Client Alert.

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Koehler v. Bank of Bermuda

Two Years Later: The Impact on Attachment in New York

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In 2009, New York State's highest court, the Court of Appeals, decided the controversial case of *Koehler v. Bank of Bermuda Limited*, 911 N.E.2d 825 (N.Y. 2009). In *Koehler*, a divided Court of Appeals ruled 4 – 3 that "a court sitting in New York may order a bank over which it has personal jurisdiction to deliver stock certificates owned by a judgment debtor (or cash equivalent to their value) to a judgment creditor . . . when those stock certificates are located outside of New York." A strong dissent by Judge Robert Smith warned that the decision would open the floodgates to judgment creditors using the New York courts to reach assets, even when the judgment creditor, the judgment debtor, and the property seized are all located elsewhere. Judge Smith's dissent also expressed concern that requiring banks to turn over property or funds held by foreign branches could place banks in the untenable position of facing conflicting laws, and the obligation to conduct expensive worldwide asset searches on a regular basis.

The breadth and significance of the *Koehler* decision continues to be a matter of debate. One issue courts have addressed is whether New York's "separate entity rule" remains valid. Prior to *Koehler*, New York courts held that bank branches in different countries were "separate entities" and thus that New York branches of a bank need not turn over assets located at a foreign branch. The *Koehler* decision did not discuss the "separate entity" rule, and in several recent cases, litigants have disputed whether the separate entity rule was implicitly overruled by *Koehler*. *Koehler* also involved the turnover of specifically identified stock certificates. Post-*Koehler* litigants have disputed whether *Koehler* can be extended to require that banks seek out and turn over "any" assets of the judgment debtor, including unidentified assets.

Jurisdiction is another issue raised by post-*Koehler* litigants. In *Koehler*, the New York bank was a subsidiary of the Bermudan entity, and thus (even putting aside the "separate entity rule") it would appear to be a separate entity from the Bermudan bank. Despite this factual background, however, the Bermudan entity took the unusual step of conceding personal jurisdiction. Therefore, the *Koehler* court had no reason to address whether attachment extends to foreign branches that have not conceded personal jurisdiction.

Three recent decisions by lower courts, treated below, discuss these issues.

JW OILFIELD EQUIPMENT

The broadest interpretation of the *Koehler* holding to date was rendered in January 2011: *JW Oilfield Equipment, LLC v. Commerzbank AG*, 764 F.Supp.2d 587 (S.D.N.Y. 2011). The plaintiff, JW Oilfield Equipment, won an attorneys' fee award after being sued in Oklahoma by J.J.S. Oilfield Supply. To collect on the award, JW Oilfield brought a special proceeding in New York seeking assets held by J.J.S. Oilfield Supply in one of Commerzbank's German branches.

The court required Commerzbank to turn over assets held in Germany. In so doing, the court found that *Koehler* had implicitly abrogated the separate entity rule. The court also held that an order of attachment had been rendered against Commerzbank as a whole and not against the New York branch alone.

SAMSUN LOGIX CORPORATION

The breadth and implications of the *Koehler* decision were also addressed in *Samsun Logix Corp. v. Bank of China*, 2011 NY Slip Op 50861U, 2011 N.Y. Misc. LEXIS 2268 (N.Y. Sup. Ct. May 12, 2011). In *Samsun*, a South Korean plaintiff attempted to enforce a London arbitral award by bringing a special proceeding in New York against a group of Chinese banks.

The *Samsun* court held that the separate entity rule remained good law, commenting that the New York Court of Appeals would have been explicit if it had intended to overrule that long-standing doctrine. The court then applied the separate entity rule and concluded that New York branches of a bank need not turn over assets located in foreign branches. The court noted that "other post-*Koehler* decisions" have indicated that "*Koehler* has placed in doubt the continued viability of the separate entity rule" but dismissed these as "not controlling precedent" and noted that the other cases did not not face "an issue relevant to this particular proceeding, namely, that the relief sought here greatly exceeds the relief sought in *Koehler*."

The court emphasized that *Koehler* involved a discrete asset (stock certificates), while *Samsun*'s plaintiff sought the turnover of "any property" located in any branch of any of the banks worldwide, so long as the property belonged to any of the three judgment debtors at issue. Citing heavily to the *Koehler* dissent and to amicus curiae briefs that quoted the dissent, the *Samsun* court concluded that the *Koehler* majority did not intend for its ruling to be applied beyond the narrow circumstances of that case. The *Samsun* court also found persuasive the public policy arguments that extending *Koehler* would turn New York into a "global clearing house for judgment creditors," and lead to increased administrative costs, invasive discovery requests, and potential double liability.

PARBULK II AS

A second New York State lower court also concluded that *Koehler* did not require it to compel a bank's New York branch to turn over assets held in a foreign branch. In *Parbulk II AS v. Heritage Maritime SA*, No. 651285 (N.Y. Sup. Ct. June 10, 2011) (J. Sherwood), a Norwegian plaintiff attempted to use the New York courts to enforce a London arbitration award.

The *Parbulk* court concluded that the separate entity rule remained good law, emphasizing that *Koehler* never addressed, much less eliminated, this rule. In a footnote, the *Parbulk* court noted that it "disagrees" with the *JW Oilfield* decision's interpretation of *Koehler* as putting an end to the separate entity rule.

PRACTICAL IMPLICATIONS

While these three post-*Koehler* decisions do not all reach the same results, the two more recent decisions (both by New York State courts) hold that *Koehler* is limited to its own peculiar facts. Significantly, the New York State decisions agree that *Koehler* did not overrule the separate entity rule. The sole federal court to interpret the decision, on the other hand, did so broadly, concluding that New York's separate entity rule is no longer valid. Under these circumstances, parties should carefully consider whether to pursue cases in state or federal court.

The individual decisions may have been influenced by the specific facts of the cases and the differing circumstances of the plaintiffs. *JW Oilfield*, the sole case to enforce an attachment upon assets held in a foreign branch of a bank, was also

the only case to involve a US plaintiff and the only case in which the proceeding was based upon a debt incurred in the United States. The court may thus have been less disposed toward arguments that a broad interpretation of *Koehler* would transform New York into a "global clearing house for judgment creditors."

Certain other background facts in *JW Oilfield* may have also contributed toward its outcome. The court emphasized that the judgment debtor had originally brought suit against the plaintiff in the U.S., and then tried to avoid the resulting liability: "The United States has a strong interest in enforcing its judgments, especially against those who affirmatively avail themselves of its courts and then attempt to avoid the consequences." The court also raised such issues as the fact that the German government did not oppose the attachment of assets located in Germany, and that Commerzbank itself argued in a German case that it was lawful to turn over to New York courts the judgment debtor's assets.

Courts may also be influenced by the specificity of the requested attachment. *Koehler* dealt with specific stock certificates, and *JW Oilfield* involved assets known to exist in the German branch of the bank. By contrast, in both *Parbulk* and *Samsun* the plaintiffs sought to attach "any" asset held by the judgment debtors in any branch worldwide.

Considering the split among the lower courts, it is likely that higher courts will revisit the *Koehler* decision. In fact, in a recent oral argument, Judge Sullivan expressed his conviction that the higher courts will need "to say once and for all what it is to do in cases like this one." *Gucci America, Inc. v. Weixing Li*, 10-cv-04974, Tr. of Hear'g June 3, 2011, Docket No. 73 (S.D.N.Y. June 17, 2011) (RJS).

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