SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED Justice PART 60

HON. BERNARD J. FRIED

E-FILE

International Legal Consulting Limited,

Claimant/Petitioner,

- v -

Malabu Oil and Gas Limited, et. al.,

Respondent.

INDEX NO. #651773/2011 E

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the attached memorandum decision.

SO ORDERED.

01 651773

Dated: 3/15/2012

J.S.C.
HON. BERNARD J. FRIED

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST [ ] REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 60

- X

In the Matter of the Arbitration Between:

INTERNATIONAL LEGAL CONSULTING LIMITED,

Claimant/Petitioner,

- against - Index No. 651773/11

MALABU OIL AND GAS LIMITED; and JPMORGAN CHASE & CO. and all of its subsidiaries and affiliates including but not limited to JPMORGAN CHASE BANK, N.A.,

Respondents.

- X

APPEARANCES:

For Petitioner:

Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005
(Donald J. Kennedy, Mark R. Zancolli)

For Respondents:

Clifford Chance US LLP
31 West 52nd Street
New York, NY 10019
(Robert G. Houck, Lewis M. Kaminski)

FRIED, J.:

Motion sequence nos. 002, 003 and 005 are hereby consolidated for disposition. In motion sequence 002, petitioner International Legal Consulting Limited (ILC) moves, pursuant to CPLR 7502 (c), for a temporary restraining order and a preliminary injunction in aid of an arbitration that is pending in London, England between ILC and respondent Malabu Oil and Gas Limited (Malabu). In motion sequence 003, ILC moves to confirm an ex parte order of attachment. Motion sequence 005 is the amended petition filed by ILC on or about July 14, 2011.

This proceeding arises out of the alleged breach of an "Engagement Letter and Fee Agreement" entered into by ILC and Malabu dated January 19, 2010 (the Fee Agreement). ILC is a consulting company incorporated under the laws of the British Virgin Islands with its principal place of business in Limassol, Cyprus. Am. Petition, ¶ 8. Malabu is a Nigerian company. *Id.*, ¶ 8. ILC was engaged to provide negotiation and consulting services in order to facilitate Malabu's transfer of all or part of its interest in "OPL 245," an Oil Prospecting License over oil block 245 in Nigeria. OPL 245 has been the subject of various lawsuits since the license was originally granted to Malabu in 1998, revoked by the Federal Government of Nigeria (FGN) in 2001, and then re-allocated to Malabu in 2006 and 2010.

ILC contends that it found an investor for OPL 245 and negotiated an assignment and transfer of Malabu's rights in OPL 245. It has submitted a document entitled "Block 245 Malabu Resolution Agreement" dated April 29, 2011, between the FGN and Malabu (the Malabu Agreement). As is relevant here, the Malabu Agreement provides that the FGN will pay Malabu the sum of $1,092,040,000 in full and final settlement of all of its claims, interest or rights relating to OPL 245, and that those rights would be re-allocated to Nigerian Agip Exploration Limited (NAE) and Shell Nigeria Exploration and Production Company Limited (SNEPCO) in accordance with a separate Reallocation Agreement to be entered into by the FGN with those entities and others. ILC also has submitted a second undated document, entitled the "Block 245 Resolution Agreement" (the Resolution Agreement) which provides for the payment by NAE of the sum of $1,092,040,000 into an escrow account "for the purposes of FGN settling all and any existing claims and/or issues over Block 245 . . ." Affidavit of Ednan Agaev sworn to on June 24, 2011 (Agaev Aff.), Ex. C, Clause 1.3.

ILC contends that it fully performed its obligations under the Fee Agreement entitling it to a 6% success fee amounting to $65,522,400, and that Malabu has indicated that it will not pay this amount. The Fee Agreement provides that it is to be governed by English law and that disputes shall be settled by arbitration in London, England under the Rules of the London Court of International Arbitration by a sole arbitrator. An arbitration proceeding against Malabu was commenced on or about July 22, 2011.

ILC commenced this special proceeding against Malabu on June 27, 2011, seeking an attachment in aid of arbitration pursuant to CPLR 6211 and 7502 (c). On June 28, 2011, this court issued an ex parte order of attachment to ILC securing the sum of $74,695,936 based on the contention of ILC's principal, Ednan Agaev, that the escrow account holding the proceeds of the sale of OPL 245 was at JPMorgan Chase & Co. (JPMorgan) in New York. Agaev Aff., ¶ 2. It is now undisputed that JPMorgan does not presently hold any moneys in any account which is held in the name of Malabu, including an escrow account to or for the order of Malabu, and that the bank account at issue herein was established with a London branch of JPMorgan and is held in the name of the FGN.

In the meantime, on July 3, 2011, another alleged creditor of Malabu, Energy Venture Partners Limited (EVP), obtained a worldwide freezing order against the assets of Malabu in the amount of $215 million from the High Court of Justice, Queen's Bench Division, Commercial Court (the QBD). EVP filed a claim against Malabu in the QBD on July 4, 2011 (Claim No. 2001 Folio 792) alleging that EVP had a written "Exclusive Agency Agreement" dated January 27, 2010 with Malabu to provide consulting services to find a purchaser for, and negotiate, the sale of Malabu's interests in OPL 245. EVP claims that it

is owed the sum of $200 million from the sums payable by or on behalf of NAE and SNEPCO. *See* Houck 8/16/11 Affirm., Ex. 5. On July 13, 2011, the freezing order was "varied" by the QBD to include the proceeds of the sale of OPL 245. Reply Affidavit of Ednan Agaev sworn to on September 8, 2011 (Agaev Reply Aff.), Ex. P. On July 15th, JPMorgan asked the QBD to clarify whether the freezing order applies to funds held pursuant to a Depository Agreement between the FGN and a London branch of JPMorgan.

Also on July 15, 2011, ILC came back to this court seeking a temporary restraining order (TRO) and a preliminary injunction in aid of arbitration. ILC was granted a TRO restraining Malabu and JPMorgan from transferring "assets of Malabu" to the extent of $65 million, including $65 million of the

> "approximately $1.1 billion in proceeds from the transfer of Malabu's rights to an oil prospecting license over oil block OPL 245 ("OPL 245") in Nigeria held in the escrow account or depository account at JPMorgan Chase & Co. which has been frozen in England which is to be identified within three business days, including but not limited to any account at JPMorgan Chase Bank, N.A., in the name of the Federal Government of Nigeria, not for the Federal Government of Nigeria's own account but for the benefit of Malabu and/or Malabu's principal, Dan Etete a/k/a Dauzia Loya."

OSC dated July 15, 2011; *see also* 7/15/11 Tr. at 48, 53-54. At the hearing held on July 15, 2011, I clarified that the account to be restrained was the account frozen by the QBD and any other account for the benefit of Malibu, and that JPMorgan was only to provide the name and number of the account. Tr. at 40-41, 55. The granting of the TRO was further conditioned on ILC filing a demand for arbitration against Malabu within 30 days and an application to the arbitrator for a temporary restraint or provisional remedy of this nature. 7/15/11 Tr. at 34. The TRO was to remain in effect until it is dissolved by further order of this court or the

arbitrator in London determines that there is no basis to continue the TRO. Finally, I ruled that the bond in place for the attachment would be sufficient if the bonding company was prepared to issue a written statement that it would cover the TRO, as opposed to the ex parte order of attachment.

By letter dated July 20, 2011, counsel for JPMorgan identified the name of the account which had been frozen by the QBD as "Federal Republic of Nigeria Escrow," and located at "JPMorgan ChaseBank N.A., 125 London Wall, London, EC27 5 AJ" (hereinafter, the London depository account). JPMorgan has also disclosed a copy of the "Depository Agreement by and among The Federal Government of Nigeria ('FGN') and J.P. Morgan Chase Bank, N.A., London Branch as Depository," dated May 20, 2011, which, by its terms, is to be governed by and construed in accordance with English law. Agaev Reply Aff., Ex. E at 4, 15.

Initially, the money from the proceeds of the sale of OPL 245 was placed in an escrow account pursuant to an escrow agreement dated May 4, 2011 by and between the FGN, NAE, SNEPCO and "J.P. Morgan Chase Bank, N.A., London branch as Escrow Agent" (Escrow Agreement No. 2). *See* Letter to this court dated October 14, 2011 from Donald J. Kennedy, Esq.; Agaev Aff., Ex. C: Resolution Agreement, clause 2 (ii). The escrow account was funded by NAE on behalf of NAE and SNEPCO on May 23, 2011. According to clause 3 of the Resolution Agreement, once the FGN confirmed that it had achieved the full and final resolution of all claims and issues in dispute over OPL 245 and obtained a release from all claims, Escrow Agreement No. 2 was to be terminated and the money held in the escrow account was to be paid into the London depository account.

JPMorgan received an "Escrow Completion Notice" from NAE and SNEPCO instructing its London branch to deposit the funds into the London depository account, and this instruction was carried out on May 24, 2011. Thus, as of the filing of this proceeding, no funds were being held in escrow and all of the proceeds of the sale of OPL 245 were being held in the London depository account.

In a letter dated July 15, 2011 and in connection with the EVP litigation, Malabu's lawyers advised London counsel for JPMorgan as follows:

> 1. Malabu is not a customer nor account holder of JP Morgan, nor party to escrow arrangements with JP Morgan.
>
> 2. Malabu has no legal or beneficial interest in any funds held by JP Morgan.
>
> 3. Malabu has no power to dispose of any funds held by JP Morgan.
>
> 4. For the avoidance of doubt, Malabu has a contractual right to receive sums from the Federal Government of Nigeria. Malabu understands that those sums may be paid from funds held by JP Morgan on behalf of the FGN, but this a matter for the FGN.

Agaev Reply Aff., Ex. S.

By letter dated July 16, 2011, Mr. Mohammed Bello Adoke, San, identified as Nigeria's Attorney General of Federation and Minister of Justice, advised EVP's London counsel that, with respect to the freezing of funds in the London depository account, "the FGN does not submit to the jurisdiction of the English Courts and that this letter is sent only to claim immunity." Agaev Reply Aff., Ex. X. This letter goes on to question whether the QBD considered the FGN's status as a foreign state and the provisions of English law prohibiting injunctions against the property of a foreign state, which, according to the letter,

the QBD must consider regardless of whether the FGN is a party to the proceedings. The letter states that the funds in the London depository account are held in the name of the FGN, that Malabu is not a party to the Depository Agreement, and has no interest in the funds. Nevertheless, without waiving its immunity, the Attorney General indicated that the FGN would not object to the London court enjoining $215 million of the funds on deposit with JPMorgan until July 22, 2011 so that payment of the sum of $802,040,000 can be issued to Malabu. On July 29, 2011, after submissions from JPMorgan and the FGN, the London court issued a further order continuing the injunction issued in the July 3rd freezing order, as modified. Agaev Reply Aff., Ex. W.

At oral argument of these motions on October 13, 2011, this court was advised that the sole arbitrator in the London arbitration had been appointed. Counsel for ILC also advised that no application for injunctive relief had been filed with the arbitrator, upon the advice of ILC's English counsel, because the arbitrator would not have authority to direct JPMorgan, a non-party to the arbitration agreement, to do anything. 10/13/11 Tr. at 54-50. With respect to the London depository account, the court was advised: (1) that $215 million had been deposited with the London court on August 5th to secure EVP's claim, and that this transfer was effectuated pursuant to the instructions of the FGN; and (2) on August 23, 2011, the remaining $800 million in unrestrained funds was transferred, at the instruction of the FGN, to two Nigerian bank accounts held by Malabu. Accordingly, all that is left in the London depository account is $74,840,931.39. 10/13/11 Tr. at 5-7; *see also* JPMorgan's Inter. Resp. No. 2; Agaev Reply Aff., ¶ 17.

By letter dated October 14, 2011, counsel for ILC requested that the amount restrained be increased from $65 million to equal the amount of the ex parte order of attachment, namely $74,695,936 to take into account fees, costs and interest that may be awarded.

"It is well established that, where personal jurisdiction is lacking, a New York court cannot attach property not within its jurisdiction. It is a fundamental rule that in attachment proceedings the *res* must be within the jurisdiction of the court issuing the process, in order to confer jurisdiction." *Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538-539 (2009) (internal quotations omitted); *see also Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 311 (2010); *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 41 AD3d 25, 39 (1st Dept 2008).

ILC argues that the London depository account is a debt owed by JPMorgan (8/2/11 Tr. at 14-15), and that the situs of the debt is the location of the debtor, citing *Harris v Balk* (198 US 215 [1905]). Since JPMorgan is headquartered here, ILC maintains that the situs of the debt is New York. Where, however, the debtor is a bank with more than one branch, it is well established in New York that the situs of a bank account is fixed at the branch of the bank where the account is carried. *McCloskey v Chase Manhattan Bank*, 11 NY2d 936 (1962); *National Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts*, 269 AD2d 101 (1st Dept 2000); *Parbulk II AS v Heritage Maritime, SA*, __ Misc 3d __, 935 NYS2d 829, 832 (Sup Ct, NY County 2011); *Newtown Jackson Co. v Animashaun*, 148 NYS2d 66, 67 (Sup Ct, Nassau County 1955); *see also Allied Maritime, Inc. v Descatrade SA*, 620 F3d 70, 74 (2d Cir 2010); *Motorola Credit Corp. v Uzan*, 288 F Supp 2d 558, 560

(SD NY 2003); Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5222:5.). While it may be the case that the $1,092,040,000 from NAE and/or SNEPCO was wire-transferred through New York at one point in time, the documentary evidence is clear that the money was placed in escrow with "JPMorgan Chase Bank, NA London Branch" (*see* Escrow Agreement No. 2, at 1, 3) and was transferred on May 24, 2011 to a London branch of JPMorgan. When this proceeding was commenced on June 27, 2011, and at present, the *res* is located in London, England.

Relying on *Hotel 71 Mezz Lender LLC v Falor* (14 NY3d 303, *supra*), and *Koehler v Bank of Bermuda Ltd.* (12 NY3d 533, *supra*), ILC contends that a New York court may order an attachment of a debtor's out-of-state assets held by a garnishee bank over whom the court has in personam jurisdiction. There is no dispute that the potential judgment debtor[1] here is Malabu, a Nigerian company which has not consented to jurisdiction in New York and has not appeared in this proceeding. ILC argues that the garnishee is JPMorgan over whom the court admittedly has jurisdiction.

JPMorgan, however, is not in possession of any assets belonging to Malabu, and thus is not a proper garnishee for Malabu's assets under the CPLR. CPLR 6202 provides, in relevant part:

> "Any debt . . . against which a money judgment may be enforced as provided in section 5201 is subject to attachment. The proper garnishee of any such . . . debt is the person designated in section 5201; . . . "

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[1] While CPLR Articles 52 and 62 use the words "judgment debtor" and "defendant," in the context of an attachment in aid of arbitration, the correct title for the respondent Malabu would be "potential judgment debtor."

Section 5201 (a), in turn, provides:

> "A money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor, . . ."

The debt in this case -- the London depository account -- is money owed to the FGN by JPMorgan, and is not "due, certainly or upon demand of" Malabu.

ILC argues that there is no question that the remaining funds in the London depository account belong to Malabu as the proceeds from the transfer of Malabu's rights in OPL 245. ILC cites to clause 1.3 of the "Block 245 Resolution Agreement," which provides for the payment by NAE of the sum of $1,092,040,000 into an escrow account "for the purposes of FGN settling all and any existing claims and/or issues over Block 245 . . ." Notably, however, Malabu is nowhere mentioned in this document. While it does appear that the FGN was indeed the proverbial "straw man" holding $1.1 billion for ultimate payment to Malabu, the name of the holder of the London account is and has always been the FGN, even if Malabu has a contractual or equitable right to those funds. *See Bradford v Chase Natl. Bank of City of NY*, 24 F Supp 28, 38 (SD NY 1938) (best, if not only way, to show possession of a bank account is by showing in whose name the account stands), *affd sub nom Berger v Chase Natl. Bank of City of NY*, 105 F2d 1001 (2d Cir), *affd mem* 309 US 632 (1939). Indeed, the Depository Agreement clearly provides that the customer is the FGN, and that even if the FGN is acting as agent on behalf of another person, "the Customer alone shall be treated as the Depository's customer." Agaev Reply Aff., Ex. E. The remaining funds in the London depository account are not payable by JPMorgan at the demand of Malabu, and thus the proper garnishee here is the FGN, which is not named as a

respondent. While counsel for ILC claimed the FGN was given notice of these proceedings, and that their consulate in New York "was served by the sheriff according to the attachment" (10/13/11 Tr. at 6), no affidavit of service has been filed with the court. Property of an unserved party cannot be levied upon. *Ward v Kent Props.*, 102 AD2d 771 (1st Dept 1984).

Even assuming that JPMorgan is a proper garnishee, the question arises as to whether service on the New York offices of JPMorgan is sufficient to render accounts maintained at this bank in London subject to attachment. JPMorgan argues that the "separate entity rule" bars this method of establishing jurisdiction over bank accounts that are situated outside of New York. ILC argues that the separate entity rule is an "antiquated legal fiction" that should not be followed given the realities of modern day banking. Pet. Reply Memo. of Law, at 12. Citing *Koehler v Bank of Bermuda Ltd.*, (12 NY3d 533, *supra*), and *JW Oilfield Equip., LLC v Commerzbank AG* (764 F Supp 2d 587 [SD NY 2011]), ILC argues that New York courts have the power to require a garnishee present in the state to bring out-of-state assets under the garnishee's control into the state.

"The general rule in New York is that in order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained." *Therm–X–Chem. & Oil Corp. v Extebank*, 84 AD2d 787 (2d Dept 1981). Thus, in *McCloskey v Chase Manhattan Bank* (11 NY2d 936, *supra*), service of a warrant of attachment on Chase Manhattan offices in New York was held insufficient to attach funds held in two bank accounts maintained at a Chase Manhattan branch in Germany. "The theory of these decisions is that for purposes of attachment, among others, each branch of a bank is a separate entity, in no way concerned with accounts maintained by depositors in

other branches or at the home office." *Cronan v Schilling*, 100 NYS2d 474, 476 (Sup Ct, NY County 1950), *affd* 282 App Div 940 (1st Dept 1953). "The separate entity rule was historically justified on the basis of both the impracticability of requiring constant transmission of reports on the status of accounts in one branch to all other branches, and on the recognition that any banking operation in a foreign country is necessarily subject to the foreign sovereign's own laws and regulations . . . ." Healey & Maris, *New York Court Determines That Banks Still Have the Protection of the "Separate Entity" Doctrine After Koehler*, 128 Banking LJ 668, 669 [2011]).

The separate entity rule was thereafter criticized and limited by some federal courts. In *Digitrex, Inc. v Johnson* (491 F Supp 66 [SD NY 1980]), the court held that given technological advances and improvements in communication and record keeping by banks using high-speed computers and sophisticated communications equipment, service of a restraining order upon a bank's main branch is adequate. The holding of *Digitrex*, however, was clarified, and limited, by *Limonium Maritime, S.A. v Mizushima Marinera, S.A.* (961 F Supp 600 [SD NY 1997]), in which the court held that the *Digitrex* exception to the separate entity rule is applicable only where the restraining notice is served on the bank's main office; the main office and the branches where the accounts in question are maintained are within the same jurisdiction; and the bank branches are connected to the main office by high-speed computers and are under its centralized control. *Id.* at 607–608. Thus, even applying the *Digitrex* exception, service on JPMorgan's offices in New York would be insufficient to attach a bank account located in London, England. *Accord Limonium Maritime, S.A. v Mizushima Marinera, S.A.*, 961 F Supp 600 (SD NY 1997) (service of writ of attachment on

Royal Bank of Scotland branch in New York insufficient to attach bank account located at bank branch located in London, England); *Fidelity Partners, Inc. v Philippine Export and Foreign Loan Guar. Corp.*, 921 F Supp 1113 (SD NY 1996) (rejecting application for attachment of assets at Philippine National Bank's Manila headquarters by service on the bank's New York branch).

In *Matter of Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Advanced Empl. Concepts* (269 AD2d 101, *supra*), the First Department was presented with the issue of whether the separate entity rule was no longer good law, in light of *Digitrex*. In aid of arbitration, the petitioner brought a special proceeding for an order of attachment and a restraining order against the respondent. Both were granted, without opposition, and the order was served upon NationsBank in New York, who restrained two of the respondent's accounts held at a NationsBank branch in Florida. The respondents successfully moved to vacate the attachment, and the First Department affirmed. "In order to be subject to attachment, property must be within the court's jurisdiction, and the mere fact that a bank may have a branch within New York is insufficient to render accounts outside of New York subject to attachment merely by serving a New York branch." 269 AD2d at 101. The First Department held that an extension of the holdings in *Digitrex* and *Limonium* required a pronouncement from the Court of Appeals or the Legislature. *Id.* at 102.; *accord Motorola Credit Corp. v Uzan*, 288 F Supp 2d 558, 561 (SD NY 2003) (separate entity rule still prevents attachment of a bank account held in a bank's foreign branch by process served on that bank's New York office absent some contrary indication by New York lawmakers).

ILC argues that that pronouncement by the Court of Appeals came in 2010 with their decision in *Koehler v Bank of Bermuda Ltd., supra. Koehler*, however, was a post-judgment turnover proceeding brought pursuant to CPLR Article 52. The Court of Appeals held only that New York courts may order the out-of-state assets of a debtor that are under the control of a garnishee bank with a New York office be turned over to satisfy a United States money judgment *Id.* at 541. Notably, the Court of Appeals was careful to contrast Article 52, where jurisdiction has been acquired over the judgment debtor, from pre-judgment attachment under Article 62 which is "typically based on jurisdiction over property." 12 NY3d at 537. In *JW Oilfield Equip., LLC v Commerzbank AG, LLC* (764 F Supp 2d 587, *supra*), upon which ILC relies, even Judge P. Kevin Castel noted that "[t]he separate entity rule may still have application in prejudgment attachment proceedings, even after *Koehler.*" *Id.* at 595, n 3. In so noting, Judge Castel cited *Allied Maritime, Inc. v Descatrade SA* (620 F3d 70, *supra*), in which the Second Circuit ruled that a petitioner could not, under New York law, in aid of a pending London arbitration, attach bank accounts of the respondent located at BNP Paribas in Paris through service on BNP Paribas in New York.

ILC also argues that the *Koehler* has been extended to pre-judgment attachment in *Hotel 71 Mezz Lender LLC v Falor* (14 NY3d 303, *supra*). *Hotel 71* is distinguishable for several reasons. First, the *res* sought to be attached was not a bank account located in a foreign country, but the defendants' ownership interests in 23 limited liability companies formed in Delaware, Georgia and Florida. The Court of Appeals ruled that these were "intangible contract rights" that could be attached in New York, because the person who possessed and had control over those rights, defendant Guy Mitchell, had been physically

present in New York when the order of attachment was served on him. Second, the court had in personam jurisdiction over Mr. Mitchell and the other defendants by virtue of the personal guaranties that they had signed. Citing *Koehler*, the Court of Appeals ruled that "a court with personal jurisdiction over a nondomicilliary present in New York has jurisdiction over that individuals' tangible or intangible property, even if the situs of property is outside of New York." *Id.* at 312. In the case at bar, in personam jurisdiction over both Malabu and the FGN is lacking, rendering the attachment of their assets located in bank branches overseas improper.

As several of my colleagues have noted, neither *Koehler* nor *Hotel 71 Mezz Lender LLC* involved the separate entity rule, and *National Union Fire Ins. Co. of Pittsburgh, Pa.* has never been overruled. *Global Tech., Inc. v Royal Bank of Canada*, 34 Misc 3d 1209(A), 2012 WL 89823, at *12 (Sup Ct, NY County 2012) (Stallman, J.); *Parbulk II AS v Heritage Maritime SA*, 935 NYS2d at 832, *supra* (Sherwood, J.); *Samsun Logix Corp. v Bank of China*, 31 Misc 3d 1226(A), 2011 WL 1844061, at *3 (Sup Ct, NY County 2011) (Solomon, J.). This court likewise holds that the separate entity rule is still good law, particularly with respect to pre-judgment attachment of a bank account under CPLR Article 62, and that the service of an ex parte order of attachment in aid of a pending arbitration on a bank in New York does not encompass branches of the bank located in foreign jurisdictions, where the arbitration is pending in a foreign jurisdiction and involves a dispute between non-U.S. entities having no relationship with New York or even the United States.

Therefore since jurisdiction to order a pre-judgment attachment of the London depository account is lacking, ILC's motion to confirm the order of attachment is, denied,

and the ex parte order of attachment issued on June 28, 2011 is vacated.

JPMorgan also argues that a preliminary injunction is unavailable, because ILC is merely an unsecured creditor who seeks only money damages against Malabu.

Provisional injunctive relief has historically been "limited to equitable actions where the defendant threatened to violate the rights of the plaintiff 'respecting the subject of the action, which would tend to render the judgment ineffectual.'" *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 (2000). The reason for this limitation is because "in a pure contract money action, there is no right of the plaintiff in some specific subject of the action; hence, no prejudgment right to interfere in the use of the defendant's property; and no entitlement to injunctive relief pendente lite." *Id.*

An exception to the general rule exists where the subject of the action involves a specific fund. The classic case is *Sau Thi Ma v Xuan T. Lien* (198 AD2d 186 [1st Dept 1993]), where a woman claimed that her husband's uncle had stolen her winning $8 million lottery ticket. Although the ultimate relief sought by the plaintiff was monetary damages, her motion for preliminary injunctive relief ordering future lottery payments to be held in escrow was granted, because the action was directed at a specific fund of money of which the plaintiff claimed ownership. Likewise, in *Bashein v Landau* (96 AD2d 479 [1st Dept 1983]), the court restrained a down payment held in escrow by a real estate sellers' lawyer to preserve the status quo until the buyer's claim for the return of their down payment could be adjudicated. In both instances, the moneys being restrained were the subject of the action.

ILC argues that this exception to the general rule in *Credit Agricole* applies here since ILC's claim against Malabu in the London arbitration seeks a portion of a specific fund, that

is, ILC's claim in the arbitration seeks to recover a success fee of $65,522.400, representing 6% of the $1,092,040,000 in proceeds from the transfer of Malabu's rights to OPL 245. Although ILC makes this argument, the demand for arbitration that ILC actually filed with the London Court of International Arbitration describes ILC's claim as follows:

> "ILC has a claim for $65,522,400 against Malabu for non-payment of its fee, plus expenses pursuant to Clause 3 of the Fee Agreement, interest, costs and a reasonable allowance for attorneys' fees."

Houck Affirm., Ex. 6, § (d) (I). This arbitration demand makes no mention of the London depository account or the proceeds of the sale of OPL 245, does not seek specific performance of any contractual right to payment of the 6% success fee from any particular bank account or fund of money, and seeks only a sum of money from Malabu for breach of the Fee Agreement. While the amount of the success fee and the timing of the payment of that fee is tied to the "Purchase Consideration" received by Malabu for the sale of its rights in OPL 245 (*see* Fee Agreement, § 3.1), there is nothing in the Fee Agreement or arbitration demand that tie's ILC's right to payment to the proceeds of the sale of OPL 245. Notably different language can be found in EVP's alleged exclusive agreement with Malabu which, according to the claim filed with the QBD, gave EVP the right to approve any payment terms, a right of set off against any sums due Malabu for the sale of OPL 245, and the right to demand payment of the entire purchase price to EVP directly. *See* Agaev Reply Aff., Ex. D. Counsel for EVP successfully argued to the QBD that these provisions conveyed security on EVP with respect to the London depository account and justified a grant of injunctive relief. *Id.* The Fee Agreement between ILC and Malabu which is the subject of the London arbitration has no such similar protections for ILC. As such, ILC is merely an unsecured

potential creditor whose ultimate objective is attaining an enforceable money judgment against Malabu. As such, preliminary injunctive relief pursuant to CPLR 6301 is not available.

ILC also argues that *Credit Agricole* is distinguishable, because ILC seeks a preliminary injunction in aid of arbitration. The 2005 amendment to CPLR 7502 (c) allegedly permits the issuance of a preliminary injunction to secure a money award, as long as the award to which the applicant may be entitled may be rendered "ineffectual" without the preliminary injunction and the three traditional criteria for injunctive relief are met. However, the 2005 substantive amendment to CPLR 7502 (c) merely eliminated the uncertainty that then existed as to whether the provisional remedies of attachment and injunction could be sought in connection with arbitrations pending outside of New York and even outside the United States. *See* Alexander, 2006 Supp. Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C7502:6, at 109. Indeed, the only case ILC cites in support of this argument, namely *In re XTF Global Asset Mgt., LLC* (2010 WL 1116450 [Sup Ct, NY County 2010]), does not mention the 2005 amendment to the statute. More importantly, this decision does not cite or discuss the 2008 decision by the Second Department in *Winter v Brown* (49 AD3d 526), squarely applying *Credit Agricole* in the arbitration context and concluding that the issuance of a preliminary injunction in aid of arbitration pursuant to CPLR 7502 (c) was in error absent some proof that the monies sought to be restrained were part of any specific *res* or fund which could rightly be regarded as the "subject of the action." *Id.* at 529; *accord Traffix, Inc. v Talk.com Holding Corp.*, 2001 WL 123724, *2 (SD NY 2001).

In addition to the *Credit Agricole* problem, I am unconvinced that the petitioner has satisfied all three traditional criteria for preliminary injunctive relief under CPLR Article 63 -- namely a probability of success on the merits, the danger of irreparable harm, and a balance of the equities in favor of granting the injunction. *See Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 (1st Dept 2009). With respect to whether ILC has demonstrated a likelihood of success on the merits, there is another company, EVP, claiming that it was granted an *exclusive* right to negotiate the sale of Malabu's interests in OPL 245. In his supporting affidavit, Mr. Agaev claims he "made a proposal to Emeka Obi of Energy Venture Partners that he be my subcontractor in connection with this project" in November 2009. Agaev Aff., ¶ 8, at 6. Mr. Agaev then admits that a separate agreement between Obi and Malabu was signed, but offers no further details on EVP's role with respect to this transaction.

Another necessary requirement for injunctive relief is that the balance of equities favor the granting of an injunction. ILC repeatedly cites to Mr. Etete's March 2007 criminal conviction in France of money laundering, upheld on appeal in March 2009, and claims that Mr. Etete's reputation was so bad that reputable oil companies refused to enter into a commercial relationship with Etete. And yet, Mr. Agaev knowingly entered into a business transaction with this man in December 2009. *Cf. KMW International v Chase Manhattan Bank*, 606 F2d 10, 15 (2d Cir 1979) (party who knowingly enters into international business transaction assumes risks and hazards of foreign political turmoil). In addition, ILC had claimed, in support of its initial request for an ex parte order of attachment, that Etete was removing assets from New York, but no assets of Malabu were ever here to remove.

Even if I were inclined to grant an attachment or preliminary injunction in aid of arbitration, the funds in the London depository account are immune from both attachment and a preliminary restraint based on principles of foreign sovereign immunity, because the London depository account is the property of a foreign state.

JPMorgan argues that this immunity stems from the Foreign Sovereign Immunities Act (FSIA), 28 USC §§ 1602-1611, which provides, in pertinent part, that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter." 28 USC § 1609.[2] However,

> "the FSIA does not create immunities, but rather creates exceptions to pre-existing immunities. Before enactment of the FSIA in 1976, the traditional view of courts in the United States was that property of foreign states was absolutely immune from execution. The exceptions created by the FSIA to immunity from execution are contained in Sections 1610 and 1611."

Fidelity Partners, Inc. v Philippine Export and Foreign Loan Guar. Corp., 921 F Supp at 1118 (internal case citations omitted). "[B]efore enactment of the FSIA in 1976, the law of sovereign immunity prescribed absolute immunity from execution upon assets of a foreign state outside the United States." *Philippine Export & Foreign Loan Guar. Corp. v Chuidian*, 218 Cal App 3d 1058, 1093 (Cal App 6 Dist 1990); *see also Aurelius Capital Partners, LP*

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The word "attachment" in the context of 28 USC § 1609 has a broader meaning than in the traditional civil procedure sense, and encompasses all encumbrances and restraints imposed to prevent the dissipation of assets before judgment. *See Raji v Bank Sepah-Iran*, 131 Misc 2d 158, 162 (Sup Ct, NY County 1985), citing 1976 US Code Cong & Admin News, at 6629. Thus, it has been held that the attempted use of an injunction instead of an attachment, violates the clear intent of the FSIA. *S & S Mach. v Masinexportimport*, 706 F2d 411 (2d Cir), *cert denied* 464 US 850 (1983).

v Republic of Argentina, 584 F3d 120, 130 (2d Cir 2009) ("[T]he property that is subject to attachment and execution must be property in the United States of a foreign state . . . ." [quotation and citation omitted], *cert denied* 130 S Ct 1691 (2010); *Walters v People's Republic of China*, 672 F Supp 2d 573 (SD NY 2009) (restraining notices and subpoenas served on New York branches of Chinese banks seeking to restrain assets held by The People's Republic of China outside of the United States quashed since FSIA's exceptions to foreign sovereign immunity did not apply). Thus, the FSIA's exceptions to foreign sovereign immunity do not apply here since the London depository account is not "in the United States."

Even accepting ILC's argument that the situs of the London depository account is New York, ILC fails to establish that any of the exceptions in Sections 1610 or 1611 apply. Relying on *Weston Compagnie de Finance Et D'Investissement, S.A. v La Republica del Ecuador* (823 F Supp 1106, 114 [SD NY 1993]), ILC counters that the FSIA is not implicated, because the funds in the London depository account belong to Malabu, a private party, and are the proceeds from the transfer of Malabu's rights in OPL 245. In *Weston*, the court was construing the exception to sovereign immunity set out in 28 USC § 1611 (b) (1) for the property of a "foreign central bank or monetary authority held for its own account" in connection with the request of an attachment on funds held by the Banco Central del Ecuador in a New York bank. The exception to foreign sovereign immunity in Section 1611 (b) for domestic accounts of foreign central banks is simply not applicable to the London depository account held in the name of the FGN.

Although not briefed in their papers, at oral argument of the motion, counsel for ILC

suggested that the sovereign immunity of the FGN was not an issue, because the FGN has not appeared in this proceeding and claimed immunity and because sovereign immunity is waived in Section 22.4 of the Depository Agreement. *See* 10/13/11 Tr. at 9.

Turning first to the issue of express waiver, 28 USC § 1610 (d) provides that:

> "the property of a foreign state . . . used for commercial activity in the United States, shall not be immune from attachment prior to entry of judgment . . . if -- (1) the foreign state has explicitly waived immunity from attachment prior to judgment, . . . (2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, . . ."

Thus, the assets of a foreign state may not be attached pre-judgment without an express waiver, unless they are used for commerce in the United States, and unless the purpose of the attachment is to obtain security for an eventual money judgment against that sovereign state. None of the criteria of section 1610 (d) are satisfied here. In addition, the waiver ILC relies on states only that the depositor, the FGN, waives "immunity from jurisdiction and/or immunity from execution, in any action, claim suit or proceeding brought by the Depository [JPMorgan]." Agaev Reply Aff., Ex. E. Thus, there is no express waiver by the FGN of pre-judgment attachment, and this waiver only applies to suits or claims against the FGN by JPMorgan.

Finally, the fact that the FGN has not appeared in this proceeding and asserted a claim of foreign sovereign immunity with respect to the London depository account does not render the defense inapplicable.[3] The FGN was not named a party to this proceeding and there is

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[3] As noted, ILC raised this argument for the first time at the oral argument held on October 13, 2011, and cited no law to support its position.

no indication it was formally served with any process. A foreign sovereign's immunity from attachment of its property operates independently from jurisdictional immunity and is broader. *Walters v Industrial and Commercial Bank of China, Ltd.*, 651 F3d 280, 288-289 (2d Cir 2011). In *Walters*, the Second Circuit held that even if a foreign state does not enter an appearance to assert an immunity defense, a court still must determine that execution immunity is unavailable under the FSIA. *Id.* at 290-294; *accord Rubin v Islamic Republic of Iran*, 637 F3d 783, 801 (7th Cir 2011) ("where the plaintiff seeks to attach property of the foreign state itself, immunity is presumed and the court must find an exception—with or without an appearance by the foreign state"); *Peterson v Islamic Republic of Iran*, 627 F3d 1117, 1128-1129 (9th Cir 2010) ("courts should proceed carefully in enforcement actions against foreign states and consider the issue of immunity from execution sua sponte"); *Walker Intl. Holdings Ltd. v Republic of Congo*, 395 F3d 229, 233 (5th Cir 2004) (rejecting "proposition that it is the sovereign's exclusive right to raise the issue of sovereign immunity under the FSIA" and holding garnishee could raise issue), *cert denied* 544 US 975 (2005). The Nigerian Attorney General's letter to EVP's counsel is also evidence that the FGN considers the London depository account to be its property and the QBD's freezing order a violation of the FGN's sovereign immunity.

For the foregoing reasons, petitioner ILC's motion, pursuant to CPLR 7502 (c), for a preliminary injunction in aid of arbitration is denied. ILC has made an oral request for time to take other steps to protect its client should the court deny its motion and dissolve the TRO in place. *See* 10/13/11 Tr. at 49. While I am not inclined to grant a lengthy stay, however, since the TRO was always intended to be an interim measure to protect ILC's rights until an

appropriate application could be made in the jurisdiction where the arbitration is pending and the funds at issue are located. I am informed that the London arbitrator is without power to issue any injunctive relief and no such application appears to have been made in any English court of law. Under these circumstances, a stay of twenty (20) days is warranted. Petitioner's motion, pursuant to CPLR 6211 (b), to confirm the ex parte order of attachment is also denied, and the amended petition is denied and the proceeding dismissed.

Accordingly, it is hereby

ORDERED that petitioner's motion for a preliminary injunction in aid of arbitration (seq. no. 002) is denied; and it is further

ORDERED that the temporary restraining order issued by this court on July 15, 2011 restraining $68 million in funds held in the Federal Republic of Nigeria Escrow, account no. xxxx1493, located at JPMorgan ChaseBank N.A., 125 London Wall, London, EC27 5 AJ, is hereby vacated and shall be of no force and effect twenty (20) days from the date of service of this Order and Judgment, with Notice of Entry upon the Claimant/Petitioner; and it is further

ORDERED that petitioner's motion (seq. no. 003) to confirm the Order of Attachment Without Notice In Aid of Arbitration issued on June 28, 2011 is denied; and it is further

ORDERED and ADJUDGED that the amended petition (seq. no. 005) is denied and the proceeding is dismissed twenty (20) days from the date of service of this Order and Judgment, with Notice of Entry upon the Claimant/Petitioner, with costs and disbursements to respondent JPMorgan Chase Bank, N.A., and it is further

ADJUDGED that respondent JPMorgan Chase Bank, N.A. residing at _____, New York, New York, recover from the respondent International Legal Consulting Limited, residing at _____, costs and disbursements in the amount of $_____, as taxed by the Clerk upon submission of a bill of costs, and respondent shall have execution therefore.

Dated: March 15, 2012

UNFILED JUDGMENT
This Judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must EFile a "Request for Entry of Judgment", Proposed Judgment, and any supporting documents on the NYSCEF system.

ENTER:

J.S.C.
HON. BERNARD J. FRIED

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