

**Uzan v Telsim Mobil Telekomunikasyon
Hizmetleri A.S.**

2007 NY Slip Op 33539(U)

October 5, 2007

Supreme Court, New York County

Docket Number: 0105996/2006

Judge: Charles E. Ramos

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

Charles Edward Ramos

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PRESENT.

Index Number : 105996/2006

PART _____

CEM CENGIZ UZAN

vs

TELSIM MOBIL TELEKOMUNIKASYON

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with
accompanying memorandum decision and order.

FILED

OCT 31 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/5/07

CHARLES E. RAMOS s.c.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
CEM CENGIZ UZAN,

Plaintiff,

Index No. 105996/2006

-against-

TELSIM MOBIL TELEKOMUNIKASYON
HIZMETLERI A.S., FERRUH TUNC,
MEHMET TASALTIN, YASAR AKGUN,
OMER KUCUKOZCAN, UGUR HAYIRLI, &
HALIL OZKENTLI,

Defendants.
-----X

FILED
OCT 31 2007
NEW YORK
COUNTY CLERK'S OFFICE

Charles Edward Ramos, J.S.C.:

In motion 001, defendants, Telsim Mobil Telekomunikasyon Hizmetleri A.S. ("Telsim"); Ferruh Tunc; Mehmet Tasaltin; Yasar Akgun; Omer Kucukozcan; Ugur Hayirli; and Halil Ozkentli (collectively referred to as "Telsim Directors"), move, to dismiss this action: (1) pursuant to CPLR 3211 (a) (7), failure to state a cause of action; (2) pursuant to CPLR 3211(a) (8), lack of personal jurisdiction; (3) pursuant to CPLR 327, based on the doctrine of *forum non conveniens*; (4) based on the Act of State Doctrine; (5) based on the fugitive disentitlement doctrine; and/or (6) based on the principles of international comity.

Background

Plaintiff Cem Uzan, is a Turkish national and a member of the Uzan family, who control a vast group of companies in Turkey. The range of companies owned by the Uzan family spans many different business sectors including banking, electricity, television, radio, newspaper, printing, insurance, construction, trade, jewelry, telecommunications, internet, and sports

industries ("Uzan Group"). The Uzan Group is controlled, either directly or indirectly, through Rumeli Holding A.S. ("Rumeli") and its subsidiaries, and its largest asset was Telsim. Until July 2003, Cem Uzan served as a director and vice-president of Telsim. Since his departure from the board, he remains one of Telsim's beneficial owners, retaining the right to receive dividends from Telsim's profits.

Defendant Telsim Corporation, is a Turkish telecommunications company, founded in 1994 and organized under the laws of Turkey, with its principal place of business at Rumeli Plaza, Mehmet Akif Mahallesi, Inonu Caddesi Star Sok. No. 2, 34540 Ikitelli, Istanbul Turkey. The company formerly operated as the second largest local mobile network, in terms of market size, in Turkey before, as plaintiff alleges, in February 2004, the Turkish Savings Deposit Insurance Fund ("SDIF"), illegally seized management authority over Telsim and appointed new directors to manage Telsim's affairs. Telsim had acquired a license to operate as a mobile telephone operator in Turkey and provided such services only in Turkey, until May 24, 2006, when all of Telsim's assets were transferred to Telsim Vodafone ("Telsim Vodafone"). Prior to Telsim's assets being transferred to Telsim Vodafone, Telsim was owned by the following Uzan Group companies: Standard Telekom (66.48%); Rumeli Telefon (24.54 %); and Rumeli Holding (7.33%).

The individual defendants are all SDIF appointed directors of Telsim (collectively referred to as "Telsim Directors"), and

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were appointed in and around February 14, 2004. Ferrah Tunc, a Turkish national, was appointed by the SDIF and still serves as a member of the Telsim Board of Directors (the "Telsim Board"). Mehmet Tasaltin, a Turkish national, ended his term on July 6, 2006. Along with serving as a board member, Tasalatin was also Chairman of the Communication Group, a subcommittee of the Telsim Board. Yasar Akgun, a Turkish national, still serves as a member of the Telsim board. Omer Kucukozcan, a Turkish national, ended his term on February 1, 2007. Ugur Hayirli ("Hayirli"), a Turkish national, remains a member of the Telsim Board since his appointment. Halil Ozkentli ("Ozkentli"), a Turkish national, was appointed to serve as a member of the Telsim Board and ended his term on July 6, 2006.

The plaintiff alleges in Count I that he should receive contribution from Telsim for compensatory money judgments, in the amount of US\$ 2.9 billion, entered against plaintiff and others, jointly and severally, for committing common law fraud in the action entitled *Motorola v Uzan*, 274 F Supp 2d 481 (SDNY 2003) (the "Motorola RICO Action").

Along with contribution, plaintiff seeks damages from the Telsim Directors for a variety of torts. Count II is for prima facie tort alleging that the SDIF appointed directors conspired to sell Telsim's assets with a malevolent intent and without lawful justification for the purpose of causing harm to plaintiff. Count III is for breach of fiduciary duty by: (i) agreeing to hold Telsim liable for an alleged US\$5 Billion dollar

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loss of Turkiye Imar Bankasi T.A.S. ("Imar Bank"), another Uzan family company; (ii) auctioning Telsim's assets; and (iii) disregarding plaintiff's efforts to satisfy the Motorola Credit Corporation ("MCC") and Nokia Corporation ("Nokia") debt by refusing to transfer Telsim shares to the District Court's registry. Count IV is for waste of Telsim's assets by, *inter alia*, agreeing to assume a \$5 billion obligation to the Turkish Treasury and paying MCC US\$ 940 million without receiving a release from Telsim's contractual debts and instead assigning that receivable to Bayindirbank, A.S. ("Bayindirbank"). Finally, Count V alleges that Telsim Directors conspired to convert Telsim's property for personal gain.

In order to understand the complicated nature of the transactions that led to the take over of Telsim and the appointment of new Telsim Directors, by the SDIF, and the alleged acts that plaintiff seeks contribution and/or indemnification for, along with damages, one must first understand the conflicting claims to Telsim's assets between the SDIF, MCC, and Nokia.

The Turkish Banking Regulation and Supervisory Agency ("BRSA") is an instrumentality of the Republic of Turkey, and supervises all national banks, issues rules, legal interpretations, makes corporate decisions concerning banking and bank investments, and employs bank examiners to supervise domestic banks. The BRSA's directive is to enforce the regulations and rules relating to the Turkish Banking Law, and

its predecessor, the Banks Act (collectively referred to as "Turkish Banking Laws"). The BRSA is headed by the Banking Regulation and Supervision Board ("BRSA Board") which consists of seven members chosen by the Council of Ministers¹. Under the Turkish Banking Laws, the BRSA is authorized to revoke any bank's license to carry out banking activities and/or collect deposits from the public.² Once the BRSA has revoked the license of a banking institution, management and control of the bank is then transferred to the SDIF, and the bank's shareholders are stripped of all rights of ownership, other than the right to receive dividends, as was the case with Imar Bank.

The SDIF is an instrumentality of the Republic of Turkey, and the principal decision organ of the SDIF is its Board of Directors ("SDIF Board"). The SDIF's main responsibilities, pursuant to Turkish Banking Laws, include, insuring bank

¹ The Council of Ministers is composed of the Prime Minister and the Ministers of all the ministries.
http://www.turkishembassy.org/index.php?option=com_content&task=view&id=190&Itemid=447.

² The decision to revoke a bank's license is taken by the BRSA Board provided that it finds one or more of the following events have occurred: (a) the bank has failed to take measures required under the Banking Law to secure deposits and maintain its financial health; (b) the bank's financial health has been compromised to such an extent that it is near failure, and it is no longer possible to rescue the bank, even if measures required by the Banking Law are implemented; (c) the bank has effectively failed, and cannot meet obligations to its creditors in a timely fashion; (d) the total amount of the bank's liabilities exceeds the total value of its assets; (e) the bank's continued activities endanger the rights of its depositors and threaten the general safety and the stability of the financial system.
Affidavit of the SDIF of the Republic of Turkey in Support of the Motion to Dismiss Complaint against Plaintiff, ¶23 ("SDIF Aff.").

deposits, extending loans to banks, restructuring and liquidating failing institutions, and collecting debts from banks in default. Under the Turkish Banking Laws, where management and control of the bank has passed to the SDIF, and the SDIF has assumed all shareholder rights, it may subject the bank to reorganization, transfer, merger, sale, or if these are not possible, to liquidate the bank. Usually management and control of the bank passes to the SDIF after the BRSA revokes a bank's license, as was the situation in this case.

Once management and control of the bank has passed to SDIF, it is authorized to pay the amount of their deposits to insured savings deposit holders. Subsequently, the SDIF is authorized to seek reimbursement for such expenditures and resources from, *inter alia*, the bank's management, and/or shareholders, whether direct or indirect. In order to obtain such payments, the SDIF can seek injunctions and attachments from Turkish courts and sell the assets to which the injunctions apply.

THE SDIF and BRSA became involved with the Uzan Group of companies in and around 2003. The BRSA began an investigation of Imar Bank, one of the companies within the Uzan Group of companies, in and around June 2003. On July 3, 2003, The BRSA revoked Imar Bank's license to carry out banking activities and to accept deposits, and on July 4, 2003, the SDIF assumed management and control of Imar Bank. The basis for revoking Imar Bank's license stemmed from Imar Bank's alleged inability to meet its obligations to its depositors and creditors in a timely

manner, its failure to comply with the applicable regulatory requirements and provisions of the Turkish Banking Laws. Affidavit of Ahmet Yilmaz, February 28, 2007 ("SDIF Aff") at ¶31. Along with assuming control of Imar Bank, the SDIF obtained injunctions from the Ankara 1st Commercial Court of First Instance, freezing the assets and all receivables of all controlling shareholders, including plaintiff, of Imar Bank. Once SDIF took control of the bank, further investigation allegedly found several financial irregularities with the bank's books which plaintiff denies. *Id.* at ¶¶35-39.

Due to these alleged irregularities and attempts to hide assets among the various Uzan Group companies, on August 13, 2003, the SDIF's Board authorized the SDIF's legal department to make an application to the criminal court of competent jurisdiction seeking injunctions against the managers, shareholders, former authorized signatories of Imar Bank, and against the assets of 179 Uzan Group companies, including Telsim and Imar Bank Off-Shore Ltd, on the basis of control group liability. *Id.* at ¶39. The Sisli Criminal Court granted the injunctions. SISLI Criminal Court Judgment No. 2003/426 and SISLI Criminal Court Judgment No. 2003/442. The appellate Court in that jurisdiction, the 8th Istanbul High Criminal Court, affirmed the attachments to satisfy the outstanding obligations of Imar Bank in a decision dated May 11, 2004. 8th Istanbul High Criminal Court Transcript May 11, 2004.

After further investigation, the SDIF and BRSA allegedly

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uncovered further financial irregularities at Imar Bank and ultimately, in February 2004, the SDIF removed the existing Board of Telsim and appointed a new set of Telsim Directors, who are now defendants in this case. The basis for removing the existing directors was an alleged finding by the BRSA, SDIF, and the Turkish Ministry of Internal Affairs that fraudulent conveyances were made to controlling entities. *Id.* at ¶53. After the appointment of the SDIF directors, the SDIF possessed all the rights of ownership of Telsim stock, except the right to receive dividends, which was retained by the original shareholders.

Plaintiff alleges that the BRSA used its unfettered powers, granted by "controversial" Turkish Banking Laws, to unfairly target Imar Bank's authorization to carry out banking activities and to accept deposits. Plaintiff further alleges that the SDIF, on the basis of these banking laws, has now unlawfully seized control over all Uzan family assets (including Telsim), based on an unchallenged administrative finding that Imar Bank accumulated a huge loss of US\$ 5 billion that needs to be satisfied by the sale of Uzan family assets, including Telsim.

Prior to the SDIF takeover of Telsim in February 2004, Telsim was provided with credit from both, Nokia and MCC to finance a major expansion of Telsim's operation between April 1998 and September 2000. Nokia provided funding through ABN Amro Bank in the amount of approximately US\$ 711 million and MCC provided funds in the amount of approximately US\$ 1.8 billion. Telsim, which at the time of these transactions was

controlled by the Uzan family, failed to repay the credit according to the schedules negotiated with Nokia and MCC because of an alleged intent to defraud these entities by inducing both companies to transfer monies to the Uzans through loan agreements with Telsim. See *Motorola Credit Corp. v Uzan*, 274 F Supp 2d 481 ("MCC RICO Action") (SDNY 2003), affirmed in part, vacated in part, remanded in part, 388 F3d 39 (2d Cir 2004), cert denied, 125 S. Ct 2270 (2005). In June 2001, after Telsim failed to pay its loan obligations, Nokia, through ABN Amro, initiated arbitration proceedings against Telsim in Switzerland pursuant to the Financing Agreements. ("Nokia Arbitration Proceeding").

On February 5, 2002, concurrently with the arbitration proceedings initiated by Nokia, Telsim initiated two arbitration proceedings against MCC, in order to define their obligations under the relevant financing and pledge agreements. ("MCC Arbitration Proceeding"). The Nokia Arbitration Proceeding concluded on February 12, 2004, with an award for ABN Amro in the amount of approximately US\$ 900 million to be paid by Telsim. On June 13, 2005, the MCC Arbitration Proceeding awarded MCC approximately US\$ 2.6 billion plus interest.

In January 2002, in conjunction with the ongoing arbitration proceedings, Nokia and MCC filed a lawsuit against the Uzan family, including plaintiff and several Uzan-controlled companies, in the Southern District of New York, alleging, *inter alia*, common law fraud and RICO claims and seeking recovery of the loaned funds. See *Motorola*, 274 F Supp 2d 481 *supra*. Telsim

was not a named party in the Motorola RICO action, and never appeared in the RICO action. On July 31, 2003, the District Court ultimately found the defendants in the Motorola RICO Action, including Cem Uzan, jointly and severally liable for failure to repay MCC and Nokia based on fraud. *Id.* The Court awarded MCC US\$ 2.13 billion and Nokia US\$ 850 million in compensatory damages, and over US\$ 2 billion dollars in punitive damages. *Id.* The judgment was affirmed by the Court of Appeals as to jurisdiction, liability, compensatory damages, and contempt, but vacated: (i) the District Court's imposition of a constructive trust over Telsim shares for the benefit of MCC; (ii) its order permitting MCC and Nokia to enforce their judgment against all of the Uzan Group entities; and (iii) its multi-billion dollar punitive damages award. *See Motorola Credit Corp v Uzan*, 388 F3d 39 (2nd Cir 2004) ("Motorola Appeal I"). On remand, the District Court granted Nokia punitive damages in the amount of US\$ 1.7 billion and MCC US\$ 1 billion. *Motorola*, 02 Civil 0666 (JSR) (SDNY June 20, 2006).

On August 1, 2005, MCC filed a lawsuit against Telsim in New York to confirm its arbitral award. *See Motorola Credit Corp. v Telsim*, 05 CV 6821 (SDNY 2005) ("Motorola Enforcement Action"). The Motorola Enforcement Action sought preliminary and permanent injunctive relief requiring Telsim to bring its assets into the jurisdiction and turn them over to MCC and Nokia. On August 26, 2005 and October 28, 2005, Nokia and MCC entered into separate agreements with Telsim (then under the management and control of

the SDIF, an instrumentality of the Turkish government) to settle conflicting claims that the Turkish Government and MCC and Nokia had to the assets of Telsim. Under the Nokia settlement agreement ("Nokia Agreement"), Nokia and ABN-Amro waived enforcement of their receivables due from Telsim in consideration for a payment of US\$ 150 million or 7.5% of the proceeds from the sale of Telsim's assets. Under the MCC settlement agreement ("MCC Agreement"), MCC agreed to waive certain receivables due from Telsim in consideration of a cash payment of US\$ 500 million and 20% of the proceeds from the sale of Telsim's assets exceeding US\$ 2.5 billion. Also as part of the MCC Agreement, MCC assigned certain of Telsim's accounts receivables to Bayindirbank, which was under the management and control of the SDIF and had advanced the initial funds conveyed to MCC (US\$ 500 million), and Telsim dropped its pending arbitration claims of GBP 300 million against MCC. MCC also retained its right to pursue its fraud claims against the individual defendants in the MCC RICO action.

Cem Uzan, and the other individual defendants in the MCC RICO action, sought relief from the final judgment in the MCC RICO Action on the basis that "by assigning its contractual claim against Telsim [sic], [MCC] has elected the contract remedy for the injury caused by the extension and non-repayment of the loans... and thereby released [in full] its claims to recover for the same injury against the Individual Defendants." *Motorola Credit Corp. v Uzan*, 2007 WL 1098689 (SDNY April 11, 2007). The

District Court denied defendants' Rule 60 Motion, which allows the court to vacate orders and judgments entered against the party "only upon a showing of exceptional circumstances." *Id.*

The Court rejected the arguments on numerous grounds and explicitly stated that "the Individual Defendants are estopped from this attempt to recast MCC's settlement with the Turkish government as a superseding event that relieves them of their responsibility for fraud..." *Id.* at *2.

Plaintiff, Cem Uzan, now brings a complaint in New York State Supreme Court, looking for another way to relieve his financial burden of satisfying this huge debt to MCC, Nokia, and the SDIF by alleging causes of action for contribution or equitable indemnification, prima facie tort, breach of fiduciary duty, waste, and conversion. Specifically, Cem Uzan alleges that because of the commercial decisions and commercial misconduct of Telsim Defendants, Telsim should be made to contribute or indemnify plaintiff for his obligation to pay MCC and Nokia for financing that Telsim used to purchase and deploy cellular telecom equipment throughout Turkey and still continues to use in its commercial enterprise. Cem Uzan further alleges that because of the personal misconduct of the Telsim Directors, he has been impeded from being able to satisfy and comply with the judgments and orders of the District Court.³

³ Cem Uzan alleges that the Telsim Directors actively interfered with his ability to satisfy the New York Judgment [MCC RICO Action], by refusing to grant a constructive trust over the Telsim stock that Mr. Uzan was to use to satisfy the Motorola judgment. ("However, the Telsim Directors, through Unikom,

Discussion

This Court has concluded that the complaint should be dismissed on several grounds. It is also worth noting that plaintiff's attempts to absolve himself of any financial responsibility for the massive fraud committed on MCC, Nokia, and the Turkish government border on frivolous conduct.

General Jurisdiction

Plaintiff alleges that jurisdiction over Telsim is predicated upon CPLR 301 since Telsim has engaged in routine business in New York that includes: (i) defending legal proceedings in New York; (ii) maintaining a bank account at UBS, in New York, until 2004; (iii) negotiating a US\$ 300 million loan from UBS Bank in New York; (iv) entering into an equipment purchasing contract; (v) entering into roaming agreements; and (vi) entering into a settlement agreement resolving litigation in New York. Plaintiff also contends that Telsim's Notice of Appearance in the MCC Enforcement Action is an implicit waiver of any jurisdictional objections.

Standart, and Standard Paz, refused to grant a constructive trust..." (Memorandum of Law in Opposition to Defendant's Motion to Dismiss, 10). What plaintiff fails to make clear to this Court is that a constructive trust was imposed by the District Court, but that on appeal to the Second Circuit, it vacated the District Court's imposition of a constructive trust for the benefit of Motorola. *MCC*, 383 F3d 39, 60.

Now, plaintiff turns around, and states in his complaint "in August of 2005, the defendants [plaintiff and the other Uzan family members who were defendants in the MCC RICO Action] in the New York action [MCC RICO Action] directed their counsel to acquiesce to the issuance of a constructive trust over Telsim's [sic] 66% of Telsim's outstanding stock in favor of Motorola in order to facilitate payment of the Motorola judgment." (Complaint, ¶31).

Defendant argues that this Court cannot exercise jurisdiction over the Telsim Defendants because plaintiff failed to allege that Telsim Defendants were engaged in a continuous and systematic course of doing business or having a presence that would trigger jurisdiction under CPLR 301.

CPLR 301, states that, "[a] court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." Courts have interpreted this statute as authorizing the exercise of jurisdiction over foreign corporations when they are found to be doing business in New York. *See Landoil Resources Corp. v Alexander & Alexander Servs., Inc.*, 77 NY2d 28, 33-34 (1990). A foreign corporation can also be found to have a presence within New York for the purposes of general jurisdiction under several theories including consent.

Plaintiff argues that Telsim has a presence in this state because it failed to object to the jurisdiction of New York courts in its appearance in the Motorola Enforcement Action, thereby consenting to jurisdiction. Plaintiff claims that Telsim's original two entries of appearance do not state that the appearance is challenging jurisdiction and that only in its third entry of appearance does Telsim raise any objection. Also, Telsim did not contend that it lacks sufficient contacts with New York in its appearance in the Motorola Enforcement action, and therefore it acknowledges the Court's jurisdiction. Plaintiff fails to mention that Telsim, in its Memorandum of Law in

Opposition to MCC's Motion for a Preliminary Injunction and Pre-Judgment Attachment, asserts in a footnote that "Telsim expressly reserves the right, upon service, to assert additional defenses including, but not limited to 'lack of sufficient jurisdictional contacts to establish general or specific jurisdiction'". (Thomas R. Trowbridge, III, Affirmation in Support of Plaintiff's Opposition to the Motion to Dismiss, April 23, 2007, n5) ("Trowbridge Aff."). Federal Rule of Civil Procedure 12(b)⁴ is similar to CPLR 3211(e)⁵, in that, a defendant does not waive his right to object to personal jurisdiction up until he files a responsive pleading unless otherwise provided for. In the MCC Enforcement Action, Telsim was first objecting to the defects in service and explicitly reserved the right, once service was deemed proper, to assert other defenses. This is hardly a ringing endorsement of the Court's jurisdiction, as plaintiff attempts to define it.

⁴ "Every defense... to a claim for relief in any pleading... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:... (2) lack of jurisdiction over the person... A defense of lack of jurisdiction over the person... is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." Federal Rules of Civil Procedure 12(b), (h) (1) [28 USCA §12];

⁵ "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading." CPLR 3211(e).

The "doing business" test is another basis for finding general jurisdiction over a foreign corporation and must include a finding of a continued and systematic presence by the foreign corporation in New York. *Landoil Resources*, 77 NY2d at 33-34, *supra*. The relevant time period to determine when a corporation was engaged in "doing business" is from the time an action is commenced.⁶ *Lancaster v Colonial Motor Freight Line, Inc.*, 177 AD2d 152, 156 (1st Dep't 1992) ("While an examination of the various factual permutations which have been held to constitute doing business is not necessary to our decision here, what is essential is... the requirement that defendant be shown to have been doing business at the time when the action was commenced.").

In determining whether a foreign corporation is doing business here, New York has devised a simple and pragmatic test with factors including: (i) whether the corporation has an office in New York; (ii) the presence of a bank account or property; (iii) employees working for the defendant; and (iv) the solicitation of business in the state by the company or its agent. *Central Gulf Lines, Inc. v Cooper/T. Smith, Stevedoring*, 664 F Supp 127, 130 (SDNY 1987) (applying NY law).

⁶ Defendants, in their reply brief, take a jab at plaintiff's legal argument that the relevant time period by which to measure when a corporation is doing business in New York is when an action is commenced. ("Finally, Uzan's suggestion that the relevant time period is when the Complaint was filed, and not served, has been wrong for over 90 years.") (Defendants Reply Memorandum of Law in Further Support of Motion to Dismiss Complaint, 17). However, defendants counsel should have taken more time in researching basic hornbook principles instead of crafting snide remarks in response to plaintiff's proper assertion of the legal rule.

Cem Uzan commenced this action in May 2006, after the District Court refused to vacate its judgment imposing compensatory and punitive damages against Cem Uzan and the other individual defendants in the MCC RICO Action. At around the time this lawsuit was commenced, Telsim's business links to New York were barely existent, and plaintiff's attempt to recast them as continuous and significant does not make them anymore so. Telsim did not at anytime have an office in New York, or have employees working in New York on its behalf. (Affidavit of Barry Kartal, March 7, 2007, ¶14) ("Kartal Aff."). Telsim was a telecommunications company, and as such, its business was conducted in Turkey where it obtained a license to operate. *Id.*; *Motorola*, 274 F Supp 2d at 531, *supra*.

Plaintiff next points to a UBS bank account that was held by Telsim, but authority over the account was maintained by Kemal Uzan, father of plaintiff. "The creation of a bank account does not, as a general rule constitute 'doing business' in the State so as to subject a defendant to personal jurisdiction..." *Georgia Pacific v Multimark's Intern. Ltd.*, 265 AD2d 109, 111 (1st Dep't 2000). In order to show that a bank account establishes a presence of the foreign corporation in the state, a party must show that the New York bank account was used to conduct at least a majority, if not almost all of its business. *Id.* Here the defendants allege that the Telsim Directors never used the account at UBS nor were there any transactions conducted at that time. Kartal Aff. at ¶20. Even more importantly, plaintiff

acknowledges that the last known use of the UBS account was in 2004.

Plaintiff highlights a negotiation conducted by Kemal Uzan, father of Cem Uzan and one of the principals in the Uzan group of companies, for a US\$ 300 million dollar loan with UBS in 1998, that was renewed for another year in 1999 and was repaid in 2000, in order to acquire a Global Standard License ("GSM") license from Turkey. *MCC*, 274 F Supp 2d at 518.

The mere solicitation of business in New York does not, by itself, establish requisite contacts between the state and a foreign defendant for purpose of establishing personal jurisdiction under the general jurisdiction statute. *Holness v Maritime Overseas Corp.*, 251 AD2d 220, 222 (1st Dep't 1998). Rather, parties must be engaged in substantial solicitation that is carried on with continuity and permanence. *Corio v Stebo, Inc.*, 84 AD2d 738, 739 (1st Dep't 1981). Here the negotiation was for a loan that was a one time loan, and was not used for any business purpose in New York State, but was used to purchase a license in Turkey.

As to litigation amounting to doing business in New York, BCL § 1301 provides that:

a foreign corporation shall not be considered to be doing business in this state...by reason of carrying on in this state any one or more of the following activities:

(1) Maintaining or defending any action or proceeding, whether judicial, administrative, arbitratve or otherwise, or effecting settlement thereof or the settlement of claims or disputes.

The doing business requirement in BCL § 1301 is considered the

same doing business standard as enumerated in CPLR 301. See *Fremay, Inc. v Modern Plastic Mach. Corp.*, 15 AD2d 235 (1st Dep't 1961).

Finally, the doing business standard must conform to the minimum contacts standard that justifies jurisdiction only in situations where the activity was purposeful and directed toward to the forum such that the defendant can reasonably anticipate being sued there. Taken together all of these activities fail to prove that Telsim ever anticipated being sued in New York. Therefore, this action fails to satisfy general jurisdictional requirements.

Personal Jurisdiction

Defendants also argue that the Court lacks specific personal jurisdiction, as defined under CPLR 302, over the Telsim Defendants because in order to gain jurisdiction over a non-domiciliary, a party must enumerate acts which establish a nexus or substantial relationship between the cause of action and defendant's activities in New York and plaintiff has failed to show how Telsim Directors transacted any business in the state and furthermore, with regard to Telsim, plaintiff has failed to show that it provided any services in the state of New York.

Plaintiff contends that the Telsim Directors decision to settle the MCC and Nokia dispute, a matter that was pending before a New York court, is a single business transaction conducted within New York that satisfies the transacted business standard to establish long arm jurisdiction pursuant to CPLR

302(a)(1).

Any application of CPLR 302(a) must begin with a two part inquiry: (i) determine whether CPLR 302 confers jurisdiction in light of defendants' contact with the state; (ii) if the first question is answered in the affirmative then the court must determine whether the exercise of jurisdiction comports with due process. *LaMarca v Park-Mor Mfg. Co.*, 95 NY2d 210, 214 (2000).

Plaintiff's argument that this Court may assert long-arm jurisdiction due to Telsim Defendants transacting business in New York twists the concept of transacting business into something that it is not. Plaintiff has not submitted any evidence that any business was transacted in New York. Rather, plaintiff attempts to make the argument that Telsim's settlement with MCC and Nokia over a matter pending in New York is a transaction that occurred in New York. There is no evidence in the record or any indication that any of the settlement contracts were negotiated in New York or that there is any connection of these contracts to New York. The fact that MCC and Nokia chose to litigate in New York has no bearing on the issue of whether the Telsim Defendants transacted any business in New York. Furthermore, MCC and Nokia are not New York corporations. MCC has its primary offices in Illinois and Nokia is headquartered in Finland.

As to the Telsim Directors, none of them have entered New York at any time near the commencement of this action, and again there is no evidence to suggest that the Telsim Directors were transacting business by phone, mail or other means in New York.

(Kartal Aff. at ¶23).

Plaintiff also contends that the Telsim Directors are subject to long arm jurisdiction, pursuant to CPLR 302(a)(3)(ii) for committing a tortious act, based on the following five criteria: (i) Telsim Directors are not domiciled in New York; (ii) plaintiff alleges four tort claims (prima facie tort, breach of fiduciary duty, waste, and conversion) against the Telsim Directors; (iii) the Telsim Directors, on behalf of Telsim, by accepting Imar Bank's US\$ 5 billion dollar liability, as well as by settling MCC and Nokia's claims for a fraction of their value, have interfered with the New York judgments by preventing Mr. Uzan from satisfying them and thereby causing an injury in New York; (iv) it was foreseeable to the Telsim Directors that Telsim, Mr. Uzan's largest asset, would have been used by him to satisfy the New York judgments, and that their conduct would interfere with his ability satisfy the New York judgments, and (v) Telsim Directors derived substantial revenue from international commerce by being paid for conducting an international auction of Telsim's assets and directing the sale of those assets to a foreign corporation, and negotiating a settlement of an international arbitration award with MCC and Nokia.

In order to prove that this Court has jurisdiction under CPLR 302 (a) (3), plaintiff must satisfy a five part test under CPLR 302(a)(3)(ii). The Court of Appeals stated that:

"First, that defendant committed a tortious act outside the State; second, that the cause of action arises from that

act; third, that the act caused injury to a person or property within the state; fourth that the defendant expected or should reasonably have expected the act to have consequences in the State; and fifth, that defendant derived substantial revenue from interstate or international commerce." *LaMarca v Pak-Mor Manufacturing Company*, 95 NY2d at 214.

Plaintiff has fulfilled the first two elements. However, plaintiff's argument that his inability to satisfy a New York District Court Judgment is the "type of injury within the state" contemplated by the statute is not a compelling argument. First, an injury can only occur in New York when the "first effect of the [alleged] tortious act be experienced in New York" or was New York the location of original event that caused the injury. *DiStefano v Carozzi North America, Inc.*, 286 F3d 81, 84-85 (2d Cir 2001); *Kramer v Hotel Los Monteros S.A.*, 57 Ad2d 756, 757 (1st Dep't 1977), *appeal denied*, 43 NY 2d 649 (1978).

The SDIF appointed Telsim Directors and Telsim's primary office are all located in Turkey. The directors decision to settle the MCC and Nokia claims, as well as accepting, on Telsim's behalf, the Imar Bank liability all had its first effects in Turkey and not New York. The decision to liquidate Telsim to pay for the SDIF's, MCC's, and Nokia's claims were all felt in Turkey first because Telsim was liquidated in Turkey.

Secondly, the injury itself is an indirect economic injury that allegedly occurred to a foreign plaintiff. Jurisdiction of a resident or domicile must be based on direct injury within the state; indirect financial losses alone were not enough. *Fantis Foods v Standard Importing Co., Inc.*, 49 NY2d 317, 326 (1980).

Here, the main financial loss of the settlements of the Imar Bank debt and Nokia and MCC debt was the sale of Telsim, one of the Uzan group's largest assets. The sale was conducted under the auspices of the Turkish authorities in Turkey. Plaintiff's notion that an injury occurred within New York is speculative at best. Therefore, the complaint shall be dismissed as against the Telsim Defendants on personal jurisdictional grounds.

Act of State Doctrine

Defendants argue that the Act of State Doctrine is applicable here as a doctrine of abstention because the actions taken by Telsim Defendants were a direct result of the legislative and regulatory mandates of the Turkish Republic and its instrumentalities and resolution of this action would require this Court to sit in judgment of the Turkish Republic and its instrumentalities.

Plaintiff argues that the Act of State Doctrine is not applicable as a doctrine of abstention in this case because the challenged conduct does not involve an official public act of a foreign sovereign, but rather, is a commercial action by a private corporation, Telsim and Telsim's Board, therefore this Court will not be sitting in judgment of a sovereign act by the government of Turkey. Plaintiff also points to the policy considerations underlying the Act of State Doctrine, namely "its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs," and argues that those concerns are

not implicated in this case because there are no significant foreign policy interests at stake.

"The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 401 (1964). To that end, Act of State issues only arise when a court must decide the validity of an official, public act by a foreign sovereign within its own territory. See *Environmental Tectonics v W.S. Kirkpatrick, Inc.*, 847 F2d 1052, 1059 (3d Cir 1988), judgment *aff'd*, 493 U.S. 400, (1990). There is no doubt here that the Telsim Directors are Turkish Citizens, and Telsim is a Turkish Corporation and that all of the alleged actions in plaintiff's complaint took place in Turkey.

Plaintiff first contends that because the Telsim Defendants failed to allege that they "step[ped] into the shoes of the Turkish Government" they are essentially barred from arguing an Act of State defense because otherwise they would have argued a sovereign immunity defense. ("The Act of State Doctrine only applies when there is an official act by somebody who has sovereign immunity.") (June 27, 2007 Hearing Transcript, 20:18-22). Plaintiff is essentially arguing that in order to raise an Act of State argument, one must also raise the issue of sovereign immunity simultaneously. However, the law regarding the Act of State Doctrine is separate from the law of state sovereign

immunity.

Plaintiff's characterization of the Act of State Doctrine, as only applying to government acts committed by government officials is a misunderstanding of the Act of State Doctrine. Amjur Intern Law §56 (The "act of state doctrine" is a substantive rule of law that precludes the district court from inquiring into the legality of a sovereign's public acts; it is not strictly an immunity from suit.").

Secondly, the Telsim Defendants do not argue that they are instrumentalities of the Turkish government, but rather that they "acted pursuant to the law, and/or regulatory directives of sovereign entities." (Telsim Defendants Memorandum of Law, 13) ("The Act of State Doctrine has been employed to dismiss claims against parties, like the Defendants, who acted pursuant to the law, and/or regulatory directives of sovereign entities..."). This is a paradigm example of where the Act of State Doctrine applies. Amjur Intern Law §59 ("The courts will apply the doctrine where a foreign sovereign is sued either directly or through an agent; where it is a party to litigation involving private rights affected by its acts; or where its actions are questioned collaterally in litigation between private citizens.").

Plaintiff, on several occasions, reiterates the point that "plaintiff is not challenging any official actions of the SDIF, and he is not challenging the legality of the application of any Turkish banking laws." Instead, plaintiff argues, "he is

challenging a decision by the directors of a corporation engaging in a commercial action." First, plaintiff tries get around the application of the Act of State Doctrine by disconnecting the relationship between the SDIF, an instrumentality of the Turkish government, the Turkish Government, and the Telsim Directors. Secondly, plaintiff tries to invoke a so-called commercial exception to the Act of State Doctrine which is still a highly debated and an unclear area of law.

The Telsim Directors are appointed by SDIF, a Turkish governmental entity. The Turkish legislature is the entity that passed the Turkish Banking Laws which created the SDIF and gave it its authority. Furthermore, the Turkish Banking Laws legislation, an undisputed public act of government, gives the SDIF the power to appoint directors and creates a regulatory scheme to address alleged malfeasance or nonfeasance of the SDIF appointed directors. Finally, the Telsim Directors were acting under the auspices of the SDIF.

Even if the Telsim Directors were found to be engaging in a purely commercial enterprise, the exception upon which plaintiff tries to rely is one shrouded in confusion. The Act of State Doctrine's commercial exception is often confused with its counterpart the Foreign Sovereign Immunity Act's commercial exception and the two are not synonymous. The Foreign Sovereign Immunity Act 28 USCA §§ 1330, 1332, 1391, 1441, 1602 *et seq*, ("FSIA") is a federal statute that provides for the sole basis for obtaining jurisdiction over a foreign sovereign. One of the

ways in which jurisdiction can be established over a sovereign is the commercial activity exception. 28 U.S.C.A. §1605(a)(2).

On the other hand, the commercial exception to the Act of State Doctrine is one that is mired in doubt and uncertainty. The decisions regarding a commercial exception to the Act of State Doctrine all tread around the subject, but none definitively find a commercial exception. ("A four member plurality of the Supreme Court in *Alfred Dunhill of London, Inc. v Republic of Cuba* further proposed an exception for commercial activity... However, the Supreme Court and the courts of appeal have thus far avoided ruling on the merits of a separate commercial activity exception to the Act of State doctrine." *International Trade & US Antitrust Law*, §11:5, Exception to the Act of State Doctrine; See *Kirkpatrick, Inc.*, 847 F.2d 1052; *Clayco Petroleum Corp. v Occidental Petroleum Corp.*, 712 F 2d 404, 408, (9th Cir 1983); *First Nat. Bank of Boston v Banco Nacional de Cuba*, 658 F 2d 895, 902 (2d Cir 1981). Therefore, this court refrains from deciding upon the application of a commercial exception to the Act of State Doctrine.

Forum Non Conveniens

Defendant argues that even if this Court finds jurisdiction over the parties, New York is not the proper forum for this case based on several factors. First is the non-residency of the parties. Plaintiff is a citizen of Turkey, the Telsim Directors are all citizens of Turkey, and Telsim's principal place of business is in Turkey. Second, the inconvenience factor of

having the litigants traveling back and forth along with the location of the documents and witnesses being primarily located in Turkey. Third, and more importantly, plaintiff is directly and indirectly challenging the actions of Turkish government instrumentalities and the legitimacy and enforcement of the Turkish Banking Laws. Challenges of this sort would be best suited for the Turkish Courts because individuals who have knowledge of these issues would be found in Turkey and not New York. Fourth, Turkey has a substantial interest in resolving these disputes because it involves Turkish Banking Laws and Turkish Government Agencies. Fifth, Turkey is an adequate alternative forum because (i) defendants are amenable to process in Turkey and (ii) the Turkish Courts permit litigation of the subject matter of the dispute and are substantially fair forums for resolving disputes.

Plaintiff argues that *Forum Non Conveniens* is not an appropriate ground for discretionary dismissal because defendants main argument (a New York court will be interpreting Turkish Banking Law) is not applicable in this case because Cem Uzan's claims have very little to do with interpreting Turkish Law. Second, Telsim and the Telsim Directors have ample resources to come to New York and plaintiff alleges that Telsim has done extensive business in the United States through its commercial roaming agreements. Third, the nexus between the parties and the facts with New York supports retention because plaintiff's claims arise out of commercial activities by Telsim (conduct of business

with Motorola in New York and the New York Action). Fourth, and the most important factor according to plaintiff, is the unavailability of Turkish Courts as an adequate alternative forum. The Turkish Courts are not an adequate forum, plaintiff alleges, because defendants did not agree to be served in Turkey. Further, the proposed forum must permit litigation of the subject matter, but here defendants argue that Mr. Uzan is estopped from bringing his claims in Turkey. Lastly, plaintiff alleges that the Turkish courts are corrupt, and even more specifically, the current government, out of political animus, is making it impossible for Cem Uzan to receive fair treatment in the judicial system.

Even if this action was jurisdictionally sound, the Court may nevertheless dismiss if it determines that, in the interest of substantial justice, the action should be heard in another forum. *see World Point Trading PTE v Credito Italiano*, 225 AD2d 153, 158 (1st Dep't 1996). CPLR 327(a) provides that "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any condition that may be just." The factors to be considered include: "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit The court may also consider that both parties to the action are nonresidents . . . and that the transaction out of which the

cause of action arose occurred primarily in a foreign jurisdiction No one factor is controlling." *Shin-Etsu Chemical Co., Ltd v 3033 ICICI Bank Ltd.*, 9 AD3d 171, 176 (1st Dep't 2004) citing *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 (1984), cert denied, 469 US 1108 (1985) (citations omitted).

Plaintiffs argument that Turkey is not an adequate forum because of defendants claim he is estopped from bringing claims is a strange characterization of defendants argument. Defendants do not argue that Mr. Uzan is estopped from bringing his claims in Turkey, rather they assert that "New York should apply collateral estoppel to the decision of the 7th Commercial Court of Istanbul and dismiss the claims." Defendants Memorandum of Law in Support of Motion to Dismiss, 23. Defendants are simply stating a rationale for why this Court should refrain from commenting on these matters, and does not suggest in anyway that the Turkish Courts would not permit Cem Uzan to litigate these matters especially when the 7th Commercial Court stated that damage claims against the SDIF and its agents could only be claimed through an administrative court action and not a commercial court. (Affidavit of Dr. Ali Cem Budak, ¶¶48,49,53). Furthermore, Cem Uzan has initiated five lawsuits in Turkish Administrative Courts challenging the SDIF's decisions, and still has recourse to the Constitutional Court. SDIF Aff. at ¶65. As to the service of process, defendants acknowledge that they are subject to process in Turkey.

Turkey is a more suitable forum for this action because the underlying injury to the party, the inability to satisfy the New York judgement, arose because of Turkish government actions. In addition, Telsim is a Turkish corporation with its headquarters in Istanbul, Turkey, and the rights of a shareholder vis-a-vis the corporation, will be determined by the laws of where the corporation was incorporated. Defendants rightfully point out, that nearly all the witnesses and relevant documents in this case are located in Turkey. Finally, as to plaintiff's claims that the Turkish courts are corrupt and inadequate forums to hear cases, plaintiff has not submitted any evidence that the Turkish courts are corrupt or unavailable to adjudicate the dispute. Therefore, the complaint shall be dismissed on *Forum Non Conveniens* grounds.

It is unnecessary to address the plaintiff's remaining arguments.

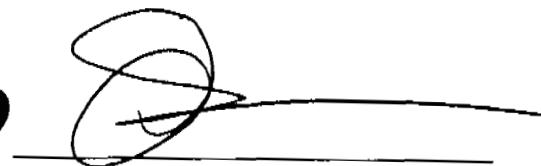
Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of this Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 5, 2007

FILED
OCT 31 2007
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

Counsel are hereby directed to obtain an accurate copy of

this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.