

Client Alert

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US Federal District Court Orders Claimant in ICSID Investment Arbitration to Turn Over Any Award Proceeds to Judgment Creditors of its Corporate "Alter Ego"

On September 27, 2010, the Southern District of New York held that the claimant entity in a long-running World Bank arbitration against Turkey, Libananco Holdings Co. Limited (Libananco), is the corporate alter ego of the Turkish Uzan family. The court held further that the Uzans had "abused the privilege of doing business" in that corporate form by shifting funds to defraud the plaintiffs, Motorola Credit Corporation (Motorola) and Nokia Corporation (Nokia), to whom the Uzans owe US \$ 4.8 billion pursuant to a 2002 fraud judgment.¹

The court proceeded to order that Libananco pay and/or turn over to the plaintiffs personal property and assets, specifically including its potential recovery in the pending arbitration at the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).²

Issue Before the Court

The issue before the court was whether the plaintiffs had provided sufficient evidence to support a finding that Libananco was the corporate alter ego of the Uzans in order to pierce the corporate veil.³ Under New York law, the relevant law in the dispute, a ruling to pierce the corporate veil

requires a showing that (1) the owners exercised "complete domination" of the corporation and (2) that the owner abused this ownership structure to "commit a fraud or wrong" against the plaintiffs resulting in some injury.⁴

Prong 1: Complete Domination of the Entity

With regard to the first prong of the test, the court found that the ICSID proceedings revealed Libananco's true ownership structure. In its Request for Arbitration, Libananco claimed that Turkey's seizure of electricity concessions belonging to Cukurova Elektrik AS (CEAS) and Kepez Elektrik (Kepez) violated the Energy Charter Treaty. It claimed injury as a substantial shareholder and investor in CEAS and Kepez.⁵ The proceedings, however, revealed that both companies are owned by the Uzans. Additionally, the plaintiffs marshalled evidence establishing that Cem Cengiz Uzan, a member of the Uzan family and its business empire, owns 100 percent of Libananco.⁶

Prong 2: Abuse of Control of the Entity Causing Injury to the Plaintiff

Regarding the second prong of the test, in a 2003 decision, the Southern District of New York previously found

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that the Uzans shifted funds between various corporations in order to avoid creditors.⁷ Libananco was just one more entity to add to the list, since the Uzans owned and controlled it in addition to CEAS and Kepez, but yet brought the ICSID claim under Libananco's name.⁸ The court found that the evidence showed that "the Uzans are clearly using Libananco to avoid the judgment obligations to plaintiffs."⁹

Further influencing this decision was the adverse inference that the Uzans made "studied attempts . . . to avoid appearing in [court]" finding this as "an attempt to avoid providing plaintiffs with discovery that could even more clearly establish alter ego status."¹⁰

Recovery

In addition to ordering that Libananco pay and/or turn over to the plaintiffs assets including its potential recovery in its pending investment arbitration, based on the Uzan's history of transferring funds to avoid complying with judgments, the court held that, until it has paid the plaintiffs, Libananco is not permitted to sell, assign, transfer or interfere with any of their property. This included "any rights, causes of action, or anticipated future benefits arising from or relating to" its investment treaty claims against Turkey.¹¹

Latham & Watkins' dedicated team of Public International Law and International Dispute Resolution specialists have extensive experience in advising and representing States and private entities in relation to all aspects of international investment arbitration and related domestic court proceedings.

Endnotes

- ¹ *Motorola Credit Corporation and Nokia Corporation v. Uzan*, Case 1:02-cv-00666-JSR-FM, slip op. at 9 (S.D.N.Y. Sept. 27, 2010).
- ² *Id.* at 10. In February 2006, Libananco instituted ICSID proceedings against Turkey, seeking US \$10 billion for alleged breaches of the Energy Charter Treaty. See *Libananco Holding Co. Limited v. Republic of Turkey*, ARB/08/8 (pending).
- ³ *Id.* at 5.
- ⁴ *Id.* at 7 (citing *Morris v. State Dep. 't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (N.Y. 1993)).
- ⁵ *Id.* at 6.
- ⁶ *Id.* at 5.
- ⁷ *Id.* at 5 (citing *Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481, 526-31, 583 (S.D.N.Y. 2003)).
- ⁸ *Id.* at 6.
- ⁹ *Id.* at 9.
- ¹⁰ *Id.*
- ¹¹ *Id.* at 13.

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