The Banking Law Journal

Established 1889

An A.S. Pratt® PUBLICATION JULY/AUGUST 2015

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ISBN: 978-0-7698-7878-2 (print)
ISBN: 978-0-7698-8020-4 (eBook)

Cite this publication as:

The Banking Law Journal (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

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MATTHEW BENDER

(2015–Pub.4815)

Editor-in-Chief & Board of Editors

THE BANKING LAW JOURNAL (ISBN 978-0-76987-878-2) (USPS 003-160) is published ten times a year by Matthew Bender & Company, Inc. Periodicals Postage Paid at Washington, D.C., and at additional mailing offices.

For customer support, please contact LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204 or e-mail Customer. Support@lexisnexis.com. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258 (phone). Material for publication is welcomed— articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL LexisNexis Matthew Bender, 630 Central Ave, New Providence, NJ 07974.

POSTMASTER: Send address changes to THE BANKING LAW JOURNAL, A.S. Pratt & Sons, 805 Fifteenth Street, NW., Third Floor, Washington, DC 20005-2207.

Recent Cases Are Likely to Reduce the Use of New York Courts for "Turnover" Actions

Lea Haber Kuck and Timothy G. Nelson*

Enforcement proceedings typically involve the issuance of subpoenas and/or freezing orders against banks with branches in New York, with the judgment creditor attempting to identify, freeze, and ultimately obtain assets or accounts held by these banks. The proceedings (known as "turnover" actions) have raised the issue of whether a New York court can attach, or order banks to turn over, assets or bank accounts located outside the United States. Decisions in 2014 by both the New York Court of Appeals and the U.S. Supreme Court are likely to affect a judgment creditor's ability to use the New York courts for turnover proceedings in the future. The authors of this article discuss the decisions and the ramifications for litigants.

New York's position as a global financial center means litigants often have sought to use New York courts as a forum to enforce judgments or arbitration awards against foreign entities. In reality, the burden of enforcement proceedings often falls on third parties, such as financial institutions that hold (or are alleged to hold) the judgment debtor's assets. Typically, enforcement proceedings involve the issuance of subpoenas and/or freezing orders against banks with branches in New York, with the judgment creditor attempting to identify, freeze and ultimately obtain assets or accounts held by these banks. The proceedings (known as "turnover" actions) have raised the issue of whether a New York court can attach, or order banks to turn over, assets or bank accounts located outside the United States. However, decisions in 2014 by both the New York Court of Appeals and the U.S. Supreme Court are likely to affect a judgment creditor's ability to use the New York courts for turnover proceedings in the future.

NEW YORK COURT OF APPEALS AFFIRMS THE "SEPARATE ENTITY RULE"

The October 2014 New York Court of Appeals decision in *Motorola Credit*

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Corp. v. Standard Chartered Bank[1] clarifies the status of the "separate entity" rule, following two earlier decisions addressing the permissible reach of a turnover action. In the first, *Koehler v. Bank of Bermuda Ltd.*,[2] a judgment creditor sought a turnover order directing a Bermuda bank to deliver stock certificates owned by the judgment debtor. Although the stock certificates were physically located in Bermuda, the Court of Appeals decided in 2009 that the New York courts were empowered to order the bank to deliver certificates to New York. Critical to the holding was the fact that the Bank of Bermuda had consented to the jurisdiction of New York courts. By contrast, in its 2013 decision in *Commonwealth of the Northern Mariana Islands v. Canadian Imperial Bank of Commerce*,[3] the Court of Appeals held that New York courts could not order a bank to turn over assets or monies allegedly held by the bank's Cayman Islands subsidiary. It concluded that a court may only issue a post-judgment turnover order against a bank if the bank has "actual, [and] not merely constructive, possession or custody of the assets sought,"[4] which it concluded the parent bank did not. It noted that *Koehler* did not require a different result "and is only significant in holding that personal jurisdiction is the linchpin of authority" under the New York turnover statute.[5]

These cases left open the viability of the "separate entity rule," a common law doctrine that treats individual branches of a bank as legal entities separate from the bank headquarters and other bank branches for enforcement purposes (such that, for example, a foreign bank that has branches in New York would not be obligated to turn over assets or accounts located in its Buenos Aires branch). In *Motorola Credit Corp. v. Standard Chartered Bank*, the Court of Appeals finally addressed the separate entity rule for the first time—and affirmed it.

The *Motorola/SCB* case began in the U.S. District Court for the Southern District of New York ("SDNY"), where Motorola Solutions Credit sought to enforce judgments against a group of Turkish individuals and companies (the "Uzans") totaling approximately $3.1 billion.[6] After the Uzans failed to satisfy the judgments, Motorola attempted to aid its collection efforts by obtaining third-party discovery and a restraining order against property of the Uzans,

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[1] 24 N.Y.3d 149 (2014) ["Motorola/SCB"].

[2] 12 N.Y.3d 533 (2009).

[3] 21 N.Y.3d 55 (2013).

[4] *Id.* at 57.

[5] *Id.* at 64.

[6] *See Motorola Credit Corp. v. Uzan*, 274 F. Supp. 2d 481 (S.D.N.Y. 2003), *aff'd in part, vacated in part*, 388 F.3d 39 (2d Cir. 2004); *Motorola Credit Corp. v. Uzan*, 413 F. Supp. 2d 346 (S.D.N.Y. 2006), *aff'd*, 509 F.3d 74 (2d Cir. 2007).

which Motorola served on the New York branch of Standard Chartered Bank ("SCB"). SCB was not a party to the underlying litigation, nor did it possess any property of the Uzans in its New York branch. However, its United Arab Emirates ("U.A.E.") branch held about $30 million of assets in the name of an entity that was allegedly a "proxy" for the Uzans. Upon receiving the freezing order, SCB froze the accounts. Apparently in response, the U.A.E. Central Bank debited approximately $30 million from SCB's account, and the Central Bank of Jordan seized documents at SCB's Jordan branch based on SCB's obligations under local laws to remit the funds to the entity alleged to be the Uzans' proxy.

SCB sought relief from the restraining order in the SDNY on the ground that it had been subjected to "double liability," *i.e.*, the order to turn over assets in New York was at odds with the local law in the jurisdiction of its other branches. The district court agreed. On appeal, the U.S. Court of Appeals for the Second Circuit certified the following question to the New York Court of Appeals: "whether the separate entity rule precludes a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a debtor's assets held in foreign branches of the bank."[7]

A majority of the New York Court of Appeals answered in the affirmative, holding that *Koehler* did not disturb the separate entity rule. It noted that, "undoubtedly, international banks have considered the doctrine's benefits when deciding to open branches in New York, which in turn has played a role in shaping New York's status as the preeminent commercial and financial nerve center of the Nation and the world."[8] Moreover, the separate entity rule, which had deep New York common law roots, was justified by principles of comity and public policy, and it shielded banks with operations in multiple jurisdictions from the risk of "double liability."[9]

ENFORCEMENT AFTER *DAIMLER AG V. BAUMAN*: THE *SONERA* AND *LI* CASES

Not surprisingly, given that personal jurisdiction is the "linchpin of authority" under the New York turnover statute, the Supreme Court's 2014 decision in *Daimler AG v. Bauman*,[10] in which the court redefined what it

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[7] *Tire Eng'g & Distribution L.L.C. v. Bank of China Ltd.*, 740 F.3d 108, 117–8 (2d Cir. 2014) (certifying question for *Motorola/SCB* and a related question in a companion case); *Motorola/SCB*, 24 N.Y.3d at 158.

[8] *Motorola/SCB*, 24 N.Y.3d at 162 (citation omitted) (internal quotation marks omitted).

[9] *See id.* at *162–64.

[10] 134 S. Ct. 746 (2014).

means for an entity to be "at home" for purposes of general jurisdiction, impacts the enforcement of judgments. Under *Daimler*, a defendant is "at home" in the state where it is incorporated and in the state where it maintains its principal place of business, and perhaps nowhere else.[11] Two cases recently decided by the Court of Appeals for the Second Circuit, *Sonera Holding B.V. v. Çukurova Holding A.Ş.*[12] and *Gucci America, Inc. v. Li*,[13] illustrate the ramifications of *Daimler* for judgment enforcement.

In *Sonera*, the Second Circuit denied enforcement of an arbitral award for lack of personal jurisdiction over the judgment debtor. The dispute arose from a $932 million Geneva arbitration award obtained by Sonera against Çukurova, a Turkish company. Sonera sought enforcement of the award in several jurisdictions, including the SDNY. The district court held, prior to the *Daimler* decision, that it had personal jurisdiction over Çukurova and confirmed the award.[14] Reversing in light of *Daimler*, the Second Circuit noted that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there."[15] Sonera had sought to assert "general" personal jurisdiction over Çukurova based on a series of alleged contacts with New York, including that (1) two different affiliates of Çukurova used an office in New York, and (2) statements on the website of one of those affiliates noted that it had been "[f]ounded in New York City in 1979" and was Çukurova's "gateway to the Americas."[16] The Second Circuit, however, concluded that after *Daimler*, "even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum."[17] Under that test, Çukurova had insufficient contacts with New York and, therefore, exercising general jurisdiction over Çukurova violated the due process clause of the U.S. Constitution.

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[11] The Court acknowledged "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 and of such a nature as to render the corporation at home in that State." *Id.* at 761 n.19 (citations omitted).

[12] 750 F.3d 221 (2d Cir. 2014) (per curiam), *cert. denied*, 134 S. Ct. 2888 (2014).

[13] 768 F.3d 122 (2d Cir. 2014).

[14] *Sonera Holding B.V. v.Çukurova Holding A.Ş.*, 895 F. Supp. 2d 513 (S.D.N.Y. 2012).

[15] *Sonera,* 750 F.3d at 225 (quoting *Daimler*, 134 S. Ct. at 760). Although the Second Circuit found it unnecessary to determine the scope of general jurisdiction under New York law, the court noted "some tension between *Daimler's* 'at home' requirement and New York's 'doing business' test for corporate 'presence.'" *Id.* at 224 n.2. In light of "*Daimler's* gloss on due process," "[n]ot every company that regularly 'does business' in New York is 'at home' there." *Id.*

[16] *Id.* at 223–24, 226.

[17] *Id.* at 226 (quoting *Daimler*, 134 S. Ct. at 761).

In *Li*, the Second Circuit held that a nonparty bank, Bank of China ("BoC"), was not subject to general jurisdiction in New York and vacated the district court's order of contempt and fines when BoC refused to produce documents that it was prohibited from disclosing under the law of its home country.[18] The plaintiffs in the case—Gucci and other makers of luxury goods—sued defendants for trademark infringement. The plaintiffs moved for and obtained a temporary restraining order along with their complaint, which was later converted into a preliminary injunction. The injunction expressly applied to banks in possession of the defendants' assets—including BoC. The plaintiffs served BoC's New York branch with a subpoena requesting all documents concerning the defendants' accounts. BoC produced responsive documents from its New York branch but refused to produce documents from its Chinese branches, arguing that disclosure would violate Chinese bank secrecy laws and would subject it to sanctions in China. The district court held BoC in contempt, ordering it to pay an initial fine of $75,000 and $10,000 for each additional day of noncompliance, as well as attorneys' fees and costs.

Reversing, the Second Circuit held that under *Daimler*, the SDNY erred in exercising general jurisdiction over BoC since, "[j]ust like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere."[19] In vacating the injunction, the Second Circuit concluded that BoC's contacts were not "'so continuous and systematic as to render [it] essentially at home in the forum.'"[20] The Second Circuit left open the possibility of obtaining specific jurisdiction over BoC on remand. The court noted that in some cases specific jurisdiction had been exercised over domestic nonparties that violated injunctions, but that there was no case addressing this issue with respect to foreign nonparties with limited contacts with the forum; the court remanded for consideration because the record had not been developed and neither the parties nor the court had fully briefed or argued the issue. The Second Circuit also reversed the district court's imposition of sanctions, finding that BoC had not violated a clear provision of

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[18] *Gucci Am., Inc. v. Li*, 768 F.3d 122, 125–26, 145 (2d Cir. 2014). *See also Tiffany (NJ) LLC v. China Merchs. Bank*, Nos. 12-2317-cv, 12-2349-cv (2d Cir. Sept. 17, 2014) (companion case to *Li*, incorporating the *Li* analysis in a summary order).

[19] *Li*, 768 F.3d at 135.

[20] *Id.* (quoting *Daimler*, 134 S. Ct. at 761 & n.19 (alteration in original)). The Second Circuit also vacated the injunction and denial of the bank's motion on the independent ground that the district court failed to conduct a proper comity analysis. *Id.* at 138–140; *id.* at 139 n. 20 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403(1) (1987)).

the subpoena and the monetary sanctions were "punitive and therefore impermissible."[21]

CONCLUSION

The *Daimler*, *Sonera* and *Li* cases illustrate a trend against allowing U.S. courts to assert personal jurisdiction over foreign entities, particularly when the entity is a bank and the plaintiff is seeking to attach assets of that bank to satisfy a foreign judgment. This trend, combined with the reaffirmation of the separate entity rule by the Court of Appeals in *Motorola*, is likely to reduce the ability of creditors to use New York as a forum for judgment enforcement against foreign entities.

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[21] *Li*, 768 F.3d at 144.