Australian
Banking & Finance
Law Bulletin

Australian banks in New York and the risk of exposure to legal proceedings in the United States

***Mark Wilks**, **David Anthony** and **Vanessa McGlynn** CORRS CHAMBERS WESTGARTH*

The year 2014 has seen three key decisions by US courts clarifying the extent to which non-US banks that maintain a branch in New York can be sued in the United States. With a number of Australian banks now having a branch or office presence in New York, these recent cases confirm that Australian banks have a solid legal basis for resisting subpoenas, court orders and the like served only on their New York offices, but which seek documents and/or assets held outside the United States.

Risks to Australian banks operating in the United States

In a global market, Australian banks increasingly have a presence beyond Australian shores. Engagement, however, with the international financial market brings with it risks for Australian banks. For those banks operating a branch or office in the United States, a key risk is becoming embroiled in litigation before the US courts.

Involvement in transnational litigation is not only costly, but also exposes litigants to the peculiarities of each jurisdiction. With regards to the United States, these risks include:

- the use and availability of class action procedures;
- punitive damages (ie, damages awarded to *punish* a party's conduct in addition to compensatory damages to restore a party to the position that it would have been in but for litigated event); and
- different fee and costs structures (eg, contingency fees are an accepted practice by attorneys in the United States and, save for certain exemptions, a successful party to litigation is not able to recover their costs).

Given these risks, Australian banks should be able to take comfort from recent cases which suggest that a mere office or branch in the United States is insufficient to invoke the jurisdiction of the US courts.

Operating a branch in the United States — what jurisdiction do US courts have?

The decisions of *Daimler AG v Bauman*[1] and *Gliklad v Bank Hapoalim, BM*[2] make clear that where a foreign corporation operates a subsidiary or a branch in the United States, then US courts will not have jurisdiction to hear matters involving that corporation where the matter has no relationship to the subsidiary's activities in the United States — something more is required.

Daimler involved a group of Argentinean residents filing suit in the federal court of California against the German public company DaimlerChrysler Aktiengesellschaft (Daimler). The plaintiffs alleged that Mercedes-Benz Argentina, the Argentinean subsidiary of Daimler, collaborated with state security forces during Argentina's 1976–83 "Dirty War" to kidnap, detain, torture and kill certain Mercedes-Benz Argentina workers, among them the plaintiffs or persons closely related to the plaintiffs. The plaintiffs sought damages from Daimler for the alleged human-rights violations under the laws of the United States, California and Argentina.

A key issue for determination was whether, in circumstances where the plaintiffs' claims arose entirely outside California and against a foreign entity, a Californian court had jurisdiction to deal with the matter.

The plaintiffs sought to invoke personal jurisdiction over Daimler on the basis that another of Daimler's subsidiaries, Mercedes-Benz USA (MBUSA), undertook certain activities in California. Although MBUSA was incorporated in Delaware with its principal place of business in New Jersey, it distributed Daimler-manufactured vehicles to independent dealerships around the United States, including in California. The plaintiffs argued that personal jurisdiction over MBUSA could be established on the basis of its extensive business activities within California. It was argued that this personal jurisdiction could then be imputed to Daimler.

The Ninth Circuit Court of Appeals upheld the exercise of jurisdiction on these grounds, finding that MBUSA was Daimler's "agent" for jurisdictional purposes. The Supreme Court reversed the Ninth Circuit's ruling, in a decision which addressed the question of jurisdiction in this context for the first time.

The Supreme Court considered that the agency theory adopted by the lower courts would "subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the sprawling view of general jurisdiction".[3]

Instead, the court found the relevant question to be whether a corporation's affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state. Whether the corporation is incorporated or has its principal place of business in the forum state will be significant in establishing whether the corporation is "essentially at home" in that state.

Here the court found that the Ninth Circuit erred in concluding that it had jurisdiction to hear the matter. Neither Daimler nor MBUSA was incorporated in California, nor had its principal place of business in that state. That being the case, jurisdiction could only be invoked where Daimler was "essentially at home" in California on some other grounds. The court held that even MBUSA's business activities in California were not sufficient to prove that either corporation was essentially at home in that state.

Although *Daimler* was a decision involving a foreign corporation's subsidiary, it established the framework through which the New York Supreme Court could mould the decision to apply to the banking sphere in *Gliklad*.

In *Gliklad*, Mr Gliklad served a subpoena and retraining notice on the New York branch of Bank Hapoalim to enforce a $505 million judgment obtained against Mr Cherney, a judgment debtor. Mr Gliklad sought the turnover of assets purportedly held in Mr Cherney's accounts at non-US branches.

The New York Supreme Court held that maintaining a branch in New York is not a sufficient basis to assert personal jurisdiction over the bank. The New York branch is a separate legal entity and service of process on the branch does not mandate the turnover of documents or assets held at other branches located outside the United States.

This decision highlights that a foreign bank will not be subjected to the jurisdiction of US courts simply because it maintains a branch in the United States, in circumstances where the claims have no relationship to the bank's activities in the United States.

Passing funds through US banks — does this give US courts jurisdiction?

The jurisdiction of United States courts over foreign banks was also at issue in *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros Co*.[4] This matter involved a dispute between a United Arab Emirates bank, Mashreqbank, and AHAB, a Saudi Arabian partnership, regarding a foreign exchange swap transaction. The transaction contemplated that Mashreqbank transfer $150 million to AHAB's account at Bank of America in New York, in exchange for AHAB paying the equivalent value in Saudi riyals. Mashreqbank upheld its end of the bargain, but AHAB did not.

Mashreq sued AHAB to collect the alleged debt in the New York state court, on the assumption that AHAB held assets in New York. In response, AHAB filed a third-party complaint against one of its employees, alleging that he had fraudulently arranged the transaction and that Mashreq aided and abetted his fraud.

At first instance, the court dismissed the proceedings on the grounds of *forum non conveniens* — that is, on the grounds that Saudi courts were better placed to deal with the matter. That decision was reversed by the Appellate Division, which observed that "New York has a compelling interest in the protection of the native banking system from misfeasance or malfeasance".[5]

On appeal to the New York Supreme Court, the court reinstated the decision at first instance. The court found that the mere passage of foreign funds through a US bank does not give US courts jurisdiction to hear matters that are otherwise unrelated to the United States.

In response to the Appellate Division's concern for protecting New York's banking system from misfeasance, the New York Supreme Court commented:

> Our State's interest in the integrity of its banks is indeed compelling, but it is not significantly threatened every time one foreign national, effecting what is alleged to be a fraudulent transaction, moves dollars through a bank in New York … New York's interest in its banking system "is not a trump to be played whenever a party to such a transaction seeks to use our courts for a lawsuit with little or no apparent contact with New York".[6]

The Supreme Court of New York's decision in *Mashreqbank* is significant for foreign banks. Had the Appellate Division's decision been left undisturbed, foreign banks would have faced the increased risk of being drawn into costly litigation in the United States in circumstances where they facilitated investment flows with the United States.

Summary

The decisions in *Daimler*, *Gliklad* and *Masheqbank* are critical for Australian banks with a presence in the United States for a number of reasons. First, as a decision of the US Supreme Court, *Daimler* carries significant weight, while the New York Supreme Court cases of *Gliklad* and *Mashreqbank*, though binding only in New York, are likely to be highly influential elsewhere in the United States. Second, the cases make clear that any effort to exercise jurisdiction over an Australian bank in New York simply because it operates in New York, or funds pass through it, is likely to be unsuccessful. Third, and perhaps most crucially, the cases confirm that Australian banks are safe to rely on the "separate legal entity rule" to refuse requests for documents or applications for the turnover of assets by branches outside the United States which are only served on the bank's presence in the United States.

Mark Wilks
Partner
Corrs Chambers Westgarth
mark.wilks@corrs.com.au
www.corrs.com.au

David Anthony
Senior Associate
Corrs Chambers Westgarth
david.anthony@corrs.com.au
www.corrs.com.au

About the author

David Anthony *is a Senior Associate in the Dispute Resolution Group at Corrs Chambers Westgarth. David advises clients on a range of commercial and corporate litigation matters, with a focus on banking, insolvency and restructuring, and regulatory litigation.*

Vanessa McGlynn
Lawyer
Corrs Chambers Westgarth
vanessa.mcglynn@corrs.com.au
www.corrs.com.au

About the author

Vanessa McGlynn *is a Lawyer in the Dispute Resolution Group at Corrs Chambers Westgarth. Vanessa works primarily on commercial and property disputes.*

Footnotes

1. *Daimler AG v Bauman* No 11-965, 2014 WL 113486 (US 14 January 2014).
2. *Gliklad v Bank Hapoalim, BM* No 155195/2014 (NY Sup Ct NY Cnty 11 August 2014).
3. Above, n 1, at 17.
4. *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros Co* No 54 (NY Apr 8, 2014).
5. *Mashreqbank PSC v Ahmed Hamad LA Gosaibi & Bros Co* 191 AD3d 1 [1st Dept 2012] at 8.
6. Above, n 4, at 7–8.