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2nd Circ. Raises Bar For US Jurisdiction Over Foreign Banks

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On Feb. 9, 2018, the Second Circuit decided SPV Osus Ltd. v. UBS AG,[1] affirming the dismissal of UBS AG and related and unrelated foreign financial management companies from litigation brought by alleged victims of the Madoff fraud. Broadly speaking, the complaint alleged that the defendants, with knowledge of Madoff's illegal activities, kept his Ponzi scheme alive by sponsoring and promoting "feeder funds" based outside the United States that allegedly funneled billions of dollars to Madoff and his company (Bernard L. Madoff Investment Securities, or BLMIS), resulting in $2.9 billion in damages to the plaintiff, SPV.[2] The defendants, UBS AG (Switzerland) and three of its foreign affiliated banking and financial services companies (collectively, "UBS"), allegedly were responsible for this loss on what was described "in broad strokes" as aiding-and-abetting theories under New York law.[3] As relevant here, the Second Circuit found that the district court lacked personal jurisdiction over the defendants. First, it found this was not an "exceptional case" that warranted deviation from the rule that "general" personal jurisdiction over companies typically exists only where they are incorporated or have their principal place of business. Next, it rejected assertion of "specific" personal jurisdiction because UBS' contacts with the forum were inadequate and SPV could not link its alleged loss to actions taken by UBS.[4] As discussed further below, these holdings reinforce that foreign banks are justified in relying on their corporate organizations to provide a measure of protection from U.S. litigation, and that the absence of causation remains a key and broadly applicable ground for finding that specific personal jurisdiction does not exist.

Background

SVP commenced an action in New York state court against UBS and others, asserting a variety of aiding-and-abetting tort claims. SVP alleged that UBS facilitated the Madoff fraud by creating, promoting, and managing foreign feeder funds that channeled investor funds into BLMIS. SVP asserted that UBS' conduct provided BLMIS with a veneer of legitimacy and a source of fresh money, which in turn enabled the fraud to be perpetrated and to continue.

UBS removed the case to federal court and moved to dismiss the case on

jurisdictional grounds. Judge Jed Rakoff of the Southern District of New York granted the motion, finding (1) UBS was not subject to general personal jurisdiction in New York, and (2) the court's exercise of specific jurisdiction would be inconsistent with due process because UBS had "scant contacts" with the forum and the plaintiff's claims were unrelated to those contacts.

The Court of Appeals' Decision

After rejecting SPV's challenge to its jurisdiction on appeal, the Second Circuit considered whether personal jurisdiction could be asserted over UBS. It first addressed "general" jurisdiction, and whether UBS was "essentially at home in the forum state," as required by the U.S. Supreme Court's 2014 ruling in Daimler AG v. Bauman.[5] Daimler held that, in all but an "exceptional case," a corporation is "at home" for purposes of general jurisdiction only where it is incorporated or has its principal places of business.[6] Neither of those conditions was met for UBS and, citing its own ruling in Brown v. Lockheed Martin Corp.,[7] the Second Circuit found those facts to be dispositive.[8] UBS had many contacts with New York unrelated to the claims in this case, but the court found that these did not establish an "exceptional case."

The Second Circuit next addressed the assertion of "specific" jurisdiction, which requires a showing that the defendant's "suit-related conduct" created "a substantial connection with the forum."[9] The court observed that the Supreme Court has not addressed precisely how a defendant's conduct must be tied to the forum for the "substantial connection" requirement to be met, and that circuit courts have applied different standards — ranging from proximate cause to merely "but for" causation.[10] The court described the standard employed in the Second Circuit as varying along a sliding scale, depending on the extent of "the relationship among the defendant, the forum, and litigation."[11] Thus, where a defendant has had "only limited" contacts with the forum, a requirement that those contacts be the proximate cause of the plaintiff's injuries "may be appropriate"; on the other hand, where the defendant's in-state contacts "are more substantial," jurisdiction may be exercised even though the plaintiff's injuries are not proximately caused by the defendant's actions within the forum.[12]

The court found that the connections between UBS, SVP's claims and New York were "too tenuous to support the exercise of jurisdiction."[13] It first pointed out that UBS does not reside in New York.[14] Then it explained that SVP had alleged that its injuries were caused by BLMIS, not UBS, expressly noting the absence of an allegation that SVP decided to invest in BLMIS based on UBS' alleged role in creating and servicing the feeder funds, or that SVP otherwise relied on USB' contacts with the feeder funds when it made its investments.[15] In sum, the Second Circuit concluded that the contacts SVP alleged, which in the court's view amounted to "a handful of communications and transfers of funds," were insufficient to permit the exercise of specific jurisdiction."[16]

Discussion

The Second Circuit's holdings are useful for foreign banks facing litigation in the United States in a number of ways.

First, the panel's decision is a reminder that, for purposes of general personal jurisdiction, corporate structure matters. General personal jurisdiction has a broad reach — it is not limited to claims arising out of a defendant's contacts with the forum — but it is harder to obtain. SPV Osus is another confirmation that Daimler retains full vitality: Absent extraordinary circumstances, general jurisdiction is available over a company incorporated outside the United States only in the unusual situation where its principal place of business is in this country.[17] That rule applies even where a foreign bank operates in the United States through branches rather than a U.S. subsidiary.[18]

Second, the court appeared to take an unusually holistic view of the specific personal jurisdiction inquiry, focusing on the geographic locus of the activities in question and de-emphasizing relatively isolated contacts with the United States that were not directly related to the plaintiff's claims. It noted two requirements: that a claim be related to a defendant's contacts with the forum and that a defendant have "purposefully availed" itself of the privilege of conducting activities within the forum.[19] But in resolving the case at bar, the panel's focus more broadly was on "the connection between [UBS], SPV's claims, and its chosen New York forum."[20]

In determining that this "connection" was inadequate, the panel noted that the complaint did not allege that SPV had "relied" on UBS' contacts or based its decision to invest in Madoff's company on UBS' alleged role in creating and servicing the feeder funds. These actions by UBS outside the United States might seem irrelevant at the threshold to an inquiry that focuses on whether claims arose from forum-connected activities, but (as did the district court) they may have been cited simply to demonstrate that not even UBS' nonforum conduct would support SPV's claim.[21] And in fact, the court affirmatively found UBS' contacts with New York relating to the claims to be inadequate, disparaging them as a "handful of communications and transfers of funds."[22] This would trigger a requirement that the plaintiff satisfy the more demanding "proximate cause" standard, and also appears to have been used by the panel to conclude that SPV failed to meet the "purposeful availment" prong of the specific personal jurisdiction inquiry.[23]

Third, foreign banks should take notice of the specific acts by UBS the panel found not to constitute "purposeful availment." As recited by the district court in greater detail, these included forming a feeder fund and arranging for it to have an account with BLMIS, itself delivering account paperwork signed by a UBS official to BLMIS on the fund's behalf, contracting with BLMIS to be the fund's "subcustodian" (processing investor redemptions), and otherwise communicating with BLMIS on the fund's behalf.[24] The panel also cited with approval a district court decision holding that contacts with New York made by a foreign entity "merely to ensure compliance with contract terms negotiated and executed" elsewhere are inadequate to support jurisdiction.[25] Indeed, a number of Second Circuit rulings protect foreign banks from exposure to jurisdiction in the U.S. as a result of routine reliance upon New York as a U.S. financial center.

In another recent Madoff case, for example, the Second Circuit held that specific personal jurisdiction could not be based on the defendant's "communication and transmission of information to and from [BLMIS] in connection with fund administration and custodial duties" or "the mere maintenance of correspondent bank accounts at an affiliate bank in New York," where no allegation of "intentional and repeated use of correspondent accounts" was made or that such use was an "integral" part of the fraudulent scheme.[26] Foreign banks operating in the United States should also remain mindful that somewhat different rules apply when U.S. litigation is used as a means to obtain discovery of the bank's operations worldwide.[27]

Conclusion

Foreign banks are well-advised to understand the rules relating to personal jurisdiction when they are structuring their dealings with U.S. residents and entities. Whether activities ranging from negotiation to enforcement will trigger the possibility of U.S. jurisdiction in many instances depends on decisions the banks themselves can make, and the banks thus have an unusual ability to mitigate their risk of liability.

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[1] SPV Osus Ltd. v. UBS AG, 2018 WL 798291 (2d Cir. Feb. 9, 2018). Judge Guido Calabresi concurred in the panel's decision, arguing that the case should have been dismissed on the merits and not jurisdictional grounds.

[2] SPV brought its claim as purported assignee of the claims of the allegedly injured party. For ease of discussion, we refer to SPV as if it were itself the allegedly injured party.

[3] SPV Osus, 2018 WL 798291,at *2.

[4] Id. at *7-*8.

[5] Daimler AG v. Bauman, 134 S. Ct. 746, 761 (2014).

[6] Id. at 761 n.19.

[7] Brown v. Lockheed Martin Corp., 814 F.3d 619 (2d Cir. 2016).

[8] SPV Osus, 2018 WL 798291, at *7.

[9] Id. (internal quotation marks and citation omitted).

[10] Id.

[11] Id.

[12] Id. at *8.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id.at *7.

[18] Daimler, 134 S. Ct. at 760 (finding general jurisdiction over parent would be inappropriate even if it

existed over U.S. subsidiary, and subsidiary's contacts were "imputable" to its parent).

[19] SPV Osus, 2018 WL 798291,at *7. Courts typically use a three-part test for specific jurisdiction requiring (i) "minimum contacts" with the forum, (ii) that the plaintiffs' claims arise from or relate to those contacts, and (iii) that asserting jurisdiction would independently be consistent with "traditional notions of fair play and substantial justice" reflected in the due process clause. See, e.g., Chloe v. Queen Bee of Beverly Hills LLC, 616 F.3d 158, 172-73 (2d Cir. 2010). Defendants should be mindful that in certain cases (e.g., federal statutes providing for nationwide service of process and where the requirements of the "federal long-arm statute," Federal Rule of Civil Procedure 4(k)(2), are met) courts look to Fifth Amendment due process and focus on a defendant's contacts with the United States as a whole, not just with the forum state. See, e.g., Livnat v. Palestinian Authority, 851 F.3d 45, 54-55 (D.C. Cir. 2017).

[20] SPV Osus, 2018 WL 798291, at *8.

[21] SPV Osus Ltd. v. UBS AG, 114 F. Supp. 3d 161, 170 (S.D.N.Y. 2015).

[22] SPV Osus, 2018 WL 798291, at *8.

[23] Id. Application of a proximate cause standard also would appear to dispose of any concerns that an aiding and abetting of fraud claim, which does not require reliance by the plaintiff under New York law, could be based on UBS' conduct in other countries supporting the feeder funds. See, e.g., Oster v. Kirschner, 77 A.D.3d 51, 55 (1st Dep't 2010).

[24] SPV Osus, 114 F. Supp.3d at 170.

[25] SPV Osus, 2018 WL 798291,at *8 (citation omitted).

[26] Hau Yin To v. HSBC, 700 Fed. Appx. 66, 67-68 (2d Cir. 2017) (summary order) (and cases cited).

[27] See Robert P. Reznick, Stephen Foresta and Camille Joanne Rosca, "New Grounds for Foreign Banks to Resist Compliance with Third-Party Subpoenas, New York Law Journal, Oct. 12, 2017, available here.