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New york "Rule B" attachments: Testing the limits of "maritime claims"

One of our previous client alerts considered New York Rule B attachments; one of the tools available to a party seeking to secure or enforce its claim. Such attachments are a means by which a claimant can apply to seize property of a defendant, including electronic funds passing through intermediary banks in New York, in support of a "maritime" claim or award.

This alert focuses on our recent experience where a Rule B attachment was granted and maintained under a sale contract, supporting a view that, in certain circumstances US Courts can be persuaded to construe the definition of "maritime jurisdiction" more expansively than has previously been the case. This has potentially far-reaching consequences for those involved in international trade.

The threshold for obtaining an attachment

To obtain a Rule B attachment, the following conditions must be met:

(a) the underlying cause of action must fall within the court's admiralty and maritime jurisdiction; in other words, the claimant must have a "maritime claim";

(b) the defendant "cannot be found" within the district; and

(c) the defendant has, or shortly will have assets within the district.

Because of the "maritime claim" hurdle, it has often been said that claims under a commodity sale and purchase contract (as opposed to a charterparty) will not be covered by the procedure. At the same time, however, it has long been recognised that the scope and effect of the Rule B attachment procedure is constantly developing on the basis of decisions made by the New York Courts. The case with which we were involved demonstrates this clearly.

Background Facts

Under a FOB contract for the sale and purchase of Russian milling wheat, the Seller failed to make arrangements to berth and load the Buyer's vessel. The Buyer held the Seller in breach of contract and claimed for default damages and wasted vessel costs. The Seller's obligations under the contract were guaranteed by a third party.

The Buyer commenced GAFTA arbitration in accordance with the contract. The value of the Buyer's claim was approximately $4,000,000. The Buyer had concerns as to the Seller's ability to pay any award. Accordingly, US law advice was taken in relation to the possibility of obtaining a Rule B attachment in the US.

Initially it was considered that as the contract which was the subject of the Buyer's claim was a contract for the sale and purchase of wheat, such a contract would not be considered to be "maritime". However, the application was made, focusing on a possible expansion of the scope of "maritime jurisdiction" particularly in the wake of the Supreme Court's decision in *Kirby*[1]. In *Kirby*, the Supreme Court held that a contract is maritime when a primary objective of the parties' contract is to accomplish the transportation of goods by sea, even where there are non-maritime components to the contract.

The Buyer successfully obtained a Rule B attachment order against the Seller for the full value of its claim. The attachment order was subsequently amended to include the Seller's guarantor.

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[1] Norfolk Southern Ry. Co. v. Kirby, 543 U.S. 14 (2004)

The Buyer caught significant sums by way of the attachment order. The Seller and its guarantor then challenged the attachment on the following grounds:

(a) the contract at issue was not the subject of maritime jurisdiction;

(b) the guarantee did not fall within the court's maritime jurisdiction; and

(c) the claim under the guarantee was not yet "ripe"

By the time the challenge came before the Court in New York, the Buyer had obtained an Arbitration Award in its favour, awarding the Buyer default damages plus damages representing wasted costs for the vessel including the costs associated with shipping the cargo, re-fixing the vessel under a new charter, bunker, port and survey costs.

The Decision

It is worth setting out below the detail of the decision as it provides a useful insight into the way in which, if conditions are right, US Courts can be persuaded to construe the definition of "maritime jurisdiction" relatively widely.

(a) The Contract

The Judge set out the test for determining whether an issue related to maritime jurisdiction as follows:

"To determine if an issue related to maritime interests has been raised, an issue will not give rise to maritime jurisdiction if the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."

The Court found that in this case, the contract itself made it clear that maritime transportation was integral to the contract. In coming to this conclusion, the Judge focused on the detail contained in the contract in relation to the conditions for transportation and delivery. In particular, she highlighted the following:

- The contract provided for a delivery window for loading in a specified port
- The vessel was required to tender NOR
- The contract set out how loading of the vessel was to be effected
- The contract gave details of the type of vessel which was acceptable

In addition, it was held that the dispute between the parties was connected to maritime commerce. The Court relied heavily on the Arbitration Award and the lengthy discussion in the Award about the wasted costs incurred on account of the vessel's lack of use because of the Seller's default. The Judge concluded that the contract and the dispute fell within the court's maritime jurisdiction.

(b) The Guarantee

The Seller and its guarantor claimed that the guarantor did not fall within the Court's maritime jurisdiction. Although the courts in New York and elsewhere have held that an agreement to act as a surety on a maritime contract is not maritime in nature, the Court has recognised that the same is not true of an agreement to guarantee the performance of a maritime contract.

As the guarantor in this case guaranteed all of the Seller's performance obligations as principal obligor, the Judge held that the guarantee also fell within the meaning of maritime contracts.

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(c) Is the claim "ripe"?

The Seller and guarantor claimed that the claims arising out the guarantee were not ripe. However, the Judge held that the Arbitration Award had ordered that payment be made and as it had not yet been paid the matter was therefore "ripe" in respect of the guarantor. This was despite the fact that the Award was being appealed.

Accordingly, the motion to vacate the attachment was denied and sums to secure/ enforce the claim remain frozen.

Conclusion

As far as we are aware, this is the first time that a Rule B attachment has been granted (and maintained in the face of a challenge) in respect of a GAFTA sale contract. Despite the fact that part of the Buyer's claim was in respect of market price losses, the Court was persuaded that the claim fell within the scope of "maritime jurisdiction".

There is no doubt that in this case the decision of the Judge was influenced to a large degree by the fact that the Buyer already had an Arbitration Award which expressly referred to the Seller's obligations to provide a loading berth and load the Buyer's vessel. However, it does indicate that in certain circumstances a Rule B attachment can be successfully obtained pursuant to a sale contract as long as the Court is persuaded as to the "maritime connection".

No doubt there will be yet further development in this area. However, at the present time and in the light of such a decision, it is always worth seriously considering whether a Rule B attachment might be available either to secure a claim or to enforce a judgment/arbitration award, even if the claim does not arise under a charterparty or bill of lading. A final word of caution, however: claimants will need to consider carefully when to apply for a Rule B attachment because once made, a failed security application cannot be repeated once an Award is finally obtained.