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Bank Litigation Client Alert

July 23, 2015

New Court Decisions Expose Non-U.S. Banks With U.S. Branches to New Risks of Litigation in American Courts

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I. Introduction

Non-U.S. banks with branches in New York and elsewhere in the United States find themselves sued or otherwise exposed to judicial orders in American courts with regularity. The cases reflect the full range of U.S. legal risks, including claims alleging fraud and breach of contract, or violations of federal statutory schemes such as those for securities, antitrust, and RICO (anti-racketeering), or federal laws, like the Alien Tort Statute that may address politically charged issues. In addition, banks often are called on to submit to the jurisdiction of U.S. courts as non-parties, to provide information or comply with remedial orders.

No matter what the issue, a non-U.S. bank will be required to defend itself or comply with a judgment only if it is subject to the personal jurisdiction of the court. Whether jurisdiction attaches to the bank depends upon the scope of the jurisdictional statutes of the State where the litigation is based, jurisdictional provisions of applicable federal statutes, and—critically—compliance with safeguards provided by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. The law governing the assertion of personal jurisdiction against non-U.S. banks based on U.S.-branch activity is changing rapidly, however, and in some courts' view in the direction of requiring non-U.S. banks to answer to a much wider range of claims than before. This note provides a brief description of some of the more significant changes, and counsels that defenses to the assertion of

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jurisdiction must be raised without delay or they will be waived forever.[1]

II. Discussion

An important set of changes in the law can be traced to *Gucci Am. v. Bank of China*,[2] in which the United States Court of Appeals for the Second Circuit held that a Chinese bank—a nonparty that appeared in the case only because a subpoena had been served on it—was not automatically subject to the jurisdiction of federal courts as a result of its maintenance of a New York branch. The *Gucci* case arose out of claims for trademark infringement against defendants who allegedly produced and sold counterfeit versions of designer products made by Gucci as well as other luxury brands. The trial court entered a preliminary injunction freezing the defendants' assets, including proceeds from the alleged counterfeiting operation that the defendants had wired to bank accounts at the Bank of China ("BOC"), in China. The plaintiffs sought information about the frozen assets, and served a subpoena on the New York branch of BOC to require that the bank produce the information. BOC refused to comply, and the trial court, on motion by the plaintiffs, required it to do so. BOC appealed, and the Second Circuit reversed.

Before deciding whether to affirm enforcement of the subpoena on the merits, the Court of Appeals considered whether it could assert jurisdiction over BOC consistent with protections afforded by the Due Process Clause of the U.S. Constitution.[3] Two types of jurisdiction could apply: "general personal jurisdiction," pursuant to which BOC would be subject to claims of any kind, and "specific personal jurisdiction," in which BOC would be held accountable only if it "purposefully directed" its activities towards the forum, if the claim against it arose out of those contacts, and if asserting jurisdiction was consistent with "traditional notions of fair play and substantial justice."[4] The District Court had issued its asset freeze based on assertion of general jurisdiction over BOC. Subsequently, however, the standards for asserting general jurisdiction were tightened significantly by the U.S. Supreme Court in *Daimler AG. v. Bauman*,[5] in which the Court held that a corporation is not subject to general personal jurisdiction unless its contacts with the forum are so substantial that it can be considered "at home" there—a situation that, absent exceptional circumstances, is satisfied only where it is incorporated or has its principal place of business.[6] *Daimler* limited dramatically the exposure of non-U.S. companies and individuals[7] to suit in the U.S. over actions taking place elsewhere in the world, and the Court of Appeals in *Gucci* applied that ruling to conclude BOC's maintenance of a branch bank in New York did not meet the constitutional test. In so doing, it reversed decades of pre-*Daimler* precedent.[8]

The Court of Appeals next had to consider whether specific personal jurisdiction over BOC could be asserted based on BOC's contacts with New York, and whether the litigation arose out of those contacts.

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[1] Different issues are presented where jurisdiction over a non-U.S. bank is premised on the bank's use of a U.S. correspondent bank to make dollar-denominated transfers. Compare, *e.g., Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013) (personal jurisdiction found where use of New York correspondent bank was frequent and deliberate) with *Community Finance Group, Inc. v. Stanbic Bank Ltd.*, 14cv5216(DLC), 2015 US Dist LEXIS 89904 (S.D.N.Y. July 10, 2015) (no personal jurisdiction arising from single wire transfer).

[2] *Gucci Am. v. Bank of China*, 768 F.3d 122 (2d. Cir. 2014).

[3] The Due Process clauses of the U.S. Constitution's Fifth Amendment (applicable to the federal Government) and Fourteenth Amendment (applicable to the States) each prohibit the deprivation of "life, liberty, or property" without "due process of law."

[4] *Gucci*, 768 F.3d at 134,136.

[5] *Daimler AG. v. Bauman,* 134 S. Ct. 746 (2014).

[6] *Id.* at 760-761.

[7] Individuals are generally considered to be "at home" where they are domiciled. *Id.* at 760.

[8] *Daimler's* statement that general personal jurisdiction over non-U.S. corporations could alternatively be found in "exceptional" circumstances has also created a divergence of views with respect to its application to banks. *Compare SPV OSUS Ltd. v. UBS AG*, 15-cv-619 (JSR), 2015 US Dist. LEXIS 94386, at *13 (S.D.N.Y. July 20, 2015) (UBS AG not subject to general personal jurisdiction in New York as an "exceptional" case) with *Hosking v. Hellas Telcoms. (Lux.) III SCA*, Ch. 15, Case No. 12-10631 (MB), 2015 Bankr. LEXIS 278, at **37 (Deutsche Bank AG subject to general personal jurisdiction in New York as "exceptional" case).

Noting that there was little precedent regarding the assertion of specific personal jurisdiction against a non-party in connection with an assert freeze and that a factual record had not been developed, the Court of Appeals remanded the matter to the District Court to consider in the first instance. It identified a number of factors that the District Court might consider, including BOC's bank's status as a non-party and as a non-US corporation, as well as the fact that BOC was involved as the target of a post-judgment asset freeze injunction. Additionally, the Court of Appeals observed that "[t]he question whether the exercise of personal jurisdiction is appropriate in this context may depend, in part, on the nature of the foreign nonparty's contacts with the forum," including its "presence and activity" in New York.[9]

Separate and apart from the question whether the law imposes jurisdiction, any party can consent to a court's personal jurisdiction by its own actions. This can occur by agreement, such as through a contractual dispute resolution or arbitration clause, or by operation of law, based on affirmative acts that are seen as invoking the benefits and protection of the forum state's legal system. The Court of Appeals raised the possibility that such consent had been given, through BOC's voluntary registration of its branch with the New York Department of Financial Services as a foreign banking corporation under § 200 of the New York Banking Law. Under that statute, the registrant is deemed to have consented to service of a claim "arising out of a transaction with its New York . . . branches." But the Court of Appeals did not determine whether this provision would attach to the asset freeze injunction at issue, leaving it instead for the trial court to decide after the case was remanded.

While the trial court in *Gucci* has not yet ruled on that question, another federal court in New York did address the scope of a non-U.S. bank's consent to jurisdiction in a different context, taking a very expansive view. The plaintiffs in *Vera v. Republic of Cuba*[10] were representatives of the estates of individuals allegedly killed and tortured by the Republic of Cuba and its leaders and agents. The plaintiffs obtained judgments against the Cuban entities and individuals in state court in Florida, and sought to enforce the judgments in federal court in New York against funds frozen for many years by U.S. sanctions. In pursuit of this effort, they served post-judgment subpoenas on the New York branches of a number of U.S. and non-U.S. banks, seeking information about accounts worldwide in which Cuba had an interest. Most of the banks ultimately agreed to a procedure for turning over the blocked funds, subject to indemnification agreements, but two banks objected on a number of grounds, including the lack of personal jurisdiction. After an adverse decision, one Spanish bank, Banco Bilbao Vizcaya Argentina, S.A. ("BBVA"), sought reconsideration of the personal jurisdiction ruling based on the holding of the recently-decided *Gucci* case.

The District Court disagreed that *Gucci* precluded the assertion of jurisdiction. First, it held that § 200 of the New York Banking Law amounted to consent to jurisdiction over the action in question. The Court recited but did not discuss the statutory language, which limited consent to claims "arising out of a transaction with its New York . . . branches." Rather, the court relied on various policy arguments that, in its view, counseled that New York branches of non-U.S. banks should generally be subject to jurisdiction to the same extent as a bank based in New York, at least as to information held in the U.S. branches. Thus, the court concluded:

> Contrary to BBVA's suggestions, *Daimler* and *Gucci* should not be read so broadly as to eliminate the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States. There is no reason to give advantage to a foreign bank with a branch in New York, over a domestic bank. I cannot espouse a notion of jurisdiction that allows banks to hide information concerning assets connected to terrorism in other countries. . . . Foreign banks should not be permitted to promote the legitimacy of their business by registering to do business in New York, and then hide illicit activity by 'keeping' information concerning assets relating to terrorism in other

[9] *Gucci*, 768 F.3d at 137-38.
[10] *Vera v. Republic of Cuba*, 12 Civ. 1596 (AKH), 2015 U.S. Dist. LEXIS 32846 (S.D.N.Y. March 17, 2015).

countries."[11]

Second, the District Court distinguished *Gucci* as involving *pre-judgment* requests, noting that post-judgment subpoenas of the type at issue had typically been given "very permissive scope."[12] The court rejected BBVA's argument that Due Process considerations should serve as a limit on such requests, and held that so long as jurisdiction over the *defendants* (*i.e.*, the Cuban defendants) existed, it had jurisdiction to enforce a post-judgment subpoena against any non-party.[13] Finally, the District Court rejected BBVA's argument that jurisdiction should be denied based on the factor of international "comity," and reaffirmed its prior rejection of that argument.[14]

Accordingly, the District Court required BBVA to produce to the plaintiffs "all information reasonably available to it which is responsive to the Information Subpoenas, without limitation to whether the accounts it provides information about are located in New York."[15] The mechanics of this obligation were not made entirely clear, as elsewhere the court states that it is only ordering the production of information "located in New York," and that BBVA is ordered "from" its New York branches "to make inquiry of all branches."[16]

Whatever the details, the *Vera* court's holdings with respect to the scope of consent to jurisdiction that comes with a non-US bank's registration with New York banking authorities, and policy arguments seemingly supporting jurisdiction irrespective of contacts, are expansive. They are not at all in the same spirit as an opinion issued by a different New York federal judge two weeks later in *7 West 57th Street Realty Co., LLC v. Citigroup, Inc.*[17] In that case, multiple U.S. and non-U.S. banks[18] were sued under the antitrust and RICO statute for conduct related to an alleged conspiracy to fix the LIBOR rate, and the plaintiffs argued that the banks were subject to the court's specific personal jurisdiction. The court reviewed the different tests for specific jurisdiction established under New York's jurisdictional statute and the federal Due Process Clause, and observed that both required a minimal relationship between the banks' contacts with New York and the violations alleged. It concluded, however, that the complaint was essentially based on alleged conduct having no connection with New York, and concluded that jurisdiction had not been established.

The District Court separately considered whether jurisdiction could be based on the registration of the non-US banks' New York branches under New York Banking Law § 200. The court noted that the statute applied only to claims "arising out of a transaction with its New York . . . branches," and interpreted this language to mean that jurisdiction existed only with respect to the activities of the branches.[19] Given its prior conclusion that no significant connection existed between the allegations of the complaint and New York, the court found that no consent to jurisdiction could be inferred.

The *Vera* and *7 West* decisions also discuss other factors that must be kept in mind when analyzing potential defenses to an assertion of personal jurisdiction. In New York, for example, where much of the relevant

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[11] *Id.*, at *25-*26.
[12] *Id.*, at *27. The question whether a federal court can impose a post-judgment *asset freeze* on a US branch of a foreign bank—certainly one applicable to deposits outside the US—raises different and difficult questions. *See Tiffany (NJ) LLC v. Andrew*, 10 Civ. 9471 (KPF)(HBP), 2015 U.S. Dist. LEXIS 77391, at *32-*38 (S.D.N.Y. June 15, 2015 (holding such asset freeze inappropriate).
[13] *Id.*, at *29.
[14] *Id.*, at *30-*31.
[15] *Id.*, at *29.
[16] *Id.*, at *23, *29.
[17] *7 West 57th Street Realty Co., LLC v. Citigroup, Inc.*,13 Civ. 981 (PGG), 2015 U.S. Dist. LEXIS 44031 (S.D.N.Y. March 31, 2015).
[18] The non-U.S. banks were Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Pank PLC, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings pic, HSBC Bank pic, Lloyds Banking Group pic, Cooperatieve Centrale Raif-feisen-Boerenleenbank B.A., HBOS pic, the Norinchukin Bank, the Royal Bank of Canada, the Royal Bank of Scotland pic, Portigon AG (f/k/a WestLB AG), and Westdeutsche ImmobilienBank AG.
[19] *7 West 57th* , at *39-*40.

litigation occurs, the case law has not yet come fully to grips with potential limitations on general jurisdiction imposed by the U.S. Supreme Court's decision in *Daimler*. Most U.S. States' jurisdictional statutes are written to extend to the full limit of the State's authority under the federal Due Process Clause. But New York's is specific.[20] Historically, arguments were made that New York's assertion of jurisdiction was thus narrower than that permitted elsewhere, and these arguments remain valid. But the provisions conferring general jurisdiction over an entity may now be significantly broader than that permitted under *Daimler*. For many years, for example, general jurisdiction could be established under New York law if a defendant "was engaged in continuous, permanent, and substantial activity in New York."[21] In all but exceptional cases, however, *Daimler* now only permits general personal jurisdiction to be asserted against an entity organized under New York law or having its principal place of business in that state. While the apparent conflict between New York's general jurisdiction statute and *Daimler* has been noted, it has yet to be resolved.[22]

Additionally, many U.S. federal statutes have provisions that provide an independent basis for jurisdiction that is not tied to the State where a case has been filed. These statutes, including the securities laws, the antitrust laws, and RICO (the anti-racketeering statute) provide one form or another of what is called "nationwide service of process," meaning that under certain circumstances cases alleging violations of those the statutes can be brought in a wide range of locations, including ones where the alleged unlawful conduct did not occur. Similarly, the procedural rules for the U.S. federal courts allow jurisdiction to be asserted against a non-U.S. entity anywhere in the U.S., if (i) there is no single place in the U.S. where jurisdiction otherwise exists over all defendants, and (ii) Due Process requirements are met. Notably, the constitutional requirement is satisfied in this situation if the defendant's contacts with the U.S. as a whole are sufficient to allow a court to conclude that forcing it to answer a complaint in the U.S. is not unfair. Questions relating to jurisdiction under these federal statutes, as well as whether the statutes are to be given "extraterritorial" effect to reach conduct occurring wholly or partially in another country, can be complicated.

III. Conclusion

The law regarding a U.S. federal court's ability to assert jurisdiction over a non-U.S. bank with American branches is changing. Some of the currents of change, such as the principle established by the *Daimler* case, lead in the direction of a lower risk of litigation. Others, such as the question whether state bank registration statutes can form the basis for general personal jurisdiction over a non-U.S. bank, may lead in the opposite direction.[23] These changes also underscore a critical issue in opposing the assertion of personal jurisdiction: Defenses generally must be asserted immediately upon the filing of a case, or they risk being waived forever.[24] Notably, in both the *Gucci* and *7 West* cases, defendants failed to raise objections to personal jurisdiction at

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[20] *See* N.Y. C.P.L.R. § 302(a) (Consol. 2015).

[21] *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000).

[22] *See, e.g., Putnam Leasing Company, Inc. v. Pappas*, 46 Misc. 3d 195, 199; 995 N.Y.S.2d 457, 460 (1st Dist. 2014); *Reich v. Lopez,* 38 F. Supp. 3d 436, 454-55 (S.D.N.Y. 2014).

[23] Legislation introduced in the New York legislature would, if enacted, deem the registration of a non-New York corporation to do business in New York to be consent to general personal jurisdiction. The proposal would not change the scope of § 200 of the New York Banking Law, but it might make that provision irrelevant. *See* S. B. 4846, 2015-2016 Reg. Sess. (N.Y. 2015). A number of courts have found that conditioning an application to do business in a State upon consent to general jurisdiction is prohibited by *Daimler*. *See*, *e.g.*, *AstraZeneca v. Mylan Pharmaceuticals*, No. 14-696, 2014 WL 5778016, at *4-*6 (D. Del. Nov. 5, 2014) (Delaware business registration statute, which requires the designation of an agent within the state to accept service of process, cannot serve as a basis for consent to general jurisdiction consistent with *Daimler*); *Chatwal Hotels & Resorts v. Dollywood Co.*, No. 14-CV-8679, 2015 WL 539460, at *6 (S.D.N.Y. Feb. 5, 2015) ("[a]fter Daimler…the mere fact of [the foreign company's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business."); *see Facchetti v. Bridgewater College*, No. 14-CV-10018 (JPO), 2015 U.S. Dist. LEXIS 77714, at *5 (S.D.N.Y. June 16, 2015) (declining to reach the "interesting question whether requiring foreign corporations to consent to general jurisdiction in order to do business in a state" is consistent with *Daimler*.

[24] A litigant that does not believe that it is subject to the Court's jurisdiction may elect simply to ignore the litigation, and suffer the entry of a default judgment. It may later raise jurisdictional objections to the enforcement of a judgment, but by that time it will have forfeited any defense to the merits of a claim, and it will arrive in court in an unsympathetic procedural posture.

earlier stages, and had to rebut arguments that defenses had been waived. Consent to jurisdiction may attach at the very beginning of a case, with the filing of a motion to dismiss on the merits or filing an Answer to a complaint. It is thus essential that an assessment of potential jurisdictional defenses be undertaken immediately upon notice of a lawsuit, and that the assessment reflect an understanding of the many and as yet unsettled arguments that can be made.