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TRACING AND FREEZING ASSETS IN AID OF LITIGATION

Freeze with Ease: New York Orders of Attachment and Non-U.S. Parties

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Freeze with Ease: New York Orders of Attachment and Non-U.S. Parties

By Kathleen M. Kunder*

Generating assets always has been a talent and function of New York City. Given this fact, it is ironic that the State of New York is one of the most favorable jurisdictions to go to when seeking to freeze the assets of non-U.S. defendants in litigation. Through the process of obtaining orders of attachment in New York courts, claimants can freeze the assets of various foreign individuals and corporations with ease. In today's global society, in which billions of dollars of assets belonging to foreign corporations and individuals can be found in New York, the power of attachments and the ease with which they are obtained in New York should not be overlooked.

The most commonly used remedy to freeze assets in the United States in connection with a claim in litigation is through an order of attachment.¹ An attachment is the seizing of money or property of the defendant prior to the Court's granting a judgment. In New York, the plaintiff effects the seizure by the sheriff taking constructive and sometimes actual hold of the property under the terms of the order of attachment.² In this article we discuss two of the grounds for obtaining an order of attachment in New York that should be particularly interesting to non-U.S. litigants: (1) that the defendant is a nondomiciliary or foreign corporation and (2) that the cause of action is based on a foreign money judgment which qualifies for recognition in New York. We also focus on the purpose for such attachments, namely, a security purpose and sometimes a jurisdictional purpose. Finally, we review what property may be seized.

A. Grounds for Freezing Assets and Procedural Requirements

In New York, attachments are governed by Article 62 of the Civil Practice Law and Rules ("CPLR"). Article 62 provides that except for matrimonial actions, "an order of attachment can be granted in *any* action...where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants" when one of the five enumerated grounds is met.³ One ground is directed specifically towards nondomiciliaries and provides that an attachment may be granted when "the defendant is a nondomiciliary residing

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¹ Manuel Juan Dominguez, *Using Prejudgment Attachments in the European Community and the U.S.*, 5 J. TRANSNATIONAL L. & POL. 41, 59 (Fall 1995) (This article compared the use of prejudgment attachment in the U.S. and several European countries including England, France and Germany).

² See DAVID D. SEIGEL, *NEW YORK PRACTICE* 313 (4th ed. 2005).

³ The five enumerated grounds are set out at N.Y. C.P.L.R. § 6201 (McKinney 2007) as: "(1) the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or (2) the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or (3) the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or (4) the action is brought by the victim or the representative of the victim of a crime, as defined in subdivision six of section six hundred twenty-one of the executive law, against the person or the legal representative or assignee of the person convicted of committing such crime and seeks to recover damages sustained as a result of such crime pursuant to section six hundred thirty-two-a of the executive law; or (5) the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies for recognition under the provisions of article 53."

without the state or is a foreign corporation not qualified to do business in the state."⁴ Another ground usually finds the non-U.S. party in the role of plaintiff; this ground provides that an attachment may be granted to enforce a foreign money judgment that is entitled to recognition.⁵

1. The Evolution of the New York Attachment Article

Orders of attachment have been granted in New York against non-resident individuals and corporations since the 19th century. The Code of Procedure, enacted in 1848 in New York, contained the fundamental elements of the grounds for an order of attachment as we have them today.⁶ Under the 1848 Code, an attachment could be granted "against a corporation created by or under the laws of any other state, government, or country, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself."⁷ While the modern civil procedure code (the CPLR) still contains the fundamental elements of the 1848 Code of Procedure, the grounds for attachment have evolved over time. Noticeably absent in the 1848 provision is any reference to a "nondomiciliary." Moreover, the 1848 Code targets *all* foreign corporations and not just those that are "not qualified to do business" in New York.

The concept of a domiciliary surfaced after the enactment of the Civil Practice Act of 1920 ("C.P.A.") through court interpretations of the word "non-resident." The C.P.A. provided that an attachment could be granted against a non-resident. At first, the courts looked to pre-C.P.A. decisions and interpreted this language as referring to bodily presence in the state.⁸ During the 1950s, the courts clarified that "residence" is different from "domicile" and that the object of the statute is not to give a remedy against persons who temporarily leave the state.⁹ The courts concluded that what the statute was targeting was a party who had abandoned New York as his domicile.¹⁰ This ground for attachment continued to evolve. In an amendment in 1977, the Legislature substituted the phrase "nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state" for the previous language which was directed towards any non-resident or any foreign corporation.

The ground of enforcing a foreign money judgment did not appear until 1970, when New York adopted the Uniform Foreign Money Judgments Act as Article 53 of the CPLR. At the same time, Article 62 was amended to provide the additional ground of a cause of action to enforce foreign money judgments.¹¹

2. The Procedure

A request for an order of attachment is usually made at the time the complaint is filed. The plaintiff typically asks the court *ex parte* for a very short-term temporary restraining order (TRO) prohibiting the transfer of the assets by a garnishee until the defendant can be served with an order

⁴ N.Y. C.P.L.R. § 6201(1). Even if the defendant is domiciled in the state, however, an attachment may be granted in certain situations on other grounds. *See* N.Y. C.P.L.R., § 6201(2) and (3), *supra*.

⁵ N.Y. C.P.L.R. § 6201(5). Recognition of foreign money judgments is provided for under N.Y. C.P.L.R., Article 53. Under Article 53, the grounds for non-recognition are limited.

⁶ *Furman v. Walter*, 13 How. Pr. 348 (Sup. Ct. 1856).

⁷ *Ferrier v. American Glass-Silvering Co.*, 34 How. Pr. 496 (Sup. Ct. 1868) (quoting the N.Y. Code of Proc. § 227).

⁸ *Loew's Inc. v. Dorsey*, 97 N.Y.S.2d 315, 316 (Sup. Ct. 1950).

⁹ *See Bonwit Teller, Inc. v. Morris*, 116 N.Y.S.2d 84, 85 (1st Dep't 1952).

¹⁰ *Id.*

¹¹ N.Y. C.P.L.R. § 6201(5).

to show cause or the motion for an order of attachment and appear in court.¹² The result is that the defendant has the opportunity to challenge the requested seizure by order of attachment, but cannot transfer the property before the court considers whether such pre-judgment attachment is appropriate.

On a motion for an order of attachment, a plaintiff must show "by affidavit and such other written evidence" that there is (i) a cause of action, (ii) that it is probable that the plaintiff will succeed on the merits, (iii) that one or more grounds for attachment provided in CPLR § 6201 exist, and (iv) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.¹³ In addition, if the order of attachment was granted without notice (not very common in view of the TRO procedure noted above), in most cases a plaintiff must move on notice to the defendant for an order confirming the order of attachment within five days.¹⁴ During this confirmation proceeding, the plaintiff must establish the same elements as on the original motion for attachment.¹⁵ If a plaintiff fails to move for an order confirming the order of attachment, the original order will have no further effect and will be vacated upon motion.¹⁶

Unless waived by the court (which is not common), a condition of an order of attachment is that the plaintiff must post a bond in an amount set by the court.¹⁷ Part of the bond will be posted as security in the event that the defendant prevails at trial. In that case, the amount that was set aside would go to the defendant to cover costs and damages as well as reasonable attorneys' fees.¹⁸ The other part of the bond will be posted to cover the sheriff seizing the property to pay "all of his allowable fees."¹⁹

When faced with a motion to vacate an order of attachment, the plaintiff bears the burden of establishing the grounds for the attachment, the need for continuing the levy, and probability of success on the merits.²⁰ It is also important to note, however, that the courts recognize that attachment is a "harsh remedy" and it is for that reason that even if a plaintiff meets the statutory requirements, it is still in the court's discretion to grant or deny such an order.²¹ A plaintiff who seeks an attachment bears the burden of convincing the court of the necessity and fairness of the attachment even if the case falls into one of the five statutory grounds.²²

¹² New York County Supreme Court, *Courthouse Procedures: Ex Parte Applications* (March 2006), available at http://www.courts.state.ny.us/supctmanh/ex_parte_applications.htm.

¹³ N.Y. C.P.L.R. § 6212(a).

¹⁴ N.Y. C.P.L.R. § 6211(b).

¹⁵ N.Y. C.P.L.R. § 6212(a).

¹⁶ N.Y. C.P.L.R. § 6211(b); *see also* § 6223.

¹⁷ N.Y. C.P.L.R. § 6212(b). In New York County, the amount of the bond is generally 5% of the amount to be restrained. *See* New York County Supreme Court, *Courthouse Procedures*, *supra* note 12 above.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ N.Y. C.P.L.R. § 6223(b).

²¹ *See, e.g.,* Burrell Color, LLC v. Burrell, No. 2005/01317, 2005 WL 3076323 (Sup. Ct. 2005) (Where although the plaintiff was able to establish that the defendant was indeed a nondomiciliary residing without the state, the Court held that plaintiff was not entitled to attachment. The nondomiciliary had already submitted to the Court's jurisdiction. Further, although plaintiffs were not required to prove, for security purposes, that the defendants were insolvent or would secret assets, the motion for an order of attachment was also denied because there was no evidence that defendants would not be able to pay an adverse money judgment).

²² *Nippon Emo-Trans Co., Ltd. v. Emo-Trans, Inc.*, 744 F.Supp. 1215, 1233 (E.D.N.Y. 1990) (in which the Court denied plaintiff's motion for an order of attachment even though plaintiff had a valid foreign judgment that was entitled to recognition under CPLR, Article 53. The Court held that the plaintiff could not establish that there was a security reason that made the attachment of the defendant's assets a necessity).

3. Who is a Nondomiciliary Residing without the State Under § 6201(1)?

"Domicile" has been defined as "one's principal and permanent place of residence where one always intends to return to from wherever one may be temporarily located."²³ It has also been held that a person can have two or more residences, but only one domicile, and that generally, the residence established earlier in time remains the individual's domicile until a clear intention to change is established.²⁴ Therefore, a nondomiciliary is one who, even if having a residence in New York, does not intend to stay in the State of New York.²⁵

As to the concept of a nondomiciliary "residing without the state," the concept of residence must be viewed in the context of the purpose of the statute. As discussed below,²⁶ one purpose is to obtain security over assets without regard to obtaining jurisdiction. The analysis of residing without the state thus turns not on whether the defendant would receive notice at his place of abode in New York as in the case of the statute on service of process²⁷, but rather on whether there is a likelihood that the defendant will have assets within the state to respond to a judgment against him. While amenability to service of process at an abode within the state is one factor among many in determining whether the defendant resides without the state, more practical considerations such as whether the individual stays in a hotel apartment in New York infrequently on business (and unlikely to maintain adequate assets in New York) will weigh heavily as will proof of defendant's involvement in a place of residence outside New York.²⁸

4. What is a Foreign Corporation Qualified to Do Business Under § 6201(1)?

Establishing whether a foreign corporation is qualified to do business in New York usually requires no more than proving that the defendant has requested to do business in New York by filing with the New York Secretary of State and paying necessary taxes. The element can easily be satisfied by an affidavit of a paralegal or attorney who attests to having checked with the Secretary of State and having found that there was not a filing.²⁹

²³ *Laufer v. Hauge*, 528 N.Y.S.2d 878, 879 (2d Dep't 1988) (citing *Matter of Brunner*, 394 N.Y.S.2d 621 (N.Y. 1977)).

²⁴ *Laufer*, *supra* (in which the Court concluded that the plaintiff's request for an order of attachment should be denied because the defendant resided most of the year in New York, conducted business in New York, paid both city and State taxes, as well as maintained bank accounts, and did not make any attempt to formally change her domicile. Evidence that she had a Wyoming driver's license and that she had registered to vote in Wyoming was not sufficient to show intent to change domicile).

²⁵ *Matter of Schwarzenberger*, 626 N.Y.S.2d 229 (2d Dep't 1995) (holding that decedent was a nondomiciliary because he had moved his residence to Florida and had expressed his intent to become a citizen of Florida in writing). See also *King v. Car Rentals, Inc.*, 813 N.Y.S.2d 448, 452 (2d Dep't 2006) (New Jersey student who stayed in New York after graduation to await employment with a New York company and who did not evidence an intent to live permanently in New Jersey was found to be domiciled in New York.).

²⁶ See pages 6 -8 *supra*.

²⁷ See N.Y.C.P.L.R. § 308

²⁸ See analysis and cases cited in *ITC Entertainment, Limited v. Nelson Film Partners*, 714 F.2d 217 (2d Cir. 1983).

²⁹ *Al-Azhari v. Merit Capital Associates, Inc.*, No. 99 Civ. 9795 (LAK), 2000 WL 151914 (S.D.N.Y. 2000) (the Court held that the foreign corporation was not qualified to do business in New York after petitioner submitted a certificate from the Special Deputy Secretary of State, certifying that foreign corporation had not applied for authority to do business in New York).

Some defendants have attempted to undermine the undisputed absence of the filing, by curing it after the litigation has begun. This strategy has been found ineffective. In *Elton Leather Corp. v. First General Resources Co.*,³⁰ the defendant filed with the Secretary of State only after the plaintiff's motion for attachment had been granted but not yet confirmed. The *Elton* court held that such a post-attachment filing of an application to do business in the State of New York would not, by that act alone, cause an order of attachment to be vacated when there was evidence that the filing was a "sham" to defeat the plaintiff's attempt to recover money.³¹

The *Elton* court declined to follow an earlier federal court ruling which had held that "qualified to do business" should be treated literally and without regard for whether the act of filing for qualification took place after the order of the attachment was granted but not yet confirmed.³² The Court held that such an interpretation of § 6201(1) went against the state legislature's intent of enacting the 1977 revision, which included that the attachment law would continue to protect the security interest of a plaintiff.³³ Under the federal court's ruling, all a corporation would have to do evade the attachment order would be to file paperwork to conduct business in New York; the *Elton* court held that this would render § 6201(1) almost useless.

Finally, it should be noted that a pre-judgment attachment may not be obtained against the assets of a foreign state. Therefore, if a corporation is wholly owned or nationalized by a foreign government, the remedy of an attachment may not be available.³⁴

5. Cause of Action Based on a Foreign Money Judgment

Article 53 of the CPLR "applies to any foreign country judgment which is final, conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal."³⁵ According to Article 62, the judgments recognized by Article 53 are also subject to attachment.³⁶ In enacting Article 53, the State of New York sought to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments receive streamlined enforcement in New York.³⁷

In *CDR Crances S.A. v. Euro-American Lodging Corp.*, the plaintiff was seeking recognition of a money judgment rendered by the Paris Court of Appeal, as well as an attachment of the defendant's assets.³⁸ The Paris Court of Appeal had held that the defendant was to pay the plaintiff \$83 million. Under CPLR Article 53, the plaintiff was able to establish that the Paris judgment should be recognized by New York. Therefore, the Court held that the plaintiff was entitled to an order of attachment under CPLR § 6201(5) to enforce the Paris judgment.³⁹

³⁰ 529 N.Y.S.2d 769 (1st Dep't 1988).

³¹ *See id.*, at 772.

³² *See id.*, at 771.

³³ *See id.* In reaching its conclusion the *Elton* court reasoned that the overhaul of the attachment statute in 1977 sought (1) to assure the constitutionality of the attachment procedure (see discussion of *Shaffer v. Heitner* below at pg. 6) and (2) to render the attachment statute more workable, thus striking a fair balance between due process and the plaintiff's interest in the utility of obtaining security to be sure that a judgment will be satisfied.

³⁴ Foreign Sovereign Immunities Act, 42 U.S.C.A. § 1609 (West 2007).

³⁵ N.Y. C.P.L.R. § 5302; *CDR Crances S.A. v. Euro-Am. Lodging Corp.*, No. 115951/03, 2005 WL 1047546 (Sup. Ct. 2005).

³⁶ N.Y. C.P.L.R. § 6201(5).

³⁷ *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 762 N.Y.S.2d 5, 9 (N.Y. 2003).

³⁸ *See CDR Crances S.A.*, *supra* at *1.

³⁹ *Id.*, at *5.

The case of *CIBC Mellon Trust Co. v. Mora Hotel Corp., N.V.*,⁴⁰ illustrates the particular value of obtaining an order of attachment when enforcing a foreign judgment. The case began in New York in 2000 with the plaintiffs seeking recognition of an English judgment as well as an attachment of a hotel in New York worth \$30 million.⁴¹ The New York trial court granted the recognition and docketed the English judgment. At the same time, the trial court confirmed the attachment and appointed a post judgment receiver to manage and sell the hotel. In the meantime, for three years, the case worked its way through two appeals touching on complicated issues.⁴²

6. Arbitration and the Effect of Article 62

Arbitration claims can also be subject to the attachment provisions in Article 62.⁴³ CPLR 7502(c), added to the arbitration statutes in 1985, expressly provides for this, "but only on the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."⁴⁴ According to CPLR § 6212(c), the attachment, the order and the papers upon which the attachment is based, together with the "summons and complaint" in the action must be filed with the clerk within ten days of the granting of an order of attachment so as to give public notice of the attachment.⁴⁵ However, there is not any "summons and complaint" in an arbitration proceeding. In *Mulder v. A.S. Goldman & Co.*,⁴⁶ the Court held that in an arbitration, the equivalent of the "summons and complaint" is the demand or notice papers which commence the arbitration proceeding.

B. The Purposes of an Order of Attachment

In New York, an attachment against foreign corporations and nondomiciliaries can serve as a jurisdictional basis and also offer security to enforce a judgment.

1. Giving *Quasi in Rem* Jurisdiction

Specifically, seizure of property pursuant to an order of attachment gives New York courts *quasi in rem* jurisdiction over a nondomiciliary.⁴⁷ Originally, any property owned by a non-resident that was located in New York could be seized as a basis for obtaining jurisdiction.⁴⁸ However, the Supreme Court in *Shaffer v. Heitner* held that when the property serving as the jurisdictional basis has no relationship to the cause of action and there are no other ties among the defendant, the forum and the litigation, *quasi in rem* jurisdiction will be lacking.⁴⁹

⁴⁰ 762 N.Y.S.2d 5 (N.Y. 2003).

⁴¹ *CIBC Mellon Trust, Co. v. Mora Hotel Corp., N.V.*, 743 N.Y.S.2d 408 (1st Dep't 2002).

⁴² Interestingly, the English litigants had obtained a *Mareva* order under English law to freeze assets on a worldwide basis (*See Reichers v. Reichers*, 679 N.Y.S.2d 233, 235 (Sup. Ct. 1998)). On appeal, defendants contended that the English court's use of *Mareva* orders rendered the English system incompatible with due process, but the New York Court of Appeals disagreed. *See CIBC Mellon Trust*, 762 N.Y.S.2d at 10.

⁴³ N.Y. C.P.L.R. § 7502(c).

⁴⁴ *Id.*

⁴⁵ N.Y. C.P.L.R. § 6212(c).

⁴⁶ 703 N.Y.S.2d 678 (Sup. Ct. 1999).

⁴⁷ *Elton, supra* at 770.

⁴⁸ *Banco Ambrosiano S.P.A. v. Artoc Bank & Trust, Ltd.*, 476 N.Y.S.2d 64, 66 (N.Y. 1984).

⁴⁹ *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

In *Silvestre v. De Loiza*,⁵⁰ the Court held that the plaintiff could not establish that the defendant's bank account, which the plaintiff was seeking to attach, was sufficiently connected to the underlying cause of action to warrant an order of attachment in view of *Shaffer v. Heitner*.⁵¹ In *Silvestre*, the plaintiff argued that an agreement was entered into whereby defendants set up a New York account and paid into the account. The Court ruled, however, that the agreement did not require defendants to set up such an account and that the agreement was too vague to ascertain whether the account in question was related to plaintiff's claim.⁵²

Even if assets do have a relationship to the cause of action, the plaintiff will establish jurisdiction and confirm an attachment only to the extent of such related assets. This was dramatically illustrated in *CME Media Enterprises B.V. v. Zelezny*,⁵³ a case in which the plaintiff sought to enforce a \$23 million arbitration award when jurisdiction was based solely on attachment of an account containing \$0.05. Jurisdiction was granted and the attachment confirmed but only to the extent of the five cents in the account!

2. Obtaining Security for the Judgment

The second reason for granting attachments is to "secure judgments against nondomiciliaries residing without the state."⁵⁴ The use of attachments as security is to ensure that, pending litigation, a non-resident debtor having assets in New York does not "sell his property, and remain at home, in which event he could not be reached by any of the provisional remedies or supplementary proceedings provided by New York laws..."⁵⁵ However, the New York courts have held that when an order of attachment is being sought *only* for security purposes, the plaintiff must show that there would be difficulty in enforcing a judgment against the defendant.⁵⁶

In *ITC Entertainment, Ltd. v. Nelson Film Partners*,⁵⁷ the Defendants attempted to argue that the amended § 6201(1) eliminated the right to issue attachments solely for security purposes because its language, aimed at nondomiciliaries, suggested that its purposes were to serve as a jurisdictional basis only. The Court held that the attachment statute allowed attachments for security purposes even when personal jurisdiction was obtained and that attachments had long been issued against both residents and non-residents for security purposes.⁵⁸

It is also important to note that assets can be frozen through an order of attachment at a federal level as well as at a state level. The judicial power to seize a person's property or assets can be found in the Federal Rules of Civil Procedure, Rule 64. This rule provides that the federal court will apply the law of the state in which the court is held.⁵⁹ Therefore, if an attachment proceeding is commenced in a federal court in the State of New York, the state attachment statute will apply.

The New York and federal system of freezing statutes has met some criticism. Manuel Juan Dominguez, Assistant Attorney General in the Division of Economic Crimes in Florida, has asserted that the New York system is "confusing" and "antiquated" when compared to the

⁵⁰ 820 N.Y.S.2d 440 (Sup. Ct. 2006).

⁵¹ *Id.*, at 442.

⁵² *Id.*, at 444.

⁵³ No. 01 Civ. 1733 (DC), 2001 WL 1035138 (S.D.N.Y. 2001).

⁵⁴ Elton, *supra* at 771.

⁵⁵ *See id.*

⁵⁶ *Katz Agency, Inc. v. Evening News Ass'n*, 514 F. Supp. 423, 429 (S.D.N.Y. 1981)

⁵⁷ 714 F.2d 217 (2d Cir. 1983).

⁵⁸ *Id.*, at 220.

⁵⁹ Federal Rules of Civil Procedure, Rule 64.

European Community.⁶⁰ To remedy these problems, Dominguez argues that Congress should amend the Federal Rules of Civil Procedure to adopt a uniform standard regarding attachments. Specifically, Dominguez argues that, like the European Community, the federal and state governments should allow attachment of *any* assets when the defendant's only contact with the forum is through the assets themselves. Also, Dominguez asserts that the U.S. should enter into more treaties with Europe so that jurisdictional issues would be less complicated.⁶¹

C. Types of Assets/Property That Can be Frozen Through Attachment

The types of assets that may be frozen through an order of attachment are set forth in CPLR § 5201, the section that covers what can be levied upon post-judgment. The section provides that (i) a money judgment may be enforced against *any* debt (provided it is not subject to an explicit exemption);⁶² (ii) a money judgment can be enforced against *any* property (provided it is not subject to an exemption), which can be assigned or transferred "whether it consists of a future or present interest and whether or not it is vested";⁶³ (iii) proper garnishees for other types of property or debt (such as stocks, a decedent's estate, interest in a partnership, and interest in a negotiable instrument).⁶⁴

Perhaps the most common type of property that a plaintiff can attach is a bank account. Bank accounts fall under property which can be assigned or transferred under section 5201(b).⁶⁵ An attached bank account is easier to levy on than tangible property.⁶⁶ This is because upon execution of a judgment, the sheriff can immediately take the necessary amount from the attached bank account, rather than go through a sale that is usually required for tangible property. The courts have recognized that we live in a "wired age" where "the location of an intangible, especially a bank account, is a metaphysical question [and] ... bank deposits exist as electronic impulses embedded in silicone chips," and, thus, are "every where and nowhere."⁶⁷ Despite this, the bank account must be located in New York to be subject to attachment; the mere fact that a branch of the bank in question is present in New York is insufficient.⁶⁸

Although not as convenient as seizing a bank account, a levy on other intangible property is possible. In *Gasser Chair Co., Inc. v. Infanti Mfg. Corp.*,⁶⁹ the Court was faced with the seizure of a patent and held that it be sold privately through an appointed receiver.⁷⁰

As long as the intangible property has its "situs" or location in New York, such that New York can obtain jurisdiction over the intangible property, it can be attached with few exceptions.⁷¹

⁶⁰ Manuel Juan Dominguez, *supra* at 63.

⁶¹ *Id.*

⁶² N.Y. C.P.L.R. § 5201(a).

⁶³ N.Y. C.P.L.R. § 5201(b).

⁶⁴ N.Y. C.P.L.R. § 5201(c)(1)-(4).

⁶⁵ *Considar, Inc. v. Redi Corp. Establishment*, 655 N.Y.S.2d 40 (1st Dep't 1997).

⁶⁶ David D. Siegel, *Practice Commentaries* Subdivision (b), C5201:13 (1997).

⁶⁷ *Yayasan Sabah Dua Shipping SDN BHD v. Scandinavian Liquid Carriers Ltd.*, 335 F. Supp. 2d 441, 448 (S.D.N.Y. 2004).

⁶⁸ *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Advanced Emp. Concepts, Inc.*, 703 N.Y.S.2d 3, 4 (1st Dep't 2000) (which held that because the defendant's account was located in Florida, the plaintiff was not entitled to attach funds through a main branch office in New York).

⁶⁹ 2006 WL 297451 (E.D.N.Y. Feb. 8, 2006).

⁷⁰ See N.Y. C.P.L.R. § 5228 (which provides for a court-appointed receiver who is authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest).

For example, other intangible property that has been attached include: accounts receivable,⁷² stock in a corporation,⁷³ as well as a defendant's share in partnership profits.⁷⁴ Further, where a corporation located in another country is a party to a licensing agreement and the obligation to perform rests upon another party located in New York, the interest in the agreement is intangible property having situs in New York, and such property may be attached so as to give a New York court jurisdiction over the corporation.⁷⁵

Conclusion

Using an order of attachment to restrain or seize assets until a judgment can be obtained is well-established in New York law. The procedure is usually easy when the defendant is a nondomiciliary residing without the state or a foreign corporation not qualified to do business in New York. A pre-judgment attachment is also easily obtained when the cause of action is to recognize a foreign money judgment. The attachment procedure can provide jurisdiction as well as security for the judgment and should be considered whenever claims have a relationship to the State of New York. In short, when non-U.S. parties are involved, there is a good chance that in New York, the plaintiff can freeze with ease.

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⁷¹ For example, New York courts have held that ERISA qualified pension accounts as well as individual retirement accounts cannot be subject to attachment. *See* *Lauder v. Jacobs*, 809 N.Y.S.2d 482 (Sup. Ct. 2005).

⁷² *Int'l Ribbon Mills Ltd. v. Arjan Ribbons, Ltd.*, 365 N.Y.S.2d 808 (N.Y. 1975).

⁷³ *See Koehler v. The Bank of Bermuda Ltd.*, 2005 US Dist. LEXIS 3760 (S.D.N.Y. Mar. 9, 2005) (Shares of Bermuda corporation may be leviable if a situs could be found for them in New York, however, none of the provisions of UCC § 8-112 as referred to in CPLR 5201(4) provided authority that the shares have a New York situs and no situs in New York could otherwise be identified.)

⁷⁴ *Executive House Realty v. Hagen*, 438 N.Y.S.2d 174 (Sup. Ct. 1981).

⁷⁵ *ABKCO Industries, Inc. v. Apple Films, Inc.*, 385 N.Y.S.2d 511 (N.Y. 1976).