ENFORCEMENT OF JUDGMENTS IN NEW YORK: KOEHLER V. BANK OF BERMUDA LTD.

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Most participants in the marine industry are aware that last year in *The Shipping Corp. of India v. Jaldhi* (585 F. 3d 58 (2d Cir. 2009)), the federal court of appeals in New York overruled prior cases and held that prejudgment attachments of electronic funds transfers being processed by intermediary banks in New York City are no longer possible under Rule B. Maritime creditors lost a powerful, cost-effective procedure to secure and enforce their claims.

In *Koehler v. The Bank of Bermuda Ltd.* (12 N.Y. 3d 533 (2009)), however, the New York State Court of Appeals made it easier to enforce foreign judgments in New York by holding that a judgment creditor may obtain an order directing a foreign garnishee (for example, a bank) holding assets of a foreign judgment debtor to turn over such assets to the judgment creditor, if the foreign garnishee is subject to the personal jurisdiction of the New York Court. The remedy in *Koehler* is a far cry from the pre-*Jaldhi* practice of attaching electronic funds transfers; nevertheless, it should be considered by any creditor seeking to enforce a foreign judgment.

Such a 'turnover' proceeding is a post-judgment remedy, unlike the Rule B prejudgment attachment of property to obtain security for an eventual judgment. In *Frontera Resources Azerbaijan Corp. v. State Oil Company* (582 F. 3d 393 (2d Cir. 2009)), the Federal Court of Appeals in New York confirmed that there must exist either an independent basis of personal jurisdiction or a prejudgment attachment, in order to enter a judgment upon a foreign arbitration award. During the years when attachments of electronic funds transfers were allowed, hundreds of shipping companies registered to do business in New York in order to avoid the disruption such attachments caused. In light of *Koehler*, any company that registered to do business in New York solely to avoid attachments of its dollar transfers should carefully review with its attorney whether it should deregister. Equally, creditors holding foreign judgments should check to see whether the debtor is registered to do business in New York.

Interestingly, it is not necessary to have an independent basis of jurisdiction to enter a judgment in New York upon a foreign judgment. In *Lenchyshyn v. Pelko Electric, Inc.* (723 N.Y.S. 2d 285 (A.D. 4 2001)), the court held that a judgment may be entered in New York upon a foreign judgment, pursuant to New York's Uniform Foreign Country Money Judgments Recognition Act, despite the lack of an independent basis for exercising personal jurisdiction and the absence of any assets within the State.

Similarly, a federal statute permits a judgment in one US District Court to be registered as a judgment in any other US District Court, irrespective of the existence of grounds for personal jurisdiction.

This would be of particular interest in cases involving Forward Freight Agreements and other contracts that call for disputes to be resolved in the English Courts, rather than in arbitration. Additionally, a creditor who holds a foreign arbitration award could confirm the award as a foreign judgment, and then as a New York judgment, despite an absence of grounds for personal jurisdiction in New York.

A post-judgment turnover proceeding is available in both the federal and state courts and in both maritime and non-maritime cases. It is available with respect to property in the possession of the judgment debtor itself. The judgment debtor may be ordered to turn over such property, even if the property is located abroad. However, before obtaining such an order, the judgment creditor must show that the judgment debtor actually possesses property. In other words, the court may not simply order the debtor to pay the debt, but only direct the debtor to turn over specific property or funds that it has been shown to possess.

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A turnover proceeding is also possible with respect to the judgment-debtor's property held by a third-party garnishee. The garnishee must be identified and, in addition to a showing that the garnishee in fact possesses the debtor's property, there must also exist a basis upon which to exercise personal jurisdiction over the garnishee. If the garnishee is subject to the Court's personal jurisdiction, it must comply with the Court's orders, notwithstanding that the property that is the object of the order is located beyond the Court's territorial jurisdiction.

Personal jurisdiction over a foreign bank or corporation is not established solely by the presence in New York of a subsidiary or affiliate, if the foreign and local offices are different corporate entities. In that event, something more will have to be shown, such as that the local branch or office is an agent of the foreign entity. In *Koehler*, the judgment creditor argued that the Bank of Bermuda's subsidiary in New York was an agent for the Bermudan entity, and that this relationship was sufficient to establish personal jurisdiction here over the latter. The parties litigated that and other issues for some 10 years, until the Bermudan bank finally consented to the jurisdiction. Therefore, there was no substantive holding whether in fact the subsidiary's activities established a sufficient agency relationship.

Another basis for holding a local subsidiary's presence here is sufficient to establish personal jurisdiction over a foreign entity is that the entities themselves disregard their separate corporate integrity. In *Yayasan Sabah Dua Shipping SDN v. Scandinavian Liquid Carriers Ltd.* (335 F. Supp. 2d 441 (S.D.N.Y. 2004)), a Rule B attachment

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served upon the New York branch of a Cayman Islands bank was upheld, notwithstanding the defendant's bank account was located in the Cayman Islands branch, because "the Cayman Islands branch is a paper bank entirely controlled and managed by Danske Bank's New York operation". *Yayasan* involved a prejudgment attachment and branches, not separate corporate entities. Nevertheless, similar reasoning conceivably may be used to find a basis on which to exercise personal jurisdiction in a turnover proceeding against a foreign bank.

There are other post-judgment remedies available to judgment creditors in New York. Judgment creditors may serve a restraining notice upon potential garnishees, which restrains the recipient from disposing of any judgment debtor's assets that it may possess. Additionally, creditors may serve questionnaires, known as information subpoenas, upon potential garnishees. These devices do not require a prior showing that the garnishee possesses the judgment debtor's property. They are regularly used by collection lawyers on a 'mass-produced' basis. Given that these remedies, like a turnover proceeding, are directed against garnishees personally, we see no reason why such devices could not be used to find and restrain property located abroad, as long as the garnishee is subject to personal jurisdiction in New York.

Given New York's importance as a banking centre, creditors who hold an arbitration award or judgment issued in a foreign country should investigate the possibility of enforcing the claim in New York despite the demise of prejudgment attachments of dollar transfers under Rule B.

CROATIAN REGULATIONS

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The Croatian authorities have introduced revised Notice of Arrival reporting regulations for ships calling at Croatian ports. The regulations require all tankers of 150 gross tons or more and other ships of 300 gross tons or more to participate. In addition to other obligations regarding ISPS code compliance, ballast water management, waste management and dangerous goods reporting, the new regulations require confirmation of insurance cover for wreck removal.

Enquiries by the International Group suggest that the port authorities may be prepared to rely on evidence of entry in an International Group club to satisfy this obligation, but that is not officially confirmed. Members who encounter any difficulties with providing evidence of P&I cover to the satisfaction of the Croatian authorities should get in touch with their usual contact at the club.

PAY TO BE PAID

'Pay to be paid' is a fundamental principle of P&I cover. A member's cover is one of indemnity, that is, the member must actually pay a claim made against him by a third party before seeking reimbursement from the club.

Under English law, specifically the Third Party (Rights Against Insurers) Act 1930, a third party claimant could proceed directly against an insurer if the assured was insolvent. However, in stepping into the assured's shoes the claimant could not be in a better position than the assured under the insurance contract. The House of Lords clarified that contingent indemnity provisions (such as pay to be paid) would bind a claimant in such circumstances but observed that liability insurers should not rely upon such pay to be paid provisions when faced with claims for damages for death or personal injury. For many years it has been the practice of the club not to rely upon such arguments in dealing with the personal injury claims that our members face. The club amended its rules in February 2009 to expressly waive the pay to be paid provision in respect of crew claims.

Also, the clubs have sometimes agreed to accept direct action as a means of securing balanced and reasonable rights, defences and limitations for shipowners in the negotiation of several international conventions. Examples include the international regimes for pollution, both for tankers and for bunkers from other ships.

English insurance law has now been updated with the passing of the Third Party (Rights Against Insurers) Act 2010. The new Act streamlines claims by avoiding the need for duplicate proceedings, gives claimants new rights to obtain certain insurance information and removes specific policy defences (e.g. failure by an insolvent assured to provide information). Further, the Act states that the rights transferred from an insolvent assured to a claimant are not subject to any pay-to-be-paid requirements. However, the Act retains pay to be paid in the context of marine insurance other than in respect of claims for death or personal injury. Other policy defences (for example following non-payment of premium) and rights of set-off remain available to insurers.

English law now codifies the practice and procedure of the clubs in dealing with claims for death or personal injury following the insolvency of a member, whilst recognising and retaining pay to be paid for other risks.