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SDNY Grapples Again with the "Separate Entity Rule" in Connection with Enforcement of a Multi-Billion-Dollar Judgment against Foreign Judgment Debtors

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Motorola Credit Corp. v. Uzan, 2013 WL 4452014 (S.D.N.Y. Aug 21, 2013)

More than ten years ago, Motorola Credit Corp. ("Motorola") won an over-$2 billion judgment in the Southern District of New York ("SDNY") against certain foreign defendants, arising out of their diversion of Motorola funds to a Turkish telecommunications company that defendants owned. On August 21, 2013, in a proceeding to enforce that judgment, Judge Rakoff of the SDNY entered the decision summarized below.

As part of a "worldwide, decade-long hunt" for the judgment debtors and their assets, Motorola served a restraining order and injunction (the "Restraint") on the New York branch of third party Standard Chartered Bank ("SCB"), an international banking group. The Restraint essentially directed SCB to freeze assets of the judgment debtors and certain identified "proxies" of the judgment debtors. After being served in New York, SCB conducted a global search for such assets and identified what it claimed were four interbank deposits totaling approximately $30 million, which Jordan Dubai Islamic Bank ("JDIB"), one of the judgment debtors' identified "proxies," had placed in an SCB branch located in the United Arab Emirates (the "UAE"). In compliance with the Restraint, SCB froze JDIB's assets and refused to remit payments due to JDIB, leading the UAE Central Bank to debit, from SCB's account with the Central Bank, funds in the full amount of JDIB's assets. SCB then moved the Court for relief from the Restraint.

The Court addressed two substantive issues in its decision: (i) whether the assets at issue were judgment debtor proxy JDIB's property, as opposed to SCB's, and (ii) whether the "separate entity rule" rendered New York service of the Restraint ineffective with respect to JDIB's assets held at SCB's UAE location. With respect to the first issue, the Court held that the assets were the property of JDIB and were merely held by SCB, and thus were subject to the Restraint. The Court also rejected SCB's request for equitable modification of the Restraint to allow the release of JDIB's assets, which SCB had argued was warranted due to a risk of "double liability" in that it could be obligated both to turn over the frozen amounts to Motorola and, under UAE law, to remit funds to JDIB. The Court relied on long-established authority to hold that the risk of double liability is "an ordinary cost of doing business in multiple jurisdictions," which did not provide sufficient basis for equitable modification of the Restraint.

Turning next to the issue of the "separate entity rule" — under which, for purposes of attachment and execution, courts must treat each branch of a bank as a separate entity — the Court held that the rule "continues to bear weight" and precluded Motorola from restraining assets located in SCB's UAE branch. In doing so, the Court rejected Motorola's argument that the New York Court of Appeals, in Koehler v. Bank

of Bermuda, Ltd. 12 N.Y.3d 533 (2009), had implicitly abolished the rule in the post-judgment enforcement context when it required a bank subject to personal jurisdiction in New York to turn over stock certificates located in Bermuda that belonged to the judgment debtor in that case, without requiring service on the bank's Bermuda branch. While acknowledging that various federal and state courts in the wake of Koehler have reached differing conclusions regarding whether the separate entity rule continues to apply, the Court held that Koehler did not abrogate the separate entity rule given that (i) the Koehler court — which did not discuss the separate entity rule in its decision — had had no reason to address it and (ii) it is "unlikely that the New York Court of Appeals would silently overrule such an important policy and precedent."

The Court also rejected Motorola's argument that the separate entity rule "no longer makes sense in the face of modern technology," which now allows for "nearly instant global communications" among bank branches. The Court pointed out that the separate entity rule not only reflects accessibility considerations but also is intended to avoid disruption of banking practices, which regardless of technological advances may still occur to the extent that banks are subject to foreign laws and practices; further, "double liability" may ensue where freezing and turning over assets held at a foreign branch violates local law. Disruptions to SCB's banking operations in UAE and Jordan had actually occurred as a result of the Restraint, the Court noted.

Despite ruling that the separate entity rule precluded Motorola from restraining JDIB's assets held by SCB at its UAE branch, the Court granted a temporary injunction against the release of the assets pending appeal. The Court chose to maintain the asset freeze because: (i) there was a high likelihood that the release of those assets would irreparably harm Motorola, given that the judgment debtors had a history of secreting assets, (ii) the viability of the separate entity rule "remains an open and hotly-contested issue," and (iii) the balance of hardships favored Motorola.

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