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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----x

3 CE INTERNATIONAL RESOURCES
3 HOLDINGS LLC,

4 Movant,

5 v.

12 CV 8087 (CM)

6 S.A. MINERALS LTD., TANTALUM
7 TECHNOLOGY INC. and YEAP SOEN
7 SIT,

8 Respondent.

9 -----x

New York, N.Y.
November 30, 2012
2:15 p.m.

12 Before:

13 HON. COLLEEN MCMAHON,

District Judge

15 APPEARANCES

16 MARC J. GOLDSTEIN, ESQ.
16 Attorney for Movant

18 PHILIPPE ZIMMERMAN, ESQ.
18 Attorney for Respondents

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1 (Case called)

2 (In open court)

3 THE COURT: The application for confirmation and
4 enforcement of the interim arbitral award is denied and the
5 award is vacated.

6 The interim award in question comes in two parts.
7 First, respondent is order to post security in the amount of
8 \$10 million based on the arbitrator's finding of fact and
9 preliminary conclusion that the petitioner is likely to succeed
10 on the merits, which findings and conclusion are expressly made
11 subject to change. Second, respondent is enjoined from
12 transferring any assets up to the amount of \$10 million in the
13 event that it fails to post security, that injunction to run to
14 assets anywhere in the world.

15 It is well settled that a federal court lacks
16 authority to enforce an interim arbitration award, *Michaels v.*
17 *Mariforum Shipping S.A.*, 624 F.2d 411, 414, (2d Cir. 1980).
18 However, the styling of an award as interim does not insulate
19 it from review if it finally determines a severable issue in
20 the case. *Metalgesellschaft AG v. MPV Capitan Constante*, 790
21 F.2d 280, 283, (2d Cir. 1986).

22 Petitioner takes the position that this award finally
23 determines the issue of prejudgment security and so is
24 enforceable, notwithstanding that it does not finally determine
25 the issue of liability on the merits. Petitioner cites

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1 authority for this proposition including decisions by two of my
2 colleagues, Judges Buchwald and Nathan. Respondent insists
3 that recent Second Circuit authority, notably *Accenture LLP v.*
4 *Preng*, 647 F.3d 72 at 77, (2d Cir. 2011), stands for the
5 proposition that the only award that is reviewable is a final
6 award determining liability. In *Accenture* the circuit found a
7 district court's order denying an application to enjoin an
8 arbitration not to be final and therefore not subject to
9 appeal. *Accenture* says very little that is relevant here,
10 because the issue in that case was not any interim order of an
11 arbitrator, but rather an order of the district court. There
12 was no interim order issued by any arbitrator that was
13 ostensibly the subject of review in *Accenture*. Actually, what
14 *Accenture* held was that the Second Circuit lacked appellate
15 jurisdiction over the matter under 9, U.S.C., Section 16(b)(4)
16 without regard to the issue of interim relief.

17 I happen to agree with Judge Buchwald, who in *British*
18 *Insurance Company of Cayman v. Water Street Insurance Company*,
19 93 F.Supp 2d 506, 514, (SDNY 2000) held that an award of
20 temporary equitable relief, such as a security award, was
21 separable from the merits of the arbitration and so is subject
22 to federal review. However, that provides petitioner only with
23 a pyrrhic victory, because on review I cannot and will not
24 confirm the award which should never have been entered in the
25 first place.

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1 The interim award provides for an award of prejudgment
2 security and a so-called Mareva injunction, which prevents the
3 respondent from transferring any assets wherever located, up to
4 the amount of security until such security is posted. The
5 parties' arbitration agreement is a general agreement that does
6 not provide for the posting of security pending a final award
7 in an arbitration. The contract containing the arbitration
8 clause is governed and must by agreement of the parties be
9 enforced in accordance with the law of the State of New York,
10 which means the powers of the arbitrator are constrained by the
11 laws of the State of New York. Under New York law an unsecured
12 creditor cannot be turned into a secured creditor by requiring
13 a litigant to post prejudgment security unless the parties in
14 their contract expressly provide for the posting of security
15 above and beyond the requirements of New York law. One cannot
16 get a preliminary injunction in aid of arbitration when one is
17 seeking a money judgment without running afoul of New York law
18 and the requirement to post security prior to judgment is just
19 such an injunction. Winter v. Brown -- I don't have an
20 official cite -- 853 New York Supp 2d 351, some Appellate
21 Division, I'm not sure which one, 2008. If you're coming in
22 front of me in the future, I want official cites in proper
23 firm.

24 Banco deSeguros del Estado v. Mutual Marine Offices,
25 Inc. 344 F.3d 255 (2d Cir. 2003), the case on which petitioner

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1 principally relies is a case in which the Second Circuit
2 affirmed a district court's confirmation of an interim award
3 ordering respondent to post and maintain a letter of credit.
4 The posting and maintaining of the letter of credit was
5 contractually mandated. The district court in Banco de Seguros
6 concluded that the award of the arbitrator finally determined
7 an issue that was severable from the rest of the arbitration
8 and the circuit agreed. Critical to the circuit's
9 determination that the district court's confirmation of the
10 award would be affirmed was the fact that the underlying
11 contract provided, mandated the posting of the letter of
12 credit. Equally critical was that the insurance contract at
13 issue provided that it was not to be construed as imposing
14 legal obligation and that the parties' arbitration agreement
15 specifically excused any arbitrator from following strict rules
16 of law. Needless to say, there are no similar provisions in
17 the contract at issue in this case. While the contract
18 contains a broad arbitration clause, it is not limitless. An
19 arbitrator's power is per force constrained by the terms of the
20 parties' agreement and in this case the parties agreed that the
21 law of New York would govern not only the construction of the
22 contract but its enforcement.

23 Petitioner insists that interim security is indeed
24 authorized by the State of New York because the requirements
25 for obtaining security in the form of attachment pursuant to

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1 Article 62 of the CPLR have been satisfied. Article 62 is
2 indeed the only route to prejudgment relief in the form of
3 security that is permissible in New York. However, Article 62
4 relief which is available against a foreign corporation in an
5 action for money damages does nothing more than allow the
6 sheriff to attach and restrain property of a non-domiciliary
7 that is located in New York. It is beyond peradventure that
8 the only property subject to prejudgment attachment is property
9 located in New York. National Union Fire Insurance Company of
10 Pittsburgh v. Advanced Employment Concepts Inc., 269 AD2d 101
11 (1st Dept 2000). The arbitrator's award does not purport to be
12 attached to property located in New York. Indeed in the
13 context of the Mareva injunction it addresses property located
14 anywhere, and for all I know respondent has no property located
15 in New York. Attachment also requires the posting of security
16 by the party obtaining the attachment for the purpose of
17 allowing the sheriff to attach the property, to levy against
18 the property and hold it, none of which had been ordered here.

19 The second part of the interim award is easily
20 disposed of. The injunction at issue is a Mareva injunction
21 and both the United States Supreme Court and the New York Court
22 of Appeals have held that federal and New York State courts are
23 without power to issue them. Grupo Mexicano de Desarrollo SA
24 v. Alliance Bond Fund, Inc., 527 U.S. 308, (1999); Credit
25 Agricole Indosuez v. Sossiyski Kredit Bank, 94 NY2d 541 (2000).

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1 Petitioner urges that these cases are without precedential
2 force here because they do not address the power of the
3 arbitrator to issue such an injunction and indeed they do not.
4 But if this Court is without authority to issue such an
5 injunction it defies reason and logic to say that it can agree
6 to enforce one, especially when the injunction was issued by an
7 arbitrator whose authority to issue it was constrained by the
8 four corners of the parties' contract, a contract governed and
9 to be enforced in accordance with New York law which
10 specifically and emphatically refuses to authorize such an
11 injunction. It would indeed be contrary to the public policy
12 of New York to confirm the award.

13 New York's aversion to prejudgment security in a case
14 like this one is longstanding and clear. It is explicitly
15 applicable to the issue that was decided by the arbitrators in
16 this case which was the availability of interim relief. I note
17 here that interim relief is a procedural matter and it is well
18 settled that the law of the arbitral situs, in this case New
19 York, determines the availability of interim relief, whether
20 from the arbitrators or local courts. And while petitioner
21 insisted in its application for interim relief that the
22 arbitrator should apply the law of Switzerland, Canada,
23 Singapore and England ostensibly because New York provided no
24 specific principles concerning interim measures, which is a lie
25 to the arbitrators as far as I'm concerned, the petitioner

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1 acknowledged elsewhere in his papers that the arbitrators
2 should look to U.S. and specifically New York law for any
3 principles governing the award of interim measures and New York
4 is quite clear that it does not authorize them. The issue was
5 identified to the arbitrators and that's why I waited to see
6 what the brief was that was given to the arbitrators. The
7 issue was identified to the arbitrators in a submission to the
8 panel made by a different party which has elected not to appear
9 here, the party represented by Shearman & Sterling, and the
10 brief makes all of the arguments that I have adopted here.
11 Nonetheless, the arbitrators apprised of the law, ignored the
12 law of the contract, ignored the law of the situs of the
13 arbitration and awarded prejudgment security as well as an
14 unenforceable Mareva injunction. In so doing they manifestly
15 exceeded their powers. Therefore the interim award of security
16 in the Mareva injunction will not be confirmed and it is hereby
17 vacated. Stoltz-Nielsen SA v. Animal Feeds Corp. 548 F.3d 85
18 at 89, (2d Cir. 2008)

19 That's that.

20 The brief to the arbitrator should have been submitted
21 to me along with your brief. It's going to be marked Court
22 Exhibit 1 and it will be added to the record.

23 MR. GOLDSTEIN: Your Honor, do you have any interest
24 in any discussion or should we just go to the circuit?

25 THE COURT: Go to the circuit. Order the transcript.

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1 Go to the circuit.

2 MR. GOLDSTEIN: If your would like to spend ten
3 minutes, call it reconsideration or not, but if we're finished,
4 we're finished.

5 THE COURT: Go to the circuit. I've put my time in on
6 this one. Go to the circuit. Order the transcript. It's all
7 yours.

8 COUNSEL: Thank you, your Honor.

9 MR. ZIMMERMAN: Your Honor, completely unrelated
10 point, before I handed to your clerk a copy of Shearman &
11 Sterling's letter.

12 THE COURT: Oh, Shearman & Sterling's letter.

13 MR. ZIMMERMAN: From last Wednesday. You may recall
14 there was an issue of them not appearing. They had attempted
15 to advise you in advance of the last appearance. This is a
16 courtesy --

17 MR. GOLDSTEIN: Your Honor, if I may for one minute
18 make a motion for reconsideration, something that you
19 overlooked. You may deny it, and I won't take more than one
20 minute.

21 THE COURT: Go ahead.

22 MR. GOLDSTEIN: Yes, the contract does contain a broad
23 arbitration clause, but it is narrow in the sense that it says
24 the parties will arbitrate under the ICDR, Triple A
25 international rules of arbitration, which include Rule 21 the

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1 rule concerning interim relief, which states the arbitrator may
2 grant any interim relief that the arbitrator considers
3 appropriate. That was the contractually agreed standard and
4 therefore the arbitrator had the power. That's the point I
5 submit your Honor has overlooked.

6 THE COURT: Contrary to overlooking, it wasn't in
7 anything that I saw. That point wasn't made in anything that
8 was given to me.

9 MR. GOLDSTEIN: Oh, yes, it was, your Honor. I'm sure
10 it was, your Honor, I'm sure it was made.

11 THE COURT: I'm sure it was. Never mind.

12 MR. GOLDSTEIN: It was specifically made in the
13 rejoinder --

14 THE COURT: Hold on, let me go deal with that.
15 Everybody stay.

16 MR. GOLDSTEIN: That is the specific and critical
17 point, your Honor.

18 (Recess)

19 THE COURT: Back on the record. The short statement
20 of truth is I've never seen the reply brief until this second.
21 I have not seen it. Now, whether that's a screwup in my
22 chambers or not, I don't know. This is literally the first --
23 this was never mentioned in your original moving papers. It
24 was not there, and this is the first second that I've seen the
25 reply brief. Therefore -- therefore, I didn't know a reply

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1 brief had been submitted. Therefore, the prior order is
2 vacated. Go away. I'll have you come back some day when I
3 have time and I will do a new decision.

4 MR. GOLDSTEIN: May we set a date, your Honor?

5 THE COURT: No. I'll call you. I'm starting a trial
6 on Monday.

7 MR. ZIMMERMAN: May I have a word with respect to the
8 issues raised in the rejoinder which was filed without
9 permission of the Court with the 19-page attachment which is
10 inconsistent with your Honor's rules. We'd like the
11 opportunity certainly to put in a surreply.

12 THE COURT: You can put in a surreply. I'll expect it
13 by Tuesday.

14 MR. ZIMMERMAN: Thank you, your Honor.

15 THE COURT: Okay? I mean, what can I say?

16 MR. GOLDSTEIN: Is there a chance, your Honor -- we
17 faxed it at 6:00 last night.

18 THE COURT: You may well have. I'm not saying you
19 didn't, I'm just telling you flat out that I have done nothing
20 for the last two and a half hours, including cancel my lunch,
21 to try to craft a decision in this case. I never saw this
22 document before, okay? Never saw it.

23 MR. GOLDSTEIN: Is there a possibility we could be fit
24 into your schedule sometime next week?

25 THE COURT: I do not know. I will call you.

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MR. GOLDSTEIN: Thank you. Thank you very much, your
Honor.
(Adjourned)

