# A Brief Overview of Recent Supreme Court Precedent – Keeping Foreign Litigation at Bay


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GLOBALIZATION marches on. Consistent with this, connections between the United States and the outside world (both perceived and actual) have become commonplace.[1] Of particular relevance to products liability practitioners, from the 1990s through present day, exports of goods and services as a percentage of United States gross domestic product have continued to increase, as has international trade in general.[2]

For the United States judiciary, this likely means more litigation that is

[1] THE WORLD BANK, *International Tourism, Numbers of Departures*, http://data.worldbank.org/indicator/ST.INT.DPRT (last visited August 30, 2016) (noting that departures from the United States have increased from 51 million in 1995 to 68 million in 2014); *See also* Christine Lagarde, Managing Director, International Monetary Fund, *Speech to the U.S. Chamber of Commerce* (Sept. 19, 2013) (the United States accounts for 11 percent of global trade, the United States represents 20 percent of global manufacturing, foreign banks hold $5.5 trillion of United States assets, American banks hold $3 trillion of foreign claims, and half of the S&P 500's sales originate abroad).

[2] THE WORLD BANK, *Exports of Goods and Services (% of GDP)*, http://data.worldbank.org/indicator/NE.EXP.GNFS.ZS?locations=US&order=wbapi_data_value_2011+wbapi_data_value+wbapi_data_value-first&page=3&sort=asc (last visited Jul. 8, 2016) (confirming that from 1990 to 2015 exports of goods and services as a percentage of GDP has increased from 9.2 to 12.6 percent).

international in nature. Along with that international flavor comes more claims between persons and entities of different national origins, as well as more choice-of-law, venue, and jurisdictional issues. Due to the civil jury system that it provides, its more generous damages laws, and the different compensation structures available to its legal counsel, the United States (and its constituent states and territories) will likely continue to be an attractive litigation *situs* for claims with greater connections to foreign countries.[3]

In light of this, for products practitioners, as well as defense counsel in other contexts, it is important to understand some of the more recent United States Supreme Court precedent addressing tools to keep foreign litigation at bay. Considered together, these decisions demonstrate the High Court's tendency to err on the side of keeping foreign-centered litigation outside of the United States court system.

Examples of such decisions include those addressing where the principal conduct at issue is centered for purposes of the Foreign Sovereign Immunities Act ("FSIA"); the presumption against extra-territorial application of United States statutory law; personal jurisdiction over foreign defendants; and the doctrine of *forum non conveniens.*

## I. Recent Precedent Demonstrating The High Court's Tendency To Keep Foreign Litigation At Bay

### A. *OBB Personenverkehr AG v. Sachs* and FSIA's Commercial-Activity Exception

In *OBB Personenverkehr AG v. Sachs,* a California resident sued the Austrian state-owned railway for injuries that she sustained while attempting to board a train in Innsbruck, Austria.[4] She predicated her suit on a United States-based travel agent's Internet sale of a Eurail pass to her before she left for her trip to Europe.[5] Such passes "are available only to non-Europeans, who may purchase them both directly from the Eurail Group and indirectly through a worldwide network of travel agents."[6]

The Austrian governmental defendant raised FSIA, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-11, as a defensive bar.[7] In response, the plaintiff argued (successfully in Ninth Circuit Court of Appeals) that her case satisfied FSIA's commercial-activity exception.[8] The commercial-activity exception abrogates sovereign immunity for suits "based upon a commercial activity carried on in the United States by [a] foreign state."[9] The *Sachs* plaintiff contended that this

[3] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 240 (1981) (Plaintiff "candidly admits that the action against [Defendants] was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland.").

[4] 136 S. Ct. 390 (2015).

[5] *Id.* at 393.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 394.

[9] *Id.* at 392-393. The exception is found at 28 U.S.C. § 1605(a)(2).

exception allowed her suit to proceed in United States federal district court because her suit was "based upon" her Massachusetts travel agent's Internet-based sale of a Eurail pass in the United States, and the travel agent's sale was attributable to the Austrian state-owned railway through common-law principles of agency.[10] Under the plaintiff's and the Ninth Circuit's analysis, so long as at least one element of her claim was tied to the United States-based ticket sale, the commercial-activity exception applied and allowed her action to proceed here.[11]

Without reaching the agency question, the United States Supreme Court unanimously rejected the plaintiff's position and reversed the Ninth Circuit.[12] Chief Justice Roberts' opinion for the Court reasoned that conduct comprising only "one element" of a plaintiff's cause of action is insufficient to satisfy the "based upon" requirement of the first clause of FSIA's commercial-activity exception.[13] Instead, the Court – echoing the views of the Solicitor General's *amicus* brief – held that *an action is based on the conduct constituting the civil action's "gravamen."*[14] In this case, the action's "gravamen" or "core" was tied predominately to Innsbruck, Austria, where the allegedly dangerous platform conditions and allegedly faulty boarding process caused the accident.[15] In other words, the United States-based ticket sale was not the gravamen of the plaintiff's action when conditions on the ground in Austria allegedly caused the plaintiff's injuries.[16]

While the Court did not reach related questions of due process and personal jurisdiction, its FSIA commercial-activity analysis nevertheless appears significant for United States defense counsel because it requires our courts to determine the "particular conduct on which the action is 'based,'" and to identify that conduct by looking to "the gravamen of the complaint."[17] That analysis has a familiar feel when compared to other tools available to defense counsel to keep foreign litigation at bay, such as motions to dismiss addressing *forum non conveniens* and/or an asserted lack of personal jurisdiction over a foreign defendant, which are discussed *infra*. Analogies are bound to be drawn between these contexts based on the commonsense question of where the incident at issue truly arose. In *Sachs*, the correct conclusion was Austria: "However [the plaintiff] frames her suit, the incident in Innsbruck, Austria, remains at its foundation."[18]

The Court also relied on its prior decision in *Saudi Arabia v. Nelson*.[19] There, a married couple sued Saudi Arabia and its state-owned hospital for the husband's alleged wrongful arrest, imprisonment, and torture by Saudi police while he was employed there.[20] The plaintiffs argued that the suit was "based upon" the defendants' commercial activities in recruiting, signing an employment contract,

[10] *Id.* at 393.

[11] *Id.* at 395-396.

[12] *See generally id.*

[13] *Id.* at 395-396.

[14] *Id.* at 396.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 395.

[18] *Id.* at 396.

[19] *See Sachs*, 136 S. Ct. at 395-397 (citing Saudi Arabia v. Nelson, 507 U.S. 349 (1993)).

[20] *Sachs*, 136 S. Ct. at 395.

and employing the husband.[21] However, the Court held that the "'based upon' inquiry ... requires a court to ' identify [ ] the particular conduct on which the [plaintiff's] action is 'based' ... [that is] 'those elements ... that, if proven would entitle a plaintiff to relief ... the gravamen of the complaint.'"[22] Because the particular conduct that injured the husband was the behavior of Saudi police, and not the commercial activity, the Court ruled that the plaintiffs' suit fell outside FSIA's commercial-activity exception.[23] Under this line of precedent, the issue remains the primary situs of the incident and conduct at issue.[24]

## B. *Kiobel v. Royal Dutch Petroleum Co.* and the Presumption Against Extraterritorial Application of United States Law

In *Kiobel v. Royal Dutch Petroleum Co.*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian oil corporations under the Alien Tort Statute, 28 U.S.C. § 1350, ("ATS"), for allegedly abetting the Nigerian government's violations of the Law of Nations.[25] Specifically, the complaint alleged that, in response to environmental protests, government forces beat, raped, killed, and arrested residents, while destroying or looting property – all in Nigeria.[26] Following the alleged atrocities, the plaintiffs moved to the United States where they were granted asylum and became legal residents.[27] The plaintiffs claimed that the oil companies provided Nigerian forces with food, transportation, and compensation, and allowed the military to use their property to stage attacks. The ATS grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United Sates."[28]

The Court, however, held that the presumption against extraterritorial application of a statute applies even to the ATS.[29] That presumption or canon of construction provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none ... [and] reflects the [proposition] that *United States law governs domestically but does not rule the world.*"[30] To rebut the presumption, the United States legislation at issue must "evince a clear indication of extraterritoriality."[31]

There was nothing in the ATS's text, history, or purposes that provided a clear indication that Congress meant for it to apply to offenses committed abroad.[32] The inclusion of generic terms such as "any" in the phrase "any civil action" did not evidence an intent for extraterritorial reach.[33] In terms of history, the Court explained that at the time Congress passed

[21] *Id.* (citing *Nelson*, 507 U.S. at 358).

[22] *Sachs*, 136 S. Ct. at 395 (citing *Nelson*, 507 U.S. at 356).

[23] *Sachs*, 136 S. Ct. at 395.

[24] *Id.*

[25] 133 S. Ct. 1659 (2013).

[26] *Id.* at 1662.

[27] *Id.* at 1663.

[28] *Id.* at 1662.

[29] *Id.* at 1665.

[30] *Id.* at 1664 (emphasis supplied).

[31] *Id.* at 1665 (internal citation omitted).

[32] *Id.*

[33] *Id.*

the ATS, there existed three principal offenses against the Law of Nations, as described by Blackstone: violation of safe conducts; infringement of the rights of ambassadors; and piracy.[34] Of these, only piracy normally occurred outside of United States-sovereign territory.[35] Even so, applying United States law to piracy on the high seas did not "typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carrie[d] less direct foreign policy consequences."[36] Finally, the Court also explained that there was no evidence that the ATS was passed to make the United States "uniquely hospitable" for the enforcement of international norms.[37]

The canon of statutory construction discussed in *Kiobel* – along with consideration of other choice-of-law issues – is another tool United States defense counsel should consider when attempting to keep foreign litigation at bay. Foreign litigants are frequently tempted to sue in the United States, ostensibly under United States (rather than foreign) law.[38] United States law is often perceived as more favorable to plaintiffs but is properly avoided through choice-of-law analyses as well as canons of construction such as the presumption against the extraterritorial application of United States law.[39]

## C. *Daimler AG v. Bauman* and General Personal Jurisdiction

Personal jurisdiction has received increased attention from the High Court over the last five years, resulting in four significant decisions.[40] One of those decisions was *Daimler AG v. Bauman*.[41] There, several Argentines sued Daimler, a German auto-manufacturer, under the Alien Tort Statute and the Torture Victims Protection Act.[42] They alleged that Daimler's wholly-owned subsidiary, Mercedes-Benz Argentina, collaborated with Argentine state security forces to kidnap, torture, and kill company workers during that country's "Dirty War" of the late 1970s and early 1980s.[43] Plaintiffs sued in California under the theory that

[34] *Id.* at 1666.

[35] *Id.* at 1666-1667.

[36] *Id.*

[37] *Id.* at 1668.

[38] Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1090 (2015) (discussing the characteristics that have traditionally made U.S. courts attractive to foreign litigants: "U.S. courts offered the promise of large damages awards, including the possibility of punitive damages. On the merits, U.S. law was thought to offer greater chances for recovery. And U.S. choice-of-law rules were thought to favor U.S. laws, even for torts occurring overseas, which made plaintiff-friendly American substantive provisions more likely to apply. Plaintiffs also favored U.S. courts because they entertained opt-out class actions, required parties to pay their own legal fees, permitted contingency fees, allowed extensive pretrial discovery, and took a broad approach to personal jurisdiction and the extraterritorial reach of federal statutes. Most foreign fora lacked most if not all of these (widely criticized) characteristics.").

[39] *See id.* at 1090-1107.

[40] Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Daimler AG v. Bauman, 134 S. Ct. 746 (2014); Walden v. Fiore, 134 S. Ct. 1115 (2014).

[41] 134 S. Ct. 746 (2014).

[42] *Id.* at 751.

[43] *Id.*

the state had general personal jurisdiction over Daimler's American subsidiary Mercedes–Benz USA, LLC ("MBUSA") because of its extensive California contacts (although it was incorporated in Delaware and had its principal place of business in New Jersey).[44] Plaintiff combined that contention with an agency argument that MBUSA's California contacts were, in turn, attributable to Daimler through common-law principles of agency.[45] The Argentine plaintiffs succeeded on this jurisdictional argument in the Ninth Circuit.[46]

However, the United States Supreme Court reversed that decision and held that even assuming MBUSA's California contacts could somehow be attributed to Daimler, they were insufficient to establish general personal jurisdiction over either entity.[47]

While *Pennoyer v. Neff*[48] originally held that a court's personal jurisdiction was limited to the geographic bounds of the forum state, this rigid understanding was abandoned in *International Shoe Co. v. Washington*,[49] which instead – through the Fourteenth Amendment's due-process clause – conceived of two types of personal jurisdiction later denominated specific and general jurisdiction.[50] Specific (or conduct-linked) jurisdiction grants a court personal jurisdiction in cases in which the defendant's forum-directed conduct gives rise to the liabilities sued on. In contrast, a court can exercise general (or all-purpose) jurisdiction where a foreign defendant's forum-directed conduct is "so substantial and of such a nature as to justify suit against it *on causes of action arising from dealings entirely distinct from those activities*."[51] Through *Daimler* and its prior decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[52] the High Court held that general jurisdiction is typically limited to a handful of paradigm situations.[53] For individual defendants, general jurisdiction will typically be limited to their state of residency.[54] For corporate defendants, general jurisdiction will typically be limited to the entity's state of incorporation or principal place of business.[55]

Because the plaintiffs never alleged that California could exercise specific jurisdiction over Daimler (and, indeed, could not have done so because their action did not arise from conduct occurring in or directed at California), the Court limited its analysis to general jurisdiction.[56] Rejecting the plaintiff's argument that general jurisdiction can be exercised where a corporation engages in a course of business that is "substantial, continuous, and systematic," the Court reaffirmed that, under the proper framework, a "court may assert general jurisdiction over foreign ... corporations to hear any and all claims against them when their affiliations with the State

[44] *Id.* at 752.

[45] *Id.*

[46] *Id.* at 753.

[47] *Id.* at 760.

[48] 95 U.S. 714 (1877).

[49] 326 U.S. 310 (1945).

[50] *See Daimler*, 134 S. Ct. at 753-776 (discussing the evolution of personal jurisdiction).

[51] *Id.* at 754 (citing *Int'l Shoe*, 326 U.S. at 318) (emphasis supplied).

[52] 564 U.S. 915 (2011).

[53] *Daimler*, 134 S. Ct. at 760.

[54] *Goodyear*, 564 U.S. at 924.

[55] *Daimler*, 134 S. Ct. at 760.

[56] *Id.* at 759.

are so 'continuous and systematic' as to render them *essentially at home in the forum State*" – "*comparable to a domestic enterprise in that State.*"[57]

Because neither MBUSA nor Daimler's principal place of business was in California, and neither entity was chartered or incorporated there, the Court held that California courts could not exercise general personal jurisdiction over them.[58] To do otherwise would unfairly deprive these out-of-state defendants of the ability "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[59]

As noted above, *Daimler* is but one example of the High Court's recent personal-jurisdiction precedent. Indeed, in the past five years, it has issued two decisions addressing specific personal jurisdiction – *J. McIntyre Mach., Ltd. v. Nicastro* (providing plurality and concurring opinions on stream-of-commerce-type specific jurisdiction; addressing the applicable forum-by-forum approach; and requiring "targeting" of the specified forum state),[60] and *Walden v. Fiore* (unanimous decision explaining that specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation" and "must arise out of contacts that the defendant [it]self creates with the forum State" – "The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way.").[61] And, prior to *Daimler*, the Court issued another recent decision addressing general jurisdiction, the abovementioned *Goodyear Dunlop Tires Operations, S.A. v. Brown* case (which, similar to *Daimler*, articulated the proper "at home" standard for general jurisdiction).[62]

Motions to dismiss for lack of personal jurisdiction remain a powerful tool for defense counsel to keep litigation out of a judicial forum that lacks constitutionally sufficient minimum contacts with the defendant(s) subject to suit. And, consistent with Federal Rule of Civil Procedure 12(b)(2), (h) and its state-court cognates, such motions should be asserted at the outset of the litigation in order to avoid waiver. However, as noted in the following section, a developing circuit split threatens *Daimler*'s viability in light of the ubiquity of mandatory state registration statutes.

## D. Post-*Daimler* Circuit Split on Registration Statutes

As personal jurisdiction is an individual right, it can be waived.[63] Historically, one way foreign corporations have waived a personal-jurisdiction defense has been by voluntarily using certain state procedures – thereby implicitly consenting to the state's personal jurisdiction.[64] Presently, all states require that a foreign corporation register in the state and appoint an in-state agent

[57] *Id.* at 758 n.11 (emphasis supplied).

[58] *Id.* at 761.

[59] *Id.* at 761 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)).

[60] 564 U.S. 873, 882 (2011).

[61] 134 S. Ct. 1115, 1121-1122 (2014).

[62] *Goodyear*, 564 U.S. at 919.

[63] Ins. Corp. of Ireland, Ltd. v. Compagnie de Bauxites de Guinee, 456 U.S. 694, 704-705 (1982).

[64] *Id.* at 704; Pa. Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co., 243 U.S. 93, 96 (1917).

for service of process to conduct business in that state.[65]

Post-*Daimler*, whether registration acts as "consent" to the forum state's general jurisdiction has been a matter of much spilled ink; indeed, this consent-by-registration theory has resulted in a circuit split. The First, Third, Eighth, and Ninth Circuits have held that a company may consent to general jurisdiction by registering to do business in a state and appointing an agent for service of process if the state recognizes compliance with the statute as resulting in consent to jurisdiction.[66] On the other hand, the Fourth, Fifth, Seventh, and Eleventh Circuits have ruled that mere compliance with a statute requiring registration does not grant the courts of a state general jurisdiction over the registered entity.[67] In addition, the Second Circuit has provided a narrowing construction of a state registration statute to avoid this constitutional issue.[68] How this question is resolved could greatly impact the extent to which *Daimler* remains sufficient to avoid overly broad assertions of general jurisdiction.[69]

Jurisdictions that do not recognize general jurisdiction under a consent-by-registration framework posit that by allowing courts to bypass a minimum-contacts analysis, consent-by-registration allows a state to exercise overly broad general jurisdiction in spite of *Daimler*'s concern with "a company being haled into court merely for doing business in a

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[65] Kevin D. Benish, Note, Pennoyer's *Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609, 1644 (2015).

[66] *See* Holloway v. Wright & Morrissey, Inc., 739 F.2d 695, 697 (1st Cir. 1984) (noting that it is "well-settled" that a corporation may consent to jurisdiction through registration); Bane v. Netlink, Inc., 925 F.2d 637, 640 (3d Cir. 1991) ("We need not decide whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact ... because such registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts."); Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1199 (8th Cir. 1990) (finding consent via the state's registration statute); King v. Am. Family Mut. Ins. Co., 632 F.3d 570, 574 (9th Cir. 2011) ("[T]he appointment of an agent for service of process will subject a foreign insurer to general personal jurisdiction in the forum *if* the governing state statute so provides.").

[67] Ratliff v. Cooper Labs., Inc., 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require a firmer foundation than mere compliance with state domestication statutes."); Wenche Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183 (5th Cir. 1992) ("Not only does the mere act of registering an agent not create [defendant's] general business presence in Texas, it also does not act as consent to be hauled into Texas courts on any dispute with any party anywhere concerning any matter."); Wilson v. Humphreys (Cayman), Ltd., 916 F.2d 1239, 1245 (7th Cir. 1990) ("Registering to do business is a necessary precursor to engaging in business activities in the forum state. However, it cannot satisfy ... standing alone ... the demands of due process."); Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1293 (11th Cir. 2000) (holding that casual presence of a corporate agent does not grant general jurisdiction to the forum state, and citing cases in which registered corporations that had appointed agents for service of process were not subject to a state's general jurisdiction).

[68] Brown v. Lockheed Martin Corp., 814 F.3d 619, 640-641 (2d Cir. 2016).

[69] *Daimler* limited general jurisdiction to a company's (1) place of incorporation, (2) principal place of business, or (3) in "exceptional" cases where a company's operations are so "substantial and of such a nature as to render the corporation at home in that State." 134 S. Ct. at 761 n.19.

state."[70] Under a consent-by-registration analysis, registering to do business in a state but not yet having conducted business there could nonetheless subject a foreign entity to suit in that state for a claim arising anywhere in the world. Thus, broad recognition of consent-by-registration theory would gut *Daimler*'s core holding that general jurisdiction is a limited concept applicable, typically, in only two paradigm circumstances regarding entity defendants: (1) principal place of business; and/or (2) state of incorporation.[71]

The Delaware Supreme Court made this point in *Genuine Parts Company v. Cepec*, by discussing the changed landscape post-*Daimler* and by abrogating precedent holding that foreign corporations are subject to general jurisdiction in Delaware by complying with the state's registration statute.[72] The Court held that, post-*Daimler* and post-*Goodyear*, as a matter of constitutional due process, a registration statute must be read narrowly, without implying consent to general jurisdiction. Doing so avoids subjecting foreign corporations to "an unacceptably grasping and exorbitant exercise of jurisdiction, consistent with *Daimler*'s teachings."[73] In short, "*Daimler* rejected the notion that a corporation that does business in many states can be subject to general jurisdiction in all of them."[74] Furthermore, *Daimler* was also concerned with jurisdictional predictability.[75] Thus, for courts rejecting the consent-by-registration theory of general jurisdiction, the idea of limiting jurisdiction to two locations – the corporation's place of incorporation and principal place of business – is a simple rule that grants predictability to corporate defendants.[76]

Courts upholding a consent-by-registration framework counter by asserting that *Daimler* was specifically limited to cases in which defendants had not consented to jurisdiction.[77] For example, in

[70] AstraZeneca AB v. Mylan Pharms., Inc., 72 F. Supp.3d 549, 556 (D. Del. 2014), *aff'd on other grounds*, 817 F.3d 775 (Fed. Cir. 2016).

[71] *See, e.g.*, Benish, *supra* n. 65, 90 N.Y.U. L. REV. at 1610-1646.

[72] No. 528, 2015, — A.3d ——, 2016 WL 1569077, at *1 (Del. Apr. 18, 2016) ("We conclude that after *Daimler*, it is not tenable to read Delaware's registration statutes as *Sternberg* did. *Sternberg*'s interpretation was heavily influenced by a prior reading given to § 376 by our U.S. District Court, and like that District Court decision, rested on a view of federal jurisprudence that has now been fundamentally undermined by *Daimler* and its predecessor *Goodyear Dunlop Tires Operations, S.A. v. Brown*.").

[73] *Cepec*, 2016 WL 1569077, at *13 (internal citations omitted).

[74] *Id.* at 14.

[75] *Daimler*, 134 S. Ct. at 761 ("[E]xorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.").

[76] Takeda GmbH v. Mylan Pharms. Inc., No. 15-3384, 2016 WL 146443, at *4 (D. N.J. Jan. 12, 2016).

[77] *See* Syngenta AG MIR 162 Corn Litig., No. 15-9593, 2016 WL 1047996, at *2 (D. Kan. Mar. 11, 2016), Acorda Therapeutics, Inc. v. Mylan Pharms. Inc. 78 F. Supp.3d 572, 590 (D. Del. 2015), *aff'd on other grounds*, 817 F.3d 775 (Fed. Cir. 2016). Because the statute at issue in *Daimler* had already been interpreted to lack a consent requirement, the Court did not have a need to address the issue. *See* Acorda Theraputics Inc. v. Mylan Pharms., Inc., 817 F.3d 775, 769 (Fed. Cir. 2016) (O'Malley, J., concurring) ("Notably, the Court had no occasion to consider the rule it laid down in *Pennsylvania Fire* because California – the state where the action at issue was pending – had interpreted its registration statute as one that

*Acorda Therapeutics v. Mylan Pharmaceuticals*, the District of Delaware (later affirmed by the Federal Circuit) noted that *Daimler* specifically distinguished between consensual and non-consensual jurisdiction when the Court referred to *Perkins v. Benguet Consol. Mining Co.*,[78] as a "textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum."[79] *Acorda* thus reasoned that pre-*Daimler* cases upholding consent-by-registration were left untouched – even if the result was "odd" and seemingly inconsistent with *Daimler*.[80] For courts approving the consent-by-registration theory of general jurisdiction, *Daimler*'s Fourteenth Amendment "minimum contacts" analysis does not overrule existing precedent, and consent-by-registration theory remains an alternative means of exercising general jurisdiction over a foreign corporation.[81] As for the fear of unpredictable exercises of jurisdiction, these courts posit that it is only a result of the imprecise "minimum contacts" analysis.[82] The alternative consent-by-registration examination is purportedly clear – the corporation is subject to jurisdiction in each state in which it has registered and has appointed an agent for service of process, so long as the state views the statute as resulting in consent to general jurisdiction.[83]

In light of this circuit split, and the palpable tension that it has created with *Daimler* and *Goodyear*, this issue could very well prove to be one of the next frontiers for personal jurisdiction addressed by the United States Supreme Court. It should also be of particular significance to products liability practitioners because many national products manufacturers and distributors are registered to do business in dozens (if not all of) the United States' constituent states and territories.

## E. *Piper Aircraft Co. v. Reyno* and *Forum Non Conveniens*

Like motions to dismiss for lack of personal jurisdiction, the doctrine of *forum non conveniens* remains a potentially powerful tool to keep foreign litigation at bay. While not as recent as the Supreme Court decisions discussed above, *Piper Aircraft Co. v. Reyno*,[84] remains the principal decision on *forum non conveniens*. *Piper* involved a wrongful-death action arising out of an aviation accident in Scotland.[85] The plaintiffs brought a products-liability action against a Pennsylvania aviation manufacturer and an Oregon propeller manufacturer.[86]

Given that the defendants were American entities, personal jurisdiction was not the tool of choice. Instead, the defendants eventually pursued motions to dismiss under the common-law doctrine of *forum*

did not, by compliance with it, give rise to consent to personal jurisdiction.").

[78] 342 U.S. 437 (1952).

[79] *Acorda*, 78 F. Supp.3d at 589 (citing *Daimler*, 134 S. Ct. at 755-756), *aff'd on other grounds*, 817 F.3d 775 (Fed. Cir. 2016).

[80] *Id.* at 590-591.

[81] *Id.* at 591.

[82] *Id.*

[83] *Id.*

[84] 454 U.S. 235 (1981).

[85] *Id.* at 238.

[86] *Id.* at 239.

*non conveniens*.[87] The specific question before the Court was whether – considering that Scottish law was less favorable to the plaintiffs and that a "plaintiff's choice of forum ordinarily deserves substantial deference" – the United States was the proper forum where the accident took place in Scotland, the decedents and their families were foreign, and the accident investigation was conducted abroad.[88]

In reversing the Third Circuit's decision – which had given dispositive weight to the potentially unfavorable change in applicable law – the Supreme Court focused on the reduced deference due to a foreign plaintiff's choice of a United States forum and the district court's balancing of what have now become the familiar private- and public-interest factors used to weigh a motion to dismiss for *forum non conveniens*.[89]

Regarding the private-interest factors (which affect the convenience of the litigants), the Court upheld the district court's analysis that

> [w]itnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident – all essential to the defense – are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.[90]

Moreover, the defendants' inability to implead Scottish third-party defendants – *i.e.*, the pilot's estate, the plane's owners, and the charter company – supported holding the trial in Scotland.[91]

As for the district court's review of the public-interest factors (which affect the convenience of the forum), the Court also upheld the district court's balancing analysis.[92] The district court held that Pennsylvania law would apply to one defendant and Scottish law to another. In contrast, the Third Circuit, in overturning the district court, held that only Pennsylvania law would apply.[93] Per the Third Circuit, there would not have been any problem of familiarity with, or confusion from, analysis of foreign law.[94] However, even if the Third Circuit's consideration of the choice-of-law factor were correct, the Supreme Court held that "all other public interest factors favored trial in Scotland."[95] Scotland had a very strong interest in the litigation (unlike the United States); the accident occurred in Scotland; all of the decedents were Scottish; and, the defendants aside, the remainder of the potentially involved persons and entities were foreign.[96]

Finally, the Court focused on the practical implications of devoting United States judicial resources to foreign-centered civil actions.[97] The Court disagreed with the Third Circuit's holding that dismissal on *forum non conveniens* grounds is automatically barred

[87] *Id.* at 238.

[88] *Id.* at 242.

[89] *Id.* at 247-257.

[90] *Id.* at 242.

[91] *Id.*

[92] *Id.* at 257-260.

[93] *Id.* at 260.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 246-257.

where the law in the alternative forum is less favorable to the plaintiff than the potentially applicable United States law.[98] The Court ruled that the difference in the favorability of the possible fora's laws should not be given substantial weight.[99] In addition, the Court held that where the plaintiffs or real parties are foreign, the presumption in favor of the plaintiff's chosen forum applies with less force.[100] To do otherwise would mean that "American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation . . . would increase and further congest already crowded courts."[101]

Defense counsel should also be aware of the specialized *forum non conveniens* analysis that applies to forum-selection or choice-of-forum clauses under the Supreme Court's decisions in *Bremen v. Zapata Off-Shore Co.*,[102] and *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas.*[103] Contractual forum-selection clauses are a powerful tool to plan, in advance, the potential *situs* of litigation between the contracting parties, and such clauses are generally enforceable in United States courts. Motions to dismiss predicated on forum-selection clauses are equally helpful tools in keeping foreign litigation at bay.

## II. Conclusion

The foregoing provides a small sampling of case law and doctrines available to defense counsel to assist in keeping foreign litigation at bay (and, hopefully, reducing litigation costs and improving litigation results for foreign clients). Globalization means that foreign manufacturers are increasingly involved in the United States economy, and the same is true of United States manufacturers vis-à-vis the outside world. In addressing a matter with a significant foreign-centered component, United States defense counsel should thus be aware that they may seek out and utilize applicable defensive tools to reduce improper exposure to United States litigation. With ever increasing globalization, this should become a focus for products liability practitioners.

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[98] *Id.*

[99] *Id.*

[100] *Id.* at 255.

[101] *Id.* at 252.

[102] 407 U.S. 1 (1972).

[103] 134 S. Ct. 568 (2013).