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OVERVIEW OF U.S. COURT TREATMENT OF INTERIM MEASURES IN SUPPORT OF INTERNATIONAL ARBITRATION

By Ava Borrasso

I. Introduction

National courts play an important role in supporting international arbitration. Prior to the enactment of institutional rules providing for emergency arbitrators, courts were routinely petitioned to preserve assets, obtain evidence and otherwise maintain the status quo pending arbitration under a variety of circumstances. Those same needs continue post the issuance of emergency arbitrator rules under particular conditions, as most institutional rules recognize. In addition, courts play an important role in the enforcement of interim relief ordered by arbitral tribunals. This article addresses the continuing need to obtain interim relief from courts to support international arbitration proceedings and recent U.S. court treatment of these issues.

Many institutional rules now expressly provide that interim relief may be sought before relevant judicial authorities *or* arbitral panels, depending on the particular circumstances at hand.[1] Similarly, many institutions also provide for emergency arbitrators to handle urgent matters pending constitution of the tribunal.[2] The enforceability of interim and emergency orders from arbitral tribunals against parties who fail to voluntarily comply with them is a matter of some debate and may take some time to settle.[3] In the U.S., recent case law suggests that, despite these developments, continued cooperation from U.S. judicial authorities to support international arbitration proceedings - both before and after constitution of the arbitral panel - remains a critical tool to preserve relief pending resolution of disputes on their merits as addressed more fully below.

II. Court Orders on Direct Requests for Interim Relief Pending Arbitral Proceedings

Parties have pursued actions in court to procure and preserve evidence, require compliance with arbitration agreements, obtain injunctive relief and otherwise maintain

the status quo pending international arbitration proceedings. U.S. courts maintain a high degree of flexibility to fashion that relief and to specifically tailor it to the particular needs of the underlying case. As the following cases demonstrate, courts weigh the ability to meaningfully support the arbitral process by maintaining the status quo against a healthy respect for the arbitral process and an arbitrator's ability to grant interim relief when in a position to do so.

A. Orders Granting Injunctive Relief

In *Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc.,*[4] the Ninth Circuit Court of Appeals held that it was error to deny a request for an injunction pending an ICC arbitration without analyzing the appropriate standards. Toyo Tire sought injunctive relief in the district court to preserve the status quo on the same day it filed an ICC arbitration and sought interim relief from the tribunal. Toyo Tire sought to enjoin the defendants from dissolving their joint venture partnership and distributing partnership assets until the ICC panel ruled on the merits. The district court denied the injunction based on the pendency of the request for interim relief before the panel, reasoning that the result was required under binding precedent.[5]

The Court of Appeals reversed and held the relief sought was necessary to "preserve the meaningfulness of the arbitral process" and to maintain the status quo pending the panel's ruling on interim relief. As a result, the Court determined that the relief requested was consistent with the authority provided under the applicable ICC Rules permitting conservatory and interim measures.[6] The relief was further supported by the fact that the arbitrator was not yet appointed at the time the relief was sought and Toyo Tire had moved expeditiously in light of the urgency of the relief sought.

Similarly, in *Oberto Sausage Co. v. JBA S.A.*,[7] the court granted a preliminary injunction pending an arbitrator's decision on the merits. In that case, an agreement between a U.S. manufacturer of beef jerky and a Brazilian meat processor required the conveyance of highly confidential and proprietary equipment and training to the Brazilian partner. The agreement also contained a strong non-compete provision and required continued performance by the parties pending final resolution of any dispute in arbitration. When a competitor merged with the Brazilian company years into the agreement, the U.S. company filed suit seeking a preliminary injunction pending resolution of the arbitration.

The court applied the legal standard for issuance of an injunction: (a) the movant is likely to prevail on the merits; (b) the movant is likely to suffer irreparable harm absent entry of the relief; (c) the equities balance in favor of the movant; and (4) the relief requested is in the public interest.[8] The court assessed those factors in favor of the U.S. manufacturer and granted a preliminary injunction pending resolution of the ultimate issues by the arbitrator. Notably, the injunction sought was narrowly tailored so as not to interfere with the arbitration. The court enjoined the defendant from using its predecessor's Brazilian plant to manufacture or export meat snacks and enjoined the use of plaintiff's confidential and proprietary information to manufacture and export meat snacks to the U.S. at another Brazilian plant.

Other courts have granted injunctive relief under comparable circumstances to support the arbitral process. *See Blom ASA v. Pictomerty Int'l Corp.,* 757 F. Supp. 2d 238 (W.D.N.Y. 2010) (granting competing injunctions sought by the parties to preserve status quo pending ICC arbitration over alleged breach of exclusive licensing agreement),[9] *Zoll Circulation, Inc. v. Elan Medizintechnik, GmbH,* 2010 U.S. Dist. LEXIS 75574; 2010 WL 2991390 (C.D. Cal. July 26, 2010) (granting motion for injunction, in part, pending ICC arbitration where plaintiff sought to enjoin defendant from representing itself as a distributor of plaintiff's products after expiration of licensing agreement and requiring plaintiff to post a bond prior to issuance of injunction).[10]

B. Orders Denying Injunctive Relief

By contrast, in *Palmco Corp. v. JSC Techsnabexport,*[11] a district court declined to consider a request for an injunction because the parties had agreed to arbitrate their dispute in Sweden. The court dismissed an action for interim injunctive relief pending the arbitration based on the doctrine of forum *non conveniens*. The court applied the relevant factors – the existence of an adequate alternate forum plus a weighing of various private interest and public interest factors – and determined that the doctrine applied. The court acknowledged that although the tribunal may not be able to fashion the same relief, it could assess damages for failure to comply with an interim order at the end of the case – or, as in *Publicis,* discussed below, enter an award which would then be subject to enforcement by the courts.[12]

Other U.S. courts have similarly declined to grant interim relief when a matter is or should be properly pending before an arbitral tribunal. *Genias Graphics GmbH & Co. KG v. Tecplot, Inc.,*[13] clearly articulates when a court should intervene in the face of arbitral proceedings:

> … there is a threshold question as to whether issuance of a preliminary injunction is appropriate in light of the parties' contractual agreement to arbitrate disputes. "A district court may issue interim injunctive relief on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process - provided, of course, that the requirements for granting injunctive relief are otherwise satisfied." *Toyo Tire Holdings of Americas Inc. v. Continental Tire N. Am., Inc.*, 609 F.3d 975, 981 (9th Cir. 2010). But, where an arbitrator is authorized under the governing rules of arbitration to grant the equivalent of the interim relief sought - *and is in a position to do so* - it is not appropriate for a district court to grant preliminary injunctive relief. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725-26 (9th Cir. 1999).[14]

Given the pendency of the arbitration pursuant to the ICDR Rules which authorize the arbitrator to award interim relief and the fact that the arbitrator already had been appointed before the case was filed, the court determined that the arbitrator could fashion the appropriate relief and dismissed the case.[15]

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As the preceding discussion demonstrates, resolution of claims before courts depends in large part on the particular claim brought, the status of the arbitration proceeding and the rules applicable to the arbitration. The terms of the agreement of the parties are also critical. By way of example, in *Nexteer Auto. Corp. v. Korea Delphi Auto. Sys. Corp.*,[16] the parties' exclusive supply agreements called for SIAC arbitration of any dispute but contained a rather broad carve-out permitting either party to seek preliminary or injunctive remedies "under applicable laws for any purpose."[17] Nexteer filed suit in a Michigan district court seeking to enjoin Korea Delphi from supplying certain auto shafts to a third party based on the claim that the manufacture and supply of the equipment violated the parties' exclusive supply agreement by using confidential information, among other things.

Procedurally, Nexteer sought preliminary and permanent injunctive relief in the district court while the arbitration was pending in Singapore. Nexteer filed the SIAC arbitration in June 2013 seeking expedited arbitration which was denied. In November 2013, Nexteer filed new claims under related agreements and sought to consolidate the cases. Notably, Nexteer did not seek preliminary or interim relief in the SIAC arbitration. Then, in December 2013, Nexteer filed the Michigan district court case seeking injunctive relief. Korea Delphi sought to dismiss the case and compel arbitration of the claims.

The court first addressed its jurisdiction under the agreement and determined it had jurisdiction on the request for preliminary relief (but denied relief because Nexteer failed to meet the requisite elements) but lacked authority to award a permanent injunction because that was a matter for the arbitration. Notably, the arbitrator had issued an intervening order that precluded Nexteer from obtaining permanent injunctive relief through the court action.[18] The court determined that, though not bound by the arbitrator's ruling, proceeding on the request for permanent injunctive relief would essentially eviscerate the parties' arbitration clause:

> The agreements cannot be interpreted to mean that the parties intended for their contractual dispute to be resolved in two forums simultaneously which would involve the significant risk of inconsistent findings and rulings. The "carve out" provision expressly provides that the mandatory arbitration provision "shall not preclude the parties from applying for any preliminary or injunctive remedies available under applicable laws." The court is aware of no law, interpreting arbitration agreements like those presented here, which would allow Nexteer to seek permanent, as opposed to interim relief, outside the arbitration forum while the arbitrator is adjudicating the same issue. Moreover, given that resolution of this dispute involves the interpretation of multiple provisions of multiple agreements, and extensive fact finding in this complex and highly disputed history of the development of halfshaft joints on both sides, principles of comity and fairness require that the arbitration proceedings before the SIAC go forward unhindered by the risks of litigating this matter in two forums. The rules of the SIAC specifically provide for injunctive relief, and Nexteer has sought that relief in the arbitration proceedings. Were this court to allow Nexteer's claim for permanent injunctive relief to go forward here, the arbitrator would retain the power to modify and reverse

any decisions made in this court because by contract, the arbitrator makes the ultimate decision.[19]

As a result, the court denied the motion for preliminary injunction, granted the motion to compel arbitration and dismissed the case.[20]

Similarly, in *APR Energy LLC v. First Inv. Group Corp.,*[21] the parties' energy consulting services agreement provided for ICC arbitration but it reserved the parties' rights to apply to a court for preliminary injunctive relief as long as the relief requested was necessary to prevent imminent damage *and* did not seek to resolve the merits of the dispute. When the parties' dispute arose from nonpayment under the terms of the agreement, APR filed suit in a Florida district court while First Investment Group (FIG) filed suit in a Libyan court to freeze monies due to an APR-related entity from third party, General Electric Company of Libya (GECOL), under an agreement allegedly procured by a FIG-related entity. The Libyan court granted the relief. FIG later instituted the ICC arbitration.

In the Florida case, APR moved to compel arbitration and for issuance of an anti-suit injunction barring FIG from proceeding with the Libyan case and requiring FIG to raise the matters before the Libyan court in arbitration. The court reviewed the motion against the carve-out of the arbitration clause. The court handily determined that the issues before the Libyan court did not fall within the exception to the arbitration clause: namely, there was no threat of imminent damage merely the possibility of not being able to collect a money judgment.[22] As such, the court granted the motion to compel and ordered FIG to resolve the issues in arbitration.

The court then turned to the request for an anti-suit injunction noting issuance of such orders are rare and require restraint because "it effectively restricts the jurisdiction of a foreign court."[23] The court determined that, although the parties in both actions were not identical, the real parties in interest were effectively present in both the Florida and Libyan cases thus satisfying the first element. The second element – whether "the case before the enjoining court could be dispositive of the action to be enjoined" – was also satisfied because the claims pending in Libya had to be resolved in the arbitration.[24] Because additional discretionary factors weighed in favor of issuance under the most conservative legal standard, the court granted the anti-suit injunction, declined to require APR to post a bond and ordered the parties to resolve their disputes in arbitration.[25]

Other courts have balanced requests for relief before them against that available in arbitration and granted partial relief tailored to the unique circumstances presented. For example, in *Robbins Co. v. JCM Northlink LLC,*[26] the court issued a preliminary injunction to preserve the status quo pending an ICC arbitration but denied a request for replevin of certain rental equipment. The Court determined that the temporary injunction precluding disclosure of confidential or trade secret information and protecting the equipment from damage during testing was properly converted to a preliminary injunction pending the parties' arbitration before the ICC. Because replevin of the equipment was an ultimate issue in the arbitration, the court declined to grant it and otherwise dismissed the case. In granting interim relief to preserve the status quo, the court relied on the ICC arbitration rules that permit application to a court for interim or conservatory measures without constituting a waiver of the arbitration agreement or otherwise affecting the tribunal's powers.[27] Similarly, in *Zhenhua Logistics (H.K.) Co. v. Metamining, Inc.,*[28] the court denied a motion to convert a temporary restraining order into a preliminary injunction and allowed the order to expire because the movant failed to establish entitlement to an injunction and the arbitrator was authorized to grant interim relief under the applicable SIAC arbitration rules.[29]

C. Rulings on Attachment Proceedings

Two recent U.S. Circuit Court of Appeals cases addressed motions for attachment in the maritime context and highlight the importance of underlying law. In both cases, the Courts denied attachment pending international arbitration proceedings. *See, Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar,* 895 F.3d 375 (5th Cir. 2018) (affirming order vacating pre-award writ of attachment of pig iron aboard a vessel where movant failed to invoke or comply with requirements of state attachment law); *SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC,* 875 F.3d 609 (11th Cir. 2017) (declining to award security through attachment where Georgia's adoption of UNCITRAL Model Law on interim measures failed to adopt 2006 amendments that expanded the interim measures to include attachment and otherwise failed to satisfy maritime jurisdictional prerequisites).

Also, in *Shah v. Commercial Bank "Ob'Edinennyi Investitsionnyi Bank,*[30] a New York district court denied a motion to attach a New York bank account pending resolution of an arbitration before the LCIA. There, Shah had already obtained a prior arbitration award and garnished bank accounts in Austria and New York based on the award. When he filed a second arbitration, he sought a separate order of pre-award attachment. The court examined the request and denied it under applicable law. Despite satisfaction of the predicate elements that the dispute involved a proper cause of action, that Shah was likely to succeed in the arbitration, and that there were no pending counterclaims, Shah failed to demonstrate the potential award would likely be "*rendered ineffectual"* as required under New York law.[31] *See also*, *Swift Splash, Ltd. v. Rice Corp.,* 2010 U.S. Dist. LEXIS 101324; 2010 WL 3767131 (S.D.N.Y. Sept. 24, 2010) (vacating temporary restraining order that garnished respondent's New York bank account pending London maritime arbitration proceeding where petitioner failed to meet the heavy burden of attachment under New York law).[32]

By contrast, pre-award attachment was granted under Massachusetts law in *University of Notre Dame (USA) v. TJAC Waterloo, LLC.*[33] The parties were engaged in a construction and renovation dispute in a London arbitration pursuant to English law and agreed to bifurcate the liability and damages phases of the case. After the arbitrator issued the final award on liability, the University filed an action for attachment in Massachusetts state court which was removed to federal court. The University then added a claim to confirm the liability award along with its request for attachment and other relief.[34] The district court issued

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an attachment order for $7.2 million, equal to the insurance the defendants were required to maintain on the project (but had permitted to lapse). The court held the remedy was available under the less stringent standard of Massachusetts' law: that there is a "*reasonable likelihood*" the plaintiff will recover a judgment equal to or in excess of the amount attached.[35]

III. Judicial Enforcement of Arbitral Interim Relief Orders

In addition to ruling on direct requests for interim relief, U.S. courts also have enforced interim relief awarded by arbitral tribunals. For instance, in *Publicis Commun. v. True North Communs. Inc.,*[36] the Seventh Circuit Court of Appeals affirmed the district court's ruling that enforced a tribunal order granting interim relief pending resolution of the dispute on the merits. There, the parties were in the midst of dissolving their joint venture and their agreement provided for disputes to be resolved by LCIA arbitration pursuant to the UNCITRAL rules. A preliminary issue was the U.S. company's need to obtain certain records from its French co-party, Publicis, in order to timely comply with its tax filings before the IRS and SEC. The Chair issued an interim order in favor of the U.S. party, compelling the French company to provide the requisite information by a date certain. The U.S. party then sought to confirm the order before an Illinois district court.

Publicis fought confirmation arguing that the order was not a final award subject to confirmation under the New York Convention and, therefore, should await resolution of the remaining issues pending before the tribunal.[37] Publicis also argued that the order was imperfect in form because it was only signed by the Chair and not the entire tribunal as the UNCITRAL rules require. The district court dispensed with the arguments and confirmed the award.

On appeal, the Circuit Court affirmed, reasoning that "[a]lthough [Publicis] suggests that our ruling will cause the international arbitration earth to quake and mountains to crumble, resolving this case actually requires determining only whether or not this particular order by this particular arbitration tribunal regarding these particular tax records was final."[38] The Court noted that the ruling was final in all respects though termed an "order" and rejected Publicis' invitation to impose what it termed "extreme and untenable formalism." The Court also dispensed with the procedural objection that the Chair's signature "for and on behalf of" the co-arbitrators was non-final.[39] The Court reasoned that the UNCITRAL rules permit the Chair to determine procedural issues alone. Upon examination of the substance of the ruling, the Court determined that the signature for the panel, a representation otherwise unnecessary for a procedural order, on the urgent issue was final and enforceable.

In another instance, in *CE Int'l Res. Holdings LLC v. S.A. Minerals, Ltd.,*[40] a New York district court confirmed an interim order issued by an ICDR arbitrator that required the defendants to post a $10 million security bond or refrain from transferring assets worldwide up to $10 million. The tribunal order required security in the form of a Mareva injunction or freeze order otherwise unavailable under applicable New York law. The court, nonetheless, confirmed the interim order.

The court noted the order was severable from the remaining issues in the arbitration and determined there was a sufficient basis to confirm it – despite its non-final nature. The court also addressed the respondents' argument that the freeze order was unavailable under applicable New York law and hence violated public policy. The court weighed the strong policy favoring arbitration against the applicable underlying law and resolved the issue by relying on the terms of the parties' agreement which allowed the arbitrator to award interim relief. By consenting to the ICDR rules for the arbitration, the court held the parties had consented to arbitrator's authority to issue the interim order:

> While the contract does not expressly provide for the posting of pre-judgment security … the parties' agreement to the [ICDR] rules, without exception for the rules that allow an arbitrator to order interim security, means that they conferred on the arbitrator the necessary authority to issue the interim award here sought to be enforced. That is true even though, had the underlying action been brought in this court or in the New York State Supreme Court, no such interim security could have been ordered. It is not contrary to the public policy of the State of New York to enforce the terms of an agreement freely reached by sophisticated parties.[41]

As a result, the court confirmed the arbitrator's interim award and later held the respondents in contempt for failing to abide by it.[42] *See also, Commodities & Minerals Enter. V. CVG Ferrominera Orinoco,* 2018 U.S. Dist. LEXIS 120909; 2012 WL 12844750 (S.D. Fla. July 18, 2018) (confirming partial interim award in excess of $62 million issued by panel pursuant to rules of Society of Maritime Arbitrators that provided security for claim where movant demonstrated likelihood of success, financial hardship, and difficulty enforcing ultimate award against Venezuelan government owned entity).

IV. Conclusion

As this overview of recent U.S. case law suggests, interim measures continue to be awarded in direct court actions. However, given the strong policy in favor of arbitration, U.S. courts push back and decline to enter relief in cases where the arbitrator has the authority to issue the relief and such relief would be viable under the circumstances. The particular relief requested must comply with underlying law as clearly demonstrated by the cases seeking writs of attachment. Finally, U.S. courts appear willing to enforce interim orders issued by tribunals in proper cases despite ongoing debate among jurisdictions as to their enforceability.

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1 *See e.g.* 2016 SIAC Rule 30 (Interim & Emergency Relief); 2014 ICDR Rules, Article 24 (Interim Measures); 2017 ICC Arbitration Rules, Article 28 (Conservatory and Interim Measures); LCIA Arbitration Rules (2014), Article 25 (Conservatory and Interim Measures); HKIAC Arbitration Rules (2013), Article 23 (Interim Measures of Protection and Emergency Relief); UNCITRAL Arbitration Rules (2014), Article 26 (Interim measures); (citations to current rules).

2 *See e.g.* 2016 SIAC Rules, Schedules 1 (Emergency Arbitrator); 2014 ICDR Rules, Article 6 (Emergency Measures of Protection); 2017 ICC Arbitration Rules, Article 29 (Emergency Arbitrator); 2014 LCIA Arbitration Rules (2014), Article 9B (Emergency Arbitrator); HKIAC Arbitration Rules (2013), Schedule 4 (Emergency Arbitrator Procedures).

3 *See e.g. Enforceability of interim measures and emergency arbitrator decisions,* Norton Rose Fulbright, Martin Valasek & Jenna Anne de Jong, Lexology, July 5, 2018; *Interim Relief Through Emergency Arbitration: An Upcoming Goal or Still an Illusion?* Linklaters, Alessandro Villani, Manuela Caccialanza, Kluwer Arbitration Blog, July 14, 2017; *The Coming of Age of Interim Relief in International Arbitration: A Report from the 28th Annual ITA Workshop,* White & Case LLP, Michelle Grando, Kluwer Arbitration Blog, July 20, 2016 (citing a 2012 survey noting 62% voluntary compliance with interim orders issued by tribunals, encouraged by potential sanctions and reputational impact of non-compliance).

4 609 F.3d 975 (9th Cir. 2010).

5 *Simula Inc. v. Autoliv Inc.*, 175 F.3d 716 (9th Cir. 1999) (*Simula).* The Court of Appeals reversed finding *Simula* distinguishable because the movant there sought to avoid arbitration altogether and argued that the tribunal could not grant the relief requested. The court in *Simula* determined that the panel could grant the requested relief and therefore dismissed the case.

6 ICC Article 23 (current Article 28, ICC Arbitration Rules) provided for interim relief through the courts either prior to the time the file was transmitted to the tribunal or "in appropriate circumstances even thereafter." *See Toyo Tire,* at 980. Notably, at the time the order was issued, the ICC had not enacted the emergency arbitrator rule providing for relief prior to empaneling of the tribunal. The ICC Emergency Arbitrator Rules were first enacted for cases filed after January 2, 2012 (Article 29) (The ICC's prior procedure, Rules for a Pre-Arbitral Referee Procedure, required the express agreement of the parties in order to apply). By way of comparison, the ICDR Emergency Measures of Protection (then Article 37) were first enacted for agreements entered on or after May 1, 2006. The court's analysis highlights the importance of the underlying arbitration rules. Had the emergency arbitrator rules been in effect at the time of the ruling, the urgent relief requested may have been addressed in the arbitration.

7 2011 U.S. Dist. LEXIS 33077; 2011 WL 939615 (W.D. Wash. March 11, 2011).

8 *Id.* at *7-8.

9 The court relied on the ICC Rule authorizing the parties to apply to courts for interim measures and a carve-out in the parties' agreement that permitted them to pursue injunctive relief in court in case of irreparable injury. The court granted the interim relief to "maintain the status quo so that the remedy of arbitration is meaningful," affirming its pro-arbitration posture: The parties have selected the ICC as their chosen forum and there is no good reason why that body should not entertain whatever application is made for conservatory relief. Upon the issuance of an order by the ICC arbitration panel granting such relief, the parties may return to this Court to seek a modification of this Order, to conform to the relief granted by the ICC arbitration panel. *Id.* at 247-48.

10 The defendant had also filed an action in German court for an injunction to compel the plaintiff to continue providing the products.

11 448 F. Supp. 2d 1194 (C.D. Cal. 2006).

12 *Id.* at 1200.

13 2013 U.S. Dist. LEXIS 192157; 2013 WL 12092542 (W.D. Wash. Aug. 21, 2013).

14 *Id*. at *3, 4, emphasis added. Note that *Simula,* discussed above, was later distinguished in *Toyo Tire* on these particular facts.

15 *Genias* at *9.

16 2014 U.S. Dist. LEXIS 18250; 2014 WL 562264 (E.D. Mich. Feb. 13, 2014).

17 *Id.* at *5.

18 The rationale is particularly instructive:

These potential problems are born out in the Arbitrator's recent opinion ordering Nexteer to cease and desist from pursuing its claims for injunctive relief here.

While the Arbitrator lacks the authority to determine this court's jurisdiction, a fact admitted, his observations about the potential pitfalls of allowing the case to move forward in two forums ring true, and guide this court's ultimate conclusion that Nexteer cannot seek permanent injunctive relief in this court, while simultaneously pursuing the same relief in arbitration. The arbitrator rejected Nexteer's argument that it can seek any type of injunctive relief, whether preliminary or permanent, outside the arbitral process, citing the following difficulties:

I cannot accept Nexteer's submission that the final sentence of Article 6.11(b) creates an unqualified right on the part of either party to seek preliminary or injunctive remedies in any forum willing to find jurisdiction. On Nexteer's construction, it would be possible for either party to obtain not only preliminary remedies but any type of injunction, including final injunctions, in different fora. This would undermine the authority and efficiency of international arbitration as a single forum of dispute resolution and create the risk of conflicting decisions and forum-shopping by the parties. It would also open to abuse as parties could seek injunctive relief in multiple fora with a view to undermining the arbitral process.

While this court disagrees with the arbitrator's view on Nexteer's right to pursue preliminary injunctive relief in federal court, the court agrees with his reasoning that the 2011 agreement, and likewise the 2006 agreements which he did not consider, do not allow Nexteer to pursue permanent injunctive relief both from the arbitrator and from this federal court simultaneously. (internal citations omitted). *Id.* at *41-43.

19 *Id.* at *37-38.

20 *Id.* at *43, 44. The court also set out the applicable standard to grant a motion to compel arbitration:

"First, [the court] must determine whether the parties agreed to arbitrate; second, [the court] must determine the scope of that agreement; third, if federal statutory claims are asserted, [the court] must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the action are subject to arbitration, [the court] must determine whether to stay the remainder of the proceedings pending arbitration." *Id.* at *15.

21 88 F. Supp. 3d 1300 (M.D. Fla. Feb. 20, 2015).

22 Importantly, Florida law applied to the underlying claims. As explained by the Court, absent satisfaction of the heightened statutory requirements to obtain pre-judgment relief (which were not satisfied), Florida law does not permit assets to be frozen simply to secure a potential money judgment or to preserve assets pending resolution of a legal action for damages. *Id.* at 1311-12. *See also, Shah v. Commercial Bank, discussed infra,* (court denied pre-award attachment of bank account where movant failed to meet New York's statutory requirements including demonstration that ultimate award would be "rendered ineffectual").

23 *Id.* at 1314.

24 *Id.* at 1320. The court reasoned: "the Libyan Proceeding is not following a parallel track but is instead an attempt by Defendants to carve out an exception to the parties' agreement to arbitration, choice of forum, and choice of law. On this record, the Court concludes that these factors outweigh countervailing considerations of comity, and APR's request for an antisuit injunction must be granted." *Id.* at 1322-23.

25 *Id.* at 1324-25.

26 2016 U.S. Dist. LEXIS 105180; 2016 WL 4193864 (W.D. Wash. Aug. 9, 2016).

27 The Court cited Articles 28(2) and 29(7) of the ICC Arbitration Rules in particular, which state respectively:

Article 28(2): Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

Article 29(7): The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

28 2013 U.S. Dist. LEXIS 94071; 2013 WL 3360670 (N.D. Cal. July 3, 2013).

29 2013 SIAC Rule 26, 2016 SIAC Rule 30 (Interim & Emergency Relief).

30 2010 U.S. Dist. LEXIS 19717; 2010 WL 743043 (S.D.N.Y. March 4, 2010).

31 Notably, the Court reasoned:

…the fact that it has been a challenge to enforce a prior judgment is not the same as evidence that it will be "rendered ineffectual" without the attachment. Although Shah only managed to discover two accounts with attachable funds, they collectively contain more than $6 million dollars. While the Citibank account laid fallow for an extended period after the initial attachment and transfer of $1.1 million, Shah admits that Respondent added millions to the account despite there being an existing attachment. Other than Respondent's refusal to pay the arbitral award on demand, Shah provides no evidence that the bank has deliberately hidden its funds or attempted to evade enforcement by transferring assets. Shah also fails to show or even allege that ObiBank is financially insecure, in danger of insolvency, or otherwise lacks the assets to pay the judgment; indeed the $6 million Petitioner attached demonstrates quite the contrary. And although some of this money is likely to "dissipate" in that it will be used to satisfy the 2006 award, Shah provides no explanation as to why the remaining funds -- which, from this record, appear to exceed the amount needed for the potential 2009 award -- would suddenly disappear once the first award has been satisfied and the first attachment dissolved. While ObiBank may well have a plan to squirrel away the remaining U.S. funds after the first attachment concludes, Shah provides no evidence to that effect.

32 Circumstances where relief may be rendered ineffectual, none of which were present in the pending case, include:

"where the petitioner demonstrated the respondent's potential insolvency; where the respondent has transferred its assets to another; where the respondent is a shell company without appreciable assets; where the respondent has historically failed to pay creditors; or where the respondent has stated an intent to remove assets from the jurisdiction." *Id.* at *7.

33 2016 U.S. Dist. LEXIS 47259; 2016 WL 1384777 (D. Mass. April 7, 2016).

34 The court confirmed the liability award pursuant to the Federal Arbitration Act and New York Convention. On appeal, the decision was affirmed as having met the finality requirement of the Convention due to the parties' agreement to bifurcate the issues. 861 F.3d at 292.

35 2016 U.S. Dist. LEXIS 47259 at *21 *aff'd* 861 F.3d 287 (1st Cir. 2017) (opinion by Associate Justice of the U.S. Supreme Court, Hon. David H. Souter (Ret.) sitting by designation).

36 206 F.3d 725 (7th Cir. 2000).

37 *See discussion,* note 3, *supra*.

38 *Id.* at 728.

39 The district court judge had requested and obtained the signatures of the co-panelists in the intervening period before appeal.

40 2012 U.S. Dist. LEXIS 176158; 2012 WL 6178236 (S.D.N.Y. Dec. 10, 2012); *subsequent proceedings on motion for contempt,* 2013 U.S. Dist. LEXIS 21798; 2013 WL 324061 (S.D.N.Y. Jan. 24, 2013) (holding respondents in contempt for failing to comply with order, awarding daily fine as sanction for non-compliance and ordering arrest of respondent's principal upon entry into United States).

41 *Id.* at *10-11.

42 *See* note 40, *supra*.

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Ava Borrasso FCIArb of Miami, Florida serves as counsel and arbitrator. With over 25 years of experience, she has acted as lead counsel in complex commercial disputes before the ICDR, AAA, and ICC, as well as before state and federal courts. Before establishing the firm in 2015, she was a partner with a prominent international litigation and arbitration boutique for nearly a decade. She has represented parties in commercial disputes involving international distribution and trade agreements, financial services agreements, fraud and corruption, business torts, construction and real property disputes.

As a Fellow of the Chartered Institute of Arbitrators, a panel member of the ICDR and the AAA commercial panel, and registered ICC member, Ms. Borrasso acts as an independent arbitrator focused on commercial disputes. She has been recognized by Legal500 Latin America for international arbitration, Best Lawyers of America for commercial litigation, and Legal Elite and Super Lawyers for international practice. Ms. Borrasso serves as sole and panel arbitrator in international and domestic arbitrations.