New York Court Grants Pre-Award Attachment in Aid of a Foreign-Seated International Arbitration

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The recent decision of the New York Supreme Court, Appellate Division (an intermediate state appellate court) in *Sojitz Corp. v. Prithvi Information Solutions Ltd.*, 2011 N.Y. Slip Op. 1741; 2011 N.Y. App. Div. LEXIS 1709, bolsters New York's reputation as a jurisdiction friendly to international arbitration. In this case, which involved two non-U.S. parties in an arbitration seated in Singapore, the appellate court held that a petitioner can attach a respondent's assets located within New York in anticipation of an arbitral award, even where the New York courts have no personal jurisdiction over the respondent. The appellate court upheld the attachment of a debt owed by a New York-domiciled customer of the respondent in *Sojitz* even though the respondent had no contacts with New York other than the debt owed by its customer.

The case arose out of a contract between the petitioner, a Japanese-based company, and the respondent, an Indian-based company, pursuant to which the petitioner agreed to provide Chinese-produced telecommunications equipment to the respondent in India. The respondent was to make payments for the equipment to an escrow account at an Indian-based commercial bank from which the petitioner would withdraw the funds. The contract was governed by English law and provided that any disputes arising from or relating to the contract were to be resolved by arbitration in Singapore. In early 2008, the petitioner delivered equipment pursuant to the contract and issued invoices and bills of exchange to the respondent in the amount of approximately $47.5 million. The respondent accepted the delivery of the equipment without complaint but only paid the petitioner approximately $5.6 million of the total amount due, citing cash-flow problems.

Anticipating a favorable arbitral award, the petitioner sought an *ex parte* order attaching a debt owed to the respondent by a New York-domiciled customer in the amount of $18,480 under New York's Civil Practice Law and Rules § 7502(c). Section 7502(c) provides for the pre-award attachment of assets located in New York in connection with an arbitration regardless of where it is seated:

"[New York courts] may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside 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."

In its decision, the appellate court began by recounting the statutory history of § 7502(c). The court

explained that the New York Court of Appeals (the highest court in the New York judicial system) concluded in a much-criticized 1982 decision – *Cooper v. Ateliers de la Motobecane*, 57 N.Y.2d 408 (1982) – that New York courts had no authority to order the attachment of property in connection with an arbitration. The Court of Appeals had held in *Cooper* that New York statutory law in effect at the time permitted a court to issue an order of attachment only in an action for damages, not in a connection with an arbitration. Moreover, the Court of Appeals had held that, even if an attachment order could be issued, such an order would be inconsistent with the New York Convention because the Convention precludes courts from doing anything other than ordering an arbitration to proceed. The latter holding had placed New York in a distinct minority among courts internationally, as well as in the United States. (For further background, see Gary Born, *International Commercial Arbitration* 2030-2042 (2009).)

In response to the *Cooper* decision, the New York legislature added § 7502(c) in 1985. However, the provision as enacted at that time permitted New York courts to issue orders of attachment or preliminary injunctions only in connection with arbitrations seated in New York that were not subject to the New York Convention. It was not until 2005 that the New York legislature amended § 7502(c) to add the current language to the statute, extending its application to arbitrations seated outside of New York and to arbitrations under the New York Convention. This amendment foreshadowed UNCITRAL's addition of Article 17J to the UNCITRAL Model Law the following year. Article 17J expressly provides that courts located outside the arbitral seat can issue interim measures in aid of international arbitrations.

After discussing the statutory history, the appellate court analyzed whether the $18,840 debt could properly be attached in the absence of personal jurisdiction over the respondent. (The court lacked personal jurisdiction because the respondent had no offices, employees, or bank accounts in New York, had only occasionally solicited business in New York, and had not undertaken any business activities in connection with the contract at issue in New York.) The court determined that the attachment was proper.

In reaching this conclusion, the court distinguished *Shaffer v. Heitner*, 433 U.S. 186 (1977), a leading U.S. Supreme Court decision that had held that a state court could not exercise personal jurisdiction over a party merely because the party owned property in the state. The appellate court reasoned that the Supreme Court had noted in dicta in *Shaffer* that this principle did not preclude an action to attach property in a forum as security for a judgment being sought in another forum, even where the property owner had no other contacts with the forum in which the property was located to give rise to personal jurisdiction. The appellate court concluded that this "security" exception applied in the arbitration context under § 7502(c) because the petitioner was not seeking to rely on the property to confer personal jurisdiction but rather was "merely seek[ing] to have the property attached for future execution in the event a recovery is ordered by the out-of-state forum."

The appellate court further noted that two safeguards built into § 7502(c) – a requirement that the petitioner must show that any arbitral award made would be ineffectual without the attachment and a provision that the attachment order expires if the petitioner fails to initiate an arbitration within 30 days of the attachment being granted – addressed any concerns regarding fairness. Oddly, the *Sojitz* court did not address its prior interpretation of the New York Convention in *Cooper* – holding that the Convention precluded grants of provisional relief in aid of an international arbitration. That holding was a matter of U.S. federal law (because U.S. treaties have the status of federal law) and, as a consequence, not subject to being "overruled" by state law – including state legislation such as the amendment to § 7502(c). The *Sojitz* court presumably, and correctly, reconsidered and reversed its prior interpretation of the New York Convention in *Cooper*, but its opinion does not explain this reasoning. Assuming that this logic is followed in the future, the *Sojitz* decision provides a useful tool for parties to international arbitration whose counter-parties have assets located in New York and

comes as a welcome development in the field of international arbitration.

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