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When Will US Courts Grant Provisional Remedies When a Dispute is Governed by an Arbitration Agreement?

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A recent ruling from a U.S. federal district court has highlighted an emerging doctrine in United States courts with respect to a party's ability to seek provisional remedies from a court in support of international arbitration. The recent ruling, together with other cases, demonstrates a reluctance to permit parties to seek redress in courts, even for ancillary issues, where the parties have clearly agreed to utilize arbitration to resolve their disputes.

In Emirates Int'l Inv. Co. v. ECP Mena Growth Fund, LLC, 2012 WL 2198436 (S.D.N.Y. June 15, 2012)), the court denied a preliminary injunction where the parties were already engaged in arbitration before a constituted tribunal. The underlying dispute occurred over an investment that the petitioner, Emirates International Investment Company ("EIIC") made with the respondent, ECP Mena Growth Fund (the "Fund"). EIIC was aggrieved when the Fund declared EIIC a "defaulting shareholder" because of an allegedly late capital call payment. The status designation of "defaulting shareholder" subsequently entitled the Fund to sell EIIC's portion of the Fund. EIIC moved for a preliminary injunction enjoining the Fund from selling its portion until the resolution of the underlying dispute.

Generally, in the U.S., a party seeking a preliminary injunction must show: (a) a likelihood of irreparable harm in the absence of the injunction; and (b) either a likelihood of success on the merits or sufficiently serious questions going to the merits, in which a balance of hardships analysis comes out in the movant's favor. Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008). The first requirement is satisfied where the petitioner demonstrates that absent the preliminary injunction it will suffer injury that actual and imminent, rather than remote or speculative, and that the injury would not be remedied if a court waits until the end of the litigation to resolve the harm. Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005). The irreparable harm requirement is the most important determination a court must make before issuing the preliminary injunction.

Although the court in Emirates Int'l Inv. Co. acknowledged its ability to grant provisional remedies, including preliminary injunctions, in aid of international arbitration, it nonetheless denied the request because EIIC had not demonstrated any likelihood of irreparable harm. The

court's decision was driven, at least in part, by the fact that the parties were already engaged in arbitration before a constituted tribunal, which therefore had the power to enjoin the parties before it.

Similarly, in Anwar v. Fairfield Greenwich Ltd., 728 F. Supp.2d 462 (S.D.N.Y. 2010), the court denied a preliminary injunction where the parties were in the midst of an arbitration before an already constituted panel. The petitioners argued that where a federal statute mandated a stay of discovery while motions to dismiss complaints were pending in US court, a stay of discovery was also warranted in a simultaneous ongoing AAA Arbitration over the underlying dispute. The court disagreed, holding that the petitioner had not demonstrated irreparable harm if the discovery in the related arbitration was allowed to proceed. The court also noted a lack of the likelihood of success on the merits because the plaintiffs had also asked the arbitration panel to stay discovery and been denied.

Emirates Int'l Inv. Co. and Anwar demonstrate a welcome trend by US courts of establishing a clear line for parties with respect to when they may request provisional remedies from the courts where the underlying dispute is subject to arbitration. The cases show that courts are likely to deny motions for provisional remedies where the arbitration tribunal has already been constituted and the arbitration is ongoing because the tribunal itself can provide the requested relief. On the other hand, where an arbitration tribunal has not been constituted and arbitration is not yet occurring, US courts may still grant provisional remedies, as in Huawei Tech. Co., Ltd. v. Motorola, Inc., 2011 WL 612722 (N.D. Ill. Feb. 22, 2011). This distinction preserves the ability of parties to protect themselves in cases of true emergency, but makes it clear that when parties have elected to resolve their disputes through arbitration, they should not be able to run to court just because it suits their purpose.

It is worth noting a potential wrinkle in this distinction: New ICC rules (and the rules of other arbitral bodies) which allow for the appointment of an emergency arbitrator, prior to the constitution of the main tribunal, to deal with provisional remedy requests. In light of these new rules, a US court may hold that, even before the constitution of a tribunal, a party can no longer seek provisional remedies in US courts if the applicable rules allow for the appointment of an emergency arbitrator. Though courts have not yet applied this logic, the possibility that courts will decline to provide a provisional remedy where the remedy itself could be issued by an arbitrator, provides further support for the notion that by picking arbitration as dispute resolution method, parties should stick to the arbitration process, rather than attempting to find redress in US courts.

This entry was posted on Monday, July 1st, 2013 at 5:56 pm and is filed under Commercial Arbitration, Domestic Courts, Interim Orders, Pro arbitration, Provisional measures, United States
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