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# New York court clarifies jurisdictional requirement for attachment of assets as security for international arbitration awards

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**A** New York court, in *Sojitz Corp v Prithvi Information Solutions Ltd*, recently confirmed a claimant's attachment of the assets of its adversary as security for a potential award in an international arbitration despite a lack of any connection with New York establishing personal jurisdiction over the party whose assets were seized.<sup>1</sup> The court held that the location of the asset within New York State was sufficient to permit attachment under New York law. The case supports the possibility of obtaining pre-award security whenever assets of an opponent in an international arbitration can be found in New York State. In order to seize assets as security in connection with an international arbitration, New York law requires a showing that 'the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.'<sup>2</sup>

## Facts of the case

In *Sojitz*, a Japanese company and an Indian company had entered into a contract for the sale of telecommunications equipment manufactured in China.<sup>3</sup> The contract included an arbitration clause calling for arbitration of disputes in Singapore.<sup>4</sup> After the Indian company allegedly failed to make over US\$40 million in payments required under the contract, the Japanese company obtained an *ex parte* order of attachment for US\$40 million from a judge of the New York Supreme Court (the state trial court) against the Indian company.<sup>5</sup> The Japanese company moved to compel disclosure in aid of the attachment order and, then, to confirm an attachment of an US\$18,000 account receivable owed by a New York-domiciled entity to the Indian company.<sup>6</sup> After the Japanese company applied for the initial

order of attachment, but before the company had moved to confirm its attachment, the Japanese company commenced arbitration in Singapore against the Indian company.<sup>7</sup>

## Requirements for attachment in New York

In granting the request for confirmation of the attachment, the *Sojitz* court recited the two basic requirements that a plaintiff must satisfy under New York law before an order of attachment may be issued.<sup>8</sup> First, the plaintiff's underlying demand must be for a money judgment.<sup>9</sup> Secondly, the plaintiff must satisfy one of the five enumerated paragraphs of N Y C P L R § 6201, the first of which permits attachment when 'the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state.'<sup>10</sup> Parties seeking an attachment must also post a bond, set by the court, to cover potential damages to the defendant in the event that defendant prevails in the underlying proceeding or the attachment is found to have been unwarranted.<sup>11</sup>

Though the basic requirements are commonly satisfied in the context of an international arbitration, under a prior New York court decision the availability of attachment as a provisional remedy in international arbitrations was in doubt due to uncertainty whether the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') provides for a provisional attachment remedy.<sup>12</sup> However, adopting the view of the Second Circuit in *Borden Inc v Meiji Milk Products Co*, the New York legislature revised the statute governing arbitration to make clear that attachment is available to secure assets in anticipation of all arbitral awards, even where the arbitration is governed by the New York Convention.<sup>13</sup>

In amended form, New York law now states that attachment may be granted in aid of an arbitration that is pending or to be commenced within 30 days ‘upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief’ whether or not the New York Convention applies.<sup>14</sup> Thus, in addition to the basic prerequisites – that the claimant is seeking an arbitral award that includes a money judgment and that the defendant is not a domiciliary of New York – an applicant for an attachment must show that the vindication of the ultimate arbitral award may be jeopardised if attachment of assets is not allowed.

### Court’s holding and reasoning

In *Sojitz*, the court found that that the plaintiff satisfied each requirement. The Japanese company sought a money judgment in the Singapore arbitration.<sup>15</sup> The Indian company was, obviously, not a domiciliary of New York.<sup>16</sup> Last, the Japanese company’s uncontested, documented allegation that the Indian company had diverted funds from an escrow account without a legitimate explanation demonstrated a risk that absent the attachment the award would be rendered ineffectual.<sup>17</sup>

The Indian company unsuccessfully argued, inter alia, that the court needed to obtain personal jurisdiction over the defendant before granting an order of attachment in favour of the Japanese company.<sup>18</sup> That is, the Indian company argued, the plaintiff had to demonstrate that the defendant itself had some ‘minimum level of contact’ with New York State before a New York court could attach the Indian company’s assets.<sup>19</sup> The Japanese company countered, however, that the court could confirm an order of attachment as long as the asset was within the court’s jurisdiction.<sup>20</sup> The court agreed with the Japanese company, finding that if an attachment is sought solely for security purposes, the presence of the asset in New York is sufficient.<sup>21</sup>

For support, the court pointed to a seminal United States Supreme Court case that previously set out the limits of personal jurisdiction based exclusively on property, explaining that ‘while mere presence of “property” does [not] support jurisdiction to adjudicate [a separate claim unrelated to the property,] a State in which property is located should have jurisdiction to attach that property. . . as security for a judgment

being sought [in another court elsewhere].’<sup>22</sup> Thus, the court noted approvingly that the Japanese company ‘did not seek to litigate the merits of its claims in New York,’ but instead merely sought ‘attachment for security to preserve assets that would not otherwise be available if it prevails in Singapore.’<sup>23</sup> ‘[T]he fundamental rule in attachment proceedings is that the [property to be attached] must be within the jurisdiction of the court issuing the process [in order] to confer jurisdiction.’<sup>24</sup>

### The ‘rendered ineffectual’ standard

New York courts typically allow attachment under the ‘rendered ineffectual’ standard where a defendant’s solvency or likelihood of compliance with an award is in doubt. Thus, the availability of attachment will often turn on the factual particulars of each dispute. In *Sojitz*, for example, the claimant alleged the defendant was guilty of fraud and unexplained diversions of funds. In another case, *Habitations, Ltd v BKL Realty Sales Corp*, a New York appellate court declared that ‘sinister maneuvers or fraudulent conduct [are] not required to be shown in an application’ for an attachment in connection with an arbitration.<sup>25</sup> However, in that case, the petitioner persuasively showed that that the defendant had historically failed to pay creditors and had even expressly ‘stated to others that he [intended] to remove his assets from the State’ and that he intended to resist fulfillment of the arbitral award.<sup>26</sup> Similarly, where a plaintiff shows that ‘there is some indication that [a defendant corporation] has engaged in liquidating and transferring assets’ and has ceased functioning, the plaintiff has satisfied its burden to demonstrate that any arbitration award ultimately obtained may be rendered ineffectual if no attachment is authorised.<sup>27</sup> On the other hand, ‘[a]n attachment does not appear necessary for security purposes ... where the funds plaintiff seeks to attach are being held in escrow under the control of the entity in which the parties invested [and that entity] at least has not been swayed to release any funds by defendant’s threats of litigation.’<sup>28</sup>

### Conclusion

*Sojitz* affirms the availability of attachment of New York assets in connection with international arbitrations, at least when there is some doubt as to the collectability of an arbitral award that may ultimately be issued. Since international entities’ assets are

often located in New York State, arbitration claimants should evaluate early on whether attachment may be available; attachment of an arbitration respondent's assets can help ensure the collection of an arbitration award and may place considerable pressure on a respondent to resolve a matter quickly. Parties against whom claims in arbitrations may be asserted, meanwhile, should be aware of and plan to respond to the possibility of an attachment proceeding at the outset of a dispute if not sooner. Through avoidance of conduct that could be construed as placing the collection of an eventual award in doubt, parties may be able to reduce the risk of having their New York assets seized.

**Notes**

- 1 *Sojitz Corp v Prithvi Information Solutions Ltd*, 2009 WL 4405480 (N Y Sup Ct 2 December 2009).
- 2 NYCPLR § 7502(c) (McKinney 2009).
- 3 *Sojitz Corp*, 2009 WL 4405480 at \*1.
- 4 *Ibid*.
- 5 *Ibid*.
- 6 *Ibid*.
- 7 *Ibid* at \*2.
- 8 *Ibid* at \*2.
- 9 NYCPLR § 6201 (McKinney 2009).

- 10 NYCPLR § 6201(1) (McKinney 2009). The other enumerated bases for attachment include, inter alia, instances where a defendant cannot be served, a defendant has intent to defraud or frustrate enforcement of a judgment, or when a judgment has already been entered in a separate action. NYCPLR § 6201(2)-(5) (McKinney 2009).
- 11 NYCPLR § 6212(b) (McKinney 2009).
- 12 *Cooper v Ateliers de la Motobecane*, 57 NY 2d 408, 416 (NY 1982) (denying availability of pre-award attachment in connection with New York Convention arbitrations).
- 13 919 F 2d 822, 826 (2d Cir 1990), cert denied, 500 U S 953 (1991); NYCPLR §§ 7200, et seq (McKinney 2009); *Sojitz Corp*, 2009 WL 4405480 at \*2.
- 14 NYCPLR § 7502(c) (McKinney 2009).
- 15 *Sojitz Corp*, 2009 WL 4405480 at \*1.
- 16 *Ibid*.
- 17 *Ibid* at \*4.
- 18 *Ibid* at \*4\*7.
- 19 *Ibid* at \*5.
- 20 *Ibid*.
- 21 *Ibid*.
- 22 *Ibid* (quoting *Shaffer v Heitner*, 433 U S 186, 210 [1977]).
- 23 *Ibid*.
- 24 *Hotel 71 Mezz Lender, LLC v Falor*, 58 A D 3d 270, 273 (NY App Div 2008).
- 25 *Habitations, Ltd v BKL Realty Sales Corp.*, 160 A D 2d 423, 424 (NY App Div 1990) (authorising attachment).
- 26 *Ibid*.
- 27 *County Natwest Sec Corp v Jesup, Josephthal & Co*, 180 A D 2d 468, 469 (NY App Div 1992) (authorising attachment).
- 28 *MFAI (Jersey) Ltd v Westbury Holdings, Inc*, 264 A D 2d 663 (NY App Div 1999) (denying attachment).