The *Sojitz* Effect: An Obscure Ruling Allows Israeli Companies to Seize Assets in New York to Secure Israeli or Other International Arbitration Awards

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In *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*[1], the Appellate Division, First Department of the New York State Supreme Court issued a groundbreaking ruling allowing the seizure of receivables in New York to secure a possible win in a non-U.S. arbitration -- that had not yet been commenced.

What is especially interesting about this ruling is that the dispute between the claimant (the "**Claimant**") – a Japanese company -- and the respondent (the "**Respondent**") – an Indian company -- had no connection to New York.

Instead, receivables due to the Indian Respondent by its New York-based customer (the "**Customer**"), gave rise to Claimant's opportunity for interim relief. Payments for goods purchased by the Customer were owed to the Respondent (the "**Receivables**"). The lower court in *Sojitz* issued a seizure order of the Receivables to secure a possible judgment against the Respondent in a prospective non-U.S. arbitration.

On appeal, the court affirmed that "a creditor can attach assets in New York for security purposes in anticipation of an award that will be rendered in an arbitration proceeding in a foreign country, **[even] where there is no connection to New York by way of subject matter of personal jurisdiction**."[2]

The New York statute which authorizes pre-award attachment of assets is the New York Civil Practice Law and Rules ("**CPLR**") Section 7502(c). This provision allows the New York Supreme Court to "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 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.*"[3]

Procedural History

The Japanese Claimant sold telecommunications equipment produced in China to the Indian Respondent pursuant to a written supply agreement.[4] The supply agreement required all disputes to be resolved by arbitration in **Singapore** under the laws of **England**.[5] Neither party regularly transacted business in New York.[6]

The Japanese Claimant delivered the equipment to Respondent in India, and after accepting delivery of the equipment from the Japanese Claimant, the Indian Respondent failed to pay approximately $48.4 million.[7]

Even prior to commencing arbitration in Singapore, the Japanese Claimant commenced a special proceeding in New York on an *ex parte* basis seeking an order of attachment against Respondent for $40 million to ensure that assets would be available to satisfy any arbitration decision.[8] The New York County Supreme Court granted the attachment order, and required the Japanese Claimant to post a $2 million bond.[9]

While Respondent "did not maintain any offices in New York, was not licensed to do business in New York, and had no property, bank accounts, or employees in New York" -- Respondent had at least one New York customer, which owed Respondent $18,480 – against which the attachment was enforced.[10]

The lower court asserted that under the applicable statute, personal jurisdiction over Respondent was unnecessary in the case of a motion seeking attachment of the Receivables from the New York Customer.[11]

The appeals court affirmed the lower court's decision that the attachment of the $18,480 was "strictly for security purposes" and, therefore, "was proper."[12] The court justified this critical determination explaining that, in an attachment for security pending litigation or arbitration in an out-of-state forum, "a petitioner is in no way seeking to compel a respondent to litigate in an improper forum to save [its] property; the petitioner **merely seeks to have the property attached for future execution in the event a recovery is ordered by the out-of-state forum**."[13]

Procedural Safeguards

The *Sojitz* court pointed to one substantive and one procedural safeguard, which it believed would assure that a CPLR Section 7502 attachment comports with the notion of due process and does not offend the U.S. Constitution. Substantively, under the statute, petitioner is required to show that **an award issued in arbitration would, absent the attachment, be null and void**.[14] In Sojitz, the Japanese Claimant met this burden by submitting "documentary evidence suggesting that respondent diverted funds from the escrow account without explanation."[15] Procedurally, the attachment order expires and is null and void if the petitioner fails or neglects to commence arbitration within 30 days of the issuance of such order.[16]

Federal Court Application of Sojitz

The *Sojitz* decision was subsequently applied by a New York federal court – the U.S. District Court for the Southern District of New York in the case of *Mishcon de Reya New York LLP v. Grail Semiconductor, Inc.*[17] There, the claimant– Mishcon de Reya New York LLP, a New York law firm obtained an *ex parte* order of attachment in aid of arbitration it commenced against its former client – respondent Grail Semiconductor, Inc., a California corporation, which it claimed owed Claimant over $2 million in overdue legal fees.[18]

The claimant attached respondent's sole asset – which was a patent for a semiconductor memory chip.[19] The district court initially granted the attachment order on the basis that respondent intended to transfer the patent, "making it likely that any arbitration award won by [claimant] would be ineffectual absent an attachment of the . . . [p]atent."[20] Claimant then moved to confirm the attachment order,[21] and respondent opposed the motion and cross-moved for a stay of the arbitration.[22]

The district court analyzed the claimant's burden of demonstrating that the arbitration award to which it may be entitled may be rendered ineffectual without the attachment. The court warned that "[i]n order to satisfy its burden, the [claimant] must do more than show that attachment would be 'helpful.'"[23] However, "demonstrating the possibility, if not the likelihood, that absent the attachment being requested, the ultimate arbitration award would be severely compromised will satisfy the [claimant's] burden."[24] Courts will look at

factors such as (i) respondent's history of paying creditors; (ii) indicated intention to dispose of assets; (iii) respondent's insolvency; and (iv) whether there have been any completed asset transfers.[25]

The *Mishcon* court granted claimant's motion confirming the attachment of respondent's patent. It held that "the Court concludes that even without having definitively shown [respondent's] intent to transfer the patent, claimant has made a sufficient showing of [respondent's] insolvency, which showing suffices to establish that any future arbitration award would be ineffectual absent attachment."[26]

Practical Implications for Israeli Companies

In light of the *Sojitz* decision, Israeli companies can now attach the receivables of an adversary's **customer** in New York for future execution in the event of a favorable arbitration award against such claimant in a foreign country, even where the adversary has no ongoing legal presence in New York that would give rise to personal jurisdiction in New York.

Here is an example of how *Sojitz* could be applied:

- **French Company** – a French company— fails to pay **Israeli Company** – an Israeli supplier -- $500,000 for components supplied to French Company pursuant to a supply agreement containing an arbitration clause.

- Neither **French Company** nor **Israeli Company** regularly transact business in New York.

- **French Company** has a customer in New York -- **New York Customer** – that owes **French Company** $400,000 from the purchase of equipment.

- **Israeli Company** can seize the $400,000 receivable due to **French Company** to secure collection in the event that Israeli Company prevails in an Israeli or other foreign arbitration proceeding against the **French Company**.

- To obtain such attachment, **Israeli Company** must be able to show that an arbitration award would be ineffectual absent the attachment, and must commence the arbitration against the French company within 30 days of filing the petition for attachment of the New York receivables.

Risks of Sojitz Attachments

Although attachment can be an effective litigation tool that protects claimants from dissipating assets otherwise available to satisfy an arbitration award, there are also risks and practical implications that claimants should consider when employing this device.

First, CPLR Section 6212(b) imposes a requirement on claimants to post an **undertaking**, in the form of a bond, in an amount to be determined by the court, which would be available as damages to respondent in the event that the attachment is subsequently determined to have been wrongfully issued.[27] In *Sojitz*, the Court set the undertaking at 5% of the amount of the attached receivable.[28] However, because the amount of the undertaking is discretionary with the court, the amount could be significantly higher – or lower.

Second, under CPLR Section 3212(e), **the petitioner is liable for respondent's damages, including attorney's fees, if the attachment is wrongfully issued**.[29] Importantly, the petitioner's liability is not limited to the amount of the undertaking.[30] The *Sojitz* Court confirmed that "Respondent has the right to recover any damages sustained by reason of an *improperly* granted attachment."[31]

Conclusion

The *Sojitz* decision has paved the way for Israeli companies to attach New York-based assets

prior to obtaining any arbitration award. Of course, the decision of whether to seek such attachment must be carefully evaluated, giving due consideration to the merits of the arbitration claims, the amount of the assets to be attached compared to the amount of the arbitration claim, and any other conditions which could render the arbitration award ineffectual absent the attachment.

[1] *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 82 A.D.3d 89, 921 N.Y.S. 2d 14 (N.Y. App. Div., 1st Dep't 2011).
[2] *Id.* at 96 (emphasis added).
[3] CPLR § 7502(c) (emphasis added). Article 75 was amended in 1985 by the New York Legislature to overrule the New York Court of Appeals decision of *Cooper v. Ateliers de la Motobecane*, 57 N.Y.2d 408, 442 N.E.2d 1239, 456 N.Y.S.2d 728 (1982), which held that attachment was not available in connection with proceedings to compel arbitration. The amendment made attachment a proper interim remedy in arbitrable controversies. The statute was subsequently amended in October of 2005 to grant authority to New York courts to issue attachment orders in aid of arbitrations involving foreign parties and conducted outside the state or country.
[4] *Sojitz*, 82 A.D.3d at 90-91.
[5] *Id.* at 91.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 92.
[11] *Sojitz Corp. v. Prithvi Info. Solutions, Ltd.*, 891 N.Y.S.2d 622, 628 (N.Y. Sup. Co. 2009) (holding that "pre-award attachments in international arbitration cases are proper against ascertainable property, including but not limited to debts owed to respondent by its obligors domiciled within the State of New York").
[12] *Sojitz*, 82 A.D.3d at 94.
[13] *Id.* at 96 (emphasis added).
[14] *Id.*
[15] *Id.* at 94.
[16] *Id.* at 96.
[17] No. 11 Civ. 04971, 2011 U.S. Dist. LEXIS 150998 (S.D.N.Y. Dec. 28, 2011).
[18] *Id.* at *4, 7.
[19] *Id.* at *5.
[20] *Id.* at *7.
[21] *Id.* CPLR § 6211 provides the "an order of attachment granted without notice shall provide that within a period not to exceed five days after levy, the plaintiff shall move, on such notice as the court shall direct to the defendant, the garnishee, if any, and the sheriff, for an order confirming the order of attachment."
[22] *Mishcon*, 2011 U.S. Dist. LEXIS at *7.
[23] *Id.* at *32 (internal citations omitted).
[24] *Id.* (quoting *Country Natwest Sec. Corp. USA v. Jesup Josephthal & Co.*, 180 A.D.2d 468, 468, 579 N.Y.S.2d 376 (N.Y. App. Div. 1st Dep't 1992) (internal quotations omitted).
[25] *Mishcon*, 2011 U.S. Dist. LEXIS at *32-33 (internal citations omitted.
[26] *Id.* at *35.
[27] CPLR § 6212(b) (providing that "[o]n a motion for an order of attachment, the plaintiff shall give an undertaking, in a total amount fixed by the court . . . a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property.")
[28] *Sojitz*, 82 A.D.3d at 92.
[29] CPLR § 6212(e).
[30] *Id.*
[31] *Sojitz*, 82 A.D.3d at 92.