

New York Court of Appeals Answers Questions on When Jurisdiction Can Be Established Based on New York Correspondent Accounts

The New York Court of Appeals has issued an opinion that could have significant implications for non-US banks that have limited operations in the United States. In *Licci v. Lebanese Canadian Bank, SAL*, the Court of Appeals confirmed that maintaining a correspondent banking account will not support the exercise of jurisdiction over a non-US bank in matters unrelated to the non-US bank's use of the correspondent bank account, but further held that correspondent banking transactions could establish New York jurisdiction over banks in cases with a close nexus to those transactions.

In the *Licci* case, jurisdiction was proper over the defendant because “[the defendant] did not route a transfer for a terrorist group once or twice by mistake. Rather, plaintiffs allege that [the defendant] deliberately used a New York account again and again to effect its support of [the financial arm of Hezbollah] and allegedly shared terrorist goals.” The decision comes in response to questions certified by the Second Circuit.¹

The *Licci* plaintiffs alleged that the defendant banks facilitated financial transactions by Hizballah, and that Hizballah is responsible for their injuries in rocket attacks against Israel. One defendant, Lebanese Canadian Bank, SAL (LCB), is a now-defunct Lebanese bank, which had no branches, offices or employees in the United States. LCB's only alleged point of contact with

the United States was a correspondent account in New York, maintained at co-defendant American Express Bank (Amex).

Plaintiffs brought claims in the Southern District of New York against LCB under the Anti-Terrorism Act (ATA), both as a primary violator and for aiding and abetting; under the Alien Tort Statute (ATS), for aiding and abetting genocide, war crimes and crimes against humanity in violation of international law; and under Israeli law, for negligence and alleged breaches of statutory duty.

The plaintiffs asserted specific jurisdiction² under CPLR 302(a)(1), which applies when a defendant transacts business in the state of New York and the cause of action arises from that transaction.

On appeal from the district court order granting LCB's motion to dismiss, the Second Circuit certified two questions to the New York Court of Appeals relating to each prong of CPLR 302(a)(1):

1. Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York and use of that account to effect “dozens” of wire transfers on behalf of a foreign client, constitute a transaction of business in New York within the meaning of CPLR § 302(a)(1); and

2. Do the plaintiffs’ claims “arise from” LCB’s transaction of business in New York within the meaning of CPLR § 302(a)(1)?

The Court of Appeals held that where a complaint alleges a foreign bank’s repeated use of a correspondent account in New York on behalf of a client, the complaint alleges “purposeful availment of New York’s dependable and transparent banking system.” Thus, according to the Court of Appeals, the *Licci* complaint alleged sufficiently purposeful activity to constitute a “transaction of business” in New York. In so holding, the Court of Appeals distinguished *Tamam v. Fransabank SAL*, in which the US District Court for the Southern District of New York dismissed similar terrorism-related ATS claims against several Lebanese banks for lack of personal jurisdiction. The Court of Appeals explained that, in *Tamam*, “the Lebanese banks did not transact business in New York because the plaintiffs (unlike plaintiffs here) did not allege actual transfers from Hizballah front group accounts in Lebanon through correspondent banks in New York.”

The Court of Appeals then considered whether plaintiffs’ claims “arise from” LCB’s transaction of business in the state of New York. The court held that the inquiry is “relatively permissive” and that all that is required is that the claims at issue are “in some way arguably connected to the transaction [in New York].” The court—noting that it must accept the allegations in the complaint as true, including that LCB engaged in terrorist financing by using its account in New York to transfer the funds needed to support the terrorist activity—held that the pleadings established the “articulable nexus” needed to survive a motion to dismiss on the basis of personal jurisdiction.

In the wake of *Licci*, plaintiffs likely will try to exploit the decision to subject non-US banks to the jurisdiction of New York courts in cases that have little connection to New York. We

anticipate seeing allegations framed to connect defendants’ use of New York accounts to plaintiffs’ injuries in non-US jurisdictions. We also expect to see more aggressive requests for discovery into the use of correspondent accounts by non-US institutions. Plaintiffs may find it relatively simple to make conclusory allegations that a defendant bank has a correspondent account that was used, somehow, in connection with the events at issue; it remains to be seen how much specificity courts will require before permitting discovery into those accounts.

Defendants, meanwhile, can point out that the New York Court of Appeals held, in *Licci*, that the jurisdictional determination is “nuanced” and fact specific, which suggests that a defendant bank’s maintenance of a New York correspondent account does not *always*, or *automatically*, confer jurisdiction.

The *Licci* decision left a number of questions open.

The precise meaning of “repeated” use of an account is one such open question: how many transactions are necessary to raise the inference that the use of a New York correspondent account was purposeful? The implication that banks may route dollar transactions through New York “once or twice by mistake” seems at odds with usual bank practice, and it is not clear whether repetition is necessary if intent can be shown more directly.

Another question arises from the court’s suggestion that the repeated use of a New York account on behalf of *the same customer* indicates that routing transactions through New York posed some particular intended benefit. It is unclear how the courts will treat a repeated course of conduct on behalf of different bank customers. The court also seemed to suggest that receiving transfers from New York might be less purposeful than sending them through New York.

A final issue is whether the holding is limited to claims such as terror financing, where the wire transfer itself is the alleged tort, or whether it extends to commercial cases in which the transactions are more ancillary to the alleged wrong. As the Court of Appeals noted, in *Licci* itself, “the alleged breaches occurred *when LCB used the New York account.*”

For more information about the Licci decision, or any other matter raised in this Legal Update, please contact any of the following lawyers.

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Endnotes

- 1 For more information, see our April 4, 2012 Legal Update at <http://www.mayerbrown.com/New-York-High-Court-May-Consider-Whether-Use-of-a-New-York-Correspondent-Account-Can-Create-Personal-Jurisdiction-Over-Non-US-Bank-04-04-2012/>.
- 2 If LCB had a branch or another office in New York, then LCB could be sued in New York for any type of claim, even a claim with no relationship to New York, based on LCB's presence in New York (this is known as “general jurisdiction”). But LCB had no New York branch or office, and New York courts have long held that the maintenance of a correspondent account is not the equivalent of maintaining a branch or office. Accordingly, LCB could not be subject to “general jurisdiction” in New York.

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