The Second Circuit Swims Alone Against the Tide in Tossing ATS Claims against the Arab Bank

On December 8, 2015, the United States Court of Appeals for the Second Circuit upheld the District Court's dismissal of claims by plaintiffs against Arab Bank, a corporation, under the Alien Tort Statute (the "ATS") 28.U.S.C §1350 on the grounds that ATS claims may not be brought against corporations. The basis for the court's decision in *In re Arab Bank, PLC Alien Tort Statute Litigation*, ("*The Arab Bank Case*") (2d Cir. December 8, 2015) was an earlier decision, *Kiobel v. Royal Dutch Petroleum Co.,* 621 F.3d 111 (2d to Cir, 2010), commonly referred to as "*Kiobel I.*"

In one sense the decision in the *Arab Bank Case* was simply a holding by one three-judge panel on the Second Circuit that it was bound by an earlier decision, *Kiobel I*, by another three-judge panel. But the case is far more than that. In *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (2013) (*Kiobel II*), the Supreme Court affirmed *Kiobel I*, but on other grounds.

The issue of whether a corporation can be sued under the ATS was fully briefed and argued in the Supreme Court in *Kiobel I*. However, at the end of the argument some pointed questions were posed by Supreme Court Justice Elena Kagan. Judge Kagan's questions made it sound, to those who listened to the oral argument, like there was not going to be sufficient support to affirm *Kiobel I* on the grounds that a corporation could not be sued under the ATS. Shortly thereafter, Justice Roberts ordered re-briefing and additional oral argument in *Kiobel* on the question of whether the ATS had an extraterritorial application since the acts alleged against Royal Dutch Petroleum mainly took place outside of the United States.

On the second round, the Supreme Court affirmed the Second Circuit in *Kiobel* on the ground that there was no extraterritorial application to the ATS. The Supreme Court did not directly address the question of whether *Kiobel I* was correct in the analysis of 2 of the 3 Second

Circuit Judges that corporations could not be sued under the ATS (Judge Leval disagreed in a concurrence). Thus, *Kiobel I* remained and still remains the law in the Second Circuit.

There is a growing consensus among the sister circuits that the decision in *Kiobel I* appears "to swim alone against the tide." The Second Circuit did not duck the issue. *Arab Bank Case*, Slip opinion at p. 15. What is most interesting about the Second Circuit's decision in the *Arab Bank Case* is the candid admission of the Second Circuit that *Kiobel II* casts considerable doubt on the analysis of the two-judge majority of Judge Cabranes and Chief Judge Jacobs. *The Arab Bank Case* panel (Sack, Chin and Carney, JJ) was so forthright that they suggested that *Kiobel I* may indeed have been effectively overruled in *Kiobel II*. The Court acknowledged that, while as a general rule a panel of a Court cannot overrule a prior decision of another panel, there is an exception to this general rule where there has been an intervening Supreme Court decision that casts doubt on the controlling precedent. In refreshing directness, the Second Circuit stated: "*Kiobel II* does cast a shadow on *Kiobel I* in several ways." *Arab Bank Case* at p. 22.

In *Kiobel II*, the Supreme Court observed that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices" to displace the presumption against extraterritorial application. 133 S. Ct. at 1669. The Second Circuit noted that "if corporate liability under the ATS were not possible as a general rule, the Supreme Court statement about 'mere corporate presence' would seem meaningless." *Id* at 23.

As the *Arab Bank Case* panel commented:

> "Our reading of *Kiobel II* is bolstered by what appears to be a growing consensus among our sister circuits that the ATS allows for corporate liability."

The *Arab Bank Case* panel stated: "*Kiobel II* may be viewed as an intervening Supreme Court decision that casts doubt on [*Kiobel I*]." In a remarkable statement, the panel

acknowledged "*Kiobel II* suggests a reading of the ATS that is at best 'inconsistent' with *Kiobel I*'s core holding, which along with the views of our sister circuits indicates that something may be wrong with *Kiobel I*." *Id* at 25.

The *Arab Bank* panel concluded by saying: "We nonetheless decline to conclude that *Kiobel II* overruled *Kiobel I*." *Id* at 27. The Court's reasoning is important to understanding the appellate process:

> "We think that one panel's overruling of the holding of a case decided by a previous panel is perilous. It tends, in our view, to degrade the expectation of litigants, who routinely rely on the authoritative stature of the Court's panel opinions. It also diminishes respect for the authority of three-judge panel decisions and opinions by which the overwhelming majority of our work, and that of other circuits, is accomplished… We will leave it to either an en banc sitting of this Court or an eventual Supreme Court review to overrule *Kiobel I* if, indeed, it is no longer viable."

Id at 27.

In the final analysis, the decision of the panel in the *Arab Bank Case* is quite illuminating. The panel openly and honestly provided all of the reasons why another Second Circuit panel may have "gotten it wrong" in a prior ATS case. The Court did not just suggest that *Kiobel I* was wrongly decided, it pretty much said it. The *Arab Bank Case* is not about the merits of whether corporations can be sued under the ATS. Rather, it is an exposition on respect for precedent and the right of each three-judge panel to decide the issues before it and have its decision remain as binding precedent until overruled by an *en banc* panel or the Supreme Court.

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