DEVELOPMENTS CONCERNING RULE B ATTACHMENT IN NEW YORK AND RELATED ISSUES

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BACKGROUND

Maritime attachment under U.S. law is an extraordinary remedy which permits pre-judgment seizure of a defendant's property. The maritime attachment remedy was approved by the Supreme Court as early as 1825 (in which the Court, at that early date, recognized the remedy as already a long-standing practice) and is now embodied in Rule B of the Supplemental Rules for Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. The attachment remedy has long been a part of maritime practice, and traditionally the practice has been exercised to a greater extent in the Southern District of New York than elsewhere, but largely due to two factors - the approval of the restraint of wire transfers by the Second Circuit Court of Appeals and the sudden and dramatic economic downturn in the shipping industry, there has recently been a very significant increase in the number of Rule B filings in New York.

RULE B REQUIREMENTS

Rule B permits a maritime claimant to seize a defendant's property within a particular judicial district, provided certain preconditions are met. The claimant must have a claim that sounds in admiralty, must be *in personam* against the defendant, the defendant cannot be "found" within the judicial district in which the application is made, and the defendant must have attachable property in the district in which the application is made.

For purposes of the Rule, a defendant is "found" within the judicial district if the defendant is subject to personal jurisdiction (essentially, the defendant is "doing business" within the district) **and** the defendant has an agent for service of process within the judicial district. When either of these factors is absent, the defendant is not "found"

and property of the defendant located within the district is subject to seizure. Under the rule, "property" is broadly defined as all assets in which the defendant has an interest, tangible or intangible. Accordingly, attachable property includes traditional maritime assets such as vessels, bunkers and cargo, as well as other assets such as bank accounts, accounts receivable, debts, and other "intangibles" such as electronic funds transfers, or EFTs. For reasons that are largely historical in basis, real estate carmot be attached under Rule B.

PROCEDURE

The procedure for obtaining an attachment 1s relatively simple and the requirements are quite minimal. To obtain an attachment, a claimant need only file a verified complaint and an affidavit (normally executed by counsel) establishing that: **(!)** the cause of action is within the court's admiralty and maritime jurisdiction; (2) the defendant carmot be "found" within the district; and (3) the defendant has, or shortly will have, assets within the judicial district.

One of the few requirements of a Rule B that rises above the standards set for other federal actions is the requirement under Rule E(2)(a) to plead the allegations of the complaint "with particularity". This is generally held to mean that mere notice pleading consistent with Rule 8 is insufficient.

Significantly, Rule B attachments are granted *ex parte* – with no advance notice given to the defendant – and except in certain circumstances, courts generally do not review the merits of the underlying claim at the time when the attachment order is issued. Indeed, a Rule B action can be filed in the United States to obtain security for a claim which is proceeding between two foreigners subject according to their contract to foreign

law in a foreign venue (such as via London arbitration), even if the events giving rise to the claim, and the parties themselves, had no contacts at all with the United States. Any assets that are restrained pursuant to the order of attachment are simply held pending a later resolution of the underlying claim in the appropriate forum. When the forum hearing the merits of the dispute is an arbitral tribunal, Title *9* of the U.S. code authorizes the placement of the Rule B security proceeding on the court's inactive, or "suspense" docket.

The *ex parte* nature of the relief of Rule B is balanced by the protections under companion Rule E. Ru1e E(4)(f) provides that "any person claiming an interest in [the attached property] shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the…attachment should not be vacated…." This provision is designed to satisfy US. constitutional requirements of due process so that the defendant is given a fair opportunity to contest the seizure, the amount of the security demanded, or any other alleged deficiency in the proceedings. Prior to its incorporation into Rule E(4)(f), this post-attachment hearing existed as a local rule of the Southern District of New York. Every Circuit Court that has heard a challenge to Rule B on due process grounds has held that the post-attachment hearing guaranteed by Rule E(4)(f) appropriately satisfies due process concerns.[1]

The post-attachment hearing is not intended to resolve the underlying claim or dispute between the parties, but only to make a determination regarding whether the

[1] The substantive due process argument has been raised again recently, with a defendant arguing that the use of Rule B to capture EFTs moving through the district and the exercise of jurisdiction to the extent of those EFTs violates the defendant's due process rights. That argument was defeated at the district court level, but has not been decided at the appellate level. *See* Seatrek Trans Pte Ltd. v. Regalindo Res. Pte Ltd., No. 08-cv-0551 (LAP) (S.D.N.Y. 2008); DSND Subsea AS v. Oceanografia. S.A. de C.V., 569 F.Supp.2d 339 (S.D.N.Y. 2008). That said, the issue has recently been certified for consideration by the Second Circuit, which is currently evaluating whether it will consider the issue on a full appeal.

attachment was properly ordered and complied with the requirements of the rules. Aqua Stoli Shipping Ltd. v. Gardner Smith Ptv. Ltd., 460 F.3d 434, 435, 437 (2d Cir. 2006).

The relief granted by Rule B is also somewhat balanced by the defendant's right to seek countersecurity under Rules E(2) (for costs) and E(7) (for counterclaims). Under Rule E(7), a defendant who has first given security to the plaintiff is entitled to seek countersecurity for any counterclaim it might have against the plaintiff arising out of the same transaction or occurrence as the main claim. The court has discretion on whether to order the posting of countersecurity, and if so, in what amount. Result Shipping Co. Ltd. v. Ferruzzi Trading USA Inc., 56 F.3d 394, 399-400 (2d Cir. 1995).

Often, the court will try to strike a balance between the parties so that if, for example, the plaintiff has through Rule B secured 50% of its claim against the defendant, the defendant will obtain security for 50% of its counterclaim against the plaintiff. The appeal of this type of balance is that it discourages a race to the courthouse by a party with a small claim so as to try to limit the amount of countersecurity that can be obtained by the later-filed counterparty. Under this balanced arrangement, the advantage of being the first to file is significantly limited. There is, however, a difference in the verbiage between Rule B and Rule E(7) such that an argument could be made that Rule B allows for pre-judgment restraint by the plaintiff "up to the amount sued for" (which can include awardable fees and costs of London arbitration, for example), but that Rule E(7) is limited to just the amount of the defendant's "damages" as alleged in the counterclaim itself *(i.e.,* excluding such awardable fees and costs). Compare:

Rule *B(1)(*a)	**Rule E(7)(a)**
"...a verified complaint may contain a prayer for **process** to attach the defendant's tangible or intangible property -up to the amount sued for – in the hands of garnishees named in the process."	"...a plaintiff for whose benefit the security has been given **must** give security for damages demanded in the counterclaim..."

Ultimately with respect to countersecurity, though, the court has discretion not only as to whether or not to require the posting of countersecurity, but also the amount. As with the initial Rule B application, the court will not delve deeply into the merits of the counterclaim, and generally speaking, unless the plaintiff can demonstrate that the counterclaim is patently frivolous, countersecurity will be awarded. The impecunity of a plaintiff will not necessarily prevent the issuance of an order requiring the posting of countersecurity, and the Southern District of New York has consistently held that a penalty for failing to provide countersecurity – a prohibition on proceeding with the plaintiffs main claim – can be applied extraterritorially, precluding the plaintiff from proceeding with its claim on the merits, such as in London arbitration. Failure to comply can be treated by the court as contempt.

RECENT RISE IN THE USE OF THE RULE B PROCEDURE

Rule B has long been an extremely effective and commonly-used remedy for maritime practitioners, especially in New York. However, the recent proliferation of Rule B filings is far beyond anything which has previously been seen. This increase in Rule B filings, which by some counts place as l/3 of all filings in the Southern District of New York, was prompted by the economic downturn in the shipping industry that saw freight rates fall as much as 90% or more in a very short time period, and was facilitated by court rulings which permitted the attachment of electronic funds transfers (EFTs) which passed through New York banks.

Faced with the disruptions caused by the seizure of EFTs, defendants seeking to avoid the attachment of their funds, and banks saddled with administering the significant

number of attachments, argued that EFTs should not be considered "attachable property" within the meaning of Rule B.

These arguments were based on state law which immunized banks from complying with orders of attachment of EFTs if the bank was acting as an intermediary transferor with respect to the funds. In Consub Delaware LLC v. Schahin Engenharia Limitada, the Second Circuit rejected these state law arguments, holding that EFTs remain subject to attachment under Rule B. 543 F.3d 104 (2d Cir. 2008).

Predictably, defendants have tried many avenues to avoid attachments, including challenges to the merits of the underlying claim and arguments that plaintiffs should be required to prove a "need" for security (as is common under many state law attachment procedures) as a prerequisite to obtaining an attachment. Challenges to the merits of the underlying claim generally fail, as the court – if it will not be hearing the merits of the dispute between the parties – leaves such issues to the forum that will hear the arguments on the merits. Such challenges to the merits only truly stand any chance of success if the plaintiffs claim is demonstrably frivolous, or if the amounts sought to be restrained carmot be demonstrated to any reliable degree (this latter challenge, if successful, often results in a diminution of the attachment quantum and not necessarily the vacature of the attachment *in toto).*

The "need" argument split the Southern District of New York for approximately a year, with about half of the judges upholding a requirement to demonstrate "need" for the attachment and vacating attachments against companies that appeared to be solvent and long-standing, and about half of the judges holding that there was no such requirement to demonstrate "need" under Rule B and so the court lacked discretion to vacate on the basis

of "no need" for an attachment absent something truly "unfair". The second group of judges ultimately was proven correct by the Second Circuit in Aqua Stoli, and this argument has largely been put to rest.

One tactic frequently employed by parties anticipating that they will soon be defendants in a Rule B action is to register in New York. As explained above, a Rule B attachment is only available where the defendant cannot be found" in the district. Many companies have tried to defeat this requirement by establishing a presence in New York by registering with the New York Secretary of State to do business as a foreign business entity and by appointing an agent for service of process in the Southern District of New York. Under New York state law, such registration means that the party is doing business throughout the state (whether or not any actual business anywhere in the state is actually being conducted). Only in one case – in a decision issued by a magistrate judge that since its issuance was roundly criticized as an incorrect decision – ever held that such registration was insufficient to prevent a Rule B attachment. This issue was ultimately settled at the appellate level on March 19, 2009 when the Second Circuit decided STX Panocean CUK) Co. Ltd. v. Glory Wealth Shipping Pte. Ltd., 560 F. 3d 127 (2d Cir. 2009), holding that registering with the Secretary of State is sufficient to prevent the issuance of a Rule B attachment. Thus, registration plus appointment of an agent should prevent the issuance of any new Rule B orders against the registering company.

Of course, registering to do business with the Secretary of State is not without consequences. Any entity that registers to do business in New York is consenting to the general jurisdiction of all courts in New York for any claim (whether maritime or not). Registration will not act as a waiver of the benefit of any forum selection clause

contained in any applicable contract and will not prevent a party from asserting a defense based on *forum non conveniens*, but registering will waive any personal jurisdiction defense which might otherwise be available. Also, there are tax implications. The extent of the tax implications are beyond the scope of this paper, but certainly, an entity which registers to do business in New York will be responsible for the payment of taxes on any income earned in New York and will be required to file an annual tax return and pay a franchise tax, whether income is earned in New York or not. An entity considering registration with the Secretary of State to avoid Rule B would be well-advised to consult with a tax attorney and/or accountant first. Registering also has a substantial post-judgment collection consequence under a recent New York decision, as will be discussed further below.

Some defendants will also seek to avoid Rule B restraint of their EFTs by establishing a "paying agent". The paying agent is typically a separate corporation with a totally unrelated name (sometimes created in a jurisdiction foreign to the defendant) which makes and receives payments for and on behalf of the defendant. In order for this measure to be effective for the defendant in making payments and in receiving payments, though, the name must be circulated to anyone and everyone currently doing business with the defendant, because otherwise those expecting payment will be unable to trace payments received and those who need to make payments will need to pay the new entity. The end result is that the name of the paying agent soon becomes known in shipping circles and a good private investigative service can (for a fee) generally find the identity of the paying agent. Given sufficient evidence that there is a paying agent relationship, judges in the Southern District ofNew York generally allow Rule B to extend to paying

agents. Sometimes enough of a relationship exists between the defendant and another corporation that an allegation of *alter ego* can be supported. If so, then judges in the Southern District of New York will also generally allow Rule B to extend to such alleged *alter egos.* Under federal law in New York, to support an allegation of *alter ego,* the plaintiff needs to show **either** domination and control of one entity by the other ***Q!*** fraud. Again, as with paying agents, generally a good investigative service can determine the name(s) of the defendant's *alter ego(s)* and perhaps provide some evidence of the nature of the relationship between the entities.

ADDITIONAL REQUIREMENTS IMPOSED BY JUDGES AND RESULTING CONFUSION

In addition to the efforts of defendants to combat the use of Rule B to restrain EFTs moving through New York, a number of district judges have developed their own procedures and imposed restrictions on the use of the attachment remedy. For instance, many judges now include provisions in the attachment orders establishing a deadline for the attachment of funds. If no funds are attached within the allotted timeframe, then the attachment order expires by its own terms. Similarly, many attachment orders now contain deadlines for the commencement and prosecution of the underlying claim, and if those proceedings are not commenced or progressed within the deadline, the attachment order can be (and often is) vacated. With regard to the first of these provisions, there is some logical sense to the imposition of a date by which property must be restrained – one required allegation in obtaining a Rule B attachment is that the defendant's property is (or will shortly be) within the district. If funds or other property cannot be captured within, say, 120 days, then perhaps the same is reasonable evidence that the defendant's property

is not within the district. Of course, it could also mean that the defendant is simply very adept at hiding its assets.

The other provision – a requirement that an action on the merits be commenced within a certain period of time (some judges, without any basis in the rule or in any decisional law, hold that the proceeding on the merits must be commenced *before* an application for an attachment can be granted[2]) seems harder to justify because it is not tied in any way to any requirement under Rule B or Rule E. Such a requirement seems particularly unjust when a maritime plaintiffs time to bring its claim on the merits could be far longer under the applicable law of the forum where the parties agreed to have their dispute decided than the New York judge has allowed in the attachment order (and may seem even more unjust if the case is complex and if there is a very real concern about being able to collect at the conclusion of the case on the merits). However, as might be expected, the ease with which a Rule B attachment can be obtained lends the remedy subject to abuse, and the court has been mindful of this in imposing such restrictions. For example, cases in which a party has obtained an attachment, restrained property, and then never pursued the case (or extremely belatedly pursued the case) on the merits are not uncommon. In the absence of some restriction on the commencement of the action on the merits, a party could potentially use Rule B for unfair and improper leverage.

District court judges have also imposed restrictions on the marmer in which orders of attachment can be served on banks. The routine practice has been to allow an agent of the law firm representing the plaintiff to serve the banks initially in person but to then continue with subsequent daily service by fax or email. This practice fostered the cost-

[2] Indeed, with regard to cases in which the merits will be heard in a foreign arbitral tribunal, 9 U.S.C. §8 arguably gives maritime plaintiffs the right to commence a proceeding on the merits via attachment in a proceeding here.

effective use of Rule B to capture EFTs moving through New York. Recently, however, certain judges have ruled that daily service of the attachment order can only be made by personal service which is more costly than daily fax/email service. One judge has even imposed a further restriction, ordering that the attachment order must be served by the U.S. Marshal, rather than by an agent (as is specifically allowed under Rule B(l)(d)(ii)). This adds costs and creates uncertainty regarding the timely service of the attachment order since the Marshal's office does not have staff dedicated to Rule B service and due to other constraints upon the Marshal's office and its schedule, the Marshal may not be able to effect service in a timely manner on a daily basis. Such a restriction arguably imposes an unfair prejudice against the plaintiff.

An issue that has arisen, like Lazarus from the dead, is whether EFTs may be captured by Rule B both going to and coming from a defendant. Winter Storm Shipping Ltd. v. **TPI,** 310 F.3d 263 (2d Cir. 2002) was a case in which funds coming from a defendant were restrained, and the Second Circuit (reversing the district court) authorized the restraint. Thereafter, a well-reasoned decision was issued, Noble Shipping, Inc. v. Euro-Maritime Chartering Ltd., 2003 U.S. Dist. LEXIS 23008 (S.D.N.Y. Dec. 24, 2003), which held that EFTs, whether going to or coming from a defendant, were attachable property under Rule B. Several decisions, relying on Noble Shipping, followed. The position seemed confirmed by the Second Circuit in Aqua Stoli, which held unequivocally that wire transfers "to or from the defendant" were attachable property. However, in one of the first post-Aqua Stoli decisions, Seamar Shipping Com. v. Kremikovtzi Trade Ltd., 2006 U.S. Dist. LEXIS 83834 (S.D.N.Y. Nov. 1, 2006), the court held that the Second Circuit's use of the words "to or from" with respect to EFTs

was mere *dicta*, pointing to the fact that in Winter Storm, the funds were only issuing from the defendant. The Seamar Court, though, seems to have disregarded the fact that in Aqua Stoli, there were several restraints, some of funds going to the defendant and some coming from the defendant. In so holding that the Second Circuit's decision on this point was mere *dicta*, Seamar held that only EFTs from the defendant were attachable, and the court vacated funds that had been restrained which were being transferred to the defendant in that case. For the next two-plus years, every decision that considered the "to / from" question – and there were many – held that Seamar was incorrect and not to be followed. Indeed, the judge who issued Seamar later modified his own view somewhat. In Penguin Maritime Ltd. v. Lee Muirhead Ltd., 08 cv 6570 (JER), the court initially issued an order limiting Rule B restraints to those involving funds emanating from the defendant, but later-upon an application to reconsider-authorized (at least initially) the restraint of funds in both directions, conceding that the court's predetermination on the issue improperly set the plaintiff against the court instead of against the defendant, and decided that instead the adversarial system should be allowed to run its course on this issue. Peculiarly, with this to / from issue essentially decided and no longer seriously in question at the district level, the Second Circuit in Consub Delaware specifically raised the question-without answering it-of whether funds traveling in both directions were subject to attachment, or if only funds from the defendant were attachable. This led to significant confusion at the district level and now several judges issue "Seamar" attachment orders in which (whether expressly or – supposedly – by implication) only funds from defendants may be attached. Such orders impose a heavier burden on garnishee banks, who now must do more than merely enter the names of Rule B

defendants in their interdiction software – they must now come to a determination as to whether the funds are being transferred to or from the defendant. Even more confusing, the same judge who had issued the decision in Noble which accurately predicted the outcome of Aqua Stoli and which had served as a basis for holding that funds to and from defendants were attachable, forming the basis of more than a dozen consistent decisions on this very issue, has now self-reversed, holding that Aqua Stoli was unclear, that Consub Delaware is similarly unclear, and so only funds from a defendant are attachable. American Steamship Owners Mutual Protection and Indemnity Assoc. Inc. v. Atlantic Oil Maritime S.A., 09 cv 5959 (DLC).

Other judges have imposed other requirements. One judge requires that the client itself verify the complaint (which can be accomplished post-filing via declaration) before the attachment can be considered. Several judges require substantive showings that there will in fact be funds or other property in the district. One of these judges has even gone so far as to deny an attachment for lack of such a showing when the plaintiff demonstrated, using proof provided by the Clerk of Court, that the defendant's funds were being held in the registry of the court (in an actual interest-bearing cash account). Some judges impose filing/reporting requirements every time funds are restrained in addition to the required notice found under Rule B and Local Rule B.2.

Another judge routinely does not issue Rule B attachments. Prodding the court may result in a hearing being held at which the court will hold a discussion with plaintiffs counsel, but ultimately, the attachment does not issue. In one case, where the defendant (post-filing of the Rule B) registered with the New York Secretary of State, that judge denied the attachment application as "moot" since the defendant had registered

and was therefore now "found". This, despite the fact that Rule B was amended (by the Supreme Court with approval by Congress) specifically to make it clear that the time for determining when a defendant was "found" was at the time the attachment application was made. In another recent case with regard to that judge, an application for a writ of mandamus, to require the issuance of the attachment, is pending.

More uncertainty arises from the Rule E(4)(f) hearing. Nowhere in the Federal Rules or in the Supplemental Admiralty Rules is there any instruction on the form the hearing is to take. Case law holds that evidence presented need not necessarily meet the requirements of admissibility under the Federal Rules of Evidence to be considered at such a hearing. Counsel have routinely used their best judgment, based on the special circumstances of the case and the issues to be determined by the court, as to what form the hearing would take, and sometimes counsel will have witnesses testify. In at least two cases so far, though, fact witnesses were flown to New York from distant places for the purpose of testifying at a Rule E(4)(f) hearing but were prohibited from testifying. One judge, ruling from the bench that he would not hear the fact witness that had appeared, said that under his own individual practice rules, witnesses were not permitted to present any direct evidence at hearings or trials. Curiously, though, his individual practice rules say no such thing.

THE "MODEL ORDER"

Early this year, Judge Scheindlin of the Southern District of New York headed a meeting between maritime lawyers, the Southern District of New York's "Judicial Improvements Committee" and the banking industry. The purpose of the meeting was for the bar and the bench, as well as the banks, to have an open dialogue about Rule B

and ways to improve and streamline the Rule B practice. Ultimately, at the invitation of the Judicial Improvements Committee, the maritime bar presented a Rule B "model order" for the court's consideration in EFT cases. Thereafter, after receiving input from the banking industry, the Judicial Improvements Committee put out a model order of its own on April 4, 2009 and suggested it be used in all future Ruie B cases in the Southern District of New York. A copy of the "Model Order" is attached as an exhibit to this paper.

The model order is by no means a model of perfection, let alone clarity. There has already been a case in which the model order was issued, plaintiffs counsel attached funds consistent with the order, notified the court of the attachment and of counsel's understanding of the order justifying restraints "to and from" the defendant. The court vacated the attachment on the to *I* from issue, and the court even held a hearing as to whether or not sanctions should be imposed based on what the court felt was a deliberate attempt to obtain an extrajudicial attachment not authorized under the so-called "express wording" of the model order. Ultimately, sanctions were not imposed, in part because the order was not so clear as the judge believed it to be and in part because the Second Circuit issued a stay on the vacature of the attachment pending further determination at the appellate level.

The Balkanized view of the bench toward Rule B is reflected in the various "options" in the order. The model order provides, *inter alia,*

1. For service by the U.S. Marshal;
2. That the banks may charge a "reasonable fee" in the bank's discretion, for "processing" a Rule B attachment order;

3. That supplemental process may not be issued without further order of the court;
4. That the plaintiff must advise the court within 5 days of attaching any funds;
5. That the parties must agree to alternative security or deposit of attached funds into the court registry, and that if the parties cannot agree the case will be dismissed without prejudice to reopening for further necessary proceedings;
6. That the order will automatically expire after 60 or 90 days; and
7. That the attachment will automatically expire after 45 days if the plaintiff has not commenced substantive proceedings on the underlying claim.

It is perhaps not surprising nnder these circumstances that use of the model order by the 44 judges of the Southern District of New York is anything but universal. Indeed, very few judges actually use the model order at all, and many of those who do use it regularly modify it quite substantially. Even the model order has not been put to universal use, the very fact that it was developed is clear evidence of the strain felt by the judges in the Southern District of New York as they have sought to deal with the "flood" of Rule B cases. It is believed that the model order's use will inevitably lead to future disputes between litigants and the banks with regard to timing of service, the bank's due diligence to match the attachment order and the process of maritime attachment and garnishment with any EFTs passing through their funds transfer systems, as well as the "reasonable fee" provision – which has not been interpreted uniformly by the banks as yet – with some imposing no charge, others a fee as high as $300 per case, and still others indicating they will impose a fee of$125 per service (this last, which essentially imposed a $125 per day fee, has recently been struck down).

These judge-made requirements have created obstacles to the effective use of Rule B. Incredibly, many of these judge-made requirements have actually ***increased*** the litigation burden on parties and the court. Further, the imposition of significantly different requirements by different judges has created the anomalous result that the requirements for obtaining a Rule **B** attachment differ depending on the judge assigned to the particular case. This result becomes extremely unjust when two Rule B plaintiffs are seeking attachments against the same defendant- the Rule B plaintiff who draws a judge more antagonistic to Rule **B** is at a decided disadvantage vis-a-vis the Rule B plaintiff who drew the more Rule B friendly judge.

A FINAL WORD ABOUT POST-JUDGMENT COLLECTION

In New York, Rule B is a strictly pre-judgment remedy. Once judgment is obtained, the remedy cannot be used to restrain EFTs or other property. An interesting new development, though, may allow for New York to become a center for debt collection in any kind of case, maritime or otherwise.

As indicated above, many defendants concerned about the restraint of their EFTs took the anti-Rule B measure of registering to conduct business with the New York Secretary of State. The same subjected those defendants to suit in New York, but many defendants felt that so long as they didn't conduct any actual business in New York, the threat of suit was more theoretical than actual. For the cost of less than $1000 and annual taxes thereafter of a few hundred dollars, they could insulate themselves from Rule B and its disruptive restraint of EFTs and could conduct business as usual without the need to provide prejudgment security.

Enter Koehler v. Bank of Bermuda, Ltd., 101 F.3d 863 (2d Cir. 2009). In Koehler, the Second Circuit, sitting in diversity, held that a judgment creditor (who had a judgment *in personam* against the defendant) could bring a special proceeding against a garnishee bank (or a branch or department thereoJ) to compel that bank to bring the judgment debtor's property which it held abroad (as a bailment) into New York for purposes of collection. In Koehler, the plaintiff had secured judgment in the District of Maryland against the defendant, Dodwell. Dodwell had deposited substantial assets – stock certificates – in the Bank of Bermuda, in Bermuda. Koehler had its Maryland judgment registered in New York and then brought a proceeding against Bank of Bermuda's branch office in New York seeking to compel the bank to bring those assets into New York for purposes of collection. Bank of Bermuda moved to dismiss, citing the bank branch rule, and arguing that its New York branch was entirely separate, but its application was denied in a decision by Judge Haight of the Southern District of New York. That decision was affirmed on appeal.

The result of this ruling is that now there are pending in both federal and state court several "Koehler" actions against defendants who registered to avoid Rule B to recognize and confirm foreign arbitral awards against them or for comity recognizing foreign judgments against them. Once such judgments are entered in New York (or elsewhere), proceedings can be brought against the defendants' banks in order to compel payment in satisfaction of the judgments. Those who sought to avoid payment, and then to avoid prejudgment security via anti-Rule B registration with the New York Secretary of State are now caught because the registration renders them subject to *in personam*

jurisdiction of the Court, and now their banks with offices in New York can be compelled to transfer their assets to New York for collection.

Koehler is still very new and its effectiveness in actually compelling payment remains to be tested. It will be well worthwhile to keep track of decisions by judges in the Southern District of New York who are already very wary of security and collection actions due to the rise in Rule B cases. It remains to be seen whether Koehler actions are more advantageously brought in federal or state court.

CONCLUSION

What is the upshot of these recent developments and what does the future hold for attachment of EFTs in the Southern District of New York? It is too early to draw firm conclusions, but several things seem to be predictable: the banks will continue to push for the elimination of the practice of using Rule B to capture EFTs; certain judges will continue to defend Rule B attachment of EFTs while others will side with the banks; and the New York maritime bar will continue to strive to maintain this ancient remedy and to continue to try to innovate so as to keep the Rule "up to speed" with modem commercial practices.

It seems unlikely that the Supreme Court would grant a writ of certiorari to review Winter Storm or its progeny, since the issue of EFT attachment is so heavily concentrated solely within the Second Circuit, and there is no contrary decisional law of any other circuit on point in existence now (or likely to be in existence anytime soon). Absent an act of Congress, it is likely that EFT attachments will continue, and that the floodgates of new Rule B filings will be affected most by market conditions and new judicial restraints.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2008

(Argued: May 5, 2009 Decided: October 16, 2009)

Docket Nos. 08-3477-cv(L), 08-3758-cv(XAP)

THE SHIPPING CORPORATION OF INDIA LTD.,

Plaintiff-Counter-Defendant-Appellant-Cross-

Appellee, v.

JALDHI OVERSEAS PTE LTD.,

Defendant-Counter-Claimant-Appellee-Cross-

Appellant. Before: FEINBERG, WINTER, and CABRANES Circuit

Judges.

Plaintiff The Shipping Corporation of India, Ltd. ("SCI") appeals from a June 27, 2008 order of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) insofar as it vacated portions of an order of maritime attachment and garnishment entered by the District Court on May 7, 2008, pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B"). Defendant Jaldhi Overseas Pte Ltd. cross-appeals from the same June 27, 2008 order insofar as it denied defendant's motion for counter-security for various counterclaims pending in arbitration on the grounds that SCI, as an alleged instrumentality of the government of India, was entitled to immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C.

§§ 1602-1611. We hold that electronic fund transfers ("EFTs") being processed by an intermediary

of the Court in active service, we overrule Winter Storm Shipping, Ltd. v. TPI, 310 F.3d 263, 278 (2d Cir. 2002), to the extent that it is inconsistent with this opinion. Accordingly, we affirm the order of the District Court vacating those portions of its maritime attachment affecting EFTs of which defendant was the beneficiary. We remand the cause to the District Court for further proceedings consistent with this opinion with respect to the remaining portions of the attachment order affecting EFTs of which defendant was the originator. In addition, we decline to consider defendant's cross-appeal regarding a claim for counter-security as it is likely moot.

Affirmed in part, vacated in part, and remanded.

JEREMY J. O. HARWOOD, Blank Rome LLP, New York, NY, for plaintiff-counter-defendant- appellant-cross-appellee The Shipping Corporation of India Ltd.

RAHUL WANCHOO, Glen Rock, NJ, for defendant-counter-claimant-appellee-cross-appellant Jaldhi Overseas Pte Ltd.

Bruce E. Clark, (H. Rodgin Cohen, Michael M. Wiseman, Laurent S. Wiesel, Scott A. Rader, of counsel), Sullivan & Cromwell LLP, New York, NY, for Amicus Curiae The Clearing House Association L.L.C.

JOSÉ A. CABRANES, Circuit Judge:

This case is based on a dispute between a company incorporated in India and a company incorporated in Singapore over an accident that occurred in India while one company was shipping products to China; the dispute was to be arbitrated in England. Because the parties' banks had

accounts in New York banks, electronic fund transfers ("EFTs")[1] between one party involved in the dispute and third parties passed through New York electronically for an instant. Under Winter Storm

[1] We explained the operation of EFTs in United States v. Daccarett, 6 F.3d 37, 43-44 (2d Cir. 1993) and paraphrase that explanation here:

> An EFT is nothing other than an instruction to transfer funds from one account to another. When the originator and the beneficiary each have accounts in the same bank that bank simply debits the originator's account and credits the beneficiary's account. When the originator and beneficiary have accounts in different banks, the method for transferring funds depends on whether the banks are members of the same wire transfer consortium. If the banks are in the same consortium, the originator's bank debits the originator's account and sends instructions directly to the beneficiary's bank upon which the beneficiary's bank credits the beneficiary's account. If the banks are not in the same consortium—as is often true in international transactions—then the banks must use an intermediary bank. To use an intermediary bank to complete the transfer, the banks must each have an account at the intermediary bank (or at different banks in the same consortium). After the originator directs its bank to commence an EFT, the originator's bank would instruct the intermediary to begin the transfer of funds. The intermediary bank would then debit the account of the bank where the originator has an account and credit the account of the bank where the beneficiary has an account. The originator's bank and the beneficiary's bank would then adjust the accounts of their respective clients. See Amicus Br. 9-11.
>
> To more concretely illustrate the circumstances of the instant case, consider the following example: ABC Shipping wants to transfer $100 to XYZ Overseas. ABC has an account at India National Bank, and XYZ has an account at Bank of Thailand. India National Bank and Bank of Thailand do not belong to the same consortium, but each has an account at New York Bank. To begin the transfer, ABC instructs India National Bank to transfer $100 to XYZ's account at Bank of Thailand. India National Bank then debits ABC's account and forwards the instruction to New York Bank. New York Bank then debits India National's account and credits Bank of Thailand's account. Bank of Thailand then credits XYZ's account, thereby completing the transfer.
>
> We refer to the transferor in an EFT as the "originator" and the transferee as the "beneficiary." References to "a defendant" or "defendants" generally— as opposed to specific references to Jaldhi Overseas Pte Ltd.—indicates the party, whether originator or

beneficiary, whose property is the object of a Rule B attachment.

Shipping, Ltd. v. TPI, 310 F.3d 263, 278 (2d Cir. 2002), this momentary passage was sufficient to vest

jurisdiction in the United States District Court of the Southern District of New York.

We are now presented with the question of whether the rule of Winter Storm should be reconsidered and, upon reconsideration, overruled. Specifically, this appeal raises the issue of whether EFTs of which defendants are the beneficiary are attachable property of the defendant pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B" of "the Admiralty Rules")[2] under our decisions in Winter Storm, 310 F.3d at 278, Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd., 460 F.3d 434, 436 (2d Cir. 2006), and Consub Delaware LLC v. Schahin Engenharia Limitada, 543

F.3d 104, 109 (2d Cir. 2008). We now conclude, with the consent of all of the judges of the Court in active service, that Winter Storm was erroneously decided and therefore should no longer be binding precedent in our Circuit.[3]

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[2] Rule B(1)(a) of the Admiralty Rules states, in relevant part:

> If a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

Fed. R. Civ. P. Supp. R. B(1)(a).

[3] For clarity, we pause to note that by overturning Winter Storm, we also abrogate any decision insofar as it has relied on Winter Storm, specifically, Consub Delaware LLC v. Schahin Engenharia Limitada, 543 F.3d 104 (2d Cir. 2008).

Our decision in Winter Storm produced a substantial body of critical commentary. Indeed, within four years of our decision, we ourselves had begun to question the correctness of Winter Storm, see Aqua Stoli, 460 F.3d at 445 n.6 ("The correctness of our decision in Winter Storm seems open to question . . . ."), as have, more recently, some judges of the United States District Court for the Southern District of New York, see e.g., Hannah Bros. v. OSK Mktg. & Commc'ns, Inc., 609 F. Supp.

2d. 343, 352 n.3 (S.D.N.Y. 2009) ("The discussion above also underscores a point that has become conventional wisdom in this district—that Winter Storm and Aqua Stoli may merit reconsideration . . . ." (emphasis added)). Various commentators and courts have suggested that Winter Storm directly led to strains on federal courts and international banks operating within our Circuit. See, e.g., Permanent

Editorial Bd. for the Uniform Commercial Code, PEB Commentary No. 16: Sections 4A-502(d) and 4A-503, at 5 n.4 (July 1, 2009) ("PEB Commentary") ("[T]he Winter Storm approach is proving to be practically unworkable."). And some have even suggested that Winter Storm has threatened the usefulness of the dollar in international transactions. See generally id. ("[T]his explosion of writs creates an additional threat to the U.S. dollar as the world's primary reserve currency and New York's standing as a center of international banking and finance."); see also Lawrence W. Newman & David Zaslowsky, Is There Finally a Backlash Against Rule B Attachments?, 241 N.Y. L.J. 3 (2009) ("[W]hen lawyers are advising their clients that the best way to avoid Rule B attachments is to

conduct maritime and perhaps other transactions in a currency other than U.S. dollars, there are

emerging risks of a significant reduction in the use of the dollar as the dominant currency of international commerce.").

The unforeseen consequences of Winter Storm have been significant. According to amicus curiae The Clearing House Association L.L.C.—whose members are ABN AMRO Bank N.V.; Bank of America, National Association; The Bank of New York Mellon; Citibank, National Association; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, National Association; UBS AG; U.S. Bank National Association; and Wells Fargo Bank, National Association—from October 1, 2008 to January 31, 2009 alone "maritime plaintiffs filed 962 lawsuits seeking to attach a total of $1.35 billion. These lawsuits constituted 33% of all lawsuits filed in the Southern District, and the resulting maritime writs only add to the burden of

800 to 900 writs already served daily on the District's banks." Amicus Br. 3-4. Judge Scheindlin recently outlined the effect of Winter Storm on international banks located in New York:

> This Court was recently informed that, currently, leading New York banks receive numerous new attachment orders and over 700 supplemental services of existing orders each day. This is confirmed by the striking surge in maritime attachment requests in this district, which now comprise approximately one third of all cases filed in the Southern District of New York. As a consequence, New York banks have hired additional staff, and suffer considerable expenses, to process the attachments. The sheer volume . . . leads to many false "hits" of funds subject to attachment, which has allegedly introduced significant uncertainty into the international funds transfer process.

Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group, 613 F. Supp. 2d 426, 431-32 n.7 (S.D.N.Y. 2009) (citation omitted).

Our holding in Winter Storm not only introduced "uncertainty into the international funds transfer process," id., but also undermined the efficiency of New York's international funds transfer business. As the Federal Reserve Bank of New York noted in its amicus curiae brief in support of the motion for rehearing en banc by the defendant in Winter Storm, "efficiency is fostered by protecting the intermediary banks; justice is fostered by expressly telling litigants where the process should be served. . . . [Winter Storm] disrupt[ed] this balance and threaten[ed] the efficiency of funds transfer systems, perhaps including Fedwire." Amicus Br. of Federal Reserve Bank of New York 9, Winter Storm, 310 F.3d 263 (No. 02-7078). Undermining the efficiency and certainty of fund transfers in New York could, if left uncorrected, discourage dollar-denominated transactions and damage New York's standing as an international financial center. See, e.g., PEB Commentary 6 n.4 ("Winter Storm and its progeny have had a far greater, and damaging, potential impact on U.S. and foreign banks
located in New York than might have been anticipated."); Newman & Zaslowsky, 241 N.Y. L.J. at 3.

Overturning Winter Storm will dramatically affect the law of maritime attachments in our Circuit, but we must not overstate the practical effect of our holding in this case. Since we decided Winter Storm, decisions in both our Court and in the Southern District of New York have cabined Winter Storm to minimize its effects on the courts and banks of New York without overturning Winter Storm directly. See, e.g., STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd., 560 F.3d 127,
133 (2d Cir. 2009); Cala Rosa, 613 F. Supp. 2d at 432; Marco Polo Shipping Co. Pte v. Supakit Prods. Co., No. 08 Civ. 10940, 2009 U.S. Dist. LEXIS 19057, at *4 (S.D.N.Y. Mar. 4, 2009). Although these cases have further complicated the law of Rule B attachments, they have also limited the reach of Winter Storm and thus necessarily limited the effect of our decision in the

instant case.

In STX Panocean, we recently held that by merely registering as a domestic corporation with the New York Secretary of State, a defendant is "found" within the district for the purposes of Rule B attachment. 560 F.3d at 133. Because Rule B provides for attachment of defendant's property that is found within the district only if the defendant itself is not found within the district, our ruling in STX Panocean allows an international firm to avoid having its property—including property other than EFTs—attached simply by registering as a domestic corporation in New York State. Although the implications of STX Panocean are unknown, it would not be surprising if many international firms that engage in dollar-denominated transactions register in New York State to avoid attachment of their property.

In Cala Rosa, Judge Scheindlin denied a maritime plaintiff's request for "continuous service" of an attachment on banks—a decision that, if upheld on appeal, would likely further limit the usefulness of attachments of EFTs. 613 F. Supp. 2d at 432. In light of our decision in Reibor International Ltd. v. Cargo Carriers Ltd., 759 F.2d 262, 266 (2d Cir. 1985), which held that an attachment is void unless a garnishee actually "possesses" defendant's property when the attachment is served, and the instantaneous nature of most EFTs, Judge Scheindlin's decision renders many maritime attachments effectively unenforceable. As Judge Scheindlin explained:

> Many courts, including this one, have noted that in light of Reibor a continuous service provision is necessary, in practice, to allow attachment of EFTs. That is no doubt true. But Reibor provides the proper response to this concern: the New York "rule works, to be sure, to the detriment of an attaching creditor, but that is simply the way the law was intended to operate."
>
> Many courts have also expressed concern that in the absence of a continuing service provision, plaintiffs will post process servers at bank offices around the clock in an attempt to capture EFTs at the precise moment of their arrival. I agree that this is likely and that this would be highly disruptive to New York banks. Accordingly, I decline to specially appoint any plaintiff-designated process servers. As a result, pursuant to Rule B(1)(d)(ii), I authorize only the United States Marshals to serve the process and any supplemental process.

> Plaintiff expresses concern that this will impose an undue burden on the United States Marshals. Plaintiff's concern, though appreciated, is overstated: nothing requires the Marshals to repetitively serve the banks with attachment orders around the clock. Further, plaintiff's duty to bear the costs of Marshal-served processes will help limit the Marshals' workload.

Cala Rosa, 613 F. Supp. 2d at 432 (footnotes omitted) (quoting Reibor, 759 F.2d at 268). A Circuit-wide decision rejecting a continuous service provision in the case of the attachment of EFTs would arguably limit the reach of Winter Storm.

Finally, in Marco Polo, Judge Koeltl recently required a "plausible" showing that defendant's funds were actually passing through Southern District of New York, as opposed to hypothetically passing through the Southern District. See 2009 U.S. Dist. LEXIS 19057, at *4. Judge Koeltl noted that "[t]he fact that the defendant is still actively doing business and at some point in the past has conducted its business in United States dollars may mean that the defendant could transfer funds through a New York bank in the future, but it hardly makes it plausible that it actually will." Id. at

*5. By requiring more than a hunch to obtain an attachment, Judge Koeltl further limited the usefulness of attachment of EFTs sanctioned by Winter Storm.

Taken together, these cases may have limited the practical usefulness of our holding in Winter Storm to plaintiffs and thus may also have reduced the practical effects of overturning that decision. This is not to say that we take our decision to overturn Winter Storm lightly but, rather, that we seek to allay any concerns that the decision in this case is wholly unanticipated, surprising, or disruptive to ongoing financial practices. In doing so, we recognize a trend toward limiting maritime attachments of EFTs in our Circuit and take this opportunity to definitively untangle the doctrinal knot created by Winter Storm and its progeny.

BACKGROUND

In this action, plaintiff The Shipping Corporation of India, Ltd. ("SCI" or "plaintiff") appeals from a June 27, 2008 order of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) insofar as it vacated portions of an order of maritime attachment and garnishment (the "attachment") entered by the District Court on May 7, 2008, pursuant to Rule B. Specifically, the June 2008 order vacated the attachment of EFTs sent from third parties not involved in this litigation to defendant Jaldhi Overseas Pte Ltd. ("Jaldhi" or "defendant") in the amount of $3,533,522.

Jaldhi cross-appeals from the same June 27, 2008 order insofar as it denied Jaldhi's motion for counter-security for various counterclaims to be arbitrated in London on the ground that SCI, as an alleged instrumentality of the government of India, was entitled to immunity from pre-judgment attachment under the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602-1611 ("FSIA").

On appeal, the parties raise the following issues: (1) whether EFTs of which a defendant is the beneficiary are attachable property of that defendant under our decisions in Winter Storm, 310 F.3d 263, Aqua Stoli, 460 F.3d 434, and Consub Delaware, 543 F.3d 104; and (2) whether SCI is entitled to immunity under the FSIA from pre-judgment attachment of security for Jaldhi's counterclaims to be arbitrated in London.

The relevant factual and procedural history is as follows. In March 2008, SCI chartered its vessel M/V Rishikesh (the "vessel") to defendant to transport iron ore from India to China.[4] Specifically, the charter provided that SCI was to deliver the vessel to Jaldhi on March 29, 2008,

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[4] Although the charter commits the parties to resolve any disputes under English law and by arbitration in London, it is unclear from the record and briefs whether any arbitrations in London were commenced or are ongoing.

"with hull, machinery, and equipment in a thoroughly efficient state." The vessel was delivered to Jaldhi on March 29, 2008, in compliance with the terms of the charter. While in port in Kolkata, India the next day, a crane on board the vessel collapsed, killing the crane operator, halting cargo operations, and causing Jaldhi to place the vessel "off hire," i.e., to suspend the charter.

On May 2, 2008, SCI issued an invoice to Jaldhi seeking payment of Jaldhi's unpaid balance of $3,608,445. After not receiving payment, SCI filed a complaint in the District Court seeking an ex parte maritime attachment pursuant to Rule B of the Admiralty Rules on May 7, 2008 for the balance, interest, and attorneys' fees for a total of $4,816,218. According to SCI, the vessel came back "on hire" on April 13, 2008, when its cranes passed safety inspections, and therefore Jaldhi owes payments under the charter from that date forward. On May 8, 2008, the District Court entered an ex parte order of Maritime Attachment and Garnishment in the amount of $4,816,218 and noted in its order that the attachment applied

> against all tangible or intangible property belonging to, claimed by or being held for the Defendant by any garnishees within this District, including but not limited to electronic fund transfers originated by, payable to, or otherwise for the benefit of Defendant, whether to or from the garnishee banks or any other electronic funds transfers . . . .

J.A. 15. SCI then filed an amended complaint on May 15, 2008, to adjust the amount attached to reflect additional fees and a $1,260,585 payment from Jaldhi to SCI, bringing the total attachment to $4,689,247. On May 22, 2008, Jaldhi filed a motion to vacate the attachment pursuant to Rule E of the Admiralty Rules[5] and sought counter-security against SCI to cover any damages resulting from

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[5] Rule E of the Admiralty Rules states, in relevant part:

> Whenever property is arrested or attached, any person claiming an 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

the crane accident. By that date, SCI had attached EFTs in the amount of $4,873,404.90. EFTs where defendant was the beneficiary comprised $4,590,678.60 of the total amount attached, with the remainder consisting of EFTs where defendant was the originator.[6] The parties then worked together to release any funds attached in excess of the amount provided in the attachment order.

In a Memorandum Order dated June 27, 2008, Judge Rakoff vacated his May 8, 2008 attachment order insofar as it applied to EFTs of which defendant was the beneficiary. See Shipping Corp. of India, Ltd. v. Jaldhi Overseas PTE Ltd., No. 08 Civ. 4328, 2008 U.S. Dist. LEXIS 49209, at *5 (S.D.N.Y. June 27, 2008). Judge Rakoff based his decision to vacate the attachment order on his own prior decision in Seamar Shipping Corp. v. Kremikovtzi Trade Ltd., 461 F. Supp. 2d 222 (S.D.N.Y.

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these rules.

Fed. R. Civ. P. Supp. R. E(4)(f).

[6] Specifically, EFTs from and to the following parties were seized while they briefly passed through the computer systems of banks located in the Southern District of New York:

Originator	Beneficiary	Amount Restrained
Sesa Goa Ltd	Jaldhi Overseas Ltd	$ 2,377,533.90
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 1,399,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 449,960.00
Sarat Chatterjee & Co.	Jaldhi Overseas Ltd.	$ 269,363.72
Bhusan Power & Steel Ltd.	Jaldhi Overseas Ltd.	$ 93,861.00
		$ 4,590,678.60
Jaldhi Overseas Ltd.	Bridge Oil Ltd.	$ 282,726.35

J.A. 32.

Total	$ 4,873,404.90

2006), in which he had concluded that EFTs en route to a defendant were not attachable under Rule B. See Shipping Corp. of India, 2008 U.S. Dist. LEXIS 49209, at *1-2. He also concluded that SCI was entitled to sovereign immunity under the FSIA, although he did not make any specific findings regarding SCI's sovereign status. Id. at * 3. Noting, however, that there were differing opinions among judges of the Southern District of New York regarding the attachment of EFTs where the defendant is the beneficiary of the transfer, Judge Rakoff certified the matter for appellate review pursuant to 28 U.S.C. § 1292(b).[7] Id. at *2-3 ("Because the determination to vacate the attachment clearly involves a controlling question of law as to which there is substantial ground for difference of opinion, and because an immediate appeal from the order may materially advance the ultimate termination of the litigation, the Court hereby certifies the vacatur for interlocutory appeal . . . ." (internal quotation marks and citation omitted)).

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[7] This statute states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

DISCUSSION

A. Standard of Review

We generally review a district court's decision to vacate a maritime attachment for "abuse of discretion." See, e.g., Consub Del., 543 F.3d at 108; cf. Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008) ("A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or rendered a decision that cannot be located within the

range of permissible decisions." (internal quotation marks, citation, and alterations omitted) (emphasis added)). Because the District Court made a threshold ruling of law before exercising its discretion, our review is de novo. See Aqua Stoli, 460 F.3d at 439.

B. EFTs as Attachable Property

Rule B of the Admiralty Rules permits attachment of "the defendant's tangible or intangible personal property." Fed. R. Civ. P. Supp. R. B(1)(a).[8] From a plain reading of the text, it is clear that to attach an EFT under Rule B, the EFT must both (1) be "tangible or intangible property" and (2) be the "defendant's." Id.

Before we can reach the question presented squarely in this appeal—whether an EFT is defendant's property when defendant is the beneficiary of that EFT—we must first consider the

[8] For a brief overview of the history and purpose of maritime attachments, see Aqua Stoli, 460 F.3d at 437-38.

threshold issue of whether EFTs are indeed "defendant's" property subject at all to attachment under the Admiralty Rules. We first held that EFTs were in fact attachable property under Rule B seven years ago in Winter Storm. Although we have subsequently applied Winter Storm in numerous cases, see, e.g., Consub Del., 543 F.3d 104; Aqua Stoli, 460 F.3d 434, we now conclude, as noted earlier, that Winter Storm was erroneously decided and should no longer be binding precedent in this Circuit.

We readily acknowledge that a panel of our Court is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court," United States v. Wilkerson, 361 F.3d 717, 732 (2d Cir. 2004), and thus that it would ordinarily be neither appropriate nor possible for us to reverse an existing Circuit precedent. In this case, however, we have circulated this opinion to all active members of this Court prior to filing and have received no objection. See, e.g., United States v. Crosby, 397 F.3d 103, 105 n.1 (2d Cir. 2005); Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261, 268 n.9 (2d Cir. 1997).[9]

Our reasons for reversing a relatively recent case are twofold. First, and most importantly, we conclude that the holding in Winter Storm erroneously relied on Daccarett, 6 F.3d 37, to conclude that EFTs are attachable property. Winter Storm, 310 F.3d at 276-78. Second, as noted above, the

[9] We refer to this process as a "mini-en banc." See United States v. Parkes, 497 F.3d 220, 230 n.7 (2d Cir. 2007); see also Jon O. Newman, The Second Circuit Review—1987-1988 Term: Foreword: In Banc Practice in the Second Circuit, 1984-1988, 55 Brook. L. Rev. 355, 367-68 (1989) (noting that judges will occasionally circulate particularly important panel opinions before filing).

effects of Winter Storm on the federal courts and international banks in New York are too significant to let this error go uncorrected simply to avoid overturning a recent precedent.

Beginning in Winter Storm, we have held that "EFT funds in the hands of an intermediary bank" are "subject to Admiralty Rule B attachment." Id. at 278. In that case, plaintiff sought to attach an EFT that originated in defendant's account with the Bank of Ayudhya—based in Bangkok, Thailand—while it was en route to a third party who maintained an account with the Royal Bank of Scotland in London. Id. at 266. The EFT passed through the Bank of New York—the "intermediary bank"—which is headquartered in Manhattan. Id. The District Court vacated the attachment of the EFT because, in its view, the EFT was not "property" within the meaning of Rule B. Id. at 267. Specifically, she concluded that there was no federal law on point and that state law—New York's version of the Uniform Commercial Code—forbade courts from attaching funds in an intermediary bank. See id.; see also N.Y. U.C.C. § 4-A-503.

On appeal, a panel of our Court concluded that relevant federal law indicated that EFTs were indeed "property" that could be attached in a Rule B proceeding and therefore recourse to state law was unnecessary. Winter Storm, 310 F.3d at 278. In a comprehensive opinion, Judge Haight, sitting by designation, offered three reasons to support this decision.

First, the panel observed that Rule B itself—which covers "defendant's tangible or intangible personal property," Fed. R. Civ. P. Supp. R. B(1)(a)—is written in very broad language. "It is

difficult to imagine words more broadly inclusive than 'tangible or intangible.' . . . The phrase is the secular equivalent of the creed's reference to the maker 'of all there is, seen and unseen.'" Winter Storm, 310 F.3d at 276. This broad language, the panel reasoned, sweeps sufficiently far to encompass even ephemeral EFTs.

Second, the panel stated that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment under Rule B." Id. (emphasis added). By extension, the panel reasoned, "[we are un]able to discern in admiralty law or elsewhere a basis for regarding [the defendant's] funds in [the intermediary bank's] hands prior to their electronic transfer to [the beneficiary] as anything other than the funds held by [the intermediary bank] for the account of [the defendant]." Id. Since a defendant's bank account was attachable property, the panel reasoned, the effectively equivalent EFTs should also be attachable property of the defendant.

Third, the panel observed that in Daccarett we had upheld the seizure of EFTs that passed through intermediary banks in New York City, where the EFTs were used by a Colombian criminal cartel to transfer funds from accounts in Luxembourg to accounts in Panama and Colombia. 6 F.3d at 44, 54; see also id. at 55 (holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under the forfeiture statutes"). The seizures in that criminal case were made pursuant to 21 U.S.C. § 881, a penal statute which borrows the procedures

for asserting maritime liens under Admiralty Rule C.[10] The panel reasoned that there was "no principled basis" for applying the procedures outlined in Admiralty Rule C to a seizure of an EFT in a forfeiture action, but not to a maritime attachment under Rule B. Winter Storm, 310 F.3d at 278.

Relying on these three reasons—each of which was based on federal law—the Winter Storm panel concluded that "EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)." Id. Accordingly, the panel had no occasion to look to state law, as Judge Scheindlin had done, to determine whether EFTs were attachable.[11] Id.

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[10] 21 U.S.C. § 881 states, in relevant part:

> (a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:
> . . . .
>
> (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

21 U.S.C. § 881(a)(6); see also id. § 881(b) (requiring property to be seized "in the manner set forth in [18 U.S.C. § 981(b)]"); 18 U.S.C. § 981(b)(2)(A) (permitting a seizure without a warrant where "a complaint for forfeiture has been filed in the United States district court and the court issued an arrest warrant in rem pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims").

[11] Although the panel did briefly discuss New York law, it concluded that New York law was not controlling because federal law—particularly Daccarett—adequately defined the contours of Rule B. See Winter Storm, 310 F.3d at 279.

Upon further consideration, we find Winter Storm's reasons unpersuasive and its consequences untenable. Most importantly, we find that Winter Storm's reliance on Daccarett was misplaced. Daccarett did not decide that the originator or beneficiary of an EFT had a property interest in the EFT; it held only that funds traceable to an illegal activity were subject to forfeiture under 21

U.S.C. § 881. See Aqua Stoli, 460 F.3d at 445 n.6 ("Because Daccarett was a forfeiture case, its holding that EFTs are attachable assets does not answer the more salient question of whose assets they are while in transit."). Under the forfeiture laws, funds can be seized even if they do not constitute property of the defendant because "no property right shall exist in . . . [all] moneys . . . traceable to

[a violation of Title 21, Chapter 13, Subchapter I of the United States Code]." 21 U.S.C. § 881(a). To be eligible for forfeiture, the EFTs needed only to be traceable to the illegal activities, and thus the court in Daccarett was required only to assess whether the EFTs in that case were in fact traceable to illegal activities. No further inquiry into the identity of the owner of the EFTs was necessary—indeed, that question was wholly irrelevant.

For maritime attachments under Rule B, however, the question of ownership is critical. As a remedy quasi in rem, the validity of a Rule B attachment depends entirely on the determination that the res at issue is the property of the defendant at the moment the res is attached. See, e.g.,

Transportes Navieros y Terrestres S.A. de C.V. v. Fairmount Heavy Transp. N.V., 572 F.3d 96, 108 (2d Cir. 2009).

Because a requirement of Rule B attachments is that the defendant is not "found within the district,"

the res is the only means by which a court can obtain jurisdiction over the defendant.[12] If the res is not the property of the defendant, then the court lacks jurisdiction. In contrast, civil forfeiture is a remedy in rem. In rem jurisdiction is based on the well-established theory that the "thing is itself treated as the offender and made the defendant by name or description." California v. Deep Sea Research, Inc., 523 U.S. 491, 501 (1998). Thus, for in rem remedies such as forfeitures, ownership of the res is irrelevant, as the court has personal jurisdiction regardless of who owns the res at issue. Although not considered by the Winter Storm panel, this distinction provides, in our view, a principled basis for allowing EFTs to be subject to forfeiture but not attachment. In sum, Daccarett provides no persuasive guidance on the validity of Rule B attachments of EFTs and should not serve as the foundation for a rule that allows the attachment of EFTs under Rule B.

Without the support of Daccarett, we are unpersuaded that either the text of Rule B or our past maritime holdings relating to defendants' bank accounts compel us to conclude as a matter of

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[12] The "jurisdiction" at issue in a Rule B attachment proceeding is quasi in rem, rather than in personam or in rem. In Rule B attachment proceedings, jurisdiction is predicated on the presence within the court's territorial reach of property in which the Rule B defendant has an interest. See Black's Law Dictionary 857 (7th ed. 1999) (defining quasi in rem as "[j]urisdiction . . . based on [a] person's interest in property located within the court's territory"); see also Restatement (Second) of Judgments § 6 cmt. a, at 73; id. § 8 cmt. a, at 83-84. Because of the requirement that the defendant not be "found" within the district where the action is brought, Fed. R. Civ. P. Supp. R. B(1)(a), Rule B contemplates that a court will lack in personam jurisdiction over the defendant when it orders that a writ of attachment be issued. In such a proceeding, the court's coercive authority is coterminous with the scope of its jurisdiction, and limited to the extent of the defendant's interest in the attached property; that authority does not extend to the exercise of in personam jurisdiction over a Rule B

defendant.

federal law that an EFT is "defendant's . . . personal property." Fed. R. Civ. P. Supp. R. B(1)(a) (emphasis added). Moreover, we are unaware of any historical rationale that justifies the extension of federal maritime common law to support the Rule B practices that have taken place under the rule of Winter Storm. One of the primary grounds for the historical development of Rule B attachments was that "[a] ship may be here today and gone tomorrow." Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 637 (9th Cir. 1982); see also Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. De Navegacion, 732 F.2d 1543, 1547 (11th Cir. 1984) (noting that a "relevant

commercial . . . consideration[ ]" relating to Rule B practices is that "a ship's ability to dock, unload cargo, and fill its hold with goods intended for another destination—all within twenty four hours—imposes tremendous pressure on creditors desiring to attach a vessel or property located aboard"). EFTs, like ships in a port, are transitory. Streamlined Rule B practices, however, developed out of the concern that ships might set sail quickly, not because the courts intended to arm maritime plaintiffs with writs of attachment prior to the arrival of the ship in port. Under Winter Storm, however, maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative

hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period the attachment order is in effect. See, e.g., TJ Shipping & Logistics v.

Havi Ocean, LLC, No. 09 Civ. 1555, 2009 WL 454137, at *2-3 (S.D.N.Y. Feb. 19, 2009). Such practices,

which have increased dramatically since Winter Storm, bear little, if any, relation to the text of Rule B or to our jurisprudence relating to the bank accounts of maritime defendants.

When there is no federal maritime law to guide our decision, we generally look to state law to determine property rights. See, e.g., Reibor, 759 F.2d at 266 (citing California ex rel. State Lands Comm'n v. United States, 457 U.S. 273, 283 (1982)) (considering state law where federal admiralty law is "thin" and "a decision . . . contrary to the general rule of the state might have disruptive consequences for the state banking system" (internal quotation marks omitted)). Accordingly, we now look to state law to determine whether EFTs can be considered a "defendant's" property for purposes of attachment under Rule B.

New York State does not permit attachment of EFTs that are in the possession of an intermediary bank. Specifically, New York law states that "a court may restrain . . . the beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds." N.Y. U.C.C. § 4-A-503; see also id. § 4-A-503 cmt. 1 ("After the funds transfer is completed by acceptance of a payment order by the beneficiary's bank, [the beneficiary's] bank can be enjoined from releasing funds to the beneficiary or the beneficiary can be enjoined from withdrawing funds.").

As for those interested in obtaining the originator's funds, New York law is also clear. Specifically, "a court may restrain . . . an originator's bank from executing the payment order of the originator." Id. § 4-A-503; see also id. § 4-A-502 cmt. 4 ("A creditor of the originator can levy on

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account of the originator in the originator's bank before the funds transfer is initiated . . . . The creditor of

the originator cannot reach any other funds because no property of the originator is being transferred." (emphases added)). Apart from these injunctions, "[a] court may not otherwise restrain [any activity] with respect to a funds transfer." Id. § 4-A-503; see also European Am. Bank v. Bank of N.S., 784 N.Y.S.2d

99, 100-01 (1st Dep't 2009) (noting that attachments served on intermediary banks cannot be enforced); N.Y. U.C.C. § 4-A-503 cmt. 1 ("No other injunction is permitted. In particular, intermediary banks are protected . . . ." (emphases added)).

Finally, an authoritative comment accompanying the New York Uniform Commercial Code states that a beneficiary has no property interest in an EFT because "until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach." N.Y. U.C.C. § 4-A-502 cmt. 4 (emphasis added); cf. Sigmoil Res., N.V. v. Pan Ocean Oil Corp. (Nigeria), 650 N.Y.S.2d 726, 727 (1st Dep't 1996) ("Neither the originator who initiates payment nor the beneficiary who receives it holds title to the funds in the account at the correspondent bank."). Taken together, these provisions of New York law establish that EFTs are neither the property of the originator nor the beneficiary while briefly in the possession of an intermediary bank.

Because EFTs in the temporary possession of an intermediary bank are not property of either the originator or the beneficiary under New York law, they cannot be subject to attachment

under Rule B. As stated earlier, Rule B allows attachment only of "defendant's . . . property." Fed. R.

Civ. P. Supp. R. B(1)(a) (emphasis added). If the EFTs are not the property of either the originator or the beneficiary, then they cannot be "defendant's . . . property " and therefore are not subject to Rule B attachment.[13]

In sum, because there is no governing federal law on the issue and New York law clearly prohibits attachment of EFTs, we conclude that EFTs being processed by an intermediary bank in New York are not subject to Rule B attachment. Accordingly, we conclude that the District Court did not err in vacating the portions of the order in this action affecting EFTs of which defendant was the beneficiary. We remand the cause to the District Court with directions to consider whether there are grounds for not vacating the remaining portions of the attachment order affecting EFTs of which defendant was the originator.

C. Sovereign Immunity

Because it is probable that on remand the District Court will vacate the May 8, 2008 attachment order in its entirety, we decline to consider the second argument on appeal—whether

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[13] If it is argued that property rights must vest in some entity at all times, then perhaps New York law envisages EFTs as the property of the intermediary bank for the short while or instant during which they remain in the bank's possession. Because this question is not presented in this case, we need not address it here. If, however, a court were to find that the EFTs were property of the intermediary bank, it would have no effect on the application of Rule B. If EFTs are the property of the intermediary bank and that bank is a defendant for purposes of Rule B, then the property would still not be subject to Rule B attachment because these intermediary banks are necessarily "found within the district " in which the EFTs are found and Rule B only allows the attachment of property within the district that belongs to defendants "not found within the district."

Fed. R. Civ. P. Supp. R. B(1)(a).

the District Court erred in denying Jaldhi's motion for counter-security on the ground that SCI was a sovereign instrumentality. Without briefing before us on the issue, we leave it to the District Court to determine if Jaldhi's motion for counter-security should be denied as moot. If it is not moot, the District Court is directed to give plenary reconsideration to the claim of sovereign immunity made by SCI, with such jurisdictional discovery as may be appropriate in the circumstances. See generally First City, N.A. v. Rafidain Bank, 150 F.3d 172, 176-77 (2d Cir. 1998) ("[G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue [in actions where FSIA applies.]" (internal quotation marks omitted)).

CONCLUSION

In summary, we hold the following:

(1) We overrule our previous decision in Winter Storm, 310 F.3d 263, and conclude that EFTs being processed by an intermediary banks are not subject to attachment under Rule B.

(2) In accordance with our conclusion that such EFTs are not subject to attachment, we AFFIRM the June 27, 2008 order of the District Court insofar as it vacated the portions of the May 8, 2008 attachment order that affect EFTs of which defendant is the beneficiary and we REMAND the cause to the District Court with directions to consider whether there are other grounds for not vacating the remaining portion of the attachment order that affects EFTs of which defendant is the originator.

(3) Finally, we VACATE the June 27, 2008 order of the District Court insofar as it denied Jaldhi's motion for counter-security and REMAND the cause to the District Court to consider whether to dismiss that motion.

The mandate shall issue forthwith. Each party shall bear its own costs.