New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 249—NO. 92
TUESDAY, MAY 14, 2013

Outside Counsel

Think Globally, Act Locally? International Judgment Collection

By **Gary J. Mennitt**

The recent unanimous decision of the New York Court of Appeals in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce* (April 30, 2013) (Rivera, J.) (*CIBC*) clarifies the landscape of judgment collection in New York against debtors with assets at international banks with a New York presence and provides some protection for assets held at foreign affiliates of New York garnishees.[1] For international enterprises, especially banks and other financial institutions, the decision confirms established due process and procedural safeguards for subsidiaries and affiliates around the world. However, certain significant issues remain open to further resolution by the courts, including whether the "separate entity" doctrine remains as a bulwark against attempts to attach or collect foreign-held assets through service upon a New York branch of a foreign bank.

Four years ago in *Koehler v. Bank of Bermuda*, the Court of Appeals created a stir in the international banking community by ruling that New York courts could enforce a domesticated foreign judgment against assets outside the state where the garnishee bank had a branch in the state.[2]

On April 30, 2013, the *CIBC* decision revisited this area of the law and held that *Koehler* cannot be construed so broadly as to require that a garnishee be compelled to direct an affiliate not subject to personal jurisdiction in New York, even a subsidiary that it controls, to deliver to the judgment creditor assets located outside of New York.

The 'Koehler' Decision

In the 2009 *Koehler* case, the Court of Appeals (Pigott, J.), in a 4-3 decision, held that under CPLR Article 52 a New York court has the power to order a bank over which it has personal jurisdiction to deliver a judgment debtor's out-of-state stock certificates to the plaintiff judgment creditor, without regard to whether the judgment debtor has any assets here, and without requiring any connection between the lawsuit and the state. Specifically, the court held that personal jurisdiction is the linchpin of judicial authority under the statute providing for payment or delivery of the debtor's property to enforce a judgment. The court noted that unlike pre-judgment attachment, post-judgment collection requires only personal jurisdiction over the person or entity holding the assets of the judgment debtors.[3]

Some predicted that the *Koehler* case would lead to an avalanche of imported judgment enforcement litigation. Judgment creditors have indeed sought to use the decision in New York actions to reach judgment debtors' assets held all over the world, even where, unlike *Koehler*, the bank garnishee asserts that the New York branch is a separate entity. Judgment creditors have argued that the presence of a New York branch allows the New York courts to exercise jurisdiction over the entire bank's worldwide operations and assets.

In *Koehler*, the plaintiff obtained a judgment in federal court in Maryland and registered the judgment in the Southern District of New York. In 1993, the New York federal court, applying FRCP 69(a)(1) and New York enforcement law, entered an order requiring the bank to turn over any stock certificates owned by the judgment debtor or any debts owed to the judgment debtor. In 2005, the District Court held that it lacked in rem jurisdiction over the stock certificates in Bermuda, and effectively vacated its own 1993 order.

On appeal the U.S. Court of Appeals for the Second Circuit certified the following question to the New York Court of Appeals: "May a court sitting in New York order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to N.Y. CPLR Article 52, when the stock certificates are located outside New York?"

GARY J. MENNITT *is a partner and group leader in complex commercial litigation at Dechert, and is the coauthor of "Comparison of New York State Court and Federal Practice," a chapter of 'Commercial Litigation in New York State Courts' (West, 3rd Edition).*

As noted above, a closely split Court of Appeals answered that the New York courts do have that power.

The *Koehler* court explained that "CPLR article 52 contains no express territorial limitation barring the entry of a turnover order that requires a garnishee to transfer money or property into New York from another state or country." Further "the key to the reach of the turnover order is personal jurisdiction over a particular defendant," and in rem jurisdiction is not required where personal jurisdiction exists. Thus, "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee."[4]

The dissent in *Koehler* (Smith J.) called the majority holding a "recipe for trouble." The dissent argued that "[t]he majority's holding opens a forum-shopping opportunity for any judgment creditor trying to reach an asset of any judgment debtor held by a bank (or other garnishee) anywhere in the world," and expressed concern about the policy considerations for New York. The dissent further expressed "serious doubt" that personal jurisdiction over the garnishee alone "is enough contact under [*International Shoe v. Washington*, 326 U.S. 310 (1945)] to justify the enforcement of a non-New York judgment by a non-New York creditor against a non-New York debtor, to recover an asset that is located in Bermuda."[5]

'Hotel 71' Decision

One year after the *Koehler* decision, the Court of Appeals addressed related issues concerning a pre-judgment attachment in the *Hotel 71 Mezz Lender v. Falor* case. There, the court upheld an attachment order served in New York on an individual non-domiciliary defendant. The court held that the defendant's intangible and uncertificated membership interests in out-of-state limited liability companies "travel with him, and were attachable in New York based on his presence in this state." Further, citing *Koehler*, the court noted that "a court with personal jurisdiction over a nondomiciliary present in New York has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York."[6] Similarly, but in the judgment enforcement context, the Appellate Division, First Department, has recently held enforceable restraining notices served on a foreign corporation subject to personal jurisdiction here against a contractual obligation to pay a broker's fee due to a judgment debtor.[7]

The 'CIBC' decision provides some clarity for global financial institutions and may significantly impact the corporate organization of such entities in the future.

'Separate-Entity' Doctrine

Koehler did not address the applicability of the so-called "separate entity" rule and the courts have subsequently diverged on whether the rule survives. For over half a century, the separate entity rule has generally barred judgment creditors from seeking pre-judgment attachment and post-judgment execution through service on a New York bank branch where the assets sought are elsewhere because "each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in other branches or at the home office."[8]

Even before *Kohler*, some courts limited the effect of the separate entity rule where international operations were sufficiently centralized to allow a branch office to rapidly access worldwide account information. In 1980, a court in the Southern District held in *Digitrex v. Johnson* that service of a restraining notice on the main office of a bank was effective to restrain funds in other branch offices where the bank had an integrated computer system.[9] The holding of *Digitrex*, however, was subsequently limited to apply only to a restraining notice served on the bank's main office, where the branch is in the jurisdiction, and the branches are connected to the home office by computers and are under its centralized control.[10] Thus, notwithstanding *Digitrex*, prior to *Koehler*, the separate entity doctrine had been widely enforced.[11]

There has been a split of authority concerning whether *Koehler* impliedly abrogated the separate entity doctrine, with two 2011 federal court decisions finding such abrogation.[12] The state courts, however, consistently continued to apply the separate entity rule.[13] Subsequently, in 2012 a Southern District court in *Shaheen Sports v. Asia*, found the doctrine still applicable in light of the state courts' continued application of the rule, while noting the post *Koehler* "lack of clarity permeating this area of the law."[14]

Legislative Recommendation

In January of 2011, the Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge of the Courts of the State of New York recommended that the "separate entity rule" be legislatively repealed. In connection with this proposal, New York State Senate Bill S4542 was introduced in the 2011 session, and was referred to the Judiciary Committee on April 11, 2011, and again on Jan. 4, 2012. To date, no such legislation has advanced beyond the committee reference.[15]

The 'CIBC' Case

Against that background, last year the Second Circuit in *CIBC* certified the following question to the New York Court of Appeals: "May a court issue a turnover order pursuant to N.Y. CPLR §5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose subsidiary might have possession or custody of such assets?" The Court of Appeals recently answered in the negative and thus never reached the second question certified, concerning what factual considerations would be taken into account.

In 1994, the Commonwealth of the Northern Mariana Islands obtained two tax judgments for more than $18 million in the U.S. District Court for the Northern Mariana Islands against a married couple. In 2011, the commonwealth registered the judgments and commenced an action in the Southern District of New York against CIBC seeking a turnover order against assets held offshore at a Cayman Island affiliate, controlled by CIBC. The District Court declined to enter the turnover order and on appeal the Second Circuit certified the question indicated above.

The New York Court of Appeals held that "for a court to issue a post-judgment turnover order pursuant to CPLR §5225(b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought. That is, it is not enough that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets."[16]

The court's analysis centered on the requirement in CPLR §5225(b) that the garnishee be "a person in possession or custody of money or other personal property in which the judgment debtor has an interest." The court found the omission of the word "control" to be dispositive, noting that the phrase "possession, custody or control" appears in numerous places throughout the CPLR and yet control was not included as a sufficient condition in the money judgment enforcement statute.

The court further found that the *Koehler* decision did not turn on the "possession or custody" language in the statute because in that earlier case the assets at issue were in the bank's possession and custody, although outside the jurisdiction. The court concluded that "[n]o case supports the [judgment creditor's] attempt to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction. Such an expansion is inconsistent with the plain language and scope of section 5225(b)."[17]

The 'CIBC' decision held that 'Koehler' cannot be construed so broadly as to require that a garnishee be compelled to direct an affiliate not subject to personal jurisdiction in New York to deliver to the judgment creditor assets located outside of New York.

Conclusion

The *CIBC* decision provides some clarity for global financial institutions and may significantly impact the corporate organization of such entities in the future. In light of the earlier *Koehler* and *Hotel 71 Mezz Lender* decisions, the dissent in the *Kohler* case, and the state and federal court decisions considering the continued vitality of the separate entity doctrine, there is no doubt that the issues discussed herein will be the focus of future appellate clarification.

1. *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, No. 58, 2013 WL 1798585 (N.Y. April 30, 2013).
2. *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533, 883 N.Y.S.2d 763 (2009).
3. *Koehler*, 12 N.Y.3d at 537, 541.
4. *Koehler*, 12 N.Y.3d at 539-41.
5. *Koehler*, 12 N.Y.3d at 541-42.
6. *Hotel 71 Mezz Lender v. Falor*, 14 N.Y.3d 303, 312, 315-16, 900 N.Y.S.2d 698 (2010).
7. *Doubet v. Trustees of Columbia Univ. in the City of N.Y.*, 99 A.D.3d 433, 952 N.Y.S.2d 16 (1st Dept. 2012).
8. *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (N.Y. Sup. Ct. N.Y. County 1950), aff'd, 126 N.Y.S.2d 192 (1st Dept. 1953).
9. *Digitrex v. Johnson*, 491 F.Supp. 66, 69 (S.D.N.Y. 1980).
10. *Limonium Maritime v. Mizushima Marinera*, 961 F.Supp. 600 (S.D.N.Y. 1997). See *Nat'l Union Fire Ins. of Pittsburgh, PA v. Advanced Employment Concepts*, 269 A.D.2d 101, 703 N.Y.S.2d 3 (1st Dept. 2000) (noting that *Limonium* had limited *Digitrex* and declining to extend *Digitrex* to foreign branches).
11. *Motorola Credit v. Uzan*, 288 F.Supp.2d 558, 560 (S.D.N.Y. 2003); *Lok Prakashan v. India Abroad Publ'n*, No. 00 Civ. 5862 (LAP), 2002 WL 1585820, at *1 (S.D.N.Y. July 16, 2002); *Fidelity Partners v. Philippine Export & Foreign Loan Guarantee*, 921 F.Supp. 1113, 1119 (S.D.N.Y. 1996); *Therm-X-Chem. & Oil v. Extebank*, 84 A.D.2d 787 (2d Dept. 1981) (restraining notice served on main office of bank ineffective as to branch); *McCloskey v. ChaseManhattan Bank*, 11 N.Y.2d 936, 228 N.Y.S.2d 825 (1962) (attachment and levy in New York ineffective to reach assets at German branch).
12. *J.W. Oilfield Equip. v. Commerzbank*, 764 F.Supp.2d 587, 595 (S.D.N.Y 2011) (finding "*Kohler* indicates that New York courts will not apply the separate entity rule in post-judgment execution proceedings" and holding that a New York bank branch was enough for "general jurisdiction over the entire entity," but acknowledging that the rule may still be applicable to pre-judgment attachments); *Eitzen Bulk v. Bank of India*, 827 F.Supp.2d 234 (S.D.N.Y 2011) (accord).
13. *Global Tech. v. Royal Bank of Canada*, 34 Misc.3d 1209A, 943 N.Y.S.2d 791, at *13 (N.Y. Sup. Ct. N.Y. County 2012) (analyzing post-*Koehler* decisions and holding "under the separate entity rule, service of the petitioner's restraining notice upon respondent's branch in Manhattan did not restrain [the judgment debtor's] bank accounts in Canada"); *Samsun Logix v. Bank of China*, 31 Misc.3d 1226A, 929 N.Y.S.2d 202 (N.Y. Sup. Ct. N.Y. County 2011) (*Koehler* case did not abrogate the separate entity rule); *Parbulk II v. Heritage Maritime*, 35 Misc.3d 235, 935 N.Y.S.2d 829 (N.Y. Sup. Ct. N.Y. County 2011) (same). See also *International Legal Consulting v. Malabu Oil & Gas*, 35 Misc.3d 1203A, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. N.Y. County 2012) (applying the separate entity rule in the context of pre-judgment attachment proceedings); *Ayyash v. Koleilat*, 38 Misc.3d 916, 957 N.Y.S.2d 574 (N.Y. Sup. Ct. N.Y. County 2012) (applying the separate entity rule to a case involving a Lebanese money judgment, a Lebanese judgment creditor, and a Lebanese judgment debtor, and invalidating information subpoenas aimed at finding overseas assets allegedly controlled by French, Canadian and Swiss banks with branches in New York).
14. *Shaheen Sports v. Asia Ins.*, 2012 WL 919664 at *9 (S.D.N.Y. 2012) (separate entity rule prohibited a judgment creditor from executing on overseas assets through service on a bank's New York branch), app. dismissed sub nom. *Hamid v. Habib Bank*, No. 12-1418, 2012 WL 4017287 (2d Cir. Aug. 14, 2012).
15. http://open.nysenate.gov/legislation/bill/S4542-2011.
16. Slip Op. at *1-2.
17. Slip Op. at *13.