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The law of personal jurisdiction: A game changer for foreign banks involved in litigation in the U.S.

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Hogan Lovells partner Marc Gottridge is the co-head of our global financial services litigation practice. He represents some of the world's leading banks in major class actions, investigations, and commercial litigation in the U.S.

In this hoganlovells.com interview, Gottridge discusses how the U.S. Supreme Court, in its 2014 decision in *Daimler v. Bauman*, changed the law of personal jurisdiction, and discusses how plaintiffs' counsel have reacted by relying on alternative theories to assert personal jurisdiction over foreign banks in U.S. courts, as well as how those arguments can be defeated.

"With the law of jurisdiction changing, in many cases we have been able to argue successfully that a foreign bank we represent does not belong in a case at all because it is not subject to general jurisdiction and that the facts do not tie the case to New York or the United States closely enough in order to subject the bank to specific jurisdiction," explains Gottridge.

"Personal jurisdiction arguments have now permitted us to extricate our clients from some very large cases at a relatively early stage, before they incur massive amounts of expense on discovery — document production and depositions — or litigating class certification issues. Personal jurisdiction can provide a relatively clean basis for dismissal, on the law, without extensive and costly fact development," he added.

Why was the U.S. Supreme Court's decision in *Daimler v. Bauman* a watershed in the law of personal jurisdiction?

Gottridge: For more than 90 years — before the U.S. Supreme Court decided *Daimler v. Bauman* in 2014 — the law in New York was that a foreign bank with its main office in Germany, France, Italy, the UK, or anywhere in the world could be sued in New York state or federal courts based on a cause of action arising anywhere in the world, so long as it operated a branch or other office. Under the old "doing business" standard, such a bank — even if it had only 100 (or fewer) employees in a single office — was subject to general or all-purpose jurisdiction in New York. It could be sued just as freely in New York, on claims unrelated to its New York operations, as the major New York City banks that are incorporated here and have branches on every corner. The law was generally the same around the country, too.

That's why plaintiffs were able to sue foreign banks here in cases having nothing to do with New York or the United States, such as the "Apartheid litigation," when foreign banks and other companies were sued in a federal court in New York based on alleged conduct in South Africa. If such a case were to be filed now, it would almost certainly be dismissed against non-U.S. entities for lack of jurisdiction, but under pre-*Daimler* law that defense was not available to non-U.S. banks and companies.

The Supreme Court in *Daimler* changed that, and the holding was applied to banks by the Second Circuit Court of Appeals a little bit later in the *Gucci America* case. Under *Daimler* and *Gucci*, a company is subject to general jurisdiction only where it is truly "at home" — and that almost always means one of (at most) two places: where it is incorporated and where its principal place of business is. So banks incorporated in Europe with a principal place of business also in Europe, because they are not "at home" in New York or anywhere in the United States, are no longer subject to general jurisdiction. So for plaintiffs' lawyers, the world got a lot smaller.

What did the plaintiffs' lawyers start doing in response to this U.S. Supreme Court ruling?

Gottridge: One thing the plaintiffs' lawyers started doing was to say, "Maybe I can hold these banks in the United States courts on a theory that they consented to general jurisdiction." In many cases, plaintiffs have tried to base jurisdiction over banks that have registered a branch or other office with the New York Department of Financial Services, or with a similar agency in another state, on a "consent" theory. In general, those registrations are filed under state statutes providing that the superintendent of banks or a similar state official is appointed as the agent for service of process on the foreign bank. So the plaintiff who wants to sue a bank in New York can deliver a summons to the superintendent of banks, and that is good service on the foreign bank. The plaintiffs' lawyers, however, have argued that what these statutes mean is something considerably more: that the banks have consented to personal jurisdiction (not just service of process) in New York — without regard for whether the claims had anything to do with this state. In other words, they are trying to undo what the Supreme Court held in *Daimler*, based on registration with a state official.

In most of the recent cases in which we have been involved, where this argument has been raised, the courts have seen through plaintiffs' tactic. First, the statute (at least in New York) is actually all about accepting service of process, which is not the same thing as establishing jurisdiction. Second, the New York statute applicable to foreign banks also says specifically that it applies only as to claims that arise out of the conduct of the New York branch. So it doesn't do the plaintiff any good if they are going to claim that there was manipulative trading in Europe and the New York branch had nothing to do with it. We have increasingly seen plaintiffs lose with this theory.

There is another type of personal jurisdiction called specific jurisdiction, which is very well established in the United States, but which plaintiffs generally did not have to invoke, or even think about, in the years before *Daimler*. It permits personal jurisdiction that is limited to the particular claims at issue, rather than for all purposes. Specific jurisdiction means that the plaintiff gets its

ticket punched for that one case, not for all cases. For the courts to accept jurisdiction on this theory, the plaintiffs have to show in the particular case that there is a close enough connection or nexus between what the defendant did to the United States or to the state of New York, so that the plaintiff can sue the defendant here, even though it is not "at home" here.

Specific jurisdiction requires both that the defendant did something to purposefully avail itself of the privilege of doing business in the forum state, and that the claim arose out of the defendant's conduct either in or directed to the forum state. In cases we have litigated, the courts have generally held it insufficient for the plaintiffs to allege that the banks manipulated prices or rates in Europe which disadvantaged U.S.-based traders. As a general rule, unless the plaintiffs can show that employees in the United States were involved in the alleged manipulation, or that the banks deliberately directed their alleged manipulation into the United States, then the result in those cases is that there's no specific jurisdiction. In many of the cases we have been involved with, plaintiffs are really grasping at straws to try to create the appearance of a meaningful connection between their claims and either New York or the United States. The courts have generally scrutinized those assertions closely, and often found them wanting.

What are some plaintiffs' strategies around conspiracy jurisdiction?

Gottridge: In the law in general, for purposes of establishing liability, if two or more people engage in a conspiracy together they are considered each other's agents, and are responsible for each other's conduct. Plaintiffs' lawyers are now trying to extend this idea to the law of personal jurisdiction. In some cases that involve alleged conspiracies, the plaintiffs say that while the defendants are all sitting in Europe or Asia, they conspired with a U.S. bank or a trader in New York. And plaintiffs argue that since the alleged conspirators should all be treated as agents of one another, they are all subject to jurisdiction here. In some cases, courts that have accepted this theory but the trend lately has been against it, because the courts see that plaintiffs are mixing up two different concepts (liability and jurisdiction) and because the Supreme Court has recently reiterated that the emphasis for specific jurisdiction has to be on what the defendant itself is alleged to have done, not what some third party supposedly did.

Nevertheless, we are seeing this conspiracy theory being rolled out by plaintiffs' lawyers in a lot of our cases for banks. It's a very aggressive attempt by the plaintiffs to get around the fact that the Supreme Court effectively pulled the rug out from under their general jurisdiction theory in *Daimler* and they often cannot allege facts supporting specific jurisdiction over a particular bank based on what they can alleged about that bank's own conduct.

What are some of the best practices associated with establishing the jurisdictional facts?

Gottridge: Whenever you move to dismiss a case for lack of personal jurisdiction, you have to consider how to establish the jurisdictional facts that would support dismissal. At Hogan Lovells, we have prepared numerous affidavits and declarations for witnesses that do a very effective job of conveying that the bank is not at home in the United States or New York and refuting whatever else the plaintiffs' counsel suggest in their pleadings.

Another thing to consider in certain cases is whether to make an argument based on *forum non conveniens* as a backstop. This is a theory that even if there is jurisdiction in the U.S. court, a judge here can dismiss a case so that plaintiffs can pursue it in another country that has a closer connection to the facts and/or the law. This is where the firm's international network comes in. Very often the other forum — where we are suggesting the case should be litigated instead of in the United States — is a jurisdiction where Hogan Lovells has a leading team of lawyers who handle litigation for financial institutions. And we rely on them to develop facts about their countries' laws and court systems which are essential to convincing an American court that the foreign country is an adequate alternative forum for the case. These facts need to be presented in an affidavit or declaration.

If we succeed in getting the case dismissed here on *forum non conveniens*, and the case gets re-filed in another jurisdiction, very often our global financial services team can help the client in that other jurisdiction.

How does Hogan Lovells help foreign banking clients navigate these litigation cases in New York or other U.S. courts?

Gottridge: We have been at the cutting edge of this issue in a number of high-profile cases, and also have one of the country's leading appellate practices. Our appellate lawyers are involved in some of the leading personal jurisdiction cases in appellate courts, including the U.S. Supreme Court and U.S. Courts of Appeals. The skills of our appellate practice are an essential part of what we offer to our financial institution clients, because it's obviously not enough to get a case dismissed in the trial court — you also have to defend that victory on the inevitable appeal.

For More Information on Personal Jurisdiction Law

Gottridge and associate Anjum Unwala co-authored an article "Daimler's Effect on Bank of Nova Scotia Subpoenas" that appeared in the October 13, 2016 issue of *Corporate Counsel*. Also on this topic is a March 17, 2016 article co-authored by Gottridge and partner Lisa Fried titled "Why Courts Should Reject the 'Consent by Registration' Theory of General Personal Jurisdiction Over Non-US Banks in New York," which was published in the *New York Law Journal*.

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