
Assets in New York May Be Attached as Security Prior to International Arbitration

by Ronan J. McHugh

The New York Supreme Court ruled on December 2, 2009, in Sojitz Corporation v. Prithvi Information Solutions Ltd, that under New York law an order in aid of providing security in an international arbitration may be granted to a creditor attaching the New York assets of the debtor even though neither creditor nor debtor are from New York and their underlying contract dispute is subject to international arbitration outside of New York.

As such, parties with contracts providing for international arbitration of disputes may be able to take advantage of the courts in New York to obtain provisional security, where the other party conducts separate business, or has other assets, in New York.

The Relevant Facts

Sojitz, a Japanese company with its principal place of business in Tokyo, entered into a contract with Prithvi, an Indian company with its principal place of business in Hyderabad, India, to provide Chinese-made telecommunications equipment to Prithvi in India. The contract contained an English law clause and provided for disputes to be arbitrated in Singapore. Sojitz delivered equipment to Prithvi worth \$47,483,106.93, but alleged it was only paid \$5.6 million. With delay interest under the contract, Sojitz claimed \$48.4 million.

On August 13, 2009, Sojitz moved ex parte for an order of attachment against Prithvi for \$40 million. Sojitz' motion was granted with Sojitz posting a \$2 million bond. Sojitz then attached an \$18,000 account receivable debt owed to Prithvi from an unrelated New York-domiciled party and sought to confirm this attachment. Also, on August 27, 2009, Sojitz commenced arbitration in Singapore. Prithvi objected to confirmation of the attachment. The question for the court was, "May a creditor attach assets in New York, for security purposes, in anticipation of an award in arbitration commenced in a foreign jurisdiction when there is no contact with, or connection to, New York by way of subject matter or personal jurisdiction."

The Applicable Law

In 2005, to resolve conflicting case law, the New York Legislature revised its Civil Practice Law and Rules, changing Section 7502(c) to provide that “The supreme court...may entertain an application for an order of attachment...in connection with an arbitration that is pending or that is to be commenced inside or outside of this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.”

The Court noted that this statute “provides that the sole ground to be considered in a case covered by CPLR 7502(c) is whether a later award would be rendered ineffectual without provisional relief. Thus, without more, a nondomiciliary attachment in aid of arbitration is permissible, once the “ineffectual” requirement of CPLR 7502 (c) is met.”

In addition, New York law provides that for an order of attachment: (1) a plaintiff’s demand must be for a money judgment; and (2) one of five factors in CPLR 6201 must be met, which includes, “defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state.”

The New York Supreme Court ruled that both CPLR 7502 (c) and 6201 were met here, as Sojitz alleged and documented that Prithvi diverted funds without explanation from an escrow account held for Sojitz’s benefit, which allegations were uncontested. The court rejected Prithvi’s arguments, distinguishing the cases it cited, that either personal jurisdiction or a demonstration of some minimal contacts with New York was necessary before attachment, even as a security, could be granted. The court accepted the principle. It distinguished the facts of *Shipping Corp of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58, 66-71 (2nd Cir. 2009). There, assets that were sought to be attached, electronic funds transfers, were in the possession of intermediary banks and under New York’s Uniform Commercial Code a beneficiary had no interest in such, so that attachment was not possible, as they were not the property of the defendant. The court noted that the effect of *Shipping* was to bring U.S. law governing maritime seizures in line with New York commercial cases where assets, whether tangible or intangible, may be seized for security.

“Accordingly, pre-award attachments in international arbitration cases are proper against ascertainable property, including, but not limited to debts owed to respondents by its obligors domiciled in the State of New York.”

If you have any questions about the content of this advisory, please contact the Pillsbury attorney with whom you regularly work, or the author of this advisory.

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