

# ClientAlert

## Commercial Litigation

September 2014

### The Second Circuit Limits the Power of Courts to Enforce Asset Restraints and Discovery Orders Against Foreign Banks: *Tiffany (NJ) LLC v. China Merchants Bank* and *Gucci America, Inc. v. Bank of China*



In *Tiffany (NJ) LLC v. China Merchants Bank*<sup>1</sup> and *Gucci America, Inc. v. Bank of China*,<sup>2</sup> the US Second Circuit Court of Appeals issued important rulings, confirming that the limits on the exercise of US general jurisdiction, set forth in the Supreme Court's landmark decision in *Daimler AG v. Bauman*,<sup>3</sup> apply equally in the context of relief, including discovery, sought from nonparties. The Second Circuit held that in light of *Daimler*, a nonparty foreign bank is not subject to general personal jurisdiction simply because it maintains branch operations in New York.<sup>4</sup> Accordingly, the lower court's authority to compel nonparty banks to comply with a prejudgment asset restraint or to provide extraterritorial discovery would depend on whether the court had specific personal jurisdiction over the bank—i.e., purposeful contact with the United States by the bank relating to the particular dispute.

The decisions should put to rest in the Second Circuit any question that *Daimler's* limits on general jurisdiction apply to banks with US branches. They also make clear that the new jurisdictional paradigm established by *Daimler* applies to nonparties in general and, more specifically, to discovery from nonparties.

These decisions involved orders issued in the context of prejudgment proceedings. The rulings, however, should also apply with equal force to judgment enforcement proceedings, such as the enforcement of subpoenas, restraining notices and requests for turnover orders addressed to garnishee banks. The decisions also reinforce the arguments supporting the continued recognition of the separate entity rule presently before the New York Court of Appeals in *Motorola Credit Corp. v. Standard Chartered Bank*,<sup>5</sup> where the court has been asked to address the continuing vitality of the separate entity rule.

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1 Nos. 12-2317-cv; 12-2330-cv (Consol.); 12-2349-cv (Consol.), Slip. Op. (2d Cir. Sept. 17, 2014) ("*Tiffany* Slip. Op").

2 Nos. 11-3934-cv; 12-4557-cv (Consol.), Slip. Op. (2d Cir. Sept. 17, 2014) ("*Gucci* Slip. Op").

3 134 S. Ct. 746 (2014).

4 The court left open the question of whether the designation of an agent for service of process constitutes consent to jurisdiction, but the only such designation made by banks operating a branch in New York is under New York Banking Law, which provides for designation of the Superintendent of Banking to accept service for certain purposes. By its terms, that section provides only consent to service, not to jurisdiction. In any event, the consent contained in the statute applies only "in any action or proceeding against [the bank] on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches." N.Y. Banking Law § 200(3) (emphasis added). See *Gliklad v. Bank Hapoalim B.M.*, No. 155195/2014, Slip. Op. at \*4-5 (N.Y. Sup. Ct. Aug. 11, 2014).

5 CTQ-2014-00001 (N.Y.)

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## Background Facts

In *Tiffany* and *Gucci*, plaintiff-appellees, luxury goods manufacturers, brought suit in the US District Court for the Southern District of New York, asserting, among other things, claims for trademark infringement under the Lanham Act against various defendants who allegedly produced and sold counterfeit products.<sup>6</sup> In both cases, the district court entered a preliminary injunction freezing the defendants' assets, including proceeds from the alleged counterfeiting that the defendants had wired into bank accounts located in China.<sup>7</sup> The plaintiffs served notice of the asset freezes on the Chinese banks at their New York branches. The nonparty banks moved to modify the preliminary injunctions so that they would not apply to the banks with respect to accounts maintained at branches in China, arguing, among other things, that Chinese law prohibited the banks from complying with such an order from a US court. The plaintiffs moved to compel compliance with the preliminary injunctions. The district court in both actions denied the banks' motions to modify the preliminary injunctions and granted the plaintiffs' motions to compel compliance with the asset freeze provisions.<sup>8</sup>

In *Gucci*, the plaintiffs also moved to compel compliance with subpoenas that called for the disclosure of information about accounts maintained at bank branches in China. The *Gucci* court ordered the nonparty bank to comply with a subpoena seeking information regarding bank accounts held by defendants in China, notwithstanding the bank's position that the disclosure of account information would violate Chinese bank secrecy laws.<sup>9</sup> In *Tiffany*, the court concluded that discovery should proceed by way of the Hague Convention on the Taking of Evidence Abroad ("Hague Convention"). The banks appealed.<sup>10</sup>

## The *Daimler* Decision

In January 2014, while the *Tiffany* and *Gucci* appeals were still pending, the Supreme Court issued the *Daimler* decision.<sup>11</sup> In *Daimler*, the Court held that a corporation is not subject to general, all-purpose, personal jurisdiction merely because it "engages in a substantial, continuous, and systematic course of business" in a forum.<sup>12</sup> A corporation is subject to general jurisdiction only where it is considered "at home," and absent exceptional circumstances, a company is only "at home" where it is incorporated or has its principal place of business.<sup>13</sup> The Second Circuit allowed additional briefing with regard to the impact of *Daimler* on the issues raised in the appeals.

## The *Tiffany* and *Gucci* Decisions

The Second Circuit held that since its jurisdiction over the defendants was undisputed, the lower court had the authority to issue an order directed at defendants (the trademark infringers) restraining the defendants' assets pending adjudication.<sup>14</sup> The court further stated that a preliminary injunction issued against a defendant may also bind nonparties who are not directly enjoined but who act "in active concert or participation with" an enjoined defendant to assist in violation of the injunction. The court, however, made clear that a district court may enforce an injunction against a nonparty only where it has personal jurisdiction over that nonparty.<sup>15</sup>

The Court of Appeals concluded that under *Daimler*, there was no basis for general jurisdiction over the banks, which had been the sole ground articulated by the district courts for jurisdiction in these cases.<sup>16</sup> In so holding, the court found that *Daimler* had overturned decades of precedent that had sustained general jurisdiction over banks based on the existence of a branch in New York, concluding

6 *Gucci* Slip. Op. at \*5 – 6; *Tiffany* Slip. Op. at \*2.

7 *Gucci* Slip. Op. at \*6 – 7; *Tiffany* Slip. Op. at \*2.

8 *Gucci* Slip. Op. at \*10; *Tiffany* Slip. Op. at \*2.

9 *Gucci* Slip. Op. at \*10.

10 The actions were briefed separately but argued jointly on appeal. The movant-appellants in the *Tiffany* action were China Merchants Bank (represented by White & Case), Bank of China, and the Industrial and Commercial Bank of China. Bank of China was the sole movant-appellant in the *Gucci* action.

11 A previously published Client Alert on the *Daimler* decision is available at <http://www.whitecase.com/alerts/012014/daimler-ag-v-bauman-us-supreme-court-significantly-limits-where-companies-may-be-sued/>

12 134 S. Ct. at 761. General jurisdiction, under which a company or person may be sued for any claim, even one unrelated to its activities in the forum state, is distinguished from specific jurisdiction, under which a company or person only may be sued for claims that arise from purposeful contacts with the forum state.

13 *Id.*

14 *Gucci* Slip. Op. at \*14 – 16; *Tiffany* Slip. Op. at \*3.

15 *Gucci* Slip. Op. at \*25; *Tiffany* Slip. Op. at \*5.

16 *Gucci* Slip. Op. at \*28-29; *Tiffany* Slip. Op. at \*5.

that “just like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere.”<sup>17</sup> Further, the court concluded that “this is clearly not an ‘exceptional case’ where the Bank’s contacts are ‘so continuous and systematic as to render [it] essentially at home in the forum.’”<sup>18</sup>

Accordingly, the Court of Appeals vacated the lower court’s orders enforcing the asset freeze injunctions against the banks.<sup>19</sup> It remanded the cases to the district court, instructing the district court, upon remand, to consider whether it had specific jurisdiction over the banks to compel compliance with the asset freeze injunctions and, assuming that such jurisdiction existed, to apply a proper comity analysis using the framework set forth in Section 403 of the Restatement (Third) of Foreign Relations Law.<sup>20</sup> This analysis considers whether, among other things, compliance would violate foreign law.

In the *Gucci* action, the Court of Appeals held that a district court “must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under the Federal Rule of Civil Procedure 45” and concluded that under *Daimler*, there was no basis for the exercise of general personal jurisdiction to compel production of documents held by the nonparty bank in China.<sup>21</sup> The court remanded for consideration the question of whether there was a basis for the exercise of specific jurisdiction.<sup>22</sup>

### Implications of the *Tiffany* and *Gucci* Decisions

The *Tiffany* and *Gucci* decisions are the first US appellate-level decisions to examine *Daimler*’s impact on a court’s authority to enforce asset restraints and related discovery orders on nonparty banks with regard to accounts located abroad. The decisions are important for several reasons. First, they make clear that under *Daimler*, the maintenance of a branch bank in the forum state does not by itself give rise to general jurisdiction over the bank. Second, the decisions eliminate any uncertainty as to whether *Daimler*

applies to nonparties generally and, specifically, whether a court has a basis for a broader exercise of jurisdiction over nonparties with respect to discovery.

The decisions should limit the extent to which banks (and other nonparties) that maintain offices in a forum state are subjected to routine requests for extraterritorial discovery, and make it more likely that parties will be required to resort to the Hague Convention, or similar conventions or treaties, when seeking discovery about accounts maintained abroad.

The decisions should also curtail efforts to use New York as a forum to enforce foreign judgments by employing New York’s judgment enforcement scheme to collect foreign assets from banks or other foreign corporations with branch offices here. As the New York Court of Appeals has emphasized, judgment enforcement devices, such as turnover orders directed at nonparties (garnishees), rest on in personam jurisdiction over the garnishee. Since it is now clear that the presence of a New York branch does not alone confer general jurisdiction, the jurisdictional predicate for the use of judgment enforcement devices against a foreign bank will be lacking in the ordinary case where the bank is neither headquartered nor incorporated in New York.

Finally, the decisions also confirm that, in the context of foreign banks, *Daimler* provides a constitutional underpinning for the separate entity rule long recognized in New York and elsewhere, under which, for purposes of prejudgment attachments and post-judgment enforcement devices, a branch is deemed to be a separate entity. These decisions, of course, do not foreclose any exercise of jurisdiction over a foreign bank with a branch here. Rather, these decisions force parties seeking to proceed against banks to make a showing of specific jurisdiction. Whether, and in what circumstances, a bank (either a party or nonparty) can be subject to specific jurisdiction will undoubtedly be the subject of significant litigation. The Second Circuit opinions do not provide clear guidance on these issues.

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17 *Gucci* Slip. Op. at \*28; *Tiffany* Slip. Op. at \*5.

18 *Gucci* Slip. Op. at \*28.

19 *Gucci* Slip. Op. at \*24; *Tiffany* Slip. Op. at \*5 – 6.

20 *Gucci* Slip. Op. at \*24; *Tiffany* Slip. Op. at \*5 – 6.

21 *Gucci* Slip. Op. at \*42 – 43.

22 *Id.* at \*43 – 44.

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