



## Client Alert

*Including an arbitration clause in a contract may not prevent the expense of participating in court proceedings.*

### **Court May Place Lien on Defendant's Assets During Arbitration**

Arbitration is designed to spare parties the cost and inconvenience of litigating disputes in court. However, under some circumstances, California law allows a party to an arbitration to file a court action asking for a "provisional remedy" even while the arbitration is pending. To obtain such a remedy, the party must show that "the award to which the applicant may be entitled may be rendered ineffectual without provisional relief." A recent decision of the California Court of Appeal, *California Retail Portfolio Fund GMBH & Co. v. Hopkins Real Estate Group*, could significantly expand the number of arbitrations in which courts will intervene to award provisional relief. The appellate court held that "the apparent insolvency of a party to an arbitration agreement, or other evidence showing that the party was experiencing severe financial difficulties, is sufficient to satisfy the ineffectual relief requirement."

**Background.** The case concerned a real estate partnership agreement that obligated the defendant to pay the plaintiff \$582,000 each year, for a four-year period. The plaintiff filed for arbitration after the defendant missed the first two annual payments. While the arbitration was pending, the plaintiff filed a separate action in court, asking the judge to issue a "writ of attachment," i.e., an order placing a lien on the defendant's assets to satisfy any potential arbitration award. The defendant argued that the plaintiff's actions were improper, because the real estate partnership agreement required all disputes to be resolved by an arbitrator. The trial court disagreed and granted a writ of attachment in the plaintiff's favor.

The Court of Appeal affirmed the trial court's decision. It noted that courts must not "invade the province of the arbitrator" and that a court should become involved in a dispute subject to arbitration "only where the arbitrator's award may not be adequate to make the aggrieved party whole." Therefore, a court should not intervene unless the plaintiff would face "irreparable harm" if it failed to do so. The appellate court acknowledged that no decision had yet



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considered whether a defendant's financial problems presented the type of risk that justified judicial intervention in an arbitration. Yet it reasoned that an arbitrator could not grant meaningful relief if the defendant lacked the resources to satisfy an award. Accordingly, the appellate court concluded that "both insolvency and the inability to otherwise pay damages are appropriate measures of irreparable harm that might render an arbitration award ineffectual when a writ of attachment is sought."

Significantly, the appellate court held that a judicial writ of attachment was appropriate even though the plaintiff provided very little evidence of the defendant's financial problems. In fact, the only evidence the plaintiff produced was a two-year-old internal email from the defendant's chief financial officer, referring to "some concerns" he had concerning the defendant's "overall liquidity" and potential problems with an unrelated obligation. Not only did the appellate court hold that this email was sufficient to establish the plaintiff's need for a writ of attachment, it suggested that the defendant's unexplained failure to pay plaintiff the sum at issue in the arbitration — standing alone — might provide enough proof of the defendant's financial problems to justify such an order.

**Conclusion.** As a result of this decision, plaintiffs in contract disputes subject to arbitration may seek a writ of attachment whenever they can credibly claim that the defendant has an "inability to pay damages." Including an arbitration clause in a contract may not prevent the expense of participating in court proceedings.

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