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U.S. EXTRATERRITORIAL DISCOVERY CONSIDERATIONS FOR FOREIGN BANKING ORGANIZATIONS

Foreign banks that have U.S. offices or U.S. correspondent accounts may, in certain cases, be compelled to produce documents located abroad by subpoenas from U.S. government agencies or civil litigants. In this article, the authors describe the various avenues for such discovery, focusing first on grand jury subpoenas to two Chinese banks and next on the government's recently expanded authority to issue Patriot Act subpoenas. They then turn to civil subpoenas under the Federal Rules of Civil Procedure in a case involving extraterritorial discovery from a U.S. bank subsidiary of a foreign banking organization. They close discussing another avenue for such discovery under 28 U.S.C. Section 1782.

By Jeffrey Alberts and Dustin N. Nofziger *

Recent judicial decisions have clarified, and in some cases modified, the avenues that government agencies and civil litigants can take within the U.S. judicial system to obtain bank documents that are located outside of the U.S ("extraterritorial discovery"). In addition, the recently enacted National Defense Authorization Act for Fiscal Year 2021 ("NDAA")[1] substantially expands the authority of the Secretary of the Treasury and the Attorney General to issue Patriot Act subpoenas to foreign banks with U.S. correspondent accounts. Foreign banking organizations should be aware of the following legal mechanisms for compelling extraterritorial discovery, as well as the limitations that courts recently have placed or may place on them:

1. Foreign banks that have U.S. offices often have consented, as part of an application to the Board of Governors of the Federal Reserve, to the personal jurisdiction of the U.S. federal courts with respect to the enforcement of federal grand jury subpoenas seeking documents relating to investigations arising under the Bank Secrecy Act.

2. The NDAA substantially expands the authority of the Secretary of the Treasury and the Attorney General to issue Patriot Act subpoenas to foreign banks with U.S. correspondent accounts by authorizing them to request "any" records relating to a foreign bank's U.S.

[1] William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong. § 6308 (2020) (enacted).

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correspondent account or otherwise relating to "any" accounts at the foreign bank that are the subject of a U.S. criminal, BSA, or other investigation.

3. U.S. subsidiaries of foreign banks may be compelled under the Federal Rules of Civil Procedure to produce documents located abroad to civil litigants in U.S. proceedings where the U.S. subsidiary is a "mere department" of the foreign bank.

4. "Foreign banks may be compelled under 28 U.S.C. § 1782 to produce documents located abroad for use in foreign proceedings, provided that a U.S. federal court has personal jurisdiction over the bank or subsidiary, and provided that the discovery material sought "proximately resulted" from the foreign bank or subsidiary's contacts with the U.S. that gave rise to personal jurisdiction."

GENERAL JURISDICTONAL PRINCIPLES

The backdrop for all compelled extraterritorial discovery is the U.S. Constitution. In order for a subpoena to be enforced by a U.S. court against the recipient of the subpoena, the U.S. Constitution requires the court to have "personal jurisdiction" over the recipient. The U.S. Constitution's personal jurisdiction requirement protects individual liberty by requiring that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'"[2]

A court can have general or specific personal jurisdiction over a foreign bank due to the foreign bank's contacts with the U.S., and it may also have personal jurisdiction by virtue of the foreign bank's consent. A court may assert "all purpose" or general personal jurisdiction over a foreign bank or a foreign bank's subsidiary to hear any and all claims against it when its affiliations with a U.S. forum are so "continuous and systematic" as to render it essentially at home in the forum.[3] A federal district court may have general personal jurisdiction, for example, over a foreign banking organization's U.S. subsidiary due to that entity's continuous and systematic contacts with the forum. But it will not have general personal jurisdiction over a foreign bank due merely to the fact that the foreign bank has a U.S. branch in the forum.[4] A court may assert "case-linked" or specific jurisdiction, in contrast, over issues that relate to or arise out of a foreign bank's contacts with a U.S. forum.[5] Finally, because the personal jurisdiction requirement protects individual liberty, it can be waived by a foreign bank.[6] As discussed below, this may be the case, for example, when a foreign bank executes an agreement with the Federal Reserve Board to submit to the jurisdiction of the U.S. federal courts with respect to matters arising under U.S. banking law.

GRAND JURY SUBPOENAS

Background

Federal prosecutors have broad discretion to issue subpoenas on behalf of federal grand juries, and a grand jury itself typically does not approve a grand jury subpoena before it is issued.[7] While a federal grand jury subpoena is issued under the authority of a federal court, that court has no prior control over the issuance of the subpoena and typically does not become involved unless the recipient challenges the subpoena.[8] Grand jury subpoenas are governed by Rule 17 of the Federal Rules of Criminal Procedure. Under Rule 17, subpoenas in

[2] *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702–03 (1982) (citation omitted).

[3] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citation omitted).

[4] *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 134-55 (2d Cir. 2014) (Bank of China's branch offices in forum did not establish general personal jurisdiction). On remand, the district court found that it had specific personal jurisdiction over Bank of China with respect to the non-party Rule 45 subpoenas. *Gucci Am., Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 104 (S.D.N.Y. 2015).

[5] *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014).

[6] *Ins. Corp. of Ireland*, 456 U.S. at 703.

[7] *Doe v. DiGenova*, 779 F.2d 74, 80 (D.C. Cir. 1985) ("Nor does the grand jury necessarily approve or even have knowledge of a subpoena prior to its issuance.").

[8] *Id.*

federal proceedings may be served anywhere within the United States.[9]

Recent Developments

Foreign banking organizations with U.S. offices may not realize it, but they may have consented to personal jurisdiction with respect to the enforcement of U.S. grand jury subpoenas issued in connection with Bank Secrecy Act investigations when they applied to open a U.S. office. *In re Sealed Case*,[10] a recent D.C. Circuit case, stands for this proposition.

Sealed Case involved a grand jury investigation into whether U.S. financial institutions that provided correspondent banking accounts to two Chinese banks had properly exercised due diligence over those correspondent bank accounts, as required by U.S. law. A correspondent bank account is an account established to receive deposits from a foreign financial institution, make payments its behalf, or handle other financial transactions its behalf.[11] As described in further detail below, the Bank Secrecy Act, as amended by the Patriot Act, requires U.S. financial institutions to establish appropriate due diligence policies, procedures, and controls that that are reasonably designed to detect and report instances of money laundering through the correspondent accounts that they establish, maintain, administer, or manage.[12] U.S. financial institutions are subject to criminal liability if they "willfully" violate these requirements.[13]

In *Sealed Case*, the U.S. government was investigating whether the Chinese banks' correspondent accounts had been used by an unnamed Chinese company (the "Company") to make or receive payments in U.S. dollars on behalf of a North Korean entity – for example, to allow the North Korean entity to receive revenue in U.S. dollars from the sale of coal and other minerals that North Korea could then use to purchase materials for its nuclear weapons program. The government sought to determine whether the Company or any other entities (e.g., the U.S. banks providing the Chinese banks with correspondent accounts) had committed various federal crimes, including, with respect to the U.S. banks, failing to exercise due diligence in correspondent banking as required by the Bank Secrecy Act. The grand jury subpoenas sought a wide variety of records from the Chinese banks:

> [A]ll records dated 2012 to 2017 concerning all correspondent banking transactions associated with certain accounts linked to the Company, defining records to include signature cards, ledger cards, account statements, and documentation of deposits, withdrawals, and transfers.[14]

The D.C. Circuit held that the two Chinese banks that had U.S. branches had consented to the district court's personal jurisdiction with respect to its enforcement of the grand jury subpoenas when they submitted applications to the Federal Reserve Board to open U.S. branches. By way of background, the Board's prior approval is required before a foreign bank may establish a branch or agency in the United States, and the Board has wide latitude to impose such conditions on its approval of a foreign bank's application as it deems necessary.[15] *Sealed Case* indicates that one such condition that the Board imposed on the Chinese banks was that they "consent[ed] to the jurisdiction of the federal courts of the United States . . . for purposes of any and all . . . proceedings initiated by . . . the United States . . . in any matter arising under U.S. Banking Law."[16] It also indicates that the Board defined "U.S. Banking Law" expansively in its agreements with the Chinese banks to mean "all federal criminal laws of which violation(s) arise(s): . . . under . . . the Bank Secrecy Act."[17] As the D.C. Circuit noted, the Bank Secrecy Act required the U.S banks hosting the Chinese banks' correspondent accounts to exercise due diligence over the correspondent accounts, and "makes willful dereliction of that obligation a federal criminal violation."[18] Because the grand jury was investigating whether the U.S. banks hosting the Chinese banks' correspondent accounts had complied with the Bank Secrecy Act, the court held that the necessary ingredients for jurisdiction were present in the form of a

[9] Fed. R. Crim. P. 17(e)(1).

[10] 932 F.3d 915 (D.C. Cir. 2019).

[11] 31 U.S.C. § 5318A(e)(B).

[12] 31 U.S.C. § 5318(i); *see also* 31 U.S.C. §§ 5318A(4)-(5).

[13] 31 U.S.C. § 5322.

[14] *Sealed Case*, 932 F.3d at 921.

[15] 12 U.S.C. §§ 3105(d)(1), (d)(5).

[16] 932 F.3d at 923; *see also In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 & 50 U.S.C. § 1705*, 381 F. Supp. 3d 37, 50 (D.D.C.), *aff'd sub nom. In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).

[17] *Sealed Case*, 932 F.3d at 923.

[18] *Id.*

criminal grand jury investigation initiated by the United States arising under "U.S. Banking Law."

The D.C. Circuit gave short shrift to the Chinese banks' arguments to the contrary. It rejected the Chinese banks' arguments that the government must make a "reasonable" showing of an actual Bank Secrecy Act violation in order to establish personal jurisdiction. The agreement that the Chinese banks had signed with the Federal Reserve Board required only that a federal criminal investigation "arise" under U.S. banking law, not that the government show the existence of an actual Bank Secrecy Act violation. The grand jury investigation "arose" under U.S. banking law, according to the D.C. Circuit, because it sought to determine whether the U.S. banks that held the Chinese banks' correspondent accounts had violated the Bank Secrecy Act.

The D.C. Circuit also rejected the Chinese banks' arguments that the district court had no personal jurisdiction over them because the subpoenaed records were located outside of the U.S. (presumably, in China). The court stated that the location of the subpoenaed records outside the U.S. "has no bearing on personal jurisdiction given that the banks' consent agreements supply the basis for jurisdiction."[19] It also noted that even if the Chinese banks' challenge was understood as a challenge to the scope of the grand jury subpoenas rather than to personal jurisdiction, the Chinese banks' argument would fail because "[f]ederal courts have long required the production of documents held abroad," and "grand juries often investigate violations of criminal laws that obviously cover extraterritorial conduct."[20]

The Chinese banks also argued that, according to a "comity" analysis, they should be excused from complying with the grand jury subpoenas because doing so would be illegal under Chinese law. The D.C. Circuit rejected this argument. As the D.C. Circuit explained, comity refers to the spirit of cooperation in which a U.S. tribunal approaches the resolution of cases touching the laws and interests of other sovereign states. Under a comity analysis, a U.S. court first determines whether a conflict truly exists between the U.S. legal system and the foreign legal system, and then, provided a conflict truly exists, considers a "constellation" of factors to determine whether to apply U.S. law.

The Chinese banks' comity argument was grounded on the fact that Chinese law prohibits Chinese banks from handing over records that have not been approved for release through the process specified in the U.S.-China Mutual Legal Assistance Agreement ("MLAA"). In *Sealed Case*, the government chose to issue grand jury subpoenas (and, as noted below, a Patriot Act subpoena with respect to a third bank) rather than utilize the MLAA process. The D.C. Circuit ruled that the district court had correctly determined that a conflict truly existed between U.S. law, which authorized the grand jury subpoenas (and the Patriot Act subpoena), and Chinese law, which made it illegal for the Chinese banks to comply with those subpoenas. It also affirmed the district court's conclusion that consideration of the constellation of relevant factors weighed in favor of applying U.S law. Among other things, it was important to the D.C. Circuit that the MLAA process had been proven largely ineffective, as China had failed to respond to 35 of 50 MLAA requests in the past 10 years, and, where it had responded, had generally responded in an inadequate or untimely fashion. It was also important that the Chinese banks were in significant part state-owned, making it unlikely that any bank employees would be subjected to Chinese criminal liability if the banks complied with the U.S. subpoenas. While the D.C. Circuit noted that it "proceeds with extreme caution when enforcing subpoenas that would require recipients to violate a foreign sovereign's domestic laws," and that the district court below had made a "hard call" to require compliance with the subpoenas, it affirmed the district court's conclusion that the comity analysis did not require applying Chinese law.[21]

The D.C. Circuit also held that the district court did not abuse its discretion in holding the Chinese banks that had received the grand jury subpoenas (as well as the Chinese bank that had received the Patriot Act subpoena) in civil contempt of court for failing to comply with the district court's prior order compelling the banks to comply with the subpoenas. As the D.C. Circuit explained, civil contempt is a remedial sanction used to obtain compliance with a court order or to compensate for damage sustained as a result of non-compliance with a court order. In the case of the Chinese banks, the district court had ordered that they be assessed a fine of $50,000 per day "until such time as those banks are willing to complete production of the subpoenaed records."[22] (The fines were stayed by the district court pending the Chinese banks' appeal of the

[19] *Id.* at 924.

[20] *Id.*

[21] *Id.* at 939.

[22] *In re Grand Jury Investigation of Possible Violations of 18 U.S.C. § 1956 & 50 U.S.C. § 1705*, No. MC 18-175, 2019 WL 2182436, at *6 (D.D.C. Apr. 10, 2019), *aff'd sub nom. In re Sealed Case*, 932 F.3d 915 (D.C. Cir. 2019).

contempt order to the D.C. Circuit.) One of the Chinese banks that had received a grand jury subpoena (as well as the Chinese bank that had received the Patriot Act subpoena) appealed the district court's civil contempt order to the D.C. Circuit. These banks argued that the district court abused its discretion in applying the sanction of contempt because compliance with the subpoena would violate Chinese law, and because the banks had attempted (unsuccessfully) to obtain the Chinese government's permission to produce the records. The D.C. Circuit concluded that the district court did not abuse its discretion in issuing the contempt order against the banks. There was no question that the banks had violated the court's order requiring compliance with the subpoenas, and compliance with the order was essential to an investigation into a matter implicating national security.

PATRIOT ACT SUBPOENAS

Background

In addition to a grand jury subpoena, the U.S. government can also use a Patriot Act subpoena to demand extraterritorial records from a foreign bank. U.S. lawmakers became increasingly concerned about foreign banks' use of U.S. correspondent bank accounts in the wake of the September 11, 2001 terrorist attacks by foreign nationals on U.S. soil. Section 312 of the Patriot Act amended the Bank Secrecy Act by requiring U.S. financial institutions to establish appropriate due diligence policies, procedures, and controls that that are reasonably designed to detect and report instances of money laundering through the correspondent accounts that they establish, maintain, administer, or manage.[23] Section 313 prohibited covered U.S. financial institutions, including agencies and branches of foreign banks,[24] from establishing, maintaining, administering, or managing correspondent accounts in the United States for, or on behalf of, foreign shell banks that do not have a physical presence in any country.[25]

The Patriot Act also established a mechanism by which U.S. authorities could subpoena non-U.S. records from a foreign bank relating to a U.S. correspondent account. Section 5318(k) of Title 31 of the U.S. Code authorized the Secretary of the Treasury or the Attorney General to issue a subpoena to any foreign bank that maintained a correspondent account in the United States "request[ing] records related to such correspondent account, including records maintained outside of the United States relating to the deposit of funds into the foreign bank."[26] The Secretary of the Treasury or the Attorney General were authorized to issue a subpoena to the foreign bank directly, without going to court to obtain the subpoena.[27] Such a subpoena could be served on the foreign bank in the United States if the foreign bank had a representative in the United States.[28]

The Patriot Act also provided an indirect, but effective, method of ensuring that a foreign bank that had a U.S. correspondent account had a U.S. representative upon whom a Patriot Act subpoena could be served. Any U.S. bank that maintained a correspondent account in the United States for a foreign bank was required to maintain records in the United States identifying the foreign bank's owners, as well as the name and address of a person residing in the United States authorized to accept service of legal process for records regarding the correspondent account.[29] The U.S. Treasury developed certification and recertification forms that assisted U.S. banks in complying with these requirements.[30] The U.S. Treasury's certification form, which was completed by the foreign bank, required the foreign bank to name a U.S. resident as its agent who was "authorized to accept service of legal process on behalf of [the foreign bank] from the Secretary of the

[23] 31 U.S.C. § 5318(i).

[24] 31 U.S.C. § 5312(a)(2)(D).

[25] 31 U.S.C. § 5318(j).

[26] 31 U.S.C. § 5318(k)(3)(A)(i) (2020).

[27] *Id.*; *see also Sealed Case*, 932 F.3d at 925-926 ("[T]he statute confers authority to issue a subpoena directly on the Attorney General and the Treasury Secretary, rather than on a federal district court . . . . Rather than requiring the Attorney General or Treasury Secretary to go to court to obtain a subpoena, Congress authorized those officers to issue process themselves.").

[28] 31 U.S.C. § 5318(k)(3)(A)(ii) (2020).

[29] 31 U.S.C. § 5318(k)(3)(B)(i) (2020).

[30] 31 C.F.R. § 1010.630(b) ("Subject to paragraphs (c) and (d) of this section, a covered financial institution will be deemed to be in compliance with the requirements of paragraph (a) of this section [prohibiting correspondent accounts for foreign shell banks and requiring recordkeeping with respect to owners of foreign banks and agents for service of process] with respect to a foreign bank if the covered financial institution obtains, at least once every three years, a certification or recertification from the foreign bank."); 31 C.F.R. § 1010.605(b) ("Certification and recertification mean the certification and recertification forms regarding correspondent accounts for foreign banks located on FinCEN's Internet Website, http://www.fincen.gov.").

Treasury or the Attorney General of the United States pursuant to Section 5318(k) of title 31, United States Code."[31]

As explained below, the recently enacted NDAA builds upon and expands government authority to request records from foreign banks authorized by Section 5318(k).

Recent Developments – Sealed Case

In *Sealed Case*, discussed above, there were three Chinese banks from which the government sought records related to the Chinese Company that it suspected had acted as a front for the North Korean entity. The government correctly determined that it could use grand jury subpoenas to reach the records of the Chinese banks that had U.S. branches because, as discussed above, the Chinese banks had consented to the jurisdiction of the U.S. federal courts for purposes of proceedings arising under the Bank Secrecy Act. But the third Chinese bank had no U.S. office, and had not consented to such jurisdiction as part of an application to the Federal Reserve Board.

Rather than issuing a grand jury subpoena, the government issued a Patriot Act subpoena to the third bank under 31 U.S.C. § 5318(k). The subpoena called for the same records as those required by the grand jury subpoenas. Because the third bank had not consented to personal jurisdiction as part of an application to the Board, the question for the D.C. Circuit was whether the federal district court in the District of Columbia had specific personal jurisdiction over the third bank because the third bank had "purposefully directed" its relevant "activities" at "the forum."[32]

The D.C. Circuit rejected the third bank's argument that the "forum" for purposes of Section 5318(k) was the District of Columbia (where the foreign bank had no meaningful contacts) rather than the United States as a whole.[33] Moreover, the D.C. Circuit rejected the third bank's argument that the Attorney General had exceeded his statutory authority under Section 5318(k) by issuing a subpoena calling for the production of records relating not just to the third bank's correspondent accounts in the United States, but also its correspondent accounts in non-U.S. countries The Patriot Act subpoena to the third bank had called for the production of "[a]ll documents relating to [the Company's] correspondent banking transactions" – without specifying that it was only calling for the production of documents relating to the Chinese Company's *U.S.* correspondent banking transactions.[34] The D.C. Circuit agreed with the third bank that Section 5318(k) generally allowed the government to subpoena only records "related" to a U.S. correspondent account. But the court held that "records 'related to' a U.S. correspondent account include records of transactions that do not themselves pass through a [U.S.] correspondent account when those transactions are in service of an enterprise entirely dedicated to obtaining access to U.S. currency and markets using a U.S. correspondent account."[35] Because there was evidence that the "sole purpose" of the Company on whose behalf the Chinese banks were engaging in correspondent banking was to obtain access for the North Korean entity to U.S. currency and markets using U.S. correspondent accounts, the D.C. Circuit held that, on the facts of the case, records relating to correspondent banking transactions for *non-U.S.* correspondent accounts also were required to be produced.[36]

While *Sealed Case*'s holding that third bank was required to produce correspondent banking records for non-U.S. correspondent accounts may have been concerning to foreign banks, it was arguably limited to the unique facts of the case. As described below, the

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[31] *Certification Regarding Correspondent Accounts for Foreign Banks*, https://www.fincen.gov/sites/default/files/shared/Certification%20Regarding%20Correspondent%20Accounts%20for%20Foreign%20Banks.pdf.

[32] *Sealed Case*, 932 F.3d at 924 (citation omitted).

[33] The district held that it had specific personal jurisdiction over the third bank based on the bank's contacts with the United States because "correspondent banking activity suffices for specific personal jurisdiction when the exercise of that jurisdiction pertains to the correspondent banking activity." *Grand Jury Investigation*, 381 F. Supp. 3d at 57–58. Because

footnote continued from previous column…

the third bank did not argue on appeal that it lacked the necessary contacts with the United States as a whole (as opposed to the District of Columbia) for personal jurisdiction, the D.C. Circuit did not review "the district court's conclusion that Bank Three's maintenance of correspondent accounts in the United States supplies the necessary nexus." *Sealed Case*, 932 F.3d at 927 (citation omitted).

[34] *Sealed Case*, 932 F.3d at 928.

[35] *Id.* at 930.

[36] The third bank argued that a comity analysis indicated that U.S. law requiring compliance with the Patriot Act subpoena should not apply, and that the third bank should not have been held in contempt by the district court for failing to comply with the subpoena. The D.C. Circuit rejected these arguments for the same reasons noted above in the grand jury section.

NDAA expands the law beyond the scope of the holding in *Sealed Case.*

The NDAA

Section 6308 of the NDAA[37] expands Secretary of the Treasury and the Attorney General's power to issue a subpoena to a foreign bank that maintains a correspondent account in the United States in several respects that go far beyond the holding in *Sealed Case*. It also provides limited protections to foreign banks in the form of a statutory right to move to quash or modify a Patriot Act subpoena.

As noted above, prior to the NDAA, Section 5318(k) authorized the Secretary of the Treasury or the Attorney General to issue a subpoena to any foreign bank that maintained a correspondent account in the United States "request[ing] records related to such correspondent account, including records maintained outside of the United States."[38] Section 6308 of the NDAA substantially expands this authority. The Secretary of the Treasury and the Attorney General are now authorized to request not just "records," but "any" records related to a U.S. correspondent account.[39] Moreover, they are now authorized to request records not just related to a U.S. correspondent account, but also related to "any account at the foreign bank."[40] In either case, the records must be the subject of an investigation of a violation of federal criminal law, a violation of the BSA, a civil forfeiture action, or a Section 5318A investigation.[41]

The new ability to request records related to "any account at the foreign bank" is a substantial expansion of the Secretary of the Treasury and the Attorney General's authority. Section 5318(k) had previously allowed the government to subpoena only records "related" to a U.S. correspondent account. While *Sealed Case* held that in the unique circumstances of the case, the third bank's non-U.S. correspondent account records were properly the subject of a Patriot Act subpoena because they "related" to the third bank's U.S. correspondent account, *Sealed Case*'s limited holding might have been used by foreign banks to argue that, in circumstances not involving a bank client whose "sole purpose" was to access U.S. currency and markets, a Patriot Act subpoena could only call for the production of records directly relating to a foreign bank's U.S. correspondent account. The NDAA changes this analysis by directly authorizing the Secretary of the Treasury and the Attorney General to subpoena records related to "any account at the foreign bank." It remains to be seen how aggressively the Secretary of the Treasury and the Attorney General will use this new authority to seek records not actually related to a U.S. correspondent account. It also remains to be seen whether a foreign bank whose only connection to the United States is a U.S. correspondent account will be able to challenge the enforcement of such a subpoena on personal jurisdiction grounds.[42]

The NDAA makes several other important changes to Section 5318(k), such as by revising the statute's service of process provision[43] and authorizing the Attorney General to petition a federal district court for an order to compel compliance with the subpoena and authorizing the district court to hold the foreign bank in contempt for non-compliance with any such order.[44] Of particular note, a foreign bank that receives a Patriot Act subpoena is now prohibited from notifying the account holder or person involved in the subpoena of the existence or contents of the subpoena.[45] If the foreign bank violates this prohibition, it will be subject to a civil penalty equal to twice the amount of the suspected criminal proceeds sent through the correspondent account.[46]

In addition, a Patriot Act subpoena must now designate the judicial district where the related criminal, BSA, civil forfeiture, or Section 5318A investigation is pending,[47] and the foreign bank recipient of the subpoena now has the statutory right to petition the federal district court to modify or quash the subpoena, or the prohibition against disclosure of the existence or contents of the subpoena described in the preceding

[37] H.R. 6395 § 6308.

[38] 31 U.S.C. § 5318(k)(3)(A)(i) (2020).

[39] H.R. 6395 § 6308(a)(2)(3)(A)(i).

[40] *Id.*

[41] *Id.*

[42] *Cf. Grand Jury Investigation*, 381 F. Supp. 3d at 57–58 ("[C]orrespondent banking activity suffices for specific personal jurisdiction when the exercise of that jurisdiction pertains to the correspondent banking activity." (citations omitted)).

[43] H.R. 6395 § 6308(a)(2)(3)(A)(iii)(II).

[44] *Id.* at § 6308(a)(2)(3)(D).

[45] *Id.* at § 6308(a)(2)(3)(C)(i).

[46] *Id.* at § 6308(a)(2)(3)(C)(ii). If no such proceeds can be identified, the foreign bank will be subject to a civil penalty of up to $250,000. *Id.*

[47] *Id.* at § 6308(a)(2)(3)(A)(iii)(I)(bb).

paragraph.[48] Conflict with foreign secrecy or confidentiality law cannot be the "sole" basis for a motion to quash or modify the subpoena, however.[49]

While *Sealed Case* suggested that records related to accounts other than a U.S. correspondent account could be the subject of a Patriot Act subpoena in limited circumstances, the NDAA purports to allow U.S. prosecutors to obtain non-U.S. records from foreign banks that hold U.S. correspondent accounts in far broader circumstances. The new statutory right to petition a federal district court to modify or quash a Patriot Act subpoena may be somewhat helpful to foreign banks, however. In particular, the statutory language stating that conflict with foreign law cannot be the "sole" reason to modify or quash a Patriot Act subpoena suggests that conflict with foreign law can, when combined another reason or reasons, be grounds to petition the district court to quash or modify a subpoena. Foreign banks will doubtless test the Secretary of the Treasury and Attorney General's new NDAA authority through motions to quash or modify Patriot Act subpoenas on grounds including that the compliance would violate foreign law. Foreign banks should also be mindful of personal jurisdiction arguments and, where appropriate, should consider arguing that personal jurisdiction is lacking if and when subpoenaed for records that are not directly related to their U.S. correspondent accounts.

CIVIL SUBPOENAS

Background

In addition to U.S. government agencies, foreign banks and their U.S. subsidiaries can be served with subpoenas by civil litigants. Federal Rule of Civil Procedure 45 governs subpoenas in federal civil litigations. A Rule 45 subpoena may command the person served to produce documents "in that person's possession, custody, or control."[50]

Although Rule 45 specifies that "[s]erving a subpoena requires delivering a copy to the named person," it does not specify what constitutes personal service on a corporation in the U.S. or in a foreign country.[51] Some federal courts fill this gap by applying the service-of-process requirements in Federal Rule of Civil Procedure 4, which governs the summons that is served on a defendant along with a copy of a complaint to notify the defendant that a lawsuit has been filed against it.[52] Rule 4(h) provides that a U.S. or foreign corporation generally may be served in the U.S. by delivering a copy of the summons and complaint to an officer or agent authorized to receive service of process.[53] It also provides that a summons generally may be served on a U.S. or foreign corporation in a foreign country in the same manner as prescribed by Rule 4(f) for service on an individual in a foreign country.[54]

Federal Rule of Civil Procedure 4(f), in turn, provides that an individual may be served with a summons abroad "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[55] The Hague Convention, meanwhile, provides that as long as the country of destination does not object, judicial documents may be sent by "postal mail" directly to persons abroad.[56] Some federal courts have interpreted this Hague Convention language to allow service by international registered mail.[57]

Federal Rule of Civil Procedure 26(b) provides that parties to a U.S. civil litigation:

> [M]ay obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[58]

[48] *Id.* at § 6308(a)(2)(3)(A)(iv)(I).

[49] *Id.* at § 6308(a)(2)(3)(A)(iv)(II).

[50] Fed. R. Civ. P. 45(a)(1)(iii).

[51] Fed. R. Civ. P. 45(b)(1).

[52] *See, e.g., Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 262 F.R.D. 293, 305 (S.D.N.Y. 2009).

[53] Fed. R. Civ. P. 4(h)(1)(B).

[54] Fed. R. Civ. P. 4(h)(2).

[55] Fed. R. Civ. P. 4(f)(1).

[56] *See, e.g., Aristocrat Leisure Ltd.*, 262 F.R.D. at 307 (quoting Hague Convention, article 10(a)).

[57] *Id.*

[58] Fed. R. Civ. P. 26(b)(1).

This relevance and proportionality standard applies to the discovery of non-parties as well as parties.[59] The party seeking the materials has the burden of showing that discovery sought is within the bounds of Rule 26(b).[60]

Recent Developments

A recent Southern District of New York case, *Hake v. Citibank*,[61] illustrates the interaction between the provisions of the Federal Rules of Civil Procedure described above in the context of subpoenas seeking extraterritorial discovery from a U.S. bank subsidiary of a foreign banking organization.

The case involved individuals who had sued the Islamic Republic of Iran and/or certain Iranian entities after the individuals were injured in terrorist attacks committed by agents of Iran. One set of plaintiffs (the "Hake plaintiffs") was in the process of submitting an application for a default judgment against Iran's central bank, an Iranian bank, and Iran's government-owned oil and gas producer. These plaintiffs were seeking wire transaction records to establish that these Iranian entities had provided material support to Iranian agents and proxies responsible for terrorist attacks. Another plaintiff, Gill, had already obtained a $30 million judgment against Iran and was seeking wire transaction records to help identify Iranian assets that would satisfy the judgment.

The Hake plaintiffs and Gill both served Rule 45 subpoenas seeking wire transaction records involving the subject entities on a U.S.-chartered bank, HSBC Bank USA N.A. ("HBUS"). The plaintiffs established good reason to serve HBUS with the subpoenas by noting that HBUS's parent company HSBC Holdings plc ("HSBC Holdings"), a foreign holding company located in the U.K., had entered into a deferred prosecution agreement with U.S. prosecutors for offering U.S. dollar clearing services to six Iranian banks through its foreign bank subsidiaries' correspondent accounts with HBUS.

Unfortunately for the plaintiffs, HBUS was only able to identify and produce a small number of transaction records in response to the Rule 45 subpoenas. This was because HSBC Holdings' foreign bank subsidiaries that had correspondent accounts with HBUS (their sister company) allegedly had stripped information from transactions before sending them to HBUS.

HSBC Holdings, however, had in its possession, custody, and control the wire transaction records sought by the plaintiffs. In fact, HSBC Holdings had through U.S. counsel (who was also counsel to HBUS) commissioned a report from Deloitte U.K. that reviewed, on an aggregated basis, U.S. dollar fund transfers passing through the U.K. and Hong Kong. Although the Deloitte report was provided to a U.S. Senate subcommittee committee and to HBUS's U.S. prudential regulator, the Office of the Comptroller of the Currency, HSBC Holdings never provided HBUS with a copy of the report. In addition, neither HSBC Holdings nor Deloitte U.K. had ever brought the transactional source data examined by Deloitte U.K. into the U.S.

The Hake plaintiffs and Gill filed motions in the Southern District of New York to compel HBUS to produce the Deloitte report, as well as underlying source data that were in the possession of HSBC Holdings in the U.K. A Southern District of New York magistrate judge denied the plaintiffs' motions to compel for several reasons.

First, the plaintiffs had not made the required showing under Federal Rule of Civil Procedure 26(b) that the discovery sought was relevant to their claims and proportional to their needs. The court found that the Deloitte report was not relevant at all, given that it contained only aggregated data and did not contain any individual transaction data that plaintiffs might use to identify the subject entities or to identify Iranian assets. With respect to the underlying source data, the court found that the relevance of the proposed discovery was low, as were the needs of the plaintiffs for this information, whereas the burden of production was high. With respect to the Hake plaintiffs, although the transaction records sought would have included information identifying the Iranian banks, it would not necessarily have contained information concerning the banks' underlying clients, and thus would not necessarily have contained information concerning the subject entities that had been responsible for the terrorist attacks. In addition, the Hake plaintiffs arguably did not need the proposed discovery given the low burden of proof for obtaining a default judgment. With respect to plaintiff Gill, although the wire transaction records sought would have demonstrated the movement of funds, they would not have identified any assets that Gill could attach, and thus were not relevant to Gill's case. Meanwhile, the burden of producing the source data was high, given the large size of the source data (nine

[59] *Hake v. Citibank, N.A.*, No. 19MC00125JGKKHP, 2020 WL 1467132, at *4 (S.D.N.Y. Mar. 26, 2020) (Katherine Parker, Magistrate J.).

[60] *Id.* at *5.

[61] *Id.* at *1-8.

terabytes), the fact that it had been archived, and the potential privacy concerns that might arise in connection with transferring the data from the U.K to the U.S.

Second, although the source data was marginally relevant to the Hake plaintiffs' claims, HBUS did not have possession, custody, or control of it. The source data sought was not in the possession of HBUS, but rather its U.K. parent, HSBC Holdings. It is true that a party to a U.S. litigation can compel a subsidiary to produce its foreign parent's documents if it shows that the documents are within the U.S. subsidiary's control,[62] such as when documents "ordinarily flow freely" between the U.S. subsidiary and the parent.[63] But the Hake plaintiffs had made no such showing. The only connection the Hake plaintiffs had drawn between HBUS and HSBC Holdings was that both were represented by the U.S. counsel that had commissioned the Deloitte report with respect to the government investigations that had resulted in the deferred prosecution agreement.

Third, while HSBC Holdings had possession, custody, or control over the source data, it had not been properly served with the subpoenas. Although the Federal Rules of Civil Procedure permit a party to seek discovery from a non-party foreign corporation, they also (as interpreted by Second Circuit courts) provide that a Rule 45 subpoena must be served by an internationally agreed means of service that is reasonably calculated to give notice. One such internationally agreed means of service amongst contracting states, such as the U.S. and the U.K., is the Hague Convention, which permits service by "postal mail." But plaintiffs chose to serve their subpoenas on HBUS in the U.S. rather than utilize the Hague Convention procedures to serve the subpoenas by mail on HSBC Holdings in the U.K. The court declined to allow plaintiffs to effect what it considered "a shortcut around established discovery rules" for serving corporations located abroad with subpoenas.[64]

Fourth, and although the court's holding on this point was less than clear, to the extent the subpoenas served on HBUS sought the source data from HSBC Holdings, the court suggested that it would not have the personal jurisdiction over HSBC Holdings necessary to compel the production. The court cited a 2009 Eastern District of New York decision, *Linde v. Arab Bank*, for the proposition that for a New York court to have personal jurisdiction over a parent company based on a subsidiary's presence in New York, the parent's control over the subsidiary must be so complete that the subsidiary is a "mere department" of the parent.[65] The court then noted that the Hake plaintiffs had put forth no evidence that HBUS was a "mere department" of HBSC Holdings. For example, the plaintiffs identified no evidence that HSBC Holdings effectively dictated HBUS's operations. Although the court did not explicitly hold that it lacked personal jurisdiction over HSBC Holdings, the court's finding that there was no evidence that HBUS operated as a "mere department" of HSBC Holdings suggests that the court believed that it lacked personal jurisdiction.

For these reasons, the court denied the plaintiffs' motion to compel production from HBUS. It concluded that the plaintiffs "failed to meet their burden of showing that the Deloitte [r]eport and the underlying [s]ource [d]ata [were] relevant and proportional to the needs of their cases," and, while the source data was marginally relevant to the Hake plaintiffs' case, they had "failed to show that HBUS ha[d] possession, custody, and control of over the underlying [s]ource [d]ata" held by HSBC Holdings in the U.K.[66]

SECTION 1782 ORDERS

Background

Litigants in foreign proceedings cannot rely on Rule 45 of the Federal Rules of Civil Procedure to obtain documents, as plaintiffs sought to do in *Hake*. However, there is an avenue by which litigants in foreign proceedings can obtain extraterritorial discovery from foreign banks and their subsidiaries, provided that a U.S. federal court has personal jurisdiction over the bank or subsidiary. Foreign banks should be aware that litigants

[62] *See, e.g., Linde v. Arab Bank, PLC*, 262 F.R.D. 136, 141 (E.D.N.Y. 2009).

[63] *Hake*, 2020 WL 1467132, at *6 (citation omitted).

[64] *Hake*, 2020 WL 1467132, at *8.

[65] *Id.* at *7 (citing and quoting *Linde* as "explain[ing] that, absent evidence that the parent's 'control over the subsidiary's activities . . . [is] so complete that the subsidiary is, in fact, merely a department of the parent,' the court [in *Linde*] lacked personal jurisdiction over the parent and service of a Rule 45 subpoena on the subsidiary could not be deemed effective against the nonresident parent"); *Linde*, 262 F.R.D. at 142 ("For New York courts to acquire personal jurisdiction over the parent based on a subsidiary's presence in New York, the parent's control over the subsidiary's activities must be so complete that the subsidiary is, in fact, merely a department of the parent." (quotations and citations omitted)).

[66] *Hake*, 2020 WL 1467132, at *8.

in non-U.S. proceedings may be able to obtain documents located abroad from them by filing an application with a U.S. federal court for an order under 28 U.S.C. § 1782. Section 1782 provides that "[t]he district court of the district in which a person resides or is found may order him to . . . produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."[67]

Recent Developments

In the recent case of *In re del Valle Ruiz*,[68] the Second Circuit addressed two novel issues regarding Section 1782: first, the meaning of the district in which a person is "found"; and second, whether Section 1782 permits extraterritorial discovery. The foreign disputes leading to the request for documents under Section 1782 involved the sale of Popular Espanol, S.A. ("BPE"), a Spanish bank laden with toxic assets, in a Spanish government auction to Banco Santander S.A. for 1€. Mexican and U.S. investors in BPE suffered significant financial losses as a result of the auction and brought legal challenges to it in European proceedings.[69] The investors filed several Section 1782 applications in the Southern District of New York, seeking discovery from Santander and its New York-based asset-management affiliate, Santander Investment Securities, Inc. ("SIS") for use in proceedings outside the U.S. The investors sought discovery relating to topics such as BPE's liquidity position, the sale process, and communications with regulators concerning BPE or the BPE resolution.

Santander contended that it was not "found" in the Southern District of New York under Section 1782, which does not define the word "found." Santander argued that "found" should be limited to individuals and entities over which a district court has general personal jurisdiction, and argued that the district court did not have general personal jurisdiction over it. The Second Circuit disagreed with Santander's interpretation of "found," holding that the meaning of "resides or is found" in Section 1782 extends past general jurisdiction "to the limits of personal jurisdiction consistent with due process."[70] Thus, Section 1782 allows a district court that has general or specific personal jurisdiction over a person to order that person to produce documents for use in a foreign or international proceeding.

The district court had held that it did not have specific personal jurisdiction over Santander, and the Second Circuit agreed with this conclusion. According to the Second Circuit, specific personal jurisdiction over a non-party to a foreign proceeding in the Section 1782 context requires that the non-party's "having purposefully availed itself of the forum must be the primary or proximate reason that the evidence sought is available at all."[71] But Santander's limited contacts with New York were not causally related to the evidence sought concerning the sale of BPE in the auction. While Santander had hired two New York banks to conduct due diligence on BPE, this was for a private sale that fell through before the auction.

Since its subsidiary SIS was based in New York, Santander could not argue that SIS was not "found" in New York or that the district court's conclusion that it had general personal jurisdiction over SIS was incorrect. The only question for the Second Circuit to decide with respect to SIS was therefore whether Section 1782 allowed for the compelled discovery of evidence located abroad. The Second Circuit joined the Eleventh Circuit in holding that "a district court is not categorically barred from allowing discovery under Section 1782 of evidence located abroad."[72] The rationale offered by these courts was that Section 1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure, which "in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control."[73] While a district court "should" consider the extraterritorial location of documents in considering whether to grant a Section 1782 request, it is not barred from authorizing extraterritorial discovery under Section 1782.

In the case of SIS, the Second Circuit held that the district court had not abused its discretion in granting the investors' Section 1782 petition. The Supreme Court has set forth several non-exclusive factors to be considered in determining whether to grant a Section 1782 petition,[74] and these factors (such as whether SIS

[67] 28 U.S.C. § 1782(a).

[68] 939 F.3d 520 (2d Cir. 2019).

[69] One group of investors also brought an international arbitration proceeding against Spain, and another also sought to intervene in Spanish criminal proceedings against BPE.

[70] *Id.* at 528.

[71] *Id.* at 530.

[72] *Id.* at 533.

[73] *Id.*

[74] *See id.* at 533–34 (non-exclusive factors set forth by Supreme Court are "(1) whether 'the person from whom discovery is sought is a participant in the foreign proceeding,' in which event 'the need for § 1782(a) aid generally is not as apparent as

was a party to the foreign proceeding, such that discovery might be obtained from SIS in the foreign proceeding) weighed in favor of authorizing discovery against SIS.

CONCLUSION

These recent federal cases and the NDAA both make clear that several avenues exist to compel extraterritorial discovery and identify potential defenses to such compelled discovery. For example, *Sealed Case* suggests that even if foreign banks have consented to personal jurisdiction, they may be able to resist government subpoenas requesting documents where the U.S. government ignores the applicable treaty process or where producing these documents would violate a foreign law. The government's success in arguing that the treaty process was ineffective in *Sealed Case* and that a violation of foreign law would likely not be prosecuted was based on facts unique to China that would not apply to many other countries. Similarly, while Section 6308 of the NDAA greatly expands Secretary of the Treasury and the Attorney General's power to use Patriot Act subpoenas to obtain extraterritorial discovery from a foreign bank that maintains a correspondent account in the United States, it also provides the foreign bank with the right to file a motion to quash or modify the subpoena on grounds including that production would conflict with foreign law. Moreover, if the Secretary of the Treasury or the Attorney General seek to aggressively utilize this new power to subpoena non-U.S. documents unrelated to a foreign bank's U.S. correspondent account, the foreign bank recipient of the subpoena may be able to successfully argue that the appropriate federal district court lacks personal jurisdiction over the bank to compel compliance with the subpoena. In the civil context, *Hake v. Citibank* demonstrates that a foreign bank holding company with a U.S. subsidiary may be able to successfully resist a civil subpoena requesting documents held abroad by the holding company where the subpoena is not served on the parent holding company following the Hague Convention, the documents possessed by the holding company are not within the U.S. subsidiary's control, and the U.S. subsidiary is not a "mere department" of the foreign holding company. Finally, *In re del Valle Ruiz* underscores the fact-specific nature of these inquiries by finding that documents outside the U.S. *were* in the possession, custody, or control of a foreign bank's U.S. subsidiary. Banks served with subpoenas demanding the production of documents located outside the United States should consult with counsel concerning the potential applicability of these fact-specific defenses before agreeing to produce documents located outside the United States. ■

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it ordinarily is when evidence is sought from a non-participant in the matter arising abroad'; (2) 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court assistance'; (3) 'whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'; and (4) whether the request is 'unduly intrusive or burdensome.'" (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004)).