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NEW YORK TAPS THE BRAKES ON FOREIGN JUDGMENT COLLECTION

Four years ago, the New York Court of Appeals, in *Koehler v. Bank of Bermuda*,[1] greatly broadened the judgment enforcement power of New York courts, a decision of note especially for global financial institutions with customer assets in faraway places. This split decision by the state's highest court accorded judgment creditors worldwide the long arm of New York's new enforcement law, enabling them to reach far beyond New York's borders to grab debtors' assets. But what if the underlying litigation, the parties themselves, and the targeted assets bear no connection to New York? It does not matter.

Although the court recently shortened, somewhat, the long arms bestowed by *Koehler*, the far-reaching implications of these two decisions on international enterprises—especially financial institutions—subject to jurisdiction in New York (and their business counterparties) command attention. Ignorance of the evolving jurisprudence might prove expensive.

FOREIGN JUDGMENT ENFORCEMENT IN NEW YORK UNDER *KOEHLER*

In 2009, the *Koehler* court held that New York courts could enforce a domesticated foreign judgment against assets outside the state if a garnishee bank is subject to jurisdiction in New York. *See Koehler* ("a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce [assets] located outside New York, pursuant to [New York's CPLR §] 5225(b).").[2] It reasoned that under CPLR § 5225, the "key to the reach of the turnover order is personal jurisdiction" over the garnishee, not *in rem* jurisdiction over the assets.[3] In other words, the focus is squarely on the bank's nexus with the forum and not on anything else.

Take, for example, a bank headquartered in London and subject to personal jurisdiction in New York (perhaps because it has a branch in the state). Assume that bank has a Texas customer with a Texas judgment against it in favor of a California entity. *Koehler* bestows on New York courts the power to order that

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bank to deliver to the California creditor the customer's assets located in London whether the judgment debtor, itself, has any assets in or is subject to jurisdiction in New York, and regardless of whether there exists any connection between the underlying lawsuit and the state. As the *Koehler* court explained, because "personal jurisdiction is the linchpin of authority under § 5225(b)," all that is required is personal jurisdiction over the garnishee (that person or entity holding the assets of the judgment debtor) no matter where in the world the garnishee actually holds those assets.

Understandably, the implications of *Koehler* raised concerns in the international banking community, since a bank subject to personal jurisdiction in New York might be compelled to turn over assets located anywhere in the world, even if its debtor-client has no connection to New York.[4]

Not specifically addressed by the court was the question of whether the longstanding "separate entity" doctrine—which provides that "each branch of a bank is a separate entity"[5]—survived in light of *Koehler*'s long-reach holding. This was of obvious concern to the garnishees of choice in the banking industry, who feared that foreign assets held by foreign affiliates would be delivered into the waiting hands of judgment creditors in New York.

At the same time, the decision was music to the ears of foreign judgment creditors. Legal pundits predicted that a wave of judgment enforcement litigation would hit New York courts. Indeed, many judgment creditors have tried to use *Koehler* to reach assets all over the world. Some have even argued that if an international bank is subject to jurisdiction in New York, *Koehler* allows New York courts to exercise jurisdiction over the bank's entire worldwide operations and assets.

But a recent unanimous decision by the New York Court of Appeals in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce* ("*CIBC*")[6] appears to tap on the brakes of *Koehler*. The *CIBC* decision articulates some limits on judgment collection in New York against debtors who have assets at international banks with a New York presence. In particular, it provides some protection for assets held at foreign affiliates of New York garnishees as long as the New York entity is not deemed in "custody" of its affiliates' assets. Thus, does the New York operation have custody? What does custody even mean?

THE *CIBC* DECISION

In 1994, the Commonwealth of the Northern Mariana Islands obtained tax judgments against a couple in the U.S. District Court for the Northern Mariana Islands. In 2011, the Commonwealth commenced proceedings under CPLR § 5225(b) against Canadian Imperial Bank of Commerce ("CIBC") in the Southern District of New York seeking to collect assets that the couple had deposited with CIBC FirstCaribbean International Bank Limited ("CFIB-Cayman"), an affiliate of CIBC in the Cayman Islands. Relying on *Koehler*, the Commonwealth tried to transitively reach through CIBC (located in and subject to jurisdiction in New York) to its Cayman affiliate CFIB-Cayman (not subject to personal jurisdiction in New York) to seize, and have delivered to it in New York, foreign assets held by CFIB-Cayman to satisfy the judgment. The District Court denied the Commonwealth's motion for a turnover order, and on appeal, the U.S. Court of Appeals for the Second Circuit certified the following question to the New York Court of Appeals:

May a court issue a turnover order pursuant to CPLR § 5225(b) to an entity that does not have actual possession or custody of a debtor's assets, but whose *subsidiary* might have possession or custody of such assets?

The New York Court of Appeals in *CIBC* recently answered that question in the negative.[7] The court held that "for a court to issue a post-judgment turnover order pursuant to CPLR § 5225 against a banking entity, *that entity itself must have actual, not merely constructive, possession or custody of the assets sought*. That is, it is not enough that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets."[8] The court focused on the language of CPLR § 5225(b) that refers to "a person in *possession or custody* of money or other personal property in which the judgment debtor has an interest," rejecting the Commonwealth's argument that the court should read the word "control" into the statute.[9]

Thus, the court held, a New York court could order a garnishee to turn over out-of-state property if the garnishee is itself subject to personal jurisdiction in New York *and* that garnishee should rightly be considered as having custody of a judgment debtor's property, even though not physically in

New York.[10] Addressing its earlier decision, the court found that nothing in *Koehler* required otherwise. Further, the court found no cases interpreting its earlier decision that supported "the Commonwealth's attempt to broadly construe *Koehler* and require that a garnishee be compelled to direct another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction."[11]

CONCLUSION

The *CIBC* decision clearly limits the reach of CPLR § 5225(b), alleviating some of the concerns raised by the court's earlier decision in *Koehler*. Significantly, the court's decision appears to preserve legal barriers between parent, subsidiary, and affiliate companies (at least with respect to judgment enforcement). However, the decision—while encouraging to many international businesses (especially banks) and their clients—leaves key practical questions unanswered and does not afford the bulletproof protection to foreign entities that it may appear to at first glance.

For example, the linchpin for judgment enforcement under CPLR § 5225(b) remains, as articulated in *Koehler*, personal jurisdiction, which may be established even over foreign entities with no physical presence in New York (but that, nonetheless, engage in a continuous and systematic course of business in the state). Moreover, uncertainties regarding the viability and practical impact of the separate entity doctrine remain, including the extent to which foreign affiliates or branches of international banks can evade the long reach of *Koehler*—even with *CIBC*'s limitations—since questions of jurisdiction, possession, and custody turn on many specific facts and often require deep analysis.

Thus, due to the broad powers and long reach of New York courts and the remaining uncertainties, international businesses should, at a minimum, analyze the potential implications these issues may have on their businesses (and clients) and seek the advice of counsel to address concerns, such as whether, under the law, a company is subject to personal jurisdiction in New York and, even so, whether it has legal "custody" of assets located far beyond state borders.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Lee A. Armstrong
New York
+1.212.326.8340
laarmstrong@jonesday.com

William J. Hine
New York
+1.212.326.3684
wjhine@jonesday.com

Sevan Ogulluk
New York
+1.212.326.3977
sogulluk@jonesday.com

Alan M. Rabinowitz, an associate in the New York Office, assisted in the preparation of this Commentary.

ENDNOTES

1 *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (N.Y. 2009).

2 *Koehler*, 12 N.Y.3d at 541.

3 *Koehler,* 12 N.Y.3d at 540.

4 Sevan Ogulluk and Alan Schwartzwald, "New York's High Court Beckons Foreign Judgment Creditors to New York – but Does Koehler Loosen Cornerstone of New York's Economy?," *Bloomberg Law Reports*, New York Law, Vol. 1, No 14 (October 26, 2009).

5 *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (N.Y. Sup. Ct. N.Y. County 1950), aff'd. 126 N.Y.S.2d 192 (1st Dep't 1953).

6 *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 2013 WL 1798585 (N.Y. April 30, 2013).

7 *CIBC*, 2013 WL 1798585, at *1-2.

8 *CIBC*, 2013 WL 1798585, at *1 (emphasis added).

9 *CIBC*, 2013 WL 1798585, at *5 (emphasis added).

10 *Id.*

11 *CIBC*, 2013 WL 1798585, at *6.

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