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Outside Counsel

Expert Analysis

Personal Jurisdiction and Financial Transfers: Exploring Reach of U.S. Law

When the U.S. Supreme Court decided *Daimler v. Bauman*[1]—sharply narrowing circumstances where a court could exercise general jurisdiction over a defendant—many hoped that it would finally limit a plaintiff's ability to invoke broad jurisdiction of U.S. courts to prosecute claims against foreign financial institutions arising out of foreign conduct in the United States.

As we noted last year, however, lower courts have resisted *Daimler's* core teaching—that a corporation is only subject to general jurisdiction in the forum in which it is incorporated or has its primary place of business—and have found the exercise of general jurisdiction proper on a much lower showing than what appeared to be contemplated by the Supreme Court. ("Limits of General Jurisdiction: Do Recent Decisions Undo 'Daimler'?" NYLJ, June 11, 2015.) Those cases are pending and subject to ongoing appellate review.

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In the meantime, some lower courts have responded to *Daimler* by adopting a broad reading of New York's long-arm statute to justify the exercise of jurisdiction over foreign financial institution defendants. Specifically, departing from long-established precedent, the district court in *Official Committee of Unsecured Creditors of Arcapita, Bank v. Bahrain Islamic Bank*,[2] held that a defendant's mere use of a correspondent bank account could satisfy the requirements for the exercise of jurisdiction. Meanwhile, in *Strauss v. Credit Lyonnais*,[3] the district court approved the exercise of jurisdiction over a foreign financial institution on the basis that less than 2 percent of the challenged transfers were made through a correspondent account held at Credit Lyonnais' New York branch.

> Two decisions underline the risk, still faced by foreign financial institutions, of being haled into court in the United States to account for conduct occurring outside the United States.

Taken together, *Arcapita* and *Credit Lyonnais* create a risk that a foreign financial institution engaging in a dollar-denominated transaction anywhere in the world may wind up having to litigate claims arising out of those transactions in the United States—solely based on the fact that they were executed in dollars and involved U.S.-based correspondent bank accounts. This result is not only unprecedented, but conflicts with the Supreme Court's guidance in *Daimler* and *Kiobel v. Royal Dutch Petroleum Company*[4] that U.S. courts should be modest, careful and prudent in agreeing to adjudicate foreign conduct of foreign defendants.

Transfers and Jurisdiction

Forty years ago, New York's Court of Appeals held that "standing by itself, a correspondent bank

relationship…may not form the basis for long-arm jurisdiction under CPLR 302(a)(1)."[5] Following *Amigo Foods*, generations of federal and state lower courts held that the existence of a correspondent bank account in New York was insufficient basis for the exercise of personal jurisdiction over a foreign defendant.[6] In reaching these decisions, courts acknowledged that merely transacting in dollars, with the accompanying use of a correspondent bank account in New York, did not equate to transacting business in New York, especially given the large number of dollar-denominated transactions entered into worldwide that otherwise had no connection to the United States.

In 2012, however, in *Licci v. Lebanese Canadian Bank*, the New York Court of Appeals altered the Amigo Foods rule and held that "purposeful" and "repeated" "use of a correspondent bank account in New York" could provide a basis for the exercise of personal jurisdiction over the defendant.[7] In deciding *Licci*, the Court of Appeals stressed the fact that the defendant had purposefully used a New York-based correspondent account to exercise "dozens" of dollar-denominated transactions, allegedly moving millions of dollars to terrorist organizations through New York.

While *Licci*, for the first time, permitted the exercise of jurisdiction on the basis of a defendant's use of a correspondent bank account, it limited such exercise of jurisdiction to cases where (i) the defendant held a correspondent account "in" New York and the transactions through the New York account were (ii) "purposeful," and (iii) material (*Licci* itself concerned "dozens" of transfers valued in the millions of dollars). The Arcapita and Credit Lyonnais courts largely ignored these limits, creating a risk—if those decisions are upheld on appeal—that U.S. law will reach any dollar-denominated transactions, no matter where in the world they takes place.

Arcapita Case

In *Arcapita*, the creditors' committee of a bankrupt Arcapita Bank sought to avoid certain pre-bankruptcy transfers made by Arcapita, a Bahranian bank, to two Bahrain-based financial intermediaries, the Bahrain Islamic Bank (BIB) and Tadhamon Capital B.S.C. BIB and Tadhamon then used the proceeds of those transfers to make investments on Arcapita's behalf in London and Bahrain. The sole connection to the United States was that the dollar-denominated transfers moved through the New York-based correspondent account of Tadhamon's Barhanian bank and BIB's correspondent account, also located in New York.

Notwithstanding these minimal connections to New York, the district court found the exercise of personal jurisdiction proper because BIB and Tadhamon had "selected U.S. dollars as the currency in which to execute the transactions" and "designated New York correspondent bank accounts to receive the funds." Thus, the court held that merely by electing to transact in dollars and identifying the correspondent account by name in the transaction documents, the defendants purposefully availed themselves of New York's "dependable and transparent" banking system and the "dollar as a stable and fungible currency." The court could therefore properly exercise personal jurisdiction over the defendants.

Under this reasoning, an entity that is a party to a dollar-denominated transaction that is negotiated, documented, and executed entirely outside of the United States may nevertheless be vulnerable to suit in the United States because the transaction is denominated in dollars and therefore requires the use of a correspondent account. Indeed, *Arcapita* goes further still, holding that the exercise of jurisdiction is proper even if the correspondent account at issue belongs not to the defendant, but to a financial intermediary used by a defendant. If *Arcapita's* reasoning is permitted to stand, a party to any dollar-denominated transaction worldwide may be subject to being haled into court in the United States. This would not only turn decades of jurisdictional jurisprudence on its head, but could also cause sophisticated foreign businesses to reconsider using the dollar as the currency of choice for their transactions.

'Strauss v. Credit Lyonnais'

The District Court's decision in *Strauss* is equally questionable. In *Strauss*, family members of terrorism victims brought suit against Credit Lyonnais under the Anti-Terrorism Act, alleging that

Credit Lyonnais had violated the ATA by carrying, in France, a bank account of a charity organization that allegedly funneled money to a terrorist organization. After the Supreme Court's Daimler decision, Credit Lyonnais moved to dismiss arguing that the district court lacked personal jurisdiction over Credit Lyonnais.

The District Court denied the motion, finding that while it lacked general jurisdiction, it could nevertheless exercise personal jurisdiction over the bank because a small percentage of the challenged transfers allegedly made by Credit Lyonnais were routed through its New York branch. The district court specifically rejected the argument put forth by Credit Lyonnais that because the number and size of transfers alleged to have gone through the New York branch were "de minimis"—five transfers accounting for approximately $200,000 out of an alleged $3 million worth of transfers made by Credit Lyonnais—they did not "support" the exercise of personal jurisdiction over Credit Lyonnais.

Instead, the district court held that a single transfer would be sufficient to justify the exercise of personal jurisdiction over plaintiffs' claim in respect of all the transfers made by Credit Lyonnais, whether they had any connection to the United States or not. As the district court explained, because the claims "do not necessarily correspond one-to-one with particular transfers, but instead rest upon the millions of dollars [the banks] allegedly transferred," the court could exercise jurisdiction to adjudicate the claims against the defendant whether or not they could be shown to relate to the U.S. transfers.

The Credit Lyonnais decision goes significantly beyond what the Court of Appeals authorized in *Licci*, and creates the potential that a single transfer made by a foreign institution through the United States could be used to support jurisdiction over claims which otherwise lack any connection to the United States and could not be brought in a foreign jurisdiction.

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Conclusion

Combined, *Arcapita* and *Credit Lyonnais* underscore the lower courts' resistance to the Supreme Court's recent guidance, including in *Daimler* and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), that U.S. courts should decline plaintiffs' invitations to have U.S. courts adjudicate cases that have, at best, marginal connections to the United States. Moreover, these decisions underline the risk, still faced by foreign financial institutions, of being haled into court in the United States to account for conduct occurring outside the United States.

Ultimately, it remains to be seen whether the Second Circuit will sanction such a broad reading of specific jurisdiction based on financial transfers through the United States. In the meantime, foreign financial institutions should be mindful of this potential litigation risk of partaking in, structuring, and documenting dollar-denominated transactions—particularly where high-risk transactions or geographic locations are involved.

1. 571 U.S. 310 (2014).
2. Case No. 15-Civ-3828, 2016 U.S. Dist. LEXIS 42635 (S.D.N.Y. 2016).
3. Case No. 06-Civ-702, 2016 U.S. Dist. LEXIS 45030 (S.D.N.Y. 2016).
4. 133 S.Ct. 1659 (2013).
5. *Amigo Foods Corp. v. Marine Midland Bank-New York*, 39 N.Y.2d 391 (NY 1976).
6. See, e.g. *Tamam v. Fransabank*, 677 F.Supp.2d 720 (S.D.N.Y. 2010).
7. 20 N.Y.3d 327 (2012).

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