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**UPDATE REGARDING MANIFEST DISREGARD
OF THE LAW IN THE AFTERMATH OF
HALL STREET ASSOCIATES:
THE FIFTH CIRCUIT WEIGHS IN**

By Edward P. Grosz

Although rumors of the death of manifest disregard of the law as a basis for vacating an arbitration award were greatly exaggerated, the doctrine continues to suffer blows to its vitality. The United States Court of Appeals for the Fifth Circuit recently held that, in light of the United States Supreme Court's decision in Hall Street Assocs. v. Mattel, Inc., ---U.S. ----, 128 S. Ct. 1396 (2008), manifest disregard of the law is no longer a valid basis for vacatur of an arbitration award under the Federal Arbitration Act ("FAA"). Citigroup Global Markets, Inc. v. Bacon, --- F.3d ----, 2009 WL 542780 (5th Cir. March 5, 2009). Holding that Hall Street Associates effectively overruled Fifth Circuit authority to the contrary, the Court held that the FAA does not permit a court to vacate an arbitration award based upon a purported manifest disregard of the law by the arbitration panel. Although the Citigroup Court rejected contrary holdings by the Second, Sixth and Ninth Circuits, it is unclear whether, even in those Circuits, the doctrine has the same force as it had prior to Hall Street Associates.

INTRODUCTION

When the Supreme Court decided Hall Street Associates in 2008, some commentators concluded that the Court had put an end to the ability of courts to vacate arbitration awards based upon a manifest disregard of the law, or at least strongly signified that the doctrine was no longer valid. That was certainly a reasonable conclusion, since one of the bases for the Court's holding in Hall Street Associates was the "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputed straightaway." Hall Street Associates, 128 S. Ct. at 1405. Allowing courts to modify or vacate awards for manifest disregard of the law, or upon other vaguely worded criteria, would certainly be contrary to that national policy. Consistent with this principle, the Supreme Court held that Sections 10 and 11 of the FAA "respectively provide the FAA's exclusive grounds for expedited vacatur and modification." Since manifest disregard for the law is not one of the grounds set forth in the statute, many courts have held that that ground no longer may form the basis to vacate an arbitration award. Nonetheless, a careful review of the tortuous procedural background of Hall Street Associates and the actual holding of the decision should, in hindsight, have alerted more readers of the decision to the fact that the Supreme Court had clarified very little, and had muddied the

waters considerably as to the role of Federal courts in reviewing arbitration awards. Rather than reducing the role of courts in the arbitration process, the ambiguities contained in Hall Street Associates may only make the arbitration process more litigious.

What is perhaps most interesting about the Hall Street Associates case is that it did not involve a claim that the arbitration panel acted in manifest disregard of the law, and the Supreme Court did not, in fact, hold that manifest disregard of the law could not be a basis for vacating an arbitration award. The only specific question presented to the Supreme Court was “whether statutory grounds for prompt vacatur and modification may be supplemented by contract.” Hall Street Associates, 128 S. Ct. at 1400. It should therefore not be surprising that the Court’s discussion of manifest disregard of the law was muddled and subject to conflicting interpretations.

CASE HISTORY

The case involved a lease dispute between Hall Street Associates, LLC (“Hall Street”) and its tenant, Mattel, Inc. (“Mattel”). Hall Street argued that the grounds set out in the FAA for vacating or modifying an arbitration award are not exclusive, citing the manifest disregard of the law standard as an example of a non-statutory basis for vacatur. *Id.*, p. 1403. Hall Street argued that the Supreme Court recognized the manifest disregard of the law standard in Wilko v. Swan, 346 U.S. 427 (1953), overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989). In dictum, the Wilko Court made the following cryptic comment:

While it may be true, as the Court of Appeals thought, that a failure of the arbitrators to decide in accordance with the provisions of the Securities Act would ‘constitute grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act,’ that failure would need to be made clearly to appear. In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko, 346 U.S. at 436-437 (footnotes omitted). Lower courts would subsequently rely on this language to hold that manifest disregard for the law permitted a court to vacate an arbitration award. The Supreme Court appeared to endorse this interpretation of Wilko, in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995).

In Hall Street Associates, however, the Supreme Court, for the first time, dealt directly with the 55-year-old Wilko language and the line of lower court cases it had wrought. After characterizing the Wilko language as “vague,” the Court essentially acknowledged that it did not know what the language meant and declined to illuminate its prior dictum any further:

Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.” We, when speaking as a Court, have merely taken the Wilko language as we found it without embellishment, see First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Hall Street Associates, 128 S. Ct. at 1404 (citations omitted). The above-quoted language could be interpreted as leaving open the possibility that the manifest disregard of the law standard was based on the explicit language of the FAA.

The United States Court of Appeals for the Second Circuit has held that Hall Street Associates did not, in fact, abrogate the manifest disregard standard, but merely reconceptualized it as a “judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA.” Stolt-Nielsen SA v. Animalfeeds Int’l Corp., 548 F.3d 85, 94 (2d Cir. 2008). The Second Circuit recognized that Hall Street Associates was inconsistent with prior cases holding that manifest disregard of the law was a non-statutory basis for vacating an arbitration award. However, the Second Circuit held that courts continued to have an obligation to review arbitration decisions to determine whether the arbitration panel so disregarded applicable law as to “exceed[] their powers, or so imperfectly execute[] them that a mutual, final, and definite award upon the subject matter submitted was not made.” *Id.*, pp. 94-95 (quoting 9 USC § 10(a)(4)). Accord Comedy Club, Inc. v. Improv West Assocs., 553 F.3d 1277, 1289-90 (9th Cir. 2009); Coffee Beanery, Ltd. v. WW, LLC, 300 Fed. Appx. 415, 418-419 (6th Cir. 2008).

CONCLUSION

It remains to be seen whether application of the manifest disregard standard by those courts which continue to find it valid will be affected by the need to interpret it in accordance with the strict language of the FAA, rather than as an extra-statutory judicial basis for vacatur.

It also remains to be seen what other avenues of judicial review of arbitration awards will be pursued by litigants in the aftermath of Hall Street Associates. In addition to its discussion of manifest disregard of the law, the Supreme Court in that case also held that the FAA was not the exclusive source of authority for judicial review of arbitration decisions. The Court held that parties seeking judicial review remain free to seek it under state statutes or the common law. Hall Street Associates also holds that the California Arbitration Act (the “CAA”), which is similar to the FAA, allows broader judicial review of arbitration awards than the FAA. Connection, Inc. v. DIRECTV, Inc., 44 Cal. 4th 1334, 190 P.3d 586 (2008).

The unique procedural posture of Hall Street Associates also allowed the Supreme Court to open another door for judicial review. Because the arbitration provision in Hall Street Associates was contained in a court order, the Court *sua sponte* questioned whether the arbitration agreement should be treated as an exercise of

the District Court’s authority to manage its cases under Federal Rule of Civil Procedure 16, therefore permitting broader judicial review than permitted by the FAA. On remand, the Court of Appeals held that the issue raised by the Supreme Court had been preserved by Hall Street, and remanded the case for further determinations and hearings consistent with the Supreme Court’s decision. Hall Street Assocs. v. Mattel Inc., 531 F.3d 1019 (9th Cir. 2008). Thus, for the third time in this case’s tortuous history, the District Court has jurisdiction to review the arbitration panel’s decision.

It is ironic that a Supreme Court decision which ostensibly narrowed the scope of judicial review of arbitration decisions has left so many unresolved issues regarding judicial review. It is also ironic, and a cautionary tale to practitioners and parties contemplating arbitration, that the decision of the litigants in Hall Street Associates to engage in arbitration, presumably in order to streamline the adjudication of the dispute between the parties, has spun off this extensive litigation focused on judicial review. Parties entering into arbitration provisions should give careful consideration to both the language of their agreements and the various sources of law that might be implicated in any judicial review of arbitration decisions. It appears that court supervision of the arbitration process will be with us for years to come.

NON-HAGUE OFFSHORE DEFENDANTS OUT OF REACH? NOT ANYMORE COURT OF APPEALS BRINGS OFFSHORE DEFENDANTS INTO NEW YORK TERRITORY FOR THE PURPOSE OF SERVICE OF PROCESS

By Jacqueline L. Zalapa

When you sue an out of state defendant to get damages or other relief, you need to know how to serve them first. This is because the formal delivery of a writ, summons or other legal process is a pre-requisite to continuing the action. And expansion of international trade, technology and communication in recent decades combined with the tendency of commercial transactions involving parties beyond U.S. borders, means either your existing or potential business counterpart will probably be domiciled in a foreign country.

This article will consider a recent decision of the Court of Appeals, New York State’s highest appellate court, that provides judicial clarity on the service of process on certain out of state defendants.

INTRODUCTION

In November 2008, the Court of Appeals handed down an important decision. The Court held that methods

for service inside the state under New York’s *Civil Practice Law and Rules* (the “CPLR”) control proper service of process on individuals and corporations of foreign states provided that: (1) there are grounds for extraterritorial jurisdiction;ⁱ and (2) an international treaty does not mandate service otherwise. Morgenthau v. Avion Resources Ltd., 11 N.Y.3d 383, 869 N.Y.S.2d 886, 892 (N.Y.2008).

The main international treaty that sets forth mandatory service requirements is the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638ⁱⁱ (the “Hague Service Convention”). For signatory states under the Hague Service Convention, service of process must comply with its provisions. Failure to comply will result in improper service.ⁱⁱⁱ

Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2 722 (1988). Compliance with the Hague Service Convention is generally welcomed by a New York plaintiff because Article 10(a) permits service to be made through the regular postal channels directly to the out of state defendant.

As at February 22, 2009, however, the Hague Service Convention has been ratified by only 59 sovereign states.^{iv} This means that its utility is limited because in our world of 193 sovereign states, we are left with 136 non-signatory states, including offshore financial centers and asset protection havens that domicile offshore corporations such as Bermuda, British Virgin Islands, Cayman Islands and the Turks and Caicos Islands. Other non-signatories include U.S. trading partners, Australia, Brazil, Malaysia, New Zealand, Singapore, South Korea and Taiwan.

Until the Morgenthau decision, a New York plaintiff was required to navigate its way through a thorny territory of international treaties to determine which specific method was required to effectuate U.S. service on an out of state defendant that resided in a non-signatory state. With the Morgenthau decision, that treasure hunt has been expedited. That is because the service provisions of the CPLR – well-trodden ground for New York attorneys – may be applied to sidestep uncertainties and delays to serve an out of state defendant where no treaties supplant New York’s service requirements.

CASE HISTORY

The genesis of this appeal was a civil forfeiture proceeding initiated by the New York County District Attorney, Robert M. Morgenthau. Morgenthau sought to seize proceeds of an alleged illegal international money transfer scheme uncovered by federal agents and engaged in by defendants, individuals and corporations of Brazil, in an amount of \$636,924,0865. The funds were allegedly transferred from certain “casas de cambio” or money transfer stations in Brazil to a Manhattan bank account in violation of New York banking laws and Brazilian monetary regulations. Most defendants were charged with violating Banking Law § 650(2)(b)(1). Concurrent with the pending indictments, Morgenthau instituted forfeiture proceedings in the Supreme Court of New York County and in June 2006, obtained an ex parte attachment order to freeze the funds. Defendants were subsequently served with process in Brazil in accordance with New York’s service mechanisms of the CPLR.

In February 2007, the attachment order was vacated and the action dismissed. The Supreme Court deemed that service of process on the Brazilian defendants failed to comply with Brazilian law and the Inter-American Convention on Letters Rogatory^v (the “Letters Rogatory Convention”) which set forth service guidelines between the United States and Brazil.

Morgenthau appealed. But, the Appellate Division affirmed the trial court’s decision that service was improper and failed to comply with Brazilian law. However, the Court of Appeals reversed and held that the Appellate Division erred in requiring compliance with Brazilian service requirements. The Court reinstated the action awarding costs to Morgenthau.

SUMMARY OF ARGUMENTS

Defendants’ counsel argued that service was void because U.S. service of process in Brazil should have been made exclusively under the Letters Rogatory Convention. Defendants also claimed that service was improper because it offended the doctrine of international comity, a Private International Law concept of reciprocity whereby one sovereign state acknowledges or at least avoids undermining the validity of the executive, judicial and legislative acts of another sovereign state.

Morgenthau argued that service pursuant to the CPLR constituted proper service for two reasons. First, service under CPLR § 313 on the out of state defendants complied with due process requirements. Second, the Letters Rogatory Convention method of service was not mutually exclusive to other methods of service available to the U.S. for Brazilian nationals and corporate entities.

THE DECISION

Judge Ciparick, in writing the decision for the unanimous Court, agreed with Morgenthau. The Court held that service of process pursuant to CPLR § 313 was proper service and Morgenthau was not required to serve under Brazilian law or the Letters Rogatory Convention. In reaching its decision, the Court set forth the following four reasons.

A. Statute is Clear & Unqualified

First, the Court began with reading the words of the statute:

“A person domiciled in the state or subject to the jurisdiction of the courts of the state...may be served with the summons without the state, *in the same manner as service is made within the state...*”

CPLR § 313 (emphasis added). On the face of the statute, the Court considered that its intention and language plainly permitted service to be made outside the state utilizing the same methods available for service inside the state:

“Absent in the plain text [CPLR] is any requirement to fulfill a foreign locale’s service of process requirements in order to effectuate service in a New York action upon a defendant in another country....All

due process requirements were met and proper service upon those defendants time served were effected.”

Morgenthau, 869 N.Y.S.2d at 892.

B. *Comity Irrelevant*

Second, the Court rejected defendants’ argument that the doctrine of comity presented an obstacle to service pursuant to a New York statute on the Brazilian defendants because New York law does not apply that doctrine to import a foreign state’s laws in a New York lawsuit. Principles of comity are not relevant to service issues when service requirements under the CPLR are fulfilled. Morgenthau, 869 N.Y.S.2d at 892 *citing Banco do Comercio e Industria de Sao Paolo v. Esusa Engenharia e Constuceos*, 173 A.D.2d 340, 341, 569 N.Y.S.2d 708 (1st Dep’t 1991).

C. *Hague Service Convention Also Irrelevant*

Third, the Court went on to clarify that service under the CPLR was not compromised by the Hague Service Convention. As a multilateral treaty, it is mandatory only for signatory states and does not apply to non-signatory states. Brazil is not a signatory under the Hague Service Convention. That convention, therefore, does not influence, lest control, the issue of service on a non-signatory state.^{vi}

D. *Letters Rogatory Convention Allows for Service Pursuant to a State Statute*

Fourth, the Court concluded that the Letters Rogatory Convention is not mutually exclusive to other methods of service and permits service pursuant to the CPLR. Even though both the U.S. and Brazil are contracting states, the Court held that Article 2 of this convention does not mandate this method of service as “the exclusive means” to serve a party in Brazil. Morgenthau, 869 N.Y.S.2d at 934.

This provides useful clarity because compliance with the Letters Rogatory method is a protracted expensive procedure that requires “formal requests” by a U.S. court to the foreign state’s court.^{vii}

CONCLUSION

The Court of Appeals has brought certain offshore defendants into the well-known local territory of New York service provisions. As a result, a New York plaintiff may serve papers under the CPLR on an out of state defendant without complying with the foreign state’s internal service requirements provided that a treaty does

not mandate service otherwise. Notwithstanding this development, one should be mindful of securing an express consent to nominate a New York agent for the purpose of service of process when contracting with an offshore party.

ⁱ Extraterritorial jurisdiction is a court’s ability to exercise power beyond its territorial limits. Black’s Law Dictionary, 869 (8th ed. 2004).

ⁱⁱ Hague Conference on Private International Law, Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638.

ⁱⁱⁱ Contracting parties under the Hague Service Convention as at February 22, 2009 are: Albania, Antigua and Barbuda, Argentina, Bahamas, Barbados, Belarus, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, People’s Republic of China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Republic of Korea, Kuwait, Latvia, Lithuania, Luxembourg, The former Yugoslav Republic of Macedonia, Malawi, Mexico, Monaco, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Russian Federation, Saint Vincent and the Grenadines, San Marino, Seychelles, Slovakia, Slovenia, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela.

^{iv} Adopting the standard definition of the term “state” under international law as applied by Article 1 of the Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933.

^v Organization of American States, Inter-American Convention on Letters Rogatory, Jan. 30, 1975, O.A.S.T.S. No. 43, Additional Protocol to the Inter-American Convention of Letters Rogatory and Annex, May 8, 1979, O.A.S.T.S. No. 56.

^{vi} It is important to note that had Brazil been a signatory under the Hague Service Convention, the Supreme Court’s position on this issue would have voided service since the methods of service prescribed under the Hague Service Convention are binding on the contracting states. Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 108 S.Ct. 2104, 100 L.Ed.2 722 (1988).

^{vii} In addition to the U.S. and Brazil, the other contracting parties under the Inter-American Convention of Letters Rogatory are Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Spain, Uruguay and Venezuela. It should be noted that Argentina, Mexico, Spain and Venezuela are also contracting parties to the Hague Service Convention. Thus, U.S. service on these foreign states requires deference to the Hague Service Convention.

**MARITIME ATTACHMENTS OF
ELECTRONIC FUNDS TRANSFERS:
LIFE IN THE BRAVE NEW WORLD OF
FEDERAL MARITIME RULE B**

By Edward P. Grosz

Imagine for a moment that you find yourself in a dispute with a foreign counter-party that does not have a presence in the United States. For whatever reason, you are contemplating litigation. You immediately realize that it will be difficult to obtain personal jurisdiction over your adversary or its assets, except in its home country, where the quality of justice you are likely to receive from the civil courts may be less than enticing. What do you do?

INTRODUCTION

If your claim falls within the admiralty or maritime jurisdiction of the Federal courts, and if your adversary transacts any business in the United States, the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Actions of the Federal Rules of Civil Procedure (the “Federal Maritime Rules”) provides a very effective remedy. A plaintiff can proceed *ex parte* in any district where the defendant’s assets are located and attach any tangible or intangible property of the defendant, simply by satisfying the Court that the dispute has a “genuinely salty flavor” and the defendant cannot be found within the district. Because of the transitory nature of vessels and goods involved in maritime transactions, the Federal Maritime Rules provide a quick and simple means to assure that assets will be available to satisfy any potential judgment.

The issuance of maritime attachments is a practice that dates back centuries to the earliest maritime tribunals and is an important feature of maritime law and procedure. It also facilitates the issuance of maritime trade credit, by providing comfort that debts can be collected by proceedings in a convenient forum.

There is no requirement in such proceedings that either the dispute or the parties has any connection to the United States, and no requirement that the dispute be adjudicated in the United States. If, for example, the dispute is subject to arbitration outside the United States, the attached assets will remain available throughout the proceeding, awaiting a determination on the merits of the underlying claim. There is also no requirement that the assets have any connection to the underlying dispute. Maritime attachments are therefore a powerful tool to parties seeking redress of maritime-related grievances. The successful attachment of assets is often a very

effective way of getting the attention of a recalcitrant debtor. Problem solved.

EXPLOSION OF MARITIME ATTACHMENTS

In recent years there has been an explosion of the use of maritime attachments in the United States District Court for the Southern District of New York. The explosion arises out of the innovative use in this District of maritime attachments to secure funds involved in an electronic fund transfer (“EFT”). EFT’s are commonly used in international transactions. Banking networks serving global commerce tend to use intermediary banks in the world’s financial capitals to facilitate international money transfers. For international transactions denominated in dollars, funds are often routed through United States banks to arrange for currency conversions. For obvious reasons, a significant amount of EFT traffic passes through New York. Indeed, the volume of EFT traffic in New York has given rise to a virtual cottage industry of litigation over the attachment of EFT’s in the Southern District of New York, while such litigation appears to be unheard of elsewhere.

The instantaneous nature of EFT transfers creates a number of unique problems which do not arise in ordinary attachment proceedings. The United States Court of Appeals for the Second Circuit has held that for an attachment to be valid, service has to be effectuated on the garnishee at a time when it is in possession of property of the defendant. Reibor Int’l Ltd. v. Cargo Carriers (KACZ-CO.) Ltd., 759 F.2d 262 (2d Cir. 1985). Strict application of this principle would require plaintiffs to effectuate service of process on garnishee banks at the exact instant that electronically transferred funds are in the possession of the banks. As this is essentially an impossible task to accomplish, courts have authorized an end run around the Reibor decision by directing garnishees to treat the order as continuously served for a day after service.

The practical necessity for continuous service gives courts considerable flexibility in deciding how much assistance to provide plaintiffs seeking maritime attachments. In a recent decision, Judge Shira A. Scheindlin declined to issue an order providing for “continuous service.” Cala Rosa Marine Co. v. Sucre et

Deneres Group, 2009 WL 274486 (S.D.N.Y. Feb. 4, 2009). The Court held that although it was permissible to provide for “continuous service,” the Court was not obliged to do so. Citing the disruptive effect of maritime attachments on the New York banking industry, the Court held that it would not require the garnishee banks to treat service as continuous, though the banks were free to voluntarily treat service as continuous.

The Court held that its decision was buttressed by the fact that the case had little connection with the United States forum and that there was no reason to believe that there was, or likely would be in the future, any property of the defendant in the United States. Cala Rosa, 2009 WL 274486 at *4.

The decision in Cala Rosa is a reaction to the large increase in the volume of maritime attachment cases that the District Court must process. The deterioration of the global economy has seen a dramatic decrease in the demand for maritime services and a concomitant increase in defaults under maritime contracts. During 2008, the number of maritime cases commenced in the Southern District of New York has increased from approximately 10% of new filings to approximately 30% of new filings. New York banks have consistently opposed the legal regime which allows for the maritime attachment of EFT’s and have complained of the onerous burden they face in complying with attachment orders.

**REITLER BROWN & ROSENBLATT, LLC
SUCCESSFULLY BLOCKS ELECTRONIC FUNDS
TRANSFER**

Reitler, Brown & Rosenblatt LLC recently blocked an electronic fund transfer on behalf of a Canadian entity in connection with a dispute with a Middle Eastern entity. The case illustrates some of the pitfalls that may be encountered in connection with maritime attachments. The Court sub sponte questioned whether maritime jurisdiction existed, since the dispute related to a grain transaction. We successfully argued that the dispute fell within the Court’s maritime jurisdiction, since the dispute concerned payment of demurrage charges incurred in connection with the sale. Since the contract at issue had both maritime and non-maritime components, the District Court had admiralty jurisdiction over the demurrage dispute, since the obligation to pay demurrage charges under the contract was severable from the non-maritime obligations. Folksamerica Reins. Co. v. Clean Water of New York, Inc., 413 F.3d 307, 314 (2d Cir. 2005).

Although we knew in advance that the defendant was expecting a payment via EFT, and served the clearing bank in a timely manner, the EFT was paid without being blocked by the garnishee bank. When we alerted the bank that the payment had been made without being blocked, they requested the beneficiary bank return the funds. The beneficiary bank voluntarily complied.

The intermediary bank advised us that the transfer had not been blocked because it had been structured as a bank-to-bank “cover payment.” In effect, it appears that the defendant’s bank paid the defendant the amount the defendant was expecting via EFT, and the payor bank electronically transferred funds to the defendant’s bank. Because the wiring instructions did not contain any information about the defendant, the intermediary bank claimed there was no way for its blocking software to block the transfer. Although the intermediary bank threatened to move to have the funds released, claiming that they are not subject to attachment in New York since the funds belonged to the beneficiary bank, not the defendant, no action has been taken to date. The underlying dispute is currently the subject of an arbitration proceeding in London.

One of the banking community’s objection to maritime attachments of EFT’s is that an intermediary bank may find itself the subject of a contempt proceeding through no fault of its own because it was unable to block a transfer subject to attachment with its existing software. In our case, we knew both the amount and the time of the transfer, and were able to provide information to the bank to prove the defendant’s interest in the funds. The defendant or one of the interested banks may yet object that the funds were improperly attached, and this may prove to be an interesting test case concerning the use of the Federal Maritime Rules to attach EFT’s.

CONCLUSION

What our case demonstrates is that it helps to be able to make a strong showing concerning the fact that the defendant has or is likely to have an interest in EFT funds passing through New York. While maritime attachments of EFT’s continue to be a hotly contested and controversial practice, it appears that it will continue to occupy a significant amount of judicial and banking resources in the Southern District of New York for the foreseeable future.

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