

LONDON MARKET NEWS

**The Second Circuit Holds That Electronic Fund Transfers Processed by an Intermediary Bank Are Not Property Subject to Attachment Under Rule B**

**Breaking Developments In London Market Law**  
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*The Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 2009 WL 3319675 (2d Cir. 2009)

On October 16, 2009, the Second Circuit Court of Appeals issued its decision in *The Shipping Corporation of India v. Jaldhi Overseas Pte Ltd.* The Court held that electronic fund transfers ("EFTs") processed by an intermediary bank are not property subject to attachment under Rule B, overruling its earlier decision in *Winter Storm Shipping, Ltd. v. TPI*.

The Shipping Corporation of India ("SCI") had chartered its vessel to Defendant Jaldhi Overseas Pte Ltd. ("Jaldhi") for the purpose of transporting iron ore from India to China. The day after the vessel was delivered to Jaldhi cargo, operations were halted by the collapse of a crane on board the vessel. Jaldhi immediately placed the vessel "off hire" – *i.e.*, suspended the charter.

SCI filed a complaint in the District Court for the Southern District of New York for the remaining balance owed by Jaldhi and sought an *ex parte* maritime attachment pursuant to Rule B of the Admiralty Rules in the amount of \$4,816,218. The District Court entered the order and noted that the order applied "to electronic fund transfers originated by, payable to, or otherwise for the benefit of the Defendant, whether to or from the garnishee banks or any other electronic funds transfers[.]" Jaldhi filed a motion to vacate the attachment pursuant to Rule E of the Admiralty Rules. By this time, SCI had attached EFTs in the amount of \$4,873,404.90. The District Court subsequently vacated the attachment order as it applied to EFTs where the defendant was the beneficiary and certified the matter for appellate review. On appeal, the Second Circuit reviewed its earlier decision in *Winter Storm* and considered whether EFTs are in fact attachable property under the Admiralty Rules.

In the seminal *Winter Storm* case, the Second Circuit had announced that EFTs were property subject to attachment under Rule B. The Court had reasoned that attachment of EFTs were proper because (1) Rule B was written in an inclusive manner, and (2) if the defendant's account is attachable property under Rule B, then so too are EFTs held by an intermediary bank for the defendant. The Court had also relied on its decision in *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), a criminal seizure case, in which the Court upheld the seizure of EFTs that passed through intermediary banks pursuant to 21 U.S.C. § 881. Section 881 is a penal statute that borrows the procedures for asserting maritime liens under Admiralty Rule C. The *Winter Storm*

Court explained that there was "no principled basis for applying the Rule C procedures to the seizure of EFTs in a forfeiture action, but not to a maritime attachment under Rule B."

Upon further consideration in the *Shipping Corporation of India* appeal, the Second Circuit decided that the analysis in *Winter Storm* was flawed and unpersuasive. The Court explained that "ownership" is critical for maritime attachments under Rule B, and accordingly, "[t]he validity of a Rule B attachment depends entirely on the determination that the res at issue is the property of the defendant at the moment the res is attached." In the forfeiture context at issue in *Daccarett*, the Court was not required to address ownership. The Court acknowledged that its reliance on *Daccarett* in the *Winter Storm* case was misplaced. Without relying on *Daccarett*, the Second Circuit proceeded to evaluate whether the text of Rule B supported the attachment of EFTs. The Court noted that nothing in the text of the Rule or past maritime cases compelled the Court to conclude that EFTs constitute property. As a final effort, the Court looked to state law. Under the laws of New York, the state was not permitted to attach EFTs that are in the possession of an intermediary bank.

In summary, because there was no federal law on point and state law expressly prohibited the attachment of EFTs, the Second Circuit ultimately concluded that EFTs being processed by an intermediary bank are not subject to attachment under Rule B. After distributing the *Shipping Corporation of India* opinion to all active judges on the Second Circuit and receiving no objection, the Court overruled *Winter Storm*.

### **The Second Circuit Holds That its Decision in *Shipping Corporation of India* Applies Retroactively**

On November 13, 2009, the Second Circuit Court of Appeals issued its opinion in *Hawknet, Ltd. v. Overseas Shipping Agencies et al.* The Court held that its decision in *Shipping Corporation of India* applies retroactively. The Court also noted that a party's failure to assert an argument prior to the announcement of a decision that might support it does not constitute waiver.

Hawknet, Ltd., a company incorporated in England, entered into an agreement with defendant Overseas Shipping Agencies ("OSA"), an Iranian corporation, to charter three vessels to carry steel plate from Poland to Iran. OSA subsequently defaulted on the contract.

In June 2007, Hawknet initiated a maritime attachment lawsuit in the Southern District of New York pursuant to Rule B of the Admiralty Rules. Hawknet specifically sought to attach funds of OSA and other business entities as part of the same holding group. The District Court entered the order, and the order was then served on banks located within the Southern District that handle EFTs. The order was successful in attaching funds sent to OSA and EFTs initiated by TOM Shipping Vermittlung GmbH ("TOM") and MOS Overseas Shipping ("MOS") – alleged alter ego corporations. At the time, only MOS and OSA were named defendants.

TOM moved to vacate the attachment on the grounds that Hawknet could not sufficiently establish an alter ego relationship between TOM and the named defendants. The District Court vacated the attachment of TOM's funds, however, the Court permitted Hawknet additional time to conduct discovery and amend its complaint. Upon the completion of discovery, the District

Court vacated the order of attachment against TOM. Hawknet subsequently appealed and sought the reinstatement of the attachment order. On appeal, the Second Circuit Court of Appeals was asked to evaluate two questions: (1) whether the Court's decision in *Shipping Corporation of India* applies retroactively, and (2) whether TOM waived this argument by failing to assert it before the District Court, even though the Second Circuit had not yet announced its decision in *Shipping Corporation of India*.

With respect to the first question, the Second Circuit first explained that generally the Courts will not give retroactive effect to statutes, regulations, or decisions of the Court. The presumption against retroactive application, however, does not apply to jurisdictional rulings. The Court explained that "jurisdictional rulings" are those where "the decision affects how the District Court may obtain personal jurisdiction over defendants." The Second Circuit concluded that its decision in *Shipping Corporation of India* was a jurisdictional ruling, and therefore, applies retroactively to this case.

Turning to the second question, the Second Circuit concluded that a party cannot waive objections or defenses that were not known to be available or that did not exist at the time they could first have been made. The Court explained that prior to *Shipping Corporation of India*, the argument that the Court lacked jurisdiction over defendant to attach EFTs processed by an intermediary bank did not exist and was actually contrary to precedent in the Second Circuit. Accordingly, TOM did not waive this argument by failing to assert it before the District Court. The case was ultimately remanded to the District Court to determine whether the Court has a basis for personal jurisdiction over the defendant on other grounds.

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