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Client Alert

International Arbitration Practice Group

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Second Circuit Panel Declines to Abandon Rule on Corporate Liability Under Alien Tort Statute

On December 8, 2015, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") issued its decision in *In re Arab Bank, PLC Alien Tort Statute Litigation*,[i] which involved claims brought against Arab Bank, PLC ("Arab Bank") under the Alien Tort Statute ("ATS"),[ii] a federal statute providing U.S. courts with jurisdiction over foreign plaintiffs' tort claims asserting a violation of international law or a treaty to which the United States is party.

The *Arab Bank* decision represents the first time the Second Circuit has expressly re-examined its ATS jurisprudence since the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co*. ("*Kiobel II*"),[iii] which clarified and narrowed the scope of jurisdiction under the ATS by holding that the ATS only confers jurisdiction upon claims based upon conduct taking place, at least in part, in the United States. In the wake of *Kiobel II*, however, there remained some uncertainty as to the status of the Second Circuit decision that it affirmed ("*Kiobel I*"),[iv] as *Kiobel II* affirmed on grounds different than those underpinning the Second Circuit's decision – specifically, that the ATS did not permit claims against corporate defendants.

In *Arab Bank*, the court reaffirmed *Kiobel I* as a matter of circuit law, refusing to overrule that decision (which was decided by a different panel) despite acknowledging that the decision has been rejected by other circuits. The court relied upon the general rule providing that one panel of a federal court of appeals should generally not overrule a prior panel decision, and should instead leave the question to an *en banc* appellate panel or the Supreme Court. In so doing, the panel decision appears to make en banc review of *Kiobel I* – a significant decision holding that corporations may not be sued under the ATS – highly likely.

The ATS

The ATS is a centuries-old statute that permits non-U.S. nationals to sue in U.S. courts for violations of international law. It received relatively little attention in its first 200 years of existence, and the Supreme Court had addressed the ATS only once before *Kiobel II*, in *Sosa v. Alvarez-Machain*.[v] In *Sosa*, the Court examined the historical background of the statute and

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determined that the ATS was meant to address violations of established international norms defined by the "present-day law of nations."[vi] The Court added that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[vii] Notwithstanding the Court's admonition, the murky standard set forth in *Sosa* ushered in a significant number of ATS cases brought by foreign plaintiffs against multinational corporations, mostly for alleged wrongs committed in politically unstable regions. *Kiobel I* was such a case.

Kiobel arose out of claims brought by a group of Nigerian nationals who filed suit against various Dutch, British, and Nigerian oil companies.[viii] The plaintiffs had protested the environmental effects of oil exploration and production, and claimed that Nigerian police and military forces violently persecuted the protesters, including killing residents of the affected area and destroying their property. The plaintiffs claimed that the defendant corporations aided and abetted the security forces responsible for the atrocities, which they claimed resulted in various violations of the law of nations. The district court dismissed several of the claims, finding that those claims did not constitute violations of the law of nations as articulated by the Supreme Court in *Sosa v. Alvarez–Machain*.[ix] A panel of the Second Circuit dismissed the case on slightly different grounds, finding that the law of nations did not recognize corporate liability, and accordingly, that the claims against corporations could not be brought under the ATS.[x]

The panel's decision was accompanied by a concurring opinion by Judge Pierre Leval, in which he agreed that the plaintiffs' complaint was required to be dismissed (due to its failure to sufficiently plead a cause of action for aiding and abetting under the applicable standards), but strongly disagreed with the majority's reasoning and conclusions regarding corporate liability. Judge Leval noted that there was no authority in international law for the proposition that corporations could not be held liable for the types of egregious conduct that typically give rise to ATS cases, and that in the absence of a rule of international law barring the imposition of liability against corporations, the generally-applicable rules of U.S. law permitting the imposition of liability against corporations should be recognized in ATS cases.[xi] Judge Leval characterized the question of whether corporate entities could be held liable under the ATS as an issue of remedy, rather than one pertaining to the scope of substantive liability that could be imposed.[xii]

The Supreme Court granted *certiorari* to review the Second Circuit's ruling on corporate liability. Following argument on that question, the Court ordered the parties to brief "whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[xiii] In *Kiobel II*, the Supreme Court affirmed the Second Circuit's dismissal of the complaint on those grounds, holding that the ATS could not be applied extraterritorially absent clear congressional intent of such application. The Court did appear to leave open the possibility that certain conduct occurring outside the United States might be sufficient to confer jurisdiction under the ATS if the underlying claims "touched" and "concerned" the United States, adding, however, that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[xiv] A corporation's "mere corporate presence" in the United States, the Court noted, was not sufficient to satisfy this requirement.[xv]

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Although *Kiobel II* affirmed *Kiobel I*, the Supreme Court's decision did not address the Second Circuit's holding in *Kiobel I* concerning whether the ATS conferred jurisdiction over claims brought against corporate defendants. This uncertainty was directly addressed in the *Arab Bank* case.

Arab Bank involved the consolidated claims of various plaintiffs who were aliens injured or captured by terrorists overseas, and their family members or estate representatives. The plaintiffs brought claims against Arab Bank under, *inter alia*, the ATS based on allegations that the bank financed and facilitated terrorist activity by various prominent

Palestinian terrorist organizations.[xvi] The plaintiffs also alleged that Arab Bank routed funds connected to terrorist activity through its New York branch.[xvii]

The district court dismissed the plaintiffs' ATS claims on the basis of *Kiobel I*,[xviii] and the plaintiffs appealed to the Second Circuit. The panel affirmed the district court's decision on the basis of *Kiobel I*, reciting the well-established principle that an appellate panel "is bound by prior decisions of [the same] court unless and until the precedents established therein are reversed en banc or by the Supreme Court."[xix] However, the panel recognized "an exception to this general rule" when an "intervening Supreme Court decision ... casts doubt on our controlling precedent."[xx] The panel determined that *Kiobel II* "cast[s] a shadow on *Kiobel I* in several ways."[xxi]

First, the panel took note of the Supreme Court's statement in *Kiobel II* 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.[xxii] The panel found that implicit in the statement "that *mere* corporate presence is insufficient" was an assumption that corporate presence could, perhaps "in combination with some other factual allegations," be sufficient to confer ATS jurisdiction over a corporate defendant, suggesting the possibility of corporate liability under the ATS.[xxiii]

Second, the panel found that the Supreme Court's analysis in *Kiobel II* interpreted *Sosa* in a manner more consistent with Judge Leval's *Kiobel I* concurrence than the majority opinion, as the Supreme Court's decision appeared to reinforce that the ATS imports from international law "only the conduct proscribed, leaving domestic law to govern the available remedy and, presumably, the nature of the party against whom it may be obtained."[xxiv]

Third, the panel recognized the possibility that "*Kiobel I* and *Kiobel II* may work in tandem to narrow federal courts' jurisdiction under the ATS more than what we understand Congress may have intended in passing the statute" by putting potential plaintiffs in a very small box: Specifically, both decisions would confine ATS jurisdiction to suits against only natural persons based on conduct that occurs at least in part within (or otherwise sufficiently touches and concerns) the United States. The panel further remarked that such a result may not be desirable as it would "prevent foreign plaintiffs from having their day in court in a far greater proportion of tort cases than Congress envisioned when, centuries ago, it passed the ATS."[xxv]

Finally, the panel noted that *Kiobel I*'s holding that the ATS did not provide jurisdiction over claims brought against corporate defendants stood at odds with every other federal circuit to address the issue.[xxvi]

Despite the panel's skepticism about whether *Kiobel I* was consistent with *Kiobel II*, the panel declined to find that *Kiobel I* was no longer good law, explaining that "one panel's overruling of the holding of a case decided by a previous panel is perilous" as it "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."[xxvii] Rather, the panel decided to "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."[xxviii]

Conclusions

Perhaps taking their cue from the panel's decision, the plaintiffs in *Arab Bank* filed a petition for *en banc* review of the decision on December 22, and the Court has ordered briefing on the petition.

An overruling of *Kiobel I* would almost certainly result in a substantial uptick in ATS filings in New York – home to many corporate headquarters and the principal financial center of the United States – by plaintiffs asserting claims against corporations, who (unlike states or sovereign entities) cannot claim sovereign immunity, and who (unlike

individuals) are perceived as being able to satisfy substantial money judgments. Accordingly, the case will no doubt be closely watched by practitioners and in-house counsel alike.

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[i] 808 F.3d 144 (2d Cir. 2015).

[ii] 28 U.S.C. § 1350.

[iii] —— U.S. ——, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013).

[iv] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *aff'd, Kiobel v. Royal Dutch Petroleum Co.*, —— U.S. ——, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2013).

[v] 542 U.S. 692 (2004).

[vi] *Sosa*, 542 U.S. at 725.

[vii] *Id*. at 732.

[viii] *Kiobel I*, 621 F.3d at 123.

[ix] *Id*. at 124.

[x] *Id*. at 145.

[xi] *Id*. at 164.

[xii] *Id*. at 176.

[xiii] *Kiobel II*, 133 S. Ct. at 1663.

[xiv] *Id*. at 1669.

[xv] *Id*.

[xvi] *Arab Bank*, 808 F.3d at 149.

[xvii] *Id*. at 149-50.

[xviii] *Id*. at 148.

[xix] *Id*. at 154.

[xx] *Id*.

[xxi] *Id*.

[xxii] *Id*. at 155.

[xxiii] *Id*.

[xxiv] *Id*.

[xxv] *Id*. at 156.

[xxvi] *Id*., citing *Doe I v. Nestle USA, Inc*., 766 F.3d 1013, 1022 (9th Cir. 2014); *Doe VIII v. Exxon Mobil Corp*., 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber Co*., 643 F.3d 1013, 1021 (7th Cir. 2011); *Romero v. Drummond Co*., 552 F.3d 1303, 1315 (11th Cir.2008); *see also Al Shimari v. CACI Premier Tech., Inc*., 758 F.3d 516, 530–31 (4th Cir. 2014) (holding that the district court erred in concluding that it lacked subject matter jurisdiction over an ATS claim against a corporate defendant on extraterritoriality grounds, and finding that the plaintiffs' ATS claims sufficiently "'touch[ed] and concern[ed]' the territory of the United States" based on, inter alia, the corporate defendant's "status as a United States corporation"); *Beanal v. Freeport–McMoran, Inc*., 197 F.3d 161, 163 (5th Cir. 1999) (dismissing ATS claims against corporate defendants under Rule 12(b)(6), and to that extent appearing to implicitly assume jurisdiction over ATS claims against corporate defendants).

[xxvii] *Id*. at 157.

[xxviii] *Id*.