The Banking Litigation Law Review

Fourth Edition

Editor
Deborah Finkler

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that litigation involving banks shows little sign of slowing and continues to evolve.

Disputes that have arisen in the past year cover a broad spectrum, from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. Cross-border issues frequently arise, with banking litigation continuing to be a key area of focus for international commercial litigation.

One of the major challenges of 2020 has, of course, been covid-19, and this year has demonstrated the resilience and flexibility of court systems around the world, including in the UK, in adapting their procedures in order to minimise disruption to the administration of justice. At the time of writing, the 'new normal' in many jurisdictions now provides for virtual hearings (including remote witness evidence) and electronic trial bundles as a default. This enforced experiment seems likely to have a lasting impact on court procedures around the world. While it is likely that trials involving witness evidence will revert to being largely in person, the need to do so for many procedural applications is less obvious. In any event, it is to be hoped that some of the positive aspects of operating remotely – for example the reduction in the amount of paper used – are here to stay.

A continuing trend is the increase in the use of class or multi-party actions and representative claims. Although often perceived as a predominantly US phenomenon, the past year has seen growth in the use of class actions within non-US jurisdictions, particularly in the UK, Canada and Australia. Whether this rise is the precursor to a worldwide adoption will depend on a number of factors, including any new mechanisms for group actions that are adopted in countries where they did not previously exist and the way courts in different jurisdictions react to such new actions. In the UK, for example, judgment is keenly awaited in a Supreme Court case that is expected to play a key role in clarifying the operation of a new collective proceedings regime and, depending on its outcome, either energise or curtail the growth of competition class actions in the UK. Related to the rise of group actions, one potential area of reform is third party litigation funding (a frequent driver of such actions). Recent regulatory reforms in Australia means that litigation funders are now required to hold a licence and must comply with the same conduct obligations to which banks and other credit providers are subject, including the requirement to provide their licensed 'financial services' efficiently, honestly and fairly. It will be interesting to see whether other jurisdictions follow suit.

The preface to last year's edition highlighted the concern that claimants will seek to use data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, as a tool in litigation, and noted that this concern is only likely to

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grow. The rise of UK class action cases for damages resulting from data breaches in the past year reinforces the importance of banks managing such risks, both in a regulatory and in a litigation context. Set against the background of increasingly litigious and well-funded claimants, and considering the extensive volume of personal data that banks hold, the need for adequate systems and controls to protect the data of consumers and employees is ever more vital.

At the time of writing, the Brexit transition period is drawing to an end, and nobody is any closer to being able to say what the political or economic impact of Brexit will be. The prospect of the transition period ending with no deal is a real possibility, and it remains to be seen whether the UK can agree a deal with the European Union in the time available. The UK government has declared its intention to sign up to either or both of the 2007 Lugano Convention and 2005 Hague Convention on Choice of Court Agreements, but unless and until that happens there remains a degree of uncertainty over jurisdiction and the enforcement of judgments.

Overall, 2020 has no doubt been a tumultuous year for many. As the year approaches its end, there are some reasons for optimism: global stock markets surged following the results of the US 2020 presidential elections and news of significant strides being made in the development of a covid-19 vaccine. Nevertheless, a substantial amount of political and economic uncertainty remains. Moving forward, the prospect of an unknown future legal landscape in the UK, and to an extent in the remainder of the EU, following Brexit and the continuing effect of covid-19 on the world economy (which may well persist long after the virus itself has been contained) can be expected to generate disputes in the banking sector for a long time to come.

Deborah Finkler
Slaughter and May
London
November 2020

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Chapter 13

UNITED STATES

Jonathan I Blackman, Pascale Bibi and Vishakha S Joshi[1]

I OVERVIEW

The US continues to be an active forum for banking-related litigation. Financial institutions continue to experience litigation exposure to financial product-related suits, as well as antitrust and other claims arising out of an active litigation landscape.

Litigation derived from international sanctions violations has also been on the rise, though a ruling that claims against foreign corporations, including foreign banks, cannot proceed under the Alien Tort Statute may hinder some future claims of this kind by private civil plaintiffs. Banks must continue to be attuned to privilege laws in multiple jurisdictions to guard against the potential disclosure of confidential information in private litigation in the US, particularly in light of a new data agreement between the US and UK. In addition, the adoption of the General Data Protection Regulation in the EU, and its equivalent in the UK, raises questions regarding the protection of data located abroad in US litigation.

Though much of the litigation arising out of the foreign exchange (FX) market regulatory investigations has settled, including antitrust class actions, new suits have been filed based on investigations in other markets. Courts have heightened the requirements for actions to proceed on a class-wide basis by implying additional requirements into the class certification rule, which curbs class actions and the accompanying settlement pressures. In addition, both Congress and the Supreme Court continue to support the validity and broad scope of arbitration agreements, including by permitting the use of class action waivers in arbitration agreements, which continues to be a method widely used by financial institutions to control dispute resolution arising out of consumer contracts and limit exposure to costly class actions. The government has also taken actions to begin a rollback of rules promulgated pursuant to the Dodd-Frank Wall Street Reform Act (Dodd-Frank), including by amending Dodd-Frank to narrow its application and proposing various rule changes. A recent Supreme Court ruling on the constitutionality of the Consumer Financial Protection Bureau (CFPB) may also lead to a rise in challenges to the legitimacy of prior CFPB actions.

The covid-19 pandemic has caused significant economic instability since March 2020 and spurred federal legislation geared towards supporting the economy and providing financial relief to businesses. The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) removed various regulatory restrictions on financial institutions to allow greater opportunity

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to distribute credit or loans to borrowers. Given the current volatility of the market and uncertainty as to when the pandemic will end, it remains to be seen whether these changes will result in increased banking litigation after the crisis ends.

II SIGNIFICANT RECENT CASES

The Supreme Court recently declared unconstitutional the structure of the CFPB, which is a federal agency overseeing banks, among others, to ensure fairness and transparency for mortgages, credit cards and other consumer financial products and services.[2] The Supreme Court held that the structure of the CFPB violated the US constitutional separation of powers and struck down the provision of the statute establishing it, which protects its single director from being removed by the President without cause. This decision will likely result in litigation challenging the legality of prior CFPB actions. In addition, other agencies with similar for-cause removal protections for single, independent directors, such as the Federal Housing Finance Authority, may also face further challenges regarding their constitutionality.[3]

In January 2020, the Supreme Court granted certiorari in personal injury lawsuits in Montana and Minnesota involving Ford Motor Co to decide whether a court can exercise specific personal jurisdiction over claims where the defendant's forum contacts did not give rise to the plaintiffs' claims.[4] If the Supreme Court affirms the theories of the state court rulings, it is likely that courts may be able to exercise jurisdiction over a wider set of entities that sell products, or in the case of financial institutions, make loans or provide other services, in a state, regardless of whether the contacts gave rise to claims brought by the plaintiffs. The Supreme Court's rulings in the area of personal jurisdiction in recent years have tended to be restrictive, rather than expansive, in nature, and it will be instructive to see how the Court rules in these cases.

The Supreme Court recently denied certiorari to a Second Circuit Court of Appeals ruling allowing extraterritorial application of the Bankruptcy Code to recover subsequent transfers made to foreign investors.[5] In the context of the Ponzi scheme leading to the liquidation of Bernard L. Madoff Investment Securities LLC (BLMIS), the Second Circuit – the federal court that hears the majority of banking litigation cases – held that alleged fraudulent transfers made from BLMIS to foreign subsequent transferees, including dozens of foreign financial institutions, through foreign feeder funds, could be litigated in US courts.[6] Under the Second Circuit's ruling, foreign financial institutions are now likely to face more litigation from US bankruptcy trustees seeking to unwind transfers in US bankruptcy courts if the institutions indirectly invest in or otherwise indirectly receive funds from US entities that subsequently enter liquidation proceedings, with the defence of international comity further curtailed by this decision. Given the recent proliferation of bankruptcy proceedings in the current economic environment, it remains to be seen whether this decision will lead to

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2 *Seila Law LLC v. Consumer Fin Prot Bureau*, 140 S Ct 2813, 2197 (2020).

3 See *Collins v. Mnuchin*, 938 F3d 553, 587-88 (5th Circuit 2019) (holding the Federal Housing Finance Authority's structure is unconstitutional due to the for-cause removal protection of the agency's single director).

4 *Ford Motor Co v. Bandemer*, No. 19-369, 206 L Ed 2d 820 (US 2020); *Ford Motor Co v. Mont. Eighth Judicial Dist Ct*, No. 19-368, 205 L Ed 2d 519 (US 2020).

5 See I*n re Bernard L. Madoff Inv Sec LLC*, 917 F3d 85 (2d Circuit 2019), cert. denied in *HSBC Holdings PLC v. Picard*, No. 17-2992 (US 1 June 2020).

6 id. at 91.

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the further exposure of foreign financial institutions in US bankruptcy disputes, even where the bankrupt entity itself was not a bank customer and did not itself do business with the bank.

III RECENT LEGISLATIVE DEVELOPMENTS

i The federal system

The United States legal system is divided into federal and state jurisdictions. The federal government consists of three branches: legislative, executive and judicial. The majority of regulators that oversee financial matters (e.g., the Department of Justice, the Federal Reserve and the Securities and Exchange Commission (SEC)) are parts of the federal government, broadly defined, although states also have their own bank regulatory regimes. The federal government and the state governments are considered to be separate sovereignties and, accordingly, have concurrent legal regimes. Each of the 50 states has an independent court system and its own body of law. As a result, banks are subject to both federal and state law, which apply with equal force, but may differ in their requirements, with federal law taking precedence where applicable. Some states take a particularly active role in bank regulation; for example, as would be expected, New York and its Department of Financial Services maintain a dynamic presence in US banking regulation, and have done so during the decrease in activity by federal agencies.

ii Recent legislation

Significant banking legislation, the Economic Growth, Regulatory Relief, and Consumer Protection Act (S.2155), was enacted by the Trump administration in 2018 and revises Dodd-Frank and the Consumer Protection Act of 2010 (CPA) in an effort to reduce the burden on small- to medium-sized banks and bank holding companies. It limits the application of Dodd-Frank's enhanced prudential standards to banks with US$250 billion or more in global assets as compared with the previous US$50 billion threshold, and by exempting holding companies with US$10 billion or less in global assets from certain requirements and rules, including the Volcker Rule which, among other things, prohibits banks from making certain investments with their own funds and from making certain speculative investments. The impact of S.2155 will depend heavily on its implementation by regulators.

Following the passage of S.2155, on 20 August 2019, the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC) announced amendments to the Volcker Rule that narrow and simplify the proprietary trading prohibition and significantly reduce compliance burdens, including by limiting significant compliance programme requirements to institutions with the largest trading operations and exempting instruments held for 60 days or longer. Additionally, the final rule will expand the exception for trading outside of the United States to limit impact on foreign activity of foreign banks.[7] On 25 June 2020, five regulatory agencies announced a rule modifying the Volcker Rule's prohibition on banks investing in or sponsoring hedge funds or private equity funds, or

7 See 'Revisions to Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds' (20 August 2019), https://www.fdic.gov/news/board/2019/2019-08-20-notice-dis-a-fr.pdf.

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'covered funds'.[8] Banks may now invest in or sponsor certain categories of previously 'covered funds', including venture capital funds and family wealth management vehicles.[9] The rule will become effective 1 October 2020.[10]

Separately, in October and November 2019, the Federal Reserve, Commodity Futures Trading Commission, FDIC, OCC and the SEC released final rules tailoring the application of enhanced prudential standards to large foreign banking organisations by dividing such foreign banking organisations into four separate categories based on the level of risk associated with the organisation, which then permits the US to regulate the organisations accordingly.[11]

The CARES Act was passed on 27 March 2020 to provide relief due to the covid-19 pandemic, including financial assistance for businesses.[12] The CARES Act also provides some regulatory relief for financial institutions, the majority of which will sunset on the earlier of 31 December 2020 or the expiration of the national emergency. The relief accorded by the CARES Act, such as providing the OCC with broader authority to suspend lending limits, acts as an economic stimulus, allowing financial institutions to extend more credit or loans to borrowers than previously permitted.

At the state level, little legislative activity has occurred recently, which is generally attributable to the secondary role of the states in banking regulation. The State of New York, however, has implemented new cybersecurity regulations that apply to companies operating under New York banking, insurance or financial services laws.[13] Those regulations generally require the development of cybersecurity programmes and policies, limitations on access to data systems, use of qualified personnel, preparation of an incident response plan and notification of the New York State Department of Financial Services within 72 hours of a cybersecurity event. These requirements, and the increase in cybersecurity attacks generally, will likely result in increased litigation in this area for banks that experience such attacks. Cybersecurity attacks can also result in banks becoming plaintiffs when the banks' customers'

8 'Financial regulators modify Volcker rule' (25 June 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625a.htm.

9 12 CFR pts. 44, 248, 351, 75, 255 (2020).

10 'Financial regulators modify Volcker rule' (25 June 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625a.htm.

11 See 'Federal Reserve Board finalizes rules that tailor its regulations for domestic and foreign banks to more closely match their risk profiles' (10 October 2019), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20191010a.htm; see also 'OCC Issues Final Rule to Change Applicability Thresholds for Regulatory Capital and Liquidity Requirements' (1 November 2019), https://www.occ.gov/news-issuances/news-releases/2019/nr-occ-2019-128.html.

12 See Coronavirus Aid, Relief, and Economic Security Act, Public Law, Public Law 116-136, 116th Cong. (27 March 2020), available online at https://www.congress.gov/bill/116th-congress/house-bill/748.

13 See 23 NYCRR 500 (2019).

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information is compromised as a result of cybersecurity attacks on third parties. The success of such suits, however, is highly dependent on variations in the laws of the many states and the existing contracts under which a bank may have a right of action.[14]

IV CHANGES TO COURT PROCEDURE

Financial institutions will frequently encounter litigation in the form of a class action brought on behalf of numerous plaintiffs. Under Federal Rule of Civil Procedure Rule 23, which governs class actions in federal court, plaintiffs must affirmatively demonstrate several requirements: numerosity of parties, commonality of questions of law or fact, typicality of the representative plaintiffs' claims relative to the class, and fair and adequate representation of the class. In addition, certain courts have interpreted Rule 23 to contain an implicit 'ascertainability' requirement, meaning that the members of the proposed class must be readily identifiable based on objective criteria that will not require individual determination.[15] Such requirements provide an additional, useful basis for banks to defeat plaintiffs' use of a class action in instances where the individuals allegedly harmed, or the harm itself, is difficult to define. Further, pursuant to a recent Supreme Court ruling, once an initial proposed class action is defeated, there may be grounds for defending subsequent class actions on the basis of the statute of limitations, as pending class certification does not necessarily protect subsequent class actions asserted by putative class members, or even named class members, from expiring limitations periods.[16]

In the future, class actions may become increasingly rare in cases between parties with contractual relationships as such contracts often include mandatory arbitration provisions without providing for class actions or class-based arbitration. The enforceability of provisions in arbitration agreements explicitly precluding class claims has been upheld by the Supreme Court and, in 2018, Congress nullified a CFPB rule prohibiting class action waivers.[17] Further, the Supreme Court recently held that class-based arbitration is not permitted where the arbitration agreement is silent on the matter, or merely ambiguous as to whether class-wide arbitration is permitted.[18] We can therefore expect to see continuing use of arbitration agreements with class action waivers to block class actions in US courts.

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14 Compare *Cmty Bank of Trenton v. Schnuk Martkets, Inc*, 887 F3d 803 (7th Circuit 2018) (upholding dismissal of claims by financial institution against store from which data was breached because of economic loss doctrine precluding recovery outside contractual relationships) and *First Choice Fed Credit Union v. Wendy's Co*, No. CV 16-506, 2017 WL 1190500, at *1 (WD Pa 31 March 2017) (upholding decision by Magistrate Judge denying Wendy's motion to dismiss claims brought by banks for breach of customers' credit and debit card information) with *In re Arby's Rest Grp Inc Litig*, No. 1:17-CV-0514-AT, 2018 WL 2128441, at *14 (ND Ga 5 March 2018) (declining to dismiss claims based on the economic loss doctrine in suit by financial institutions under Georgia law against restaurant from which data was breached).

15 See, e.g., *In re Petrobras Secs*, 862 F3d 250, 264-65 (2d Circuit 2017); *Sandusky Wellness Ctr, LLC v. Medtox Sci, Inc*, 821 F3d 992, 995 (8th Circuit 2016); but see *Mullins v. Direct Digital, LLC*, 795 F3d 654, 658 (7th Circuit 2015) (rejecting ascertainability requirement).

16 See *China Agritech, Inc v. Resh*, 138 S Ct 1800, 1804 (2018).

17 See, e.g., *Epic Sys Corp v. Lewis*, 138 S Ct 1612, 1632 (2018); *DIRECTV, Inc v. Imburgia*, 136 S Ct 463 (2015); *Am Express Co v. Italian Colors Rest*, 570 US 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 US 333 (2011).

18 See *Lamps Plus, Inc v. Varela*, 139 S Ct 1407 (2019); *Epic Sys Corp v. Lewis*, 138 S Ct 1612, 1632 (2018).

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V INTERIM MEASURES

Banks will frequently encounter asset-freezing orders – injunctions or attachment orders requiring restraint of assets held by the bank – in connection with litigation to which the bank is not a party. There is variation among US jurisdictions as to the extent of a financial institution's obligation to freeze assets held outside the US in response to such orders. In New York, for example, the 'separate entity rule' allows New York courts to freeze only those assets located within the US.[19]

With regard to post-judgment execution on assets or injunctions in aid of such execution, recent changes to personal jurisdiction law, discussed in greater detail in Section II, supra, have limited the power of US courts to enforce such orders against non-parties for assets located outside the forum. Following the *Daimler* decision,[20] 'a district court can enforce an injunction against a nonparty [bank] only if it has personal jurisdiction over that nonparty', which will generally not exist over foreign banks with respect to their non-US activities.[21] Even if personal jurisdiction exists, financial institutions may still raise principles of international comity as a further defence, particularly when the bank is a nonparty that would not expect US law to apply.[22] That defence, however, has become increasingly limited as courts have held that it requires compliance with both nations' law be strictly impossible.[23]

VI PRIVILEGE AND PROFESSIONAL SECRECY

i Bank examination privilege

In the US, banks benefit from a privilege protection for confidential information shared with their bank regulators, known as the bank examination privilege. Banks are heavily regulated by a patchwork of state and federal agencies, which frequently obtain confidential information related to a bank's operations and performance in the exercise of their oversight duties. Such confidential information is often sought in litigation by third parties against banks, and the bank examination privilege may be used to protect this information from disclosure.

The bank examination privilege belongs to the regulatory agency and is largely codified in 12 USC §1828(x). It is up to the bank and its outside counsel to preserve the privilege when responding to subpoenas or discovery requests for documents covered by the privilege. Documents covered by the privilege should not be produced in parallel private litigation or to requests from non-banking agencies, unless the privilege has been waived by the applicable regulator or production has been ordered by a court following its review. In practice, outside counsel should notify the regulator of the request, and typically file under seal documents over which the privilege is being asserted for in camera court review. Outside counsel should

19 *Motorola Credit Corp v. Standard Chartered Bank*, 24 NY3d 149, 156 (2014).

20 See *Daimler AG v. Bauman*, 571 US 117 (2014).

21 *Gucci Am, Inc v. Weixing Li*, 768 F3d 122, 134 (2d Circuit 2014).

22 id. at 138-42.

23 See *In re Bernard L. Madoff Inv Sec LLC*, 917 F3d 85, 102 (2d Circuit 2019), cert. denied in *HSBC Holdings PLC v. Picard*, No. 17-2992 (US 1 June 2020) (reversing dismissal on international comity where conflict between nations' insolvency laws did not render compliance with both nations' laws 'impossible'); see also *B & M Kingstone, LLC v. Mega Int'l Commercial Bank Co*, 15 NYS3d 318, 324 (NY App Div 2015) (refusing to quash subpoena on comity grounds where party failed to show that it would face liability in its home country if required to comply with subpoena).

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be attuned to the bank examination privilege to minimise the risk of unnecessary disclosure, particularly in the current environment where banks are investigated and sued in myriad forums by a multitude of agencies and private litigants.

ii Attorney–client privilege

Privilege over documents prepared during internal investigations

In general, attorney–client privilege applies only to communications made in confidence for the purpose of obtaining legal advice. US courts have conducted fact-intensive analyses to determine whether the privilege applies. In at least one prominent US jurisdiction, the court has made clear that the correct test was whether 'one of the significant purposes' of the investigation was to obtain or provide legal advice.[24] Application of that standard to company responses to data breaches, however, has reached inconsistent results as to whether a subsequent investigation by a forensic firm produces privileged information.[25] In this context, a bank's counsel should ensure not only that internal investigations are led by attorneys and have adequate attorney oversight but that the attorneys are acting solely for the client rather than as an agent of the government.[26] In addition, careful attention should be given to which documents are provided to counsel in connection with requests for legal advice as such documents are not categorically protected as privileged, even though the request for legal advice may be.[27]

In addition, given the tendency of regulators, beyond the bank's primary supervisor, to vie with one another to take the lead in investigating potential wrongdoing, care should be taken when disclosing to regulators documents prepared by counsel during an internal investigation. At least one court has recently held that 'oral downloads' of information given by the law firm to the Securities and Exchange Commission are not privileged and therefore must be turned over from the company to former employees of the company.[28] Furthermore, when documents are disclosed to a regulator (e.g., the Department of Justice) that is not the bank's supervisory regulator, the bank examination privilege does not apply and such disclosure would constitute waiver of privilege for private litigation and other regulatory investigations.

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24 *In re Kellogg Brown & Root, Inc*, 756 F3d 754, 758-59 (DC Circuit 2014).

25 Compare *In re Premera Blue Cross Customer Data Sec Breach Litig*, No. 3:15-md-2633-SI, 2017 WL 4857596 (D Or 27 October 2017) (finding that documents prepared by forensic firm after data breach were not privileged), with *In re Experian Data Breach Litig*, No. 8:15-cv-01592, 2017 WL 4325583 (CD Cal 18 May 2017) (finding similar documents were prepared in anticipation of litigation and therefore protected work product).

26 See *United States v. Matthew Connolly and Gavin Campbell Black*, No. 16 CR. 0370 (CM), 2019 WL 2120523, at *10 (SDNY 2 May 2019) (denying motion for relief because information obtained in Black's forced interview was not used in obtaining criminal conviction).

27 See *ACE Sec Corp v. DB Structured Prod, Inc*, 55 Misc 3d 544, 557, 40 NYS3d 723, 733 (NY Sup. 2016) (citing *FHFA v. HSBC N Am Holdings, Inc*, 2014 WL 1327952, at *2 (SDNY 3 April 2014)).

28 *United States Sec & Exch Comm'n v. Herrera*, No. 17-20301-CIV, 2017 WL 6041750, at *1 (SD Fla 5 December 2017).

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Cross-border considerations

Maintaining attorney–client privilege becomes an even thornier issue when cross-border considerations enter the picture. Given the global nature of most banks, this issue will increasingly be encountered in banking litigation practice. Foreign courts may refuse to apply US privilege law, subjecting documents created during an internal investigation to disclosure to private litigants.[29] Moreover, in litigation in the US, depending on which country's privilege laws apply following a choice of law analysis, there is a possibility that attorney–client privilege may not attach at all.[30] Given the global scope of many investigations and litigations, counsel should be attuned to the increased risk of exposure to disclosure of documents created during an investigation, both in litigation proceedings in the US and abroad.

iii Subpoenas

International reach

Traditionally, warrants and subpoenas issued by the US government carry territorial limitations and, thus, do not extend to information located outside the United States.[31] On the basis of that traditional rule, the Second Circuit quashed a government warrant seeking customer emails held by a US company overseas on servers in Ireland. The government appealed that decision to the Supreme Court, which heard oral arguments on the matter in February 2018. Shortly thereafter, however, Congress passed the CLOUD Act, which explicitly declares that a provider of electronic communication service or remote computing service is required to comply with the provisions of the Act, regardless of whether the records are located outside of the United States.[32] Given the focus of the law on providers of communication or computing services, it is unclear at the time of writing how the extraterritorial reach of the law may affect banks located abroad, if at all. The Act includes provisions that permit a subpoena to be quashed or modified if it would require the provider to violate foreign law, or is otherwise improper based on the comity analysis laid out in 18 USC §2703(h)(3). Those provisions will likely prove critical in protecting records stored abroad from the reach of subpoenas, particularly in light of the European Union's General Data Protection Regulation, but may have little practical effect in protecting such information from the reach of general party discovery under the Federal Rules.[33] However, in July 2020, a data sharing agreement between the US and UK went into effect, which will require US companies to respond to UK regulatory requests and produce requested data within seven days. UK companies

29 See *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

30 See, e.g., *Wultz v. Bank of China Ltd*, 979 F Supp 2d 479 (SDNY), on reconsideration in part, No. 11 Civ 1266 (SAS), 2013 WL 6098484 (SDNY 20 November 2013) (applying Chinese privilege law, which essentially leaves materials unprotected, to all communications except those related to US legal matters).

31 See *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained By Microsoft Corp*, 829 F3d 197 (2d Circuit 2016).

32 See CLOUD Act §103(a)(1).

33 See, e.g., *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB) (SDNY 8 November 2018) (Dkt No. 495) (ordering banks to produce relevant documents, with limited exception for redacting irrelevant personal data).

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will likewise need to respond to direct requests from US authorities.[34] This new agreement could possibly trigger litigation in the US and UK, including with respect to jurisdiction and privilege issues.

Personal jurisdiction

The recent developments in personal jurisdiction case law post-*Daimler*, discussed in greater detail in Section VII, have provided banks with another tool to defend against subpoenas because they restrict general personal jurisdiction to where an entity is 'at home', limiting the ability of litigants to obtain worldwide discovery from banks that merely have US branches with no connection to the underlying action.[35] However, that rule is not as strictly followed in New York state courts where international branches of a bank have been subject to an information subpoena where the bank failed to show that the information sought could not also be accessed from the New York branch.[36]

Separate entity rule

In New York, the separate entity rule has also been a defence against subpoenas seeking information for accounts held outside of the US, though outcomes in the subpoena context have differed from the outcomes in the injunction and attachment context.[37] Recent cases have left open the question of enforcement of information subpoenas on foreign banks with operations in New York,[38] with at least one court refusing to apply the 'arcane rule' to an information subpoena,[39] and thus the issue remains unresolved.

VII JURISDICTION AND CONFLICTS OF LAW

In the US, personal jurisdiction – or the power of a particular court to hale in an entity to answer for a claim – is either general, meaning that a court can hear any claim against that entity, or specific, meaning that the court can hear only claims 'arising out of or related to the defendant's contacts with the forum'.[40]

34 See 'Clarifying Lawful Overseas Use of Data Act; Attorney General Certification and Determination' (3 March 2020), online at https://www.federalregister.gov/documents/2020/03/03/2020-04248/clarifying-lawful-overseas-use-of-data-act-attorney-general-certification-and-determination.

35 *Leibovitch v. Islamic Republic of Iran*, 852 F3d 687, 690 (7th Circuit 2017).

36 See *B & M Kingstone, LLC*, 15 NYS3d 318.

37 Compare *Motorola Credit Corp v. Standard Chartered Bank*, 24 NY3d 149 (2014) (holding separate entity rule bars attachment of assets in custody at bank's branches outside of New York) with *B & M Kingstone, LLC*, 15 NYS3d 318 (ordering compliance with information subpoena directed at bank branches outside of New York).

38 See *Vera v. Republic of Cuba*, 91 F Supp 3d 561 (SDNY 2015) (holding that neither the separate entity rule nor Daimler restrictions applied and therefore ordering a Spanish bank to comply with a subpoena for information from branches outside New York, reasoning that the bank had consented to general personal jurisdiction by registering as a foreign bank branch in New York in compliance with New York's statutory regime), rev'd on other grounds *Vera v. Republic of Cuba*, 867 F3d 310, 315 (2d Circuit 2017); see also *Nypl v. JPMorgan Chase & Co*, 15-CIV-9300 (LGS), 2018 WL 1472506, at *2-4 (refusing to exercise jurisdiction over banks based on the presence of branch offices).

39 *B & M Kingstone, LLC*, 15 NYS3d 318, 323-24.

40 *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 US 408, 415 (1984).

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i General personal jurisdiction

Traditionally, courts were permitted to exercise general personal jurisdiction over an entity with 'systematic and continuous contacts' to the state where the court was located, which, in practice, meant that foreign banks were routinely subject to suit wherever they had a branch or representative office, subject only to discretionary rules of *forum non conveniens*. In 2014, the Supreme Court substantially limited the power of the US courts over foreign entities in *Daimler AG v. Bauman*,[41] ruling that general personal jurisdiction could only be exercised over a company if the forum court is within the company's state of incorporation, or the state of the company's principal place of business, absent exceptional circumstances.[42] Since *Daimler*, the Supreme Court has made clear that the defendant must truly be 'at home' in the forum state for general personal jurisdiction to exist.[43] While *Daimler* has spawned much litigation, plaintiffs have been unsuccessful in articulating 'an exceptional case' in which the defendant's operations were so substantial and of such a nature that would warrant deviation from this rule, and even the presence of 2,000 miles of railroad and over 2,000 employees in a US state was held to be not enough to support general jurisdiction when the suit was unrelated to any of that in-state activity.[44] Thus, the majority of US courts now do not have general personal jurisdiction over foreign banks that are not incorporated in the US and do not have their headquarters there.[45]

Plaintiffs have sought to avoid the impact of *Daimler* by advancing theories based on consent to jurisdiction – specifically by arguing that obtaining a business licence to operate within a state, as banks must to operate a local branch, should constitute consent to general jurisdiction there. States have issued conflicting opinions on this point.[46] In New York, the highest court has not determined whether a licence to do business in the state will function as consent to personal jurisdiction. However, an intermediate appellate court has held that, in light of *Daimler*, 'it cannot be said that a corporation's compliance with the existing business registration statutes constitutes consent to the general jurisdiction of New York courts'.[47] Thus, while legislation is pending to impose consent to personal jurisdiction by registration in the state, even if passed into law, such a requirement could be void as unconstitutional.[48]

41 *Daimler AG v. Bauman*, 571 US 117 (2014).

42 See *Daimler AG*, 571 US, 136.

43 *Daimler AG*, 571 US, 138.

44 *BNSF Ry Co v. Tyrrell*, 137 S Ct 1549 (2017).

45 See, e.g., *Brown v. Lockheed Martin Corp*, 814 F3d 619, 628-29 (2d Circuit 2016) (refusing to find an exceptional case where the defendant maintained a physical presence in the US state for over 30 years, ran operations out of that state and employed 70 workers there, and generated substantial revenue from its operations there); *Nypl*, 2018 WL 1472506, at *4 (refusing to find an 'exceptional case' for general jurisdiction based on foreign banks' participation in criminal proceedings in the US and advertisements accessible to consumers in the US).

46 For example, courts in Delaware issued split decisions on whether registration operated as consent, before the Delaware Supreme Court – the state's highest court, and the final arbiter of Delaware state law – ruled that registration did not function as consent. *Genuine Parts Co v. Cepec*, 137 A3d 123, 148 (Del 2016).

47 *Aybar v. Aybar*, 93 NYS3d 159, 166 (NY 3d Dep't 2019).

48 NY State Assembly, A5918, Reg Sess (NY 2017), https://www.nysenate.gov/legislation/bills/2017/a5918.

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ii Specific personal jurisdiction

Plaintiffs have also sought to compensate for the loss of general jurisdiction in cases where it would previously have existed as a matter of course by broader assertions of specific jurisdiction, which requires that the claims arise out of the defendants' forumrelated contacts, arguing that their suits 'arise out of or relate to' what are sometimes relatively minimal actions by the defendant company within the forum.[49] This strategy was envisioned by *Daimler* itself, which noted that 'specific jurisdiction has become the centrepiece of modern jurisdiction theory'.[50] Specific jurisdiction can be heavily fact-dependent and, while some courts require that the in-forum conduct be the proximate cause of the injury, other courts only require the in-forum conduct to be a butfor cause.[51] Under either approach, the injury to the plaintiff must have a connection to the defendant's conduct within the forum, thereby providing a causal constraint on the use of specific jurisdiction. As noted in Section II, the Supreme Court granted certiorari over personal injury lawsuits in Montana and Minnesota involving Ford Motor Co to decide whether a court can exercise specific personal jurisdiction over claims where the defendant's forum contacts did not give rise to the plaintiffs' claims.[52] If the Supreme Court were to affirm the Montana and Minnesota courts' broad reading of the 'arise out of or relate to' standard, the scope of specific personal jurisdiction would increase, potentially allowing courts to exercise jurisdiction over entities in any state where they sell their products, including, in the case of banks, a particular financial product, regardless of whether the plaintiff's injuries from that product were caused by the defendant's in-state conduct.

Specific personal jurisdiction often exists where the injury to the plaintiff arises out of conduct taken in, or purposefully directed to, the forum.[53] Because such conduct was not purposefully directed at a particular forum merely because it caused an injury there, one court recently declined to exercise specific personal jurisdiction over foreign banks that allegedly caused injuries in the US where the alleged conduct involved manipulation of the Canadian Dollar Offered Rate in Canada.[54] While the relevant forum is most often the particular state in which the action is brought, certain types of claims aggregate all of a defendants' contacts with the US as a whole in determining whether the exercise of personal

49 Much of the increase in specific personal jurisdiction litigation has centred on products liability and non-bank commercial activitybased jurisdictional fact patterns. See, e.g., *Bristol-Myers Squibb Co v. Super Ct of Cal*, 137 S Ct 1773 (2017).

50 *Daimler AG*, 571 US, 128 (citation omitted) (internal quotation marks omitted).

51 *SPV Osus v. UBS AG*, 882 F3d 333, 334 (2d Circuit 2018).

52 *Ford Motor Co v. Bandemer*, No. 19-369, 206 L Ed 2d 820 (US 2020); *Ford Motor Co v. Mont. Eighth Judicial Dist Ct*, No. 19-368, 205 L Ed 2d 519 (US 2020).

53 See *Charles Schwab Corp v. Bank of Am Corp*, 883 F3d 68, 81-88 (2d Circuit 2018) (finding that personal jurisdiction exists for claims arising out of transactions in the US, but not for claims arising out of conduct undertaken abroad); see also *Nypl*, 2018 WL 1472506, at *5-6 (finding specific personal jurisdiction where the alleged injuries arose out of conduct for which the banks entered guilty pleas with the US Department of Justice admitting to actions directed at or occurring in US states, but refusing to extend that jurisdiction to foreign parent holding companies).

54 See *Fire & Police Pension Ass'n of Colo v. Bank of Montreal*, No. 18 CIV 342 (AT), 2019 WL 1344412, at *10 (SDNY 14 March 2019) (refusing to exercise specific personal jurisdiction over foreign banks that allegedly caused injuries in the US where the alleged conduct causing the injuries involved manipulation of the Canadian Dollar Offered Rate in Canada).

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jurisdiction is permissible, including claims brought under the Securities and Exchange Act of 1934 (SEA) and the Commodities Exchange Act, the Racketeer Influenced and Corrupt Organizations Act (RICO), the Sherman Act and certain bankruptcy-related claims.[55]

One area that has spurred particularly interesting litigation is banks' use of correspondent bank accounts in New York to clear dollar transactions within the state. In New York, those accounts can provide a basis for specific personal jurisdiction, but only where clearing transactions form part of the plaintiff's claim and the bank knowingly made use of the correspondent account (i.e., the bank acted with knowledge of the nature of the underlying transaction for which the correspondent account is used to move dollars as payment).[56] In addition, correspondent accounts have been held to provide a basis for personal jurisdiction under New York law when the foreign bank is not a party to the US litigation but is served with a third-party subpoena at least where there are a significant number of US correspondent accounts that it uses frequently.[57] This area of law continues to evolve, as courts grapple with the extent to which routine banking contacts, such as use of New York correspondent accounts, are sufficient to create specific jurisdiction over otherwise non-US-related claims.

iii Conflicts of law

Choosing the applicable law in cases in which a conflict of laws arise can be particularly complex within the US, and even more so in cases involving global banks, as courts must decide whether to use foreign, federal or state law – and if state law is applicable, which of the 50 states' laws will apply. Different US jurisdictions apply different tests to resolve choice of law questions, in some instances looking to which body of law bears the most 'significant relationship' to the suit, while in other instances rigidly applying formulas that require, for example, a contract dispute to be adjudicated under the law of the place where the contract was formed.

55 See 15 USC §78aa (providing for nationwide service of process for suits brought under the SEA); *Fire & Police Pension Ass'n of Colo v. Bank of Montreal*, No. 18 CIV 342 (AT), 2019 WL 1344412, at *10 (SDNY 14 March 2019) (recognising courts 'have applied nationwide contacts to determine personal jurisdiction for CEA and Sherman Act claims'); *PT United Can Co Ltd v. Crown Cork & Seal Co*, 138 F3d 65, 71 (2d Circuit 1998) (recognising RICO, 18 USC §1965, permits nationwide service of process for additional defendants alleged to have participated in a conspiracy where the court has personal jurisdiction over at least one defendant and the ends of justice so require); Federal Rule of Bankruptcy Procedure 7004(b) (establishing that service is sufficient to confer personal jurisdiction over any defendant in any proceeding related to a case under the Bankruptcy Code so long as it is consistent with the laws of the United States).

56 See *Rushaid v. Pictet & Cie*, 28 NY3d 316, 338 (2016), reh'g denied, 28 NY3d 1161 (2017); see also *Licci ex rel Licci v. Lebanese Canadian Bank*, SAL, 732 F3d 161, 171 (2d Circuit 2013).

57 See *NIKE, Inc v. Wu*, 349 F Supp 3d 346 (SDNY 2018); see also *Gucci Am, Inc v. Weixing Li*, 135 F Supp 3d 87, 93 (SDNY 2015).

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VIII SOURCES OF LITIGATION

i Sanction violation suits

Recent years have seen a notable uptick in the number of civil suits brought in the wake of international sanctions violations. Thus, a US government finding, or admission by a bank, typically in a guilty plea, deferred prosecution agreement, or civil settlement with bank regulators, that a company has violated a prohibition on commerce with Iran, for example, may well lead to private litigation.

Plaintiffs have primarily brought such claims under the Anti-Terrorism Act, but have also pursued those claims pursuant to common law or the Alien Tort Statute.[58] Under the Alien Tort Statute, courts imply a private right of action by persons who are not US citizens for torts that violate 'the law of nations or a treaty of the United States'.[59] The Supreme Court has held that such actions cannot proceed against foreign corporations, including foreign financial institutions,[60] but such actions continue to proceed against domestic corporations and the precise standard distinguishing between domestic and foreign corporations has yet to crystallise.[61]

Primary liability

The ATA, as amended in 2016, provides a civil cause of action for treble damages and attorneys' fees for private US persons injured by a terrorist act.[62] Plaintiffs have used this provision to assert claims against banks for effecting wire transfers that either directly provided funds to terrorist groups or that transferred funds to intermediaries who allegedly eventually provided funding to terrorist groups.[63] Considerable litigation related to these claims is ongoing. ATA primary liability claims require three elements: (1) injury to a national of the United States (2) caused by reason of (3) an act of international terrorism. An act of international terrorism in turn requires both violation of an underlying criminal statute, which for financial institutions typically involves a claim of knowing or wilfully blind support to a foreign terrorist organisation by transferring funds to it, and conduct by the bank involving violence or danger to human life and apparent intent to influence or coerce a government or population. In *Linde v. Arab Bank*,[64] the Second Circuit held that, in applying these requirements, a financial institution's provision of routine banking services to a foreign terrorist organisation or its members will not create civil liability unless the financial institution also knows that the funds it transfers will be used for terrorist activities.[65]

58 See, e.g., *Ofisi v. BNP Paribas, SA*, 278 F Supp 3d 84, 92-93 (DDC 2017), vacated in part on other grounds, 285 F Supp 3d 240 (DDC 2018).

59 28 USCA §1350.

60 See *Jesner v. Arab Bank, PLC*, 138 S Ct 1386, 1407 (2018).

61 See *Doe v. Nestle, SA*, 906 F3d 1120, 1127 (9th Circuit 2018); *Doe v. Nestle, SA*, 929 F3d 623 (9th Circuit 2019), cert. granted in *Nestle USA, Inc v. Doe I*, No. 19-416 (2 July 2020); *Kaplan v. Central Bank of the Islamic Republic of Iran*, 896 F3d 501, 515 (DC Circuit 2018).

62 18 USCA §2333.

63 See, e.g., *Wultz v. Bank of China Ltd*, 32 F Supp 3d 486 (SDNY 2014); *Lelchook v. Islamic Republic of Iran*, Civil Action No. 15-13715-PBS, 2016 WL 7381686 (D Mass 20 December 2016).

64 *Linde v. Arab Bank, PLC*, 882 F3d 314, 329-27 (2d Circuit 2018) (explaining that 'providing financial services to a known terrorist organisation may afford material support to the organisation' but that such support does not equate to an 'act of international terrorism').

65 See id. at 327.

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Following that decision, one district court has held that allegations of defendants removing information on payment messages that could alert authorities to involvement of Iranian agents and concealing the involvement of Iranian banks in letters of credit did not state an actionable claim for primary liability under the ATA, even though Iran was designated a state sponsor and supporter of foreign terrorist organisations.[66] Additionally, where the discovery process does not uncover factual development sufficient to show terroristic intent, which requires that the defendant's activities 'appeared to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by mass destruction, assassination, or kidnapping,' defendants have successfully obtained judgment as a matter of law at the close of discovery and before trial.[67] Moreover, other courts have dismissed such claims even at the pleading stage for failure to allege the requisite terroristic intent.[68]

Claims brought pursuant to the ATA have also been successfully defended on grounds of lack of causation. In 2018, the Ninth Circuit Court of Appeals interpreted primary liability under the ATA to adopt the traditional element of proximate causation, which requires that the services provided by the financial institution were a substantial factor in causing the terrorist act, and that the terrorist act should have been reasonably foreseeable to the financial institution.[69] At least one other court, however, has interpreted the causation requirement less stringently, finding the requirement satisfied where a knowing contribution to a terrorist organisation was made, even if specifically designated for a nonviolent wing of the organisation.[70] Nevertheless, even that jurisdiction has subsequently dismissed ATA claims where the bank merely provided services to a country, Iran, that is a state sponsor of terror, as opposed to participating in direct donations to a known terrorist organisation.[71]

Secondary liability

As the Second Circuit addressed in its *Linde* decision, the 2016 Amendments to the ATA create secondary liability for aiding and abetting such terrorist acts, which does not require proof that the banking services directly caused the terrorism-related injuries.[72] Instead, the causation requirement focuses on the link between the injury and the party whom the financial institution aids, as opposed to the injury caused by the financial institution itself. The other two requirements for secondary liability are that the financial institution was

66 See *Freeman v. HSBC Holdings PLC*, No. 14CV6601 (DLI) (CLP), 2018 WL 3616845, at *63 (EDNY 27 July 2018).

67 *Weiss*, 2019 WL 1441118, at *9; see also *Strauss v. Credit Lyonnais, SA*, No. 06CV702DLIRML, 2019 WL 1492902, at *7 (EDNY 31 March 2019).

68 See *Kemper v. Deutsche Bank AG*, 911 F3d 383, 390 (7th Circuit 2018); see also *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *8 (SDNY 28 March 2019) (dismissing ATA claims where defendants provided banking and other services to Iranian entities, which were not plausibly alleged to have provided support for the terrorist attacks at issue).

69 See, e.g., *Fields v. Twitter, Inc*, 881 F3d 739, 744-46 (9th Circuit 2018); *Rothstein v. UBS AG*, 708 F3d 82, 97 (2d Circuit 2013).

70 See *Boim v. Holy Land Found for Relief and Dev*, 549 F3d 685, 697-99 (7th Circuit 2008).

71 See *Kemper v. Deutsche Bank AG*, 911 F3d 383, 390 (7th Circuit 2018); see also *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *8 (SDNY 28 March 2019) (dismissing ATA claims where defendants provided banking and other services to Iranian entities, which were not plausibly alleged to have provided support for the terrorist attacks at issue).

72 See *Linde*, 882 F3d, 328-29.

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generally aware of its role in the terrorist act at the time the services were provided, and that it knowingly and substantially assisted the act. As more cases arise to which those amendments creating secondary liability are applicable,[73] the legal landscape for these types of claims will likely become clearer. Recently, the text of the statute, which requires that the injury arise out of an act of 'an organisation that had been designated as a foreign terrorist organisation', has been interpreted strictly by its terms to not apply to an attack committed by a state sponsor of terrorism because such a sponsor is not itself a foreign terrorist organisation.[74]

In 2019, the Second Circuit reaffirmed that secondary liability requires defendants be at least 'generally aware' that by providing banking services to foreign terrorist organisations, the bank itself was playing a role in the organisation's terrorist activities, thereby firmly establishing this defence to secondary liability.[75] After that decision, several trial courts have found that banks are not liable for conspiracy claims or aiding and abetting claims under the ATA, clarifying that claims that banks conducted routine transactions with entities with ties to terrorist organisations would be insufficient.[76] Many of these cases are currently pending before the Second Circuit and may be further resolved in the near future. Courts have likewise found allegations that a defendant provided services to a country, or its business, subject to sanctions for sponsoring terrorism, insufficient where the defendant's activities did not demonstrate a common purpose or plan with foreign terrorist organisations.[77]

Additionally, there has been an effort by plaintiffs to pursue common law based claims, rather than statutory based claims, against banks for aiding and abetting human rights violations by foreign states, by violating US sanctions prohibiting transfers of funds to those states.[78] A court recently reversed the dismissal of such a claim under the 'act of state' doctrine, which bars a US court from sitting in judgment over the acts of a foreign government, but it remains to be seen whether those claims will survive further motion practice.[79]

ii Financial product-related suits

Banks have traditionally faced lawsuits related to the complex financial products they offer. Although those related to mortgage-backed securities are on the decline as many of these cases have settled in recent years, the litigation in this sphere has grown as banks create

73 The 2016 Amendments implemented by the Justice Against Sponsors of Terrorism Act apply to any civil action pending on or commenced after 28 September 2016 that arises out of an injury caused on or after 11 September 2001.

74 *Shaffer v. Deutsche Bank AG*, No. 16-CR-497-MJR-SCW, 2017 WL 8786497, at *1 n1 (SD Ill 7 Dec 2017), aff'd sub nom. *Kemper v. Deutsche Bank AG*, 911 F3d 383 (7th Circuit 2018).

75 *Siegel v. HSBC N Am Holdings, Inc*, No. 18-2540-CV, 2019 WL 3719976, at *6 (2d Circuit 8 August 2019); see also *Weiss v. Nat'l Westminster Bank PLC*, No. 05CV4622DLIRML, 2019 WL 1441118, at *11 (EDNY 31 March 2019); *O'Sullivan v. Deutsche Bank AG*, No. 17-CIV-8709, 2018 WL 1989585, at *6 (SDNY 26 April 2018); *Taamneh v. Twitter, Inc*, 343 F Supp 3d 904, 917 (ND Cal 2018).

76 See *Freeman v. HSBC Holdings PLC*, 413 F Supp 3d 67 (EDNY 2019); *Averbach v. Cairo Amman Bank*, No. 19-cv-004, 2020 WL 486860 (SDNY 21 January 2020).

77 See *O'Sullivan v. Deutsche Bank AG*, No. 17 CV 8709-LTS-GWG, 2019 WL 1409446, at *9 (SDNY 28 March 2019); see also *Taamneh v. Twitter, Inc*, 343 F Supp 3d 904, 916 (ND Cal 2018); but see *Miller v. Arab Bank, PLC*, No. 18-CV-2192 (BMC), 2019 WL 1115027, at *9 (EDNY 11 March 2019) (refusing to dismiss claims against bank that provided services directly to terrorist organisations, including by providing payments to the families of terrorists through a scheme the bank administered).

78 See *Ofisi v. BNP Paribas, SA*, 278 F Supp 3d, 9293.

79 See *Kashef v. BNP Paribas SA*, No. 18-1304-cv, 2019 WL 2195619 (2d Circuit 22 May 2019) (reversing *Kashef v. BNP Paribas, SA*, 16-CV-3228, 2018 WL 1627261, at *2 (SDNY 30 March 2018)).

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increasingly sophisticated financial products and derivative instruments. Litigation usually involves allegations of various forms of fraud, misrepresentation, breach of contract or breach of fiduciary duty, and in particular, raising claims as to the suitability of the financial product. While such litigation often includes sophisticated parties, a proposed class action was recently filed against a large US bank based on a change in terms regarding the purchase of cryptocurrencies online using the bank's credit cards by consumers.[80] The complaint alleges that the bank changed its policies without notice to treat such purchases as 'cash advances', which include fees and high interest rates, in violation of the Truth in Lending Act (TILA).[81] On 1 August 2019, the court permitted the breach of contract and TILA's clear and conspicuous disclosure claims to proceed.[82] Other courts have similarly permitted federal law- and state law-based contract claims to proceed against banks regarding banking, and particularly online banking, practices.[83] Such cases demonstrate a growing trend of consumer claims against banks for fees and charges of which banks must be aware.

iii Antitrust violation suits: civil suits brought in the wake of antitrust investigations

There was a wave of private litigation borne out of regulatory investigation into financial markets, including alleged London Interbank Offered Rate (LIBOR) fixing and FX manipulation. While an increasing number of these cases have settled, litigation continues against the non-settling banks. The banks secured a recent victory in the dismissal of certain claims arising from transactions executed outside the US, but claims under the Commodity Exchange Act were allowed to proceed.[84] Additionally, claims by a separate class of plaintiffs brought under the Sherman Act as well as California state antitrust laws have been permitted to proceed.[85] Still, other types of antitrust claims remain unresolved, including claims brought by additional classes of indirect-purchaser plaintiffs alleging collusion in the FX market[86] and classes of customers alleging that certain banks used 'last look', a trading practice using complex algorithms that allegedly cancel or delay the processing of FX orders in order to ensure the bank receives a more favourable transaction.[87]

In the LIBOR sphere, federal antitrust claims that had previously been dismissed by a lower court for failure to plead antitrust injury were revived in 2016, following a reversal by the Second Circuit, which held that antitrust law did not require plaintiffs to show an injury causing harm to competition in order to allege a conspiracy among market participants when

80 See *Tucker v. Chase Bank USA, NA*, 399 F Supp 3d 105 (SDNY 2019).

81 id., No.18 CV 3155 (SDNY 10 April 2018) (Dkt. No. 1).

82 See *Tucker v. Chase Bank USA, NA*, 399 F Supp 3d 105, 108 (SDNY 2019).

83 See, e.g., *Tims v. LGE Cmty Credit Union*, No. 17-14968, 2019 WL 4019847 (11th Circuit 27 August 2019) (reversing dismissal of breach of contract claims under state and the federal Electronic Fund Transfer Act).

84 See *In re Foreign Exch Benchmark Rates Antitrust Litig*, No. 13 CIV 7789 (LGS), 2016 WL 5108131 (SDNY 20 September 2016).

85 See *Nypl v. JPMorgan Chase & Co*, No. 15 CIV 9300 (LGS), 2018 WL 1276869, at *4 (SDNY 12 March 2018) (denying banks' motion to dismiss antitrust claims brought by individual plaintiffs who purchased allegedly price-fixed foreign currency from the Defendants at the benchmark rates).

86 See *Baker v. Bank of Am Corp*, 16 CIV 7512 (LGS) (SDNY 28 April 2017) (Dkt No. 181) (dismissing dozens of banks pursuant to a stipulation between the parties).

87 See, e.g., *Alpari (US), LLC v. Credit Suisse Group AG*, 17 CIV 5282 (LGS) (SDNY 12 June 2018) (granting motion to compel arbitration).

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the conduct alleged constitutes a per se antitrust violation, as in the context of rate-setting.[88] In 2017, the Supreme Court denied a petition from the banks requesting it to review the Second Circuit opinion, so the case will proceed, focusing on whether plaintiffs are efficient enforcers of the antitrust laws – a requirement for antitrust standing. In 2018, the district court certified only a limited class of over-thecounter purchasers of LIBOR-based instruments, but refused to do the same for other proposed classes, in part due to concerns of standing.[89] To the extent the court certified classes, numerous defendants subsequently settled after being unable to obtain dismissal based on lack of personal jurisdiction.[90]

In addition, reports of regulatory investigations, prior to any settlements, have spawned private litigation. For example, in the wake of reports of investigations into the potential manipulation of prices in the supranational, sub-sovereign and agency (SSA) bond market, various class actions were filed against several large financial institutions and individual traders alleging manipulation of prices in the SSA bond market in violation of the Sherman Act, 15 USC §1.[91] Those types of claims, however, have struggled to satisfactorily plead the requirements of antitrust standing, including that the plaintiff suffered an injury-in-fact as a participant in the market that was directly restrained because of an antitrust violation, and that the injury is the type contemplated by the antitrust statute.[92]

More uniquely, one court has permitted claims based on allegations of spoofing, which is defined in Dodd-Frank as 'bidding or offering with the intent to cancel the bid or offer before execution'[93] (at least when supported by collusive messages amongst traders) to move forward as an improper restraint of trade in violation of antitrust laws, namely the Sherman Act.[94] That same decision, however, likewise recognised the eventual difficulty in proving damages in such actions given uncertainty regarding the exact impact on foreign exchange rates. Courts have similarly recognised that such allegations may also fail substantively once past the pleading stage when the court no longer must accept all allegations as true.[95] Accordingly, at the time of writing, it is uncertain whether the spoofing claims will ultimately succeed.

88 See *Gelboim v. Bank of Am Corp*, 823 F3d 759 (2d Circuit 2016), cert. denied, 137 S Ct 814 (2017).

89 See *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB), 2018 WL 1229761 (SDNY 28 February 2018).

90 See *In re LIBOR-Based Fin Instruments Antitrust Litig*, No. 11 CIV 5450 (NRB) (SDNY 25 October 2018) (Dkt No. 494).

91 See *In re SSA Bonds Antitrust Litig*, No. 16 CIV 3711 (ER), 2018 WL 4118979, at *6 (SDNY 28 August 2018) (Dkt No. 495).

92 See id.

93 7 USC §6c(a)(5)(C); see also *Sullivan v. Barclays PLC*, 13-CV-2811, 2017 WL 685570, at *12-13 (SDNY 21 February 2017).

94 See *Sullivan*, 2017 WL 685570, at *12-13.

95 See *Dennis v. JPMorgan Chase & Co*, 343 F Supp 3d 122, 156 & n110 (SDNY 2018), adhered to on denial of reconsideration, No. 16-CV-6496 (LAK), 2018 WL 6985207 (SDNY 20 December 2018); see also *Sonterra Capital Master Fund, Ltd v. Barclays Bank PLC*, No. 15-CV-3538 (VSB), 2018 WL 6725387, at *17 (SDNY 21 Dec 2018) (permitting antitrust claim to proceed only to the extent that one plaintiff could point to specific transactions on specific dates with one particular defendant).

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IX EXCLUSION OF LIABILITY

i Pleading requirements

In the securities fraud context, to survive a motion to dismiss, plaintiffs must plead the circumstances of fraud with particularity under Federal Rule of Civil Procedure Rule 9(b). The Second Circuit recently raised the standards for plaintiffs bringing Section 10(b) claims based on undisclosed wrongdoing.[96] In addition to pleading fraudulent disclosure, plaintiffs must now also allege with particularity facts of the underlying wrongdoing that was the subject of the disclosure. In this case, the plaintiffs adequately plead the defendant made misleading statements relating to an antitrust conspiracy, but failed to allege sufficient details regarding the antitrust conspiracy itself.[97]

ii Causation

In order to hold a defendant civilly liable, plaintiffs must show that the defendant caused their injuries. This causal connection requirement frequently limits a defendant's exposure to damages. Recently, however, in the securities fraud context, the Second Circuit has been more lenient with regard to allegations of causation at the initial motion to dismiss stage, including by not requiring plaintiffs to rule out other causes of loss.[98] As a result, the plaintiffs must only give 'some indication' of a 'plausible causal link' between the loss suffered and the alleged fraud.[99] In the sanctions violation context, however, a greater causal connection between the provision of banking services and the sanction violation, or terrorist act, is necessary for primary liability, as discussed in Section VI.

iii Arbitration agreements

As discussed in Section IV, arbitration clauses are increasingly included in contracts, and recent holdings of the Supreme Court are likely to affect the number of class actions against large financial service providers, which often rely upon class action waiver provisions in contractual terms for credit cards, bank accounts, student loans, and other financial products and services.

X REGULATORY IMPACT

Agencies under the Trump administration have proposed and finalised numerous changes to and rollbacks of regulations, including banking regulations and guidance. In addition to the changes to the Volcker Rule discussed above, the SEC has adopted new rules on security-based swaps, and the Federal Reserve has proposed expanding bilateral netting provisions under the Federal Deposit Insurance Corporation Improvement Act of 1991 to include more entities as 'financial institutions'.[100] Additionally, on 5 June 2019, the SEC finalised the Regulation

96 See *Gramm v. Sanderson Farms, Inc*, 944 F3d 455 (2d Circuit 2019).

97 See id. at 457.

98 See, e.g., *Charles Schwab Corp*, 883 F3d 68, 93-95; *Loreley Fin (Jersey) No. 3 Ltd v. Wells Fargo Sec, LLC*, 797 F3d 160, 188 (2d Circuit 2015).

99 *Charles Schwab*, 883 F3d, 93 (quoting *Loreley*, 797 F3d, 187).

100 Cross-Border Application of Certain Security-Based Swap Requirements, 85 FR 6270 (4 February 2020), online at https://www.federalregister.gov/documents/2020/02/04/2019-27760/cross-border-application-of-certain-security-based-swap-requirements; Board of Governors of the Federal Reserve System, Notice

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Best Interest Rule, which more closely aligns the standards applicable to broker-dealers and investment advisers while recognising the fundamental differences between the two.[101] On 2 May 2019, the US Department of the Treasury's Office of Foreign Assets Control released 'A Framework for OFAC Compliance Commitments' providing general guidance on effective sanctions compliance programmes, which is based on recent settlements with two international banks.[102]

XI OUTLOOK AND CONCLUSIONS

The US continues to experience a period of great political and economic uncertainty, and it is unclear what the implications will be for financial institutions. The Trump administration has already revised the tax code and amended portions of Dodd-Frank, which will lessen the regulatory obligations of banks – potentially significantly. The covid-19 pandemic led to the enactment of regulatory relief, albeit temporary in nature, to financial institutions in order to support the economy. It remains to be seen what the impact of these temporary measures will be on future banking litigation.

The administration is also likely to continue on the path of reducing regulations if President Trump is re-elected in November. However, if there is a new administration, it is possible that many of the changes made over the past four years could be rolled back, and a Biden administration is more likely to impose new restrictions on financial institutions, which could potentially lead to an increase in banking litigation.

The Trump administration, however, has appointed conservative and pro-business judges to the US Supreme Court and lower federal courts, and how such appointments will translate into judicial decisions in particular cases remains to be seen regardless of the type of administration to come in 2020. In addition, state attorneys general in places like New York and California have also declared their intention to take up (and have taken up) the reins of investigatory activity previously conducted by federal regulators of financial institutions.

of Proposed Rulemaking: Netting Eligibility for Financial Institutions, 84 Fed Reg 18741, 12 CFR 231 (2 May 2019), online at https://www.federalregister.gov/documents/2019/05/02/2019-08898/netting-eligibility-for-financial-institutions.

101 See EC Release No. 34-86031, at 34 (5 June 2019) (to be codified at 17 CFR pt 240).

102 See U.S. Department of The Treasury, Office of Foreign Assets Control – Sanctions Programs and Information, https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf (last visited 18 September 2020).

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Appendix 1

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Mr Blackman has been recognised as a leading international litigation and arbitration practitioner by numerous publications including *Chambers UK*, *The Legal 500* and *The American Lawyer*.

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