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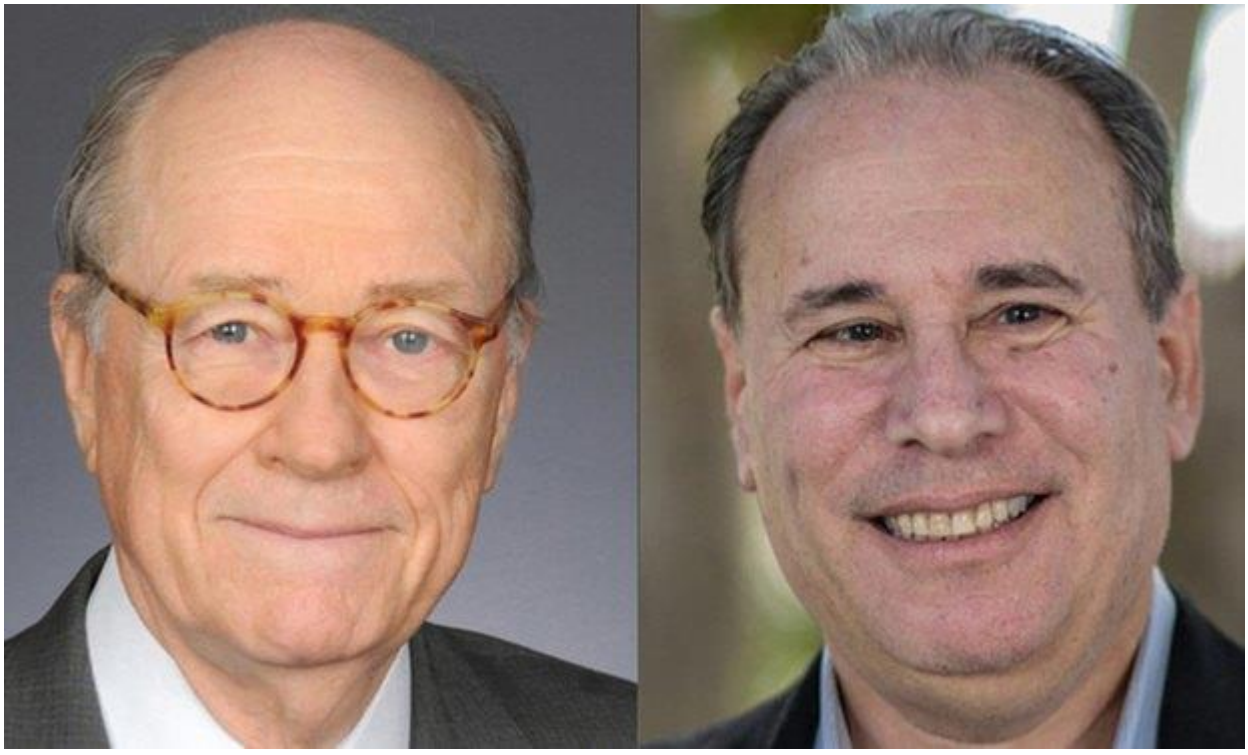
Where in the U.S. Can One Obtain Attachments in Aid of Foreign Arbitrations?

International Litigation columnists Lawrence W. Newman and David Zaslowsky focus on how states that have manifested their interest in international arbitration through enactment of the Model Law on International Commercial Arbitration. They discuss, in particular, two recent appellate decisions concerning the extent to which relief may be afforded in two states—Louisiana and Georgia—that have enacted the Model Law.

By **Lawrence W. Newman and David Zaslowsky** | September 26, 2018 at 02:45 PM



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It is often prudent for claimants or potential claimants to seek an attachment of the assets of a respondent against whom the claimant hopes to prevail in order to secure enforcement of the expected arbitral award. Since anecdotal evidence suggests that arbitration award debtors are increasingly unwilling or unable to pay awards, obtaining

security against such an eventuality becomes increasingly important. To what extent do the laws in the United States authorize courts to order this kind of provisional measure?

Unfortunately, federal law does not deal with pre-judgment or pre-award attachments, deferring, in Rule 64 of the Federal Rules of Civil Procedure, to state law. New York law, as set forth in CPLR §7502(c), permits claimants in existing or expected arbitrations to obtain an attachment of a respondent's assets provided that the claimant can show that the expected award would be rendered "ineffectual" without the attachment.

Section 7502(c) is important for several reasons. *First*, it offers the opportunity for arbitration claimants to attach accounts of prospective award debtors—and to do so in New York City, where many financial institutions are present. *Second*, it specifically permits attachments not only with respect to arbitration proceedings taking place in the state of New York but also anywhere else in the world. *Third*, it permits such attachments even if the arbitration has not been commenced (but provided that the arbitration is commenced within 30 days).

In the context of what is permitted outside this country, §7502(c) is not unique or even unusual. Laws permitting attachments with respect to arbitral proceedings both within and outside a country exist in many countries. Thus, attachments or similar relief in the form of injunctions, can be obtained in connection with arbitrations in England as well as in Germany and the Netherlands, among others. See Art. 2(3) and 44 of the Arbitration Act 1996 of England & Wales; Art. 1025(2) and 1033 of the German Code of Civil Procedure and Art. 1074(a) of the Dutch Code of Civil Procedure.

Many states provide for attachments in aid of arbitration as an adjunct to attachments in relation to court proceedings, but many do so in a less than clear way. We focus here on how states that have manifested their interest in international arbitration through their enactment of the Model Law on International Commercial Arbitration promulgated by the United Nations Commission on International Trade Law (the UNCITRAL Model Law).

We discuss, in particular, two recent appellate decisions concerning the extent to which relief may be afforded in two states—Louisiana and Georgia—of the eight states (California, Connecticut, Florida, Illinois, Oregon and Texas) that have enacted the UNCITRAL Model Law.

The cases reflect some lack of clarity in the way that these two states provide for attachments to secure expected arbitral awards inside or outside the United States. In *Stemcor USA Inc. v. CIA Siderurgica Do Para Cosipar*, 895 F.3d 375 (5th Cir. 2018), the Fifth Circuit interpreted the scope of the Louisiana non-resident attachment statute, by focusing on that statute and on a provision of the Model Law in determining whether Louisiana law permits attachments in aid of arbitration outside the state.

The Louisiana non-resident attachment statute authorizes attachments for the purpose of securing court judgments:

Article 3542. Actions in which attachment can issue A writ of attachment may be obtained in *any action for a money judgment*, whether against a resident or a nonresident, regardless of the nature, character, or origin of the claim, whether it is for a certain or uncertain amount, and whether it is liquidated or unliquidated (emphasis added)

The Fifth Circuit considered this provision in two decisions, one in 2017 and the other earlier this year, putting an end to strenuous efforts over a period of years by the Daewoo International Corporation to obtain an attachment of funds representing the proceeds of the sale of pig iron that was subject to various competing attachment filings under the Louisiana statute. A dispute arose when an attachment by Daewoo for the purpose of obtaining security for an eventual arbitral award in London was attacked by other creditors on the grounds that it was not authorized under Louisiana law.

In its 2017 opinion, and again in its decision the following year, the Fifth Circuit interpreted Article 3542 as authorizing attachments in aid of expected arbitral awards and subsequent actions to confirm the awards. It did so

on the basis that such attachments were, in effect, "action[s] for a money judgment" within the intent of the statute. The court supported this interpretation by ruling that that statute should be properly read in conjunction with §9 of the Model Law enacted in Louisiana as the "International Commercial Arbitration Act," which states as follows:

Section 9:4249. Arbitration agreement and interim measures by court It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure. (La. Revised Statute Sec. 9:4249)

As can be seen, this provision does not expressly authorize attachments in aid of arbitration, stating, on its face, no more than that it "is not incompatible with an arbitration agreement" for a party to ask a court for provisional remedies relating to the arbitration. Nonetheless, the Fifth Circuit stated that "it would be strange for Louisiana to have adopted the UNCITRAL Model Law without allowing for state law interim remedies in aid of arbitration." 895 F.3d 375 at n.5.

Therefore, in its 2017 decision, the court concluded, based on its analysis of the two statutes, that an attachment to secure an arbitral award before it had become a money judgment through a confirmation proceeding could be done, as it concluded had been done in the case before it. The court remanded the case to the district court for "any necessary proceedings consistent with this opinion." *Stemcor USA v. CIA Siderurgica Do Para Cosipar*, 870 F.3d 370 (5th Cir. 2017). Although the appellate court stated that Daewoo had complied with the procedural requirements of Article 3502 of the Louisiana non-resident attachment statue regarding attachments "before the petition is filed" (under said provision an attachment before the petition is filed can only be granted if "the plaintiff obtains leave of court and furnishes the affidavit and security provided in Article 3501 …"), the district court found that Daewoo had not so complied and vacated the attachment. Daewoo appealed.

On the second appeal, the Fifth Circuit repeated, in virtually the same language that it had used in its earlier opinion, which it withdrew in favor of its new opinion, that Louisiana law afforded a right to an attachment in aid of arbitration. But it went on to affirm the district court's ruling that Daewoo had not complied with the requirements of Article 3502 that had to be satisfied in order for an order to be given under the state statute, including that the party seeking the attachment obtain leave of court and furnish an affidavit and security. Daewoo's attachment was therefore vacated.

The upshot of the *Stemcor* decision is that claimants in Louisiana that find respondents' assets located there may have a chance of obtaining an attachment in aid of arbitral proceedings, including those commenced outside the United States, provided they can comply with the procedural requirements of Article 3502.

Another effort to find authority for provisional relief in aid of arbitration on the basis of Article 9 of the UNCITRAL Model Law was in Georgia. In *SCL Basilisk AG v. Agribusiness United Savannah Logistics*, 875 F.3d 609 (11th Cir. 2017), the claimant in a London arbitration relied on the Fifth Circuit *Stemcor* decisions in seeking an order compelling the respondent to provide security for an anticipated award. The Eleventh Circuit reviewed the following history of Article 9 in the final report of UNCITRAL regarding the Model Law:

"It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of "this State" was compatible with the fact that the parties had agreed to settle their dispute by arbitration. "

875 F.3d 609 at p.17.

In rejecting the request for the attachment, the Eleventh Circuit pointed out that the Fifth Circuit had not held, in its two *Stemcor* decisions, that Article 9 itself authorizes attachments in aid of arbitration, saying, "Had the court [the Fifth Circuit] believed that Louisiana's version of the UNCITRAL Model Law was an independent grant of substantive relief, it would not have had to consider if Louisiana's attachment statute provided a remedy."

There are provisions in the laws of the other six states that have enacted the UNCITRAL Model Law that authorize attachments in aid of arbitration, using a variety of ways of describing the bases on which this kind of relief may be granted by a court. The statutes are as follows: California Code of Civil Procedure §§1297.12 and 1297.93(a); Ohio Revised Code Annotated §§2712.02 and 2712.15 (a); Oregon Annotated Statutes §§36.454 and 36.470(3)(a); Texas Civil Practice & Remedies Code §172.001 and 172.175(c)(1); Revised Florida Arbitration Code §682.031(b); and Illinois International Arbitration Act §710 LCS 30/5-15.

Analysis of these provisions and how they have been interpreted is beyond the scope of this article. But, based on the complexities of the state laws in the cases discussed above, persons interested in obtaining attachments in other Model Law states should proceed with deliberate care, aided by local expertise. It may well be fair to say that New York's §7502(c) of the CPLR is the clearest and the most important expression of authority of U.S. state courts to issue orders of attachment in aid of arbitration, both foreign and domestic.

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