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COURT OF APPEALS

STATE OF NEW YORK

MASHREQBANK PSC,

Appellant,

-against-

No. 54

AHMED HAMAD AL GOSAIBI
& BROTHERS COMPANY,

Respondent.

20 Eagle Street
Albany, New York 12207
February 19, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: Number 54.

2 Counselor, do you want any rebuttal time?

3 MR. BOCCUZZI: One minute, Your Honor.

4 CHIEF JUDGE LIPPMAN: One minute, sure, go
5 ahead.

6 MR. BOCCUZZI: Good afternoon, and may it
7 please the court, my name is Carmine Boccuzzi from
8 Cleary Gottlieb Steen & Hamilton, on behalf of
9 plaintiff-appellant Mashreqbank.

10 CHIEF JUDGE LIPPMAN: Where was the AD off
11 base?

12 MR. BOCCUZZI: The AD was off base, Your
13 Honor, in first rejecting over the dissent of the two
14 other justices, the Supreme Court's dismissal of a
15 forum non, first, by saying that you could only get
16 to that conclusion by recasting the allegations of
17 the counterclaim.

18 The counterclaims themselves - - - remember
19 my client entered into foreign exchange transactions
20 with AHAB, the Saudi partnership. The Saudi
21 partnership defaulted. We wired dollars. They never
22 wired in Saudi Arabia the Saudi riyals that they owed
23 us.

24 They defended, and they put in their
25 counterclaim on the grounds that the contract by

1 their agent was not authorized; he forged the
2 instrument; employees of AHAB, the partnership,
3 things from the board; that they otherwise kept a
4 secret ledger of all this information. All of that
5 is information, on the face of their allegations that
6 have - - - would have to be proved with witnesses,
7 evidence - - -

8 CHIEF JUDGE LIPPMAN: Where were they - - -
9 where they were - - -

10 MR. BOCCUZZI: - - - in the Middle East.

11 CHIEF JUDGE LIPPMAN: Where were they wrong
12 in your view in the big picture of forum non
13 conveniens?

14 MR. BOCCUZZI: It - - -

15 CHIEF JUDGE LIPPMAN: What's - - - what's
16 that test all about and where did the AD misapply it?

17 MR. BOCCUZZI: I think a good example is
18 this court's decision in the Patriot Exploration
19 case. They - - - what - - - what the AD missed is
20 that there's not a single witness that has been
21 identified, not by the AD - - -

22 CHIEF JUDGE LIPPMAN: What - - - what about
23 - - -

24 MR. BOCCUZZI: - - - and not by them, that
25 resides in New York. The test is - - -

1 CHIEF JUDGE LIPPMAN: What about these
2 policy considerations that they talk about in
3 relation to New York business and banks and whatever?

4 MR. BOCCUZZI: I think there the dissent -
5 - -

6 CHIEF JUDGE LIPPMAN: Is that - - - is that
7 a viable or a - - - an appropriate thing to be
8 considering in a forum non conveniens motion?

9 MR. BOCCUZZI: I think the dissent got it
10 right. Here, while policy it maybe implicates to
11 give a New York court an interest, here the wiring of
12 dollars was tangential to the ultimate dispute that's
13 among these parties.

14 JUDGE SMITH: I mean, there's - - - there's
15 a suggestion. Is it - - - is it correct or is it
16 disputed that you - - - any large dollar transaction
17 has - - - essentially has to go through New York?

18 MR. BOCCUZZI: Yes, any dollar will touch
19 New York - - -

20 JUDGE PIGOTT: Okay, before you go - - -
21 could I - - - could I - - -

22 MR. BOCCUZZI: - - - and so by the
23 majority's reasoning - - -

24 JUDGE PIGOTT: I apologize for interrupting
25 you, but we - - - we got this thing from Mr. Grace a

1 bit ago, an order. I'm sure you're familiar with it,
2 that we got on March 12th, that - - - Mashreqbank v.
3 AHAB. And on page 7 of it, it says "Al Sanea offers
4 one piece of new information not presented in the
5 prior motion, which is that there is a suitable
6 alternative forum since there is no longer a
7 surviving first party proceeding between Mashreqbank
8 and AHAB."

9 MR. BOCCUZZI: Yes, Your Honor.

10 JUDGE PIGOTT: Is that this case? There's
11 no longer - - -

12 MR. BOCCUZZI: That is our case. What
13 happened is, the lower court after the Appellate
14 Division's decision did not - - - did not stay. We
15 asked for a stay of the proceedings, because you had
16 all taken this appeal.

17 The court said please brief your motion to
18 dismiss the counterclaim, and so we argued, as we did
19 previously, in the - - - in the briefing that was not
20 reached by the Supreme Court, because it dismissed
21 for forum non, that they failed to state a claim
22 under UAE law, but if the court was going to apply
23 New York law, because again the AD had said New York
24 law patently applies here, which I don't think is
25 true, but we also said New York law, this fails - - -

1 this counterclaim fails because of the in pari
2 delicto doctrine, articulated by this court in the
3 Kirschner case, and Justice Schweitzer agreed with
4 that and dismissed the counterclaim on that ground.

5 The case has since been basically on ice.
6 They are seeking to replead that counterclaim, so the
7 case - - - as far as I'm concerned the case has not
8 gone away, because they're trying to replead, and
9 they've filed a notice of appeal. We've made very
10 clear to the Supreme Court that if this court
11 obviously affirms - - - reverses on the forum non, or
12 they are not allowed to replead that counterclaim and
13 the Appellate Division affirms that, we're done.
14 Because we are in the UAE. We have litigated the
15 exact issue - - -

16 JUDGE SMITH: Let me - - -

17 MR. BOCCUZZI: - - - of these transactions.

18 JUDGE SMITH: Let me ask you about that.

19 If we do - - - if we - - - if we do rev - - - if we
20 agree with you that the Appellate Division was in
21 error, say, in some of its - - - its rulings, do we -
22 - - do we send it back for an exercise of the
23 Appellate Division's discretion or do we just
24 dismiss?

25 MR. BOCCUZZI: You can dismiss based on - -

1 -

2 JUDGE SMITH: That's - - - that's because
3 this is - - - this is a case where it's forum non
4 conveniens as a matter of law?

5 MR. BOCCUZZI: Yes.

6 JUDGE SMITH: Those are rare, aren't they?
7 Usually it's a discretionary call.

8 MR. BOCCUZZI: It's - - - it's
9 discretionary, but if you apply the wrong standard as
10 the AD did, that's - - -

11 JUDGE SMITH: Well, it wasn't part of the
12 wrong standard. Shouldn't - - - shouldn't they go -
13 - - but shouldn't we say go - - - now go apply the
14 right standard?

15 MR. BOCCUZZI: I - - - if - - - if you
16 don't agree that it's reversible as a matter of law,
17 then I would take that as the result, but I take it -
18 - -

19 JUDGE SMITH: Yeah, you want to win
20 completely, and if you don't, you'll take half of it.
21 But what's - - - what's the argument - - - what's the
22 argument that you can get a total win? I mean, are
23 you saying that this is one of these rare cases where
24 - - - where this is forum non conveniens - - -

25 MR. BOCCUZZI: Yes.

1 JUDGE SMITH: - - - and there's no other
2 argument?

3 MR. BOCCUZZI: Yes, there - - - it is. And
4 I think the Patriot Exploration is - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. BOCCUZZI: - - - is the similar
7 situation.

8 CHIEF JUDGE LIPPMAN: Okay, counsel.
9 You'll have your rebuttal.

10 MR. BOCCUZZI: Thank you.

11 CHIEF JUDGE LIPPMAN: Counsel? Oh, yes, go
12 ahead.

13 MR. SERIO: May it please the court, Robert
14 F. Serio, Gibson Dunn, for third-party defendant-
15 appellant Maan Al Sanea. And just picking up Judge
16 Smith's question, the two cases, Patriot Exploration
17 and Martin v. Mieth, cited in our briefs, this court
18 substitutes its discretion for the Appellate
19 Division's discretion when they have, as was the case
20 below, so clearly misapplied the - - -

21 CHIEF JUDGE LIPPMAN: Can I ask you the
22 same question? What was the worst misapplication of
23 the doctrine?

24 MR. SERIO: So, I - - -

25 CHIEF JUDGE LIPPMAN: Where did they really

1 miss it?

2 MR. SERIO: So there - - - there are three,
3 Your Honor, but the worst was contrary to this
4 court's many cases saying that its a - - - no one
5 factor is controlling, it's a facts and circumstances
6 test - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. SERIO: - - - the Appellate Division
9 clearly applied one factor, New York's alleged
10 compelling interest in protecting its native banking
11 system from malfeasance or - - -

12 CHIEF JUDGE LIPPMAN: Again, is that a
13 valid consideration in a forum non conveniens motion?

14 MR. SERIO: Well, it's - - - I - - - well,
15 we argued not, Your Honor. It clearly isn't. What
16 the - - - - what the Appellate Division did was they
17 took - - - they took cases from the choice-of-law,
18 the J. Zeevi case, the choice-of-law case.

19 CHIEF JUDGE LIPPMAN: Choice of law is
20 different, right?

21 MR. SERIO: Choice of law is different. I
22 mean, Zeevi - - -

23 CHIEF JUDGE LIPPMAN: There it's a policy
24 test. It's not - - -

25 MR. SERIO: Well, it is a policy test and

1 the question there in Zeevi, was a letter of credit
2 payable in New York? New York was the locus of
3 payment. Instead it was repudiated because Uganda
4 determined that they - - - they sent a policy out,
5 don't pay letters of credit to Israeli banks. It was
6 an anti-Semitic policy.

7 JUDGE GRAFFEO: Is there any allegations of
8 actual conduct of fraud in New York, or is it just
9 the electronic transferring of the money?

10 MR. SERIO: Well, they - - - I mean, in
11 fairness to them, they say that - - - that the tran -
12 - - that the transfer in New York was a fraud in New
13 York. It's undispute - - -

14 JUDGE SMITH: But there's no claim that any
15 human being was in New York.

16 MR. SERIO: But no - - - no - - - it was -
17 - - it was buttons. You know, it was electronic
18 transmissions. All of the conduct was directed from
19 Saudi Arabia. Everybody was in Saudi Arabia or UAE
20 or Bahrain.

21 JUDGE SMITH: We have had a few cases
22 though, where people are scattered all over the globe
23 - - - here you've got more than one country. You've
24 got Saudi Arabia; you've got - - - well, I'm not sure
25 how many countries there are in UAE - - -

1 MR. SERIO: Bahrain and UAE.

2 JUDGE SMITH: - - - but - - - and we have
3 cases like Banco Ambrosiano or the Bata v. Bata case,
4 where you have a multi-country transaction with
5 virtually no New York contact, and we said in effect,
6 well, it might as well be here as anywhere else. Is
7 this such a case?

8 MR. SERIO: I - - - I don't think so, Your
9 Honor. And I think it's important to look - - - a
10 number of those cases are, in fact, personal
11 jurisdiction cases, and a number of those cases are
12 cases where there's a res in New York. There's - - -
13 there's ex parte attachments of funds in New York - -
14 -

15 JUDGE SMITH: And the - - -

16 MR. SERIO: - - - and here there is nothing
17 - - - there's absolutely nothing - - -

18 JUDGE SMITH: Then when - - - I gather when
19 - - - when Mr. Boccuzzi originally came here, he was
20 looking for money in New York and he didn't find it.
21 Is that the - - -

22 MR. SERIO: Absolutely. And what has
23 happened here is that the plain - - - is that the
24 defendant - - - the third-party plaintiff has seized
25 upon this forum, claiming, well, we have to be here

1 no one's done any depositions yet, right? I mean - -
2 -

3 MR. SERIO: There are no depositions,
4 correct.

5 JUDGE PIGOTT: I mean, you - - - the
6 defendant's entitled to the priority, and I would
7 think they would have done that by now.

8 MR. SERIO: Well, we don't believe that the
9 personal jurisdiction's proper here and we don't
10 believe that the forum is proper here - - -

11 JUDGE PIGOTT: Yeah.

12 MR. SERIO: - - - and we wanted to - - -

13 JUDGE SMITH: Is - - - is your guy allowed
14 to come here?

15 MR. SERIO: All - - - my clients and the
16 AHAB partners are still under travel bans, until
17 matters are sorted out in Saudi Arabia and Saudi
18 banks are repaid. They cannot testify here. And
19 what - - - what - - - the trial court properly found
20 and the Appellate Division misapplied was the notion
21 that this case - - - you know, it simply can't be
22 tried here. The witnesses are in the Middle East,
23 the documents are in the - - -

24 JUDGE GRAFFEO: Did they testify in the
25 Dubai case that - - - the judgment we were sent?

1 MR. SERIO: Yeah, the - - - the Dubai case,
2 AHAB contested, Mashreq prevailed. Mashreq has
3 judgment. The first party case is res judicata. It
4 was also dismissed.

5 JUDGE GRAFFEO: Do we know - - - do we know
6 if there was discovery or testimony in that case?

7 MR. SERIO: I don't. I'm sure there was a
8 form of testimony. I don't know the extent of it,
9 because I was - - -

10 JUDGE GRAFFEO: You may not be the right
11 person to ask that.

12 MR. SERIO: I was not a party. I have
13 other - - - there were other serious infected which -
14 - - serious errors of law which infected this
15 decision including the erroneous decision - - -

16 CHIEF JUDGE LIPPMAN: Quickly.

17 MR. SERIO: - - - by the Appellate Division
18 to insist that the allegations of the - - - of the
19 plaintiff in the - - - in the - - - the third-party
20 plaintiff in the third-party complaint be taken as
21 true as to forum non conveniens. There is no
22 authority for that. It's a misreading of this
23 court's - - -

24 JUDGE SMITH: Well, whether - - - whether
25 it's right or wrong, what - - - what turns on that?

1 What allegation is being taken as true that it either
2 supports or contradicts a forum non conveniens
3 finding?

4 MR. SERIO: What - - - what the Appellate
5 Division did was - - - was credit the plaintiff - - -
6 the third-party plaintiff's characterization of the
7 clase (sic) - - - of the case. It's a theft in New
8 York. The center of gravity is - - - is in New York.
9 It could only have been done by New York banks.

10 JUDGE SMITH: Oh.

11 MR. SERIO: And the reality is that - - -

12 JUDGE SMITH: Oh, well, wait. Do you - - -
13 do you dispute that it could only have been done by
14 New York banks? That's what I thought - - -

15 MR. SERIO: Absolutely. Any - - - any
16 pegged tran - - - any pegged currency pegged to the
17 riyal could have been the subject of an FX - - -

18 JUDGE SMITH: Well, if it's going to be
19 done in dollars, it has to be - - - for - - -

20 MR. SERIO: If it's - - -

21 JUDGE SMITH: If you transfer a few hundred
22 million bucks, you got to do it in New York?

23 MR. SERIO: Well, if you - - - if you do an
24 FX exchange transaction in dollars, it has to touch a
25 New York bank. It's a purely ministerial touching,

1 but the point is this is - - -

2 JUDGE SMITH: Okay, but so - - - so that -
3 - - yeah, does - - - does that give New York a
4 sufficient interest in - - - in taking this case,
5 basically just to - - - to preserve the confidence of
6 the international banking community, that if they go
7 through New York, they're going to get justice?

8 MR. SERIO: I - - - I say no. I mean, if -
9 - - if any ministerial transaction - - - in other
10 words, that is - - - that is essentially saying that
11 we're going to make a one-factor test on forum non.
12 It doesn't matter if the evidence is abroad, if the
13 witnesses are abroad, if Saudi law applies. In order
14 to determine what's right and wrong here on the
15 transfers, you have to go through the operations and
16 authorities in a Saudi partnership where - - -

17 JUDGE PIGOTT: Well, like - - -

18 MR. SERIO: - - - my client is the in-laws
19 in this - - -

20 JUDGE PIGOTT: In that Uganda case, I mean,
21 there are certain decisions that are made, I think,
22 based upon, you know, whether justice will ever be
23 done, if it's not done here.

24 MR. SERIO: Well, justice will be done in
25 Saudi Arabia. There is - - - there is no doubt that

1 - - -

2 JUDGE PIGOTT: Depending on how it's
3 defined.

4 MR. SERIO: I'm sorry; I couldn't hear that
5 Judge Pigott.

6 JUDGE PIGOTT: Depending on how it's
7 defined, I mean, I - - -

8 MR. SERIO: Well, their - - - their expert,
9 Professor Vogel, from - - - formerly of Harvard says,
10 that there's no doubt that Saudi has a functioning
11 judiciary, that routinely - - -

12 JUDGE PIGOTT: Well, I don't mean that. I
13 mean, is - - - in terms of time and - - - and you
14 know, the intervention of the - - - of the
15 government.

16 MR. SERIO: We - - - but we - - - we're at
17 the beginning here, Your Honor. Other proceedings
18 are substantially more advanced. The Appellate
19 Division didn't permit us to supplement the record
20 when we moved to do so, but the Saudi committee
21 that's referenced in my papers had - - - has reached
22 the conclusion of its process - - -

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 MR. SERIO: - - - and the parties would be
25 able to litigate this in the Middle East.

1 CHIEF JUDGE LIPPMAN: Thank you, counsel.

2 MR. SERIO: Thank you, Your Honors.

3 CHIEF JUDGE LIPPMAN: Counsel?

4 MR. GRACE: Thank you, Your Honor. I'm
5 Bruce Grace, here on behalf of AHAB. May - - -

6 JUDGE GRAFFEO: Were there any actual
7 conversations or instructions or meetings or any kind
8 of connection to New York other than just the
9 electronic transferring?

10 MR. GRACE: Yes, Your Honor. If I could
11 make a reference to a particular part of the record,
12 which is - - -

13 JUDGE GRAFFEO: I guess I'm getting at what
14 - - - what's our New York connection to this?

15 MR. GRACE: Right, exactly. What's our New
16 York connection? I'm going to speak very
17 specifically to one incident which occurred, which is
18 there was money in a bank account in New York City, a
19 Bank of America account, 191 million, 150 of that
20 million was Mashreq's funds. There was a direction
21 from Mr. Al Sanea to another individual to transfer
22 that money from the New York bank account at Bank of
23 America to another bank account in New York City at
24 HSBC.

25 JUDGE SMITH: But where - - - where the two

1 people - - - where was Al Sanea and the person he
2 spoke to?

3 MR. GRACE: They were both in Saudi Arabia.
4 And the person he spoke to is a gentleman named Mark
5 Hayley, who worked for Al Sanea for a number of
6 years, has since become a whistleblower, and is now
7 living in England, and provided us with an affidavit
8 with - - - describing what happened, and also a
9 document signed by Al Sanea saying, transfer the
10 funds.

11 So what you have is people - - -

12 JUDGE SMITH: Was that - - - was that
13 document transmitted to New York in some form?

14 MR. GRACE: Well, the instruction that is
15 transmitted to New York. An instruction is then
16 transmitted to the Bank of America, telling them to
17 move the funds to the account at HSBC - - -

18 JUDGE SMITH: Is there some Bank of America
19 employee who would be a potential witness to this?

20 MR. GRACE: Absolutely. Just - - -

21 JUDGE SMITH: What's his name?

22 MR. GRACE: Well, we haven't had discovery,
23 so we don't - - - we don't know his name, but - - -
24 but you have, outside of New York - - -

25 CHIEF JUDGE LIPPMAN: Counsel, do you - - -

1 do you adopt this idea that the Appellate Division
2 did that there are broad policy considerations that
3 warrant their forum non conveniens decision?

4 MR. GRACE: I think there are policy
5 considerations here - - -

6 CHIEF JUDGE LIPPMAN: Is that what - - - is
7 that the test on forum non conveniens?

8 MR. GRACE: No. I don't think - - -

9 CHIEF JUDGE LIPPMAN: Or they are more - -
10 - more appropriate to a choice of law situation?

11 MR. GRACE: No, I think the doctrine of
12 forum non conveniens is flexible. And so I think - -
13 -

14 CHIEF JUDGE LIPPMAN: Isn't it about
15 economy and efficiency and all of that?

16 MR. GRACE: It is, but it's also about one
17 - - - one phrase you see, is cases that don't have a
18 substantial connection to New York shouldn't be
19 clogging up the New York courts.

20 JUDGE GRAFFEO: I guess that's why we're
21 asking you what's the connection to New York?

22 MR. GRACE: Right. And - - - and
23 substantial connection, I believe that when a case
24 does concern misbehavior in connection with the New
25 York banking system - - -

1 CHIEF JUDGE LIPPMAN: So it's all about the
2 New York banking industry - - -

3 MR. GRACE: No, it's not.

4 CHIEF JUDGE LIPPMAN: That's why - - -
5 that's why the - - -

6 MR. GRACE: I wouldn't say it's all about,
7 and I don't think that the Appellate Division said it
8 was all about. They said that's a factor that should
9 be considered. It's one of several factors that
10 should be considered. Another one is, for example -
11 - -

12 JUDGE SMITH: Are you - - - are you saying
13 that any case that involves misbehavior that affects
14 a New York dollar account is - - - that that alone is
15 enough to at least give a - - - a court discretion to
16 keep it in New York?

17 MR. GRACE: No, and I want to be - - - I
18 want to be clear that I don't think that the
19 Appellate Division looked at any one factor as being
20 determinative. They looked at the broad array - - -

21 JUDGE RIVERA: So why is this one so
22 significant?

23 MR. GRACE: I'm just answering the
24 questions about it. I mean - - -

25 JUDGE SMITH: What's - - - what's the next

1 factor?

2 JUDGE RIVERA: Okay.

3 MR. GRACE: Well, one of the factors is,
4 can - - - is there another forum? And again, that's
5 not even determinative, because Pahlavi makes it
6 clear that it doesn't have to be - - -

7 CHIEF JUDGE LIPPMAN: What about what's
8 going on in the Middle East, no other forum?

9 MR. GRACE: Well, and here's the answer to
10 that question.

11 CHIEF JUDGE LIPPMAN: Yeah, go ahead.

12 MR. GRACE: Witnesses. A fraud like this,
13 one has to have witnesses. And what we put in and I
14 think counsel mentioned the - - -

15 CHIEF JUDGE LIPPMAN: Who's here who's - -
16 - who's important in terms of witnesses?

17 MR. GRACE: Well, it's a relative question.
18 And here's - - - here's the point. In Saudi Arabia,
19 no one who is interested in the matter can testify,
20 so none of the people with knowledge about this are
21 going to be able to testify in Saudi Arabia.

22 JUDGE GRAFFEO: And how are you going to
23 get those Saudis here, and how are you going to get
24 jurisdiction over them?

25 MR. GRACE: Well, we would be able to have

1 jurisdiction over them and have them testify, and if
2 the travel ban is still going on, then they would - -
3 - we would do it by de bene esse depositions, or by
4 some kind of live transmission.

5 CHIEF JUDGE LIPPMAN: Is that economical
6 and efficient?

7 MR. GRACE: Well, this is a case involving
8 hundreds of millions of dollars. In the normal case,
9 no.

10 CHIEF JUDGE LIPPMAN: No, but is it - - -
11 is it - - -

12 MR. GRACE: In this case, yes.

13 CHIEF JUDGE LIPPMAN: Is it economic or
14 efficient to do it here?

15 MR. GRACE: There's no other place where it
16 can be done. That's the point. There's no other
17 place - - -

18 JUDGE SMITH: So you're saying that - - -
19 you're saying that Saudi Arabia won't let them
20 testify in its courts, but they will let you take
21 their depositions for American - - -

22 MR. GRACE: Yes, yes. In my firm, we have
23 taken depositions of people in Saudi Arabia. That
24 can be done.

25 CHIEF JUDGE LIPPMAN: These people, you're

1 going to be able to take their deposition?

2 MR. GRACE: Yes, yes, we will be able to.

3 JUDGE GRAFFEO: And there's some people in
4 England?

5 MR. GRACE: Yes, there's - - -

6 JUDGE GRAFFEO: Is that what you're also
7 alleging?

8 MR. GRACE: This gentleman I mentioned, who
9 we have an affidavit here, a fellow named Mark
10 Hayley, who was sort of the number one henchman of Al
11 Sanea, and then turned into a whistleblower, he would
12 be able to come to New York to testify. There's
13 another fellow named Glenn Stewart, who lives in
14 California. He would be able to testify.

15 I mean, there's something about this
16 scheme, which is you have someone in Saudi Arabia who
17 hires people who are English-speakers, who understand
18 the banking system. They set up a bank account in
19 New York City. They use it over a number of years.
20 The record shows that they're using it over five,
21 six, seven, eight years, the same bank account.
22 They're transferring billions of dollars through it.

23 And then they say, well, if we've committed
24 harm via that bank account, the only place where you
25 can try us is in Saudi Arabia, where no one will be

1 able to testify.

2 JUDGE PIGOTT: Early on in your - - - when
3 you were talking, you were about to refer to a rec -
4 - - a spot in your - - - in the record on appeal,
5 when you were making your initial point. Do - - - do
6 you remember where you were?

7 MR. GRACE: Yes, I'm - - - I'm at two
8 places. First the record at 711, which is a very
9 short note from Mr. Al Sanea signed by him, saying
10 "you are hereby instructed to transfer funds
11 currently held with our Bank of America in an
12 offshore account, to the account of Al Gosaibi with
13 Awal bank". Those were two accounts located in New
14 York City. And so that's his instruction.

15 And if - - - if the idea is he's home safe,
16 because he's not in New York when he gives that
17 instruction, I submit that would be the wrong rule of
18 law. There shouldn't be, you're home safe if you're
19 outside of New York.

20 JUDGE SMITH: Well, it - - - would it be
21 the right rule of law to say that any time that
22 happens in any country the resulting lawsuit can be
23 in New York?

24 MR. GRACE: No, I think that what one has
25 to look at is the - - - the number of contacts. And

1 so I think it's important here that, for instance,
2 the Bank of America account had been purposefully set
3 up; it had been maintained for a number of years.
4 There's evidence in the record that - - - that Mr. Al
5 Sanea knew about this. It was purposeful availment
6 from his point of view. He was using it for his
7 scheme. I - - -

8 JUDGE SMITH: What was the second - - -
9 what was the second record reference you were going
10 to give us?

11 MR. GRACE: It was Mr. Hayley's affidavit,
12 which begins at 703 - - - record 703, and it goes
13 from 703 through 706. The other - - - the other
14 point I want - - -

15 JUDGE SMITH: Anything in particular?

16 JUDGE GRAFFEO: And what's the - - - could
17 I - - - I'm sorry.

18 JUDGE SMITH: Sure.

19 JUDGE GRAFFEO: Go ahead and finish the
20 record, and then I have a question.

21 JUDGE SMITH: Is there any particular thing
22 in those pages that you were going to point to?

23 MR. GRACE: Oh, well, I was going to point
24 to his description, starting - - - two points.
25 Paragraph 9, where he discusses the routine use of

1 the Bank of America account and Mr. Al Sanea's
2 involvement in that routine use. So that's paragraph
3 9.

4 And then I would - - - I would look at
5 paragraph 16 and paragraph 17 of his affidavit, where
6 he describes this exchange that I'm talking about,
7 where the money is spirited out of the Bank of
8 America account - - -

9 JUDGE SMITH: Thank you, okay, I get it.

10 MR. GRACE: Yes.

11 JUDGE SMITH: Answer Judge Graffeo's
12 question.

13 MR. GRACE: All right.

14 JUDGE GRAFFEO: Counsel, what's your
15 ultimate goal here, to get a New York judgment?

16 MR. GRACE: Yes.

17 JUDGE GRAFFEO: Because you believe there's
18 other assets in New York?

19 MR. GRACE: Well, we believe that if we can
20 get a judgment in New York against Mr. Al Sanea, that
21 will be of tremendous value to our effort to - - - to
22 get justice for the family. And we believe that if -
23 - - if there aren't assets in New York, there are
24 other places in the world where he has assets and
25 that judgment will work - - -

1 JUDGE SMITH: You - - - you're suggesting
2 that basically it may be - - - a New York judgment is
3 going to have a little more credibility in, say,
4 Switzerland, then a Saudi judgment?

5 MR. GRACE: I'm not an - - - yes, I would
6 say that, yes.

7 CHIEF JUDGE LIPPMAN: But that's not a
8 consideration for forum non conveniens?

9 MR. GRACE: No, I don't think it is. But I
10 - - - I think you were asking a practical question.
11 Why are we here and what is our goal here?

12 CHIEF JUDGE LIPPMAN: That's why you want
13 this to hold?

14 MR. GRACE: Right, I mean, this is very
15 important to our clients to be able to actually prove
16 this case, and New York is the only place - - -

17 CHIEF JUDGE LIPPMAN: But you don't
18 necessarily believe that there are assets here?

19 MR. GRACE: We don't know, because, you
20 know, we don't have a judgment yet, and - - - and so
21 we - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. GRACE: - - - we just don't have the
24 answer to that.

25 CHIEF JUDGE LIPPMAN: Thanks, counsel.

1 MR. GRACE: Thank you very much, Your
2 Honor.

3 CHIEF JUDGE LIPPMAN: Wait a second, did
4 you reserve time, counsel?

5 MR. SERIO: I thought I reserved a minute,
6 Your Honor. Did I not?

7 MR. BOCCUZZI: I reserved a minute.

8 CHIEF JUDGE LIPPMAN: You reserved a
9 minute. I think you got one minute - - - we - - -
10 I think you used up all your time, counsel.

11 MR. BOCCUZZI: Just briefly, Your Honor.
12 The colloquy between these two gentlemen highlights
13 that we're really dealing with an internecine,
14 interfamily dispute among Saudis that my client,
15 thinking it would find assets in New York, stumbled
16 into, and then when it realized, in fact, it changed
17 - - -

18 CHIEF JUDGE LIPPMAN: Where's the fraud
19 here, counsel? Where - - - where did all this take
20 place?

21 MR. BOCCUZZI: In Saudi Arabia. And all
22 the documents - - -

23 CHIEF JUDGE LIPPMAN: Despite the bank
24 account?

25 MR. BOCCUZZI: - - - and the witnesses - -

1 - there's one - - -

2 CHIEF JUDGE LIPPMAN: Despite the bank
3 account?

4 MR. BOCCUZZI: There's one bank account,
5 and even that, the record cite that he gave you 705,
6 as well as in the third-party complaint, which is I
7 believe at - - - it's in the third-party complaint,
8 paragraphs 25 and 26, all they're alleging is that -
9 - - that his client moved the money from one account
10 of AHAB to another account of AHAB.

11 JUDGE PIGOTT: Didn't you sue this in New
12 York?

13 MR. BOCCUZZI: Excuse me?

14 JUDGE PIGOTT: You sued this in New York,
15 didn't you?

16 MR. BOCCUZZI: We did, thinking we had - -
17 -

18 JUDGE PIGOTT: So how are you aggrieved?

19 MR. BOCCUZZI: We're aggrieved because we
20 had moved to dismiss the counterclaim. The
21 counterclaim was dismissed on forum non along with
22 everything else, which we - - - our claim as well,
23 which we said we were fine doing, because we're
24 litigating with them in the UAE. And then the
25 Appellate Division brought that counterclaim back.

1 JUDGE PIGOTT: Okay.

2 MR. BOCCUZZI: So we're aggrieved because
3 that dismissal was revived or - - -

4 JUDGE SMITH: What - - - what about the
5 claim that - - - that Saudi Arabia won't let the
6 witnesses testify?

7 MR. BOCCUZZI: That's a typical aspect of
8 most civil law countries. An interested party can't
9 testify for their own interest.

10 CHIEF JUDGE LIPPMAN: Will they be able to
11 - - - to discover them here? Will they be able to -
12 - - to get to them, even though they can't testify?

13 MR. BOCCUZZI: They - - - they won't be
14 able to come to New York and testify and be cross-
15 examined by - - -

16 CHIEF JUDGE LIPPMAN: Well, they say they
17 can do it in some way long distance - - -

18 MR. BOCCUZZI: Yeah, he's happy to have me
19 cross-examine his guy by video-link eight hours away
20 through an interpreter, because all these folks speak
21 South - - - Arabic - - -

22 CHIEF JUDGE LIPPMAN: But that's not really
23 acceptable to you?

24 JUDGE SMITH: Well, but it's - - -

25 MR. BOCCUZZI: It's not. It's not - - -

1 and it's not convenient to the court system.

2 CHIEF JUDGE LIPPMAN: But it can be done.

3 But it can be done.

4 MR. BOCCUZZI: Your Honor, nothing is
5 impossible, but - - -

6 JUDGE SMITH: But isn't - - - well, isn't
7 it better - - - I mean, I guess - - - how - - - how
8 can a - - - all civil law systems work that no
9 interested party can testify? How does that work?

10 MR. BOCCUZZI: They can't - - -

11 CHIEF JUDGE LIPPMAN: No, no, counsel, no.
12 Counsel, no.

13 MR. SERIO: I know the answer.

14 CHIEF JUDGE LIPPMAN: It's fine, but - - -

15 MR. BOCCUZZI: It's striking dealing with
16 my French colleagues. They said, they needed
17 evidence on a point. I said, I'll give you an
18 affidavit. They said we don't want that. Can you
19 send us a newspaper article? I said, a newspaper
20 article? They said, yes, that's respected here,
21 because that's disinterested. So that's number one.

22 Number two, in the UAE proceeding, where
23 we're litigating this, they have raised the issue of
24 fraud, and there has been discovery, and that an
25 expert - - - two levels of experts were appointed by

1 the Dubai court to investigate his allegations and
2 his evidence that there was forgery here. Rejected
3 both times.

4 In his April 26th letter to this court,
5 where we were talking about the aggrieved party
6 issue, he said, oh, Mashreq may not be happy with the
7 Dubai court, because the - - - the Court of Appeals
8 has required more evidence on my forgery allegation.
9 Well they let that evidence in. He's litigating
10 vigorously against me there, and he lost.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 JUDGE RIVERA: Coun - - - I'm sorry, can I
13 just ask - - -

14 MR. BOCCUZZI: This is not a - - -

15 CHIEF JUDGE LIPPMAN: Judge Rivera, go
16 ahead.

17 JUDGE RIVERA: I'm sorry, just one quick
18 question. What's your response to his point that the
19 accounts have existed for years and there's been use
20 of these accounts in New York for years? These bank
21 accounts.

22 MR. BOCCUZZI: Here there's just - - -

23 JUDGE RIVERA: Which is Bank of America and
24 HSBC, I think is what he said.

25 MR. BOCCUZZI: Again, it's not atypical,

1 whenever you have a dollar transaction to have bank
2 accounts in New York. There have been accounts here.
3 But again, whether or not there was a fraud in New
4 York. There's no fraud in New York. The fraud is
5 among his client and his client in Saudi Arabia, as
6 to whether the information being given by this - - -
7 this fellow over here to this guy over here was full
8 in disclosure about what was going on with the money.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. BOCCUZZI: And don't forget, my injury
11 was when they didn't give me the Saudi riyals in
12 Saudi Arabia.

13 CHIEF JUDGE LIPPMAN: Thank you, counsel.

14 JUDGE PIGOTT: Has that been resolved?

15 MR. BOCCUZZI: Excuse me?

16 JUDGE PIGOTT: Has that been resolved?

17 MR. BOCCUZZI: Yes, to my in the UAE action
18 in my favor, yes, Your Honor.

19 CHIEF JUDGE LIPPMAN: Okay, thank you.

20 MR. BOCCUZZI: Thank you.

21 CHIEF JUDGE LIPPMAN: All of you.

22 Appreciate it.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Mashreqbank PSC v. Ahmed Hamad Al Gosaibi & Brothers Company, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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