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New York: A Home for the New York Convention: Pre-Award Attachment and Post-Award Enforcement

One of the world's leading commercial treaties, with over 140 signatory states, is the U.N. Convention On The Recognition And Enforcement Of Foreign Arbitral Awards. It was drafted in New York City between May and June 1958. The United States became its 37th signatory in 1970—despite that delay the treaty is known as the "New York Convention." It is only fitting then that two recent decisions of New York courts have established that claimants seeking pre-award attachment in aid of arbitration and post-award enforcement (including of a judgment on an award) will find a home in New York courts. Pre-award security, the most recent case holds, may be obtained even in respect of a foreign arbitration.

Judgment Enforcement: *Koehler v. Bank of Bermuda*[1]

In this landmark case, the question that the court was asked to decide under the governing New York law, as certified to it by the Second Circuit Court of Appeals, was:

> . . . whether a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to CPLR article 52, when those stock certificates are located outside New York.

The New York Court of Appeals answered the certified question in the affirmative.

The Facts

The background facts were, briefly, that the judgment creditor had obtained a judgment that he then sought to have recognized in New York and to enforce by bringing a separate action against the Bank of Bermuda by serving a restraining order on its branch in New York. The bank finally consented to personal jurisdiction, but claimed that he share certificates pledged by the judgment debtor were physically located in Bermuda. In the interim, the obligations for which the share certificates had been pledged were satisfied and, despite the turnover order served on it in New York, the share certificates were transferred by the Bank to a Bermudian company existing for the judgment debtor's benefit. The Bank argued:

> where a judgment debtor is not within the New York Court's personal jurisdiction the Court's authority is based on *in rem* jurisdiction over debtor's property (*i.e.,* not "extraterritorial") even if personal jurisdiction exists over the garnishee.

The Ruling

The Bank's argument was rejected. The majority held in material part:

1. "Enforcement proceedings and attachment proceedings … differ fundamentally in respect to a court's jurisdiction";
2. "Pre-judgment attachment" requires jurisdiction over property (*i.e., in rem*);
3. There is no "express territorial limitation barring the entry of a turnover order to transfer money or property into New York from another state **or country**" (emphasis added);
4. the Court's authority is not based on *in rem* jurisdiction but *in personam* jurisdiction over the judgment debtor or garnishees; and
5. a New York court may order the turnover of out-of-state assets held by the judgment debtor and/or garnishees over whom it has personal jurisdiction.

Pre-Award Attachment: *Sojitz Corp. v. Prithvi Information Solutions Ltd.*[2]

This month the Appellate Division of New York clarified the pre-award *in rem* remedy touched upon in *Koehler,* even in support of a foreign arbitration. On an appeal from the New York trial court,

the appellate court was asked to decide an issue not, apparently, previously addressed; namely "whether a creditor can [under New York State law] attach assets in New York, for security purposes, in anticipation of an award that will be rendered in an arbitration proceeding in a foreign county, where there is no connection to New York by way of subject matter jurisdiction or personal jurisdiction." It answered that "attachment strictly for security purposes" is proper.

The Facts

The underlying dispute involved a contract between a Japanese company (Sojitz) to provide telecommunications equipment to a company headquartered in India (Prithvi). The contract had a Singapore arbitration clause. Neither party had jurisdictional connections with New York. Following Prithvi's alleged breach Sojitz obtained an *ex parte* attachment order for $40 million (having put up a $2 million bond). Sojitz sought to dismiss the attachment based on its lack of any connection with New York. It submitted evidence that it had no property, bank accounts, *etc.* in New York and only a few customers who contributed approximately 1.4 percent of its revenue. One of those customers owed $18,480, which had been attached.

The Rulings

The trial court vacated the $40 million attachment order (leaving the $18,480 attached) and reduced the bond to $900 or 5 percent of any amount attached. It further allowed Sojitz to attach additional specific assets. It rejected Prithvi's argument that the court needed personal jurisdiction over it in order to issue an attachment. Subsequently, the continuing attachment order was dissolved, after failure to attach further property, and the bond with it. Prithvi, nevertheless, appealed the original attachment order, asserting a right to recover damages sustained if the order was improperly issued.

The court, on appeal, observed that New York law had been changed to permit preliminary injunctions and attachments in aid of arbitration, including in respect of arbitrations outside New York.

The court considered the U.S. Supreme Court's decisions on the standards for exercising jurisdiction under the Constitution's "Due Process Clause." That standard, in respect of a state court's exercise of personal jurisdiction, requires "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional motions of fair play and substantial justice."[3] A later decision,[4] *Shaffer,* applied the same standards to *in rem* or *quasi in rem* actions.

Nevertheless, the Appellate Division observed, *Shaffer* had suggested a "'security' exception to the requirement of minimum contacts in *quasi in rem* jurisdiction." The court noted other decisions had relied on this "exception" to allow prejudgment attachment and stated that it was "persuaded that New York's attachment statute does not run afoul of *Shaffer* when it is used for the purposes of security rather than to confer *in personam* jurisdiction." The court further held that "we see nothing fundamentally unfair about an attachment for security pending arbitration in a proper forum," especially given the statute's safeguards for issuance (such as commencement of the arbitration within 30 days).

The order appealed from, granting Sojitz a pre-award attachment and reducing its bond amount, was affirmed.

Discussion

Sojitz is a welcome clarification and affirmance of a right under New York State law that many an admiralty practitioner would take for granted: the right of attachment of the respondent's physical assets to secure a future award. Indeed, Supplemental Rule B (of the federal admiralty rules) refers to "tangible and intangible property" and, until recently, included electronic fund (wire) transfers. *Sojitz* holds that New York State law allows the same remedy in respect of "specific assets."

In this respect, the Federal Arbitration Act ("FAA"), 9 U.S.C. §8, provides that "a cause of action otherwise justiciable in admiralty" may be commenced by the seizure of the respondent's "vessel or other property" and, thereafter, "the court shall then have jurisdiction to direct the parties to proceed with arbitration," retaining jurisdiction to enforce the award. The limitation of this pre-award attachment remedy to admiralty cases, given that the FAA is applicable to two types of claim: "maritime transactions" and transactions in interstate or foreign commence, was questioned by Judge Learned Hand in the Second Circuit Court of Appeals, in a little cited case (which remains good law).[5] Judge Learned Hand stated "[w]e cannot conceive any reason for giving the remedy of attachment—and arrest—to the first class [maritime transactions], and denying it to the second [foreign commerce]; such a distinction would impute to Congress the merest whimsy, and that too, a whimsy which nothing in the text demands."

New York's district courts may consider that they can draw that distinction to deny pre-award attachment orders under the FAA in non-maritime transactions. *Sojitz* now provides that such relief is available under New York State law even in respect of foreign arbitrations that, in all likelihood, will be subject to the New York Convention. *Koehler* makes clear that enforcement is available over garnishees holding the judgment debtor's property in New York or abroad.

New York courts have shown their receptiveness to ensuring that commercial obligations are honored and that relief is available through them both in the beginning and at the conclusion of the arbitral process.

1. 883 N.Y.S.2d 763 (2009).
2. 2011 WL814064 (N.Y. App. Div. 1, Mar. 10, 2011).
3. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).
4. *Shaffer v. Heitner,* 433 US 186 (1977).
5. *Murray Oil Products Co. v. Mitsui & Co. Ltd.,* 146 F.2d 381, 384 (2d Cir. 1944).

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