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New York's Highest Court Affirms the Continued Vitality—for Now—of the "Separate Entity" Rule for Banks

In a decision of great interest to international banks and judgment creditors, New York's highest court ruled that the "separate entity" doctrine—a common-law rule that prevents a judgment creditor from compelling a garnishee bank operating in New York to restrain a judgment debtor's assets held in foreign branches of the bank—is alive and well in New York.

In *Motorola Credit Corp.* v. *Standard Chartered Bank*, 2014 WL 5368774 (N.Y. Ct. App. Oct. 23, 2014), Motorola, the holder of a $3 billion New York federal district court judgment against the Uzan family, served a restraining notice on the New York branch of Standard Chartered Bank (SCB), a U.K.-based bank. SCB could not locate any Uzan property at its New York branch, but found roughly $30 million of Uzan-related assets in its branches in the United Arab Emirates ("U.A.E."). SCB froze those assets in accordance with the restraining order, but the Central Bank of Jordan directed SCB to unfreeze the assets, while the U.A.E. Central Bank unilaterally debited about $30 million from SCB's account with the bank. The district court that entered the judgment granted SCB's motion to vacate the restraining order. On appeal, however, the Second Circuit certified to the New York Court of Appeals the following question: "[W]hether 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."

The Court of Appeals' 5-2 ruling sustaining the rule identified "three basic rationales" for the century-old separate entity doctrine: (1) international comity; (2) the need to protect banks from competing claims and the possibility of double liability; and (3) the burden that would otherwise be placed on banks to monitor bank accounts in numerous other branches. Noting the actions of the Central Bank of Jordan and the U.A.E. Central Bank, the majority opinion concluded that SCB "was placed in the difficult position of attempting to comply with the contradictory directives of multiple sovereign nations."

The majority distinguished *Koehler* v. *Bank of Bermuda Ltd.,* 12 N.Y.3d 533 (2009), which held that a New York court could order a bank over which it had jurisdiction to turn over stock certificates owned by a judgment debtor that were held by the bank outside New York. Unpersuaded by the apparent contradiction between *Koehler* and its *Motorola* holding, the majority explained that the bank in *Koehler* had not raised the separate entity rule and would not have been aided by it because "that case involved neither bank branches nor assets held in bank accounts." (In *Koehler,* the judgment creditor had served a subsidiary in New York, not a branch, and the judgment debtor's shares had been pledged to the bank as collateral for a loan.) Significantly, the bank in *Koehler* "had consented to personal jurisdiction based on the presence of a subsidiary in New York."

The two dissenting judges argued that the validity of the separate entity rule—which is not codified in the CPLR—should be left to the legislature. Noting recent enforcement and civil actions under the Bank Secrecy and Anti-Terrorism Acts, the dissent viewed the majority holding as "a deviation from current public policy regarding the responsibilities of banks" that would frustrate collection of large judgments and "immunize banks who benefit from doing business in New York from their responsibilities under the statutory enforcement provisions."

After *Motorola,* banks operating branches in New York and in foreign jurisdictions may take comfort that the separate entity rule remains viable in New York, protecting them from potentially inconsistent obligations under foreign law with respect to deposits held in foreign branches. While *Motorola* did not explicitly overrule *Koehler,* there is a strong argument that *Koehler* should be strictly limited to its facts. For international banks, conflicts of law and the risk of being whipsawed by inconsistent demands are a pervasive fact of life and, as the dissent points out, the onerous burdens imposed on banks to meet their obligations under US law throughout their global operations are at odds with the protective approach of the *Motorola* majority. Although the New York Court of Appeals has settled the question for now, the Legislature may ultimately determine whether this judicially created doctrine is consistent with contemporary public policy.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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