

## Long-Arm Jurisdiction In A Post-Daimler Era

By **Muhammad Faridi and Jordan Engelhardt, Patterson Belknap Webb & Tyler LLP**

*Law360, New York (January 11, 2017, 1:17 PM EST) --*

In *Ace Decade Holdings Ltd. v. UBS AG*, No. 653316/2015, 2016 BL 413780 (N.Y. Sup. Ct. Dec. 7, 2016), Justice Eileen Bransten of the Commercial Division dismissed a \$500 million fraud suit brought by an investment holding company incorporated in the British Virgin Islands, Ace Decade Holdings Ltd., against the Swiss Bank UBS AG for lack of personal jurisdiction and inconvenient forum. Justice Bransten found no basis to exercise jurisdiction over UBS for alleged fraud in connection with a financing deal negotiated in Hong Kong to purchase shares of a firm listed on the Hong Kong Stock Exchange. Justice Bransten further held that, even if the court could exercise jurisdiction over UBS, the causes of action lack a substantial enough nexus with New York and, thus, dismissal is also warranted based upon the doctrine of *forum non conveniens*. *Ace Decade* highlights the nuanced issues involved in specific personal-jurisdiction disputes following the U.S. Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), and provides important lessons for plaintiffs and defendants alike in cases involving foreign defendants.



Muhammad U. Faridi



Jordan M. Engelhardt

### The Transaction

In May 2014, Ace Decade and UBS began discussing an investment of over \$1 billion in shares offered by Haitong Securities Co. Ltd. on the Hong Kong Stock Exchange. UBS allegedly recommended that Ace Decade partially finance the investment with a loan from UBS. To avoid regulatory disclosure, UBS also recommended that Ace Decade purchase the shares through an entity called Haixia Huifu Asset Investment and Fund Management Co. Ltd., without allegedly disclosing that Haixia was closely affiliated with UBS. Ace Decade allegedly sought and received assurances from UBS that the loan terms would not include margin calls based on short-term price fluctuation triggers, and that UBS would give Ace Decade sufficient time to meet any other margin calls. Ace Decade alleged that, in reliance of UBS' representations, it agreed to make the investment through a Haixia subsidiary.

According to Ace Decade, contrary to UBS' assurances, the financing letter entered in December 2014 between Haixia and UBS included onerous margin call provisions, which allowed UBS to issue margin calls based on short-term price fluctuations, and required the entire loan to be prepaid within a few days following the margin call.

Ace Decade relocated to New York in early 2015. In its amended complaint, Ace Decade alleged that UBS continued to misrepresent the loan terms on numerous telephone calls in the first half of 2015.

In April 2015, UBS provided approximately \$688 million in loan financing to Haixia for the purchase of Haitong shares on Ace Decade's behalf. In May 2015, Ace Decade's agent transferred the remaining amount needed to fund the investment from Ace Decade's Hong Kong UBS account, and the investment was completed. Shortly thereafter, in July 2015, Haitong's share price dropped 20 percent over a few days. UBS issued a margin call. Despite allegedly knowing that Ace Decade could repay the loan if provided more time to clear funds, UBS sold Ace Decade's entire position below market value to cover the margin call. As a result, Ace Decade lost nearly its entire investment. Ace Decade's suit against UBS alleged fraud, constructive fraud, breach of fiduciary duty, negligent representation, and unjust enrichment.

### **The Court's Jurisdictional Analysis**

Justice Bransten first observed that since *Daimler*, "New York courts have recognized that 'doing business' in New York is no longer a constitutionally sufficient basis for the exercise of general jurisdiction over foreign entities."<sup>[1]</sup> The court found that UBS is not subject to general jurisdiction in New York.

Turning to specific jurisdiction, Justice Bransten held that no provision of New York's long-arm statute, CPLR 302, provided a basis for jurisdiction. CPLR 302 sections (a)(1) through (a)(3) permit a court to exercise specific jurisdiction over an out-of-state defendant where the claims arise out of: "(1) business that a defendant 'transacts ... within the state'; (2) 'a tortious act' committed 'within the state'; or (3) 'a tortious act' committed 'without the state causing injury to a person or property within the state.'"<sup>[2]</sup>

Applying CPLR § 302(a)(1), Justice Bransten determined that Ace Decade's specific claims did not arise out of business transacted by UBS in New York because, based on the "totality of the circumstances," there was not a "substantial relationship" between the causes of action and any transaction by defendant in New York.<sup>[3]</sup> The court reasoned that "the complaint describes a purchase by a British Virgin Islands company (Ace Decade) through a Chinese investment fund, of Shares regulated by Chinese law, denominated in Hong Kong Dollars and listed on the Hong Kong Stock Exchange."<sup>[4]</sup> The fact that Ace Decade relocated to New York before the investment was funded did not trigger long-arm jurisdiction under Section (a)(1), the court concluded, because UBS' telephone and email communications to Ace Decade in New York "are not enough to exercise long-arm jurisdiction with respect to claims arising out of an entirely foreign transaction."<sup>[5]</sup>

Justice Bransten further held that UBS did not commit a tortious act within New York subjecting it to jurisdiction under CPLR § 302(a)(2). The court discounted Ace Decade's allegations of ongoing misrepresentations after it moved to New York in early 2015, which the court found were contradicted by earlier statements in the original complaint and the affidavit of Ace Decade's agent. Specifically, the prior filings alleged that Ace Decade's agent did not discuss the margin call provisions with UBS again after moving to New York. Although an amended pleading supersedes all prior pleadings, the court noted that Ace Decade's earlier statements constituted a "judicial admission" that any misrepresentations were directed at Ace Decade before it relocated to New York.<sup>[6]</sup> And even if the allegations of ongoing misrepresentations were credited, the court reasoned that CPLR § 302(a)(2) would not apply in this case because a "fraudulent misrepresentation[] received in New York [is] insufficient" alone to exercise jurisdiction.<sup>[7]</sup>

The court also found CPLR § 302(a)(3) to be inapplicable because UBS did not cause injury in New York by committing a tortious act outside the state. The court found that Ace Decade's residence in New York is not a sufficient predicate for jurisdiction where the funds used for the investment were never held in a New York account and Ace Decade's allegation of "lost unnamed potential investors" in New York was too conclusory to establish injury in New York.[8]

### **Forum Non Conveniens**

The court noted that the doctrine of forum non conveniens, codified in CPLR § 327(a), permits dismissal of actions "when ... in the interest of substantial justice, the action should be heard in another forum." "Although the plaintiffs' choice of forum should rarely be disturbed, dismissal based upon forum non conveniens is warranted where there is 'no substantial connection to this State.'"[9] The court found that "the only connection to New York is that Plaintiff and its agents moved here in 2015 — after entering into the relevant agreements that structured the Investment." [10] Phone calls between Ace Decade's agents in New York and UBS' agents abroad do not establish a substantial enough connection to New York, the court held, particularly where China's and Hong Kong's interests in the lawsuit are greater than New York's interest, and relevant documents and witnesses are in Hong Kong. The court found that forum non conveniens provides another basis for dismissal of Ace Decade's claims.[11]

### **Lessons Learned**

As demonstrated by Justice Bransten's decision, Daimler has significantly limited general "doing business" jurisdiction over out-of-state defendants. Under Justice Bransten's reasoning, suits brought in New York against foreign defendants must be connected to either a specific business transaction, tortious conduct, or injury suffered in the state.

The question for litigants seeking to base jurisdiction on business transacted in New York under CPLR § 302(a)(1) is whether the transaction at issue has a substantial enough relationship to the state under the totality of the circumstances. That is a highly fact-intensive inquiry and underscores the importance of the pertinent links between the transaction or facts at issue and the forum state.

With regard to CPLR § 302(a)(2), Justice Bransten's finding that Ace Decade made contradictory statements about whether it received misrepresentations while residing in New York may provide an important distinction in future cases where there are no allegations of inconsistency in pleadings.

In sum, Ace Decade underscores the need for plaintiffs to carefully plead all facts tying the alleged conduct to New York to mitigate the risk of dismissal on jurisdictional grounds, while foreign defendants facing claims need to evaluate early in the case whether the suit lacks the required nexus to the forum and can potentially be dismissed on that basis.

---

*Muhammad U. Faridi is a partner and Jordan M. Engelhardt is an associate in the New York office of Patterson Belknap Webb & Tyler LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Ace Decade Holdings Limited v. UBS AG, No. 653316/2015, 2016 BL 413780, at \*5 (N.Y. Sup. Ct. Dec.

7, 2016) (citing *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226 [A], 22 N.Y.S.3d 138, 2015 NY Slip Op. 51280[U], at \*20 (N.Y. Sup. Ct. N.Y. Ctny. 2015)).

[2] *Id.* at \*6 (quoting CPLR 302(a)(1)-(3)).

[3] *Id.* at \*7 (quoting *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005); *Wilson v. Dantas*, 128 A.D.3d 176, 184 (1st Dep't 2015)).

[4] *Id.*

[5] *Id.*

[6] *Id.* at \*9 (citing *Tullett Prebon Fin. Services v. BGC Fin., L.P.*, 111 A.D.3d 480, 482 (1st Dep't 2013)).

[7] *Id.* (quoting *Pramer S.C.A. v. Abapulus Int'l Corp.*, 76 A.D.3d 89, 97 (1st Dep't 2010)).

[8] *Id.* at \*11.

[9] *Id.* (quoting *Blueeye Nav. Inc. v. Den Norske Bank*, 239 A.D.2d 192, 192 (1st Dep't 1997)).

[10] *Id.* at \*11.

[11] *Id.* (quoting CPLR § 327(a)).