New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 260—NO. 116
MONDAY, DECEMBER 17, 2018

SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Specific Jurisdiction Through the Lens of New York Activity of Foreign Banks

By **Edward M. Spiro**

And **Judith L. Mogul**

In the past few years, the Supreme Court has issued a number of decisions emphasizing that the Constitution's limits on personal jurisdiction have real teeth. In its seminal decision in *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014), the court upended the long-standing assumption that a corporation's business presence in a state was sufficient to support the exercise of general jurisdiction, announcing that a corporation's contacts with the state must be so continuous and systematic that it is essentially at home there, and explaining that a corporation will generally be at home only in a state in which it is incorporated or has its principal place of business.

Last year, in *Bristol-Myers Squibb Co. v. Superior Court of California,* 137 S. Ct. 1773 (2017), the court turned its attention to specific jurisdiction, rejecting a "sliding scale" test that took into account the strength of a defendant's non-suit related contacts in determining whether to exercise specific jurisdiction, and holding that the only relevant consideration was the defendant's suit-related contacts with the state. Southern District Chief Judge Colleen McMahon's recent decision in *Nike, Inc. v. Wu*, 2018 WL 6056259, at *10 (S.D.N.Y. Nov. 19, 2018) applies those general principles of specific jurisdiction to the New York activities of a group of foreign banks against whom discovery was sought in the Southern District of New York in connection with a judgment enforcement proceeding.

'Nike v. Wu'

Judge McMahon's decision in *Nike* focuses primarily on the jurisdictional implication of the use of correspondent bank accounts, widespread in the world of international banking. A correspondent account is an account at a domestic bank used to make payments or transfers on behalf of a foreign bank. These accounts allow foreign banks to facilitate transactions for clients that would normally require foreign currency exchange. According to the parties in *Nike,* there are more than 9,000 correspondent accounts maintained by foreign banks in New York alone.

In *Nike*, two footwear companies sued hundreds of online retailers for selling knock off versions of their popular shoes. The court entered a default judgment for $1.8 billion after the defendants failed to appear. Plaintiffs subsequently assigned that judgment to an investment firm, which then issued subpoenas to six Chinese banks in an effort to identify defendant assets against which to enforce the judgment.

The banks moved to quash the subpoenas, arguing both that the court lacked personal jurisdiction over them and that the records should have been sought through the Hague Evidence Convention process. The investment firm cross-moved to compel production. Magistrate Judge Debra Freeman, who was supervising post-judgment discovery, denied the motion to quash and granted the motion to compel. McMahon affirmed that decision, finding that personal jurisdiction existed over the Chinese banks and that considerations of comity did not compel resort to the Hague Convention process.

Correspondent Accounts and The N.Y. Long-Arm Statute

In upholding Freeman's decision, McMahon began with the basic

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2018).*

principle that a court must have personal jurisdiction over a nonparty in order to enforce a civil subpoena against it. *Nike*, 2018 WL 6056259, at *3. In this case the question was whether New York's long-arm statute, which confers jurisdiction as to a "cause of action arising from…transact[ing] any business within this state," provided a basis for specific, case-related jurisdiction over the Chinese banks. Id. at *3 (citing N.Y. C.P.L.R. § 302(a)(1)). She noted that courts have "translated this test to nonparty discovery requests by focusing on the connection between the nonparty's contacts with the forum and the discovery order at issue." Id. (quoting *Gucci Am. v. Li*, 768 F.3d 122, 141 (2d Cir. 2014)).

Here, the investment firm seeking to enforce the judgment relied primarily on the foreign banks' use of correspondent banking accounts to process transactions for the Chinese judgment debtors. McMahon noted that when the jurisdictional analysis turns on the use of correspondent accounts, the question of whether that activity will support the exercise of personal jurisdiction will depend on whether the foreign bank engaged in a "course of dealing" in New York. Id. at *4 (quoting *Licci v. Lebanese Can. Bank*, SAL, 20 N.Y.3d 327, 338-39 (2012)). Summarizing existing law in the area, McMahon explained that "unintended and unapproved use" of a correspondent bank account would be insufficient to create jurisdiction; instead, there must be "repeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer." Id. (quoting *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 326-27 (2016)). In short, she concluded, in order for correspondent banking activity to support jurisdiction, the "quantity and quality of a foreign bank's contacts with the correspondent bank must demonstrate more than banking by happenstance." Id. at *5 (quoting *Rushaid*, 28 N.Y.3d at 327).

The Chinese banks in *Nike* largely conceded that they had used New York-based correspondent accounts to "facilitate U.S. dollar wire transfers abroad" for the defendants on "hundreds of occasions to the tune of millions of dollars." Id. at *5. They insisted, however, that they had never "directed" customers to wire funds to a correspondent account, and that this weighed against the exercise of personal jurisdiction. Id. Instead, declarations submitted by the banks described how customers in the United States had sought to wire U.S. dollar payments to defendants' bank accounts in China. Since this is not possible, the transfers were instead sent to correspondent accounts in the United States held by the relevant Chinese banks. Upon receiving notice of those transfers, the Chinese banks would then credit the defendants' accounts in China. The banks claimed these transfers were "highly automated" and analogized a correspondent account in their reply brief to a "mailbox for U.S. dollar transactions."

> Judge Colleen McMahon's decision in 'Nike' focuses primarily on the jurisdictional implication of the use of correspondent bank accounts, widespread in the world of international banking.

McMahon was unmoved by this argument. She noted first that both New York law and decisions in the Second Circuit had made clear that the establishment and maintenance of a correspondent account could provide a basis for jurisdiction even without direction to customers by the foreign banks. While allowing that personal jurisdiction would not exist if the correspondent account was used only a single time, she found that the accounts at issue here were used hundreds of times to move millions of dollars. See *Nike, 2018 WL 6056259* at *10 (citing *Amigo Foods v. Marine Midland Bank-N.Y.*, 46 N.Y.2d 855 (1979)).

In McMahon's view, such a course of dealing was not "banking by happenstance" but rather a "purposeful availment" of the New York banking system sufficient to bring the foreign banks within the reach of the long-arm statute and satisfy due process. Id. at *5.

Credit Card Transactions

The court's analysis was not limited to the bank's use of correspondent accounts. In the alternative, McMahon found that personal jurisdiction existed over some of the Chinese banks by virtue of their role in processing credit card payments for merchants in China. She noted that courts in the Second Circuit have not yet considered whether such activity was sufficient to support jurisdiction, but that Magistrate Judge Freeman had correctly "reason[ed] from first principles" that grounding jurisdiction on such activity was a "reasonable extension of the law." Id. at **6-7.

McMahon reasoned as follows: Customers occasionally made purchases from the defendants over the Internet using credit cards issued by U.S. banks. Some of the Chinese banks acted as "acquiring banks" for the purpose of processing credit card payments for the defendants in China. In settling these accounts with the issuing banks through the credit card network, the acquiring banks used "settlement

accounts" maintained by some of the respondent banks in New York. Id. at *6; see also *Nike v. Wu*, 2018 WL 4907596, at *7-8 (S.D.N.Y. Sept. 25, 2018) (Freeman, M.J.).

Concluding that the use of these settlement accounts supported jurisdiction under the long-arm statute, Judge McMahon analogized the use of settlement accounts to correspondent accounts, noting that "both are essentially checking accounts for other banks, and both are used to support interbank transactions, particularly those involving multiple currencies." 2018 WL 6056259, at *6.

Due Process

Turning from the long-arm statute to the constitutional inquiry, McMahon held that the due process analysis under the long-arm statute was "largely identical" to the statutory analysis. The banks nevertheless argued that enforcement of the subpoenas would also implicate due process concerns regarding "fair play and substantial justice." In particular, they submitted that finding personal jurisdiction based on correspondent accounts and similar arrangements would prove "disastrous for the New York banking industry." Id. at **9-10. That is, the banks maintained, allowing New York courts to hale in financial institutions from around the globe based only on their use of automated processing accounts in New York could drive those institutions to do business only in other jurisdictions or completely avoid U.S. dollar transactions.

McMahon was unpersuaded. She noted that the New York Court of Appeals had made clear as far back as 2012 that correspondent accounts could provide a basis for personal jurisdiction and that the banks had failed "to demonstrate how this rule has been 'disastrous' for the banking industry in the intervening six years." Id. at *10.

Comity

Finally, the banks argued that the Magistrate Judge Freeman erred in failing to require discovery to proceed through the Hague Convention process instead of enforcing the subpoenas, in light of the fact that production of the requested materials could cause the banks to violate Chinese bank secrecy laws. McMahon noted that the district court has wide discretion in determining how to handle a discovery request that may run afoul of foreign law, and that Chinese bank secrecy laws in particular were not a "get out of jail free" card for the Chinese banks. Id. at *12. She concluded that Freeman had appropriately applied the multi-factor test set forth in the Restatement (Third) of Foreign Relations Law, before entering an order that might have violated foreign law, which weighs (1) the importance of the information sought; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) alternative means for securing the information; (5) the extent to which non-compliance would undermine important interests of the United States or compliance would undermine important interests of the country where the information is located.

> The court's analysis was not limited to the bank's use of correspondent accounts. In the alternative, McMahon found that personal jurisdiction existed over some of the Chinese banks by virtue of their role in processing credit card payments for merchants in China.

In particular, McMahon was concerned that proceeding under the Hague Convention was not a reasonable alternative for the party seeking to enforce the judgment. Based on evidence in the record and recent case law, she concluded that Magistrate Judge Freeman had not erred in concluding that a request to China under the Hague Convention would result in substantial delay and incomplete discovery. She further noted that the banks could not point to a single case in which a Chinese financial institution had been penalized for complying with a U.S. court discovery order. Id. at *15.

Conclusion

Correspondent accounts serve a valuable function, allowing banks and their clients access to markets and capital with minimal or even no physical presence in a foreign country. Such accounts, however, can be a double-edged sword. As McMahon found in *Nike*, correspondent accounts and similar financial arrangements can, without more, confer personal jurisdiction over foreign banks in the United States. Where a court ultimately determines that a foreign bank has engaged in a "course of dealing" for a client through repeated use of such accounts, the bank may be subject to suit and third-party discovery in the United States even if it lacks other domestic contacts.