

New York Commercial Division Round-Up Blog

News & Updates on Cases Decided in the Commercial Division of the New York State Supreme Court

Presented By **SheppardMullin**

A New Weapon Against Debtors! Attachment In Aid Of International Arbitration Is Permitted Even Where The Court Lacks Personal Jurisdiction Over The Debtor

October 13, 2011 by Sean J. Kirby

In the matter of *In re Sojitz Corporation v. Prithvi Information Solutions, Ltd*, Index No. 602511/2009 (1st Dept. 2011) ("*Sojitz Corp.*"), the First Department, in a case of first impression, affirmed the decision of former Justice James A. Yates, and held that a creditor can attach assets in New York, for security purposes, in anticipation of an award that will be rendered in an international arbitration proceeding, even though the debtor has no connection to New York by way of personal jurisdiction.

In *Sojitz Corp.*, petitioner ("Petitioner"), a Japanese company with its principal place of business in Tokyo, intended to commence an arbitration proceeding against respondent Prithvi Information Solutions, Ltd. ("Respondent"), an Indian company with its principal place of business in Hyderabad, India, to recover over \$48 million in unpaid invoices. Pursuant to the parties' agreement, Petitioner was to provide telecommunications equipment that was produced in China to Respondent in India and, in exchange, Respondent would deposit its payments in an account at Punjab National Bank in India. The agreement also contained an arbitration clause which provided that the agreement was governed by the laws of England and that any disputes arising out of the agreement would be settled by arbitration in Singapore.

Prior to commencing its arbitration in Singapore, Petitioner filed a motion in the [Commercial Division, New York County](#) (the "Commercial Division") seeking a \$40 million ex parte order of attachment against Respondent. In support of this motion, Petitioner asserted that it would be commencing the arbitration shortly and an attachment was warranted because Respondent may try to dissipate its assets while the arbitration is pending. After former Justice Yates granted the motion and ordered Petitioner to post a \$2 million bond, Respondent moved to vacate the attachment arguing that the Court lacked personal jurisdiction over it. Based on the evidence submitted by Respondent, former Justice Yates vacated the \$40 million attachment, confirmed an attachment of \$18,480, reduced the \$2 million bond to \$900, and permitted Petitioner to move to attach additional assets of Respondent in New York.

The First Department affirmed the Commercial Division decision. As detailed in the First Department's decision, the New York State legislature has repeatedly amended [CPLR § 7502](#) to expand the court's ability to issue attachments in aid of arbitration. In addition to reviewing the genesis of [CPLR § 7502\(c\)](#), and the legislature's apparent desire to expand the authority of New York courts to issue attachments in aid of arbitration, the First Department also looked to [Shaffer v. Heitner](#), 433 U.S. 186 (1977), in which the United States Supreme Court "held out the possibility of a 'security' exception to the requirement of minimum contacts in quasi in rem jurisdiction, remarking in a dictum that a plaintiff might be entitled, without demonstrating minimum contacts of any kind, to attach property located in one state 'as security for a judgment being sought in [another] forum where the litigation can be maintained consistently with International Shoe.'" [Sojitz Corp.](#), at 11 (quoting [Shaffer](#), 433 U.S. at 207, n. 22, 212).

Based on [Shaffer](#), the First Department 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 . . . [because] attachment for security pending litigation in a proper out-of-state forum does not raise the same due process

concerns as are implicated by attachment for jurisdictional purposes." *Sojitz Corp.*, at 12. This is because seeking an attachment pursuant to CPLR § 7502(c), is not the same "as compel[ling] a respondent to litigate in an improper forum to save her 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." *Id.* In addition, the First Department found that there was nothing "fundamentally unfair" about security attachments in aid of arbitration especially given the procedural safeguards of CPLR § 7502(c), specifically, the required showing by the petitioner that an arbitration award would be rendered ineffectual absent the attachment and that the arbitration be commenced within 30 days after the attachment is granted, or else the attachment would be deemed null and void. *Id.* at 12-13. Given the procedural safeguards in CPLR § 7502(c), and the Supreme Court's decision in *Shaffer v. Heitner*, the First Department affirmed the Commercial Division's decision and concluded that "we perceive no reason why local assets belonging to a party should not also be attached prejudgment to secure payment of an eventual judgment against that party, provided that party seeking the attachment demonstrates its entitlement to the provisional relief." *Id.* at 13.

In light of the *Sojitz Corp.* decision, creditors should no longer be discouraged by a lack of personal jurisdiction over the debtor from seeking an attachment of the debtor's New York assets as a security for a potential award in an international arbitration.