

US appellate court permits attachment of assets in suit to compel arbitration (Daewoo v Thyssenkrupp Mannex)

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Arbitration analysis: In a recent decision, the United States Court of Appeals for the Fifth Circuit allowed a party to attach assets in a suit to compel arbitration, even though the suit did not directly seek a money judgment as required by the applicable state statute. Steven P Finizio and Apoorva J Patel of Wilmer Cutler Pickering Hale and Dorr LLP provide an analysis of the decision and its potential implications for parties seeking attachment of assets in the US in aid of arbitrations that have not yet commenced.

Original news

Daewoo International Corp v Thyssenkrupp Mannex GmbH v America Metals Trading LLP et al, [No. 16-30984 \(5th Cir Sept 1, 2017\)](#)

What was the background?

Daewoo International Corp (Daewoo) and Thyssenkrupp Mannex GmbH (TKM) separately entered into a series of contracts with America Metals Trading LLP (AMT) for the purchase of pig iron. AMT failed to deliver pig iron to either buyer. In December 2012, Daewoo filed suit against AMT in the United States District Court for the Eastern District of Louisiana, a federal court, seeking an order compelling arbitration and an attachment of AMT's pig iron on board a cargo ship anchored in Kenner Bend, Louisiana. Daewoo invoked both maritime attachment and Louisiana's non-resident attachment statute, Article 3542 of the Louisiana Code of Civil Procedure, which allows for a writ of attachment 'in any action for a money judgment.' Daewoo also argued that 'it needed a pre-confirmation suit attachment to secure an eventual arbitral award because AMT was hemorrhaging assets.' The court granted Daewoo a writ of attachment, which Daewoo then served on the cargo.

Shortly thereafter, TKM filed suit against AMT in Jefferson Parish Court, a Louisiana state court, and obtained a writ of attachment over the same pig iron that Daewoo had attached. TKM then moved to intervene in Daewoo's suit in federal court and obtained a writ of attachment from the federal court over the same cargo.

In May 2016, TKM moved to vacate Daewoo's attachment. The federal district court granted TKM's motion on the grounds that Daewoo's maritime attachment and attachment under the Louisiana statute were both improper. Among other findings, the district court held that Daewoo's underlying suit to compel arbitration was not an 'action for a money judgment,' precluding Daewoo from obtaining a writ of attachment under the Louisiana statute. Daewoo appealed this holding to the United States Court of Appeals for the Fifth Circuit, the federal appellate court with jurisdiction over Louisiana, Mississippi, and Texas.

What did the Fifth Circuit decide?

The Fifth Circuit agreed with the district court that federal subject matter jurisdiction existed under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Daewoo's underlying suit fell under the New York Convention because:

- the contracts provided for arbitration in a New York Convention state relating to a commercial legal relationship and involved at least one non-US party
- Daewoo's suit sought an attachment to pursue the arbitration provided for in those agreements

The parties disputed whether Louisiana's non-resident attachment statute allows for attachment in aid of arbitration, and the Fifth Circuit declined to adopt a categorical approach to this issue. As explained below, the

Fifth Circuit interpreted Louisiana law to permit Daewoo's attachment because Daewoo's potential future action to confirm an arbitral award—unlike its present suit to compel arbitration—would be an action for a money judgment.

The Fifth Circuit reasoned that an 'action for a money judgment' is defined as a 'civil or criminal judicial proceeding seeking monetary damages.' On that basis, because a motion to compel arbitration does not directly seek monetary damages, but rather seeks an order requiring a party to take an action (ie, arbitrate a dispute), the court held that Daewoo's suit against AMT seeking to compel arbitration could not underlie a writ of attachment under Louisiana's non-resident attachment statute.

However, another statute, Article 3502 of the Louisiana Code of Civil Procedure, provides for the possibility of pre-suit attachment 'before the petition is filed, if the plaintiff obtains leave of court and furnishes the affidavit and security provided in Article 3501.' Because an action to confirm an arbitral award is an action for a money judgment, the Fifth Circuit concluded that Article 3502 'allows for attachments to be issued before the contemplated underlying confirmation suit is brought.'

The Fifth Circuit also noted in dicta that its interpretation of Louisiana law to allow for pre-suit attachment in aid of arbitration is consistent with the state's overall statutory scheme, including Louisiana's statute adopting the UNCITRAL Model Law (La. Stat. s 9:4249), which provides that '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 the measure.'

Consequently, the Fifth Circuit held that Article 3502 'allows for attachments to issue in aid of arbitration so long as the party seeking the attachment complies with the requirements of Article 3502 and shows good cause for a pre-petition attachment, which will usually require showing that arbitration is likely to result in a confirmation suit and also showing the need for an imminent attachment (which may include an inquiry into the imminence of the arbitration or confirmation suit).'

It was undisputed that Daewoo had complied with Article 3502's procedural requirements and, as noted above, Daewoo had argued that it needed a pre-petition attachment to secure an eventual award because 'AMT was hemorrhaging assets.' The Fifth Circuit therefore concluded that, because Article 3502 permitted Daewoo to seek an Article 3542 attachment prior to commencing a confirmation proceeding, and because Daewoo had satisfied Article 3502's requirements, Daewoo's attachment under Article 3542 was valid. The Fifth Circuit vacated the district court's order dissolving Daewoo's attachment and remanded for any necessary further proceedings.

Subsequent developments and potential implications

Following the Fifth Circuit's decision, TKM has sought rehearing. Among other arguments, TKM alleges that although Daewoo did not rely on Louisiana Code of Civil Procedure Article 3502 in its appellate arguments, the Fifth Circuit panel raised the issue sua sponte without providing counsel a fair opportunity to brief the issue, and that TKM was therefore deprived of procedural due process. As of the date of this article, TKM's motion is pending.

Notwithstanding any potential reconsideration of the Fifth Circuit's decision, the decision is notable in several respects. Unlike some jurisdictions, such as New York and California, Louisiana does not have a statute expressly allowing courts to grant attachment in aid of an arbitration that has not yet commenced (cf New York Civil Practice Law and Rules, s 7502(c); California Code of Civil Procedure, s 1281.8(b)). By permitting attachment in conjunction with a suit seeking to compel arbitration, the Fifth Circuit adopted a permissive approach to Louisiana's statutory regime favouring arbitration. Further, the Fifth Circuit's reasoning may be persuasive to courts in other US states that have adopted the UNCITRAL Model Law (eight states have done so, including California, Texas, Florida, and Illinois).

The views expressed are not necessarily those of the proprietor.

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