLR §7502(c) provides an arbitral party the means of achieving this, petitioning the court for preliminary injunctions or orders of attachment in aid of arbitration. While one would expect §7502(c) to be a popular arrow in the quiver of arbitral parties, there continue to be only a handful of cases decided under that statute each year. Despite the relative paucity of recent cases, there has been a recent shift as to how some applications under §7502(c) are resolved.

An appellate division split has long existed regarding the standard for deciding §7502 (c) applications. Section 7502(c) provides that whether the eventual arbitration award "may be rendered ineffectual" without provisional relief is the "sole ground" for granting that relief, but it also incorporates the procedural requirements of Article 62 (orders of attachment) and Article 63 (preliminary injunctions). While some courts have focused exclusively on whether the ultimate arbitration award would be ineffective if provisional relief were not granted, see, e.g., *Mermaid Marine, Ltd. v. Mar. Capital Mgmt. Partners*, 147 A.D.3d 498, 499 (1st Dep't. 2017); *Moquinon v. Gliklad*, 55 Misc. 3d 1212(A) (N.Y. Co. April 6, 2017); *Mascis Investment Partnership v. SG Capital*, 2017 NY Slip Op 30813(U) (N.Y. Co. April 21, 2017), others have further required that the movant satisfy the equitable criteria for injunctive relief, e.g., likelihood of success on the merits, irreparable harm and the balance of equities in movant's favor, see, e.g., *Rockwood Pigments NA v. Elementis Chromium LP*, 124 A.D.3d 509, 511 (1st Dep't. 2015); *Founders Ins. Co. v. Everest Nat. Ins. Co.*, 41 A.D.3d 350, 351 (1st Dep't 2007); *In re Thornton & Naumes (Athari Law Office)*, 36 A.D.3d 1119, 1120 (3d Dep't. 2007).

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Recent appellate and Commercial Division decisions have continued the trend towards requiring satisfaction of these equitable criteria for applications for preliminary injunctions. In contrast, they have revived an earlier split as to the role of such factors, if any, in deciding applications for attachment in aid of arbitration. This column addresses those recent Commercial Division decisions addressing §7502(c).

## PRELIMINARY INJUNCTIONS

For a preliminary injunction in aid of arbitration, the First Department recently reiterated that petitioners must show customary equitable criteria, including "a likelihood of success on the merits, irreparable harm and a balance of equities in their favor," in addition to satisfying the §7502(c) "rendered ineffectual" test. *Rockwood Pigments NA v. Elementis Chromium LP*, 124 A.D.3d 509, 511 (1st Dep't. 2015). While the Second Department has in the past been aligned with the First on this approach, see *Winter v. Brown*, 49 A.D.3d 526 (2d Dep't. 2008), it has not made any recent pronouncements on this issue. The Third and Fourth Departments still have not weighed in on this issue of whether this three-prong test for injunctive relief needs to be met.

Recent Commercial Division decisions have followed earlier First and Second Department cases in requiring the satisfaction of the equitable criteria for 7502(c) attachments. In *Rockwood Pigments NA v. Elementis Chromium LP*, 2014 WL 3899214 (N.Y. Co. Aug. 15, 2014), Justice Melvin L. Schweitzer granted a preliminary injunction precluding a respondent from terminating its distributorship agreement with petitioner pending arbitration. In evaluating the application, the court required that petitioner satisfy the equitable criteria for a preliminary injunction. Finding those criteria satisfied, the court then determined that the absence of a preliminary

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injunction could render an arbitral award ineffectual because petitioner would lose the ability to service its customers pending arbitration, and it granted petitioner a preliminary injunction. The First Department affirmed.

## ORDERS OF ATTACHMENT

With respect to attachments in aid of arbitration, a historical Departmental split existed on whether an attachment application under 7502(c) required satisfaction of the equitable criteria for injunctive relief, with the First and Third Departments requiring such criteria, and the lead decision of the Fourth Department not, it instead focusing on the ability of a respondent to satisfy a possible arbitral award. Compare *Founders Ins. Co. v. Everest Nat. Ins. Co.*, supra; *In re Thornton & Naumes* (Athari Law Office), supra, with *Spatz v. Ridge Lea Assocs.*, 309 A.D.2d 1248, 1249 (4th Dep't. 2003). Recently, however, decisions in the First Department have trended away from earlier precedent.

In *Kadish v. First Midwest Sec.*, Index No. 652824/2013 (N.Y. Co. Sept. 24, 2013), Justice Shirley Kornreich denied an application for an attachment in aid of arbitration where the petitioner expressed concern that respondent was insolvent and had several arbitrations pending. On appeal, the First Department rejected respondent's claim that the three-prong test for preliminary injunctions is applicable to a 7502(c) application for an attachment and affirmed Justice Kornreich's denial. *Kadish v. First Midwest Sec.*, 115 A.D.3d 445 (1st Dep't. 2014). To justify this result, and without addressing the authorities to the contrary, the panel explained that "[r]ecent cases of this Court, however, continue to apply the 'rendered ineffectual' standard with regard to a CPLR 7502(c) attachment in aid of arbitration." In *Mermaid Marine v. Mar. Capital Mgmt. Partners*, supra, citing *Kadish*, the First Department affirmed the denial of a 7502(c) attachment application, focusing solely on the petitioner's failure to satisfy the "rendered ineffectual" test.

Recent Commercial Division decisions have followed the First Department's lead. In *Moquinon v. Gliklad*, 55 Misc. 3d 1212(A) (N.Y. Co. April 6, 2017), Justice Anil C. Singh granted an attachment where there was a showing that respondent, who allegedly breached a loan agreement, intended to dissipate proceeds. In response to petitioner's 7502(c) attachment application, respondent argued that, in addition to failing to establish that an arbitration award would be rendered ineffectual without an attachment, petitioner had failed to establish a probability of success on the merits, that damages sought exceed all counterclaims and the existence of a cause of action for money damages—§6201 attachment equitable criteria, which overlap with the equitable criteria for injunctive relief. The court found a "sharp distinction" between an application for attachment and for a preliminary injunction. Relying on *Kadish* and *Mermaid Marine*, the court held the "three-part test for a preliminary injunction does not apply where the movant seeks only an order of attachment in aid of arbitration." As such, the court found the respondent had conflated the two standards and that the "rendered ineffectual" standard alone governs. Applying that standard, the court focused on evidence that the respondent was a nondomiciliary that intended to dissipate the only likely source for possible satisfaction of petitioner's claim under the loan agreement and granted the order of attachment.

A recent unpublished case in the Commercial Division, following in the wake of *Moquinon*, further cements this trend. In *Mascis Investment Partnership v. SG Capital*, 2017 NY Slip Op 30813(U) (N.Y. Co. April 21, 2017), Justice Marcy Friedman denied plaintiffs' application for a 7502(c) attachment because the plaintiffs failed to show that an eventual arbitration award would be rendered ineffectual without it. Plaintiffs alleged that respondent's assets were liquid, that it had made failed investments in the past, and that it is a nonfunctioning shell corporation. In denying the application, the court looked solely to the ineffectual test, finding insufficient evidence that respondent was in financial distress or had secreted assets or evaded creditors. The *Mascis* petitioner has appealed that decision, so we may soon have another decision by the First Department on the standard governing applications for attachments. Until that time, recent precedent in the Commercial Division addressing 7502(c) attachments have highlighted the trend in the First Department away from applying the equitable criteria and, instead, looking solely to the ineffectual test and the ultimate ability to satisfy an arbitral award.

## CONCLUSION

Over the last several years, the Commercial Division has offered further guidance to those petitioning for provisional remedies in aid of arbitration. Specifically, the courts have addressed their prior split and sought to distinguish the standards governing preliminary injunction and those governing attachment. On 7502(c) preliminary injunction applications, the courts continue to require both the equitable criteria of Article 63 and the rendered ineffectual standard in §7502(c). On attachment applications, however, recent trends depart from earlier cases that incorporated the equitable criteria and now ask only that the claimant show the arbitration award would be rendered ineffectual absent an attachment. The clear emerging trend in the First Department is that to do so the party must prove that there will not be adequate funds to cover an arbitration award should an attachment be denied. Whether other departments will follow remains to be seen. Ultimately, however, the Court of Appeals may be called upon to reconcile the various positions that the different departments have taken. ■