The Complications of Attaching Assets in the US in Aid of an Arbitral Award

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An arbitration award or court judgment is only as useful as the successful claimant's ability to collect on it. Thus, claimants in international arbitrations may find themselves seeking to freeze or otherwise secure a respondent's assets in anticipation of the final outcome of the case. Where the relevant assets are located in the United States, the process to secure assets can be both procedurally obscure and substantively difficult.

This article first outlines some of the procedural complexities of seeking to secure assets in the US for an anticipated arbitration award or foreign court judgment and then outlines the process for prejudgment attachment of assets in one state where foreign parties often have assets – New York.

We start with a useful initial practice pointer, explained in greater detail below: unduly aggressive conduct by the respondent and its counsel in the course of defending the arbitration may be a factor a New York court considers in deciding whether to grant an attachment of the respondent's assets in New York.

Background: attachment remedies in the US are governed by state law, not federal law

In *Grupo Mexicano de Desarrollo v Alliance Bond Fund, Inc*,[1] the US Supreme Court held that, in an action for money damages, a federal district court has

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1 *Grupo Mexicano de Desarrollo v Alliance Bond Fund, Inc,* 527 US 308 (1999).

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no power to enjoin a defendant from transferring or otherwise disposing of assets in anticipation of a judgment.[2] The Supreme Court's decision meant that while federal courts can, and do, issue 'injunctions in aid of arbitration', such an injunction cannot have the effect of enjoining a respondent to preserve assets in anticipation of a future judgment or arbitration award. In other words, the federal courts in the US have no inherent authority, or any other authority supplied by federal law, to issue a *Mareva* injunction (a court order temporarily freezing a portion of a defendant's assets pending the outcome of a lawsuit or arbitration so as to secure a potential judgment or arbitration award).

In the wake of *Grupo Mexicano*, state statutes allowing for prejudgment attachment of in-state assets replaced federal law as the key vehicle for a claimant in a foreign proceeding or an international arbitration to seek security for a potential arbitration award with respect to the respondent's assets located in the US.[3] Such state statutes apply even if prejudgment attachment is sought in federal court, as Federal Rule of Civil Procedure 64 provides that a federal court may seize a person or property to secure a final judgment to the extent permitted by the law of the state where the court is located. Indeed, *Grupo Mexicano* identified the applicability of state prejudgment remedies through Rule 64 as a factor in its reasoning, asking why a claimant would 'go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?'[4]

2 The majority opinion, by Justice Scalia, relied heavily on the historical distinction between law and equity in the English courts. Though the two systems are largely merged in the US system, the majority held that the 'traditional principles of equity jurisdiction' still govern the availability of injunctions in federal courts. *Ibid*, at 319. With that as the background, the majority's reasoning proceeded in two steps: (1) that a federal court's equity jurisdiction is limited to whatever was exercised by the English High Court of Chancery at the time of the enactment of the Judiciary Act of 1789, *ibid*, at 318–19; and (2) that the English High Court did not permit such injunctions at the time, *ibid*, at 319–27. Interestingly for practitioners of international arbitration, Justice Scalia supported the latter conclusion in part by arguing that the issuance of the original 'Mareva injunction' in 1975 by the English Court of Appeal was viewed as a 'dramatic departure from prior practice' of that court. *Ibid*, at 328.

3 Even though *Grupo Mexicano* explicitly limited only the *federal* courts' equity jurisdiction, several state courts determined afterwards that they similarly had no authority to enjoin the transfer of assets in cases involving only money damages. See, for example, *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 729 N E.2d 683 (NY 2000); *In re Enron Corp Litig*, No 01-CV-3645, 2002 WL 1001058 (SD Tex 16 May 2002); *Interisle Consulting Grp, LLC v Galaxy Internet Servs, Inc*, No MICV201300571, 2014 WL 3816557 (Mass Super, 16 June 2014); see also Jeffery L Wilson, 'Three if by Equity: Mareva Orders & The New British Invasion' 19 St John's J of Legal Comment 673, 725–26 (2010) (noting that not all states have been eager to expand the equitable power of their courts). Thus, in such states prejudgment attachments or other *in rem* remedies can be issued only if a state statute explicitly authorises them.

4 *Ibid*, at 330–31 (noting concern that such a preliminary injunction power would make Rule 64 'a virtual irrelevance').

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As *Grupo Mexicano* hinted, complying with local attachment and garnishment statutes can present a claimant in an international proceeding with quite a bit of 'trouble'. First, there is the simple fact that the statutes are, as the decision notes, 'local'; each state's attachment procedures authorise only the seizure of property within the jurisdiction (as discussed below, however, there is some nuance as to when property is considered to be 'sited' within the state). Thus, if a defendant has property in more than one US state, a claimant needing to secure assets for a foreign proceeding might need to initiate attachment proceedings in multiple states.

Secondly, because prejudgment attachment is generally considered a harsh remedy, the courts typically require claimants seeking prejudgment attachment to fulfil the often complicated procedural requirements to the letter. This is particularly true in the context of *ex parte* (that is, without notice to the opposing party) applications for prejudgment attachment, where full compliance with a state's procedural requirements may be necessary to comply with due process requirements under the US Constitution.[5]

Thirdly, while there are some commonalities among states' attachment statutes, there are also important differences. At a minimum, these differences could complicate an attempt to attach property in multiple states at once. More significantly, however, unique features of some state attachment statutes could prevent attempts to secure prejudgment attachment altogether. For example, Florida only authorises prejudgment attachment on a showing that the defendant is actively removing property out of the state or is fraudulently disposing of or secreting property to avoid payment of its (or his or her) debts.[6] Delaware's attachment statute does not require that kind of showing, but imposes a different kind of restriction: it does not permit garnishment to proceed against insurance companies or banks and similar financial institutions, except under limited circumstances.[7]

Because of these complications, in 2014, the National Conference of Commissioners on Uniform State Laws proposed a Uniform Asset-Preservation Orders Act (UAPOA), which would – if adopted by all the states – create a uniform process in the US for securing assets in anticipation of a judgment. (If adopted by all of the states, UAPOA would become the operative rule in federal court as well, pursuant to Federal Rule 64's borrowing of the prejudgment remedy law of the state where the federal court is located.) UAPOA would avoid the problem of having to proceed

5 See *Connecticut v Doehr*, 501 US 1, 18 (1991) (outlining such due process requirements).

6 Fla Stat ss 76.05, 76.03 (West, Westlaw through 2015 1st Reg Sess and Spec A Sess of the 24th Leg).

7 10 Del C s 3502 (West, Westlaw through 80 Laws 2015, ch 194).

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in multiple states at once by authorising a single *in personam* order against a defendant to enjoin it from dissipating assets pending judgment. UAPOA also contemplates that in the same proceeding a claimant could impose collateral restraints on non-parties such as the defendant's bank. But, as of now, the UAPOA has not been adopted by any of the 50 states.[8]

Until such time as UAPOA becomes widely adopted, litigants seeking to secure assets located in the US for a future award or judgment will be forced to pursue prejudgment attachment in one or more states under their varying laws. Due to New York City's central role in international trade and commerce and as a major financial centres, many claimants may pursue prejudgment attachment in New York state. For this reason, we outline the requirements for prejudgment attachment in New York below, emphasising those aspects of most relevance to a claimant in an international arbitration or foreign judicial proceeding.

New York's procedural rules for prejudgment attachment in aid of foreign proceedings

Statutory requirements

In general, to obtain an attachment of assets in New York as security for a potential judgment in a commercial case, the plaintiff must satisfy the following statutory requirements:

- show 'that there is a cause of action [and] that it is probable that the plaintiff will succeed on the merits';[9]
- show that the defendant is a non-domiciliary, non-registered foreign corporation, or a domiciliary that cannot be served; *or* that the defendant with intent to frustrate the judgment has or is about to move assets out of the state; *or* that the plaintiff has obtained a judgment entitled to full faith and credit (ie, from a sister state) or likely to be recognised under Chapter 53 of the CPLR (ie, a qualifying judgment from a foreign country);[10]
- show that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff;[11]

8 See Enactment Status Map, Asset-Preservation Orders Act, www.uniformlaws.org <last accessed on 8 February 2016>.

9 New York Civil Practice Law and Rules ('NY CPLR') s 6212(a) (McKinney, Westlaw through L.2015, chs 1– 589).

10 NY CPLR s 6201 (McKinney, Westlaw through L.2015, chs 1–589).

11 NY CPLR s 6212(a) (McKinney, Westlaw through L.2015, chs 1–589).

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- post a bond in an amount set by the court;[12] and
- within ten days, file the order along with the supporting papers and the summons and complaint in the action.[13]

Unusually (and perhaps uniquely) among the states, New York also has a statute that explicitly permits seeking prejudgment attachment as security for a future arbitration award. CPLR section 7502(c) provides that a New York trial court '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' (ie, the New York Convention).[14]

To obtain attachment as security for a future arbitration award, a plaintiff must satisfy all of the requirements of CPLR 6201 and CPLR 6212, except that, in the arbitration context, a plaintiff has 30 days to file a request for arbitration (rather than, in the ordinary case, the ten days from entry of the attachment order to file the summons and complaint).[15] Further, a plaintiff seeking to attach assets as security for a future arbitration award must satisfy an additional statutory requirement – that the 'award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.'[16]

New York's statutory law is clear about the court's authority to attach assets as security for an arbitration award because New York's highest court had previously ruled that New York courts had no such authority.[17] After the decision attracted criticism, the New York legislature initially amended the CPLR to allow prejudgment attachment in aid of arbitrations seated in New York not subject to the New York Convention. Then, in a subsequent amendment, the New York legislature made clear that New York courts could award prejudgment attachment in support of international arbitrations subject to the New York Convention. That history can be seen in the language of section 7502(c) itself, which somewhat awkwardly spells out that it is acceptable to order attachment in aid of arbitrations under the New York Convention.

12 NY CPLR s 6212(b) (McKinney, Westlaw through L.2015, chs 1–589). A party that obtains an attachment is liable for *all* costs and damages, including reasonable attorney's fees, sustained by reason of the attachment if the defendant recovers a judgment or if it is determined that the plaintiff was not entitled to an attachment. NY CPLR s 6212(e) (McKinney, Westlaw through L.2015, chs 1–589).

13 NY CPLR s 6212(c) (McKinney, Westlaw through L.2015, chs. 1–589).

14 NY CPLR s 7502(c) (McKinney, Westlaw through L.2015, chs. 1–589).

15 NY CPLR s 7502(c) (McKinney, Westlaw through L.2015, chs. 1–589).

16 *Ibid.*

17 See *Cooper v Ateliers de la Motobecane*, 57 NY 2d 408, 410 (1982).

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The common law requirement of 'real risk' of dissipation of assets

Under the literal terms of the New York statutes authorising prejudgment attachment, a claimant should be able to obtain an attachment of a respondent's assets in New York State merely by showing that it has a good claim and that the respondent is not based in New York. On its face, prejudgment attachment in New York is therefore an exceedingly powerful tool. However, New York courts have held that in addition to these statutory requirements, a plaintiff seeking prejudgment attachment of assets for security must show 'an identifiable risk that the defendant will not be able to satisfy the judgment.'[18]

In other words, the plaintiff must show a 'real' risk that a defendant will fail to pay a judgment, whether that risk is based upon defendant's 'financial position or past and present conduct'.[19] Thus, although the requirement of NY CPLR section 7502(c) that the plaintiff show the attachment is needed to ensure ultimate payment applies by its terms solely to attachments in aid of arbitration proceedings, that requirement essentially applies with respect to applications for attachment in aid of other proceedings as well.

Significantly, that 'real' risk must be supported with evidentiary proof, just like the statutory requirements for a prejudgment attachment.[20] Thus, to show a precarious financial position, the plaintiff must do more than plead generalised financial trouble; instead, it must submit evidence that the defendant lacks the assets to satisfy the judgment.[21] It is not enough to show that the defendants' assets are primarily located in a country where it can be difficult to enforce US judgments; because an attachment must be more than merely 'helpful,' a claimant must introduce specific evidence showing a likelihood that the enforcement would not be successful in the specific case.[22] Nor is it enough to show evidence that the defendant intends to transfer some assets. Absent evidence that the transfer is motivated by an attempt to frustrate the judgment, a plaintiff

18 *VisionChina Media Inc v Shareholder Representative Servs, LLC*, 109 A D.3d 49, 60 (1st Dep't 2013) (vacating order of attachment as improperly granted because of lack of showing of risk that the defendant would fail to satisfy the judgment).

19 *Ibid* (quoting *Ames v Clifford*, 863 F Supp. 175, 177 (SDNY 1994).

20 *Krineta Enterpr Co v Lavidas*, No 161911/14, 2015 WL 4755327, at *3 (NY Sup Ct NY Cty 24 July 2015).

21 *Nippon Emo-Trans, Co v Emo-Trans, Inc*, 744 F Supp 1215, 1235 (EDNY 1990) (denying a motion to confirm a prejudgment attachment on the ground that the plaintiff had not demonstrated a lack of available assets and had, in fact, failed to rebut evidence that the defendant did have such assets).

22 *VisionChina Media*, 109 A D.3d at 62.

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must show that the defendant does not have sufficient other assets to satisfy the judgment.[23]

A plaintiff can also demonstrate a 'real' risk of non-payment due to a defendant's past or present conduct, primarily its history of avoiding paying creditors.[24] In the situation where a plaintiff has already obtained a foreign judgment that remains unpaid, one commentator has suggested that the foreign judgment debtor 'is an obvious security risk based on non-payment of the former judgment . . . and the claim is prima facie meritorious based on the judgment itself.'[25] In practice, the courts have continued to require more than the non-payment of the judgment itself.[26]

One recent case – alluded to at the outset of this article – took a different approach to examining a defendant's past and present conduct in its assessment of whether this requirement was satisfied. In this case, *Passport Special Opportunities Master Fund v Ary Commc'ns Ltd et al*, the plaintiff (an English company) had obtained an arbitration award in Singapore against the defendants (a Pakistani company and related individuals).[27] The plaintiff sought simultaneously to confirm the awards under the New York Convention in both Singapore and the federal trial court in the Eastern District of New York, which encompasses part of New York City. While the defendants' motion to dismiss was pending in the Eastern District case, the Singapore court confirmed the award and issued a judgment. The plaintiff voluntarily dismissed the New York Convention action in the New York federal court and instead filed a new action in New York state court for the prejudgment attachment of defendants' New York State assets and to recognise the Singapore judgment under Chapter 53 of the CPLR.

While acknowledging the argument that the unpaid foreign judgment might be sufficient to show a security risk, the trial court found that that fact was 'but one indication of the need for security' in the case.[28] In granting the attachment, the evidence the court relied upon, however, was not about the defendants' financial position or about any admissions

23 *Krineta Enterpr*, 2015 WL 4755327, at *3.

24 *VisionChina Media*, 109 A D.3d at 60.

25 Vincent C Alexander, *Supplementary Practice Commentaries to N.Y. C.P.L.R. s 6201:5* (McKinney, Westlaw through L.2015, chs 1–589) (2013).

26 See *Nippon Emo-Trans Co* 744 F Supp at 1235 (concluding that some showing of necessity beyond the existence of an unpaid foreign judgment is still required, but less than that required absent the existence of the unpaid judgment); *Krineta Enterpr*, 2015 WL 4755327, at *3 (denying confirmation of attachment despite the existence of an unpaid foreign judgment).

27 No 604821/2015, 2015 WL 7511540, at *3 (NY Sup Ct Nassau Cty 17 Nov 2015) (unreported).

28 *Ibid*.

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of an intent to hide assets. Instead, the court looked to the defendants' litigation position in the underlying arbitration, in a related Pakistani court proceeding, and in the New York attachment proceedings themselves. The court stated:

> 'At bar, contrary to the contentions of the defendants, their conduct has gone beyond merely refusing to pay an arbitral award. Instead, defendants have attempted to "unseat" the appointed arbitrator, threatened him with prosecution for contempt, thwarted issuance of the Singapore arbitration award by obtaining injunctive relief in Pakistan…, exhorted the Pakistan court to declare New York arbitral enforcement proceedings "illegal" and order that they cease, and contested jurisdiction in New York while failing to cite both New York's liberal jurisdictional policies in terms of enforcement proceedings under CPLR Article 53, and Pakistan's authorization of service by mail under the Hague Convention.'[29]

In other words, the court in *Passport* found that the defendants' efforts to frustrate first the arbitration and then the recognition of the award were so aggressive as to suggest that defendants would fail to pay the award. If this rationale is adopted by other courts in New York state, respondents in arbitrations and their counsel should take notice that aggressive strategies to frustrate an arbitration proceeding could have the adverse effect of increasing the chances that a New York court will find that prejudgment attachment is warranted.

Helpful non-requirements

It is also useful to note what are *not* requirements to obtain a prejudgment attachment of assets in New York state. It is *not* necessary that New York have personal jurisdiction over the potential judgment debtor. That was the holding of a seminal decision of a New York intermediate appellate court, *Sojitz Corp v Prithvi Int'l Solutions, Ltd.*[30] In that decision, the New York Appellate Division, First Department, relied upon dicta from the Supreme Court decision *Shaffer v Heitner*,[31] that a state court could properly exercise

29 *Ibid.*

30 *Sojitz Corp v Prithvi Int'l Solutions, Ltd* 921 NYS.2d 14 (1st Dep't 2011).

31 *Shaffer v Heitner*, 433 US 186 (1977). *Shaffer* held that *quasi in rem* jurisdiction, as well as *in personam*, jurisdiction is subject to the constitutional due process requirement that a defendant have at least 'minimum contacts' with a state before being haled into its courts. *Shaffer*, 433 US at 203, 212. Thus, a state court (in that case, Delaware) could not solely use the fact that a defendant held property in the state as a means of obtaining *in personam* jurisdiction over the defendant. *Ibid*, at 202–03. The dicta upon which *Sojitz* relied – that *in rem* jurisdiction was proper without minimum contacts so long as it was merely intended to obtain security for a judgment in another forum – was thus an exception to the jurisdictional limitations announced by *Shaffer*. *Ibid*, at 210.

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in rem jurisdiction over property in that state as security for a potential judgment sought in another forum.[32]

It also appears not to be necessary that the plaintiff identify the assets it is seeking to attach or even that the plaintiff know that the respondent has assets in New York state.[33] In fact, the New York statutory scheme contemplates that *after* a plaintiff has an order of attachment in hand, he or she may obtain disclosure from any person of properties owned by or debts owed to a defendant.[34] This authority is subject to the court's discretion, however, as at least one court has dismissed a motion for attachment on the grounds that it failed to identify the assets to be attached.[35]

New York's court decisions addressing what should be considered an in-state asset are extensive and complicated. But two aspects of that law are important to a party seeking to attach assets as security for a future foreign arbitration award. First, the bad news: in response to a certified question from the Second Circuit, New York has recently reaffirmed the 'separate entity' rule, which holds that assets held at a foreign office of a bank that has a branch or representative office New York are not considered in-state assets for purpose of garnishment.[36] Secondly, the good news: any 'intangible contract rights'[37] possessed by a judgment debtor have their situs in the person who possesses and controls those rights, and so can be

32 *Sojitz Corp*, 921 NY S.2d at 17–18. New York state and federal courts have also been liberal in allowing plaintiffs to proceed without *in personam* jurisdiction in other types of actions that occur in the international arbitration context. The federal appellate court with jurisdiction in New York (the United States Court of Appeals for the Second Circuit) has strongly suggested that *quasi in rem* jurisdiction would be sufficient for a confirmation action under the New York Convention as well. See *Frontera Resources Azerbaijan Corp v State Oil Co of Azerbaijan Republic*, 582 F.3d 393, 397–98 (2d Cir 2009); see also *Adrian Shipholding, Inc v Lawndale Group SA*, No 08 Civ 11124, 2010 WL1372627, at * 1 (SDNY 26 March 2010) (interpreting *Frontera*). Even more notably, the New York Appellate Division's First Department has held that New York need not have any jurisdiction – either *in personam* or *in rem* – to enforce a foreign money judgment. *Abu Dhabi Commercial Bank PJSC v Saad Trading, Contracting & Fin Servs*, 986 NY S.2d 454, 457–58 (1st Dep't 2014).

33 See, for example, *Passport Special Opportunities Master Fund*, 2015 WL 7511540, at *3 (granting order of attachment over objections from defendants that they had no property in the state).

34 See NY CPLR s 6220 (McKinney, WestLaw through L.2015, chs 1–589).

35 *JDF Realty, Inc v Kim et al*, No 111701/09, 2010 NY Misc LEXIS 1295 at *7 (15 January 2010).

36 *Motorola Credit Corp v Standard Chartered Bank*, 24 NY 3d 149, 163 (2014).

37 Intangible contract rights are distinguished from those that are 'evidenced by written instruments', such as a stock certificate, which are sited wherever the written instrument can be found. *Hotel 71 Mezz Lender LLC v Falor*, 14 NY 3d at 314.

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considered 'in-state' if that person is served with an order of attachment while physically present in New York.[38]

Conclusion

New York's statutory and case law concerning attachment of assets with respect to an anticipated award in an international arbitration is perhaps the most developed in the US – and is claimant-friendly in important respects. In particular, counsel representing respondents in international arbitrations with assets in New York should be aware that New York's requirement that a claimant prove its need for an attachment can be supplied by the manner in which the respondent and its counsel defend the arbitration proceeding.

38 *Hotel 71 Mezz Lender LLC v Falor*, 14 NY 3d 303, 315–16 (2010) (permitting attachment of defendants' ownership and membership interests in 22 out-of-state limited liability companies); *ABKCO Indus Inc v Apple Films, Inc*, 39 NY 2d 670, 675 (NY 1976) (declaring that the situs of British company's interest in licensing agreement was New York because the company obligated to pay the licence under the agreement was located in New York).

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