An Attachable Mess: Stemcor USA Incorporated v. Cia Siderurica do Para Cosipar

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Arbitration is often used to avoid the messy processes of national litigation, sometimes involving years of appeals and hearings. But when you want to attach property to support your arbitral award, that itself can result in years-long litigation, as in the case of **Stemcor USA, Inc. v. Cia Siderurgica Do Para**. The delays in the *Stemcor* saga were largely due to state law that was not drafted with arbitration in mind.

The multiple and lengthy proceedings involved in this dispute are telling. In 2010 and 2011, Thyssenkrupp Mannex GMBH ("TKM") entered into contracts to purchase pig iron from America Metals Trading LLP ("AMT"). In 2012, Daewoo International Corp. ("Daewoo") entered into unrelated contracts with AMT to purchase pig iron, which included international arbitration provisions. AMT failed to deliver pig iron to both Daewoo and TKM.

In December 2012, Daewoo filed an action in the United States District Court for the Eastern District of Louisiana (the "District Court") to compel arbitration against AMT and sought writs of attachment on AMT's pig iron pursuant to maritime law and the Louisiana non-resident attachment statute. (*See* Louisiana Code of Civil Procedure article 3541(5)). The District Court issued the writs of attachment, which were served on December 22, 2012. Six days later, on December 28, 2012, TKM sought writs of attachment over AMT's pig iron in Louisiana state court. The Louisiana state court issued the writs which were served on the same pig iron on December 29, 2012.

In January 2013, the pig iron was sold and the proceeds were deposited into the registry of the District Court pending the resolution of the various arbitrations and litigations pending against AMT, as AMT had breached contracts with numerous other commercial partners as well.

In April 2013, TKM unsuccessfully sought to vacate Daewoo's writ of attachment on AMT's pig iron proceeds. Over two years later, in May 2015, TKM again attempted unsuccessfully to vacate Daewoo's writ of attachment. In early 2016, the case was reassigned to a different section of the District Court, coming onto the docket of a new judge. TKM sought, for the third time, in May 2016, to vacate Daewoo's attachment of AMT's pig iron proceeds.

The third time proved to be the charm. Almost three and half years after Daewoo attached AMT's pig iron, TKM finally succeeded in vacating Daewoo's attachment. On August 6, 2016, the District Court held it did not have proper jurisdiction to issue Daewoo's writs of attachment. The Court rejected

attachment pursuant to maritime jurisdiction because the contract between Daewoo and AMT was for the sale of pig iron, and not maritime in nature. The Court then discussed Daewoo's attachment under Louisiana's non-resident attachment statute. The Court determined that Daewoo's action to compel international arbitration was not "an action for money judgment" under the Louisiana statute, and so vacated Daewoo's attachment. The District Court then ordered AMT's pig iron proceeds transferred to Louisiana state court.

Daewoo appealed the District Court's order, and a year later, in September 2017, the United States Court of Appeals for the Fifth Circuit (the "Fifth Circuit") vacated the District Court's order dissolving Daweoo's attachment. The Fifth Circuit held that while Daewoo's action seeking to compel arbitration was not an action for money judgment for the Louisiana non-resident attachment statute to apply, a different article of the Louisiana Code of Civil Procedure, Section 3502, allowed for attachments in actions like Daewoo's where the plaintiff seeks attachment prior to a complaint being filed. Since Section 3502 allowed for pre-complaint attachments if the plaintiff obtained leave of court and furnished necessary affidavits and securities, and Daewoo had complied with these requirements, the Fifth Circuit found the District Court erred dissolving Daewoo's attachment. After the Fifth Circuit's decision, however, TKM requested a rehearing of the case.

Based on this request for a rehearing, ten months later, the Fifth Circuit withdrew its earlier opinion and reversed itself, finding that upon further review of the record Daewoo had not satisfied the necessary first step for attachment pursuant to Section 3502. Therefore, the Court held that as Daewoo had not complied with the requirements of Section 3502, the District Court had properly dissolved Daewoo's attachment, and now affirmed the decision of the District Court. Now it was Daewoo's turn to petition for a rehearing of its case.

Finally, in October 2018, noting that "we regret the time that has passed", the Fifth Circuit acknowledged that it was divided on the issue and concluded that it did not know how exactly to interpret the phrase "action for a money judgment" under Louisiana law, and determined that the Louisiana Supreme Court should be consulted on the proper interpretation of the statute. Accordingly, it certified the question to the Louisiana Supreme Court.

On May 8, 2019, the Louisiana Supreme Court held that the Louisiana non-resident attachment statute allows for attachment in aid of arbitration if the origin of the underlying arbitration claim is one pursuing money damages and the arbitral party has satisfied the statutory requirements necessary to obtain a writ of attachment.

After this clarifying decision, the Fifth Circuit then withdrew its earlier opinions, vacated the judgment of the District Court, and remanded. Finally, more than six years after getting the attachment, and with three District Court decisions, three Fifth Circuit decisions, and a Louisiana Supreme Court decision, Daewoo got to hold onto its pig iron proceeds.

The moral of this long story, with its many contradictory court decisions, is that laws written to support litigation are often ill-suited to support the needs of parties in arbitration. When Daewoo signed up for arbitration, it needed to know that if it prevailed, it would be able to be paid, and so it properly attached its counter-party's property. The local laws and courts should support this, without the necessity for years of litigation solely to see if those laws even apply to arbitration.

Parties may be able to avoid the quagmire faced by Daewoo by choosing an arbitral seat with laws that have already been repeatedly used and interpreted to support arbitration, or that are specifically drafted with arbitration in mind. Another possibility is to use emergency arbitration proceedings available under certain arbitral rulesets in order to provide for security for a pending claim. Such proceedings can result in an interim order issued within a short timeframe. Unfortunately, obtaining

national court enforcement of such an emergency order is still very much up in the air, as such interim orders are arguably not directly covered as final awards would be under the New York Convention. Ultimately, in a situation where multiple creditors are seeking to attach the same property, with some proceeding via litigation and others via arbitration, states and nations must provide a level playing field so that parties proceeding via arbitration have similar access to pre-judgment remedies as do parties proceeding via litigation—either through emergency arbitration or appropriate interim orders provided by national courts.