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Arbitration and attachments

A look at protecting your award in the face of respondent's disappearing assets

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Arbitration offers litigants finality, some level of confidentiality, efficiency, expertise of the arbitrator, and better management of the proceeding. But, does arbitration offer prejudgment remedies that would lien the assets of the respondent to protect against an “empty award” or the empty judgment when the award is confirmed?

In filing an action to collect a commercial debt where the debt is fixed and readily ascertainable, the Plaintiff can seek an attachment that would encumber the Defendant's assets. The Plaintiff can seek an attachment on 16 court days' notice, make out a detailed case that would support the claim and fend off any defenses. If successful, the court will issue an order for clerk to issue a writ of execution, based on the post of a \$10,000 bond. In the event of exigent circumstances, i.e., the Defendant is selling assets, going out of business and threatening to flee the jurisdiction, the Plaintiff might seek ex parte relief.

An attachment resets the clock

An attachment that affixes a lien on real or personal property bears enormous repercussions, because the attachment lien resets the clock of the enforcement lien, i.e., the date of the abstract, personal property lien (JL-1), or even an execution lien upon levy. Under section 697.020(a) the judgment lien relates back to the date of the attachment. Relationship to the date of the attachment fixes the date of homestead exemption, i.e., \$75K/\$100K/\$175K if attachment lien is recorded prior to January 1, 2021 (and relating the date if a bankruptcy). Given that

homestead exemptions jumped to \$300K/\$600K on January 1, 2021, the attachment lien, and relating back, would encourage the debtor to settle in light of the risk of a successful sheriff's sale. Under section 708.800(a), the sheriff can only sell the property if the sale is 90% of prior liens and the homestead.

How the assets may disappear

The remedies above are available to the Plaintiff who files suit. What if arbitration is the sole remedy due the Plaintiff (who is now called “Petitioner”)? There is the risk that the Respondent might squirrel away everything including sending liquid assets out of state or parking funds in offshore havens (trusts), or Respondent might liquidate assets to pay other creditors (like taxes, ex-spouses or child support) or pay down the senior liens that encumber the residence to reach the \$600,000 homestead or other exemptions. Respondent might pay off pending or future family support, pay current or pre-pay attorney fees, or hook all personal and real property in favor of bona fide or bogus liens. The Respondent might even fund a deposit account deemed “basic standard of adequate standard of care” of four. (Section 704.220.)

The writ of attachment: *Hopkins* and ineffectual relief

Subject to the breadth (or limits) of the arbitration agreement as to whether provisional relief is available to the arbitrator, the Petitioner can seek a writ of attachment under section 1281.8, subdivision (b). The Petitioner can file an application for the issuance of provisional relief on “. . . ground[s] [that the award to which the applicant may be entitled may

be rendered ineffectual without provisional relief.” The leading case is *California Retail Portfolio Fund GMBH & Co. KG v. Hopkins Real Estate Grp.* (2011) 193 Cal.App.4th 849, where the court stated: “. . . we conclude that the standards for irreparable harm set forth in section 485.010 provide *guidance* to the trial courts on the issue of ineffectual relief under section 1281.8.” Section 485.010 enables a creditor to seek an ex parte writ of attachment based on irreparable harm, insolvency, etc. However, *Hopkins* does not bind the court to requirements to a section 485.020 ex parte writ of attachment regime for issuance of an arbitration attachment but enables the trial court consider section 485.010 as a guideline, such as insolvency and irreparable harm of inability (or unwillingness) to pay. *Hopkins* focuses on “ineffectual” which is synonym for an “empty judgment,” by any means, whether insolvency, inability to pay bills as they become due, irreparable conduct or any other circumstances which the petitioner is left empty handed when the award is handed down.

In short, *Hopkins* (p. 861) suggests any basis for an attachment based on the following: “. . . doubt on the Hopkins Group's ability to pay an arbitration award for California Retail, and therefore qualified as another circumstance of irreparable harm that might render such an award ineffectual.”

Can the arbitrator grant provisional relief, including a writ of attachment, writ of possession and broad injunctive relief under section 1281.8, subdivision (a), or are these judicial and arbitration remedies harmonious or do they clash? In *Simula, Inc. v. Autoliv, Inc.* (9th Cir. 1999) 175 F.3d 716, 725 (“*Simula*”), the Ninth Circuit held



that the arbitrator can grant provisional remedies because the arbitration agreement provided for provisional remedies as follows: “The district court correctly denied *Simula’s* request for a [judicial] preliminary injunction, since provisional relief is available from the Swiss Arbitral Tribunal.” But, *Simula* does not close the courthouse door to provisional remedies for such relief: “Allowing a district court to grant this type of relief is not contrary to the ‘emphatic federal policy in favor of arbitral dispute resolution’” of primary concern in *Simula*. (See 175 F.3d at 726; *Toyotire Holdings of Americas Inc. v. Conti’ Tire N. Am., Inc.* (9th Cir. 2010) 609 F.3d 975, 980.)

Here comes the sheriff

Examining the core of the prejudgment remedies of attachment, only the California sheriff [or the U.S. Marshal per FRCP 64] can attach, seize or lien California assets. (Code Civ. Proc., § 488.020, subd. (a).) The creditor deposits Instructions with the sheriff. (Code Civ. Proc., § 488.030.) The creditor deposits fees and charges with the sheriff. (Code Civ. Proc., § 488.050.) The sheriff serves the Defendant. (Code Civ. Proc., § 488.305.) The sheriff enforces the writ subject to the statutory methods. (Code Civ. Proc., §§ 488.350 to 488.485.) Only a judge can cause the clerk to issue the writ of attachment. (Code Civ. Proc., § 484.090 “. . . the court shall consider the showing made by the parties appearing and shall issue a right to attach order,

which shall state the amount to be secured by the attachment...”) The clerk issues the writ of attachment. (Code Civ. Proc., § 488.010.) The creditor is obligated to post a bond in the amount of \$10,000. (Code Civ. Proc., § 489.220, subd. (a).) Attachments are purely statutory and strictly construed. (*Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 86.)

Here is the dilemma. The arbitration agreement enables the parties to seek provisional relief and even to ouster prejudgment provisional judicial relief. However, only a judge and court could issue the Right to Attach Order (Code Civ. Proc., § 484.090, subd. (a)), only the clerk could issue the writ of attachment (Code Civ. Proc., § 488.010) and only the sheriff could enforce the writ of attachment. (Code Civ. Proc., § 488.020.) Is the arbitration right without the attachment remedy? Is this possible? (See *China Nat. Metal Prod. Imp./Exp. Co. v. Apex Digital, Inc.* (C.D. Cal. 2001) 155 F.Supp.2d 1174, 1182 [Arbitration agreement included prejudgment remedies, but court [China] to enforce the writ did not exist].)

The remedy is before us

The remedy is before us: The vacuum of the judicial regime of enforcement if based on a *Simula* order are “the [*Hopkins*] ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief.” Implicit in the *Simula* order, is the arbitrator’s finding that without enforcement of the attachment, the award would

be ineffectual, i.e., the *Hopkins* cavalcade of horrors: insolvency, bankruptcy, inability or refusal to pay debts, or dissipation, concealment, bulk sale or liquidation of assets. The predicate to the finding is that once the arbitrator grants the attachment, Respondent recognizes that the Petitioner will prevail (i.e., probable validity under § 484.090, subd. (a)(2)), which compels the Respondent to engage in “an intentional scheme to squirrel assets into a liability-free corporation while heaping liabilities upon an asset-free corporation.” (*Sea-Land Servs., Inc. v. Pepper Source* (7th Cir. 1991) 941 F.2d 519, 524.)

Upon finding the *Hopkins* grounds of a *Simula’s* ineffectual award, the court would “domesticate” the *Simula’s* into a judicial attachment order and enforce the writ of attachment under California law.

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