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Legal Update
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US Supreme Court Dramatically Narrows Grounds for General Personal Jurisdiction

In January 2014, the US Supreme Court decided *Daimler AG v. Bauman*, 571 U.S. ___, 134 S. Ct. 746 (2014), a decision that could be of substantial importance to any non-US bank or non-US corporation that has US branches or offices in the United States, as well as any US bank or corporation that has branches or offices outside of its principal place of business or place of incorporation (its "home state"). Under *Daimler*, a company typically will be subject to general personal jurisdiction *only* in the forum where it is incorporated or where it has its principal place of business. In other words, *Daimler* adopts an approach similar to that of the European Union, where "a corporation generally may be sued in the nation in which it is 'domiciled,' a term defined to refer only to location of the corporation's 'statutory seat,' 'central administration,' or 'principal place of business,'" whereas there is no EU jurisdiction to sue a branch outside of the corporation's domicile unless the "dispute arise[s] out of the operations of [the] branch."[1] *Daimler* thus may provide significant relief not only to non-US banks with US branches that, pre-*Daimler*, would have been subject US jurisdiction in a wide variety of contexts, but also to other non-US and even US corporations operating outside of their home states.

Personal Jurisdiction

Pursuant to the US Constitution, a court may assert personal jurisdiction against an out-of-forum defendant in one of two circumstances: where a defendant is "essentially at home in the forum state" (i.e., "general jurisdiction") or where the lawsuit "arises out of or relates to the defendant's contacts with the forum" (i.e., "specific jurisdiction"). Historically, the general jurisdiction standard was satisfied whenever a non-US bank (or other non-US corporation or out-of-state US corporation) maintained a branch or office in the forum where it was named a defendant in a lawsuit. *Daimler*, however, significantly restricts the circumstances that provide a basis for the exercise of general jurisdiction.

The *Daimler* Decision

The plaintiffs brought suit in California against Daimler, a German parent company, seeking to recover for injury suffered as an alleged consequence of activities undertaken by a Daimler subsidiary in Argentina during that country's "Dirty War." The suit could go forward only if general jurisdiction over Daimler existed in California. Because "Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction," the question was whether the California contacts of Daimler's US subsidiary, MBUSA, could be attributed to the parent and, if so, whether those contacts were sufficient to establish general jurisdiction. The Ninth Circuit Court of Appeals held the assertion of jurisdiction over Daimler proper, concluding

that MBUSA was subject to general jurisdiction in California and that MBUSA's California contacts could be attributed to Daimler on an agency theory because MBUSA "'performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.'"[2]

In its review of the Ninth Circuit's decision, although the Supreme Court left open the question whether an agency theory ever could support general jurisdiction, it flatly rejected "[t]he Ninth Circuit's agency theory [that] … appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the 'sprawling view of general jurisdiction' we rejected in *Goodyear* [*Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, (2011)]."

The Court then went on to discuss a broader question. "Even if we were to assume that MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."[3] In reaching this conclusion, the Court made several observations.

First, the Court forcefully reiterated its recent holding in *Goodyear* that general jurisdiction against a foreign corporation is permissible "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.'"[4] The Court continued: "With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] … bases for general jurisdiction.' … Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[5]

Although the Court purported not to "foreclose the possibility that in an exceptional case … a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial or of such a nature as to render the corporation at home in that state,"[6] the Court plainly imagined that only the most extraordinary case could fall within this exception. Indeed, the only example of such a case offered by the Court was one in which a Philippine corporation transferred its headquarters, files, and president's office to the forum state during wartime[7]—that is, a circumstance in which the forum had become the "corporation's principal, if temporary, place of business."[8]

Second, the Court explained that the fact that an entity has continuous and very extensive contacts with the forum is not enough, by itself, to establish general jurisdiction. Daimler, through MBUSA, did have such contacts with California: MBUSA "is the largest supplier of luxury vehicles to the California market;" "MBUSA's California sales account for 2.4% of Daimler's worldwide sales;" and MBUSA had "multiple" permanent facilities (and thus, presumably, numerous employees) in California.[9] But even imputing these contacts to Daimler, the Court characterized them as "slim."[10] These contacts (even if attributed to Daimler) came nowhere near to suggesting that California was Daimler's principal place of business. As Justice Sotomayor notes in her dissent, under this approach, Daimler can conduct a very significant volume of continuous and systematic business in California, but so long as its California business falls short of transforming California into Daimler's *principal* place of business, then *Daimler* nevertheless will not be subject to general jurisdiction there.

Third, the Court emphasized that its reluctance to endorse expansive theories of jurisdiction applies with special force when the corporate parent is a foreign entity. In such circumstances, the jurisdictional inquiry must take into account

"risks to international comity."[11] Explaining that foreign governments object to the assertion of jurisdiction over their nationals by US courts that take an "uninhibited approach to personal jurisdiction," the Court concluded that "[c]onsiderations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."[12] The Court also took note of various *amicus* briefs (e.g., the Federation of German Industries, the Chamber of Commerce of the United States of America) that "homed in on the insufficiency of Daimler's California contacts for general jurisdiction purposes."[13] This rationale means that, in a case against a non-US entity, there an argument for placing a thumb on the "no jurisdiction" side of the scale.

Fourth, the Court made the case that reining in general jurisdiction is sensible given that "specific jurisdiction has become the centerpiece of modern jurisdictional theory,"[14] while "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." General jurisdiction, according to one scholar the Court cited favorably, is merely "an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it."[15]

Impact of the *Daimler* Decision

Daimler could have important consequences for for any corporation with operations in a US locale that is not its principal place of business or place of incorporation. To illustrate this, we discuss below how *Daimler* would impact non-US banks with branches in New York. Historically, the presence of a branch in New York was viewed as sufficient to subject the parent bank to jurisdiction in New York, even if the suit related to the defendant's conduct elsewhere in the world.[16] Now, however, a branch office in New York (or anywhere else in the United States) should not provide a proper basis for *general* jurisdiction. This could have several important implications.

First, suits by plaintiffs' lawyers relying on general jurisdiction to require the US judiciary to address entirely non-US conduct—e.g., Argentina's "Dirty War," South African apartheid, Middle Eastern terrorism—should be untenable. (Of course, a plaintiff may bring suit for any conduct that relates *specifically* to that branch office.)

Second, *Daimler* could have particular significance for the ability of judgment creditors' rights to require a non-US bank to turn over assets belonging to a non-US depositor/ judgment debtor—an area where the New York Court of Appeals decision in *Koehler v. Bank of Bermuda Ltd.*, 911 N.E.2d 825 (N.Y. 2009), has created significant confusion and risk to non-US banks. *Koehler* held that "a court sitting in New York may order a bank *over which it has personal jurisdiction* to deliver stock certificates owned by a judgment debtor (or cash equal to their value) to a judgment creditor, pursuant to CPLR article 52, when those stock certificates are located outside New York."[17] (emphasis supplied). Following *Koehler*, a number of New York courts have held that they can require the restraint of assets deposited into a non-US branch or non-US head office of bank that is subject to the jurisdiction of New York court.

Because *Daimler* significantly limits the ability of a judgment creditor to establish jurisdiction over non-US banks, this could significantly ameliorate the *Koehler* rule for banks other than those with a New York state charter or their principal place of business in New York. Traditionally, in the turn-over order context, courts exercise *in rem* jurisdiction: that is, jurisdiction over assets physically located in the court's territorial jurisdiction. *Koehler*, however, found that, if a New York court has general *in personam* jurisdiction over a bank, it may order the turn-over of any assets the bank holds, no matter where in the world those assets are located. Because *Daimler* substantially restricts

the circumstances in which a New York court may exercise general personal jurisdiction over a non-New York bank, *Daimler* should limit the expansive use of *Koehler* to assert claims against assets a bank holds outside New York.

Daimler may also reduce the circumstances in which non-New York banks need to rely upon the "separate entity rule." Historically, for purposes of attachment and garnishment, each branch of a bank was treated as "a separate entity, in no way concerned with accounts maintained by depositors in other braches or at the home office," such that "a warrant of attachment served upon a branch bank does not reach assets held for, or accounts maintained by, the defendant in other branches or in the home office."[18] Although *Koehler* did not squarely address this issue, some courts have held that it implicitly rejected the separate entity rule, meaning that an attachment served upon a New York bank branch could reach assets deposited by a bank customer with the same bank's New York and non-US branches.[19] Twice in the last year, the US Court of Appeals for the Second Circuit has certified this issue to the New York State Court of Appeals.[20] *Daimler*, however, may reduce the importance of the rule for non-New York banks: if New York may exercise jurisdiction over a non-New York bank only as to matters arising out of the bank's New York activity, then assets in accounts in non-New York branches often will be beyond the courts' jurisdiction.

Third, *Daimler* could curtail the circumstances in which banks may be subject to civil or criminal subpoenas (or other compulsory process, such as an IRS John Doe summons) seeking non- forum or non-US documents based upon service on a local US branch. "[A federal court's] power to issue a subpoena is determined by its jurisdiction."[21] Accordingly, a court should quash a subpoena if the court lacks specific and general jurisdiction over the third-party witness served.[22]

According to Justice Sotomayor's dissent, *Daimler* has the potential "to produce deep injustice." Among other things, she argues that *Daimler* "unduly curtails the States' sovereign authority to adjudicate disputes against corporate defendants who have engaged in continuous and substantial business operations within their boundaries," may "treat small businesses unfairly" because "[w]hereas a larger company will often be immunized from general jurisdiction in a State on account of its extensive contacts outside the forum, a small business will not be," and "will … shift the risk of loss from multinational corporations to the individuals harmed by their actions," because such individuals often will not have a US forum in which to sue a non-US corporations.

Potential Resistance to the *Daimler* Rule

Given the potential breadth of the *Daimler* decision, especially its potential to limit government investigations, its potential to deprive (in some cases sympathetic) plaintiffs of a US forum, and the other potential problems flagged in Justice Sotomayor's dissent, there may be some judicial and legislative resistance to the *Daimler* rule.

For example, plaintiffs' lawyers and prosecutors may attempt to blunt *Daimler*'s impact in the subpoena context by arguing that the decision should be limited to instances in which a court is exercising personal jurisdiction over a defendant against which a claim is being asserted, i.e., the factual situation at issue in *Daimler*. The argument would be *Daimler* acknowledges that jurisdiction turns on "the relationship among the defendant, the forum, and the litigation," and that relationship is different in the subpoena context because "a person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony."[23] This argument, however, does not address *Daimler*'s central rationale, which is

that jurisdiction should be based on whether a corporation is "at home" in the forum. Rather, it focuses on the type of fairness analysis that Justice Sotomayor, in dissenting, would have treated as dispositive, but that the Court declined to embrace.

Similarly, plaintiffs' lawyers could argue that *Daimler* should not apply to judgment enforcement orders, such as garnishment (or turn-over), arguing that the Due Process concerns are less compelling in the garnishment context because the garnishee's own assets are not in jeopardy, only those of the judgment debtor. But that argument contravenes the Supreme Court's teaching that arguments about burden cannot excuse a lack of minimum contacts: "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him."[24] This argument moreover rests on a flawed premise, because a non-US garnishee in fact may be subject to double liability if the garnishee's home country does not recognize the US garnishment order. Indeed, one could argue that it is precisely this type of risk that *Daimler* aims to avoid in taking an approach that respects comity and adopts a bright line rule relinquishing general jurisdiction over branches.

Plaintiffs' lawyers also may argue that a case in which jurisdiction rests on the presence of a bank's local branch qualifies as the type of "exceptional case" for which the Court acknowledged that "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial or of such a nature as to render the corporation at home in that state." Such an argument might focus on the heightened regulation of in-state bank branches and their importance to the local economy. But it is hard to square such an example with the sole example the Supreme Court provided of exceptional circumstances—*Perkins*, where a corporation had temporarily moved its principal place of business. Moreover, it is hard to reconcile this argument with the Court's view that, even if MBUSA's substantial contacts were imputed to Daimler, there still would be no general jurisdiction over Daimler. Moreover, when stressing the need to show respect, as a matter of comity, for the EU approach to jurisdiction, the Court emphasized that the EU does permits the exercise of only specific jurisdiction over an entity's branches.[25]

Alternatively, state legislatures (or even regulators, depending upon the scope of their authority) may require that non-forum and non-US banks consent to general jurisdiction in a local forum as a condition of doing business in the state. Currently, such a requirement does not appear to be the norm. For example, to obtain a banking license in New York, "[a] foreign bank must appoint the superintendent [of financial services] … as agent for service of process," but only "in connection with any action or proceeding against the foreign banking corporation relating to any cause of action which may arise out of a transaction with its representative office."[26]

To obtain a state banking license in California, a bank must appoint the banking commissioner as its agent "to receive service of any lawful process in any noncriminal judicial or administrative proceeding against the bank …."[27] California courts, however, "have held designation of an agent for service of process and qualification to do business in California alone are insufficient to permit general jurisdiction."[28] These types of provisions, however, might be expanded to require consent to general jurisdiction where *Daimler* would otherwise preclude it.

Given the high stakes, banks should expect that plaintiffs' lawyers and others will aggressively seek to limit the application of *Daimler* in the judiciary and the legislature. Banks and other non-US companies must meet those efforts with equal zeal.

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Endnotes

1 134 S. Ct. at 763.

2 *Id.* at 759.

3 134 S. Ct. at 760.

4 134 S. Ct. at 761 (quoting *Goodyear*, 131 S. Ct. at 2851).

5 *Id.* at 760 (citations omitted).

6 134 S. Ct. at 761 n.19.

7 *Id.* (citing *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952).

8 *Id.* at 756.

9 134 S. Ct. at 764.

10 *Id.* at 760.

11 134 S. Ct. at 763.

12 *Id.* (citation omitted)

13 *Id.* at 760 n. 16.

14 *Id.* at 749 (citing *Goodyear*, 131 S. Ct. at 2854).

15 *Id.* at 758 n.9 (citing Blorchers, The Problem with Personal Jurisdiction, 2001 U. Chi. Legal Forum 119, 139).

16 *See, e.g., Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 239 (S.D.N.Y. 2011) ("Bank of India is subject to general personal jurisdiction in New York, based on its continuous operation of a branch here.").

17 911 N.E.2d at 827.

18 *Cronan v. Schilling*, 100 N.Y.S.2d 474, 476 (Sup. Ct. 1950), *aff'd*, 126 N.Y.S.2d 192 (1st Dep't 1953).

19 *See, e.g., JW Oilfield Equip., LLC v. Commerzbank, AG*, 764 F. Supp. 2d 587, 595 (S.D.N.Y. 2011); *Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 241 (S.D.N.Y. 2011).

20 *See Tire Eng'g & Distribution L.L.C. v. Bank of China Ltd.*, 740 F.3d 108 (2d Cir. 2014); Order, *Motorola v. Uzan*, No. 13-2353 (2d Cir. Jan. 14, 2013), dkt. 139.

21 *In the Matter of Grand Jury Subpoena directed to Marc Rich & Co., A.G.*, 707 F.2d 663, 669 (2d. Cir. 1983).

22 *See, e.g., Estate of Yaron Ungar v. Palestinian Authority*, 400 F. Supp. 2d 541 (S.D.N.Y. 2005) (quashing third-party subpoena in aid of post judgment enforcement where (1) "the jurisdictional contacts alleged by plaintiffs have nothing to do with the [plaintiffs] or the debt allegedly owed by [the third party] to the [defendant]" and (2) the defendant lacked "systemic jurisdictional contacts" sufficient to support general jurisdiction.); *cf. In re Grand Jury Proceedings (Bank of Nova Scotia) (Bank of Nova Scotia)*, 740 F.2d 812 (11th Cir. 1984) (affirming the imposition of sanctions against Bank of Nova Scotia based on its failure, in response to a subpoena served on its Miami branch, to produce documents from its branches in the Bahamas, the Cayman Islands and Antigua, in a case that "involved a Canadian bank that did considerable business in the United States and that therefore plainly had the 'minimum contacts' with this country to establish jurisdiction," *In re Sealed Case*, 832 F.2d 1268, 1273 n.3 (D.C. Cir. 1987)).

23 *First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d. Cir. 1998).

24 *Walden v. Fiore*, 571 U.S. ___ (2014) (citing *Hanson v. Denckla*, 357 U. S. 235, 251 (1958)).

25 134 S. Ct. at 763.

[26] N.Y. Banking Law § 221-c, *i.e.*, for certain claims based upon specific jurisdiction.

[27] Cal. Fin. Code § 1762(b).

[28] *Thompson v. Anderson*, 113 Cal.App.4th 258, 268 (Cal. Ct. App. 2003) (holding that appointment of Commissioner of Corporations as agent for service did not establish general jurisdiction).