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Foreign Banks and Jurisdiction

Does New York Banking Law §200(3) Undo 'Daimler'?

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Over 130 foreign banks maintain New York branches, agencies or representative offices, registered with the New York Department of Financial Services (DFS).[1] These banks' presence has long subjected them to general personal jurisdiction, exposing them to suit in New York for transactions anywhere in the world, to the same extent as New York-based banks. The U.S. Supreme Court's 2014 decision in *Daimler AG v. Bauman*,[2] applied to foreign banks by the Second Circuit in *Gucci America v. Bank of China*,[3] changed that: "Doing business" no longer justifies general jurisdiction over a foreign bank.

This change has focused attention on a possible alternative theory of general jurisdiction, based on "consent." Specifically, does a foreign bank consent to be sued in New York for all purposes by appointing DFS's Superintendent as agent for service of process, as the Banking Law requires for it to operate in New York?[4] No. The legislative text and history limit the scope of any such "consent" jurisdiction to causes of action arising from transactions of the foreign bank's New York office. And if the law were otherwise, exercising general jurisdiction over foreign banks might well violate the due process rights of foreign corporations recognized in *Daimler* and *Gucci*.

The Demise of 'Doing Business'

For nearly a century, non-New York corporations were subject to general personal jurisdiction in the state if they were "here, not occasionally or casually, but with a fair measure of permanence and continuity."[5] CPLR 301 carried forward this theory of general jurisdiction, and courts subjected foreign banks with offices here to New York jurisdiction in actions arising elsewhere.[6]

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Two years ago, however, the Supreme Court effectively abolished "doing business" as a basis for general jurisdiction, holding in *Daimler* that "a court may assert jurisdiction over a foreign corporation to hear any and all claims against [it] 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."[7] Absent exceptional circumstances, a corporate defendant may now be subjected to general jurisdiction only in its "place of incorporation and principal place of business."[8] Following *Daimler*, the *Gucci* court held that a Chinese bank was not subject to general personal jurisdiction in New York, despite its two branches here.[9] "Doing business" in New York no longer can sustain general personal jurisdiction over a foreign bank.[10]

> Even if §200(3) did provide for consent to jurisdiction, it would be limited by its terms to a subset of specific personal jurisdiction—i.e., causes of action arising out of transactions with the bank's New York operations.

'Consent' as an Alternative Basis?

In reaction, "the theory that foreign corporations 'consent' to general jurisdiction by registering to do business in a forum state" has emerged as "the go-to alternative to *Daimler*'s holding."[11] As to foreign corporations generally, provisions of the Business Corporation Law (BCL) requiring registration to do business in New York and designation of the Secretary of State as agent for service for process[12] have long been held to establish "consent" to general jurisdiction,[13] even though the BCL neither expressly provides for such consent nor refers to general jurisdiction.[14] It is doubtful that such holdings can be reconciled with *Daimler*'s due process analysis.[15] Regardless, the BCL does not govern foreign banks, whose authorization to operate in New York is granted by the DFS Superintendent, not the Secretary of State—pursuant to the Banking Law, not the BCL.

Banking Law §200(3)

Banking Law §200 requires a foreign banking corporation to satisfy several conditions before it can transact banking business here, including subsection 3's requirement of filing with DFS a document appointing the Superintendent as

> its true and lawful attorney, upon whom all process in any action or proceeding against it *on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches*, may be served with the same force and effect as if it were a domestic corporation and had been lawfully served with process within the state … .[16]

Section 200(3) does not expressly provide for consent to jurisdiction, in contrast to consent to a means of serving process. Nor does it explicitly place a foreign banking corporation "on notice that by taking certain actions—actions that are quintessentially administrative in nature—it is agreeing to submit itself to a court's jurisdiction."[17] But even if the statute did provide for consent to jurisdiction, it would be limited by its terms to a subset of *specific* personal jurisdiction—i.e., causes of action arising out of transactions with the bank's New York operations.[18]

The legislative history confirms that this limitation resulted from a deliberate decision, made in 1951, to restrict the range of cases for which the Superintendent was appointed as a foreign bank's agent. The appointment requirement first appeared in the statute in 1914, providing that "all process in any action or proceeding by any resident of the state against" the foreign bank "may be served with the same effect as if it were a domestic corporation and had been

lawfully served with process within the state."[19] That provision, substantively unchanged, was retained when the statute was renumbered in 1937 and 1938.[20] In 1951, the Legislature amended §200(3) to authorize service of process on the Superintendent whether or not the plaintiff was a New York resident, while limiting the provision's scope to "a cause of action arising out of a transaction with its New York agency or agencies."[21] Although §200(3) has been amended since 1951 (including extending its reach to foreign bank branches), the scope of the causes of action implicated has not been changed.

The 1951 bill jacket is replete with evidence corroborating the amendment's plain meaning. As sponsor, the Banking Department explained that §200(3) would be "amended so as to permit such service whether or not the plaintiff or moving party is a resident of the state so long as it appears that the claim asserted against the foreign corporation arises in this state,"[22] and advised the governor's counsel that "a foreign banking corporation doing business in this state should be subject to suit by any person, resident or non-resident, if the cause of action arises out of a transaction had with the New York Agency."[23] The Department of Law described the amendment as "limiting such service to causes of action arising out of New York transactions."[24] The amendment, moreover, was consciously modeled after then §59 of the Insurance Law, providing for appointment of a statutory agent for service "in any action or proceeding … on a contract issued or a cause of action arising in this state."[25]

Case Law

Post-1951 case law construing §200(3) in actions against foreign banks generally confirms this limited scope.[26] In two decisions within five years of the amendment, state Supreme Court justices opined, albeit in dicta, that §200(3) had no application to actions arising abroad.[27] More recently, Southern District Judge Paul G. Gardephe, in a case involving alleged LIBOR manipulation, held that any consent by registered foreign banks was limited to specific, not general, jurisdiction.[28]

Some ambiguity was arguably introduced by the 2015 decisions of Southern District Judge Alvin K. Hellerstein in *Vera v. Republic of Cuba*,[29] and the First Department in *B&M Kingstone v. Mega International Commercial Bank*,[30] both enforcing post-judgment information subpoenas directed to non-party foreign banks and citing §200. The *Vera* court held that a Spanish bank had "consented to the necessary regulatory oversight in return for permission to operate in New York, and is therefore subject to jurisdiction requiring it to comply with the appropriate Information Subpoenas,"[31] but did not expressly hold that through §200(3), the bank had consented to general jurisdiction. Subpoena enforcement was notably limited to information "which is located in New York," even though it might concern accounts held elsewhere.[32] In *B&M Kingstone*, the court—after recognizing that, under *Daimler*, New York courts lacked general jurisdiction over a Taiwanese bank—held that its New York *branch* was nevertheless subject to general jurisdiction, so a New York court could compel "that branch to produce any requested information that can be found through electronic searches performed there."[33] But neither *Vera* nor *B&M Kingstone* held that foreign banks operating here consent through registration to general jurisdiction; in neither case did the court analyze §200(3) or consider a civil action against a foreign bank.[34]

Constitutional Concerns

Interpreting §200(3) as furnishing consent to general jurisdiction would raise significant due process issues in light of *Daimler* and *Gucci*. In *Motorola Credit v. Uzan*,[35] Southern District Judge Jed S. Rakoff rejected, as inconsistent with *Gucci*, the argument that foreign banks "constructively consented to the Court's jurisdiction" by registering with DFS.[36] Requiring banks to surrender their right to be free of general jurisdiction except where they are "at home" in order to operate in New York, might also violate the doctrine of unconstitutional conditions.[37] The Second Circuit, in *Brown v. Lockheed Martin*,[38] recently construed a Connecticut statute governing registration by foreign corporations (silent as to the scope of any consent) as limited to *specific* jurisdiction, thus avoiding the question whether "consent to general jurisdiction via a registration statute would be … effective notwithstanding *Daimler*'s strong admonition against the expansive exercise of general jurisdiction."[39]

Conclusion

In light of the statutory text and history, Banking Law §200(3) does not establish foreign banks' "consent" to general personal jurisdiction through appointment of DFS's Superintendent as agent for service of process.

1. See Who We Supervise, Dep't of Fin. Servs., https://myportal.dfs.ny.gov/web/guest-applications/who-we-supervise (search "Type of Institution" field for "Foreign Representative Offices," "Foreign Agencies," and "Foreign Branches").
2. 134 S. Ct. 746 (2014).
3. 768 F.3d 122 (2d Cir. 2014).
4. N.Y. Banking Law §200(3).
5. *Tauza v. Susquehanna Coal*, 220 N.Y. 259, 267 (1917).
6. See, e.g., *Dietrich v. Bauer*, No. 95 Civ. 7051 (RWS), 2000 WL 1171132, at *4 n.4 (S.D.N.Y. Aug. 16, 2000); *Bank of Montreal v. Mitsui Mfrs. Bank*, No. 85 Civ. 1519 (JFK), 1990 WL 134899, at *7 (S.D.N.Y. Sept. 11, 1990).
7. 134 S. Ct. at 751 (alternations in original) (internal quotation marks omitted).
8. Id. at 760.
9. *Gucci Am. v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014).
10. See, e.g., *Cortlandt St. Recovery v. Deutsche Bank AG*, No. 14 Civ. 01568 (JPO), 2015 WL 5091170, at *3-4 (S.D.N.Y. Aug. 28, 2015); *SPV OSUS Ltd. v. UBS AG*, 114 F. Supp. 3d 161, 167-69 (S.D.N.Y. 2015).
11. Kevin D. Benish, Note, "*Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction After *Daimler AG v. Bauman*," 90 N.Y.U. L. Rev. 1609, 1611 (2015).
12. N.Y. Bus. Corp. Law §§304, 1301.
13. See, e.g., *Rockefeller Univ. v. Ligand Pharms.*, 581 F. Supp. 2d 461, 464-67 (S.D.N.Y. 2008); *Augsbury v. Petrokey*, 97 A.D.2d 173, 175 (3d Dep't 1983).
14. Bills providing that application for authority to do business constitutes consent to general jurisdiction were introduced in the Legislature in 2014 and 2015, but not enacted. See Benish, supra note 11, at 1624-25 & nn. 99, 100. However, the proposed legislation, likely to be reintroduced in 2016, would not amend the Banking Law. See Report of the Advisory Committee on Civil Practice to the Chief Administrative Judge 32-40 (2016) (Advisory Committee Report).
15. See, e.g., *Chatwal Hotels & Resorts v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (after *Daimler* and *Gucci*, a non-New York corporation's registration to do business is "insufficient to confer general jurisdiction" where New York was not its principal place of business). But see, e.g., *Bailen v. Air & Liquid Sys.*, No. 190318/12, 2014 WL 3885949, at *4 (Sup. Ct. N.Y. County Aug. 5, 2014) (*Daimler* "does not change the law with respect to personal jurisdiction based on consent").
16. N.Y. Banking Law §200(3) (emphasis added). N.Y. Banking Law §221-c, a substantively similar provision pertaining to representative offices, was added in 1992. In 1964, the Legislature enacted Banking Law §200-b, outlining (in subsection 2) the types of cases that may be brought against foreign banking corporations and by whom; that provision grants standing or subject matter jurisdiction, not personal jurisdiction. *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238, 248 (2002).
17. Tanya J. Monestier, "Registration Statutes, General Jurisdiction, and the Fallacy of Consent," 36 Cardozo L. Rev. 1343, 1393 (2015). The statute's predecessor was construed as only authorizing service of process on the Superintendent, not conferring personal jurisdiction. *Soc'y Milion Athena v. Nat'l Bank of Greece,* 166 Misc. 190, 192 (Sup. Ct. N.Y. County 1937); see also id. at 197 (finding foreign bank subject to personal jurisdiction under *Tauza*).
18. See Advisory Committee Report 40 (Section 200(3) "is explicitly limited by statute to a narrow range of claims").
19. 1914 N.Y. Laws 1319.
20. 1938 N.Y. Laws 1798; 1937 N.Y. Laws 1437.
21. 1951 N.Y. Laws 1615-16.
22. Sponsor's Mem., Bill Jacket, L. 1951, ch. 702 §3 at 14.
23. Ltr. from St. Banking Dep't, Bill Jacket, L. 1951, ch. 702 §3 at 12.
24. Att'y Gen.'s Mem., Bill Jacket, L. 1951, ch. 702 §3 at 8.
25. See Sponsor's Mem., Bill Jacket, L. 1951, ch. 702 §3 at 13 (citing N.Y. Ins. Law §59(1) (1949) (current version at N.Y. Ins. Law §1212(a) (2016))).
26. The pre-1951 provision did not expressly so provide, but was construed as being limited to causes of action "created in this state." *Athena*, 166 Misc. at 192.
27. *Varga v. Credit Suisse*, 155 N.Y.S.2d 655, 658 (Sup. Ct. N.Y. County) (action arising from defendant's European conduct "[c]learly …does not come within the scope of that section"), aff'd, 2 A.D.2d 596 (1st Dep't 1956); *Newtown Jackson Co. v. Barclays Bank*, 133 N.Y.S.2d 726, 729 (Sup. Ct. Queens County 1954) (because the action "did not arise out of a transaction with [its] New York branch," defendant could not "have been subjected to suit in this jurisdiction merely by service of process upon the Superintendent" under Banking Law §200(3)).
28. *7 West 57th St. Realty Co. v. Citigroup*, No. 13 Civ. 981 (PGG), 2015 WL 1514539, at *11 (S.D.N.Y. March 31, 2015); see also *Gliklad v. Bank Hapoalim B.M.*, No. 155195/2014, 2014 WL 3899209, at *1 (Sup. Ct. N.Y. County Aug. 4, 2014) (dismissing petition to enforce subpoena).
29. 91 F. Supp. 3d 561 (S.D.N.Y.), appeal dismissed, 802 F.3d 242 (2d Cir. 2015).
30. 131 A.D.3d 259, 265-66 (1st Dep't), leave to appeal dismissed, 26 N.Y.3d 995 (2015).
31. 91 F. Supp. 3d at 571.
32. Id. at 571, 572.
33. 131 A.D.3d at 267 .
34. "[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." *First Am. v. Price Waterhouse*, 154 F.3d 16, 20 (2d Cir. 1998).
35. No. 02 Civ. 666 (JSR), 2015 WL 5613077 (S.D.N.Y. Sept. 9, 2015).
36. Id. at *2.
37. See, e.g., Benish, supra note 11, at 1640-45.
38. No. 14-4083, 2016 WL 641392 (2d Cir. Feb. 18, 2016).
39. Id. at *18. New York courts also apply constitutional avoidance. See *Courtesy Sandwich Shop v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 389 (1963).