Court Relaxes Attachment Law For Purposes of Arbitration

By Henry S. David

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On March 22, the Court of Appeal issued a decision of great practical importance in light of the explosion of commercial matters that are arbitrated, not litigated in court. In *California Retail Portfolio Fund GmbH v. Hopkins Real Estate Group*, 2011 DJDAR 4147 (2d Dist. Mar. 22, 2011), the court ruled that the *ex parte* grounds in the state attachment law provide "guidance," but need not be strictly met, in determining whether to issue a right to attach order in aid of an arbitration under Code of Civil Procedure Section 1281.8, which permits provisional relief only if the arbitration award otherwise "may be rendered ineffectual."

In *California Retail Portfolio*, various parties entered into a real estate partnership agreement. California Retail invested $5.5 million in the partnership, in exchange for, among other things, five annual payments of $582,000. Two installment payments were not made, so California Retail commenced an arbitration and sought a right to attach order against Hopkins Group. The company argued that absent a right to attach order, an arbitration award in its favor would be ineffectual. California Retail did not, however, provide any evidentiary support of that argument with its moving papers. Hopkins Group raised this evidentiary deficiency in its opposition.

In its reply papers, California Retail provided evidence that in a two-year-old internal e-mail, Hopkins Group's chief financial officer had expressed concern about the company's liquidity, its ability to fund other projects, and its ability to remain adequately capitalized. California Retail explained its failure to provide this information earlier on the grounds that Hopkins Group had only recently produced the e-mail in arbitration. Hopkins Group made various evidentiary objections, but the trial court did not rule on them. At the hearing, the trial court asked counsel for Hopkins Group why the payments had not been made, but counsel could provide no reason, from which the trial court made an adverse inference as to Hopkin Group's financial condition, and granted the attachment application. Hopkins Group appealed, but the Court of Appeal affirmed.

The key issue on appeal was the meaning of "ineffectual" in Section 1281.8(b). Hopkins Group argued that in the context of an attachment application, Section 1281.8 required that a creditor fulfill the requirements of Code of Civil Procedure Section 485.010, which sets forth grounds for *ex parte* attachment relief. Hence, Hopkins Group argued, when a creditor claimed that the debtor was insolvent, the creditor must state "the known undisputed debts of the defendant, that the debts are not subject to bona fide dispute, and the basis for plaintiff's determination that the defendant's debts are undisputed," as Section 485.010(b)(2) requires. Yet, Hopkins Group noted, California Retail had not done so.

The Court of Appeal reviewed the language and the title of the two statutes and the legislative history of Section 1281.8, and concluded that Hopkins Retail was comparing "apples and giraffes." The Court of Appeal noted that Section 485.010 governed whether to issue a right to attach order on an *ex parte* basis (24-hours notice) or on a noticed motion (16 court days notice). In contrast, if a court denies relief due to Section 1281.8's "ineffectual relief" require-

ment, the delay could be months, if not longer, with a substantial increase in the risk of dissipation of assets. On the facts before it, the Court of Appeal concluded that California Retail's generalized showing of illiquidity — based on a two-year-old e-mail — constituted "substantial evidence" sufficient to affirm the trial court's finding, even if that showing did not meet the requirements of Section 485.010. Hence, the court adopted a very broad standard for "ineffectual relief" under Section 1281.8 (basically anything that leads a trial court to conclude that the award may not be collectible). This is good news for creditors that find themselves compelled to arbitrations, which often are not nearly as expeditious as they are supposed to be.

This opinion provides other important takeaways. One is that the failure to obtain rulings of evidentiary objections by the trial court waives the objections for purposes of appeal. *But see Reid v. Google Inc.* (2010) 50 Cal.4th 512, 516-517 (in an appeal from summary judgment, evidentiary objections are preserved for appellate review even if the trial court does not rule on them). Therefore, counsel should respectfully request that the trial court rule on any evidentiary objections. Another takeaway is that a creditor should provide all of its evidence with its moving papers, but if it does provide evidence in its reply papers, it should explain why.

Finally, in footnote 7, the Court of Appeal went out of its way to state that it was not ruling on the issue of whether or not *ex parte* attachment relief is available under Section 1281.8. But if a creditor can fulfill the requirements of both Section 485.010 and Section 1281.8, one could argue that the creditor should be entitled to an *ex parte* attachment because nothing in either section, their legislative history, or case law suggests otherwise.

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Henry David's practice is concentrated in commercial litigation matters, with an emphasis on creditors' rights and bankruptcy litigation. He has substantial appellate, trial, and arbitration experience in matters concerning commercial law and bankruptcy (Chapter 7 and 11). Henry has handled matters including enforcement of money judgments and prosecution of hundreds of applications for provisional remedies, "commercial divorces" (disputes between equity holders in partnerships and corporations), cash collateral, sale or purchase of assets, assumption/rejection of executory contracts and unexpired leases, relief from stay, avoidance actions, disclosure statement and plan confirmation disputes, and claims allowance litigation. Henry has participated in over 50 bench trials and arbitrations, and has handled approximately 15 appeals.

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