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Litigation

More than 50 years since the Second Circuit's famous decision in the Equitable Plan Case, courts are still struggling with parties' attempts to use subpoenas served on U.S. branches of non-U.S. corporations to obtain discovery abroad from those companies.

U.S. Subpoenas: The Limits of Extraterritoriality Revisited

BY RICHARD A. SPEHR AND DANIEL F. FISHER

Almost twenty-five years ago, Mr. Spehr published an article addressing the potential issues surrounding parties' attempts to use U.S. subpoenas served on U.S. branches of non-U.S. corporations to compel those foreign corporations to produce information maintained abroad in their home offices (the "Article").[1] The Article, *US subpoenas: the limits of extraterritoriality*, used the Second Circuit's decision in *Ings. v. Ferguson* (the *Equitable Plan Case*)[2] to lay the background for the conclusion that the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention)[3] should be used to obtain discovery from non-U.S. corporations, rather than the subpoena powers of the district courts under Federal Rule of Civil Procedure (FRCP) 45.[4] The Article's conclusion was predicated on the "elementary principle of jurisdiction that the processes of the courts of any sovereign state cannot cross international boundary lines and be enforced in a foreign country."[5]

While this "elementary principle" has largely withstood the test of time in many different contexts, its particular application with respect to subpoenas issued against U.S.-based branches of non-U.S. corporations to obtain information held abroad is highly uncertain. More than 20 years after Mr. Spehr's Article, and over 50 years since the Second Circuit's famous decision in the *Equitable Plan Case*, courts are still struggling with parties' attempts to use subpoenas served on U.S. branches of non-U.S. corporations to obtain discovery

[1] Richard A. Spehr, *U.S. Subpoenas: The Limits of Extraterritoriality*, 12 INT'L FIN. L. REV. 19 (1992).

[2] 282 F.2d 149 (2d Cir. 1960).

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[3] 28 U.S.C. § 1781.

[4] At the time of the Article (1992), the law regarding the use of FRCP 45 subpoenas to obtain non-U.S. discovery from non-U.S. corporations was limited and conflicting. *See generally* Spehr, *supra* note 1.

[5] *The Equitable Plan Case*, 282 F.2d at 151.

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abroad from those companies. This article explores both some of the history of these issues, as well as some very recent case law.

The Equitable Plan Case

In the *Equitable Plan Case*, the trustee for the Equitable Plan Company sought to obtain information that might allow him to challenge a proposed settlement of a lawsuit.[6] To obtain the sought-after information, the trustee served subpoenas on the New York branches of the Bank of Nova Scotia and The Toronto-Dominion Bank.[7] The subpoenas — which sought the production of documents (subpoenas *duces tecum*) — required the New York branches of those banks to make documents located in their foreign offices available to the trustee.[8] The district court denied the banks' motions to quash the subpoenas and the New York branches of the banks appealed to the Second Circuit.[9]

The Second Circuit reversed.[10] It held that subpoenas served on the New York branches of the non-U.S. banks could not be used to compel production of documents not within the control of those New York branches.[11] The Second Circuit found that it was ''highly undesirable that the courts of the United States should countenance service of a subpoena upon a New York agency of a foreign bank.''[12] It ruled that the subpoenas should be modified and restricted to records and other documents specified in the subpoenas that were in the possession of its New York branches, but that documents and other evidence located outside of the United States should only be obtained by the trustee via a letter rogatory, or other appropriate international convention.[13]

The Second Circuit's decision in the *Equitable Plan Case* over 50 years ago remains relevant today. With international business transactions — and disputes — so paramount to the global economy, non-U.S. corporations with branches in New York — and elsewhere in the United States — often find themselves a party to litigation or otherwise exposed to judicial orders of the American courts. Of particular relevance for this article, non-U.S. corporations are often called to submit to the jurisdiction of the U.S. courts as non-parties via U.S. subpoenas to provide information and/or evidence maintained abroad. Thus, the same question addressed in the *Equitable Plan Case* presents itself today: are non-U.S. corporations required to provide information located abroad when they are non-parties to a U.S. litigation, and their U.S. branch is served with an informational subpoena?

Daimler AG v. Bauman

The Supreme Court's recent decision in *Daimler AG v. Bauman* could be of substantial importance to non-U.S. corporations that maintain U.S. branches.[14] In *Daimler*, plaintiffs brought suit in the U.S. District Court for the Northern District of California against DaimerChrysler Aktiengesellschaft (Daimler), a German parent company, seeking to recover for injuries suffered as an alleged consequence of activities undertaken by one of Daimler's Argentinean subsidiaries.[15] The lawsuit, however, could only proceed if the California district court had general jurisdiction over Daimler.[16] Jurisdiction was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler, which was incorporated in Delaware and maintained its principal place of business in New Jersey.[17] MBUSA distributed Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.[18]

The Supreme Court held that the California district courts lacked jurisdiction to hear the lawsuit.[19] Relying on its prior decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[20] the Supreme Court held that ''a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum state.' ''[21] It ruled that Daimler's own affiliations with California ''were insufficient to support the exercise of all-purpose jurisdiction over the corporation,'' and that plaintiffs failed to demonstrate that MBUSA's California contacts should be attributed to Daimler under an agency theory.[22]

The *Daimler* decision significantly narrowed the instances where non-U.S. corporations may be subject to litigation in U.S. courts based on principles of general jurisdiction. Post *Daimler*, a corporation may only be subject to general jurisdiction where it is ''at home.''[23] Thus, in perhaps a somewhat unexpected way, *Daimler* may also impact the circumstances in which a non-U.S. corporation may be subject to civil subpoenas (or other compulsory processes) seeking non-forum or non-U.S. documents based upon service of that foreign corporation's U.S. branch. Indeed, that is just what happened in *Gucci*.

Post Daimler – The Second Circuit Holds That Courts Must First Have Personal Jurisdiction On The U.S. Branch Of A Foreign Corporation In Order To Compel Production Of Information Held Abroad

The Second Circuit's decision in *Gucci America, Inc. v. Bank of China* is on point and followed the line of

[6] *Id.* at 150.
[7] See *In re Equitable Plan Co.*, 185 F. Supp. 57, 58 (S.D.N.Y. 1960).
[8] *Id.* at 58.
[9] *Id.* at 61; *The Equitable Plan Case*, 282 F.2d at 150.
[10] *The Equitable Plan Case*, 282 F.2d at 153.
[11] *Id.*
[12] *Id.* at 152.
[13] *Id.* at 152–53.
[14] 134 S. Ct. 746 (2014).
[15] *Id.* at 750-51.
[16] *Id.* at 751.
[17] *Id.*
[18] *Id.*
[19] *See id.* at 760–762.
[20] 131 S. Ct. 2846 (2011).
[21] *Id.* at 2851 (alterations in original).
[22] *Daimler*, 134 S. Ct. at 763.
[23] *See id.* at 761 (quoting *Goodyear*, 131 S. Ct. at 2851) (''Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State.' '').

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reasoning set forth in *Daimler*.[24] The Second Circuit held that a court does not have jurisdiction over a non-U.S. corporation based solely on the existence of a U.S. branch or agency of such corporation.[25] In doing so, the Second Circuit overturned long-standing New York and Second Circuit precedent previously subjecting foreign corporations with branch offices in New York to general jurisdiction in the state.

In *Gucci*, plaintiffs — Gucci and other makers of luxury goods — brought lawsuits in the U.S. District Court for the Southern District of New York against defendants for the alleged counterfeiting and sale of fake merchandise over the internet.[26] In furtherance of their claims, plaintiffs tried to freeze the defendants' assets held with the Bank of China (Bank of China, or the Bank) so that the profits of defendants' alleged counterfeiting could allegedly be recovered.[27] Plaintiffs also issued a subpoena to the Bank of China's New York branch to obtain its assistance in gathering evidence of defendants' purportedly unlawful conduct; the subpoena requested information maintained both by the Bank's New York and non-U.S. branches.[28]

The Bank of China — a non-party to the *Gucci* lawsuit — is neither incorporated nor maintains its principal place of business within the United States.[29] Only a very small portion of the Bank of China's worldwide activity takes place in New York, and the employees of its two New York branches, the Court found, are unable to search the accounts or records of its China-based offices.[30] Further, in response to plaintiffs' subpoena, the Bank of China ''informed plaintiffs that its New York City branch [did] not have possession or control over information located in any other branch or office of the Bank of China and that compliance with the subpoena would violate Chinese law.''[31] Accordingly, the Bank produced responsive documents in possession of its New York branches but refused to produce responsive documents from its branches or offices in China.[32]

In 2010, plaintiffs filed a motion to compel the Bank of China's compliance with their asset freeze injunction and subpoena.[33] In 2011, the district court denied the Bank of China's cross-motion to modify plaintiffs' asset freeze injunction and ordered the Bank to comply with the injunction and subpoena.[34] The Bank of China then made a motion to the district court to reconsider its 2011 Order; the Bank presented a letter from two regulatory agencies in China informing the district court that China's laws prohibited commercial banks from freezing accounts or turning over account records pursuant to foreign court orders.[35] The district court found, however, that the Bank of China's motion was premature, and in 2012, held the Bank in civil contempt for its failure to comply with the 2011 Order.[36] The Bank appealed.[37]

The Second Circuit — in light of *Daimler* — reversed the district court and held that it ''erred in finding that [The Bank of China] [was] subject to general jurisdiction,'' and by extension, the subpoena power of the court.[38] *Id.* at 129. The court held:

> Just like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but it is incorporated and headquartered elsewhere. Further, this is clearly not an exceptional case where the Bank's contacts are so continuous and systematic as to render [it] essentially at home in the forum. BOC has only four branch offices in the United States and only a small portion of its worldwide business is conducted in New York. Thus, BOC's activities here, as with those of the defendant in *Daimler*, plainly do not approach the required level of contact. Following Daimler, there is no basis consistent with due process for the district court to have exercised general jurisdiction over the Bank.[39]

The Second Circuit thus remanded the case to the district court to reconsider: ''(1) whether it may exercise specific jurisdiction over the Bank to order [ ] compliance [with the subpoena]; and (2) whether, assuming the necessary jurisdiction is present, such an order is consistent with principles of international comity.''[40] It also reversed the district court's order holding The Bank of China in civil contempt and imposing civil monetary penalties upon it for failing to comply with the court's subpoena.[41]

The Second Circuit's decision in *Gucci* thus effectively established the following framework for parties seeking to enforce informational subpoenas on non-U.S. corporations by serving those corporations' U.S. branches:

(1) Post-*Daimler*, courts no longer have general jurisdiction over a non-U.S. corporation or bank based solely on the existence of its U.S. based branch or agency[42]; *however,*

(2) the court, if permitted by statute, such as New York's long-arm statute under New York Civil

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[24] 768 F.3d 122 (2d Cir. 2014), *remanded to* No. 10-CV-4974 (RJS), 2015 WL 5707135 *1 (Sept. 29, 2015) (*notice of appeal filed* Dec. 1, 2015).
[25] *See generally id.*
[26] *Id.* at 125.
[27] *Id.*
[28] *Id.* at 127.
[29] *Id.* at 126.
[30] *Id.* at 126–27.
[31] *Id.* at 127 (internal citations omitted).
[32] *Id.*
[33] *Id.* Plaintiffs also served a second subpoena on the Bank of China seeking information and documents from different accounts held by the defendants with the Bank of China on February 23, 2011. *Id.*
[34] *Id.* at 127–28.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.* at 129.
[39] *Id.* at 135 (internal citations removed).
[40] *Id.*
[41] *Id.*
[42] *Id.* at 138. The Second Circuit stated:

> We express no view on whether the exercise of specific jurisdiction is appropriate in this case. Prior to *Daimler*, courts in this Circuit often asserted general jurisdiction over nonparty foreign corporations based on the presence of corporate branches, subsidiaries, or affiliates in the Circuit. [Therefore,] [i]n light of that pre-*Daimler* case law, the district court had no need to consider specific jurisdiction or to develop a record sufficient for that purpose. On remand, the district court must give the issue due consideration.
>
> *Id.*

Practice Law and Rules (CPLR) § 302, may exercise specific personal jurisdiction over non-U.S. corporations so long as the court's exercise of jurisdiction does ''not offend the traditional notions of fair play and substantial justice,''[43] and therefore, courts may still enforce the sought-after subpoena, *but only if*

(3) the court's exercise of jurisdiction to enforce compliance with the subpoena does not offend with the principles of international comity pursuant to Restatement (Third) of Foreign Relations Law § 442(1)(c), entitled ''Requests for Disclosure: Law of the United States.''[44]

The Southern District Of New York Distinguishes Gucci And Enforces A Subpoena Against A Non-U.S. Bank Based On Its Presence Of Its New York Branch And Its Purported ''Consent'' To Personal Jurisdiction

Neither *Daimler* nor *Gucci* explicitly addressed whether a non-U.S. corporation can consent to specific jurisdiction via its contacts with the forum. This can theoretically occur by agreement, such as through a contract or arbitration clause, by operation of law, such as registering to do business in that domestic U.S. location, or by affirmative acts of the corporation that are seen as invoking the benefits and protections of the forum state's legal system. This question — the ability of a non-U.S. corporation to knowingly (or unknowingly) ''consent'' to personal jurisdiction — was recently the subject of *Vera v. Republic of Cuba* in the U.S. District Court for the Southern District of New York.[45]

Plaintiffs in *Vera* were representatives of the estates of individuals allegedly tortured and killed by the Republic of Cuba and its leaders and/or agents. Prior to bringing their action in the Southern District of New York, plaintiffs obtained default judgments against Cuba from the Circuit Court of Florida.[46] Plaintiffs consolidated their actions and sought to enforce the judgments in the Southern District of New York.[47] To discover assets held by Cuba that were available to satisfy the judgments, plaintiffs sent the New York branches of Banco Bilbao Vizcaya Argentina (BBVA) and Standard Chartered Bank (SCB) subpoenas seeking information regarding the assets of Cuba and its instrumentalities; the subpoenas were of course not limited to information possessed by the banks' respective New York branches.[48]

BBVA complied with plaintiffs' subpoena requesting information from its New York branch but refused to provide similar information for its international accounts.[49] BBVA argued that the court lacked personal jurisdiction to request such information.[50] BBVA took the position that the Supreme Court's decision in *Daimler* and the Second Circuit's decision in *Gucci* overruled the prior rule of federal and state courts that general jurisdiction could be ''routinely exercised . . . over foreign corporations on the basis that those corporations were 'doing business' through a local office or branch.''[51]

The district court analyzed both *Daimler* and *Gucci*. In relevant part, it described the impact of *Daimler* as follows:

> In deciding *Daimler*, the Supreme Court held for the first time that a court cannot exercise general jurisdiction over a corporate entity in every State in which a corporation engages in a substantial, continuous, and systematic course of business. The Court observed that for a corporation that has not consented to jurisdiction in a forum, only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there, and that the paradigm forum for the exercise of general jurisdiction [over a corporation] is one in which the corporation is fairly regarded at home.[52]

The court then described the impact of *Gucci* as follows:

> Applying the Supreme Court's holding in *Daimler* — which dealt only with personal jurisdiction over parties to a lawsuit who had not consented to jurisdiction — the Court of Appeals, in *Gucci Am. Inc. v. Li*, held that a nonparty bank whose principal place of business and incorporation are located outside the United States and which had not consented to jurisdiction is not subject to general jurisdiction in a United States court simply because it maintains and operates branches or offices in the United States.[53]

The court distinguished *Daimler* and *Gucci*. It held that (1) unlike the parties in *Daimler* or *Gucci*, BBVA consented to personal jurisdiction and (2) that, in any event, *Gucci* applied only to pre but not post-judgment discovery.[54]

The court ruled that BBVA consented to New York regulatory oversight under New York Banking Law § 200 in return for permission to operate in New York.[55] Accordingly, it found that BBVA was subject to personal jurisdiction and required it to comply with the information subpoena.[56] The court stated:

> The Second Circuit recognized that the privileges and benefits associated with a foreign bank operating a branch in New York give rise to commensurate, reciprocal obligations. Foreign corporations which do business in New York are bound by the laws off

[43] *Id.* (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[44] *Id.* (citing Restatement (Third) of Foreign Relations Law § 442(1)(c), J.A. 776) (stating that courts in the Second Circuit ''before ordering a party to produce documents in contravention of the laws of a foreign country, already conduct a comity analysis pursuant to § 442) (internal citations omitted).

[45] 91 F. Supp.3d 561 (S.D.N.Y. 2015), *appeal dismissed*, 802 F.3d 242 (2d Cir. 2015).

[46] *Id.* at 563.

[47] *Id.*

[48] *Id.* at 564.

[49] *Id.* at 565.

[50] *Id.*

[51] *Id.* at 566 (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014)).

[52] *Id.* at 567 (internal citations omitted) (alterations in original).

[53] *Id.* at 568 (citing *Gucci America Inc. v. Weixing LI*, 768 F.3d 122, 135 (2d Cir. 2014), *remanded to* No. 10-CV-4974 (RJS), 2015 WL 5707135 *1 (Sept. 29, 2015) (*notice of appeal filed* Dec. 1, 2015)).

[54] *See id.* at 570–73.

[55] *See id.* at 571.

[56] *Id.*

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both the state of New York and the United States, and are bound by the same judicial constraints as domestic corporations.[57]

The court held that, ''[c]ontrary 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,'' and that there is ''no reason to give advantage to a foreign bank with a branch in New York, over a domestic bank.''[58]

The court further held — even if BBVA's registration with the Department of Financial Services did not amount to a consent of jurisdiction — that BBVA's reliance on *Gucci* was still misplaced.[59] It reasoned that the appellant (the Bank of China) in *Gucci* was arguing against an asset-freeze injunction and subpoena during the course of prejudgment discovery, whereas in *Vera*, BBVA was arguing against an information subpoena issued during the course of post-judgment discovery and execution proceedings.[60] The court held that the Second Circuit's decision in *Gucci* contained no indication that the court intended to depart from the norm of allowing broad post-judgment discovery.[61]

BBVA appealed the district court's order to the Second Circuit on April 13, 2015. However, the Second Circuit dismissed BBVA's appeal for lack of jurisdiction on September 8, 2015.[62] It held that the district court's order for BBVA to comply with the informational subpoena was not a final appealable decision of a district court under 28 U.S.C. § 1291, and therefore, was not ripe for appeal.[63] The Second Circuit stated that the only way for BBVA to obtain an immediate appellate review of the district court's order would be for BBVA to ''defy the district court's enforcement order, be held in contempt, and then appeal the contempt order, which is regarded as final under [28 U.S.C.] § 1291.''[64]

The dismissal of BBVA's appeal by the Second Circuit left the exact limits of the *Vera* decision somewhat unknown. However, the recent decision on remand to the district court in *Gucci* appears to at least come close to supporting *Vera's* conclusion that a non-U.S. corporation may be subject to informational subpoenas served on its U.S. based branch even in the context of pre-judgment discovery, despite the Supreme Court's recent decision in *Daimler*.

Gucci Court on Remand Finds Personal Jurisdiction and Orders the Enforcement of Subpoenas Against The Bank of China

On remand, the Southern District of New York held that it had specific personal jurisdiction over the Bank of China pursuant to New York's long-arm statute (CPLR § 302), that the court's exercise of jurisdiction comported with the *International Shoe*[65] standards for due process, and that a comity analysis ''strongly weighed'' in favor of compelling compliance with the informational subpoena against the Bank.[66] The decision seems to support at least the philosophy of *Vera* — that non-U.S. corporations operating branches within the U.S. should not receive treatment different from domestic corporations where such non-U.S. corporations are receiving the same regulatory benefits from their U.S. based operations as U.S. corporations.[67]

A. *The Gucci Reconsideration* The two issues for reconsideration on remand to the district court in *Gucci* were ''(1) whether it may exercise specific jurisdiction over the Bank to order [ ] compliance [with the subpoena]; and (2) whether, assuming the necessary jurisdiction is present, such an order is consistent with principles of international comity.''[68] ''Federal courts must satisfy three primary requirements to lawfully exercise personal jurisdiction over an entity: (1) the entity must have been properly served; (2) the court must have a statutory basis for exercising personal jurisdiction; and (3) the exercise of personal jurisdiction must comport with constitutional due process.''[69] In *Gucci*, it was undisputed that the Bank's New York branch was properly served, and therefore, the only issues for reconsideration on remand were (A) factors 2 and 3 above, and (B) if the court had specific personal jurisdiction, whether it could exercise that jurisdiction over the Bank of China to order compliance with the *Gucci* subpoenas without offending the principles of international comity.

i. *Specific Personal Jurisdiction over the Bank of China* Federal statutes or laws of the state in which a court is located can provide the statutory basis for personal jurisdiction.[70] In *Gucci*, the court held that New York's long-arm statute — CPLR § 302 — provided the district court with the requisite statutory basis for personal jurisdiction.[71] To exercise personal jurisdiction, the court had to find that (i) the party transacts business in New York and (ii) the alleged cause of action arises from that transaction of business.[72]

The New York Court of Appeals has already noted that the first prong of CPLR § 302 ''may be complicated by the nature of inter-bank activity, especially given the widespread use of correspondent accounts nominally in

[57] *Id.*
[58] *Id.*
[59] *See id.*
[60] *Id.*
[61] *Id.*
[62] *Vera v. Republic of Cuba*, 802 F.3d 242, 248–49 (2d Cir. 2015).
[63] *Id.* at 248–49.
[64] *Id.* at 246 (citing *In re Air Crash at Belle Harbor*, 490 F.3d 99, 104 (2d Cir. 2007)).
[65] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[66] *Gucci America Inc. v. Weixing LI*, Case No. 10-CV-4974 (RJS), 2015 WL 5707135 *1 (Sept. 29, 2015) (*notice of appeal filed* Dec. 1, 2015) (*hereinafter*, ''*Gucci Remand*'').
[67] *See Vera*, 91 F. Supp.3d at 571 (holding that ''[c]ontrary to [defendant'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,'' and that there is ''no reason to give advantage to a foreign bank with a branch in New York, over a domestic bank'').
[68] *Gucci America Inc. v. Weixing LI*, 768 F.3d 122, 135 (2d Cir. 2014), *remanded to* No. 10-CV-4974 (RJS), 2015 WL 5707135 *1 (Sept. 29, 2015) (*notice of appeal filed* Dec. 1, 2015).
[69] *Gucci Remand*, 2015 WL 5707135 at *3.
[70] *Id.* at *3 (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59–60 (2d Cir. 2012)).
[71] *See Gucci Remand*, 2015 WL 5707135 at *3; N.Y. C.P.L.R. § 302(a)(1).
[72] *See Gucci Remand*, 2015 WL 5707135 at *3; N.Y. C.P.L.R. § 302(a)(1).

New York to facilitate the flow of money worldwide, often for transactions that otherwise have no other connection to New York, or indeed the United States.''[73] However, ''[n]otwithstanding this potential complication, the New York Court of Appeals has held that 'complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client' are sufficient to 'show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States.' ''[74] Accordingly, because the Bank of China opened up an affiliated New York bank account with J.P. Morgan Chase (''Chase'') and processed repeated transactions from that New York account to transfer the *Gucci* defendant's funds to the Bank's Chinese branches, this first prong of § 302 was deemed satisfied.

The second prong of CPLR § 302 requires that the alleged cause of action arise from the opposing party's business transaction in the forum.[75] To satisfy this prong, ''the New York Court of Appeals requires that 'in light of all the circumstances, there must be an articulable nexus or substantial relationship between the business transaction and the claim asserted.' ''[76] ''Considering this analysis in the subpoena context, the Second Circuit in [*Gucci*] endorsed a focus on the connection between the nonparty's contacts with the forum and the discovery order at issue.''[77]

Applying this standard, the district court held that there was a ''strong relationship'' between the Bank's conduct and the *Gucci* subpoena requests.[78] The *Gucci* requests specifically alleged that the *Gucci* defendants used the Bank of China's correspondent New York account at Chase to effectuate wire transfers between the U.S. and China, which was a crucial component of their counterfeiting operation.[79] Accordingly, the court ruled that the Bank of China's conduct was ''substantial, deliberate, and recurring.''[80] The court reasoned that the Bank opened the correspondent account at Chase in New York to facilitate transfers directly from Chase customers to Bank of China customers, and marketed its two New York branches as ''the princip[al] U.S. dollar clearing channel of [BOC] worldwide.''[81]

Having found that the Bank of China purposefully availed itself of the forum under § 302, and that the subpoenas were ''substantially related'' to the Bank's conduct in New York, the court then analyzed ''whether [the court's] exercise of personal jurisdiction would comport with traditional notions of fair play and substantial justice.''[82] It analyzed five factors:

> (1) the burden that the exercise of jurisdiction will impose on the [entity], (2) the interests of the forum state in adjudicating the case, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and (5) the share interest of the state in furthering substantive social policies.[83]

Respectively, the court ruled that (1) Bank of China's burden litigating the case in New York was minimal as it had litigated the case there for five years, and also initiated multiple other lawsuits on its own behalf in the Southern District of New York; (2) New York as the forum state had a ''manifest interest'' in hearing the case to provide an ''effective means of redress for its residents''; (3) the *Gucci* plaintiffs had a ''strong interest in [Bank of China] complying with the 2010 and 2011 Subpoenas'' because the information sought was ''likely to provide the most fruitful avenue'' for discovering additional potential defendants and the revenue generated by the defendants' counterfeiting operations; (4) the district court's retention of the case would provide the most efficient resolution to the controversy since it was ''already intimately familiar with the parties, facts, and legal issues''; and (5) that ''Gucci's interest in compelling [the Bank of China] to comply with the 2010 and 2011 Subpoenas and the United States' interest in enforcing the Lanham Act clearly outweigh[ed] [the Bank's] interest in resisting compliance and China's interest in its bank secrecy laws.''[84] Accordingly, it held that the court's exercise of specific personal jurisdiction was proper.[85]

ii. *International Comity* The second issue for reconsideration on remand was whether — notwithstanding the proper exercise of personal jurisdiction — the court's enforcement of compliance with the *Gucci* subpoenas would offend the principles of comity under Section 442 of the Restatement (Third) of the Foreign Relations Law. The court's comity analysis considered seven factors; five of which were factors enunciated in Section 442(1)(c):

> (i) the importance to the investigation or litigation of the documents or other information requested; (ii) the degree of specificity of the request; (iii) whether the information originated in the United states; (iv) the availability of alternative means of securing the information; and (v) the extent to which noncompliance with the request would undermind important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[86]

The additional two factors considered by the court were:

> (vi) ''the hardship of compliance on the party or witness from whom discovery is ought''; and (vii)

[73] *Gucci Remand*, 2015 WL 5707135 at *3 (quoting *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL,* 20 N.Y.3d 327, 338, 960 N.Y.S.2d 695 (2012)).

[74] *Id.*

[75] *Id.*; N.Y. C.P.L.R. § 302(a).

[76] *Gucci Remand*, 2015 WL 5707135 at *4 (quoting *Licci*, 20 N.Y.3d at 338, 960 N.Y.S.2d 695).

[77] *Id.* (internal citations omitted).

[78] *Id.* at *5.

[79] *See id.* at *4–5 (''Gucci's 2010 and 2011 Subpoenas seek information about [the transfers between the New York Chase account and China], as well as Defendants' relationship with [Bank of China]. Clearly, there is more than 'an articulable nexus' between [Bank of China's] New York business activity and Gucci's discovery request.'').

[80] *Id.* at *4.

[81] *See id.* at *4.

[82] *Id.* at *9.

[83] *Id.* at *9 (quoting *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 129 (2d Cir. 2002)) (internal citations omitted).

[84] *Id.* at *11.

[85] *Id.* at *11, *15.

[86] *Id.* at *12.

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''the good faith of the party resisting discovery.''[87]

The court held that ''a balancing of the factors strongly weigh[ed] in favor of granting Gucci's motion to compel.''[88] It ruled that the Bank of China failed to: (1) demonstrate ''an actual likelihood that compliance with the Subpoena would result in criminal or civil liability in China,'' (2) put forward credible, nonspeculative evidence that requests made through the Hague Convention represented[ed] a viable alternative method of obtaining discovery,'' (3) counter or dismiss ''the clear and obvious harm caused by counterfeiters to mark holders such as [Gucci]; or (4) counter or dismiss ''the fact that such counterfeiters [ ] deliberately utilized institutions such as [the Bank] to thwart Congress and the reach of the Lanham Act.''[89] It also found that ''while China has bank secrecy laws that prevent disclosure of an individual's account information without consent, such protection can be waived by several different public bodies,'' and therefore, ''China's bank secrecy laws merely confer an individual privilege on customers rather than reflect a national policy entitled to substantial deference'' that ''are rigidly enforced or a matter of strong state policy that trump the United States' interest in enforcing the Lanham Act.''[90] Thus, the court held that ''it ha[d] specific personal jurisdiction over the Bank of China with respect to the 2010 and 2011 Subpoenas and that exercising such jurisdiction comport[ed] with due process and principles of comity.''[91]

B.*Follow-On Contempt and Sanctions to Bank of China*

On November 30, 2015, the district court, having earlier ruled that Bank of China was required to comply with the Subpoenas, considered whether Bank of China's failure to comply constituted contempt of court warranting sanctions.[92] The court held that both contempt and sanctions were appropriate and ordered Bank of China to pay a contempt fine of $50,000 per day for ''each day of subsequent non-compliance,'' plus payment of plaintiffs' attorneys fees.[93] The court rejected several of Bank of China's arguments opposing contempt. It found that Bank of China's claim that it attempted to comply with the court's order with ''reasonable diligence'' by virtue of its ''intention to pursue an appeal'' should be rejected.[94] The court further concluded that Bank of China ''showed no intention of complying with the court's orders'' — indeed the court found ''willful non-compliance'' — so it found that contempt was an appropriate remedy.[95] Finally, in setting a fine of $50,000 per day, the court focused on (i) the importance of enforcing Lanham Act claims, (ii) the fact that Bank of China ''benefits from banking activity in the United States,'' and (iii) Bank of China's financial wherewithal to pay the fine.[96]

The Bank of China noticed an appeal of the district court's holdings in its prior orders on December 1, 2015.[97] However, the Bank withdrew its appeal on February 16, 2016, leaving open some key questions addressed below.[98]

Conclusion

There is no question that this trio of *Daimler, Gucci* and *Vera* have significantly altered the landscape with respect to enforcement of U.S. subpoenas on branch offices of non-U.S. corporations.

Following *Daimler*, at least at one level, it will now be somewhat more difficult to obtain jurisdiction — and thus discovery — from branch offices whether for local documents or those located in another country.

It also seems fairly clear that after *Gucci*, at least under New York's long-arm statute, it is likely that a branch operating in New York will be found to have ''transacted business'' in New York, which will also satisfy the Constitutional due process standard of ''minimum contacts'' and reasonableness.

In our analysis, one open question that remains is the extent to which claims in these cases arise out of the transaction of business, as required by New York's long-arm statute. The *Gucci* court focused on the allegation that the wire transfers of U.S. dollars from the sale of alleged infringing products supposedly through the Bank of China and its correspondent account at Chase created a close enough ''nexus'' between the Bank's New York contacts and the underlying claims in the case to warrant a finding of specific jurisdiction.

But that is not at all clear to us. The Lanham Act claim relates to the improper copying and sale of a protected product. The subpoenas in *Gucci* did not seek that sort of information at all. Rather, they sought only information concerning the proceeds of the sale presumably in order to attempt to recover those funds. Is that enough of a nexus under New York law? This is an issue that will surely be tested.

Another area of uncertainty concerns the district court's comity analysis in *Gucci*. Short shrift was seemingly given to whether the Hague Convention was a more appropriate route for discovery. Further, while there was a fair amount of discussion on whether Chinese secrecy laws prevented disclosure of the requested information, this will surely be the focus of future cases. And, even if there is a question under Chinese law regarding secrecy, there certainly are many other countries (*e.g. France*) with strong bank secrecy laws which could well favor quashing such subpoenas.

We are also troubled by the *Vera* court's ''consent'' analysis. It is not clear to us that a mere regulatory filing in New York should constitute consent to jurisdiction for all purposes, including requiring a foreign bank, which has filed a registration in New York, to thereby consent to turn over documents and perhaps other discovery located in its home office abroad. This, again, would seem to be ripe for appellate review if and when *Vera* is appealed.[99]

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[87] *Id.*
[88] *Id.*
[89] *Id.* at *12.
[90] *See id.* at *14–15.
[91] *Id.* at *15.
[92] *Gucci America Inc. v. Weixing LI*, No. 10-CV-4974 (RJS), slip op. (S.D.N.Y. Nov. 30, 2015).
[93] *Id.* at 1.
[94] *Id.* at 3–4.
[95] *Id.* at 4, 9.
[96] *Id.* at 6–8.
[97] *Gucci America Inc. v. Weixing LI*, Case No. 10-CV-4974 (RJS), *Notice of Appeal* (Dec. 1, 2015).
[98] Order Granting the Stipulation of the Bank of China Withdrawing its Appeal, *Gucci America Inc. v. Weixing LI*, No. 10-CV-4974 (RJS) (Feb. 16, 2016).
[99] We are also unsure of the distinction that *Vera* made between pre and post judgment discovery.

Finally, the contempt and sanctions holding in *Gucci* seem overzealous. These are very difficult jurisdictional issues being considered in a legal environment in which the rules are being re-written. So, appellate consideration is inevitable. There has already been one reversal and remand in *Gucci* — albeit because the law changed post *Daimler* — but further review of the remand findings in *Gucci* may be likely. Under such circumstances, contempt and sanctions seem harsh.

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