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December 2012
A Legal Update from Dechert LLP

U.S. Lawsuits Against Non-U.S. Banks; Recent and Expected Changes

Two recent developments in U.S. law may be of special interest to non-U.S. clients, especially foreign banks. First, the highest appellate state court in New York issued a decision on November 20, 2012 holding that a Lebanese bank may be subject to personal jurisdiction in New York courts because the bank makes use of a correspondent bank account at a New York bank on behalf of a client where the legal claim is connected to the use of the correspondent account. Second, in a separate case, the Supreme Court of the United States recently heard arguments concerning whether non-U.S. corporations may be liable under the U.S. Alien Tort Statute for conduct outside the U.S. and whether such claims can be asserted against corporations.

The New York "Long Arm" Jurisdiction Case; *Licci v. Lebanese Canadian Bank, SAL*

The recent decision of the New York State Court of Appeals in the case *Licci v. Lebanese Canadian Bank*,[1] has clarified when a New York Court can exercise personal jurisdiction over a foreign banking entity whose only connection with New York is the maintenance of a correspondent account at a New York bank. This decision reduces the strength of a foreign bank's opposition to jurisdiction where it can be shown that the plaintiff's claims arise at least in part out of repeated banking activity in New York, even where the foreign bank has no other connection to New York.

New York courts may exercise "long-arm" personal jurisdiction over a foreign defendant where (1) the foreign entity "transacts business" in the state, and (2) there is a substantial relationship between the claim asserted and the actions that occurred in New York.[2] Although this is a New York State procedural statute it is also applicable in federal court.[3] Thus, to determine if there is long-arm jurisdiction, by statute the court must determine first whether the defendant has transacted business in the state and then decide whether the claims against the defendant arise out of that activity.

The *Licci* case involved claims by individuals who alleged they were victims of rocket attacks in Israel during the summer of 2006 that they contend were launched by Hezbollah. Plaintiffs brought suit against the now defunct Lebanese Canadian Bank ("LCB") alleging that LCB assisted Hezbollah by engaging in "dozens" of monetary transactions for the Shadid Foundation (which is alleged to be the "financial arm" of Hezbollah), that these wire transfers "caused, enabled and facilitated the terrorist rocket attacks," and that LCB knew that Hezbollah required these wire transfer services to operate and carry out the alleged attacks.[4]

LCB sought dismissal of the case for lack of personal jurisdiction, arguing that its correspondent banking account with American Express Bank in New York was not sufficient to confer personal jurisdiction. A federal district court in New York dismissed the case and plaintiffs then appealed to the U.S. Court of Appeals for the Second Circuit. That federal court formally asked the New York State Court of Appeals to decide as a matter of New York law whether a foreign bank's maintenance and use of a correspondent bank account at a financial institution in New York constitutes transaction of business for long-arm jurisdiction and whether the claims arose from this transaction of business.[5] On November 20, 2012, the highest State court in New York issued its ruling and answered "yes" to both questions asked – the use of a correspondent account is transaction of business, and the complaint was connected enough to the account to support jurisdiction.[6]

The Court of Appeals found that "complaints alleging a foreign bank's repeated use of a correspondent account in New York on behalf of a client—in effect, a 'course of dealing' . . . show purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."[7] Thus, the Court held that the repeated use of a correspondent account located in New York by a foreign bank demonstrates that the bank has transacted business within New York.[8]

The Court in *Licci* then addressed the connection between the plaintiffs' claims and the defendant's transaction of business in New York as required by the jurisdictional statute. The Court found that the claims must be connected to the transaction in New York, here the use of the correspondent account. The Court determined that plaintiffs' allegations (accepted as true only for purposes of the motion) that LCB supposedly engaged in terrorist financing by "repeated use of the correspondent account" established the necessary connection for purposes of personal jurisdiction.[9]

The *Licci* decision raises serious and legitimate concerns for foreign banks that maintain correspondent accounts and other entities that rely upon New York's banking system. The decision increases such banks' exposure to lawsuits in New York even if their business is entirely outside the U.S. other than for banking purposes. Although each jurisdictional inquiry is decided on the facts of the individual case, and the *Licci* case involves transactions that are alleged to support the funding of terrorist activity, the holding in the case may have broader applicability to any potential claims arising out of the foreign banks' use of a correspondent account in New York.

The problems faced by foreign banks are worsened by the increased likelihood of compelled disclosure should a complaint survive an initial motion to dismiss. In Lebanon, Switzerland, Luxembourg, Kuwait, Korea and other countries, there are criminal and civil penalties imposed upon banks which disclose confidential client information, including the identities of banking customers. This presents the prospect of a non-U.S. bank being potentially compelled to make disclosures that would violate the laws of its own jurisdiction.

The Supreme Court Considers the Reach of the Alien Tort Statute

On October 1, 2012, the Supreme Court of the United States heard oral arguments addressing two significant issues concerning the reach of the Alien Tort Statute ("ATS"):[10] first, whether the ATS gives U.S. federal courts jurisdiction over cases involving violations of international law in another country, and second, whether corporations can be sued for such human rights violations.

Generally, commercial claims under the ATS have not survived motions to dismiss for lack of subject-matter jurisdiction because such claims – like fraud, breach of contract, conversion, and breach of fiduciary duty, for example – do not amount to violations of the "law of nations." An additional legal barrier to widespread use of ATS claims in the commercial context has been that many U.S. courts have rejected claims brought under the ATS against corporations. Nonetheless, plaintiffs have continued to bring ATS claims in the U.S. courts against non-U.S. entities, for example in the *Licci* case referenced above, as well as in similar cases.

The ATS confers jurisdiction to federal courts over "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."[11] The U.S. Supreme Court has held that plaintiffs alleging a violation of the "law of nations" must allege a violation of an international law or norm that is "specific, universal, and obligatory."[12] For example, the Second Circuit Court of Appeals has recognized that medical experimentation on humans – which is explicitly prohibited by several international treaties – violates a "universally accepted norm of customary international law" and accordingly, the ATS provides federal courts with jurisdiction over claims relating to such conduct.[13]

Kiobel involves foreign plaintiffs, the conduct of a foreign country, and the role of a foreign corporation from a third country in that conduct – and there is a substantial question whether such a case has any place in U.S. courts. Similarly, some courts have rejected ATS claims against corporations based on the argument that customary international law precludes individual, not corporate, conduct.[14]

The Supreme Court's decision in *Kiobel* will likely decide whether ATS can be applied to conduct wholly

outside the U.S. and also whether corporations and other entities can be liable under the ATS.

The answers to the questions posed in the *Kiobel* case will be significant for non-U.S. banks and other entities facing potential exposure to ATS suits. The Supreme Court's decision is expected in the first or second quarter of next year.

Footnotes

[1] 2012 WL 5844997 (N.Y., November 20, 2012)

[2] N.Y. C.P.L.R. §302(a)(1)

[3] F.R.C.P. 4(k)(1)

[4] *Id*. at *3

[5] *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 70 (2d Cir. 2012)

[6] *Licci v. Lebanese Canadian Bank*, 2012 WL 5844997 at 7

[7] *Id*. at *6

[8] *Id*. at *7

[9] *Id*. at *7

[10] 28 U.S.C. § 1350

[11] 28 U.S.C. § 1350

[12] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)

[13] *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 175, 187 (2d Cir. 2009); Commercial claims, however, generally do not raise violations of the law of nations sufficient for jurisdiction under the ATS. *See, e.g.*, *IIT v. Vencap, Ltd*., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated on other grounds by Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

[14] *See Kiobel*, 621 F.3d at 148; *but see Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1017-19, 1025 (7th Cir. 2011) (rejecting the *Kiobel* court's conclusions and holding that corporations can be liable under the ATS).

[15] *See Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (cert. granted Oct. 17, 2011)

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