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

– Explanatory Note –

I. The Separate Entity Doctrine and the Doctrine of Territoriality in Private International Law

This explanatory note accompanies the resolution concerning the "Principles of Jurisdiction Over Foreign Bank Branches in the Matter of Extraterritorial Attachment and Turnover" (the "Resolution") proposed by the Committee on International Monetary Law of the International Law Association ("MOCOMILA"). The Resolution is merely a formalized articulation of the principles that have long governed international monetary law, and is intended to encourage courts in various jurisdictions to continue to uphold those principles. The Resolution would apply only to private enforcement actions, and would not purport to limit or otherwise affect the authority of regulatory or public law-enforcement agencies. Furthermore, the Resolution would not negate or contravene any of the recommendations in the Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order.

The issue of whether, and in what circumstances, a bank will be liable for deposits held in its foreign branches is not new. Generally, courts in various jurisdictions have recognized in one form or another that a bank has "in some measure localized its obligation to its customer so as to confine it, primarily at least, to a particular branch."[1] One manifestation of this principle is the established and longstanding "separate entity" doctrine, which holds that each office, branch, or agency of a bank should be treated as a separate entity, lacking possession, custody, or control over accounts maintained by depositors in other branches of the bank or at the home office.

The separate entity doctrine has long been applied as the jurisdictional rule of thumb in a great number of financial centers around the world. Under various appellations, this doctrine is recognized in countless jurisdictions, including the United States, United Kingdom, Germany, Italy, and Argentina, to name a few. Such doctrines include the private international law doctrine of territoriality or localization of debt – the rule that an asset should be treated as situated at the place of the bank branch where the account is located, and thus that demands on the asset should be made at that branch – and basic principles of legal certainty and good administration of justice, which hold that any dispute over an asset should be governed by the law of the place where the asset is located.

II. The Context and Need for the Resolution

In recent years, courts applying the separate entity doctrine and related doctrines have been confronted with the increasingly familiar scenario in which a judgment creditor requests an order to require a bank (typically not a party to the underlying action) to attach or

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[1] Rex v. Lovitt [1912] AC 212 at 219, cited in William Blair, Making Commercial Law: Essays in Honour of Roy Goode, 324, Ross Cranston eds., 1997.

turn over a judgment debtor's property, even though the debtor's assets are held by a branch or office of the bank located abroad. It has traditionally followed that service of an attachment order or writ of execution should be effective only on the assets located at the actual branch served, and should not reach outside of the jurisdiction where the branch is located. However, there have been limited instances in which courts have extended the reach of their jurisdiction to order the extraterritorial turnover or attachment of assets held in accounts located abroad, thus threatening to undermine the integrity of longstanding principles of territoriality in private international law and the separate entity doctrine.

The granting of such extraterritorial turnover orders raises grave policy implications for the financial services industry and, more broadly, affects legal certainty in international transactions.

- *First*, if such petitions are granted, judgment creditors, as well as secured creditors and other competing creditors, will be able to file conflicting claims for a single asset in multiple jurisdictions, allowing for the possibility for two or more courts to issue contradictory rulings on an asset's rightful ownership. Contradictory international turnover orders may have unforeseeable and unintended consequences that would threaten the balance of international banking law.

- *Second*, extraterritorial turnover orders expose banks to the possibility of double liability by requiring banks to transfer property without the consent of other entities that may have an interest in such property.

- *Third*, extraterritorial turnover orders may require banks to violate the laws of the countries where assets at issue are held, including bank secrecy laws and other local laws.

- *Finally*, a court's issuance of an extraterritorial turnover order will ultimately cause the misallocation of limited judicial resources, by inviting creditors to seek to enforce claims against judgment debtors, where neither the creditor nor the debtor have any relationship to the jurisdiction.