

RESOLUTION No 3/2012

COMMITTEE ON INTERNATIONAL MONETARY LAW

PRINCIPLES OF JURISDICTION OVER FOREIGN BANK BRANCHES IN THE MATTER OF EXTRATERRITORIAL ATTACHMENT AND TURNOVER

The 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012:

RECOGNISING that banks engaged in international commerce will inevitably become third-party garnishees in disputes and claims for compensation, particularly in contract, delict or restitution, across national borders;

CONSIDERING that courts in different national jurisdictions take varying approaches to the issue of whether and under what circumstances a bank's office, branch or agency in one state's jurisdiction may be liable for property held within one of its offices, branches, or agencies in another state's jurisdiction;

ACKNOWLEDGING that the "separate entity doctrine" is an established and longstanding doctrine which applies in the context of private enforcement actions and contemplates that each office, branch or agency of a bank is treated as a separate entity, particularly for situating deposit accounts or determining the place of payment of debts, and is therefore not considered to be in possession, custody or control of property maintained by depositors in other offices, branches or agencies, or at the home office;

FURTHER ACKNOWLEDGING that the widely accepted international monetary law principle of localisation of debts, also referred to as the doctrine of territoriality, similarly holds that such an asset should (subject to an agreement to the contrary) be treated as situated at the place of the bank office, branch or agency where the account is located;

WHEREAS in most jurisdictions, an order of restraint, attachment, garnishment or turnover is one in which a court permits the remedy for collection of property owed by a debtor to a creditor by reaching such property when it is in the possession of a third-party, either by requiring the third party to turn such property over to the creditor or by restraining such property in advance of the enforcement of a judgment against the debtor;

NOTING that the separate entity doctrine, the doctrine of territoriality, and general principles of private international law should prevent a court in one state's jurisdiction from issuing an absolute or worldwide order for a bank's office, branch or agency in another state's jurisdiction to garnish or turn over assets in circumstances where a garnishee will continue to be exposed to a risk of liability for the same debt by a foreign court of competent jurisdiction;

FURTHER RECOGNISING that the enforcement of extraterritorial turnover orders would potentially: (i) expose banks to liability in multiple jurisdictions, (ii) cause the violation of various national laws and regulations as banks seek to comply with orders to garnish property outside the borders of any given state, and (iii) cause banks to become subject to potentially inconsistent and contradictory judicial rulings by courts in different states concerning the same property;

ADOPTS the following Principles:

SCOPE:

- 1.1 These Principles are concerned with the particular rules of jurisdiction that are distinctive to banks which, as third-party garnishees or the equivalent, are asked by the courts of one state to attach or garnish property located in branches, offices or agencies in another state's jurisdiction.
- 1.2 These Principles are meant to apply to private enforcement actions and not to affect or limit the scope of the enforcement jurisdiction or power of relevant regulatory agencies or public law enforcement bodies.
- 1.3 These Principles do not negate or contravene any of the recommendations in the Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order.

JURISDICTION:

- 2.1 In the context of proceedings for the enforcement of a foreign judgment or arbitral award, a bank's offices, branches, agencies and other establishments are generally to be treated as separate entities which do not have possession, custody or control of property maintained by depositors in offices, branches or agencies or at the home office in another state.
- 2.2 In furtherance of this principle, in the context of proceedings for the enforcement of a foreign judgment or arbitral award, a bank should not be ordered by the courts of one state to garnish or turn over property located in an office, branch, agency or subsidiary that is outside the territorial jurisdiction of the court issuing such order of restraint, attachment, garnishment or turnover.