CTQ-2014-00001

Court of Appeals

of the

State of New York

MOTOROLA CREDIT CORPORATION,

Appellant-Respondent,

NOKIA CORPORATION,

Plaintiff-Counter-Defendant,

MOTOROLA, INC., ET AL.,

Counter-Defendants,

—against—

STANDARD CHARTERED BANK,

Respondent- Appellant,

MURAT HAKAN UZAN, ET AL.,

Defendant-Counter-Claimants,

KEMAL UZAN, ET AL.,

Defendants.

On Question Certified by the United States Court of Appeals for the Second Circuit (USCOA Docket Nos. 13-2535-cv-(L) and 13-2639-cv(con))

BRIEF OF THE COMMITTEE ON BANKING LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THIS COURT'S ENDORSEMENT OF THE SEPARATE ENTITY RULE

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Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York, is a private, non-profit organization of more than 24,000 members who are professionally involved in a broad range of law-related activities. Founded in 1870, the Association is one of the oldest bar associations in the United States, and seeks to promote reform in the law and to improve the administration of justice at the local, state, federal and international levels through its more than 150 standing and special committees. Among its purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice." Article II, Constitution of the Association. The Association regularly files briefs as *amicus curiae* to address a wide range of legal issues of importance.

The Committee on Banking Law is a standing committee of the Association that examines current legal issues affecting banks and bank holding companies operating in the U.S. and abroad, and takes positions on such issues when appropriate. The Committee is composed of members drawn from law firms, banks and other financial institutions, state and federal banking agencies, banking organizations, and law schools (professors and students) with diverse points of view. The filing of this brief was approved by a majority of the voting members of the Committee. Several members of the Committee abstained from the preparation of this brief or the vote to file it.

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The Committee on Banking Law of the Association of the Bar of the City of New York respectfully submits this brief *amicus curiae* to request that this Court answer the certified question in the affirmative. The Committee submits that Article 52, read consistently with New York principles of statutory construction and in conjunction with directly relevant provisions of New York banking and enforcement law, precludes the extraterritorial restraint or turnover of deposits held by an offshore branch office of a foreign bank simply because it maintains a New York branch office.

PRELIMINARY STATEMENT

Earlier this year, the United States Court of Appeals for the Second Circuit certified the following question to this Court:

> Whether the separate entity rule precludes 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.

Tire Eng. & Distribution L.L.C. v. Bank of China Ltd., 740 F.3d 108, 118 (2d Cir. 2014).

The district court in this case had first ordered a worldwide restraint of the judgment debtors' property pursuant to CPLR § 5222, and specifically restrained the dinar equivalent of a $30 million deposit with the United Arab Emirates ("UAE") branch office of Standard Chartered Bank. The district court thereafter answered the question above in the affirmative, holding that the separate entity rule

precludes a judgment creditor from restraining a judgment debtor's assets located outside of New York. *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666 (JSR), 2013 WL 5738876, at *8 (S.D.N.Y. Aug. 1, 2013). The district court nonetheless stayed *vacatur* of the restraining notice pending appeal, acknowledging that "the continued viability of the separate entity rule and its applicability here is a substantial issue on which the higher courts have not yet spoken definitively." *Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666 (JSR), at *2 (S.D.N.Y. May 30, 2013) (filed Aug. 16, 2013) (order staying release of restraint on UAE assets pending appeal). In its opinion certifying the question to this Court, the Second Circuit agreed.

Pursuant to the separate entity rule, as shown by Standard Chartered in its brief to this Court, each branch of a bank is viewed for certain purposes – including attachment, post-judgment restraint and turnover, and various activities unique to banking, including foreign bank insolvency – as if it were a separate entity, even though all branches may in fact be part of the same legal entity. The rule reflects the practical reality that a branch office located in a foreign country is necessarily subject to that country's laws and regulations, and that freezing or seizing property or deposits held in accounts at a foreign branch could potentially violate local laws and subject the branch to double liability. Doing so can also be seen as a direct affront to the sovereignty of the jurisdiction where the deposit is

located, and subject the foreign branch to adverse regulatory consequences. Extraterritorial enforcement is also inconsistent with treaty and legislative enactments that are premised on encouraging the reciprocal recognition and enforcement of the judgments of foreign jurisdictions.[1] In addition, if the service of a restraining notice on the New York branch of an international bank were to require an immediate worldwide search for and freeze of a judgment debtor's deposits on pain of double liability, and at the risk of violating foreign confidentiality and deposit obligations, an intolerable burden would be placed on banks and commerce.

Courts in this state have given effect to the separate entity rule for almost a century, and its survival *vel non* represents as important a banking law question as has reached this Court in a generation. Standard Chartered demonstrated in its brief to this Court that the separate entity rule is so woven into the fabric of New York banking law that its endorsement by this Court is essential for a prudent administration of New York execution law, in the context of which banks play a central and virtually exclusive role. Moreover, the separate entity rule is essential to give effect to the key provision of Article 52 as it relates to bank garnishees, the

[1] In this case, the Central Bank of the UAE, having determined that the restraint imposed by the district court contravened UAE law, debited an account maintained with it by Standard Chartered in an amount equal to that of the frozen deposit. Standard Chartered is therefore very much exposed to double liability.

discharge provided by CPLR § 5209, and to ensure that the discharge of the garnishee's obligation pursuant to that provision is as readily enforceable as the restraint and enforcement provided to the judgment creditor pursuant to CPLR §§ 5222, 5225 and 5227.

Motorola seeks worldwide restraint and turnover, but the discharge protection that can be obtained by Standard Chartered pursuant to CPLR § 5209 would stop at the water's edge, and this is a critical failure. The enforceable discharge protection given to a bank garnishee must coincide with the enforcement relief given to the judgment creditor, and if the garnishee's protection stops at the water's edge, so must the relief given the judgment creditor.

This position is required by rules of statutory construction that limit the extraterritorial compass of New York's legislative enactments, and that require courts to give effect to all elements of a legislative scheme. These rules also mandate that courts avoid construing New York law in a way that risks an unconstitutional application, such as one that would expose a garnishee to double liability. As shown in Points I and II below, all of these objectives are well-served by the separate entity rule, statutory authority for which is found in CPLR § 5240. This position is also supported by Sections 204-a(3) and 138 of New York's Banking Law, the plain language of which conditions the liability of a New York office of a bank for contracts to be performed by its foreign branches on the

liability that would be imposed on a wholly local bank in the foreign jurisdiction, a statutory test readily applied in an enforcement context. The position is also supported when the enforcement objectives of Article 52 are considered in light of those underlying Article 53, which incorporates the provisions of the Uniform Foreign Money-Judgments Recognition Act. That statute specifies that, in order for a judgment creditor to obtain enforcement of its judgment against property or debts sited in a foreign jurisdiction, it is first necessary to obtain recognition of its judgment in the courts of that jurisdiction, and to use that jurisdiction's courts to enforce the judgment. Any other approach is a direct affront to principles of comity.

The separate entity rule can be seen as a direct expression of comity, and serves the objectives of harmony, uniformity and reciprocal advantage that underlie comity, thereby promoting the interests of New York, the international banks that have chosen to maintain offices here, and the citizens of this state.

POINT I.

THE SEPARATE ENTITY RULE REFLECTS A CONSTRUCTION OF ARTICLE 52 THAT GIVES PROPER EFFECT TO ALL OF ITS PROVISIONS

Motorola's position before this Court can be reduced to a single unyielding proposition: If a judgment creditor can establish *in personam* jurisdiction over the New York branch of a foreign bank like Standard Chartered, Article 52 imposes no

territorial limits on the power of a New York court. Distinct limits are placed on the exercise of a New York court's enforcement jurisdiction pursuant to Article 52, however, and the separate entity rule provides a bright-line mechanism for giving effect to those limits in practice.

A. Statutory Rules of Construction Support Use of the Separate Entity Rule

The principal limit Article 52 imposes on extraterritorial restraint and turnover is the fundamental need for a court simultaneously to provide a discharge of the garnishee's obligation to the judgment debtor that is set forth in CPLR § 5209:

> A person who, pursuant to an execution or order, pays [money] to the judgment creditor or a sheriff or receiver . . . . is discharged from his obligation to the extent of the payment . . . .

But a discharge issued pursuant to this provision has no sway offshore, and can provide no protection from double liability to a New York bank garnishee if the funds subject to restraint and turnover are held on deposit in a branch office of the bank located in a foreign jurisdiction subject to the laws of that jurisdiction. Any execution process that exposes a garnishee to double liability by proceeding against debts or property subject to foreign law does so in violation of the garnishee's due process rights.

The New York Legislature has prescribed three rules of construction that are directly applicable here, and that counsel the application of the separate entity rule

in any attempted cross-border enforcement proceeding. The first requires that a statute be construed in such a way as to limit its extraterritorial effect without explicit legislative language to the contrary. The second requires that a statute be construed to give effect to all its provisions. The third rule counsels the construction of a statute to avoid constitutional issues.

1. The Rule Against Extraterritorial Effect[2]

The rule that proscribes giving a statute extraterritorial effect is straightforward:

> Generally, the laws of one state can have no force or effect within the territorial limits of another, without the consent of the latter jurisdiction, since each state is an independent sovereignty. *Prima facie*, therefore, all laws are co-extensive, and only co-extensive, with the political jurisdiction of the lawmaking power; and *every statute in general terms is construed as having no extraterritorial effect.*

N.Y. Statutes § 149, cited in *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 523 (1994) (Titone, J., concurring) (emphasis added) ("Under our State's rules of statutory construction, *there is no basis for inferring extraterritorial effect in the*

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[2] We note parenthetically that *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009), has no relevance because the CPLR § 5225 order in *Koehler* involved a chattel that had no physical existence in the jurisdiction from which it had already been removed. The discharge provided by CPLR § 5209 was therefore not at issue in *Koehler*. The property targeted for turnover in *Koehler* consisted of physical share certificates that the garnishee had released to the judgment debtor before the garnishee's motion to dismiss on jurisdictional grounds had been decided, and at a time when the garnishee was arguably in contempt of a court order. *Koehler*, 12 N.Y. 3d at 536-37. The garnishee's subsequent consent to jurisdiction in New York left it open to a money judgment for the value of the property released, and also meant that, by the time the Court ruled, no property outside the jurisdiction was made the subject of a turnover order with extraterritorial effect. *Tire Engineering*, 740 F.3d at 116.

face of legislative silence on the question") (emphasis added). This Court recently recognized the importance of this rule and its application:

> The federal limitation upon the reach of the Sherman Act, predicated upon and an expression of the essentially federal power to regulate foreign commerce, would be undone if states remained free to authorize "little Sherman Act" claims that went beyond it. *The established presumption is, of course, against the extraterritorial operation of New York law (see McKinney's Consolidated Laws of N.Y., Book 1, Statutes § 149), and we do not see how it could be overcome in a situation where the analogue federal claim would be barred by congressional enactment.*

Global Reinsurance Corp. v. Equitas Ltd., 18 N.Y.3d 722, 735 (2012) (Lippman, C.J.) (emphasis added). Historically, the New York Court of Appeals has adhered to the principle that "an intention will not be inferred from general language of an act to give it extraterritorial effect." *Ewen v. Thompson-Starrett Co.*, 208 N.Y. 245, 247 (1913). Application of this rule in this context would invalidate the sort of extraterritorial restraint of assets that is at issue in this case.[3]

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[3] New York law governing execution and attachment is infused with a localized territoriality. The word "Sheriff," for example, appears in 30 subsections of Article 52, and is used 92 times. Such a pervasive mention of an official having no authority to act outside a particular county is wholly inconsistent with a legislative intent to sanction worldwide restraint and execution. Indeed, the statutory authority of the New York County Sheriff, the official charged with levying on property and debts subject to execution, is limited to performing "the duties prescribed by law as an officer of the court . . . within the county," or in New York City, within the city. County Law § 650(1); New York City Charter § 1526(2); City Civ. Ct. Act § 1609. The New York County Sheriff would not be welcome across the Hudson in Newark, much less in the UAE.

2. The Rule Requiring Harmonization of All Statutory Provisions

The second rule of construction prescribed by the legislature simply requires that all provisions of a statute be read together so as to give all parts their intended effect:

> A statute or legislative act is to be construed as a whole and all parts of an act are to be read and construed together to determine the legislative intent.

N.Y. Statutes, § 97. CPLR §§ 5222 and 5225 – on which Motorola relies – must therefore be harmonized with CPLR § 5209. Harmony can be achieved simply by applying the separate entity rule and giving effect thereby to the rule against giving extraterritorial application to the provisions of Article 52 as they affect restraint and turnover.[4]

This Court's analysis in *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013) (Rivera, J.), is further

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[4] *See, e.g., Abood v. Hosp. Ambulance Serv., Inc.*, 30 N.Y.2d 295, 300 (1972) ("[W]e . . . give heed to the principle of statutory construction that a court must take the entire act into consideration and aim to reconcile apparent contradictions") (internal quotation marks omitted); *Kaplan v. Peyser*, 273 N.Y. 147, 149-50 (1937) ("But that section may not stand alone. It is to be read and applied in connection with every other section of the act. All must have their due and conjoint effect. Each must be so far qualified and limited by each other as that all may have operation in harmony, if so it may be") (internal quotation marks omitted); *In re Vetter's Will*, 158 N.Y.S. 450, 453 (N.Y. Sur. 1916) ("All sections of an act are to be read together and harmonized, if possible. None of them can be construed disjunctively, abstracted from all the residue of the context of the act, as if enacted separately. Every legislative act must be read as a whole, and all parts given effect if possible"). Therefore, New York courts must read CPLR §§ 5222, 5225 and 5227 in conjunction with CPLR § 5209 in order to resolve conflicts among them. CPLR §§ 5222, 5225 and 5227 cannot be applied extraterritorially in a situation where, as here, CPLR § 5209 cannot be given effect in a foreign jurisdiction.

instructive here. The Court concluded that the legislature's omission of the word "control" in the turnover provision being scrutinized was to be deemed intentional and therefore determinative. *Northern Mariana Islands*, 21 N.Y.3d at 63. In *Koehler*, the Court drew significance from the addition of the words "within or without the state" in a recent amendment to CPLR § 5224, the Article 52 provision governing disclosure. But these words were not added to CPLR §§ 5222, 5225 or 5227, and the analogous inference to be drawn here is that the omission of those words from those sections was also intentional. An omission should in particular not be disregarded by reading the words into the statute in a way contrary to the statutory rule against giving any statute an extraterritorial effect. In addition, as the Court noted, "[w]hen different terms are used in various parts of a statute or a rule, it is reasonable to assume that a distinction between them is intended." *Northern Mariana Islands*, 21 N.Y.3d at 63 (citation omitted).[5] As the *Northern Mariana Islands* Court observed, "this Court is required to construe the entire CPLR in a manner that harmonizes these variations." *Id.*

When these statutory rules of construction are applied together, the adoption of the separate entity rule or its functional equivalent is virtually mandated.

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[5] CPLR § 5209 is not the only statutory provision that must be taken into account. As shown below, the extraterritorial enforcement of judgments is flatly inconsistent with CPLR Article 53, which codifies the Uniform Foreign Money-Judgments Recognition Act, as well as various New York UCC provisions, New York choice of law rules, and Sections 134, 138, 204-a(3) and 204-a(1) of New York's Banking Law.

3. The Rule of Constitutional Avoidance

While the Second Circuit did not certify any constitutional issues to this Court, the interpretation of New York statutes by New York courts is conditioned by the doctrine of constitutional avoidance, as set forth in N.Y. Statutes § 150c:

> Where the constitutionality of an act may be rendered doubtful, the court will first ascertain whether a construction of the act is fairly possible by which the question may be avoided.

See also *Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984).

Accordingly, this Court must consider issues of constitutionality in construing its own law, even if a question as to constitutionality is outside its remit. But while the court need only find a constitutional doubt here to forestall abrogation of the separate entity rule, it is clear that more than a doubt would be raised by that abrogation. Indeed, as shown below, if CPLR § 5209 cannot be enforced extraterritorially to protect a bank garnishee that has paid an offshore deposit debt, or transferred offshore property, to a New York judgment creditor, the failure to give effect to the separate entity doctrine would be demonstrably unconstitutional.

B. CPLR § 5240 Provides Statutory Authority For Application of the Separate Entity Rule

Consistent with the rule of constitutional avoidance, the courts in this state have been given the power to issue decisions protective of the due process

concerns implicated by enforcement procedures, and the statutory basis for doing so is found in CPLR § 5240, which provides that:

> [t]he court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.

This provision was "clearly intended to empower the courts to prevent unreasonable annoyance and abuse in the use of the provisions of Article 52 of the CPLR in enforcing judgments." *Cook v. H.R.H. Constr. Corp.*, 32 A.D.2d 806, 807 (2d Dep't 1969). This provision grants courts extensive powers to regulate the procedures used in aid of enforcement of money judgments. *See, e.g., Tweedie Constr. Co., Inc. v. Stoesser*, 65 A.D.2d 657, 657 (3d Dep't 1978) ("CPLR § 5240 is an omnibus section empowering the court to exercise broad powers over the use of enforcement procedures and is the proper vehicle for the relief sought by the interested party"). The CPLR § 5240 power is particularly appropriate where used to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Parts Auth., Inc. v. Eagle Serv. Sta., Inc.*, 2005 WL 3601425 10 Misc. 3d 1066(A), at *2 (N.Y. City Civ. Ct. Nov. 29, 2005). The imposition or threat of double liability is certainly sufficient to trigger the Court's power under this test.

In Ayyash v. Koleilat, 38 Misc. 3d 916, 925 (N.Y. Sup. Ct. 2012), Justice Coin found that, "in the circumstances here, even assuming, arguendo, that the

separate entity rule were no longer extant, it would be appropriate for the court to avail itself of its discretionary power under CPLR [§] 5240 to deny plaintiffs motion." Justice Coin quashed the subpoena in *Ayyash* based on the separate entity rule, but the First Department, in affirming, relied on CPLR § 5240. 115 A.D.3d 495 (1st Dep't 2014). CPLR § 5240 provides a sound statutory basis for implementing the rule.

POINT II.

ARTICLE 52 MUST BE CONSTRUED TO AVOID SUBJECTING GARNISHEES TO AN UNCONSTITUTIONAL RISK OF DOUBLE LIABILITY

A. Protection of the Garnishee is Essential to a Constitutional Enforcement Process

More than a century ago, the Supreme Court decided *Harris v. Balk*, 198 U.S. 215 (1905) ("*Harris*"), and *Harris* remains important precedent in cross-border enforcement process. *Hotel 71 Mezz Lender LLC v. Falor*, 14 N.Y.3d 303, 314-15 (2010) (Jones, J.). *Harris* stands for the principle that a garnishee cannot constitutionally be subjected to double liability, and demonstrates that such a result is avoided in a domestic context by extending full faith and credit to the garnishee's discharge. In the international context, where the protection offered by full faith and credit is not available, the separate entity rule provides analogous protection from the constitutionally impermissible risk of double liability.

The circumstances addressed in *Harris* are instructive here. Harris owed a debt to Balk. Both were North Carolina domiciliaries. Balk, in turn, owed a debt to Epstein, who lived in Maryland. When Harris traveled to Maryland, Epstein attached the debt owed by Harris to Balk pursuant to Maryland garnishment process. To satisfy the garnishment order, Harris paid over to Epstein the amount he owed to Balk. Notwithstanding the satisfied Maryland garnishment order, and the purported discharge of Harris's debt to Balk by the Maryland court, Balk sued Harris on the original debt in North Carolina, and was awarded judgment against Harris on that debt by the North Carolina court. The Supreme Court reversed, holding that North Carolina was obligated to give effect to the Maryland court order in order to avoid exposing Harris to double liability on his discharged debt to Balk:

> It ought to be and it is the object of courts to prevent the payment of any debt twice over. Thus, if Harris, owing a debt to Balk, paid it under a valid judgment against him, to Epstein, he certainly ought not to be compelled to pay it a second time, but should have the right to plead his payment under the Maryland judgment.

Harris, 198 U.S. at 226. Having raised a constitutional concern about double liability, the *Harris* court held that the full faith and credit clause (U.S. Const., Art. IV, § 1) disposed of the problem:

> A judgment against a garnishee, properly obtained according to the law of the state and paid, must, under the full faith and credit clause of the federal Constitution, be recognized as a payment of the original

> debt by the courts of another state in an action brought against the garnishee by the original creditor.

Drake v. DeSilva, 124 A.D. 95, 97 (3rd Dep't 1908) (describing the holding in *Harris*). The Supreme Court confirmed this conclusion more than fifty years later in 1961:

> [O]ur prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment.

Western Union v. Pennsylvania, 368 U.S. 71, 75 (1961); *see also, e.g., United States v. First Nat'l City Bank*, 379 U.S. 378, 384 (1965) (distinguishing garnishment from freeze order); *Cities Service Co. v. McGrath*, 342 U.S. 330, 335-36 (1952) (uncompensated taking theory).[6] This Court has recognized the same principle. *Diamond v. Oreamuno*, 24 N.Y.2d 494, 504 (1969). The principle is inevitably of central importance in any case with cross-border implications. *E.g.*, *Solicitor for Affairs of His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 294-95 (1952); *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 168-69

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[6] *See also* 6 Am. Jur. 2d *Attachment and Garnishment* § 270 (West 2011) ("[W]herever it may be reasonably assumed that the garnishee may incur a double liability, in consequence of the anticipated refusal of a foreign court to recognize the judgment if rendered, the court will withhold the judgment in garnishment or refuse to exercise jurisdiction."). *See also* Restatement (Second) of Conflict of Laws § 68 (1971) Reporter's Note; Annot., *Refusal to Render Judgment of Garnishment in Proceedings in Rem, Because of Danger to Garnishee of Double Liability in Event of Refusal of Court of Another Jurisdiction to Recognize or Give Effect to Judgment, if Rendered*, 69 A.L.R. 609 (1930).

(1925). And it is also an ancient principle, dating back to the dawn of New York jurisprudence and given particular credence by Chancellor Kent: "[I]t may be laid down as a clear principle of justice, that a person compelled, by a competent jurisdiction, to pay a debt once, shall not be compelled to pay it over again." *Holmes v. Remsen*, 4 Johns. Ch. 460, 468 (1820) (Kent, Ch.).

The holding of *Harris* must be given effect by Article 52 in order to preserve the Article's constitutionality. This can be done only if enforcement and discharge are completely congruent. To enforce a judgment, a judgment creditor first serves a garnishee with a CPLR § 5222 restraining notice, the effect of which is to impose a temporary freeze on the garnishee's repayment of any deposit debt owed to the judgment debtor, or the disposition of the judgment debtor's property. CPLR § 5222. The judgment creditor next commences a proceeding seeking to establish the garnishee's obligation to pay over to the judgment creditor the judgment debtor's property or the amount the garnishee owes to the judgment debtor. CPLR §§ 5225(b) or 5227. The final step, a step essential to the protection of the garnishee, is the issuance of a discharge of the garnishee's debt pursuant to CPLR § 5209:

> A person who, pursuant to an execution or order, pays [money] . . . to the judgment creditor or a sheriff or receiver . . . is discharged from his obligation to the judgment debtor to the extent of the payment . . . .

CPLR § 5209, however, cannot be enforced outside the United States, and if the discharge provided by CPLR § 5209 is not sufficient to protect the garnishee from the judgment debtor's claim in the jurisdiction where the deposit account or property is located, the garnishee will be exposed to double liability, a result viewed as unconstitutional by the Supreme Court in *Harris*. In this case, *Standard Chartered* is present in both New York and Dubai, but because the full faith and credit clause of the U.S. Constitution will not protect Standard Chartered in Dubai, as it protected Harris in North Carolina, the holding of *Harris v. Balk* must be given effect by the separate entity doctrine. There is no international full-faith-and-credit clause, nor is there an international treaty or convention that would give effect to an attempt to circumvent in Dubai a discharge given to Standard Chartered in New York under CPLR § 5209.[7] The separate entity doctrine was developed almost a century ago to provide just this protection.[8]

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[7] Indeed, as indicated above, the Central Bank of the UAE has already made plain that giving effect to the New York freeze order was in contravention of UAE law. The situation is made even more complicated here because the deposit debt is owed, not to the named Uzan judgment debtors, but to an alleged Uzan proxy, and the very nature of this property or debt is disputed.

[8] Indeed, without the separate entity rule, the only way to avoid due process transgressions in international post-judgment proceedings would be to impose on bank-garnishees the intolerable burden of demonstrating a clear risk of double liability on a case-by-case basis. The cost and time required to investigate and prove the laws of a foreign jurisdiction would not only be impracticable but inappropriate from a due process perspective.

B. *Daimler* Does Not Permit the Exercise of General Jurisdiction Here

Evolving notions of general jurisdiction support application of the separate entity rule to preclude enforcement jurisdiction over a foreign bank in connection with the restraint and turnover of offshore deposits or rights in property having no connection to its New York presence.

Under the territorial notion of due process controlling at the time, *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Supreme Court held that Maryland had given Harris enough due process when it asserted *in rem* jurisdiction over the debt he owed to Balk. *In personam* jurisdiction was freed of territoriality in 1945 by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *quasi in rem* jurisdiction followed in 1977. *Shaffer v. Heitner*, 433 U.S. 186 (1977). *Shaffer* in turn "interred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels with his debtor," *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 296 (1980), and demanded that the property be in the court's jurisdiction. *Shaffer* did not resolve the viability of *in rem* jurisdiction, and the Supreme Court has issued no recent ruling on it.[9] In *Koehler*, this Court held that "'all assertions

[9] At least one state Supreme Court has found that cross-border garnishment of a corporate entity violates *International Shoe*, notwithstanding *Harris v. Balk*, and the question remains open for decision by the Supreme Court. *Arizona v. Western Union Fin. Serv., Inc.*, 208 P.3d 218 (Ariz. 2009). *See also* Robert Laurence, The Off-Reservation Garnishment of an On-Reservation Debt and Related Issues in the Cross-Boundary Enforcement of Money Judgments, 22 Am. Indian L. Rev. 355 (1998).

of state-court jurisdiction,' whether labeled *in personam*, *in rem* or quasi *in rem*, must be evaluated according to the standard contained in [*International Shoe v. Washington*]." *Koehler*, 12 N.Y.3d at 544 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)). And in *Daimler AG v. Bauman*, 134 S. Ct. 746, 760-761 (2014) ("*Daimler*"), the Supreme Court likewise relied on the principles of *International Shoe* to limit dramatically the scope of *in personam* jurisdiction, effectively eliminating "doing business" as a basis for general jurisdiction. *See also Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) ("it is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him"); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

In its landmark decision earlier this year in *Daimler,* the Supreme Court held that the Due Process Clause of the U.S. Constitution, as given effect in *International Shoe*, places significant limitations on the exercise of general jurisdiction over a foreign corporation, which the Supreme Court held is proper only in a state where the foreign corporation is organized or has its principal place of business: "With respect to a corporation, the place of incorporation and principal place of business are paradigm ... bases for general jurisdiction." 134 S. Ct. at 760. The *Daimler* court held that general jurisdiction over an entity is proper only when the entity is "at home" in the jurisdiction, and took a dim view of second

homes, except when the place of incorporation differed from the principal place of business: being "at home" has "the virtue of being unique – that is, ordinarily indicat[ing] only one place." None of these criteria is present here, and because the purported exercise of jurisdiction over Standard Chartered does not "arise out of or relate to [Standard Chartered's] contacts with the forum," there is similarly no basis for asserting specific jurisdiction. 134 S. Ct. at 754 (quoting *Helicopteras Nacionales a Colombia, S.A., v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Relying on its decision in *Goodyear Dunlop Tires v. Brown*, 131 S. Ct. 2846 (2011), the Court in *Daimler* explained that the proper jurisdictional inquiry was not "whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic," but rather "whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761 (quoting *Goodyear Dunlop Tires v. Brown*, 131 S. Ct. 2846, 2851 (2011)) (internal quotation marks omitted). The Court then clarified that the determination whether a corporation is "at home" in a given state for purposes of general jurisdiction requires "an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Daimler*, 134 S. Ct. at n.20. This approach supports the view that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* Applying this holistic approach to assessing general jurisdiction

in *Daimler*, the Court explained that "Daimler's slim contacts with the State hardly render it at home there." *Id.* at 760.

The logic behind the decisions in *Goodyear* and *Daimler* applies with equal force to the question of enforcement at issue in this case. Standard Chartered, which is organized under English law and has its head office in London, is an international bank with over 1,600 branches, offices and outlets in 70 countries. The mere fact that Standard Chartered maintains a branch in New York cannot render it "at home" in New York. The facts here can be seen as weighing even more strongly against exercising general jurisdiction over a New York garnishee than did the facts in *Daimler* weigh against asserting jurisdiction over the defendant whose alleged conduct was the basis for the claim. By contrast, Standard Chartered is not the judgment debtor; rather, it is a third-party garnishee with no connection to the wrongdoing leading to the judgment being enforced against the Uzans or their alleged proxy. Because the connections of Standard Chartered's New York branch to the UAE deposit account that is at issue are so attenuated as to be non-existent, a New York court order compelling Standard Chartered to first freeze and then turn over to Motorola a deposit placed with it in a foreign branch in the UAE can readily be seen as violating "traditional notions of

fair play and substantial justice" under the standard articulated in *International Shoe*.[10]

Justice Sotomayor, in a concurring opinion in *Daimler*, 134 S. Ct. at 763-73, urged the Court to apply the "reasonableness check" from *Asahi* when making a jurisdictional determination instead of the majority's holistic approach to measuring the defendant's presence in the forum state. *See Asahi Metal Industry v. Superior Court*, 480 U.S. 102, 115 (1987). The majority rejected the *Asahi* approach out of hand:

> Justice Sotomayor's proposal to import *Asahi*'s "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," *and, in the international context, "the procedural and substantive policies of other nations whose interests are affected by*

[10] The lower courts in New York have noted the likely dramatic impact of *Daimler* on questions of New York law, but have yet to give effect to that impact for procedural reasons. In *DZ Bank v. UBS*, New York County Supreme Court first noted that, while both the "mere department" doctrine and the "doing business" doctrine had historically provided a basis for general jurisdiction in New York. *DZ Bank v. UBS*, 2014 N.Y. Misc. LEXIS 1858. "*Daimler* significantly narrows the parameters for the exercise of general personal jurisdiction, and calls into question the validity of the doing business doctrine and, arguably also, the mere department doctrine." *DZ Bank*, Slip op. at 12. The *DZ Bank* court did not, however, base its decision on *Daimler* because *Daimler* "was decided after the motion was briefed and heard, and defendant has not brought the case to the court's attention or argued its effect," but the court clearly signaled its uncertainty as to the state of previously settled jurisdictional rules. *Id. See also Smart Trike v. Piermont*, 2014 N.Y. Misc. LEXIS 2294, Slip op. at n.3 (expressing in *dictum* agreement with the view expressed in *DZ Bank*).

> *the assertion of jurisdiction.*" Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

Daimler, 134 S. Ct. at 762 n.20 (emphasis added). Indeed, it can readily be seen that evaluating these factors would require a complex factual analysis and evaluation of the laws of foreign jurisdictions, and inevitably lead to getting tangled in the weeds of conflicting legal regimes. As the Court noted in rejecting this complicated approach, "it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home." *Id.* Both *Daimler* and the separate entity rule avoid these entanglements.

POINT III.

N.Y. BANKING LAW SECTIONS 204-a(3)(a) and 204-a(1) PROVIDE STATUTORY SUPPORT FOR THE SEPARATE ENTITY RULE

A. Banking Law Section 204-a(3)(a) Incorporates the Separate Entity Rule and Provides Protection from Inconsistent Cross-Border Adjudications

Whether Section 204-a(3)(a) of the Banking Law – which is applicable to the New York offices of foreign banking corporations like Standard Chartered – is viewed as a choice of law rule, an articulation of the act of state doctrine, or a statement of the separate entity rule, its clear intent is to protect the New York offices of such banks from inconsistent cross-border governmental actions or adjudications:

> [A]ny foreign banking corporation doing business in the state under a license issued by the superintendent . . . *shall be liable in this state* for contracts to be performed at its office or offices in any foreign country, and for deposits to be repaid at such office or offices, *to no greater extent than a bank*, banking corporation or other organization or association for banking purposes *organized and existing under the laws of such foreign country would be liable under its laws*.

NY Banking Law § 204-a(3)(a) (emphasis added).

While this provision, and the analogous provision applicable to New York banks and national banks with offices in New York,[11] was originally intended to protect New York banks from acts of foreign governments that were in the nature of expropriations, the language is broad enough to encompass inconsistent adjudications that place a bank at risk of double liability, and it has been so construed.[12]

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[11] Section 138(1) of the New York Banking Law provides that:

> [A]ny bank . . . or national bank located in this state which . . . shall have opened . . . a branch office . . . in any foreign country shall be liable for contracts to be performed at such branch office . . . and for deposits to be repaid at such branch office . . . to no greater extent than a bank . . . organized and existing under the laws of such foreign country would be liable under its laws.

[12] Sections 204-a(3)(b) and (c) were added to Section 204-a(3) in 1994 for the express purpose of overturning the decisions in *Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (rejecting Citibank's separate entity arguments, and holding Citibank New York liable for deposits placed with its expropriated Saigon branch), and *Wells Fargo Asia, Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991) (holding Citibank New York liable when repayment of Eurodollar deposits placed with Manila branch was prevented by debt moratorium). *See, e.g.*, Memorandum of Support from Hugh T. Farley, N.Y. State Senator, to N.Y. State Assembly at 1-2 (Feb. 4, 1994) (NYLS' Governor's Bill Jacket, 1994, ch. 264). While the terms of these provisions (as well as analogous amendments to Section 138) expressly address situations where the circumstances preventing repayment of deposits to the performance of contracts involved "war, insurrection or civil strife," the language of Section 204-a(3) does not contain similar provisos.

The plain meaning of the statute places a bank in the position of Standard Chartered on an equal footing with an entirely local UAE bank by providing that it "shall be liable *in this state* . . . to no greater extent than a *bank . . . organized and existing under the laws of such foreign country* would be liable *under its laws*." (emphasis added).[13] Because this provision speaks in terms of liability "in this state for contracts to be performed at its office or offices in such foreign country," the statute makes plain that such liability will be imposed only if the laws of that foreign country would impose liability on a completely separate, stand-alone, local bank in the foreign jurisdiction in connection with such contracts in like circumstances. In doing so, the statue views the New York branch office as an entity separate and apart from its foreign branch, and can been seen as a statutory effort to give effect to the separate entity rule.

While neither Section 204-a(3)(a) nor Section 138 has yet been invoked in an effort to avoid double liability in an execution context (because of the separate entity rule, there has been no need to do so), it can be read to apply to extraterritorial restraint and turnover relief that would impose enforcement liability on the New York branch attributable to the contractual obligations of its foreign

[13] Section 204-a(3)(a) provides that "[t]he laws of such foreign country for the purpose of this subdivision shall be deemed to include all acts, decrees, regulations and orders promulgated or enforced by a dominant authority asserting governmental, military or police power of any kind at the place where any such office is located . . . ."

branch. Both sections have been relied upon to protect a New York banking office from the risk of double liability imposed by inconsistent cross-border adjudications.

In *RSB Manufacturing Corp. v. Bank of Baroda*, 15 B.R. 650 (S.D.N.Y. 1981) (Sand, J.), the Bombay branch of the Bank of Baroda issued two letters of credit, one in favor of RSB Manufacturing Corp. ("RSB") and the other ultimately assigned to RSB to support the account party's purchase of goods. Thereafter, alleging fraud in the underlying sales contract, the account party sought and obtained from the High Court of Judicature in Bombay an injunction against payment under both letters of credit. When RSB presented the documents called for under the letter of credit to the nominated New York advising and paying banks, both dishonored demands for payment. RSB thereafter brought suit against the New York branch of Bank of Baroda, which was one of the banks. The bankruptcy judge, "[a]pplying the N.Y. Banking Law Sec. 204-a(3)(a) (McKinney), . . . found any liability the New York branch might otherwise have had extinguished by the Indian injunction." 9 B.R. 414, 417 (Bankr. S.D.N.Y. 1981). On RSB's appeal from the Bankruptcy Court decision, the District Court affirmed, likewise applying N.Y. Banking Law Section 204-a(3)(a) to conclude that any liability the New York branch might otherwise have had was extinguished by the Indian injunction:

> [A]ny argument attempting to show that the extinguishment of Baroda's duty to perform in India creates an obligation to pay in the New York branch must fail according to New York Banking Law Sec. 204-a(3)(a). As the Bankruptcy Court correctly stated, Sec. 204-a(3)(a) absolves the New York branch of any contractual liability beyond that imposed in the foreign country where the contract was to be performed. 15 B.R. at 653-655.

Cases decided under Section 138 are in accord. In *Sabolyk v. Morgan Guaranty Trust Company of New York*, 1984 WL 1275 (S.D.N.Y. 1984), the court relied on Section 138 of the Banking Law and principles of comity to hold that the New York head of office of Morgan Guaranty could not be held liable for the alleged wrongful dishonor by its Zurich branch of standby letters of credit issued by that branch ("Morgan-Zurich"). After a dispute arose between the parties to the stock purchase agreement supported by the letters of credit, the beneficiaries submitted demands for payment to Morgan-Zurich, and the account party, alleging fraud, simultaneously obtained *ex parte* a Swiss attachment order attaching the letter of credit proceeds. Addressing the defense asserted by Morgan New York under Section 138 of the Banking Law, the court concluded as follows:

> Under Section 138(1), Morgan-New York is liable for non-payment under the Letters of Credit only if, and to the extent that, a bank organized under Swiss law "would be liable under its laws." Plainly, orders of a Swiss Court attaching the "credits and claims" of Messrs. Sabolyk and Smith under Letters of Credit 2949 and 2950, must be

obeyed by a Swiss Bank such as Morgan-Zurich, and such compliance cannot engender any liability under Swiss law.[14]

Confiscation cases decided under Section 138 employ similar analyses. In *Brill v. Chase Manhattan Bank*, 14 A.D.2d 852, 220 N.Y.S.2d 903 (1st Dep't 1961) (per curiam), the head office of Chase was held not liable for dishonoring a draft drawn payable in dollars against deposits placed with its confiscated Cuban Branch. The trial court concluded that a draft payable only in Cuba in dollars contravened Cuban foreign exchange regulations, and that, under Section 138, because no Cuban bank would have been liable for dishonoring the draft, Chase could likewise not be held liable. N.Y. Sup. Ct. June 15, 1977 (No. 7949/61), *aff'd mem.* 404 N.Y.S.2d 213 (1st Dep't 1978). *See Trujillo-M v. Bank of Nova Scotia*, 51 Misc. 2d 689, 273 N.Y.S.2d 700 (Sup. Ct. N.Y. County 1966), *aff'd*, 29 A.D.2d 847, 289 N.Y.S.2d 389 (1st Dep't), *cert. denied*, 393 U.S. 982 (1967) (holding under Section 204-a(3)(a) of the New York Banking Law that the liability of the defendant bank for deposits placed with its Santo Domingo branch was to be determined under the law of the Dominican Republic).

In *Manas y Pineiro v. Chase Manhattan Bank*, 52 A.D.2d 794, 383 N.Y.S.2d 357 (1st Dep't 1976), *rev'd sub nom Perez v. Chase Manhattan Bank*, 61 N.Y.2d

[14] The Court went on to add, in a footnote that makes plain the cross-border risks to which Morgan-Zurich was exposed, "Indeed, if a Swiss Bank were to make payment to plaintiffs Sabolyk and Smith under the Letters of Credit under the circumstances present here notwithstanding the Attachment Orders and Notices, it would, in my opinion, constitute a criminal contempt of Court punishable under Articles 169 and 172 of the Swiss Penal Code."

460, cert. denied, 469 U.S. 966 (1984), Section 138 had been raised by the dissent in the First Department as a ground coterminous with the act of state doctrine for dismissing the depositor's claim against Chase. After concluding that the act of state doctrine barred examination of the confiscation because undertaken in Cuba, pursuant to Cuban law, and against a Cuban citizen, the dissent concluded that Section 138 led to the same result:

> Under [Section 138] it is obvious that the Cuban branch of the defendant bank would be entitled to the same defense against an attempt of the plaintiff to enforce payment of the certificates that a Cuban bank, organized under the Cuban laws, could plead. Surely, a Cuban bank's defense would be conclusive as against any attempt to recover from its under circumstances.

This Court, which reversed the First Department's ruling in favor of the plaintiff solely on act of state grounds, expressly declined to reach the applicability of Section 138. 61 N.Y.2d 460, 470 n.2. *See generally*, P. Heininger, *Liability of U.S. Banks For Foreign Deposits Placed In Their Foreign Branches*, 11 *L. & Policy Int'l Bus.* 903, 989 (1979).

To a significant extent, Sections 204-a(3)(a) and 138 of the New York's Banking Law can be seen as providing a statutory framework for measuring the cross-border liabilities of New York branch offices of foreign banks and their domestic counterparts in respect of foreign branch contracts. The test in each instance is the extent to which an entirely local bank in the foreign jurisdiction would be liable for the violation *vel non* of the court order or conduct being

challenged. In this case, when the restraint imposed against Standard Chartered is considered in the light of Section 204-a (3)(a), it is clear that *no* liability whatsoever could be imposed on its New York branch for any failure to first restrain and then turn over to Motorola funds on deposit with its UAE branch.

B. Banking Law Section 204-a(1) Requires the Order of a United States Court to Recognize an Adverse Claim

Section 204-a(1) of the Banking Law underscores how anomalous and intrusive the extraterritorial restraint and turnover of a bank deposit is when viewed from the perspective of the jurisdiction subject to the intrusion. Section 204-a(1) provides as follows:

> Notice to any foreign banking corporation doing business in this state . . . of an adverse claim to a credit standing on its books to the account of any person, or to the balance in any deposit account, . . . shall not be effectual in this state to cause said foreign banking corporation to recognize said adverse claimant unless said adverse claimant shall also either procure a restraining order, injunction or other appropriate process against said foreign banking corporation from a court of competent jurisdiction in the United States . . . or . . . a bond, indemnifying said foreign banking corporation from any and all liability, . . . on account of the payment of or delivery pursuant to such adverse claim . . . .

This provision provides a foreign bank's New York office with protection from adverse claims, potentially including an adverse claim asserted against a New York deposit account by a court order served on a foreign branch of the bank. Indeed, a foreign court order is given no weight by the terms of the statute. To a significant extent, Section 204-a(1) can be seen as providing the same protection to New York

branch deposits that UAE law and the UAE central bank are providing to the deposit the Uzan proxy placed with the UAE branch of Standard Chartered.[15] Viewed in this light, the extraterritorial restraint imposed on that deposit represents, not only an affront to the territorial and regulatory sovereignty of the UAE, but a restraint that is in disregard of important principles of New York law, including fundamental and directly pertinent choice of law principles.[16]

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[15] As a general matter, the deposit taking activities of banks are closely regulated, both in New York and in other jurisdictions. In New York, the activities of foreign banking corporations are regulated by provisions specifically tailored to apply to such corporations. New York Banking Law §§ 200-209. In the first place, in order to conduct a banking business in New York, a foreign banking corporation must obtain a license issued by New York's Superintendent of Financial Services. *Id.* at §§ 200, 201. Only pursuant to the terms of such a license is a foreign banking corporation entitled to accept deposits. *Id.* at § 200(4). Once a foreign banking corporation has been licensed to engage in deposit taking activities, those activities themselves are subject to statutory and regulatory oversight. *Id.* at § 202-a; 3 NYCRR §§ 9.1-9.8, 20.1-20.3, 21.1-21.3 323.1-323.3. None of these statutory provisions or regulations contemplates the suspension of regulatory oversight over the deposits taking activities of a New York branch office if a court in some foreign jurisdiction purports to exercise dominion over a deposit.

[16] In the absence of a specified or mandatory choice of law, the law of UAE would govern Standard Chartered's UAE deposit obligation, whether under an "interest analysis," an " interest analysis" incorporating a lex situs test, a "grouping of contacts" test or a "most direct and substantial" connection test. These tests are intended to ensure that "the law of the jurisdiction having the greatest interest in the litigation will be applied." *Istim, Inc. v. Chemical Bank*, 78 N.Y.2d 342, 347 (1991). In the case of a deposit placed with a bank located in a foreign jurisdiction, the foreign jurisdiction will always have the greatest interest in adjudicating rights to deposit at issue. Under no test would New York law be identified as the proper law to govern the deposit contract.

Moreover, NYUCC § 1-105(2) prescribes mandatory choice of law rules to govern certain kinds of transactions, including those relating to bank deposits and collections. NYUCC § 4-102(2), which governs bank deposits and collections, provides that the applicable law to govern such transaction is the law of the place where the bank (or the pertinent branch or separate office of a bank) is located:

(2) The liability of a bank for action or non-action with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place

(....continued)

The apparent disregard of UAE law inherent in the extraterritorial restraint ordered by the *Motorola* Court is further compounded by the disregard for New York legal principles represented by the restraint. NYUCC § 9-304 establishes a debt situs rule for bank deposits that localizes a security interest to one jurisdiction using a complex cascade of rules assured to provide a unique answer:

> (a) **Law of bank's jurisdiction governs.** The local law of a bank's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank.
>
> (b) **Bank's jurisdiction.** The following rules determine a bank's jurisdiction for purposes of this part:
>
> > (1) If an agreement between the bank and the debtor governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of this part, this article, or this chapter, that jurisdiction is the bank's jurisdiction.
> >
> > (2) If paragraph (1) does not apply and an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

(continued....)

where the bank is located. *In the case of action or non-action by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located.* (Emphasis added.)

The choice of law rule reflected in the NYUCC § 4-102(2), when applied in the context of the obligation of Standard Chartered to repay the frozen deposit at issue here, points to the law of the UAE, which is "the law of the place where the branch or separate office is located," as the law that should govern the liability of Standard Chartered in respect of the frozen deposit.

> (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction.
>
> (4) If none of the preceding paragraphs apply, the bank's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located.
>
> (5) If none of the preceding paragraphs apply, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located.

This section does not exist in isolation. Holders of security interests compete with lien creditors – such as garnishors – for priority. NYUCC § 9-317(a)(2). Presumably, this competition is governed by the same set of debt situs rules. To conclude otherwise would violate the interpretative mandate that the Legislature is presumed not to be mischievous. N.Y. Statutes § 148. Therefore, the separate entity doctrine of the UCC applies to the CPLR.[17]

Considered in light of comity and the principles of reciprocity underlying the statutory and treaty mechanisms for the cross-border recognition and enforcement of domestic judgments, the unilateral and extraterritorial enforcement of a judgment cannot be reconciled with those processes. Indeed, it cannot be.

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[17] This was explicit in the related law of security entitlements. UCC §§ 8-112(c), 8-110(b)&(e); 9-305(a)(3); CPLR 5201(c)(4). However, security entitlements are a creature of statute, which explains the greater explicitness of their rules.

POINT IV.

THE UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT CONTAINED IN ARTICLE 53 IS WHOLLY INCONSISTENT WITH THE EXTRATERRITORIAL ENFORCEMENT OF JUDGMENTS

When a judgment creditor brings a foreign judgment into New York, Art. 53 of the CPLR provides for the *recognition* of "any foreign country judgment which is final, conclusive, and enforceable," and is "conclusive between the parties to the extent it grants or denies recovery of a sum of money," provided that the judgment debtor was afforded due process and the judgment is not against public policy.

The presumption underlying Article 53 is that, once the judgment has been *recognized* by a New York court, a New York court will use New York execution law to *enforce* the recognized judgment against property located here. This structure assumes that the foreign court *needs* the aid of a New York court. Article 53 further assumes that a court cannot enforce its own judgments—otherwise it would have no purpose. N.Y. Statute § 98. The notion that a foreign court would unilaterally and extraterritorially, and without the involvement of a New York court, enforce a foreign country's money judgment by disposing of property located in New York, or by directing the repayment of New York bank deposit to a stranger to the account, is completely alien to this statutory scheme.[18]

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[18] Indeed, even the judgment of a sister state entitled to full faith and credit in New York pursuant to Article 54 of the CPLR must be properly authenticated, accompanied by an affidavit certifying that it remains unsatisfied and was not obtained by default, and filed in the office of (....continued)

Article 53 is based on principles of comity and the encouragement of reciprocity. As this Court has explained, New York courts "accord recognition to the judgments rendered in a foreign country *under the doctrine of comity which is the equivalent of full faith and credit given by the courts to judgments of our sister States*." *Greschler v. Greschler,* 51 N.Y.2d 368, 376 (1980) (emphasis added); *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (2006) (Ciparick, J.). While a New York court asked to recognize a foreign country money judgment must make the threshold determination "whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and . . . whether that foreign jurisdiction shares our notions of procedure and due process of law," this Court has made plain that, "[i]f the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding." *Sung Hwan*, 7 N.Y.3d at 83.

In recommending the adoption of Article 53 by incorporating into New York Law the Uniform Foreign Money–Judgments Recognition Act, the Judicial

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(continued....)

any county clerk of the state before it can be enforced in New York. Pursuant to CPLR § 5402(b), "[a] judgment so filed has the same effect . . . as a judgment of the supreme court of the state and may be enforced or satisfied in like manner."

Conference's Report to the Legislature pointed out that "[t]he Uniform Act codifies, rather than reforms, existing decisional law in New York and other states regarding the recognition of foreign country judgments." The Report went on to underscore the practical need for the statutory enactment being proposed:

> The basic purpose of this proposal is to procure for New York judgments in foreign countries much better reciprocal treatment at the hands of foreign courts than they now receive. The lack of recognition of New York judgments in foreign countries stems frequently from the fact that many foreign countries of civil law background do not accept decisional law as proof that New York treats foreign judgments liberally, but they rather require statutory proof of this fact. It is the opinion of experts in the field of international litigation that this codifying legislation would answer the reciprocity requirements of many foreign countries and would therefore result in obtaining better treatment for New York citizens engaged in litigation abroad.

In the absence of a statutory or treaty mechanism for obtaining recognition of a domestic judgment in a foreign court, it is typically necessary to bring an action on the judgment.[19] As noted by the Restatement (Second) of Judgments, while a state "may as a matter of comity" choose to enforce the judgment of another state, "[w]hen the . . . judgment is for a payment of money, the customary way to secure enforcement of the judgment in [the state where the assets are

[19] Pursuant to CPLR § 5303, in order to obtain recognition of a foreign country money judgment in New York, the holder of the judgment either files an action on the judgment or motion for summary judgment in lieu of complaint. When recognized, the foreign judgment becomes a New York judgment.

located] is to bring an action *there* upon the judgment." Sec. 18, comm. f (emphasis added).[20]

Finally, it is clear that the sort of extraterritorial enforcement pursued in this case is completely inconsistent with the concept of the reciprocal recognition and enforcement of judgments that is reflected and encouraged by Article 53 of the CPLR.[21]

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[20] Even when the subject is covered by treaty, it is assumed that it will be necessary to obtain recognition of a judgment by a court sitting in the jurisdiction where enforcement will be sought before any enforcement is possible. The Hague Convention on Choice of Courts Agreements, for example, has a process that bifurcates recognition and enforcement. The Convention on Choice of Courts Agreements is intended to govern the recognition and enforcement of judgments resulting from proceedings based on commercial agreements in which the parties have agreed to designate, "for the purpose of deciding disputes . . . , the courts of one Contracting State . . . to the exclusion of the jurisdiction of any other courts." Article 3(a). The Convention provides that a judgment issued by a court of the Contracting State designated as the exclusive chosen court "shall be recognised and enforced in other Contracting States," and "[t]he procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State." Articles 8(1) and 14. There is no mechanism that would permit the court of origin of such a judgment to bypass the procedures set forth in the Convention, and to enforce the judgment by extraterritorial fiat in another Contracting State.

[21] In its brief *amicus curiae* to the Supreme Court in *Daimler* at pp. 2-3, the United States was highly critical of the "expansive assertions of general jurisdiction" endorsed by the Court of Appeals for the Ninth Circuit, and pointed out that such assertions had in the past impeded the negotiation of international agreements on the "reciprocal recognition and enforcement of judgments:"

> [F]oreign governments' objections to some domestic court's expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments. The conclusion of such international compacts is an important foreign policy objective because such agreements serve the United States' interest in providing its residents a fair, sufficiently predictable, and stable system for the resolution of disputes that cross national boundaries. (Citations omitted.)

POINT V.

PRINCIPLES OF COMITY ARE WELL-SERVED BY THE SEPARATE ENTITY RULE

The New York rule of statutory construction that precludes reading a statute to give it extraterritorial effect is a strong expression of respect for comity:

> [Comity] springs from an ordered sense of respect and tolerance for the adjudications of foreign Nations, *paralleling that commanded among the States by the Full Faith and Credit Clause of the United States Constitution* (US Const, art IV, § 1; *see generally*, Restatement [Second] of Conflict of Laws § 98). The comity doctrine is also pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies.

Gotlib v. Ratsutsky, 83 N.Y.2d 696, 700 (1994) (Bellacosa, J.) (emphasis added). While *Harris* commands courts to avoid cross-border double liability,[22] *Gotlib* commands New York courts to consider the cross-border implications of their decisions in the light of comity.

The separate entity rule itself has long been viewed as an expression of comity.[23] Considerations of comity are critical to the adjudication of cross-border

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[22] *Cf. Perez v. Chase Manhattan Bank*, 61 N.Y.2d 460, 470 (1984) (payment at one place should extinguish debt everywhere).

[23] Geoffrey Sant, *The Rejection of the Separate Entity Rule Validates the Separate Entity Rule*, 65 SMU L. Rev. 813, 819-25 (2012).

antitrust disputes under both the Sherman and Donnelly Acts,[24] and New York courts recognize that international law can preempt state law. *Republic of Argentina v. New York*, 25 N.Y.2d 252, 259 (1969) . The New York doctrine of Constitutional avoidance also suggests that comity is a valid guide for the proper reading of a statute. So does N.Y. Statutes § 147, which calls for statutory interpretation that does not unjustly discriminate against New Yorkers. A state that does not give comity is less likely to receive comity. As shown below, many New York statutes are very protective of its residents – more so than the statutes of many other jurisdictions. Some of these statutes (discussed below) assume that New York assets will not be reached by foreign courts, with foreign rules that undercut New York protections. Foreign execution efforts have not reached New York-sited debts and intangible property because foreign courts, in the interest of comity have not reached outside their jurisdictions.

In *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 580 (1980) (citations and quotation marks omitted, emphases added), this Court outlined the three operative reasons for giving effect to comity in a given case:

> [Comity] is an expression of one State's entirely voluntary decision to defer to the policy of another, and such a decision may be perceived as *promoting uniformity of decision*, as *encouraging harmony* among

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[24] *Hoffman-Laroche v. Empagran, S.A.*, 542 U.S. 155, 165 (2004) (Sherman Act); *Global Reinsurance Corp., US Branch v. Equitas Ltd.*, 18 N.Y.3d 722 (2012) (Donnelly Act; following *Empagran*).

> participants in a system of co-operative federalism, or as merely an expression of hope for *reciprocal advantage* in some future case in which the interests of the forum are more critical.

Although *Ehrlich-Bober* involved domestic issues, these objectives are equally applicable in an international context. The goal of harmony is alignment with the international legal order, the goal of uniformity is self-explanatory, and reciprocal advantage is that value that protects New York interests.

A. Harmony

Harmony bespeaks accord with accepted international legal principles, with "the customs and usages of civilized nations," and with "considerations of international rapport."[25] Avoiding double liability reflects this accepted international legal principle because the double liability of an entity like Standard Chartered, an English bank, would be an uncompensated expropriation in at least one of the jurisdictions that would impose liability, New York or the UAE. Restatement (Third) of Foreign Relations Law of the United States § 712 (1987). Following the separate entity rule would clearly advance harmony in this context.

B. Uniformity

The separate entity rule is the accepted uniform rule, and has been the law in the English lower courts for almost a century. *Richardson v. Richardson*, [1927] Prob. 228, [1927] All Eng. 92; *N. Joachimson v. Swiss Bank Corp.*, [1921] 3 KB

[25] *Argentina*, 25 N.Y.2d at 259 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)); *Japan Line Ltd. v. Los Angeles*, 441 U.S. 434, 454 (1979); *Daimler*, 134 S. Ct. at 763.

100 (Ct. App.). It was recently adopted by the House of Lords. *Societe Eram Shipping Co., Ltd. v. Hong Kong & Shanghai Banking Corp. Ltd.* ¶ 57 [2003] UKHL 30. The Scottish courts have also followed their English brethren. *Stewart v. The Royal Bank of Scotland plc*, (1994) S.L.T. (Sh. Ct.) 27 (Scot.). It is also the law in New Zealand and Hong Kong. *Ludgater Holdings Ltd v. Gerling Australia Ins. Co. Pty Ltd* [2010] NZSC 49; *Nanus Asia Co., Inc. v. Standard Chartered Bank* [1988] HKC 377 (H.K.).

The separate entity rule also has considerable support in treaty law, most importantly in the European Union, where the rule has been given effect through the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Dec. 21, 2007, 2007 O.J. (L339) (the "Lugano Convention").[26] In this regard, the European Court of Justice (the "ECJ") has interpreted Article 16(5) of the Lugano Convention to uphold the separate entity rule with regard to the garnishment of or execution against accounts held with bank branches in other member status. In *Denilauler v. SNC Couchet Freres* (Case 125/79) [1980] ECR 1553, the ECJ held that "[t]he courts of the place or, in any event, of the Contracting State, where the assets . . . are located, are those best able to assess the circumstances which may lead to the grant or refusal of the measures

[26] The Lugano Convention also includes some non-EU signatories: Iceland, Norway, and Switzerland.

sought." Similarly, in *AS-Autoteile Service GmbH v. Pierre Malhe* (Case 220/840) [1985] ECR 2267, the ECJ held that "*the enforcement* of judgments *are* matters which, because of their particular difficulty or complexity, require that the court having jurisdiction should be particularly familiar with the relevant national law." In *Kuwait Oil Tanker Company SAK v. UBS AG*, [2003] UKHL 31, 1 A.C. 300, the House of Lords reversed a garnishment order issued against the London branch of UBS Switzerland, holding that Article 16(5) of the Lugano Convention (to which both the United Kingdom and Switzerland are signatories) would confer exclusive jurisdiction upon Switzerland where the debt was sited.

Because many important trading partners and prospective treaty parties have adopted the separate entity rule, abandoning the rule here would represent an anomalous and retrogressive development in an important commercial jurisdiction.

C. Reciprocal Advantage: Policy Reasons Favoring Retention of the Separate Entity Rule

This objective derives from the very practical insight that a jurisdiction that extends comity is more likely to receive the respect that comity begets in return. A jurisdiction should extend comity if it is not harmed by extending it and would be helped by receiving it. Comity, from this perspective, is a matter of pursuing New York's enlightened self-interest. *Ehrlich-Bober*, 49 N.Y.2d at 580. This interest is especially strong for New York, which is a "race to the top" state – its substantive

laws protect New York residents and those doing business in New York more than those of other jurisdictions. A state with "race to the top" substantive law should not encourage other states to implement "race to the bottom" procedural law that allows them to export their policies to the disadvantage of New York residents.

Adhering to the separate entity rule can be seen as advancing at least the following New York interests: (a) New York's interest in free speech and human rights; (b) New York's enlightened consumer law; (c) New York's standing as an international financial center; and (d) New York as an important bank regulatory jurisdiction. A comity analysis based on reciprocity assumes that foreign law would follow United States law. Such an analysis would also assume that New York's failure to extend comity to the territorial integrity of foreign bank accounts could encourage reciprocal, retaliatory foreign treatment.

Free speech and human rights: In response to *Ehrenfeld v. bin Mahfouz*, 9 N.Y.3d 501 (2007), the New York legislature enacted the Libel Terrorism Protection Act (Ch. 66 L. 2008) ("LTPA"). This statute, *inter alia*, modified New York's version of the Uniform Foreign Money-Judgments Recognition Act to clarify that foreign judgments obtained in contravention of U.S. First Amendment jurisprudence are unenforceable in New York courts. *See* CPLR § 5304(8). (Congress followed the lead of New York: 28 USC § 4102.) This statute expresses

New York's extremely strong public policy in favor of free speech. *Holmes v. Winter*, 22 N.Y.3d 300 (2013) (Graffeo, J.).

It is not difficult to imagine how the LTPA could be circumvented if the holder of a libel judgment against a New York journalist or newspaper, for example, could enforce the judgment without obtaining its recognition by a New York court. All that would be necessary would be to reach the New York bank account of the writer or newspaper by serving execution process on one of the offshore branches of the New York bank where one or both might maintain a domestic deposit account. Even a jurisdiction otherwise inclined to follow the separate entity rule, such as the UK, might be disinclined to follow it if it were clear that New York would not reciprocate, and would be prepared to restrain accounts located in that jurisdiction without regard to English law and process.

Consumer law: New York has long been influential in the development of banking law, and other states have often followed its lead. Most but not all states have followed New York's lead as an exponent of the separate entity rule. R.F. Chase, Annot., *Attachment and Garnishment of Funds in Branch Bank or Main Office of Bank Having Branches*, 12 A.L.R.3d 1088 (1967). A court in Hawaii recently thought it was doing the same thing when it abrogated the separate entity doctrine following *Koehler*. *Marisco, Ltd. v. American Samoa*, 889 F. Supp. 2d 1244, 1248 (D. Hawaii 2012). If this Court were to abandon the rule, it could be

detrimental for New York consumers if that abrogation was followed by other states.

For example, the CPLR limits the amount of money that can be garnished from an individual's bank account, CPLR § 5231(b)-(j), and requires that notices listing the full range of available exemptions be provided to consumers who happen also to be judgment debtors. CPLR §§ 5222 (d)-(f), 5222–a(a)-(h) and 5231. Not all states have similar protections, and the federal rule is limited to federal benefits. 31 C.F.R. § 212. Aggressive judgment collectors can be aggressive forum shoppers as well, and if other states were to abandon the separate entity rule, judgment collectors might be able to circumvent the protections New York has built into its laws to assist its citizens most needing that protection. "Ordinarily, the state statutes will not be interpreted so as to give nonresidents or foreign corporations greater privileges or powers than are enjoyed by residents and domestic corporations." N.Y. Statutes § 147.

New York's Status as an International Financial Center: New York is often identified as an international financial center – most often as *the* international financial center. Since 1975, this Court has recognized this in its conflict-of-law jurisprudence. *Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220 (1975); *Allstate Ins. Co. v. Stolarz*, 81 N.Y.2d 219, 226 (1993). These cases tended to expand the jurisdictional reach of New York courts, though the Court has

also recognized that this principle is consistent with some foreign disputes belonging elsewhere. *Mashreqbank PSC v. Ahmed Hamad Al Goaibi & Bros.*, 23 N.Y.3d 129 (2014) (Smith, J.).

New York's interest in maintaining the strength and integrity of its banking system is compelling, and the New York banking community has long viewed the separate entity rule as being in its interest. The Clearing House Association (the "Clearing House") – an organization of interested international money-center banks – has filed briefs as *amicus curiae* whenever the rule has been under assault, and the Institute of International Bankers ("IIB") – an organization dedicated to representing the interests of foreign banks in the United States – likewise has been active in defense of the rule before the courts. We understand the Clearing House and the IIB, joined by the New York Bankers Association and the European Banking Federation, intend to file *amicus* briefs in this case.

The policy reasons favoring the separate entity rule from the perspective of international banks with New York offices have been chronicled in a number of the cases where the rule has been challenged. A compelling reason is to avoid the risk of double liability, and the almost certain entanglement in complex, expensive, cross-border litigation (such as this very case), where the often conflicting laws of multiple jurisdictions are at issue and where loss of the litigation can bring the risk of double liability home to roost. The burden that would necessarily accompany

the need to conduct constant, multiple, and complex worldwide searches for the accounts of judgment debtors, and to freeze any accounts found in violation of local laws and to then litigate the consequences, has been described as an intolerable burden, and an important reason for retaining the rule. The extent of the burden and expense, however, that would be visited on a major international bank with offices in 50-100 countries has yet to be fully imagined or calibrated. This burden is significantly compounded, it should be noted, by data protection and privacy laws in many of the jurisdictions that would need to be searched.

Regulatory Policy: If this Court abrogates the separate entity rule, it may be possible to reassert it by establishing a separately incorporated subsidiary in New York, in reliance on this Court's decision in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013). This workaround would, however, be expensive, and contrary to both United States and New York banking policy, which encourages international bank branching of domestic banks. 12 USC § 601 *et seq.*, N.Y. Banking Law § 105(3). Indeed, Section 601 has been read as authority for the separate entity doctrine.[27] This policy also encourages New York branches of foreign banks. 12 USC § 3101

[27] *Pan-American Bank & Trust Co. v. Nat'l City Bank*, 6 F.2d 762, 766-67 (2d Cir.), *cert. denied* 269 U.S. 554 (1925) (Section 601 requires that "in respect of the collection of [a letter of credit issued by a parent bank in New York and negotiated through one of its branches outside the United States] [foreign] branches and a parent bank are to be considered as separate entities").

et seq.; N.Y. Banking Law. § 200 *et seq.* It should also be noted that the recent Federal Reserve policy requiring a domestic intermediate holding company for foreign bank holding companies does *not* apply to the bank itself. Foreign bank branches remain authorized and outside the intermediate holding company structure.

CONCLUSION

The Committee on Banking Law of the Association of the Bar of the City of New York, as *amicus curiae*, respectfully requests that the Court answer the question certified to it in the affirmative.

Dated: New York, New York
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