

**DAIMLER AG v. BAUMAN:
FOREIGN GENERAL PERSONAL JURISDICTION POST-KIOBEL**

by

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INTRODUCTION

Between the years of 1976 and 1983, the period of Argentina’s “Dirty War,” Mercedes-Benz Argentina, the subsidiary in Argentina of DaimlerChrysler Aktiengesellschaft (now known as Daimler AG), allegedly acted in concert with Argentinian government “security forces to kidnap, detain, torture and kill.”¹

In 2004

The complaint filed in 2004 in the United States District Court for the Northern District of California by twenty-two plaintiffs, nearly all both citizens and residents of Argentina, alleged that during Argentina’s 1976–1983 “Dirty War,” Daimler’s Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) “collaborated with state security forces to kidnap, detain, torture, and kill” when twenty-two Argentinian company, headquartered in Stuttgart, that manufactures Mercedes-Benz vehicles in Germany.

and citizens of Argentina.

Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages

for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

In the 2012-2013 term the United States Supreme Court decided in *Kiobel v. Royal Dutch Petroleum*² that under the Alien Tort Statute (“ATS”)³ federal courts do not have the authority to hear and decide “foreign cubed” cases⁴ in which harm is allegedly caused by a foreign corporation against a foreign citizen in a foreign country.⁵ The Court had already interpreted the Torture Victim Protection Act of 1991⁶ (“TVPA”) as applying only to lawsuits against natural persons and not against corporations; therefore, federal courts do not have jurisdictional authority in such a case. With neither the ATS nor the TVPA providing federal statutory jurisdictional grounds, prospective plaintiffs and human rights organizations continued to seek alternative jurisdictional bases for justice in United States courts in foreign cubed cases.

In *Daimler AG v. Bauman*,⁷ decided during the 2013-2014 term, the Court addressed the question of whether federal courts have authority over foreign cubed cases under general, all-purpose, personal jurisdiction.⁸ Once again, alleged human rights violations were the basis of the suit. This time, Bauman... allege that is based on events that occurred in Argentina during its Dirty War⁹ over 30 years ago.¹⁰ The case was brought in a United States district court in California by a foreign citizen against a foreign corporation for harm allegedly caused in a foreign country. With no chance of success under the TVPA against a non-natural person and with little chance of success under the ATS, the plaintiff asked the court to assert general all-purpose personal jurisdiction. The defendant argued lack of personal jurisdiction.¹¹ This is the case analyzed in this paper.

This paper will review the Court's new criteria for general all-purpose personal long-arm jurisdiction. This analysis is relevant to domestic as well as to international cases.

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I. EXTRATERRITORIAL JURISDICTION

Jurisdiction is the authority of a court to hear and decide a case.¹² To have that authority, a court must have jurisdiction both over the subject matter of the case (*in rem* or subject matter jurisdiction) and over its parties (*in personam* or personal jurisdiction).¹³ Extraterritorial personal jurisdiction is particularly problematic when a court asserts the power to make legal judgments on acts that took place outside the geographic territory of the court's government.¹⁴

Federal trial court jurisdiction is based on the law of the state in which the court is located.¹⁵ States, including California, have long-arm statutes that assert extraterritorial jurisdiction.¹⁶ Therefore, the question in *Daimler* is whether the extraterritorial reach of courts in California goes far enough to include the defendant,

II. PERSONAL JURISDICTION AND THE FOURTEENTH AMENDMENT

The reach of a state's long-arm statute is constrained by the United States Constitution, specifically the Due Process clause of the Fourteenth Amendment, "nor shall any state deprive any person of life, liberty, or property, without due process of law."¹⁷ In legal proceedings a defendant corporation may be deprived of property resulting from a remedy for monetary damages; therefore, such deprivation is only constitutional if it results with "due process of law."

In early interpretation of the Fourteenth Amendment, the Supreme Court decided in *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878) that a court's authority is limited to its geographic boundaries.¹⁸ The understanding of the jurisdictional scope under the Fourteenth Amendment increased dramatically, notably under the frequently quoted case of *International Shoe*.¹⁹ There, jurisdiction, in a case now labeled as one of "specific jurisdiction," was limited to suits based on "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"²⁰

III. GENERAL (ALL-PURPOSE) JURISDICTION

In *Daimler* the cause of action is based on alleged tortious conduct that occurred in Argentina and not in California, therefore, the personal jurisdictional authority must be general and not specific. The authority claimed here is not one of territoriality, specific *in personam* jurisdiction based on specific acts; rather the claim is that the general connection between the defendant (here Daimler) and the government (here the state of California) is so strong that any action by that defendant, anywhere in the world, can provide the court with jurisdiction over that party in that jurisdiction.²¹ Interestingly, in this case the Supreme Court decided this case based on a jurisdictional question that was barely argued or briefed by the parties.²² This is reminiscent of the approach of the court in *Kiobel*, but there the court called for re-briefing and re-argument after initial oral arguments.²³

Therefore the Court in *Daimler* looks more closely at its more recent general, all-purpose jurisdiction case, *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). In *Goodyear* the Court stated that there can be general jurisdiction over a foreign corporation,²⁴ that is, when a court can “hear any and all claims against [it],”²⁵ is when there are “continuous and systematic contacts,²⁶ that is, its “affiliations with the State in which suit is brought are so constant and pervasive”²⁷ “as to render [it] essentially at home in the forum State.”²⁸

Justice Ruth Bader Ginsburg, in the Opinion of the Court, states that, in this specific case, “The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the [United States] District Court [for the Northern District of California] from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint.”²⁹ Stated generally, the issue is when is there general or all-purpose jurisdiction over a defendant, specifically a corporation, such that it may be sued in that jurisdiction “on any and all claims against it, wherever in the world the claims may arise”?³⁰ The majority of the court refers to a hypothetical (posed by whom?) in oral argument to make clear the expansive claim they are ruling against. “[U]nder the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a polish driver and passenger,

the injured parties could maintain a design defect suit in California.”³¹ In response, they hold that “[e]xercises of personal jurisdiction so exorbitant ... are barred by due process constraints on the assertion of adjudicatory authority.”³²

General or all-purpose jurisdiction is to be distinguished from specific or conduct-linked jurisdiction. The conduct complained of in *Daimler* did not occur in the jurisdiction and therefore this case was not brought on a jurisdictional theory of specific jurisdiction. However, the plaintiff did argue, and the Ninth Circuit agreed,³³ that general jurisdiction applies to this case. The most recent Supreme Court precedent addressing general jurisdiction was *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. _____, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). The test adopted there is that “a court may assert jurisdiction over a foreign corporation ‘to hear any and all claims against [it]’ only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive ‘as to render [it] essentially at home in the forum State.’”³⁴ This “at home” test for the legal personhood of a corporation seems an attempt to create an analogy to the jurisdictional test of domicile for a natural person. In this case, the majority concludes that “*Daimler* is not ‘at home’ in California, and cannot be sued there for injuries plaintiffs attribute to MB [Mercedes-Benz] Argentina’s conduct in Argentina.”³⁵

All the justices of the Supreme Court agree that a corporation may be sued in either its “formal place of incorporation”³⁶ or its “principal place of business.”³⁷ That may be a single jurisdiction or two different jurisdictions if the principal place of business is not in the same jurisdiction as the corporation’s formal place of incorporation. In a foreign-cubed case, both the formal place of incorporation and the principal place of business of the foreign corporation are, virtually by definition, foreign. Therefore, in order to sue that foreign corporation in a United States court, there must be another jurisdictional basis. In a foreign-squared case, it could be that there is a basis for specific jurisdiction, such as the acts that are the basis of the cause of action occurred in that jurisdiction. However, if that is not so, can a foreign plaintiff sue a foreign corporation for foreign acts in a domestic, United States, court?

All of the justices agree that in the *Daimler* case the answer is no. *Daimler Chrysler Aktiengesellschaft* is “a German public stock company, headquartered in

Stuttgart, that manufactures Mercedes-Benz vehicles in Germany”³⁸ and, therefore, neither its “formal place of incorporation” nor “its principal place of business” is in California.³⁹ However, both in the majority and concurring opinions they all agree that the answer could be yes. That is, under general (all-purpose) jurisdiction, a foreign plaintiff could sue a foreign corporation for foreign acts in a United States court based upon a certain relationship between the foreign corporation and the relevant jurisdiction.⁴⁰

Ultimately, the Court adopts a vague proportionality test to avoid the “exorbitant”⁴¹ and “unreasonable”⁴² claims made in this case. Expanding on the “continuous and systematic” test used in *International Shoe*, and including the “essentially at home” test of *Goodyear, Daimler* adds “General jurisdiction ... calls for an appraisal of a corporation’s activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, ‘at home’ would be synonymous with ‘doing business’ tests framed before specific jurisdiction evolved in the United States.”⁴³ This ignores the possibility that with the growth of interstate and international commerce, national and transnational corporations have become, indeed, at home in many places, if not all places in which they have corporate activities.⁴⁴

CONCLUSION

The proportionality test adopted by the majority in *Daimler* has the appearance of consistency and therefore fairness.⁴⁵ There is also an appeal here to principles of “international comity,”⁴⁶ and, perhaps, concern for protecting United States corporations from having to defend themselves against lawsuits in other countries. But the end result here, in both this and many other cases, is to make more difficulty the bringing of lawsuits, by generally poorer plaintiffs, against, generally wealthier, defendants. Surely it reduces costs to companies, but it increases, already often prohibitively expensive, costs to those with claims against them. A right is only theoretically if it cannot be practically exercised. And, we need to bear in mind, that this principle is likely applicable for all interstate as well as international lawsuits. It appears to me that this is a post *Citizens United* attempt to approach personal jurisdiction for all legal persons in a consistent fashion. Using the term “at home” echoes the concept of domicile⁴⁷ used to determine the appropriate forum for suits against natural persons. A significant problem with this approach of treating corporations as though they are identical to natural persons is that they are not people. As corporations have grown interstate and internationally, the model of a multinational corporation having a single home is less and less true in actuality. As Justice Sotomayor notes,⁴⁸ correctly I think, both foreign and domestic corporations may have many heads, many homes, rather than a single principal place of business. It is not clear to me that her solution is best, that the test be one of reasonableness, arriving at the same judgment in this case because “the exercise of jurisdiction over *Daimler* would be unreasonable in any event,”⁴⁹ but it does seem to me to be better.

One thing that is notable in this case is consideration by the justices of the Supreme Court, both in the oral arguments and in the case itself, of the laws, specifically the jurisdictional laws, of other countries. Perhaps this reflects the sense that the United States should not serve as an international court of justice for civil claims.

However, without such a court, we are left with a dilemma. Perhaps this claim can be brought in Germany⁵⁰ and perhaps the claim in *Kiobel* could be brought in the Netherlands or in England, but it seems accepted by all that justice could not be obtained in the countries in which the conduct occurred – Argentina for the *Daimler*

case or Nigeria for the *Kiobel* case. With the court doors of United States courts being closed in foreign-cubed cases both in the *Kiobel* and the Daimler cases, and in the absence of an international forum in which those suffering from human rights violations can bring their claims, these victims may not be able to find justice anywhere.⁵¹ This is an ethical problem the law has yet to resolve.

ENDNOTES

¹ Daimler AG v. Bauman, 2014 U.S. LEXIS 644 (2014). AG abbreviates the German word Aktiengesellschaft, German for “incorporated (stock company), the equivalents of Inc. and Incorporated in the United States. <http://german.about.com/library/blabbrev.htm>.

² Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013). An edited version of this case is included in SCHAFFER, AGUSTI, DHOOGHE, EARLE, INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT (South-Western 2015, 9th ed.), at 555-557.

³ “The district courts shall have 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 States,” 28 U.S.C. §1350: Alien's action for tort, *available at* <http://codes.lp.findlaw.com/uscode/28/IV/85/1350>.

⁴ See Robert S. Wiener, Foreign Jurisdictional Algebra and Kiobel v. Royal Dutch Petroleum: Foreign Cubed and Foreign Squared Cases, **__NEJLS__ (2014)**. In this case the plaintiffs did not concede that there is no jurisdiction under Kiobel. Oral argument, “Chief Justice John G. Roberts: --You mentioned Kiobel. Do you still think you have a viable claim under Kiobel, or haven't you conceded that? Kevin Russell: We are not prepared to concede that at this point, although we recognize we have an uphill struggle to fit ourselves within the exception that's been left,” *available at* http://www.oyez.org/cases/2010-2019/2013/2013_11_965.

⁵ In *Kiobel* the foreign corporations were from the Netherlands and England, the foreign citizens were from Nigeria, and the foreign country was Nigeria. *Kiobel* at 1662. Under this ruling, federal courts may have jurisdiction over “foreign-squared” cases in which only two of the above elements are foreign, with the remaining element domestic. Oona Hathaway, *Kiobel Commentary: The door remains open to “foreign squared” cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/>. Such as a lawsuit allegedly caused by a domestic corporation against foreign citizens in a foreign country, although a federal court may refuse to hear the case under another principle, such as *forum non conveniens*. See, *In Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India* in Dec. 1984, 809 F.2d 195, 1987 U.S. App. LEXIS 1186 (2d Cir 1987).

⁶ 106 Stat. 73, 28 U.S.C. § 1350 note § 2(e).

⁷ *Daimler AG v. Bauman*, 2014 U.S. LEXIS 644 (2014). AG abbreviates the German word *Aktiengesellschaft*, German for “incorporated (stock company), the equivalents of Inc. and Incorporated in the United States. <http://german.about.com/library/blabbrev.htm>.

⁸ *Bauman et al.*, in oral arguments, asserted that it preserved its right to pursue United States jurisdiction under the Alien Tort Statute, but the majority opinion seems to slam that door shut. *Id.* at * __.

⁹ *Guerra Sucia* (Spanish).

¹⁰ Simon Romero and Jonathan Gilbert, *Argentina Finds a Dictatorship's Secret Records*, N.Y. TIMES, Nov. 5, 2013, *available at* . “Daimler AG v. Bauman, No. 11-965, arose from abuses committed during Argentina’s so-called Dirty War, which occurred from 1976 to 1983. Twenty-two residents of Argentina, contending that Daimler’s Argentine subsidiary had collaborated with state security services in killings, torture and other abuses, sued Daimler in California. The suit was proper there, the plaintiffs said, in light of business conducted in the state by an American subsidiary of Daimler that was incorporated in Delaware.” N.Y. TIMES, Jan. 14, 2014, *available at* . MBUSA sales of new Daimler vehicles accounted for 10% of its sales nationwide and 2.4% of its sales worldwide. **Daimler at *12.**

¹¹ **Daimler at *__.**

¹² “Jurisdiction, definition 1. Power of a court to adjudicate cases and issue orders.” <http://www.law.cornell.edu/wex/jurisdiction>.

¹³ *Id.*

¹⁴ **Supra n. 3 at __.**

¹⁵ See Fed. Rule Civ. Proc. 4(k)(1)(A), Daimler at 753.

¹⁶ See Cal. Civ. Proc. Code Ann. §410.10 (West 2004).

¹⁷ <http://www.law.cornell.edu/constitution/amendmentxiv>.

¹⁸ Daimler at 749.

¹⁹ *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

²⁰ **Goodyear, 364 U.S. at __, 131 S. Ct. 2846, 2853**, 180 L. Ed. 2d 796, 805 (quoting *International Shoe*, 326 U.S. at 316, 66 S. Ct. 154, 90 L. Ed 95).

²¹ See *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945); *World-Wide Volkswagen Corp. v. Woodson*, 444 U. S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980); *Asahi Metal Industry Co. v. Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987).

²² Before the Supreme Court, the lower courts focused on the legal question of agency. The oral arguments are particularly telling in this case. Several justices (including Ginsburg) highlight the general jurisdictional question, going where the lawyers do not wish to go, preferring to follow the letter of the procedural law virtually lecturing the court that arguments not “preserved” in the record should be ignored even if they would lead to a better result. But the court (specifically Sotomayor) refuse to allow this to become a situation in which “hard cases make bad law.” *Winterbottom v Wright* in 1842: “This is one of those unfortunate cases...in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.” <http://www.phrases.org.uk/meanings/hard-cases-make-bad-law.html> . See Sotomayor, concurring opinion, *Daimler* at * __.

²³ A similar situation occurred in *Kiobel* where the court went so far as to require reargument, with new briefs, on a jurisdictional question that had been largely ignored by the parties and the lower courts. This may be a sign that the court as currently constituted is particularly interested in establishing basic legal principles that will set a precedent applicable to a wide range of similar cases rather than narrow rulings that can be factually distinguished in future cases.

²⁴ And, importantly, including domestic corporations from other states. See *Daimler*, Sotomayor, concurring **opinion**, at * __.

²⁵ *Goodyear*, at __, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803.

²⁶ Citation.

²⁷ Rewording in **Daimler**, at *10.

²⁸ *Goodyear*, at 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803.

²⁹ **Daimler at *8.**

³⁰ **Id. at *9.**

³¹ See Tr. Of Oral Arg. 28-29.

³² **Daimler at *9-*10.**

³³ 9th Cir.

³⁴ **Daimler at *10** quoting *Goodyear*, at _____, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803.

³⁵ *Id.*

³⁶ (*Ante*) **Daimler at *20**, n.19

³⁷ *Id.*

³⁸ **Id. at *8.**

³⁹ The U.S. Supreme Court did not spill much ink on the issue of whether jurisdiction can be obtained against Daimler AG through agency principles as a result of the acts of its subsidiary Mercedes-Benz USA, LLC (MBUSA), “incorporated in Delaware with its principal place of business in New Jersey and distribution through the United States, including California,” **Id. at [*8]**, although it was heavily litigated in the lower courts; nor did it consider the possibility of federal jurisdiction against MBUSA based upon its business activities nationwide. Instead, the general jurisdictional question focused on MBUSA activities solely within California because the cause of action was based on California state common law of torts.

⁴⁰ In this lawsuit the case is brought in California state court (true?) and, therefore, the relevant jurisdiction is California. The court does not address here what the relevant jurisdiction would be if the case were brought in a United States District Court. **See Perkins (1952) and *Helicopteros Nacionales de Colombia, S. A. v. Hall***, 466 U.S. 408, 414, n.8, 104, S. Ct. 1868, 80 L. Ed. 2d 404 (1984),

⁴¹ Ginsburg.

⁴² Sotomayor.

⁴³ **Daimler at *43 - *44, n.20.**

⁴⁴ See Daimler, Sotomayor (**concurring opinion**), at * __.

⁴⁵ However, as in affirmative action cases, treating unequals equally may not afford equal protection under the law.

⁴⁶ **Daimler at *46-47.**

⁴⁷ Used by the European Union to apply to corporations. **See Daimler at *47.**

⁴⁸ **Daimler, Sotomayor, concurring opinion, at * __.**

⁴⁹ **Daimler, at *30.**

⁵⁰ This option is not discussed in either the opinion of the court or the concurring opinion.

⁵¹ The U.S. Supreme Court has already denied jurisdiction in another foreign cubed case this term, *Daimler AG v. Bauman*, No. 11-965, 134 S. Ct. 746, 187 L. Ed. 2d 624, 2014 U.S. LEXIS 644 (2014). And a number of lower courts have denied jurisdiction following *Kiobel*. Steve Nickelsburg, *A Continuing Trend To Define Scope Of Kiobel*, LAW360, NEW YORK (Jan. 16, 2014, 12:48 AM), <http://www.law360.com/articles/500958/a-continuing-trend-to-define-scope-of-kiobel>. Burt Neuborne observes that under the *Daimler* analysis there could be personal jurisdiction against an individual but not a corporate defendant and “Why on earth should we discriminate *in favor* of corporations in enforcing human rights norms?” Burt Neuborne, *General Jurisdiction, “Corporate Separateness,” and the Rule of Law*, 66 Vand. L. Rev. En Banc 95 (2014).