

State High Court Limits Attachment of Foreign Bank Accounts

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On Oct. 23, a divided New York Court of Appeals issued a significant decision which adversely impacts on New York judgment creditors'¹ rights to collect on judgments against defendants' funds located outside of the United States. *Motorola Credit Corp. v. Standard Chartered Bank*, ___ N.Y. 3d ___, 2014 WL 5368774 (Oct. 23, 2014). In its ruling on a question certified to it by the U.S. Court of Appeals for the Second Circuit, the New York Court of Appeals diminished the significance and reach of its recent decision in *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009). In *Koehler*, the New York Court of Appeals held that a court in New York may order a foreign bank over which the court has personal jurisdiction to turn over to a judgment creditor stock certificates owned by the judgment debtor, even when those stock certificates are held by the foreign bank outside of the United States.

The *Koehler* decision was understood by many as permitting a judgment creditor to attach the defendant's monies held outside the United States in a foreign bank account through the service of a restraining notice under NY CPLR 5222 upon the New York branch of that foreign bank.² However, in *Motorola*, the court ruled that the service of a restraining notice on the New York branch of a multinational bank does not result in the attachment of the defendants' funds in accounts located in the bank's foreign branches. In reaching this holding, the *Motorola* majority expressly based its decision on the New York common law doctrine known as, the "separate entity rule."

'Motorola'

The *Motorola* case involved two judgments based in fraud totaling over \$3 billion, entered in the US District Court for the Southern District of New York in favor of Motorola Credit Corporation

¹ New York judgment creditors include those persons who obtain final and enforceable judgments in foreign countries or other states, and then convert those judgments into New York judgments pursuant to the provisions of Articles 53 and 54, respectively, of the New York CPLR.

² Last year, the New York Court of Appeals declined to expand its ruling in *Koehler* when it held that *Koehler* does not permit attachment of a judgment debtor's assets held by the New York bank's separately incorporated foreign affiliate. *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013).

against several members of the Uzan family. As part of its judgment enforcement efforts, Motorola sought to attach assets of the Uzans held by third parties.

In February 2013, the district court issued and entered a restraining notice pursuant to CPLR 5222 (applicable to federal court cases within New York pursuant to Fed. R. Civ. P. 65 and 69) which, among other things, restrained third parties holding the Uzans' assets from transferring such property. That restraining order was served on the New York branch of Standard Chartered Bank (SCB), a bank that is incorporated and headquartered in the United Kingdom.

After conducting a global search of its branches, Standard Chartered determined that its branches in the United Arab Emirates (UAE) held approximately \$30 million in Uzan family assets. Standard Chartered froze those assets in compliance with the New York restraining notice; but bank regulators in both Jordan and the UAE then quickly took action over funds that Standard Chartered had in UAE banks. Among other things, the UAE Central Bank deducted about \$30 million from Standard Chartered's account at that central bank (presumably to reimburse the Uzans in the event Standard Chartered were to turn over the Uzans' frozen assets to Motorola).

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Standard Chartered then sought relief from the New York restraining notice in the district court, claiming that the restraint of the Uzans' assets violated UAE law, and subjected Standard Chartered to double liability. Standard Chartered also argued that under New York's separate entity rule, the service of the New York restraining notice on the bank's New York branch could not freeze funds in Standard Chartered's foreign branches. Motorola opposed Standard Chartered's motion, arguing that the separate entity rule was no longer the law in New York following the Koehler decision.

The district court ruled in favor of Standard Chartered, but stayed its ruling pending the Second Circuit's decision on Motorola's appeal. The Second Circuit found that the question of the continued viability and extent of the New York separate entity rule was unclear in light of the Koehler decision and certified the following question to the New York Court of Appeals for determination:

[W]hether the separate entity rule precluded a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank.

Separate Entity Rule

As explained by the New York Court of Appeals, under the separate entity rule, if a bank garnishee that is subject to the personal jurisdiction of the New York courts is served at its New York branch with a restraining notice or turnover order, that order is only effective against assets held at the particular branch. However, the banks' other branches are treated as separate entities for purposes of such restraining notices and turnover orders. This common law rule was first articulated approximately a century ago, and over the years has been applied by various lower New York state courts and federal courts in New York in limiting the reach of restraining notices, turnover orders, and other post-judgment remedies. But prior to *Motorola*, the rule had never been the subject of a decision by the New York Court of Appeals.

Notwithstanding its decision in *Koehler*, the court in *Motorola* affirmed the continued applicability and vitality of the separate entity rule—at least with respect to the non-US branches of multinational banks. In so ruling, the Motorola court asserted that *Koehler* had not addressed the separate entity rule, because that case did not concern funds held in a foreign bank account, and also because the separate entity rule had not been raised by the parties. The court also opined that nothing in the language of CPLR 5222 rejected that "firmly established principle of New York law" which had been consistently applied by New York courts for decades prior to the promulgation of the judgment enforcement remedies of the CPLR in 1962.

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The Motorola court also observed that at least three of the primary purposes for the adoption of the separate entity rule remain valid even in today's global economy—namely: to avoid the risk of subjecting the restrained bank to competing claims and double liability, to avoid conflicts among competing legal systems, and to promote international comity. The court also expressed its concern that abandonment of the separate entity rule could lead to "serious consequences in the realm of international banking to the detriment of New York's preeminence in global financial affairs." Therefore, the majority opinion in *Motorola* ruled that the separate entity rule continues to apply with respect to bank accounts held in non-US branches of multinational banks.

The minority opinion in *Motorola* vigorously dissented, and expressed its concern that the majority opinion would enable judgment debtors to evade enforcement of judgment proceedings and "make a mockery of our courts' duly entered judgments." The minority further argued that the continued application of the separate entity rule was contrary to, and inconsistent with, both the language of CPLR 5222 and the *Koehler* decision, which had made clear that "the Legislature intended CPLR article 52 to have extraterritorial reach." The dissent also stated its view that "any burden imposed on the banks [through the attachment of funds held in accounts outside of

the United States] is far outweighed by the rights of judgment creditors to enforce their judgments."

Further Questions

Motorola clearly prevents a New York judgment creditor from attaching its defendant's foreign bank accounts outside of the United States by serving a restraining order on that foreign bank's New York branch. However, the majority decision in *Motorola* expressly noted (in footnote 2)³ that it was not ruling on whether a New York judgment creditor could attach its judgment debtor's funds located in US bank accounts but outside of New York by serving the New York branches of those banks. Indeed, the three primary considerations noted in the majority opinion which support New York's continued adherence to the separate entity rule are not present with respect to the attachment of non-New York based bank accounts located elsewhere within the United States.

Therefore, a judgment creditor may still be able to effectively freeze its judgment debtor's bank accounts throughout the United States by serving bank branches in New York. Moreover, it does not seem that the common law separate entity rule has been generally extended to cover third parties, other than financial institutions. Thus, under *Koehler*, New York judgment creditors may still have the right to attach judgment debtors' assets held by third parties (other than banks) even outside of the United States, so long as those third parties are subject to the personal jurisdiction of courts in New York, and are served with a valid Article 52 restraining notice within the state.

³ "In this case, we have no occasion to address whether the separate entity rule has any application to domestic bank branches in New York or elsewhere in the United States. The narrow question before us is whether the rule prevents the restraint of assets held in foreign branch accounts, and we limit our analysis to that inquiry."

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