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Second Circuit Vacates *Winter Storm* And Holds That Electronic Funds Transfers At An Intermediary Bank Are Not Property Subject To Maritime Attachment Orders

On October 16, 2009, the Second Circuit issued its decision in *The Shipping Corporation of India, Ltd. v. Jaldhi Overseas Pte Ltd.* ("*SCI*"),[1] holding that electronic funds transfers ("EFTs") being processed by an intermediary bank are not subject to attachment by creditors of either the originator or the beneficiary under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B"). In so doing, the Court explicitly overruled its 2002 decision in *Winter Storm Shipping Ltd. v. TPI*,[2] which had been criticized by commentators and U.S. financial institutions alike.

I. Background of EFT Attachment and Pre-*SCI* Precedent

EFTs are ubiquitous and essential to domestic and international commerce. Financial institutions—the New York banking industry in particular—regard seriously any impediments to the free flow of EFTs. They therefore welcomed the promulgation (in 1989), and states' later adoption, of Section 503 of Article 4A of the Uniform Commercial Code ("U.C.C."), under which an EFT "in transit" at an intermediary bank is not attachable as property of either the originator or beneficiary.

In 2002, however, the Second Circuit in *Winter Storm* refused to apply U.C.C. 4A-503 in the maritime context, holding that Rule B makes an EFT attachable property of the originator. Following that ruling, New York financial institutions became subject to an ever-increasing number of maritime attachment orders (literally hundreds per day at some major banks),[3] with the obligation of restraining not only accounts in the name of the defendant

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1 The Shipping Corporation of India Ltd. v. Jaldhi Overseas Pte Ltd., Docket Nos. 08-3477-cv(L), 08-3758-cv(XAP) (available at http://www.ca2.uscourts.gov/decisions/isysquery/8e42bb5e-6c4f-4ded-889c-8fd27d1228ae/9/doc/08-3477-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/8e42bb5e-6c4f-4ded-889c-8fd27d1228ae/9/hilite/).

2 Winter Storm Shipping Ltd. v. TPI, 310 F.3d 263 (2d Cir. 2002).

3 "According to *amicus curiae*…from October 1, 2008 to January 31, 2009 alone 'maritime plaintiffs filed 962 lawsuits seeking to attach a total of $1.35 billion.'" *SCI* at 6. "[C]urrently, leading New York banks

entity or entities, but also EFTs originated by the defendant or sent for the benefit of the defendant. As pointed out by the Permanent Editorial Board for the Uniform Commercial Code and the Clearing House Association L.L.C., companies confronting increased risk of maritime attachments following *Winter Storm* often considered restructuring their transactions to avoid payments in U.S. currency that would require clearing through intermediary banks in the U.S., thus threatening the dollar's status as the world's reserve currency.

Accordingly, *Winter Storm* was subject to heavy criticism. Many had hoped that the Second Circuit would use the 2008 case *Consub Delaware LLC v. Schahin Engenharia Limitada*, 543 F.3d 104 (2d Cir. 2008), as the occasion to overrule *Winter Storm*. They were sorely disappointed when, instead, the Second Circuit used *Consub* to reaffirm *Winter Storm*.

II. The Second Circuit's Decision In *SCI*

In *SCI*, an Indian shipping entity brought suit against a company to which it had chartered a vessel for purposes of transporting iron. The plaintiff sought payment of an overdue invoice, and filed a complaint in the Southern District of New York when payment was not received. Plaintiff invoked Rule B(1)(a), which provides for attachment of the property of any defendant not present in the district. The district court's order provided that the attachment applied "against all tangible or intangible property belonging to…the Defendant…*including but not limited to electronic fund transfers originated by, payable to, or otherwise for the benefit of Defendant*" (emphasis added). Subsequently, the defendant moved to vacate the attachment, and the district court (Rakoff, J.) granted the relief, holding that EFTs in an intermediary bank *en route* to a defendant were not attachable under Rule B. The district court certified the issue for appeal, and the Plaintiff appealed to the Second Circuit.

The Second Circuit first found that there was no federal maritime law to guide its decision, and rejected as irrelevant *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993), which *Winter Storm* had previously relied upon in holding that EFTs at an intermediary bank are subject to seizure under Admiralty Rule B. *SCI* explained that *Daccarett* involved civil asset forfeiture, a remedy *in rem* where the property itself is treated as the offender and made the defendant. The question of who owned the property was therefore irrelevant.[4] By contrast, in the context of maritime attachment—a *quasi in rem* remedy—a threshold issue is whether the defendant has any interest in the property to be attached. That question, *SCI* noted, had not been answered in *Daccarett*.

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receive numerous new attachment orders and over 700 supplemental services of existing orders *each day*." Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009).

4 *SCI* at 19.

Accordingly, the Court turned to state law, the usual source for rights in property, to determine whether EFTs can be considered a defendant's property for purposes of maritime attachment. Article 4A-503 of the U.C.C., adopted in New York (and every other state), protects banks by limiting the ways in which a court may restrain EFTs. It provides:

> For proper cause and in compliance with applicable law, a court may restrain (i) a person from issuing a payment order to initiate a funds transfer, (ii) an originator's bank from executing the payment order of the originator, or (iii) the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds. A court may not otherwise restrain a person from issuing a payment order, paying or receiving payment of a payment order, or otherwise acting with respect to a funds transfer.[5]

U.C.C. 4-A thus recognizes fundamental banking law that an EFT is the property of neither the sender nor the beneficiary when it is present at an intermediary bank; therefore, it cannot be subject to seizure to satisfy either party's debts or obligations. The practical effect of this provision is that banks are relieved of any obligation—and therefore shielded from any potential liability—to monitor for attachment or garnishment the EFTs for which they serve as intermediary banks.[6]

III. Implications

SCI's over-ruling of *Winter Storm* will likely cause a dramatic drop-off in the number of maritime attachments that N.Y. financial institutions must process and a concomitant reduction in the burden imposed by having to monitor the many EFTs processed by them on a daily basis. *SCI* should also alleviate the systemic concerns identified by various institutional players, such as the Federal Reserve Bank of New York and the Clearing House, including the uncertainty caused by *Winter Storm* to the international funds transfer process and the resultant threat to the U.S. dollar's status as currency for international transactions.

Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under any of the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

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[5] N.Y. U.C.C. § 4A-503.

[6] The Official Comment to U.C.C. § 4A-503 states, "[i]n particular, intermediary banks are protected." *See also* European American Bank v. The Bank of Nova Scotia, 12 A.D.3d 189, 190 (N.Y. App. Div. 2004) (EFT in transit to final destination cannot be attached at an intermediary bank).

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