Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.: New York First Department Permits Pre-Award Attachments in International Arbitration

In a matter of first impression, the Appellate Division of New York, First Department, issued a decision on March 10, 2011 in *Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.*,[1] expanding the ability of New York courts to grant a pre-award attachment of assets in foreign arbitration even in the absence of subject matter or personal jurisdiction. The Court held that N.Y. C.P.L.R. Sec. 7502(c) permits the attachment of New York assets for the purpose of securing an anticipated award in a foreign arbitration.

I. Background and Procedural History

In November 2007, the Petitioner, Sojitz Corp., a Japanese company, entered into a contract with the Respondent, Prithvi Info Solutions Ltd., whereby Sojitz would supply telecommunications equipment for a fee.[2] The contract included a clause requiring the parties to settle any dispute by way of arbitration in Singapore.[3] Sojitz delivered the ordered equipment, but claimed it received only $5.6 million of the full invoice price of approximately $47.5 million. [4]

In August 2009, Sojitz moved *ex parte* in New York Supreme Court for an order of attachment of $40 million of Prithvi's assets, alleging that while it intended to commence the arbitration in Singapore, the time it would take to do so would permit Prithvi potentially to alienate existing assets.[5] The Court granted the requested order of attachment in the amount of $40 million, and also allowed the attachment of $18,480 that was then owed to Prithvi by one of its New York customers.[6]

Prithvi promptly moved to vacate the order of attachment on the basis that it "did not maintain any offices in New York, was not licensed to do business in New York," had no real assets or bank accounts in the state and "had only three or four customers in New York" who accounted for less than 2% of the company's revenue.[7] The Court was persuaded to vacate the attachment of $40 million, but confirmed the attachment of the $18,480 from a New York based customer and left Sojitz free to attach other assets located in New York.[8] The Court rejected Prithvi's argument that, absent personal jurisdiction over the corporation, the Court had no authority to order any pre-award attachment.[9] After unsuccessfully moving to stay the order, Prithvi appealed to the Appellate Division, First Department.[10]

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1 *Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 2011 WL 814064, (N.Y. App. Div. Mar. 10, 2011).

2 *Id.* at *1.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Sojitz*, 2011 WL 814064 at *1-2.

7 *Id.* at *2.

8 *Id.*

9 *Id.*

10 *Id.*

II. The First Department's Decision

The First Department affirmed the Supreme Court's order of attachment of the $18,480 of Prithvi's assets, finding that NY C.P.L.R. Sec. 7502(c) permits "a creditor to . . . 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, where there is no connection to New York by way of subject matter or personal jurisdiction."[11]

The Court cited the repeated efforts of the New York Legislature to expand the courts' ability to use orders of attachment in arbitration cases. In 1985, the New York Legislature first amended C.P.L.R. Sec. 7502 to add a section (c) permitting courts to order attachment "in connection with an arbitrable controversy, provided 'that the award to which the applicant may be entitled would otherwise be rendered ineffectual without such provisional relief.'"[12] This amendment overturned an earlier decision by the Court of Appeals that interpreted the previous incarnation of C.P.L.R. Sec. 7502 as not permitting attachment in any arbitration.[13] In 2005, the Legislature amended the C.P.L.R. Sec. 7502(c) yet again, this time explicitly authorizing attachment "in aid of all arbitrations including those involving foreign parties or in which the arbitration is conducted outside of New York."[14] In its current form, C.P.L.R. Sec. 7502(c) states that "The supreme 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."[15]

In addition to considering New York law on the availability of attachment in arbitration, the First Department looked to the U.S. Supreme Court for guidance on the due process implications of permitting attachment where there are no New York ties. The Court focused on the 1977 decision in *Shaffer v. Heitner*, 433 U.S. 186, in which the Supreme Court found that in rem jurisdiction must be held to "the same standard of constitutional scrutiny that has been applied to in personam jurisdiction since *International Shoe Co. v. Washington*."[16] In *Shaffer* the Supreme Court held that, while "the location of property could be evaluated as a contact for [the] *International Shoe*" inquiry into minimum contacts with a state, the "ultimate question was whether there was jurisdiction over the party against whom the plaintiff asserted liability."[17] Thus, the Court in *Shaffer* found that where property is unrelated to the cause of action, the mere fact that it is located within the state does not establish personal jurisdiction over a defendant in order "to adjudicate the merits of the case."[18]

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11 *Sojitz*, 2011 WL 814064 at *1.

12 *Id.* at *3 (citing N.Y. C.P.L.R. Sec. 7502(c) (1985)).

13 In *Cooper v. Ateliers de la Motobecane*, 57 NY 2d 408 (1982), the Court of Appeals overturned an order of attachment for assets of a New York corporation undertaking arbitration in Switzerland, holding that "attachment is, in part, a device to secure payment of a money judgment" and as such "is available only in an action for damages." *Cooper*, 57 NY 2d at 413. Not only was attachment not available for arbitrations, in *Cooper* the Court of Appeals found that the attachment was further forbidden by the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, applicable because one party was a French corporation. *Id.* at 414. The U.N. Convention "precludes the courts from acting in any capacity except to order arbitration." *Id.*

14 *Sojitz*, 2011 WL 814064 at *3.

15 *Id.* at note 1.

16 *Id.* at *3. The Supreme Court in *International Shoe*, 326 U.S. 310, 316 (1945) held that the Due Process Clause allows for personal jurisdiction only where "the defendant had 'certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'"

17 *Id.* at *4 (citing *Shaffer*, 433 U.S. at 207, n. 22, 212).

18 *Id.*

Where property is unrelated to the case, attachment of that property can not be used to obtain personal jurisdiction over a foreign defendant where jurisdiction would otherwise not exist.

The First Department then held "that New York's attachment statute does not run afoul of *Shaffer* when it is used for purposes of security rather than to confer in personam jurisdiction."[19] When combined with the "substantive and procedural safeguards" of C.P.L.R. Sec. 7502(c),[20] the limited use of attachment to secure an anticipated award in a foreign arbitration does not violate due process.[21] Tellingly, the Court observed that the Supreme Court had already permitted attachment for the purpose of executing foreign judgments in cases where the debtor's only connection to the forum was its ownership of the property.[22] The First Department here found that C.P.L.R. Sec. 7502(c) and due process permit attachment in such situations for the purpose of securing property pre-judgment as well.

The Court affirmed the order of attachment of attachment of $18,480 in Prithvi's assets.

III. Significance

In permitting attachment of the New York assets of a foreign corporation, purely as security for an anticipated foreign arbitration award, in *Matter of Sojitz Corp. v. Prithvi Info. Solutions Ltd.* the First Department continued the trend begun by the New York Legislature of ensuring that New York's global economic reach extends to the booming world of international arbitration.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

19 *Sojitz*, 2011 WL 814064 at *5.

20 *Id.* at *5. Among these safeguards requirement that the petitioner demonstrate that any arbitration award would be ineffectual without the attachment of the property, as well as the expiration of the attachment order after 30 days if arbitration has not begun. *Id.* at 4.

21 *Id.* at *5.

22 *Id.* at *5 (citing *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 1975; *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972)).