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COURT OF APPEALS
STATE OF NEW YORK

MOTOROLA CREDIT CORPORATION, et al.,
Appellants,
-against-
STANDARD CHARTERED BANK, et al.,
Respondents.

No. 162
20 Eagle Street
Albany, New York 12207
September 16, 2014

Before:
CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:
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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 162.

2 Counselor, you want - - - want rebuttal time?

3 MR. STAHL: Three minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Three minutes, sure.

5 Go ahead.

6 MR. STAHL: Good afternoon. My name is
7 Howard Stahl on behalf of the appellant, Motorola
8 Solutions Credit Company.

9 This issue has been certified, as this
10 court obviously knows, from the Second Circuit to
11 answer the question whether a court in New York with
12 personal jurisdiction over a defendant or a garnishee
13 has the right to order that garnishee to bring
14 property into New York from out of state. The
15 position we articulated to the District Court - - -

16 JUDGE GRAFFEO: Is it - - - is it property
17 or are we dealing with bank accounts here? We're
18 dealing with bank accounts here?

19 MR. STAHL: Yes, Your Honor. Well - - -
20 well, we're not - - -

21 JUDGE GRAFFEO: Which is - - - which is - -
22 -

23 MR. STAHL: - - - not dealing with bank
24 accounts here.

25 JUDGE GRAFFEO: - - - different than stocks

1 that we dealt with previously?

2 MR. STAHL: What we're dealing with in this
3 particular case are trades in palladium. The
4 transaction that Standard Chartered entered into with
5 Jordan Dubai Islamic Bank, the Uzan proxy, was
6 Standard Chartered acted as an agent for - - - for
7 Jordan Dubai Islamic Bank. And they placed trades at
8 the behest of Jordan Dubai Islamic Bank with a broker
9 in London on either the NYMEX or the London Metals
10 Exchange for the purchase and sale of palladium in
11 the United States, where the proceeds of that
12 transaction would be paid back to Jordan Dubai
13 Islamic Bank.

14 JUDGE GRAFFEO: Right, but there's - - -
15 there's money in this bank account. Am I wrong?

16 MR. STAHL: There were - - -

17 JUDGE GRAFFEO: There's not - - - there's
18 not securities in the bank account?

19 MR. STAHL: There - - - we don't know
20 exactly what is in the bank account today. What
21 there was in the bank account at one point in time
22 were these trade transactions.

23 JUDGE SMITH: But there - - - there was an
24 - - - I gather these offsetting obligations to buy
25 and sell palladium almost simultaneously?

1 MR. STAHL: Well, there were - - - there
2 were - - - there were - - - there were puts and
3 sales. That when they bought it they also had a
4 concomitant already agreed upon strike price where
5 they could put - - -

6 JUDGE SMITH: And when you get through
7 looking at it, it looks a lot like a loan. And
8 there's some - - - some suggestion that it's just a
9 way to do a loan without violating Islamic law?

10 MR. STAHL: Well, I mean, that was the
11 argument that Standard Chartered advanced in the
12 District Court. And the District Court didn't - - -

13 JUDGE SMITH: Well, there's some - - - I
14 mean the - - - the - - - the - - - these people
15 weren't fascinated with the palladium market. I
16 mean, there - - - there - - - there's some plaus - -
17 - some plausibility to that. Isn't there?

18 MR. STAHL: Well, there's another
19 possibility, Your Honor, which hasn't been delved
20 into exclus - - - totally in this case because of the
21 limited discovery today. It may be an act of money
22 laundering. You are an Uzan entity. And I have to
23 remind the court the Uzans - - - the reason we
24 haven't been pursuing them individually here in New
25 York is they're fugitives. They're in contempt.

1 There are arrest warrants out for them.

2 JUDGE SMITH: Okay, but whatever - - -
3 whatever it is, there's a - - - there's a - - - a - -
4 - a - - - a garnishee, Standard Chartered Bank, that
5 has some kind of obligation owed to it by an Uzan
6 proxy. That - - - we - - - we can agree that's the
7 bottom line?

8 MR. STAHL: Well, what we have is that
9 Standard Chartered - - -

10 JUDGE SMITH: Well, wait - - - wait - - -
11 wait a minute. Before you - - - you - - - was that -
12 - - was that - - - was that a fair summary that I
13 just made or was it not?

14 MR. STAHL: I don't believe it was, Your
15 Honor.

16 JUDGE SMITH: Okay.

17 MR. STAHL: I just want to correct it. I
18 may have misunderstood you, Judge Smith. What we
19 have is Standard Chartered, as an agent for the
20 Uzans, placed trades in London to buy and sell
21 palladium. And then they agreed that when these
22 trades were facilitated - - - they bought it and sold
23 it - - - that that money would go back to the Uzans,
24 either in U.S. dollars or whatever currency they
25 wanted.

1 JUDGE SMITH: Okay, but - - - but it's - -
2 - it seems to me you've got nothing here if you don't
3 have an obligation owed to the Uzans by Standard
4 Chartered Bank?

5 MR. STAHL: That I agree with completely.

6 JUDGE SMITH: Okay.

7 MR. STAHL: And I - - - I think - - -

8 JUDGE SMITH: And - - - and - - - and - - -
9 yeah. And the - - - and the question whether that -
10 - - whether that's an oblig - - - an obligation to
11 buy palladium or just to make a loan or - - - or - -
12 - or to repay a loan or whatever it is or to - - - or
13 to - - - or to refund a deposit, does that really
14 matter?

15 MR. STAHL: Well, I - - - I don't know that
16 it really matters, because the operative definition
17 in - - - in the CPLR Article 52 is a debt or
18 property. And the Standard Chartered has admitted
19 itself this is a debt.

20 JUDGE SMITH: So - - - so - - - would the -
21 - - would the case be different if what - - - if the
22 - - - if - - - if - - - forget about the - - - the
23 proxy. If the Uzans had a - - - had - - - had just
24 put money in the bank, had made a deposit in Standard
25 Chartered Bank in Dubai?

1 MR. STAHL: I think it would be exactly the
2 same thing, exactly the same. In both cases,
3 Standard Chartered owes money back for the benefit of
4 the Uzans. And in this case, it was derived from the
5 sale of palladium. And in another case it was
6 derived from some other act of perhaps illegality.

7 JUDGE SMITH: So - - - so - - - so for
8 those of us who get confused when you say palladium,
9 it's just as easy to think of it as a bank account?

10 MR. STAHL: No, you're - - - I agree with
11 you now that I understand it, Your Honor. But the
12 significance of it here, I think, goes to a lot of
13 the policy arguments that you're seeing raised by the
14 amici and by Standard Chartered.

15 JUDGE GRAFFEO: Well, that was going to be
16 my next question. Why is Standard not subject to
17 double liability in this case?

18 MR. STAHL: Well - - -

19 JUDGE GRAFFEO: That seems to be a pretty
20 strong argument.

21 MR. STAHL: Well, with all due deference,
22 Your Honor, I think it may be the weakest of all
23 arguments in this case for the following reasons: if
24 you go back to what the common law was, as found to
25 be the common law in this jurisdiction in New York,

1 the linchpin of it is for purposes of banks and
2 double liability, Judge Cardozo's decision in
3 Petrogradsky in 1930, where he went through the
4 common law of what a bank does where it has
5 conflicting claims to depositors' assets, and he says
6 this is a common risk of life for a bank. This is
7 what banks do. They hold money that - - -

8 JUDGE READ: What about the arguments - - -
9 what about the arguments that this - - - that the UK
10 make and that Jordan makes about the matter of
11 comity?

12 MR. STAHL: Oh, they don't even tell - - -

13 JUDGE READ: Putting them aside, you've
14 defined their law?

15 MR. STAHL: They don't even tell you, Judge
16 Read, what the matter of comity is. As the amicus
17 brief from the UK admits, we don't even know that
18 there would be any conflict of law between the law in
19 the U - - - in the UK and the law of the United
20 States.

21 JUDGE READ: Yeah, but they get to make
22 that decision, I guess, rather than a New York court.

23 MR. STAHL: No, Your Honor, the New York
24 court has to make this decision because Standard
25 Chartered is here. The Uzans were here. They were

1 tried here. They were resident here. They had
2 drivers' license here. They committed fraud here.
3 They have a judgment here. It's been appealed and
4 affirmed by the courts here, and they are in contempt
5 of the courts here. They have sworn - - - they said
6 to the District Court and to the Court of Appeals we
7 will thwart your efforts to collect on this judgment
8 forever.

9 JUDGE SMITH: Isn't it - - - is - - - isn't
10 it an advantage of the separate entity rule that
11 every - - - that a bank like Standard Chartered that
12 gets a restraining notice doesn't have to scrutinize
13 the kind of detailed facts you've just been reciting?
14 All they need to know is where the bank account is.
15 If it's in this branch, it's frozen. If it's in
16 Dubai, it's not frozen. Isn't that - - - doesn't
17 that make the banking business a lot more efficient?

18 MR. STAHL: Your Honor, if you want to give
19 the banks a pass to commit whatever acts they wish
20 outside of the United States and say automatically
21 because of some perceived double liability - - - and
22 let me say here there is no double liability.
23 Standard Chartered, recognizing the warnings from
24 Judge Cardozo, they had an agreement with the Uzans -
25 - -

1 JUDGE SMITH: No, if - - - if - - - if the
2 - - -

3 MR. STAHL: - - - that said we're
4 indemnified.

5 JUDGE SMITH: - - - if - - - if I want to
6 give the banks a pass, as you put it, giving them
7 that kind of pass does have the advantage of making a
8 simple, predictable ord - - - orderly system. Dubai
9 doesn't. You know, the United Arab Emirates doesn't
10 have to give them a pass if they don't want to. But
11 if the money is in the UAE branch of the bank, why
12 should - - - why should you be able to freeze it by
13 serving a restraining notice in New York?

14 MR. STAHL: Your Honor, that's what the law
15 says. That's what 5222 says. This bank is subject
16 to jurisdiction in New York and ergo, on the literal
17 face of the statute - - - as well as, I believe, with
18 all due deference this court - - -

19 JUDGE SMITH: But that - - - that's been
20 true for a long time. And for a long time going back
21 I guess to 1916 or something, there are cases saying
22 - - - maybe surprisingly, because it's not the usual
23 law - - - that the - - - the bank - - - two branches
24 of the same bank are separate entities. Why - - -
25 why - - - I mean isn't it kind of a radical step to

1 throw that out now?

2 MR. STAHL: Your Honor, that's been the - -
3 - that - - - that's been the - - - the - - - the - -
4 - and I'm not using the term pejoratively; I'm using
5 it descriptively - - - that's been the big lie in
6 this case for the last sixty years. This court has
7 never uttered the phrase "separate entity" in the
8 context of prejudgment or post-judgment attachments,
9 restraints, or turnover orders.

10 JUDGE SMITH: Few - - - but a few other
11 courts have.

12 MR. STAHL: If you'll allow me a moment to
13 give you the actual history of this rule.

14 CHIEF JUDGE LIPPMAN: Counselor, what about
15 Koehler?

16 MR. STAHL: Well, I - - - you know, I think
17 this court's in a better position than me to answer
18 what it intended to do.

19 CHIEF JUDGE LIPPMAN: But you think that it
20 controls - - - you think it - - -

21 MR. STAHL: I think - - - I think you
22 answered - - - if you look - - -

23 CHIEF JUDGE LIPPMAN: You think it did away
24 with the separate entity rule?

25 MR. STAHL: I don't think the separate

1 entity rule's ever existed, Your Honor.

2 CHIEF JUDGE LIPPMAN: To the extent it
3 existed, you think it did away with it?

4 MR. STAHL: I - - - I would imagine that's
5 true, but I think it - - -

6 JUDGE GRAFFEO: It's not mentioned at all
7 in the decision.

8 MR. STAHL: It is not. It's not mentioned
9 in - - - as Judge Graffeo said - - -

10 JUDGE RIVERA: But counsel, certainly - - -

11 MR. STAHL: - - - it's not mentioned in any
12 case this court - - -

13 JUDGE RIVERA: But counsel, counsel. The -
14 - - the - - - the rule was presented through your
15 adversaries to the court in - - - in Koehler. And as
16 Judge Smith has already pointed out, there is quite a
17 long history of, if not this court, at least lower
18 courts applying the separate entity rule. Would we
19 not have said something if, indeed, we were
20 overruling or had decided that the separate entity
21 rule does not apply?

22 MR. STAHL: If it wasn't there, if it
23 didn't exist, why would this court even acknowledge
24 something that wasn't there?

25 JUDGE SMITH: May - - - maybe you should do

1 the history you were going to do a minute ago that
2 shows it never existed.

3 MR. STAHL: Well, let - - - let me just
4 give you the - - - the graphic example. And - - -
5 and it goes, Judge Smith, to your observation. This
6 has a long, long history. The history of the
7 separate entity rule with respect to post-judgment
8 restraints and turnovers has virtually no history.
9 The CPLR was adopted in 1962. Do you know many
10 cases, from any court in New York prior to 1962,
11 dealt with, let alone upheld, the separate entity
12 rule in the context of post-judgment remedies?

13 JUDGE SMITH: May I guess?

14 MR. STAHL: One.

15 JUDGE SMITH: One.

16 MR. STAHL: And you know where it was from?

17 JUDGE SMITH: I don't.

18 MR. STAHL: Here is the extent of the
19 jurisprudence on that issue in New York. It's a 1943
20 case, Walsh v. Bustos, three paragraphs long,
21 involving a examination district.

22 JUDGE SMITH: And how - - - and how many
23 cases said that - - - said that branch - - - branches
24 were not separate entities?

25 MR. STAHL: Many, many of the - - - of - -

1 - of the federal cases have said that. If you look
2 at the intermediate appellate cases that began in the
3 '80s of Digitrex and - - - and - - - and - - - and
4 Avion and the others, they said that it's outmoded,
5 and it has no place any longer as long as there's
6 technology to enable a bank to identify these assets.
7 And the average - - -

8 JUDGE PIGOTT: Where did Walsh come from?
9 What - - -

10 MR. STAHL: Pardon me?

11 JUDGE PIGOTT: The - - - the one case you
12 cited. Where is it from?

13 MR. STAHL: It came from a court that was
14 dissolved the same year that the CPLR was enacted,
15 1962. It came from the city court of the City of New
16 York. A small claims court.

17 JUDGE PIGOTT: I was afraid it was the
18 Fourth Department for a minute.

19 MR. STAHL: It's - - -

20 JUDGE PIGOTT: What I did want to ask you,
21 though, is it's - - - it's - - - it's routine in this
22 state, whether it's the law or not, that if you're
23 going to execute on - - - on a judgment debtor, you
24 better get the bank you put the money in. I - - -
25 you can't serve HSBC, you know, wherever their

1 headquarters are, and get all their branches, right?

2 MR. STAHL: No, that's not true, Your
3 Honor. The law is split. This is a rule that's been
4 looking for a home forever and ever and ever. Every
5 - - - no court - - - number one, this court's never
6 ruled on it. So there's no decisive part - - -

7 JUDGE PIGOTT: But if we say that is that
8 what you can do? In other words, if you mail a - - -
9 if you mail a restraining notice to the Bank of New
10 York in New York City you've covered the nation or -
11 - -

12 MR. STAHL: Your Honor, if you read 5222
13 and 5225 the way this court has described them both
14 in Koehler as well as Northern Mariana where this
15 court has said we don't create legislation.

16 JUDGE PIGOTT: Right.

17 MR. STAHL: We interpret it. We don't add
18 provisions to what the legislature's done.

19 JUDGE SMITH: But the - - - the - - -

20 MR. STAHL: Where the legislation is clear
21 on its face - - -

22 JUDGE SMITH: Yes is going to be at the end
23 of this? The answer is yes to Judge Pigott's
24 question?

25 MR. STAHL: You could, sure. If you want

1 to create policies - - -

2 JUDGE SMITH: And indeed, it's not just you
3 covered the nation, you covered the world?

4 MR. STAHL: When the Second Circuit
5 referred this question, they recognized, couple of
6 things, I think, and it's in their decision. There
7 is no statutory basis for the separate entity rule.

8 JUDGE PIGOTT: But that means that if - - -
9 if - - - if, you know, your standard person who - - -
10 who executes on a bank account does this, and - - -
11 and the Bank of New York or Bank of America or
12 anybody lets money out, they're subject to contempt,
13 right?

14 MR. STAHL: Absolutely.

15 JUDGE PIGOTT: Okay.

16 MR. STAHL: And they - - - and they're
17 subject to other remedies, as well.

18 JUDGE PIGOTT: Because that's - - - that
19 would be big news in the collection agen - - -

20 MR. STAHL: I don't believe it would, Your
21 Honor. Let me give you an example why. You - - - we
22 all follow the travails of these various foreign
23 banks with the Department of Financial Services, the
24 300 million dollar fine three weeks ago to Standard
25 Chartered for allegedly allowing money laundering in

1 the UAE and in Hong Kong, where the Uzans happen to
2 be, I might add. They're already under obligations
3 to monitor the very things that they would have to
4 freeze or turn over under fif - - - Article 52. The
5 Patriot's Act, know your customer, any money
6 laundering, The Department of Financial Services
7 regs. That's the modern world. They can't say oh,
8 we didn't know that there was this palladium trade
9 going on in - - - in - - - in the UAE, or we didn't
10 know that this money was actually in Switzerland.
11 They're obligated to know. And more fundamentally -
12 - -

13 JUDGE SMITH: Is - - - isn't there a
14 difference between complying with money laundering
15 laws - - - which I'm sure is a huge pain in the neck,
16 but at least you - - - you know, you - - - you - - -
17 you - - - you're only worrying about the United
18 States government to - - - to having to worry about
19 every judgment debtor who serves - - - or a judgment
20 creditor who serves a restraining notice?

21 MR. STAHL: Your Honor, that happens all
22 the time. Ju - - - I - - - most of these banks have
23 departments, the sole function of which is to handle
24 garnishments. Do you know how many garnishments - -
25 -

1 JUDGE SMITH: Yeah, and - - - and don't - -
2 - can't they reasonably say yeah, and we're going - -
3 - and - - - and we have quite enough trouble handling
4 the - - - handling the money in our own bank; please
5 don't make me check Dubai every time one of these
6 things comes through?

7 MR. STAHL: Your Honor, if you believe that
8 that's the right policy for the State of New York,
9 you, as a member of this court - - - I imagine, I
10 know - - - have the authority to write a decision
11 saying that. But the place for this argument to be
12 made is down the street. The legislature is the
13 place. They have done four times since this court
14 decided Koehler - - - "they" being the banks - - -
15 asking the legislature to statutorily nullify, as to
16 banks, this court's decision in Koehler. It's never
17 been acted on once.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 MR. STAHL: Thank you, Your Honor.

20 CHIEF JUDGE LIPPMAN: Thank you. You'll
21 have your rebuttal. Let's - - - let's hear from your
22 adversary.

23 MR. CLARK: If the court pleases, Bruce
24 Clark for Standard Chartered Bank and for the
25 separate entity rule.

1 CHIEF JUDGE LIPPMAN: Counselor, tell - - -
2 tell us about your version of the history of the
3 separate entity rule in New York.

4 MR. CLARK: Very well. The first case was
5 Corn Exchange, which dealt with two branches that
6 were within New York City. The next six cases all
7 dealt with the question of whether you can attach or
8 execute on a branch that's overseas. All six said
9 no.

10 JUDGE SMITH: And when you say "attach or
11 execute on," you're suggesting more or less the same
12 thing. He says they're wholly different things. You
13 know, that he's only got - - - there's only one
14 little one-page case from a nonexistent court that
15 deals with post-judgment.

16 MR. CLARK: That's the post-judgment
17 execution case. That's true. There are three that
18 deal with attachment of such and two that deal with
19 the question of whether - - -

20 JUDGE SMITH: Why - - - why shouldn't
21 post-judgment remedies be treated differently from
22 attachment? We said - - - didn't we say in Koehler
23 that's one in personam, the other's in rem?

24 MR. CLARK: That analysis was different in
25 Koehler, but to answer your question specifically,

1 there are ten cases in the post-judgment enforcement
2 area dealing with attempted enforcement of foreign
3 branches that have said that's not permitted under
4 separate entities.

5 JUDGE SMITH: And the reason you've got ten
6 and he's got one is he cut off when the CPLR was
7 enacted?

8 MR. CLARK: That's right. I've got eleven
9 if you count the one before.

10 CHIEF JUDGE LIPPMAN: Ah.

11 MR. CLARK: That's correct.

12 JUDGE PIGOTT: But - - - but - - -

13 MR. CLARK: And - - - and - - -

14 JUDGE PIGOTT: - - - and looking at the
15 policy, I mean, if you read the statute the way Mr.
16 Stahl wants us to, there's hard - - - it's hard to
17 quarrel with that. And - - - and the only - - -
18 these days with the electronic transfer of funds and
19 things like that, I haven't seen a check in I can't
20 remember when, and I don't know where my money is.
21 At least I hope I know where it is. But money can be
22 moved in seconds. And - - - and - - - to - - - to -
23 - - and particularly I - - - I - - - I hate to focus
24 on this particular defendant. When someone is
25 purposely trying to prevent anyone from getting to -

1 - - to its money, shouldn't there be something that
2 says - - - the - - - the CPLR doesn't say we can't do
3 this. Why shouldn't we?

4 MR. CLARK: There are at least three points
5 on what you just said. First of all, in terms of
6 simply information, it's possible that there's
7 information within New York, within the computer
8 system, about New York. But that's not the purpose
9 of the separate entity rule in the context you're
10 being asked about. When we're talking about
11 overseas, we're talking about whether an - - - a
12 service by a lawyer on a New York branch under 5222
13 can create a situation where a foreign branch has to
14 violate the laws in that country and be exposed to
15 double liability. This is not a computer game.

16 JUDGE PIGOTT: Well, don't we have - - -
17 don't we have interpleader actions to solve those
18 issues?

19 MR. CLARK: Not in New York. You can't get
20 everybody here in New York. In fact - - -

21 JUDGE ABDUS-SALAAM: What's - - -

22 MR. CLARK: - - - we specifically suggested
23 to Motorola that the - - - that the provisional
24 belonged to UAE, which permits you to take a foreign
25 judgment, in this case the New York judgment or the

1 order at issue here, bring it into the UAE where
2 Motorola has an office, where our bank has a branch,
3 and where JDIB is, and have it resolved under that
4 law. They specifically refused to do that.

5 JUDGE ABDUS-SALAAM: What's wrong with
6 Judge Rakoff's analysis about this double liability?
7 Isn't - - - why isn't it just a - - - one of the
8 things of doing business for the banks?

9 MR. CLARK: Well, he's wrong in this case,
10 because the Central Bank of the UAE took 30 million
11 dollars out of my bank's account with the Central
12 Bank and gave it to JDIB. So that money's gone.

13 JUDGE SMITH: But - - - but as I understand
14 what Judge Rakoff said, he said that he - - - he's
15 not going to give you an equitable defense but that
16 he did consider double liability when he was
17 interpreting the Article 52. Did I read him wrong?

18 MR. CLARK: Well, he did say - - - he did
19 uphold the separate entity rule in this case. That's
20 why we're here.

21 JUDGE SMITH: And - - - and double
22 liability was one of the reasons for it?

23 MR. CLARK: That's right. That's right.
24 Now, you know, the point - - - the point that was
25 made before about - - - about the Uzans being bad

1 people, no one's debating that. But the Uzans are
2 not at stake here. They have their money if they are
3 JDIB. And nobody knew that JDIB was the Uzans. This
4 whole thing developed because Motorola had months of
5 ex parte communication with the judge in New York and
6 got the judge to issue an order listing 115 people
7 and entities as Uzan entities. One of them happened
8 to be a customer in the UAE.

9 JUDGE PIGOTT: But - - - but the ex parte
10 was because there - - - there was a default on the
11 other side, right?

12 MR. CLARK: But - - -

13 JUDGE PIGOTT: They - - - they had nobody
14 to talk to. I know you weren't there.

15 MR. CLARK: My - - - my bank was not at
16 fault there. And all I'm saying is these names
17 appeared on a list and suddenly the bank is faced
18 with a question of whether they restrain overseas.
19 They did restrain, because they didn't want to
20 violate the order. And they moved to - - - to lift
21 the restraint at the same time.

22 JUDGE GRAFFEO: So how do you distinguish
23 the Koehler decision then?

24 MR. CLARK: I think Koehler is a case that
25 really has no bearing on the separate entity rule

1 both because the parties to the case in their briefs
2 said it did not and because neither opinion mentions
3 the separate entity rule. And none of the - - -

4 JUDGE GRAFFEO: But how should we view it?
5 Why - - -

6 MR. CLARK: You should view it - - -

7 JUDGE GRAFFEO: Why should we see it
8 differently? What - - - what facts or what's the
9 nature of that case that - - -

10 MR. CLARK: It's what's missing from the
11 case that - - -

12 JUDGE GRAFFEO: - - - should encourage us
13 to go in a different direction in this case?

14 MR. CLARK: It's what's missing from that
15 case that distinguishes it. In that situation, the
16 bank office that held the asset in question, which
17 was a certificate, gave itself up to full
18 jurisdiction before the New York Court. So you don't
19 have a question of separate entities. You don't have
20 a question of branches, foreign law, or double
21 liability. None of that came up.

22 JUDGE READ: It was the - - - the - - -

23 MR. CLARK: And those are the essentials of
24 the separate entity rule problem. Now you also asked
25 about the - - - the section involved here, 5222. And

1 I think the answer to that is both what it says and
2 the context it's in and what it does not say. 5222
3 is one part of Article 52. An essential part of
4 Article 52 is 5209, which says that a garnishee shall
5 not be put in a position of liability, which is
6 what's being attempted here.

7 Moreover, by the time that Article 52 and
8 the CPLR was enacted, there were the seven cases I
9 mentioned, which established the separate entity
10 rule, that had been presented to the legislature by
11 the uniform commission - - - the - - - the - - - by
12 the Commission on Uniform Laws. It laid out the
13 separate entity rule for the legislature in 1962.
14 They were aware of it. And the rules are established
15 by cases in this court that if there's a rule that's
16 in effect and then a statute is passed and the
17 statute does not specifically abrogate the rule - - -
18 either directly or implicitly - - - then the rule
19 goes forward. You said that in the Kirschner case in
20 2010 and Rondack Construction dealing with Article
21 52, specifically 5236 and auction rules, in 2009.
22 And also back in 1985 in the Arbegast case dealing
23 with Section 1411. If the rule is there and the
24 statute does not do something that overrules it, it
25 goes through.

1 JUDGE SMITH: What - - - what's - - -

2 MR. CLARK: And that's the case here.

3 JUDGE SMITH: What's the significance of
4 the UCC provisions that seem to apply a separate
5 entity rule in certain specific contexts?

6 MR. CLARK: The UCC was developed, as the
7 name implies, because it's a uniform rule that was
8 proposed for New York and all other fifty states and
9 now has been passed. Because it was uniform, the
10 legislature had to react to various provisions in the
11 UCC and did so with regard to banks and with regard
12 to other issues. The most interesting example there
13 is UCC 41.06 where the uniform proposal would have
14 watered down the separate entity rule by saying it
15 only applies when you have a separate set of books.
16 And the Commission on Uniform Laws specifically
17 pointed out that was inconsistent with Corn Exchange
18 and with Cronan against Schilling with the separate
19 entity rule, and the legislature - - -

20 JUDGE SMITH: So - - - so - - - so - - -

21 MR. CLARK: - - - refused to accept that.

22 JUDGE SMITH: - - - you - - - you - - - you
23 take that to be a recognition by the legislature that
24 enacted the UCC that the separate entity rule was New
25 York law?

1 MR. CLARK: Yes, yes. And the other point
2 I wanted to make, if I may return to 5222, is that
3 the rule in New York under New York Statute Law
4 Section 149 is that a statute like that, any statute,
5 is not extraterritorial unless it says so, and it
6 does not say so. And this court has decided that in
7 the Equitas case, upheld that.

8 JUDGE PIGOTT: But if I serve the Bank of
9 New York in New York, do I get all their branches in
10 the state?

11 MR. CLARK: That's a different question
12 than what's posed to the court, and the answer
13 depends, under the Limonium case, which I think is
14 the most recent statement, the answer depends on
15 whether you serve the home office, the central
16 office, and we're only talking about branches in the
17 state, and they do have a centralized computer
18 system. Under that particular ruling, then you would
19 get the other branches in New York. That doesn't
20 have a thing to do with the overseas question.

21 JUDGE PIGOTT: No, but it - - - it - - -
22 but it's the same thing.

23 MR. CLARK: It's not, really, Your Honor.
24 Because - - - because the central question here in
25 New York is not one of violating New York law or

1 double liability. That's what's imp - - - implied
2 and - - - and - - - and is part of the question when
3 you have overseas branches and - - -

4 JUDGE PIGOTT: But if you've got
5 jurisdiction over the Bank of New York and they - - -
6 and they say well, we - - - we'd love to - - - give
7 that money to you but it's over there in Erie,
8 Pennsylvania, and we can't give it to you, that's
9 pretty frustrating. And particularly if they know
10 and they - - - and they have control over that
11 branch.

12 MR. CLARK: Well, I think it's a harder
13 question, and it may not be the same answer when
14 you're dealing with other states in the country.
15 That's still being developed, to be honest. But when
16 the legislature changed the law, CPLR, in 2006, it -
17 - - it changed Section 5224 to say that when you're
18 responding to discovery in this circumstance then - -
19 - then the Amendment A-1 says you must give up
20 information not just about here but wherever the
21 information is located. That made something
22 extraterritorial about that particular provision.
23 And what I think the policy there was meant to say is
24 here's the answer as to where the assets are. Now go
25 and get them, if you can, in that place, be it

1 Pennsylvania or the UAE.

2 JUDGE RIVERA: So - - - so - - -

3 JUDGE PIGOTT: Could you - - -

4 JUDGE RIVERA: I'm sorry.

5 JUDGE PIGOTT: No, go ahead.

6 JUDGE RIVERA: Oh, so, I'm - - - I'm sorry.

7 Just to clarify, so your - - - your position is that
8 Article 52 applies in the context of a - - - a - - -
9 a rob - - - an extraterritorial robust legal system,
10 but when there's this kind of legal system, as your
11 adversary is describing, the law can't apply? Or at
12 - - - at least 5209 means that you can't apply the
13 freeze order because there's - - - there's concern
14 about the double liability?

15 MR. CLARK: 5222 doesn't apply
16 extraterritorially at all.

17 JUDGE RIVERA: Okay.

18 MR. CLARK: And that's the statute that
19 we're - - - we're talking about. And it's not a
20 matter of - - - of analyzing country by country
21 whether there's a problem. It's a problem in every
22 country. And you can look at the opinions in the
23 lower courts, all of whom have agreed with that,
24 Justice Coin in Ayyash, Justice Stallman in Royal
25 Bank of Canada, Judge Preska in Shaheen, they've all

1 recognized - - -

2 JUDGE RIVERA: I'm sorry, but I thought you
3 were arguing that because of - - - of - - - maybe
4 I've misunderstood part of this argument. I thought
5 part of the argument was the opportunity to be
6 relieved of - - - of - - - of the - - - oh, my
7 goodness, of the - - - of liability, right? That's
8 the double-liability argument. That - - - that - - -
9 you - - -

10 MR. CLARK: Not - - - not the things that -
11 - -

12 JUDGE RIVERA: - - - you're not able to be
13 relieved of - - - you - - - I thought you were asking
14 that we had to look holistically at the statute, not
15 solely at the provisions that deal with the freeze
16 order?

17 MR. CLARK: I think it's an essential part
18 of the statute, 5209 or - - -

19 JUDGE RIVERA: Yes?

20 MR. CLARK: - - - 6204 in that context - -
21 -

22 JUDGE RIVERA: Yes?

23 MR. CLARK: - - - that the garnishee not be
24 put to the risk of double liability.

25 JUDGE RIVERA: Right, but then - - - that's

1 what I'm saying. Doesn't that mean then that what
2 you're arguing is that the statute applies when
3 you're dealing with a - - - a banking entity that is
4 located in a extratorial (sic) - - - at a country
5 outside of the U.S., obviously, that has a robust
6 legal system?

7 MR. CLARK: I think it applies to any
8 country outside the United States. There is no
9 country that has a banking system, which I think is
10 all of them, which does not have laws and rules that
11 apply to that system - - -

12 JUDGE RIVERA: Um-hum.

13 MR. CLARK: - - - which are almost
14 inevitably - - - and according to the courts I just
15 recited - - - will say that it's a violation of our
16 law to take a - - - a lawyer's writ in New York and
17 have that have effect in the UAE or Jordan or, as the
18 UK brief shows, they're worried about it, too. Even
19 there, our greatest ally, they don't want this
20 system. And it's not just a matter of being able to
21 prove at the end of the day how good the legal system
22 is in one country or another. This is a situation
23 that exists everywhere. And that's why the rule is
24 in place, and it has been in over twenty-five
25 opinions signed onto by about sixty judges in this

1 state. And many of those involve foreign branches
2 overseas. And I - - - I really do urge you to uphold
3 the separate entity rule for the good of New York
4 State, as well as for my client and banks.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. CLARK: Thank you.

7 CHIEF JUDGE LIPPMAN: Thank you, counselor.
8 Counselor, rebuttal?

9 MR. STAHL: Thank you, Your Honor.

10 Firstly, this court, I believe, answered the
11 extraterritorial question in Koehler. And it's on
12 page 6 of the opinion I have. It says, "CPLR Article
13 52 contains no expressed territorial limitation
14 barring the entry of a turnover order that requires
15 the garnishee to transfer money or property into New
16 York," for another - - - "from another state or
17 country." It would have been an easy matter for the
18 legislature to have done so. Skipping down, "Recent
19 legislation thus supports our conclusion that the
20 legislature intended CPLR Article 52 to have
21 extraterritorial reach."

22 The difference, Your Honor, is not so much
23 that. It's not a question of reach. It's effect.
24 If - - - if - - - if you are a judgment defendant, a
25 judgment debtor of mine, and I have jurisdiction over

1 you and your car is in New Jersey, I can get an order
2 compelling you to bring the car to New York. There's
3 nowhere - - -

4 JUDGE SMITH: But isn't there a difference
5 between a judgment debtor and a garnishee? I realize
6 I lost that argument in Koehler, but is - - - isn't
7 there something left of the idea that maybe you ha -
8 - - don't have to treat them exactly alike?

9 MR. STAHL: I bel - - - I think the statute
10 actually does kind of level the playing field, Your
11 Honor. Because in the case of a garnishee, you get
12 this proceeding and - - - and you get to pres - - -
13 present evidence. You really have to make sure the
14 garnishee isn't put in a bad spot. It is different
15 with the debtor. It's - - - it's much clearer,
16 because you've got a judgment against him. But I
17 think as a question of law and a question of
18 jurisdiction they're exactly the same.

19 And on the point of - - - of 5240, of the -
20 - - the point Your Honor was asking about of whether
21 the - - - the - - - the court upheld the claim of
22 double liability, the court rejected it below. The
23 District Court denied Standard Chartered's motion for
24 relief under 5240 to set aside the restraint. It
25 granted relief under the separate entity rule,

1 recognizing it was unsure about it, but it was
2 concerned enough that it wanted the Second Circuit or
3 this court - - -

4 JUDGE RIVERA: Isn't - - -

5 JUDGE SMITH: But one of the reasons it - -
6 - one of the reasons Judge Rakoff gave was his
7 concern about double liability?

8 MR. STAHL: No, if you go back and look at
9 his decision on 5240 that was the - - -

10 JUDGE SMITH: I understand that he denied
11 relief under 5240. But in upholding the sep - - -
12 the separate entity rule - - -

13 MR. STAHL: Yes.

14 JUDGE SMITH: - - - didn't - - - wasn't - -
15 - wasn't double liability part of his reasoning?

16 MR. STAHL: I don't think he said he
17 adopted that, because he rejected that very argument
18 in this case. He said I think that other courts have
19 relied upon that. But let me make another point
20 here. If there was any law that the legislature - -
21 - legislature was aware of that was, in fact, the law
22 - - - the common law of New York, it was from this
23 court it Petrogradsky. It was Judge Cardozo's dep -
24 - - opinion. That's been known and dealt with for
25 ninety years now, and it got dealt with in this case.

1 If any of you have ever looked at your
2 checking account agreements with your bank or your
3 savings account agreements your bank, there are
4 indemnities in all of them. And there's a lot worse.
5 There are arbitration provisions and all the rest.
6 But they've taken care of this risk. They have it
7 here. There's no showing of any double liability to
8 - - - to this bank. The - - - this hasn't even been
9 resolved. We haven't made an application for
10 turnover of any money.

11 JUDGE SMITH: Well, aren't - - - I mean
12 aren't you really asking them - - - you - - - you - -
13 - you - - - you want to get their mon - - - get money
14 from them and then they can chase the Uzans instead
15 of you? But shouldn't - - - should - - - shouldn't -
16 - - your client's the one who made the mistake of
17 dealing with the Uzans in the first place. Why
18 shouldn't it be your problem, not Standard Chartered
19 Bank's?

20 MR. STAHL: Well, we could say it was
21 Standard Chartered's problem in this place for having
22 dealt with the Uzans. We don't know the extent of
23 these dealings, Judge Smith. We know that in this
24 case it's 30-, 31 million dollars' worth of proceeds
25 from palladium trades. But for all we know, in the

1 prior months or years it may be hundreds of millions
2 of dollars.

3 JUDGE SMITH: Well, if you can prove - - -
4 if you can prove that they're a coconspirator with
5 the Uzans I suspect Judge - - - Judge - - - Judge
6 Rakoff will suddenly get - - - get - - - give you a
7 lot of relief, but if they really are a neutral
8 stakeholder, why shouldn't the loss fall on you not
9 them?

10 MR. STAHL: Your Honor, they - - - they - -
11 - they're hardly a neutral stakeholder. They have an
12 agreement to act as the agent for this Uzan proxy.
13 They have indemnities in that agreement. That
14 agreement, by the way, is governed by English law.
15 Disputes are to be resolved in England. So when you
16 talk about foreign law, what foreign law are we
17 looking at? Is it Jordan where this bank is? Is it
18 the UAE where the palladium trades were just
19 facilitated through Standard Chartered? Is it
20 England where this bank, Standard Chartered, is
21 headquartered?

22 JUDGE PIGOTT: I think I know the answer to
23 this but why - - - why didn't you take up counsel's
24 offer to move this to the UAE and decide it there?

25 MR. STAHL: There's no relief in the UAE.

1 What we could do is we could domesticate a judgment
2 against the Uzans. We don't get veil piercing.
3 There's no such concept there. We'd have to start
4 over again, and by the time we got done, guess what
5 would happen, Judge Pigott? The money would be moved
6 to Dubai or be moved to Switzerland or Lichtenstein
7 or the Cook Islands or Guernsey. The world,
8 strangely, is full of bad people and bad places, and
9 money laundering is quite a big problem. We would be
10 chasing the Uzans right here, but they fled, Judge
11 Smith. That's why they're fugitives. That's why
12 they're disentitled.

13 JUDGE SMITH: Am I correct in thinking that
14 - - - I mean this - - - this case - - - the - - - the
15 underlying fraud had enough connection with New York
16 that - - - that it was a - - - actually adjudicated
17 here. But if this - - - if - - - if - - - if the
18 only connection of this litigation to New York were
19 that Standard Chartered had a branch here the case
20 would be essentially the same?

21 MR. STAHL: Essentially, if the statute
22 means what the statute seems to say, 5222 and Article
23 52 generally, yes, it would. But that, you see, Your
24 Honor, is a consequence of Standard Chartered's
25 decision. They decided they wanted to do business in

1 New York.

2 JUDGE SMITH: Quite a few banks make that
3 decision, and - - - and - - - and New York is rather
4 pleased with it.

5 MR. STAHL: Yeah, at - - - at some level
6 I'm sure it is very pleased with it. But the point
7 is, after Koehler I don't think any banks left New
8 York. I haven't noticed anything appreciable. And
9 they haven't even left after they've gotten billions
10 and billions and billions of dollars of fines from
11 the Department of Financial Services and otherwise.
12 So I think New York, safely and happily, is here to
13 stay as a financial capital of the world. But it
14 doesn't need to be a place where people can come,
15 avail themselves of the law of New York, and then
16 have no consequences because of the law, perhaps, in
17 some other jurisdictions.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 Thank you both.

20 MR. STAHL: Thank you, Your Honor.

21 (Court is adjourned)

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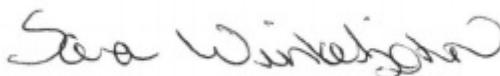
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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Motorola Credit Corporation v. Standard Chartered Bank, No. 162 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 19, 2014