UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

DAYE NONFERROUS METALS COMPANY, DAYE NONFERROUS METALS COMPANY IMPORT & EXPORT COMPANY, and HUANGSHI NONFERROUS METALS COMPANY,

Plaintiffs,

- against -

TRAFIGURA BEHEER B.V.,

Defendant.

----------X

O P I N I O N

96 Civ. 9740 (RMB)

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Sweet, D.J.

Plaintiffs Daye Nonferrous Metals Company, Daye Nonferrous Metals Company Import & Export Company, and Huangshi Nonferrous Metals Company (collectively, "Daye Nonferrous") have moved to confirm an attachment ordered by the Honorable Barbara S. Jones on December 30, 1996 and January 2, 1997 against defendant Trafigura Beheer B.V. (hereinafter, "Trafigura") and to compel arbitration. Trafigura cross-moves to vacate the attachment, opposes Daye Nonferrous's motion to confirm, and opposes Daye Nonferrous's motion to compel arbitration.

For the reasons set forth below, the court enjoins Trafigura from reclaiming the funds that have been attached pending the outcome of future litigation or arbitration and compels the arbitration specifically provided for in the parties' contract.

The Parties

Plaintiffs Daye Nonferrous Metals Company, Daye Nonferrous Metals Company Import & Export Company, and Huangshi Nonferrous Metals Company are business entities located in Xinxialu Huangshi, Province of Hubei, China. (Pl's Comp. ¶ 2). Daye Nonferrous's primary business involves purchasing and selling nonferrous metals, including copper concentrates. (Id.)

Defendant Trafigura is a trading company organized in the Netherlands. (Def's Mem. p. 2). It maintains its principal place of business and main office in Lucerne, Switzerland. (Id.) Since 1993 it has been in the business of worldwide physical bulk commodity trading. (Id.)

Prior Proceedings

On December 30, 1996, Daye Nonferrous, in response to an alleged breach of a commercial contract by Trafigura, filed a Petition to Compel Arbitration (the "Complaint") pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, et seq., and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201, et seq. (the "Convention"). Specifically, Daye Nonferrous requested enforcement of clause 18 of the contract, which provides for arbitration of any disputes arising out of the contract to take place in Paris, France. (Pl's Comp. ¶ 17). Daye Nonferrous claims that its damages are comprised of (a) the difference between the contract price and the value of the cargo as received, (b) losses related to customs, value-added tax and other consequential damages, (c) losses stemming from the "breach of the quality specifications set forth in the contract," (d) their anticipated arbitration costs, and (e) interest. (Pl's Comp. p. 6-7). This totals well over $2.5 million dollars.

In the Complaint, Daye Nonferrous requested, inter alia, an attachment against funds held by Trafigura in several New York banks pursuant to New York's C.P.L.R. § 6201 and an injunction in the form of a temporary restraining order pursuant to Fed. R. Civ. P. 65 and/or the Uniform Commercial Code Article 5-114 precluding Trafigura (or Trafigura's bank) from drawing down a letter of credit that was established under the contract. (Id. at ¶¶ 18, 19, 20(c)).

A temporary restraining order was granted by Judge Jones, sitting in Part 1, which precluded Trafigura from drawing down the letter of credit. However, Judge Jones, apparently doubtful that the restraining order would be effective when a Chinese bank was involved, also issued an ex parte order of attachment. This order attached funds belonging to Trafigura as they passed through various New York banks. The banks were ordered to seize and otherwise restrain Trafigura's property so as to satisfy the sum of $ 2,449,816.00. Daye Nonferrous secured the attachment with an escrow fund of $50,000.00. Plaintiffs then moved to confirm the order of attachment on January 30, 1997. The motion was heard and fully submitted on March 26, 1997.

Facts

The facts set forth below are based upon the affidavits and memoranda submitted in lieu of a factual hearing. On or about April 1, 1996, Daye Nonferrous entered into a contract with Trafigura which provided that Trafigura would ship a certain quantity of copper concentrates to Daye Nonferrous. (Pl's Comp. ¶ 4., Def's Rep. Mem. p. 5) In return, Daye Nonferrous Metals Company Import and Export Company opened a letter of credit with the Bank of Communications in China to cover the amount due under the contract, including ocean freight, insurance, and cargo costs. (Pl's Comp. ¶ 5., Def's Rep. Mem. p. 5).

The contract specified that the cargo was to be shipped from Las Ventanas, Chile to Lianyungang, China, and that the shipment had to be made in one lot and be completed during April 1996 provided (1) a "workable Letter of Credit fully acceptable to Seller" was received by Trafigura on or before April 10, 1996 and (2) an appropriate vessel was available. (Pl's Ex. A). Although the letter of credit also stated that the shipment must be completed by the end of April 1996, it did not specify that the date was subject to any contingencies. (Pl's Ex. C).

Trafigura arranged with the ocean carrier Comania Sud Americana De Vapores S.A. ("CSAV") to have the vessel M/V Joalmi perform the cargo shipment. (Pl's Comp. ¶ 7). However, a bill of

lading was not issued until May 10, 1996. (Pl's Ex. B). The vessel set sail from Chile that same day. (Pl's Comp. ¶ 8, Def's Rep. Mem p. 8).

Daye Nonferrous has presented evidence that Pavel Gusinskiy, the Master of the Joalmi, was approached by a representative of Trafigura who requested that he make alterations to certain dates in his log book because "the bad copper market" had rendered "some problems with the sales [sic] of the cargo." See Gusinskiy Aff. Ex. H. According to Gusinskiy, he denied Trafigura's request. While Daye Nonferrous claims that this delay alone constituted a breach of the contract (Pl's Mem. p. 4), Trafigura claims that it shipped the goods in "accordance with the sales contract," because neither contingency specified in the contract had been met prior to April 30, 1996. (Def's Mem. p. 3., Def's Rep. Mem. p. 5). Specifically, Trafigura claims that the letter of credit was not finally acceptable to Trafigura until May 21, 1996 and that the vessel did not become available until May 10, 1996. (Posen Decl. II, ¶ 4).

Daye Nonferrous claims that regardless of the contingency provisions, the shipment's delay constituted a breach of the contract, in part because, under English law, a date specified in a letter of credit gets "written into" the sales contract as the operative date. (Pl's Sur-Rep. Mem. p. 3-4). At this point, Daye Nonferrous asserts, Trafigura was faced with the Hobson's choice of

either altering the bill of lading to reflect an earlier loading date or relinquishing all rights under the contract. (Pl's Mem. p. 5). Both parties agree that upon receipt of the May 10 bill of lading, Trafigura persuaded CSAV to reissue the bill with an April 30, 1996 date of loading. (Pl's Mem. p. 5., Def's Rep. Mem. p. 7), claiming that the alteration was necessary to "ensure that it would be paid for the goods" after "[h]aving complied with its side of the bargain." (Def's Rep. Mem. p. 7).

According to Daye Nonferrous, Trafigura could not obtain further altered documents from CSAV, and therefore agents of Trafigura went ahead and made other necessary alterations themselves, including material changes and a forged shipper's signature. Trafigura has not denied that it endorsed the shipper's signature. Daye Nonferrous also maintains that Trafigura persuaded the Master of the Joalmi to alter the ship's logs to show that the copper shipment did, in fact, begin in April. (Id.; Pl's Ex. H).

Trafigura drew down on the letter of credit from Union Bank of Switzerland (hereinafter "UBS") on May 29, 1996, and on that date UBS succeeded Trafigura as the owner of the right to payment under the letter of credit. (Id. at p. 7).

According to Daye Nonferrous, Trafigura acted fraudulently because, during April and May, the market for metal commodities fell sharply and an outright breach of the contract

would have left Trafigura in possession of the devalued copper, thus requiring the alteration of the shipping documents. The vessel arrived in China on July 10, 1996 and began discharging Daye Nonferrous's cargo on July 12, 1996. (Posen Decl. ¶ 15).

In August 1996, Daye Nonferrous asked Trafigura to extend the payment on the letter of credit for 120 days. At Trafigura's request, UBS agreed to extend the repayment date by the requested 120 days. (Posen Decl. ¶ 16). On August 13, 1996, the Bank of Communications confirmed that payment would be made directly to the UBS on December 27, 1996. (Id.)

Upon an application by Daye Nonferrous alleging fraud by Trafigura, a restraint was put in place by the People's Intermediate Court of Huangshi which had the effect of precluding UBS from collecting from the Bank of Communications. For reasons that are unclear, the restraint was rescinded by the Chinese Court on December 23, 1996. (Pl's Sur-Rep. Mem. p. 9). On December 27, Daye Nonferrous initiated these proceedings. Judge Jones granted the order on December 30 described above which attached funds that would pass through various New York banks in the event that UBS was successful in drawing down. On the following day, Judge Jones ordered a temporary restraining order that precluded Trafigura from drawing down.

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According to Daye Nonferrous, UBS/Trafigura drew down on the letter of credit in early January 1997, and thus violated the temporary restraining order. Furthermore, Daye Nonferrous claims that the proceeds were not routed through the New York branch of the UBS as expected, but directly to UBS's Zurich branch, and thus Judge Jones's attachment order was successfully circumvented. (Pl's Mem. at 11; Juska Aff. ¶ 16).

According to Trafigura, Daye Nonferrous did not attempt to obtain its attachment order until December 30, 1996, three days after the payment on the letter of credit was set into motion.

Bankers Trust Company and UBS's New York branch did receive some funds remitted by various unrelated third parties for the credit of Trafigura (Juska Aff. ¶ 18), which were set aside pursuant to the Order of Attachment, and Trafigura was forced to post security.

Discussion

Injunction is an Appropriate Remedy

At the outset it should be noted that even though the Convention is silent as to whether courts have the power to order provisional remedies in aid of arbitration pursuant to the Convention, the Second Circuit has held that they do. In Borden,

Inc. v. Meiji Milk Products Co., 919 F.2d 822, 826 (2d Cir. 1990), the Court held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers pursuant to § 206," and that "[the] [e]ntertaining [of] an application for . . . [a provisional] remedy . . . is not precluded by the Convention but rather is consistent with its provisions and its spirit." See also Alvenus Shipping v. Delta Petroleum (U.S.A.) Ltd., 876 F. Supp. 482, 487 (S.D.N.Y. 1994) (citing Borden in granting preliminary injunction in aid of Convention-governed arbitration).

Having therefore acknowledged this power, the issue arises as to what body of law dictates when a provisional remedy can be employed. Trafigura seeks to vacate the attachment on the grounds that Rule 64, Fed. R. Civ. P., is controlling. The Rule states: "all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held . . . ." Fed. R. Civ. P. 64. Trafigura argues that New York law prohibits attachments in aid of arbitration governed by the Convention. See Cooper v. Ateliers De La Motobecane, 57 N.Y.2d 408(1982)(holding that C.P.L.R. § 6201 does not empower a court to issue an attachment in aid of arbitration in situations governed by the Convention); Drexel Burnham Lambert, Inc. v. Ruebsamen, 139 A.D.2d 323 (1st Dep't 1988)

(following Cooper in holding that C.P.L.R. § 7502(c) similarly does not empower a court to issue an attachment in aid of arbitration in situations governed by the Convention). Therefore, the argument follows, this court has no recourse other than to vacate the attachment.

However, the courts in both the Bordan and Alvanus Shipping decisions applied provisional remedies without making any reference to New York State law. Seeking to distinguish these cases, Trafigura notes that they deal with injunctions under Fed. R. Civ. P. 65 rather than attachments under Rule 64.

The Bordan and Alvanus decisions, among others, note that the distinction between an attachment issued under Rule 64 and an injunction issued under Rule 65 is a blurry one at best. Although Rule 64 purports to apply to "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action," Fed. R. Civ. P. 64, in this circuit a court "may issue [a preliminary injunction] to preserve assets as security for a potential monetary judgment where the evidence shows that a party intends to frustrate any judgment on the merits by making it uncollectible." Pashaian v. Eccelston Properties, Ltd., 88 F.3d 77, 87 (2d Cir. 1996) (citing Gelfand v. Stone, 727 F. Supp. 98, 100 (S.D.N.Y. 1989) (citing, in turn, Republic of Philippines v. Marcos, 806 F.2d 344, 356 (2d Cir. 1986)); see also In re Feit & Drexler, Inc., 760 F.2d 406, 416 (2d

Cir. 1985). Although the effect of an injunction issued under Rule 65 may, in practice, be no different than the effect of an attachment order issued under Rule 64, prejudgment asset sequestrations are commonly made pursuant to Rule 65.[1] Thus, this court may proceed to an analysis of whether such an injunction should be issued in this case.

A Preliminary Injunction is Warranted Here

The standard for granting a preliminary injunction in this circuit is (1) a showing of irreparable injury and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships tipping in favor of the movant. Blum v. Schlegel, 18 F.3d 1005, 1010 (2d Cir. 1994); Laureyssens v. Idea Group, Inc., 964 F.2d 131, 135-36 (2d Cir. 1992); SEC v. Unifund SAL, 910 F.2d 1028, 1038 n. 7 (2d Cir. 1990); Citibank N.A. v. Nyland (CF8) Ltd., 839 F.2d 93, 97 (2d Cir. 1988). The showing of irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." Citibank, N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985) (quoting Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp., 719 F.2d 42, 45 (2d Cir. 1983)).

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1. For a recent extensive discussion by this court of the overlapping roles of Rules 64 and 65 in this circuit and others, see Mason Tenders District Council Pension Fund v. Messera, 1997 WL 223077, at *4-8 (S.D.N.Y. May 1, 1997) (Sweet, J.).

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In this circuit, although injuries compensable by monetary damages ordinarily do not give rise to irreparable harm, see Paghaian, 88 F.3d at 86 (citing Reuy v. National Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991)), "a demonstration of intent to frustrate a [monetary] judgment will satisfy the requirement for a preliminary injunction of a showing of irreparable harm." Gelfand, 727 F. Supp. at 100. The facts as set forth above constitute such a showing.

First of all, in determining whether a party seeking an injunction has sufficiently showed that a defendant is likely to frustrate a judgment, courts have considered both evidence of past fraudulent activity as well as evidence of efforts to move assets out of a given jurisdiction. See Paghaian, 88 F.3d at 87 (implying that "an inferred intention" to frustrate a judgment can give rise to a likelihood); Gelfand, 727 F. Supp. at 100-01 (holding that "substantial evidence of [defendant's] past fraudulent activities . . . indicate[d] clearly that [defendant's] past predilection for deceptive and fraudulent practices [would] likely . . . continue.").

In the instant case, Trafigura persuaded CSAV to issue a bill of lading which reflected an incorrect shipping date of April 30, 1996, presumably to comply with the underlying contract.

Whether or not the letter of credit date supplanted the date provided in the contract (which would require application of English contract law), Trafigura's actions, as alleged, belie a belief that it had the contractual right to ignore the April 30 deadline. Daye Nonferrous has made a prima facie showing that Trafigura's alterations were performed with fraudulent intent.

In addition, there is evidence that Trafigura circumvented the December 31 restraining order issued by Judge Jones when it drew down on the letter of credit (or in some way allowed UBS to proceed with its attempt to receive payment from the Bank of Communications). First, in a fax dated December 31, 1996, Daye Nonferrous provided Trafigura with notice that the restraining order had been issued by Judge Jones that day. See Juska Aff. Ex. C. Although the restraining order was initially to expire on January 2 at 5:00 p.m., after Trafigura did not attend a January 2 show cause hearing, Judge Jones extended the restraining order and scheduled a second hearing for 4:00 p.m. on January 3. See Juska Aff. ¶ 14. Trafigura was notified of the new hearing on the morning of January 3, but again did not attend.

Other faxes sent from the Bank of Communications to UBS indicate the draw down did not take place in December, but on January 3, 1997, three days after Trafigura had received notice that the order was in place. See Dunlop Rep. Aff. ¶ 41(a)(b) Ex. K; Juska Aff. ¶ 14. Thus, a tangible paper trail indicates the

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draw down was knowingly made after Judge Jones's temporary restraining order took effect on December 31.

Furthermore, evidence suggests that Trafigura successfully avoided the December 30 attachment order, which was meant to attach the draw-down funds in New York as they passed from China to Switzerland. Apparently pursuant to instruction from Trafigura, the Bank of Communications initially routed payment through UBS's New York branch. See Junke Aff. ¶ 16. However, on January 6, Daye Nonferrous learned that UBS's Zurich branch had reported to Trafigura its safe receipt of the letter of credit proceeds. The inference to be drawn, therefore, is that Trafigura was somehow able to re-route the funds away from New York and was thereby able to skirt the attachment order.

There exist "sufficiently serious questions" concerning the merits of any future litigation or arbitration. While it is impossible to determine exactly what took place at this stage of the litigation, based on the evidence described above pertaining to Trafigura's fraud, it is likely that Daye Nonferrous may prevail in the arbitration.

In addition, the balance of hardships weighs in favor of Daye Nonferrous. If a judgment is ultimately entered against Trafigura, it seems likely that Daye Nonferrous would have difficulty collecting any sum awarded to them because of

Trafigura's past conduct and the fact that Trafigura may be in tight financial straits. See Farkouh Aff.

In sum, a preliminary injunction is appropriate when a money judgment is likely to go unfulfilled.

The Requirements to Compel Arbitration

Daye Nonferrous also moves to enforce the arbitration provision in the contract. The court notes, at the outset, that "absent evidence that the arbitration agreement was procured through fraud or excessive economic power," courts are instructed to "rigorously enforce agreements to arbitrate." Vitrasthum v. Dominick & Dominick, Inc., 1996 WL 19062, *12 (S.D.N.Y. Jan 18, 1996) (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis, 903 F.2d 109, 112 (2d Cir. 1990).

The first issue requiring decision is the applicable federal law. According to Trafigura, 9 U.S.C. § 4 should apply. Section 4 provides:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.

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Daye Nonferrous, on the other hand, asserts that 9 U.S.C § 206 applies. Section 206 states:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Trafigura asserts that Daye Nonferrous is not an "aggrieved" party under § 4 and therefore is precluded from bringing a motion to compel arbitration. According to Daye Nonferrous, under § 206 there is no requirement that the moving party be "aggrieved," and a court may compel arbitration as it sees fit.

Both parties agree, however, that 9 U.S.C. § 208 provides guidance on how to reconcile apparent conflicts between the FAA (codified as Chapter 1 of 9 U.S.C.) and the Convention (codified as Chapter 2 of 9 U.S.C.). Section 208 states:

> Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

See also, Bongoroiro v. Circus Show Corp., 1993 WL 277333, at *5 (S.D.N.Y. July 16, 1993)("§ 206. . . supersedes § 4 in Convention cases").

Trafigura, relying on Builders Federal Ltd. v. Turner Const., 655 F. Supp. 1400 (S.D.N.Y. 1987), contends that, because § 208 is "silent" as to whether a party must be "aggrieved" to compel arbitration, there exists no conflict between § 4 and § 206, and the provision in Chapter 1 should therefore apply, namely § 4.

In Builders Federal, plaintiffs, a subcontractor and other various related parties, moved pursuant to the FAA (9 U.S.C. § 4) or, alternatively, under the Convention (9 U.S.C. § 201 et seq.) to compel arbitration which, under the subcontract, was to take place in Singapore. Id. at 1402. Defendants, the general contractor and others, argued that the Convention does not allow certain so-called "offensive" petitions to compel arbitration, and that although the FAA allows such petitions, pursuant to the strictures of § 208, the plaintiffs were precluded from filing a motion to compel arbitration. The court rejected defendants' position and held that the Convention, while it does not specifically distinguish "offensive" and "defensive" motions, nevertheless, allows "offensive" motions, and hence allowed plaintiffs to file their petition.

According to Trafigura, the Builders Federal court held, effectively, that when a Convention section is "silent" as to an issue, it does not conflict with the corresponding FAA section which speaks to that very issue, and that, because § 206 is "silent" as to whether a party need be aggrieved before it can

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compel arbitration, there exists no conflict between § 206 and § 4 and the FAA provision should apply.

However, Builders Federal did more than just simply read the FAA provision's meaning into the Convention, because the Convention provision did not specifically address the issue involved. The court actually interpreted the applicable section of the Convention in holding that it was consistent with the corresponding section of the FAA. See id. at 1405 (the court offering a substantive interpretation of the Convention provision: "In my view, a court of a Contracting State becomes "seized of an action" under the Convention when a party to a written arbitration agreement. . . ."). In sum, there is an obligation to interpret a provision rather than deeming it "silent." What one interpreter views as "silence" might be viewed as a deliberate omission by another.

There is a conflict between the language of § 4 and that of § 206. Section 206 in short provides that once it is established that a court has jurisdiction under Chapter 2, that court may "direct that arbitration be held in accordance with the agreement at any place therein provided for . . . ." Given that "Congress 1) intended the broadest possible implementation of the Convention," Builders Federal, 655 F. Supp. at 1404, 2) specifically favored the Convention over the FAA for preemption purposes, and 3) enacted § 206 long after it enacted § 4 (and

therefore presumably would have adopted the language of § 4 had it desired), it would be remiss to assume that Congress intended the provisions' requirements to be the same given their striking linguistic differences.

It is established that "[t]he plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." United States v. Reyes, 1997 WL 336265, at *4 (2d Cir. June 20, 1997)(citing United States v. Ron Pair Enters., 489 U.S. 235, 242 (1989)). "When the language of a statute is unambiguous, the first canon is also the last, as the judicial inquiry ends when the ordinary meaning of Congress' words is clear." Id. In short, this court finds that § 206 unambiguously provides that "A court . . . may direct that arbitration be held in accordance with the agreement at any place therein provided for . . . ." Quite simply, contrary to § 4, there exists no requirement that a party obtain a specific status before a court can compel arbitration. Therefore, in strict accordance with the language of § 206, Daya Nonferrous need not have been "aggrieved."

The Enforcement of the Arbitration Provision

Clause 18 of the contract between certain of the parties states:

> All disputes in connection with this contract or the execution thereof shall be settled by friendly negotiation.
>
> Failure to such negotiations, the parties shall have the right to go to arbitration in Paris as per the Rules of International Chamber of Commerce, of which all Interpretations and conduct shall be governed by British Law.

According to Trafigura, Daye Nonferrous did not fulfill the condition precedent to the provision in that it neglected to engage in friendly negotiation to resolve all of the issues in dispute. Daye Nonferrous claims to the contrary notwithstanding;

In fact, Daye Nonferrous has established that attempts at friendly negotiations were made. First, Mr. Zhou Qi, the Chinese attorney for Daye Nonferrous, attested that once Daye Nonferrous became aware of the fraud, it sought the 120 day extension on the letter of credit in order to "reassess the Plaintiffs' position to claim against the Defendant including [the] prospect of obtaining security from the [D]efendant or settlement negotiation with the Defendant. . . ." Zhou Decl. ¶ 4. Zhou also attests that Mr. Peng Ming Rui of Daye Nonferrous negotiated with Mr. Li Jing and Mr. Xu Hui of Trafigura's Beijing office, but that negotiations proceeded slowly and eventually failed because of an interest rate dispute, Zhou Dec. ¶ 5. At this time, according to Daye Nonferrous, Trafigura requested that in return for granting the extension on the letter of credit, Daye Nonferrous promise not to lodge any quality claims or any other claims in connection with the cargo, an

action which tends to indicate that Trafigura knew negotiations were ongoing. Id. at ¶ 6. Furthermore, after the extension was ultimately granted, Daye Nonferrous proposed settlement of the quality claims and the late shipment claim. Id. at ¶ 9, Ex. A. Zhou also claims that one last attempt at settlement was made on December 26, 1996, when Daye Nonferrous proposed reductions in the letter of credit. Id. at ¶ 9, Ex. C. According to Daye Nonferrous, it never received any meaningful responses from Trafigura in response to its attempts to negotiate. Pl's Mem. p. 36.

According to Trafigura, Daye Nonferrous failed to attempt to negotiate all of the claims arising out of the failed shipping incident. Whether "all" of the eventual claims were sought to be negotiated seems irrelevant given Daye Nonferrous's inability to reach a settlement on the claims it did attempt to negotiate. Daye Nonferrous therefore completed the condition precedent to the contract, and, under 9 U.S.C. § 206, the arbitration shall proceed in timely fashion as prescribed by the arbitration provision in the contract.

Furthermore, because the "FAA provides that a district court must 'stay the trial of the action' when 'the issue involved in such suit or proceeding is referable to arbitration'. . . until the arbitration has been had in accordance with the terms of that agreement," any further proceedings will be stayed pending the

outcome of the Paris arbitration. Yitzhaum, 1996 WL 19063, at *1 (citing 9 U.S.C. § 3).

Conclusion

Having considered Trafigura's other arguments and finding them without merit, for the reasons set forth above, a preliminary injunction forbidding Trafigura from reclaiming moneys currently attached pursuant to Judge Jones' order is hereby granted, arbitration is hereby compelled, and a stay is granted on all matters pending the outcome of the arbitration.

Settle order on notice.

It is so ordered.

New York, N. Y.
July 22, 1997

ROBERT W. SWEET
U.S.D.J.

statute permits the making of an application for an attachment, either before or after the commencement of an arbitration proceeding.[164] Besides permitting attachments in connection with arbitrable matters, the statute changes the grounds on which an attachment may issue by eliminating the requirement that the moving party bring an "action. . . [for] a money judgment."[165] Instead, it states that the court "may entertain an application for an order of attachment. . . in connection with an arbitrable controversy."[166] In addition, the moving party may no longer be expected to satisfy the requirements for attachments in the Civil Practice Law and Rules,[167] as the new statute provides that "[t]he sole ground for the granting of the remedy shall be. . . that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."[168]

Whether the interpretations of state law of the New York courts as to the availability of attachments in aid of arbitration are dispositive in federal courts through Rule 64 of the Federal Rules of Civil Procedure is an interesting—and unanswered—question.[169]

Despite the history of the use of attachments in arbitration cases under both state law and the USAA, court decisions interpreting the Convention have thrown the concept of arbitration-related provisional remedies into confusion. The confusion began with the decision in 1974 in *McCreary Tire & Rubber Co. v. CEAT S.p.A.*[170] There, the court held, *sua sponte,* that the Convention and its implementing legislation precluded "a continued resort to foreign at-

164. *Id.*

165. N.Y. Civ. Prac. Law §6201 (McKinney 1980).

166. CPLR §7502(c).

167. N.Y. Civ. Prac. Law §6201 (McKinney 1980). These are: (1) that the defendant is a nondomiciliary residing without the state or a foreign corporation not qualified to do business in the state; or (2) that the defendant, although being domiciled or residing in the state, cannot be personally served despite efforts to do so; or (3) that the defendant, intending to defraud creditors or frustrate enforcement of a judgment that might be rendered in the plaintiff's favor, has, or is about to, dispose of or remove property from the state.

168. CPLR §7502(c). An application for attachment may be made in the court located in the place in which the arbitration is pending, or, if it has not yet been commenced, in: (a) the place specified in the parties' contract; or (b) if no place is specified in the contract, then where one of the parties resides or is doing business or, if there is no such place, in any court in the state; or (c) where the arbitration is held.

169. Attachment is available in federal court only "under the circumstances and in the manner" provided by state law, unless a federal statute governs the situation, this superseding the state law. Fed. R. Civ. P. 81(a)(3) (1970). The question is thus whether the USAA or the Convention should be interpreted as mandating that attachments are or are not available.

170. McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F. 2d 1032 (3d Cir. 1974).

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C. INTERIM MEASURES OF PROTECTION

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With the increasingly frequent use of arbitration for dispute resolution in international commercial transactions, the availability of pre-award protective measures has come to be regarded as essential to assure the effectiveness of arbitral awards.[119] Interim relief may be needed to preserve the subject matter of the arbitration, or otherwise to prevent the arbitration from being a meaningless exercise. A party may, for example, need to resort to the courts in order to provide for the preservation or sale of goods, to prevent removal or concealment of property, to preserve the *status quo* during arbitration, to secure eventual payment of an award or to assure enforcement of an interim arbitral award.[120]

To the extent that court remedies are available in support of arbitration, they are most often available before the arbitrators have been appointed, or after the making of an award. This stems in part from the reluctance of courts to interfere with an arbitration once it has been initiated.[121] Support for this approach is found in the extensive powers vested in arbitrators in the United States.

119. See, e.g., Committee on Arbitration, "The Advisability and Availability of Provisional Remedies in the Arbitration Process," 39 *Rec. A.B. City N.Y.*, 625, 632-34 (1984); Note, "Pre-Award Attachment Under the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *21 Va. J. Int'l. Law* 285, 292 (1981); Burrows and Newman, "International Litigation: Attachment in Aid of Arbitration," *N.Y.L.J.*, Dec. 30, 1982, at 1, col. 1; Note, "Attachment Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *36 Wash. & Lee L. Rev.*, 1135 (1979); McDonell, "The Availability of Provisional Relief in International Commercial Arbitration," *22 Colum. J. Transnat'l L.*, 273 (1984).

120. Hoellering, "International Arbitration: Interim Relief in Aid of Arbitration" (1984), 1 *Wisc. Int'l L.J.*, 1-11 (1984).

121. United States law makes arbitration a favored dispute resolution process. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983). Court interference in this process is disfavored, McCreary Tire & Rubber Co. v. CEAT S.p.A, 501 F. 2d 1032 (3d Cir. 1974). Thus, all issues, to the fullest extent possible, are to be referred to the arbitrators, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985).