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Between a Rock and a Hard Place: New York District Court Sanctions Bank of China

Since the early 1980s, when the seminal case of *In Re Grand Jury Proceedings (Bank of Nova Scotia)*, 740 F.2d 817 (11th Cir. 1984), was decided, foreign banks doing business in the United States have known that, at some point, they could be caught on the horns of a dilemma – between the obligation to comply with a U.S. subpoena for customer records and the financial confidentiality laws in their home countries. Repeatedly over the past three decades, U.S. courts have weighed whether to order a foreign bank to comply with a subpoena – civil or criminal – or to protect the bank (or its officers) from potential criminal prosecution abroad. In virtually all cases, the courts required compliance with the subpoena, particularly in criminal cases.

Over the past few months, the U.S. District Court for the Southern District of New York has written the latest and most ominous chapter in this ongoing international issue. On November 30, 2015, Judge Richard J. Sullivan held Bank of China in contempt of court for failing to produce financial records related to its customers in China, and ordered the bank to pay $50,000 every day, beginning on December 7, 2015, until it complies with the subpoenas for those records. The subpoenas were issued by Gucci America Inc. in civil litigation concerning the fabrication and sale of knock-off Gucci products. The subpoenas, served on Bank of China's branch office in New York in 2010 and 2011, sought disclosure of customer account records located in China, and thus their disclosure is governed by Chinese financial privacy laws, which precludes disclosure without account holder consent. Bank of China's customers are alleged to be involved in the counterfeiting and to have transferred funds derived from the scheme through accounts at Bank of China and its correspondent bank in New York. Despite its limited presence in the United States, and the restrictions imposed by Chinese law, Bank of China's efforts to quash the subpoenas failed before both federal district and appellate courts.

The power of U.S. courts to order compliance with subpoenas like those at issue here has been in some doubt since the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which restricted jurisdiction of U.S. federal courts over non-resident corporations. Indeed, Judge Sullivan's initial orders, issued in 2012, compelling Bank of China to comply with the subpoenas, were overturned by the Court of Appeals on the basis that "general personal jurisdiction" – jurisdiction for all purposes – did not exist over Bank of China. In reconsidering the issue this year, Judge Sullivan ruled that a more limited form of jurisdiction – "specific personal jurisdiction" – which exists over companies that transact business in a jurisdiction over claims that relate to that business – would support the subpoenas, because Bank of China had

utilized its correspondent bank account with JP Morgan Chase Bank in New York in transferring the defendants' funds. As is required under U.S. law, Judge Sullivan also weighed comity factors including whether Bank of China would face any real consequences for breaking Chinese law; Bank of China speculated that it would be penalized, but did not cite any examples in which the Chinese government actually imposed civil or criminal penalties for disclosure. Based on this reasoning, Judge Sullivan ordered Bank of China to comply with the subpoenas on September 29, 2015. When Bank of China failed to comply, the Court imposed the $50,000 per day contempt sanctions intended to coerce its compliance. The Bank of China has appealed Judge Sullivan's ruling to the Second Circuit.

This case is a cautionary tale for foreign banks highlighting that U.S. courts will continue to enforce their subpoenas on those banks that do business in New York, as virtually all foreign banks do. Notwithstanding the *Daimler* decision, it appears that, at least for now, U.S. courts will continue to require foreign banks to comply with U.S. injunctions and subpoenas as a prerequisite for doing business in the United States. U.S. courts, particularly those located in New York, are cognizant of the practical realities of the international financial system. Foreign banks highly value their ability to maintain a U.S. presence, so the banks have a strong incentive to comply with U.S. court orders. Because the U.S. does not recognize the right to financial privacy to the extent many other countries do, it may be indifferent to the penalties that may be imposed in those countries for violation of privacy laws. U.S. courts can also be quite skeptical regarding the potential for criminal prosecution, since it is often difficult for a foreign bank to point to actual prosecutions under the financial privacy laws. These challenges demonstrate the need for foreign banks to have experienced counsel when they face potentially problematic discovery obligations, and to coordinate with foreign counsel to weigh the various risks and make an effective presentation to a U.S. court regarding the actual legal environment in the home country. Having attorneys who have previously navigated these complex waters can make an enormous difference.

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