ADMIRALTY LAW

BY PAUL S. EDELMAN AND JAMES E. MERCANTE

It Pays to Be 'Attached'

It is often more difficult to locate property of parties to a maritime dispute than property of parties to a traditional civil action. For this reason, admiralty law affords a remedy to obtain security for a maritime claim, and jurisdiction, by attaching assets of an absent party.

And, while things maritime often have a unique language as well, the U.S. Court of Appeals for the Second Circuit in an attachment case recently added to admiralty's jargon by describing maritime parties as "peripatetic" and their assets as "often transitory." *Aqua Stoli Shipping Ltd v. Gardner Smith Pty*, 460 F3d 434, 443 (2d Cir. 2006) (*Aqua Stoli*).

We maritime attorneys understand very well the "transitory" description, but had to look beyond our International Maritime Dictionary for a definition of "peripatetic"—meaning "movement or journeys hither and thither."[1]

The maritime bar credits the Second Circuit Panel (Chief Judge John M. Walker Jr., Richard J. Cardamone and Sonia Sotomayor) for this addition to our genuine salty lingo. The description is indeed watertight because whether involving a shipment of cargo, marine insurance, charter parties, cruise lines, yachting, vessel sales, agency services, pilotage, pollution, personal injury, collision, grounding, or sinking, a maritime dispute will typically involve parties of different states or countries.

For this reason, admiralty law allows a plaintiff to seize assets and bring suit wherever such assets may be found because, while other assets may be available elsewhere, it may be extremely difficult to track them down.

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Maritime Attachment

The remedy of attachment is used in admiralty cases for two reasons, to obtain jurisdiction over an absent party by attaching its assets, and to serve as security for a potential judgment.[2] The remedy has early origins—predating Congress' grant of admiralty jurisdiction to federal courts under Article III of the U.S. Constitution.[3] Fast forward to 1966 when the U.S. Supreme Court established the Supplemental Rules for Certain Admiralty and Maritime Claims, 383 US 1071 (1966). The Supplemental Rules was a compendium of admiralty procedural rules that had developed up to that point that was updated to govern the practice of federal courts sitting in admiralty. These rules presently guide the admiralty practitioner in federal procedure.

In the *Aqua Stoli* case, the Second Circuit scrutinized two of the Supplemental Rules relating to maritime attachment, Rule B and Rule E. Rule B governs the process by which a party may attach another party's assets: It requires only that the plaintiff file a verified complaint requesting an attachment and establish by affidavit that the defendant cannot be "found" within the judicial district. Rule B(1). The corollary is that if a defendant can be found in the district, then its property cannot be attached. A defendant is "found" only if it is 1) subject to personal jurisdiction within the district and 2) capable of being served with process there.[4] Upon this ex parte showing required by Rule B, the district court will enter an order authorizing the attachment. The attachment is triggered when plaintiff serves the order on any entity in possession of defendant's property within the district, typically a bank. Rule B(2). Rule E on the other hand, provides for a prompt post-seizure hearing during which defendant may contest the validity of the seizure. Rule E(4)(f).

You're 'Attached'

The dispute between Aqua Stoli and defendant Gardner Smith arose out of a contract in which the M/V Aqua Stoli was chartered to Gardner Smith to ship cargo from Brazil to Pakistan. When the vessel arrived in Brazil, Gardner Smith refused to load the cargo, contending that the vessel was not seaworthy to make the voyage. Aqua Stoli disputed this and initiated arbitration in London under the charter contract's arbitration provision, claiming $1.45 million in damages. Gardner Smith counterclaimed in the arbitration and arrested the M/V Aqua Stoli in Singapore to obtain security for its counterclaim. Aqua Stoli counter-punched by invoking Rule B, filing a verified complaint in the U.S. District Court for the Southern District of New York, seeking an order to attach any assets of Gardner Smith's located within the district. When the prima facie case of entitlement to attachment was shown, Southern District Judge Jed S. Rakoff granted the ex parte order subject to a subsequent Rule E hearing to contest the attachment.

Aqua Stoli served the attachment order on multiple banks in the Southern District. Although the banks did not hold accounts in Gardner Smith's name, they did temporarily handle wire transfers in U.S. dollars to or from Gardner Smith. These assets were in the form of electronic fund transfers (EFTs). The Second Circuit previously determined in *Winter Storm Shipping, Ltd. v. TPI*, 310 F3d 263 (2d Cir. 2002), that EFTs to or from a party are attachable as they pass through banks located in the jurisdiction.

You're 'Unattached'

Gardner Smith contested the attachment pursuant to Rule E which states that whenever property is arrested or attached, "any person claiming interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules." Rule E(4)(f): "Procedure for Release from Arrest or Attachment."

An attachment order may be vacated in very limited circumstances, i.e., if plaintiff cannot demonstrate

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that the attachment was necessary to obtain personal jurisdiction over the defendant or to obtain security. For example, if defendant is subject to personal jurisdiction in the district, or a bond or other form of security has been posted, a prima facie case for attachment cannot be sustained under Rule B and the attachment will be vacated under Rule E. In *Aqua Stoli*, however, Judge Rakoff suggested that the court had "inherent power" to fashion a test for the vacatur of the attachment notwithstanding its validity under Rule B. 384 FSupp2d 726, 729.[5] He decided that attached assets could be released for other reasons such as if the attachment was sought "simply to gain a tactical advantage" or that the prejudice, i.e., hardship, to the defendant caused by the attachment outweighed the benefit to plaintiff.[6]

This logic was seemingly reasonable but not within the text of the Supplemental Rules. Judge Rakoff determined that Aqua Stoli had no need for the attachment because Gardner Smith was a large, financially secure company with sufficient assets outside the district to satisfy any potential judgment. Since Aqua Stoli was maintaining an arbitration in London against Gardner Smith, Judge Rakoff also reasoned that Aqua Stoli needed neither security from nor jurisdiction over Gardner Smith. 384 FSupp2d at 729-30. In addition, balancing the relative burdens, the district court found that the burden of the attachment on defendant outweighed the benefit to plaintiff because the interception of the EFTs interrupted Gardner Smith's ability to send or receive wire transfers in U.S. dollars. Id. at 730. Applying this "needs-plus-balancing" test, Judge Rakoff vacated the attachment.

Aqua Stoli's appeal followed. It centered on whether or not the district court gave too much weight to collateral issues such as "needs" and "prejudice" which are not required for a prima facie valid attachment.

Re-Attached

The issue on appeal was to what extent a district court may require a plaintiff to show any facts beyond the simple "textual requirements" of Rule B to obtain and maintain an attachment. *Aqua Stoli*, 460 F3d at 438. Highlighting the significance of this issue, the Federal Reserve Bank of New York and The Clearing House Association LLC submitted amicus curiae briefs on behalf of Gardner Smith.

To begin with, the Second Circuit observed that the congressional purpose behind having a "determinate rule rather than a flexible standard" was to ensure that attachments can be obtained with a "minimum of litigation" and avoid an overly burdensome case-by-case analysis of the actual need for plaintiff to have security. 460 F3d at 443.

The Second Circuit was not persuaded by the fact that Gardner Smith had substantial assets overseas, stating that Rule B does not require a party to go to any other country to sue or to obtain security as long as the party's assets are available here. Id. at 444.

The court also set guidelines for practitioners in this circuit going forward about when an attachment may be vacated. The circumstances when a district court may vacate an attachment are "limited," according to the Second Circuit, to when the defendant shows at the Rule E hearing that: 1) the defendant is subject to suit in a convenient adjacent forum (i.e., disallowing an attachment in the Southern District when defendant is located "across the river" in the Eastern District); 2) the plaintiff could obtain in personam jurisdiction over the defendant in the district where the plaintiff is located (i.e., if plaintiff and defendant are both present in the same district and would be subject to jurisdiction there, but plaintiff travels to another district just to attach defendant's assets); or 3) the plaintiff has already obtained sufficient security for the potential judgment by attachment or otherwise. Id. at 445. Interestingly, the Second Circuit tipped its hat to the numerous district courts that have fashioned this limited vacatur rule noting that "[w]hile these district court decisions do not bind us, their accumulated wisdom is persuasive and presents the better historical pedigree."

Conclusion

The *Aqua Stoli* case demonstrates that the ancient remedy of maritime attachment is presently alive and well in New York, which is not surprising in view of New York's pre-eminent role in international banking and shipping.

1. Merriam-Webster Online Dictionary.
2. *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 US 684, 693, 70 S.Ct. 861, 94 L. Ed. 1206 (1950).
3. U.S. Const. Article III, §2; *Aurora Mar. C. v. Abdullah Mohamed Fahem & Co.*, 85 F3d 44, 47 (2d Cir. 1996).
4. *A/S Flint v. Sabre Shipping Corp.*, 228 FSupp 384, 389 (EDNY 1964).
5. *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, 384 FSupp 726, 2005 U.S. Dist. LEXIS 19139 (SDNY 2005).
6. *Aqua Stoli Shipping Ltd v. Gardner Smith Pty*, 384 FSupp2d 726, 2005 U.S. Dist. LEXIS 19139 (SDNY 2005).