

## SECOND CIRCUIT REVIEW

## Expert Analysis

# Jurisdiction Over Foreign Financial Institutions Based on Bank Accounts

This month, we discuss *Licci v. Lebanese Canadian Bank, SAL*,<sup>1</sup> in which the U.S. Court of Appeals for the Second Circuit considered whether a district court's exercise of personal jurisdiction over a foreign bank based on its correspondent banking accounts in New York is consistent with the due process protections of the U.S. Constitution. The court's opinion, written by Judge Robert D. Sack, and joined by Chief Judge Robert A. Katzmann and Judge Amalya L. Kearse, addressed an issue previously reserved in *Licci II*,<sup>2</sup> in which the court certified state law questions regarding personal jurisdiction to the New York Court of Appeals, but reserved decision on the due process issue until after the state law ruling.

Following the New York Court of Appeals' decision that personal jurisdiction exists under state law,<sup>3</sup> the Second Circuit, vacating the district court's opinion, held that the exercise of personal jurisdiction over a foreign bank using a New York correspondent bank account to execute dozens of wire transfers is also consistent with due process.

### Background

Plaintiffs are American, Israeli, and Canadian citizens who were injured, or whose family members were injured or killed, in rocket attacks allegedly carried out by the foreign terrorist organization Hizballah in Israel in July and August 2006. Defendant is the Lebanese Canadian Bank (LCB), a foreign bank that maintains a correspondent bank account with American Express Bank Ltd. (AmEx) in New York.

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. They specialize in complex commercial litigation and white-collar criminal defense matters. EKTA R. DHARIA, a law clerk at the firm, assisted in the preparation of this column.



By  
**Martin  
Flumenbaum**



And  
**Brad S.  
Karp**

Plaintiffs allege that LCB used its correspondent bank account with AmEx to wire dozens of transfers totaling millions of dollars to Shahid (Martyrs) Foundation, a "financial arm" of Hizballah. Those funds, plaintiffs claim, were held in Shahid's LCB accounts in Lebanon, which were controlled by Hizballah. Plaintiffs further allege that LCB made these transfers knowing that the money would permit Hizballah to carry out terrorist attacks, including the rocket attacks that injured the plaintiffs and their families in Israel.

Plaintiffs assert five claims against LCB, including the commission of international terrorism in violation of the Anti-Terrorism Act, 18 U.S.C. §2333, and aiding and abetting international terrorism in violation of the Anti-Terrorism Act.

### District Court Opinion

LCB moved to dismiss all five claims for, among other reasons, lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure. On March 31, 2010, in a decision written by Judge George B. Daniels, the district court for the Southern District of New York granted LCB's motion to dismiss for lack of personal jurisdiction.<sup>4</sup>

The district court dismissed the case based on state law grounds. Under New York's long-arm statute, a defendant may be subject to personal jurisdiction if: (1) the defendant "transacted business" within New York and (2) the plaintiff's claim "aris[es] from" that activity.<sup>5</sup> The dis-

trict court concluded that LCB did not transact business in New York because wiring transfers through a correspondent bank account was not an active "use" of such an account; rather, it was the mere "maintenance" of an account, which could not rise to the level of transacting business in New York.<sup>6</sup>

The district court also held that the plaintiffs' claims did not arise from the defendant's banking activity because plaintiffs' injuries were proximately caused by Hizballah's rocket attacks, not LCB's wire transfers. Concluding that this case did not satisfy either prong of New York's long-arm statute, the district court dismissed for lack of personal jurisdiction over LCB.

Although the dismissal was based entirely on state law grounds, the district court additionally noted, without further explanation, that exercising personal jurisdiction over LCB would not comport with constitutional due process principles.

The Second Circuit held that the exercise of personal jurisdiction over a foreign bank using a New York correspondent bank account to execute dozens of wire transfers is consistent with due process.

### Initial Second Circuit Opinion

On March 5, 2012, the Second Circuit examined the district court's state law ruling in an opinion written by Judge Robert D. Sack. The court concluded that New York law was too unsettled to determine whether it would be proper to exercise personal jurisdiction over a foreign bank based on its use of a correspondent banking account in New York.

The court therefore certified to the New York Court of Appeals the following questions: (1) Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect dozens of wire transfers on behalf of a foreign client, constitute a transaction of business in New York? (2) If so, do the plaintiffs' claims arise from LCB's transaction of business in New York? The court reserved decision on the constitutional due process question until after the New York Court of Appeals answered the certified state law questions.<sup>7</sup>

#### State Court of Appeals

On Nov. 20, 2012, the New York Court of Appeals, in an opinion written by Judge Susan P. Read, answered both certified state law questions in the affirmative.<sup>8</sup> The court first held that LCB's use of the New York correspondent bank account satisfied the transaction of business prong. After examining the nature and quality of the contacts LCB had with the New York banking system, the court noted that LCB repeatedly used the New York account to make transactions. The court concluded that this was a course of dealing that evidenced "purposeful availment" of the privilege of doing business in New York.<sup>9</sup>

The court also held that LCB's actions satisfied the "arising from" prong of the long-arm statute. The court rejected the district court's requirement of proximate cause between the plaintiffs' claims and the defendant's actions. Instead, the New York Court of Appeals looked for a "relatedness" between the claim and transaction, such that they were "arguably connected" and not "too attenuated."<sup>10</sup> Finding a sufficient relationship between the plaintiffs' claim that LCB engaged in terrorist financing and LCB's use of the correspondent account in New York to wire transfers to Shahid and Hizballah, the court concluded that the plaintiffs' claim arose out of the defendant's actions.

Holding that both prongs were satisfied, the New York Court of Appeals held that a foreign bank may be subject to long-arm personal jurisdiction in New York where the plaintiff's claim is connected to the defendant's wire transfers through its correspondent bank accounts.

#### Recent Opinion

After the New York Court of Appeals resolved the state law jurisdictional issues, the Second Circuit considered whether the exercise of personal jurisdiction over LCB also satisfied federal due process protections. The exercise of personal jurisdiction comports with due process when a defendant has "minimum contacts" with the forum state such that having the suit there does not offend "traditional notions of fair play and substantial justice."<sup>11</sup> When a plaintiff asserts

specific jurisdiction, minimum contacts are satisfied when the defendant purposefully avails itself of doing business in the forum state and could foresee being haled into court there.<sup>12</sup>

**Minimum Contacts.** The court first examined whether LCB had the requisite minimum contacts in New York by evaluating the quality and nature of its contacts under the totality of the circumstances. Here, the court found that LCB's activities in New York were "deliberate and recurring." LCB could have processed the Shahid wire transfers through a correspondent account anywhere in the world, but chose to process them through its New York AmEx account. Plaintiffs also alleged that LCB wired dozens of transfers totaling millions of dollars through this account. The court concluded that such activity was not "random, isolated, or fortuitous"; its deliberate and recurring nature demonstrated that LCB purposefully availed itself of New York's banking system.<sup>13</sup>

The court held that the exercise of personal jurisdiction was reasonable in this case.... Although the injuries and deaths at issue in the case occurred in Israel, New York has an interest in monitoring its banks to ensure that its system is not used to support activities such as terrorism.

The court was careful to distinguish this case from its decisions related to the Sept. 11 attacks, in which it held that defendants must have "expressly aimed" their conduct at New York for the exercise of personal jurisdiction to satisfy due process.<sup>14</sup> The court noted that the conduct on which personal jurisdiction was based in the Sept. 11 cases occurred entirely out-of-forum, whereas the underlying conduct in *Licci* occurred within New York. The court concluded that LCB's actions satisfied the minimum contact analysis for personal jurisdiction, without requiring LCB to aim its activities expressly at New York.

**Reasonableness.** Even when the requisite minimum contacts are satisfied, a defendant may nevertheless defeat personal jurisdiction on the ground that its exercise is unreasonable—that it would offend traditional notions of fair play and substantial justice. The court considered three factors in determining whether personal jurisdiction over LCB was reasonable: (1) the burden of personal jurisdiction on the defendant; (2) the interests of the forum state in adjudicating the case; and (3)

the plaintiff's interest in obtaining convenient and effective relief.<sup>15</sup>

The court held that the exercise of personal jurisdiction was reasonable in this case. First, even though LCB was based in Lebanon and the plaintiffs resided in Israel, the burden on LCB was light because "the conveniences of modern communication and transportation ease" any burden the defense of this case in New York might impose on LCB.<sup>16</sup> Second, although the injuries and deaths at issue in the case occurred in Israel, New York has an interest in monitoring its banks to ensure that its system is not used to support activities such as terrorism. Finally, LCB identified no important interest that outweighed those of the plaintiffs in obtaining relief in New York. The court thus concluded that exercising personal jurisdiction over LCB was reasonable and therefore consistent with the due process principles of the Constitution.

#### Conclusion

The Second Circuit's decision in *Licci* answered an important lingering question about whether asserting personal jurisdiction on foreign banks based on their correspondent accounts in New York satisfied constitutional due process. The opinion clarified that the use of correspondent accounts in New York to execute wire transfers can not only satisfy long-arm personal jurisdiction over a foreign bank, but also meet constitutional due process standards.

As a result of this decision, foreign financial institutions may be subject to personal jurisdiction in New York based on correspondent accounts they hold in the state, even when their business is otherwise outside the United States.

1. *Licci v. Lebanese Canadian Bank*, SAL, No. 10-1306-cv, —F.3d—, 2013 WL 5663360 (2d Cir. Oct. 18, 2013).

2. *Licci v. Lebanese Canadian Bank*, SAL (*Licci II*), 673 F.3d 50 (2d Cir. 2012).

3. *Licci v. Lebanese Canadian Bank*, SAL (*Licci III*), 984 N.E.2d 893, 20 N.Y.3d 327 (2012).

4. *Licci v. Lebanese Canadian Bank*, SAL (*Licci I*), 704 F.Supp.2d 403 (S.D.N.Y. 2010).

5. N.Y. CPLR 302(a)(1) (2012).

6. *Licci I*, 704 F.Supp.2d at 407-08.

7. *Licci II*, 673 F.3d at 74-75.

8. *Licci III*, 984 N.E.2d at 901, 20 N.Y.3d at 341.

9. *Id.* at 899-900, 20 N.Y.3d at 338.

10. *Licci II*, 984 N.E.2d at 960, 20 N.Y.3d at 339-40.

11. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

12. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 127 (2d Cir. 2002).

13. *Licci v. Lebanese Canadian Bank*, SAL, 2013 WL 5663360, at \*7 (quoting *Keeton v. Hustler Magazine*, 465 U.S. 770, 774 (1984)).

14. *Id.* at \*7-8 (citing *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 676 (2d Cir. 2013); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 77, 95 (2d Cir. 2008), abrogated on other grounds, *Samantar v. Yousuf*, 560 U.S. 305 (2010)).

15. See *Metro. Life Ins. v. Robertson-Ceco*, 84 F.3d 560, 568 (2d Cir. 1996).

16. *Id.* at 574.