THE NATIONAL LAW JOURNAL
AUGUST 5, 2013
An ALM Publication

'DaimlerChrysler' Revisits Personal Jurisdiction

At issue is when U.S. courts can hear human rights and other claims against non-U.S. parent companies.

BY PETER TROOBOFF

In April, the U.S. Supreme Court ruled on the extraterritorial reach of U.S. courts to hear claims for violations of international law under the Alien Tort Statute, 28 U.S.C. 1350, in *Kiobel v. Royal Dutch Petroleum* (2013). While interested parties and scholars parse the several complex opinions in *Kiobel*, the court has now granted certiorari to determine when U.S. courts have general personal jurisdiction to hear an important subset of international human rights and other cases. *DaimlerChrysler A.G. v. Bauman*, No. 11-965. In *DaimlerChrysler*, the court could clarify key tests for determining when general personal jurisdiction exists.

In *DaimlerChrysler*, the plaintiffs, residents of Argentina, filed claims in U.S. District Court for the Northern District of California against DaimlerChrysler A.G., the parent German company resulting from the 1998 merger of Daimler-Benz A.G. and Chrysler Corp. The plaintiffs alleged human rights violations by the German company under the Alien Tort Statute and also the Torture Victim Protection Act, 28 U.S.C. 1350. The plaintiffs assert that the Argentine subsidiary of Daimler A.G. collaborated with the Argentine military in committing serious human-rights violations during the Argentine "Dirty War."

THE BUENOS AIRES, ARGENTINA, HEADQUARTERS OF DAIMLERCHRYSLER
BEATRICE MURCH

Significantly, the plaintiffs did not identify any acts relating to their claims that occurred in the United States by Daimler A.G. or any other member of the automaker's group. Nor did they allege that the U.S. sales and distribution subsidiary of Daimler A.G., Mercedes-Benz U.S.A, or the U.S. holding company, DaimlerChrysler Corp., played any role in the alleged violations. After limited jurisdictional discovery and without an evidentiary hearing, the district court granted a motion to dismiss for lack of personal jurisdiction over Daimler A.G.

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, after first ruling, 2-1, to affirm the dismissal, and without a second oral argument, unanimously reversed the district court. The panel held that, under the due process clause of the 14th Amendment, Daimler A.G. is subject to general personal jurisdiction in California and that the assertion of such jurisdiction "under the circumstances of this case" is reasonable.

When the Ninth Circuit denied en banc review of this second opinion, Judge Diarmuid O'Scannlain, joined by seven judges, filed a strong dissent asserting that the panel decision "extends the reach of general personal jurisdiction far beyond the breaking point" and terming the second panel holding "an affront to due process." He saw that ruling as "a gratuitous threat to our nation's economy, foreign relations, and

PETER TROOBOFF *is senior counsel in Washington at Covington & Burling.*

international comity." 676 F.3d 774, 775 and 779 (9th Cir. 2011).

On what basis did the Ninth Circuit find that Daimler A.G. had the requisite "continuous and systematic general business contacts" with California for the exercise of general jurisdiction to be reasonable? The plaintiffs accepted that the U.S. company was not an alter ego of the German parent and agreed that the separate corporate identities should be respected. Instead, they argued for, and the court adopted, an "agency" test under which two showings are required. The first is that tasks performed by the subsidiary are "a manifestation of the parent's presence," which would be the case if such tasks "are sufficiently important to the foreign entity that the corporation itself would perform equivalent services if no agent were available." Id. at 921. Second, general personal jurisdiction exists only if, in addition, the parent has either actual control or the right of control over the subsidiary.

In the case of Daimler A.G., the Ninth Circuit found these two prerequisites satisfied by the important sales of Mercedes-Benz vehicles in California by Mercedes-Benz U.S.A. and by the powers that the German company held under a general distribution agreement to determine the operational features of the U.S. subsidiary. On this key point, Judge Ronald Whyte in the district court disagreed. Presumably, based on the evidence gained through jurisdictional discovery, he found that "the evidence that alternative automobile distribution channels were used by [Daimler A.G.]…in the past and are currently used by Toyota show that distribution is not a task that 'but for the existence of the subsidiary,…[the German parent] would have to undertake itself.' " 2007 WL 486389, at *2 (N.D. Calif. Feb. 12, 2007). In seeking certiorari, Daimler A.G. argued that the precedents on this issue are incoherent and confuse and conflate the two tests of general jurisdiction.

Further, the Ninth Circuit found the assertion of general jurisdiction over the German parent company to be reasonable in view of the parent's marketing, litigation, research and development and other activities in California through its U.S. subsidiary. In reaching its ruling, the Ninth Circuit gave weight to its finding of the inadequacy of Germany and Argentina as fora for the claims. Judge Stephen Reinhardt's opinion states that "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." Id. at 927.

In *Kiobel*, the non-U.S. parent companies also raised a personal-jurisdiction defense, but it was not fully adjudicated on appeal. In a companion case to *Kiobel*, the U.S. District Court for the Southern District of New York held, and the Second Circuit affirmed, that non-U.S. parent companies were subject to general personal jurisdiction in view of the relationship between the non-U.S. parent companies and their investor-relations office in New York. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). The Second Circuit relied in finding general personal jurisdictional on the "meaningful importance" of the investor-relations services to the parent companies.

The DaimlerChrysler case will invite the Supreme Court to elaborate on its unanimous recent ruling denying general personal jurisdiction in *Goodyear Dunlop Tires Operations S.A. v. Brown*, 131 S. Ct. 2846 (2011). In that decision, which was announced after the Ninth Circuit's ruling in *DaimlerChrysler*, Justice Ruth Bader Ginsburg explained that "for a corporation,…the paradigm forum for the exercise of general jurisdiction" is an equivalent place to an individual's domicile "in which the corporation is fairly regarded as at home." In *Goodyear*, the court did not address whether the European companies at issue could be found present through the agency theory on which the Ninth Circuit relied. Justice Stephen Breyer noted in his concurring *Kiobel* opinion with three other justices that "[t]he only presence in the United States" of the two non-U.S. companies "consists of an office in New York City…that helps to explain their business to potential investors." Perhaps revealing some doubt about the *Wiwa* jurisdictional ruling in light of *Goodyear*, he addressed the Alien Tort Statute issue conditionally and gingerly. He said that "even if the New York office [of Shell] were a sufficient basis for asserting general jurisdiction," he would support dismissal in *Kiobel* based on his reading of the Alien Tort Statute and the absence of a "distinct American interest" when the defendants have such a "minimal and indirect American presence."

In support of granting certiorari, Daimler A.G. emphasized that it was being forced to litigate in a state in which it does not manufacture or sell products, own property or employ workers. Amici supporting the grant of certiorari pointed particularly to the uncertainty about personal jurisdiction that the Ninth Circuit decision creates and the economic risk under its holding for small and medium business owners operating in the United States. The U.S. Chamber of Commerce and National Foreign Trade Council amicus brief, in which the Federation of German Industries joined, strongly disputes on legal and policy grounds the Ninth Circuit's application of forum non conveniens principles to the personal jurisdiction issue under the 14th Amendment.

They also question the court's "flawed weighing of sovereign interests [that] unfairly tilts the scales against defendants." U.S. and German car manufacturers associations emphasized that the policy considerations against the Ninth Circuit ruling include "the risk of retaliation by the legislatures and courts of foreign countries against U.S. companies [and] the open invitation to plaintiffs' counsel to engage in forum shopping."

In view of the importance of the case to U.S. interests and industry, the solicitor general filed an amicus brief solidly supporting reversal on due process grounds. It is noteworthy that federal-question jurisdiction was substantially based on claims under the Alien Tort Statute and the Torture Victims Protection Act that, the solicitor general said, "do not survive this Court's intervening decisions" in *Kiobel* and *Mohamad v. Palestinian Authority* (2012). His brief elaborates how the Ninth Circuit's jurisdictional holding threatens to "discourage foreign commercial enterprises" from investment and trade in this country and could impede U.S. negotiation of treaties to recognize and enforce our courts' judgments.