Inside Mariana Islands V. Canadian Imperial Bank

Law360, New York (May 06, 2013, 1:41 PM ET) -- The New York Court of Appeals, New York's highest state court, issued a unanimous opinion in Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce, 2013 N.Y. Slip Op. 03018 (N.Y. Apr. 30, 2013) (Marianas), a significant opinion defining the reach of New York's judgment enforcement laws.

Answering a certified question from the United States Court of Appeals for the Second Circuit, the court held that pursuant to article 52 of the New York Civil Practice Law and Rules (CPLR), a court cannot issue a post-judgment "turnover order" against a bank unless the bank has "actual, not merely constructive, possession or custody" over assets sought by a judgment creditor. Id. at 1.

The court's decision in favor of Skadden's client, Canadian Imperial Bank of Commerce (CIBC), validates CIBC's earlier victory in the federal district court in this particular case, and it also may have an immediate impact on other efforts to enforce judgments against international bank deposits by initiating proceedings against nonparty banks in New York.

Attempts to Use New York Courts for Cross-Border Judgment Enforcement Against International Banks: The Koehler Controversy

Article 52 of the CPLR contains a variety of mechanisms for a judgment creditor to enforce a judgment, both directly against the judgment debtor and by bringing proceedings against nonparties that hold the judgment debtor's assets or owe a debt to the judgment debtor. For nearly four years, New York courts have been embroiled in a battle between judgment creditors and nonparty international banks over the proper scope of these judgment enforcement mechanisms, resulting from the 2009 decision by the New York Court of Appeals in Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533 (2009).

In Koehler, the New York Court of Appeals held that a New York federal or state court, when exercising post-judgment enforcement powers under CPLR article 52, could validly order a bank to deliver to a judgment creditor the property of a judgment debtor (e.g., stock certificates), even though the assets are held by the bank outside New York, so long as the court in New York has personal jurisdiction over the bank. Bank of Bermuda (in Bermuda), which held the certificates, had consented to the jurisdiction of the courts of New York, a fact emphasized by the Court of Appeals.

In the years since Koehler, judgment creditors have sought to use the decision to reach judgment debtors' assets held in foreign bank branches that, unlike Bank of Bermuda in Koehler, do not consent to personal jurisdiction in New York. They have done so by instituting post-judgment turnover petitions and related devices against the international banks' New York operations, arguing that the presence of a New York operation allows the New York courts to exercise jurisdiction over the entire bank's worldwide operations.

Often, in defending against such claims, bank garnishees have sought to invoke a long-standing rule of New York law known as the "separate entity rule." Under this rule, bank branches that are not separately incorporated nevertheless are treated as separate jurisdictional entities from their sister branches in other countries for judgment enforcement and other purposes. Accordingly, serving process on a New York branch of a foreign bank would not be sufficient to establish jurisdiction over the bank's foreign branches where a judgment debtor may have assets.

On numerous occasions over the last few years, New York's state courts have held that the separate entity rule remains intact and cannot be abrogated absent legislative action or a clear statement to that effect by the New York Court of Appeals. See, e.g., Global Technology Inc. v. Royal Bank of Canada, No. 150151/2011 (N.Y. Sup. Ct. Jan. 11, 2012); Ayyash v. Koleilat, 957 N.Y.S.2d 574 (N.Y. Sup. Ct. Oct. 22, 2012).

The federal district courts have split on the issue. Some have called the separate entity rule into question after Koehler, see, e.g., JW Oilfield Equip. LLC v. Commerzbank, AG, 764 F. Supp. 2d 587, 595 (S.D.N.Y. 2011), while others have joined the New York state trial courts in holding that the separate entity rule remains the law of New York, see, e.g., Shaheen Sports Inc. v. Asia Ins. Co., Nos. 98-cv-5951, 11-cv-920 (S.D.N.Y. Mar. 14, 2012).

The Unsuccessful Attempt to Force a Parent Bank to Turn Over Funds Held by Foreign Subsidiary Banks

The Marianas litigation did not involve a dispute over accounts at foreign branches, but instead involved an attempt by a judgment creditor to seize assets allegedly held for the judgment debtor at certain indirect bank subsidiaries of CIBC in the Cayman Islands. The judgment creditor, which had won a large civil tax judgment, initiated this action by serving CIBC's New York office pursuant to CPLR article 52, and then arguing that CIBC had the ability, and thus the obligation, to turn over Cayman assets. It was common ground that because the judgment was for tax debt, it would not be enforceable in the Cayman Islands. CIBC prevailed in the federal district court, and when the judgment creditor appealed, the Second Circuit certified the question of New York state law to the New York Court of Appeals.

The judgment creditor sought to compel CIBC to exercise authority over its offshore subsidiaries to reach any assets or accounts that the judgment debtors may hold at the subsidiaries. In rejecting this attempt, the New York Court of Appeals ruled, "it is not enough that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets," because CPLR § 5225(b) requires actual possession or custody by the entity subject to the court's jurisdiction. Marianas, 2013 N.Y. Slip Op. 03018, at 1-2. In doing so, the court found that in contrast to the statutory language "possession, custody or control," which is used in some discovery contexts, the formulation "possession or custody," which is used in CPLR § 5225(b) without the word "control," does not contemplate constructive possession. Id. at 5-6.

Finally, the Marianas court also rejected the garnishee's attempt to "broadly construe" the Koehler decision. Id. at 7. The court emphasized that, in this case, Koehler is "only significant in holding that personal jurisdiction is the linchpin of authority under section 5225(b)." Id. The court found that "[n]o case supports the [judgment creditor'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." Id.

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The Marianas decision thus represents an important clarification of the scope of New York's post-judgment execution procedures and will provide added certainty for banks and financial institutions with offshore subsidiaries.

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