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Client Alert

International Arbitration Practice Group

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Second Circuit Affirms *Arab Bank*'s Decision to Uphold *Kiobel I*

On August 24, 2016, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") issued its decision in *Licci et al. v. Lebanese Canadian Bank, SAL*, which involved claims brought against Lebanese Canadian Bank, SAL (LCB) under the Alien Tort Statute (ATS),[1] 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.

In *Licci*, the court held that it could not exercise subject matter jurisdiction over the Plaintiff's claims, using the reasoning in *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*)[2] that customary international law does not recognize the imposition of liability against corporations. In doing so, the *Licci* decision affirmed the conclusion in *In re Arab Bank, PLC Alien Tort Statute Litigation*[3] that the Second Circuit is bound by *Kiobel I*.

In *Arab Bank*, the panel had expressed strong skepticism concerning whether *Kiobel I* was reconcilable with the Supreme Court's analysis in *Kiobel II*, raising the possibility that the Second Circuit might overrule its own precedent on the issue of whether corporate liability may lie under the ATS, an issue on which the Second Circuit has disagreed with each of its sister circuits to decide the issue. *Licci* definitively dispelled any doubt concerning the Second Circuit's position. The panel clearly states that, in addressing whether *Kiobel I* was wrongly decided, they "are not free to consider that argument." Therefore, *Kiobel I* continues to be binding law in the Second Circuit, unless it is overruled by an *en banc* panel of the Second Circuit or by the Supreme Court. As a result, suits brought in Second Circuit courts (*i.e.*, the federal courts in New York, Connecticut, and Vermont) under the ATS against corporate defendants will be subject to dismissal.

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, but in recent years the Supreme Court has addressed the ATS twice: in *Sosa v. Alvarez-Machain*[4] and *Kiobel II*. While there was much speculation that the Supreme Court, in *Kiobel II*, would address the Second Circuit's corporate liability finding in *Kiobel I*, it did not do so, instead affirming that decision on different grounds, leaving the question of corporate liability for further development in the circuit courts. Specifically, the Supreme Court in *Kiobel II* affirmed the district court's

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dismissal in that case by relying on the presumption against extraterritoriality, which provides that "when a statute gives no clear indication of an extraterritorial application, it has none," and holding, in a ruling that has significantly restricted the reach of the ATS, that the statute does not apply to extraterritorial conduct.

***Licci et al. v. Lebanese Canadian Bank, SAL* Litigation**

The plaintiffs in *Licci* were foreign civilians residing in Israel who were injured and/or whose family members were killed in a series of rocket attacks in Israel.[5] Plaintiffs brought suit under the ATS against LCB, a Lebanese Bank with no branches, offices, or employees in the United States, alleging that the bank facilitated the terrorist rocket attacks by using a correspondent banking account at a New York bank to effectuate wire transfers totaling several million dollars on behalf of Hezbollah.

Licci had a long procedural history. In July 2008, Plaintiffs filed their initial claim against LCB and American Express (AmEx) in state court; the action was removed to federal court soon thereafter. Plaintiffs brought five claims against LCB: (1) commission of international terrorism in violation of the Anti–Terrorism Act, 18 U.S.C. § 2333; (2) aiding and abetting international terrorism in violation of the Anti–Terrorism Act; (3) aiding and abetting genocide, war crimes, and crimes against humanity in violation of international law, under the ATS; (4) negligence in violation of Israeli Civil Wrongs Ordinance § 35; and (5) breach of statutory duty in violation of Israeli Civil Wrongs Ordinance § 63.

LCB moved to dismiss all five claims for lack of personal jurisdiction under Fed. R. Civ. P. 12(b)(2) and for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On March 31, 2010, the District Court granted LCB's motion to dismiss for lack of personal jurisdiction. In *Licci I*, the District Court correctly noted that a defendant may be subject to personal jurisdiction in New York under N.Y. C.P.L.R. § 302(a)(1) if (1) the defendant "transacted business within the state; and (2) the claim asserted . . . arise[s] from that business activity," but determined that the allegations in the amended complaint were insufficient to satisfy either prong.[6]

Plaintiffs appealed, and in *Licci II*, the Second Circuit found that the scope and application of the long-arm statute's "transaction of business" and "arising from" tests to be uncertain. It determined that it could not "confidently say whether the New York Court of Appeals would conclude that the plaintiffs" have made a prima facie showing of jurisdiction under N.Y. C.P.L.R.[7] The Second Circuit therefore certified the following questions to the New York Court of Appeals: (1) Does a foreign bank's maintenance of a correspondent bank account at a financial institution in New York, and use of that account to effect "dozens" of wire transfers on behalf of a foreign client, constitute a "transact[ion]" of business in New York within the meaning of N.Y.C.P.L.R. § 302(a)(1)?; and (2) If so, do the plaintiffs' claims under the Anti–Terrorism Act, the ATS, or for negligence or breach of statutory duty in violation of Israeli law, "aris[e] from" LCB's transaction of business in New York within the meaning of N.Y. C.P.L.R. § 302(a)(1)?"[8] In *Licci III*, on March 29, 2012, the New York Court of Appeals accepted the certified questions, and answered them in the affirmative.

In *Licci IV*, following the guidance from the New York Court of Appeals, the Second Circuit held that (1) Plaintiffs made a prima facie showing that the District Court had personal jurisdiction over LCB; and (2) subjecting LCB, as a foreign bank, "to personal jurisdiction in New York comports with due process protections provided by the United States Constitution."[9] Accordingly, they vacated and remanded the portion of the District Court's judgment in *Licci I* dismissing claims against defendant LCB for lack of personal jurisdiction. Further, the Second District decided that because *Kiobel II* "did not directly address the question of corporate liability under the ATS," and because "the question of subject matter jurisdiction was not briefed on appeal," it was best that the District Court "address this issue in the first instance."[10]

On remand, in *Licci V*, the District Court dismissed Plaintiffs' case once more. In relevant part, the District Court held that it lacked subject matter jurisdiction over Plaintiffs' ATS claims under *Kiobel II*. Specifically, the court held that Plaintiffs failed to rebut the presumption against the extraterritorial application of the ATS because their complaint's allegations regarding LCB's provision of banking services failed to state a claim for aiding and abetting another's violation of the law of nations. The court concluded that Plaintiffs failed to allege adequately that LCB had the required *mens rea* for aiding and abetting liability, reasoning that the complaint lacked sufficiently detailed allegations as to LCB's intent. Plaintiffs appealed.

The Second Circuit focused on the second part of the ATS, whether the tort was "committed in violation of the law of nations or a treaty of the United States."[11] After canvassing precedent, the court determined that there were four jurisdictional predicates, each of which Plaintiffs had to satisfy before the court could assume jurisdiction: (1) [T]he complaint pleads a violation of the law of nations; (2) [T]he presumption against the extraterritorial application of the ATS, announced by the Supreme Court in *Kiobel II*, does not bar the claim; (3) [C]ustomary international law recognizes liability for the defendant; and (4) [T]he theory of liability alleged by plaintiffs (*i.e.*, aiding and abetting, conspiracy) is recognized by customary international law.

While the District Court found that the complaint failed to rebut the presumption against extraterritoriality, the Second Circuit disagreed, and devoted the majority of its decision to this issue, which it found required consideration of two prongs: First, that the conduct in question had to touch and concern the U.S.; and second, the conduct that touches and concerns the U.S. must also state a claim for a violation of the law of nations. The District Court had found that Plaintiffs' claim did not satisfy the second prong.

For the first prong, the Second Circuit found that LCB's use of a banking account in New York to facilitate wire transfers to Hezbollah "touched and concerned" the US with sufficient force to displace the presumption.[12] For the second, the court found that the wire transfers "enabled" and "facilitated" terrorist rocket attacks harming or killing Plaintiffs and their decedents.

The Court of Appeals ultimately held that it could not exercise subject matter jurisdiction over the Plaintiff's claims, however, based on *Kiobel I*'s holding that customary international law does not recognize liability against corporations. Insofar as the Plaintiffs argued that *Kiobel I* was wrongly decided, the court refused to entertain the argument.

Conclusions

The Court of Appeals' decision in *Licci* represents an interesting development in ATS jurisprudence. While the ATS represented a somewhat obscure and seldom-used statute for much of the time since its adoption in 1789, Plaintiffs have, in recent years, increasingly sought to bring ATS cases against corporate defendants. Because the Second Circuit encompasses New York, the financial capital of the United States, it is a place where many corporate defendants are likely to be subject to personal jurisdiction, and a natural venue to which ATS plaintiffs would typically look to file suit. The Court's findings that the use of a New York bank for clearing transactions suffices to create personal jurisdiction and to "domesticate" the case sufficiently to satisfy *Kiobel II* would likely further encourage ATS plaintiffs to bring suit in New York. *Kiobel I*, however, continues to represent a flat bar against such cases against corporate defendants. Insofar as *Kiobel I* represents a clear minority view among the circuits – each other circuit to consider the rule has rejected it[13] – it seems possible that the Supreme Court, presented with a case (such as *Licci*) in which *Kiobel I* provides the sole ground for dismissal, may seek to reconcile the disparate rules among the circuits.

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[1] 28 U.S.C. § 1350.

[2] *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).

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

[4] 542 U.S. 692 (2004).

[5] *Licci et al. v. Lebanese Canadian Bank, SAL*, Docket No. 15-1580 at 1 (2d. Cir. 2016) (*Licci VI*).

[6] *Licci v. Am. Express Bank Ltd.*, 704 F. Supp. 2d 403, 406 (S.D.N.Y. 2010) (*Licci I*).

[7] *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 73–74 (2d Cir. 2012) (*Licci II*).

[8] *Id.* at 74–75 (alterations in original).

[9] *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 165 (2d Cir. 2013) (*Licci IV*).

[10] *Kiobel II*, 133 S. Ct. at 1669.

[11] 28 U.S.C. § 1350.

[12] *Licci VI*, at 22.

[13] *See Flomo v. Firestone*, 643 F.3d 1013, 1021 (7th Cir. 2011) ("Having satisfied ourselves that corporate liability is possible under the Alien Tort Statute . . ."); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 15 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013) ("we join the Eleventh Circuit in holding that neither the text, history nor purpose of the ATS supports corporate immunity for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations."); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (affirming the *en banc* reasoning in *Sarei v. Rio Tinto*, 671 F.3d 736, 748 (9th Cir. 2011), that "corporate liability ultimately turns on an analysis of the norm underlying the ATS claim"). *See also Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("the text of the [ATS] provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants").