



The Reach of the U.S. Courts: Long-Arm Jurisdiction and Notions of International Comity

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Agenda

- **Personal jurisdiction** over foreign financial institutions located in the U.S.; positive developments...

but the plaintiffs' bar is wily

- Self-Restraint: International Comity



Jurisdiction Refresher

- In any litigation in the U.S., the threshold issue is

JURISDICTION

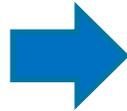
- There are two types of courts:
 - Federal
 - State
- There are two forms of jurisdiction:
 - Subject Matter Jurisdiction (court's jurisdiction over a type of claim)
 - Personal Jurisdiction (court's jurisdiction over the defendant)
- There are two forms of personal jurisdiction:
 - General (all types of claims)
 - Specific (or “long-arm”)

Recent Trends

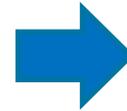
- Significant recent shifts in the law with respect to personal jurisdiction offer good defenses to foreign litigants.
- But the plaintiff's bar is creative and they are not going away without a fight.
- *Neither is the defense bar...*

Pre-Daimler

Until September 2014, even if a foreign bank was incorporated, and had its principal place of business outside the U.S., New York courts deemed that the bank was here for all jurisdictional purposes if it had a New York Branch.



“[A] bank that maintains a branch in ... New York is subject to this Court’s general jurisdiction because it is considered to be ‘doing business’ within the State.”
Mones v. Commercial Bank of Kuwait, S.A.K.
(SDNY 2005).



But in early 2014...

Daimler and *Gucci*

Jan. 2014: Supreme Court in *Daimler* holds that a foreign corporation is not subject to general jurisdiction if it is not “essentially at home” in the forum—that is, either incorporated or has its principal place of business there.



Sept. 2014: Second Circuit in *Gucci* holds, in accord with *Daimler*, that a Chinese bank with 4 U.S. branches was not “essentially at home” in NY and therefore not subject to general jurisdiction.



Since 2014, lower NY courts apply *Daimler* and *Gucci* to hold that foreign banks are not subject to general jurisdiction.



But the plaintiffs' bar is trying to undo *Daimler* and *Gucci* via multiple routes...

The “Exceptional Case”

Daimler did “not foreclose the possibility that in an exceptional case” the “essentially at home” test might not apply.



Plaintiffs argue the “exceptional case” is based on the importance of their claims, or the difficulty suing a foreign defendant in their overseas “home.”



The Second Circuit arrested that argument in Sokolow—confirming that an “exceptional case” exists only when the foreign entity temporarily relocates its principal place of business to the United States—such as during time of war or civil unrest.

Consent To Jurisdiction By Business Registration

- Soon after *Daimler*, **a split emerged** in the courts over whether a corporation or bank has consented to general personal jurisdiction in any given state by virtue of registering to do business there.
- But the Second Circuit in *Brown v. Lockheed Martin*, 814 F.3d 619 (2016), **resolved this split in the 2d Circuit** by holding that “a [state’s] run-of-the-mill registration statute,” under which a corporation simply appoints an agent for service of process:
 - Does not, without more, equal consent to the general jurisdiction of the courts of that state;
 - Could be subject to Constitutional challenge under *Daimler* if it expressly subjected the registered business to general jurisdiction; but,
 - Does equal consent to specific jurisdiction for claims arising from the in-state activities of, or injuries caused by, the registered business.

Consent To Jurisdiction In NY Federal Courts By Business Registration

- Following *Brown*, New York lower federal courts have held: Corporate business registration in NY **is not consent** to general jurisdiction. *Bonkowski* (EDNY 2016).
- *But the New York State courts have not yet addressed these issues with equal clarity.*

Consent To Jurisdiction In NY State Courts

- *See Bonkowski (EDNY 2016)*. (“The New York Court of Appeals has not defined the scope of New York’s business registration statutes and its impact on personal jurisdiction either pre- or post-*Daimler*”).
- ***But*** at least one lower state court has held that registration under Banking Law § 200 provides consent **only to specific jurisdiction**. *Gliklad v. Bank Hapoalim*, 2014 N.Y. Misc. LEXIS 3600, *5-*7 (N.Y. Sup. Ct. Aug. 4, 2014).
- ***And*** one intermediate NY appellate court held that § 200 registration **is consent to jurisdiction** to enforce information subpoenas—a form of specific jurisdiction. *Matter of B&M Kingstone, LLC v. Mega Intl. Commercial Bank Co., Ltd.*, 131 A.D. 3d 259 (N.Y. App. Div. 1st Dep’t 2015).
- ***And*** other lower state courts have held that NY corporate registration and appointment of the Secretary of State as agent for service of process (*e.g.*, under Business Corp. Law §§ 304 and 1304) **provides consent to general jurisdiction**. *Aybar v. Aybar*, 2016 N.Y. Misc. LEXIS 2253 (N.Y. Sup. Ct. May 25, 2016).

Jurisdiction By Alter Ego Or Agent

- *Daimler* did not address whether having an “**alter-ego**” or “**agent**” in the forum can provide general jurisdiction over the foreign principal.
- Post-*Daimler*, it remains the “general rule [that] a foreign parent corporation is not subject to personal jurisdiction in New York merely because its subsidiary is present in that forum.” *Bonkowski* (EDNY 2016).
- *But Daimler* did not address whether “jurisdictional contacts of “alter-ego” or “mere department” subsidiary may be imputed to the parent. *Bonkowski* (EDNY 2016).
- *But Daimler* also did not address whether jurisdiction over an in-state “agent” can provide general jurisdiction over the foreign principal.

Specific Jurisdiction

- Post-*Daimler*, the means for plaintiffs to establish general jurisdiction is now very limited.
- Post-*Daimler*, however, plaintiffs have been successful in obtaining “specific” (long-arm) jurisdiction:
 - The bank has a **NY branch** through which **relevant** transactions occur.
 - The bank has a **correspondent account with a bank in NY** through which **relevant** transactions occur.
- In these scenarios, specific jurisdiction has been used to **force foreign banks** to:
 - **Defend liability claims** under federal statutes, like the Antiterrorism Act, and the Antitrust and Securities laws;
 - **Disclose account records** and other documents in response to discovery subpoenas; and
 - **Freeze accounts** of customers who are liable on judgments (“judgment debtors”).

Specific Jurisdiction Refresher

- There are two alternative theories of specific jurisdiction:
 - **Over there:** Defendant intentionally takes tortious actions **outside the forum** that are “**purposefully directed**” or “**expressly aimed**” at the forum (the United States as a whole or, a particular state).
 - **Over here:** Defendant “**purposefully avails**” itself of the privilege of doing business in the forum (the United States as a whole, or a particular state), and the plaintiff’s claim “**arises from**” the defendant’s in-forum acts.



The defenses to specific jurisdiction depend on which theory is used.

Defeating Specific Jurisdiction

Over There (purposefully directed)

Forum is not the “focal point” of defendants’ overseas tortious actions.

No “substantial connection with the forum state.” *Sokolow*

Foreseeable or actual injury to forum residents is not enough.

Over Here (purposeful availment)

Not the “conduct that could have subjected them to liability”—not conduct just tangentially “related to” the wrong. *Sokolow; Licci*

“[O]nce or twice by mistake.” *Licci; Weiss; Strauss*

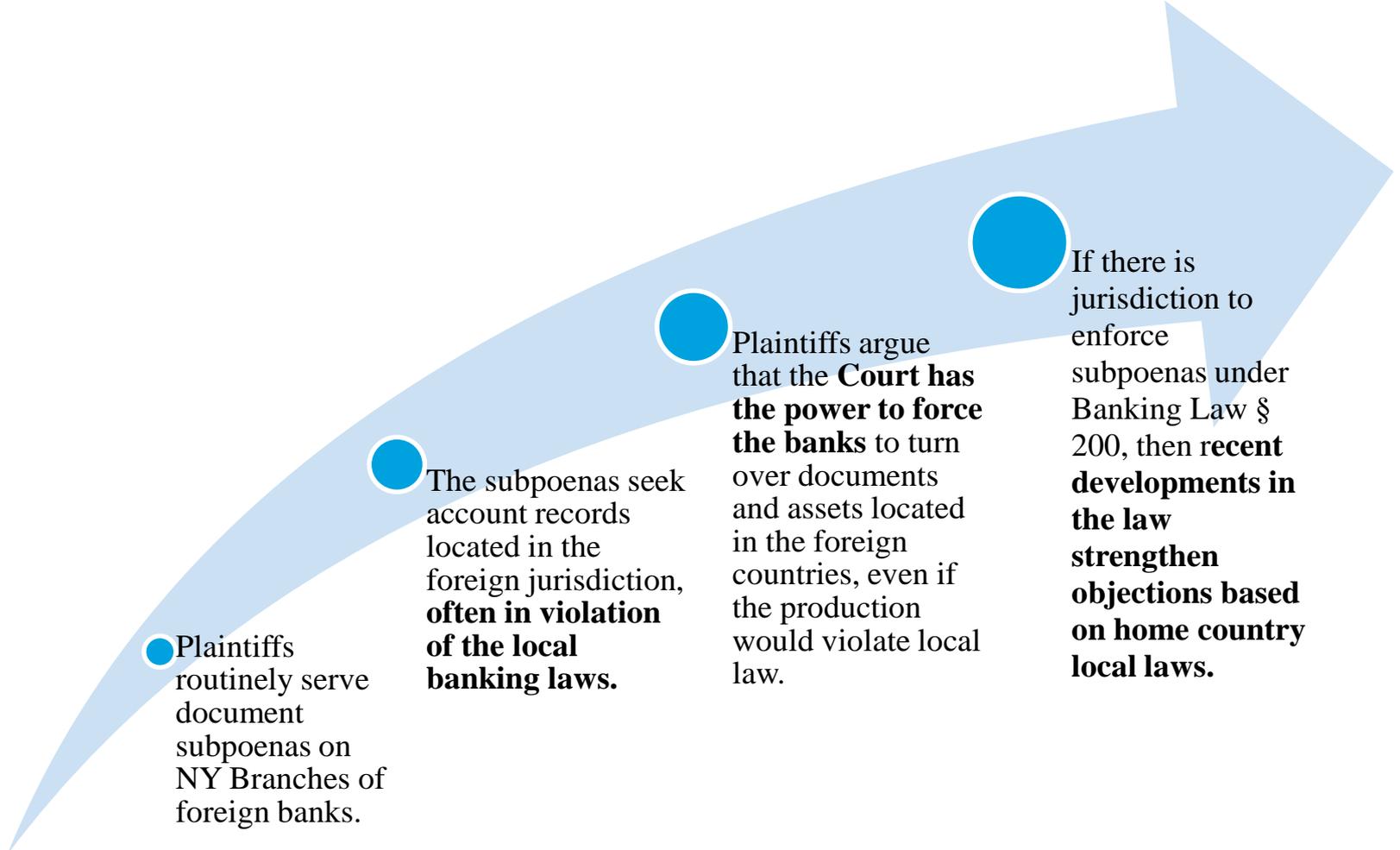
Chronology: “[A]t a time far removed from the [actions] that caused Plaintiffs’ injuries.” *Strauss; Weiss*

Proportionality/Substantial Relationship: “number or monetary value.” *Strauss; Weiss*

Who Is Making These Arguments?

- **Lloyds:** London and Tokyo-based bank actions allegedly to fix yen-denominated LIBOR. *Laydon v. Bank of Tokyo-Mitsubishi UFJ, Ltd.* (SDNY)
- **Barclays:** New York is not the “focal point” of bank actions to fix LIBOR and TIBOR. *Sonterra Capital Master Fund Ltd. v. Credit Suisse Grp. AG* (SDNY)
- **Saudi banks:** Overseas actions for Islamic charities and other customers not “expressly aimed” at the United States. *In re Terrorist Attacks* (SDNY)

Jurisdictional Challenges: Plaintiffs' Use Of Subpoenas



● Plaintiffs routinely serve document subpoenas on NY Branches of foreign banks.

● The subpoenas seek account records located in the foreign jurisdiction, **often in violation of the local banking laws.**

● Plaintiffs argue that the **Court has the power to force the banks** to turn over documents and assets located in the foreign countries, even if the production would violate local law.

● If there is jurisdiction to enforce subpoenas under Banking Law § 200, then **recent developments in the law strengthen objections based on home country local laws.**

Can the U.S. Courts Show Restraint? International Comity

International Comity

- The Second Circuit has brought some sanity back to the doctrine.
- *In In Re: Vitamin C Antitrust Litigation*
 - The Second Circuit vacated a \$147 million judgment against two Chinese vitamin C manufacturers for violating U.S. antitrust laws.
 - The defendants argued that MOFCOM compelled them to fix vitamin C prices; MOFCOM agreed, even entering an appearance in the action.
 - The Second Circuit held that U.S. courts should, and indeed must, defer to a foreign government's interpretation of its own laws.



International Comity

- The Second Circuit's ruling will affect a broad spectrum of legal issues facing foreign companies and financial institutions, especially with respect to foreign bank confidentiality laws.
- Many countries have data protection laws that forbid banks from disclosing the customer account information. Some courts have deferred to the law of the home jurisdiction forbidding the production of the information. *See, e.g., Tiffany (NJ) LLC v. Qi Andrew*, 276 F.R.D. 143 (SDNY 2011).
- By contrast, other courts have required financial institutions to comply with a U.S.-issued subpoena, even if the producing party must violate the laws of its home jurisdiction to do so.

International Comity

- The Second Circuit’s decision in the Vitamin C Antitrust Litigation offers clarity, namely, that U.S. courts should defer to the law of the foreign jurisdiction, as interpreted by the government of that jurisdiction, if there is a genuine conflict between the requirements of U.S. law and the foreign law.
- However, the Second Circuit set some limitations on its decision that U.S. courts should defer to the views of a foreign government regarding the interpretation of its own laws.
 - The foreign government must “directly” appear in the litigation.
 - The foreign government must provide a “sworn evidentiary proffer” regarding the “construction and effect” of its laws and regulations.
 - The foreign government’s proffer must be “reasonable under the circumstances presented.”
- **The plaintiffs has filed for cert., seeking review of the Second Circuit’s decision by SCOTUS. So watch this space.**

Thank you!



Q & A