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Consub Delaware LLC v. Schahin Engenharia Limitada, et al. United States Court of Appeals for the Second Circuit 543 F.3d 104 (Decided September 23, 2008)

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**EFTS ARE ATTACHABLE PROPERTY UNDER RULE B AND FORUM SELECTION
CLAUSE PROVIDING FOR ENGLISH LAW DOES NOT PRECLUDE A RULE B
ATTACHMENT IN NEW YORK.**

The Second Circuit declined an opportunity to overrule *Winter Storm* and apply New York law. The Second Circuit also affirmed the district court's holding that a forum selection clause providing for English law does not preclude a rule b attachment in New York.

Consub Delaware LLC v. Schahin Engenharia Limitada, et al.
United States Court of Appeals for the Second Circuit
543 F.3d 104
(Decided September 23, 2008)

On November 8, 2001, Consub Delaware LLC ("Consub) and Schahin Engenharia Limitada ("Schahin") entered into a novation agreement whereby Consub was to provide and operate a vessel to assist with maintenance and service of submarine fiber-optic cables. This agreement was made pursuant to a pre-existing agreement, the ACMA agreement, whereby Schahin had contracted with another party to provide the same services. As per the novation agreement, Consub was to assume all of the obligations of the original party to the ACMA agreement and, therefore, was bound by its terms. Both agreements contained forum selection clauses that provided for the application of English law in English courts.

Approximately two years after entering into the novation agreement, Consub initiated an action in the Royal Courts of Justice in London to recover payments it alleged were owed to it for services it performed for Schahin. Schahin, in response, filed numerous applications in Brazilian courts, which Consub asserted were simply meant to delay the English proceedings. Consub, therefore, filed a complaint in the United States District Court for the Southern District of New York seeking an ex parte order for process of maritime attachment and garnishment pursuant to Supplemental Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B"). On November 14, 2006, the district court granted Consub's request and issued an ex parte order for process of maritime attachment and garnishment ("Order"). Consub served the Order on garnishees named therein.

On or about December 1, 2006, in an unrelated transaction, Schahin instructed its Brazilian bank to transfer funds to a third-party located in Switzerland. Since the transfer involved conversion of Brazilian reais into United States dollars, the transfer passed through two intermediary banks in New York. On December 6, 2006, Standard Chartered Bank advised Schahin's Brazilian bank that the electronic funds transfer ("EFT") had been attached pursuant to the district court's Order.

Schahin declined Consub's request to post a bank guarantee. Schahin, rather, served Consub with an order to show cause in support of its motion to vacate the attachment. Schahin argued that EFT's are not "property" within the meaning of Rule B and could not be attached. Schahin also argued that the forum selection clauses contained in the agreements prohibited Consub from seeking a Rule B attachment in New York. The district court denied Schahin's motion to vacate the Order; however, the district court granted Schahin's motion to file an interlocutory appeal on the EFT issue. Shortly after certifying the EFT issue for interlocutory appeal, the district court declined to certify the forum selection clause issue for interlocutory appeal.

The Second Circuit, however, addressed both issues raised by Schahin because the district court's certification of the EFT issue had the effect of certifying the district court's entire order denying

Schahin's motion to vacate. The Second Circuit reviewed the district court's denial of Schahin's motion to vacate for abuse of discretion, the district court's factual determinations regarding the applicability of the forum selection clause for clear error, and the district court's legal conclusions regarding the forum selection clause de novo.

The Second Circuit first addressed whether an EFT in the hands of an intermediary bank is the property of the originator and is subject to a Rule B attachment. Schahin urged the court to apply New York law and overrule the Second Circuit's earlier decision in *Winter Storm Shipping, Ltd. v. TPI*.¹ Schahin relied on a footnote in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*,² which expressed doubt about the holding in *Winter Storm*. Under New York law, according to that footnote, an "EFT could not be attached because EFT's are the property of neither the sender nor the beneficiary while present in an intermediate bank."³

In affirming *Winter Storm*, this court expressed reluctance to overrule a prior Second Circuit decision in the absence of an intervening Supreme Court decision. The court also wrote that the question in *Aqua Stoli* was not whether EFT's could be attached; rather, the question was what is the correct standard for vacatur of an attachment pursuant to Rule E(4)(f). In addition, the Second Circuit wrote that the footnote cited by Schahin acknowledged that federal law—not New York law—governed the question of who owns EFT's as they pass through an intermediary bank. Even if New York law applied, the court reasoned, Article 4-A of New York's Uniform Commercial Code merely provides that intermediate banks need not act with respect to process served upon them and that the property interest in the EFT does not vest in the intermediary bank. Since the court held that New York law did not apply, the court did not address Consub's argument that Schahin retained control over the EFT while it was in transit. Notably, the court also did not address the issue of whether EFT's en route to a defendant are subject to a Rule B attachment.

Schahin also argued that the forum selection clauses precluded Consub from seeking a Rule B maritime attachment in New York. Both agreements contained forum selection clauses that provided for the application of English law in English courts. Schahin argued that clauses like "in relation" and "in connection with" demonstrate that the forum selection clauses applied to any dispute relation to the agreements, and not just disputes concerning the merits. Although the Second Circuit agreed with Schahin that each agreement is subject to jurisdiction in English courts, the court held that a Rule B prejudgment attachment "does not fit neatly" into the plain language of the clauses.⁴

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¹ 310 F.3d 263 (2002) (holding that funds in the hands of an intermediary bank pursuant to an EFT are the property of the originator and are therefore subject to a Rule B maritime attachment); see also *U.S. v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) (holding that proceeds of an illegal drug sale being routed electronically through intermediary banks in New York are subject to attachment by the government).

² 460 F.3d 434, 446 n. 6 (2d Cir. 2006).

³ *Id.*

⁴ *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 631 (9th Cir. 1982).