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MAY 2013

RECENT DEVELOPMENTS IN SUITS AGAINST FOREIGN GOVERNMENTS AND CORPORATIONS DOING BUSINESS ABROAD

The United States is an attractive forum for plaintiffs to challenge the actions of foreign states, due to U.S. courts' liberal discovery rules, higher damage awards, availability of class actions, and the absence of "loser pay" rules. But foreign states are generally entitled to immunity from such civil suits under the Foreign Sovereign Immunities Act ("FSIA").

As a result, plaintiffs often seek to circumvent FSIA immunity through three different strategies. First, plaintiffs sue private corporations that are not covered by the FSIA, claiming that the corporations were complicit in the foreign state's alleged wrongdoing. Second, plaintiffs sue the foreign states directly, but try to fit the action into one of the FSIA's exceptions to immunity, principally the exceptions for commercial activity, torts, or takings. Third, plaintiffs sue the foreign officials who allegedly committed or ordered the sovereign acts in question, who do not enjoy FSIA immunity.

This *Commentary* analyzes the U.S. Supreme Court's April 17, 2013 decision in *Kiobel v. Royal Dutch Petroleum Co.*[1] and other recent developments related to these circumvention strategies, and discusses how corporations, foreign states, and foreign officials can respond to such suits.

SUITS AGAINST CORPORATIONS

Plaintiffs seeking to circumvent FSIA immunity often sue private corporations under the Alien Tort Statute ("ATS"), which confers jurisdiction in U.S. courts over torts committed against foreign citizens "in violation of the law of nations or a treaty of the United States."

The Supreme Court recently revisited ATS jurisdiction in *Kiobel*. In that case, plaintiffs alleged that the Nigerian military committed various human rights abuses when it responded to an uprising in the Ogoni region of the country. Rather than sue the Nigerian government, plaintiffs instead sued Dutch and British oil companies, claiming that they aided and abetted the Nigerian military. In affirming the dismissal of the plaintiffs' claims, the Supreme Court held that the ATS does not confer jurisdiction in U.S. courts over claims

"seeking relief for violations of the law of nations occurring outside the United States."

Two issues remain unresolved under the *Kiobel* decision. First, the *Kiobel* case had initially gone to the Supreme Court on the question of whether corporate defendants may be sued under the ATS. The Court in the end did not reach that issue, which currently divides lower courts.

Second, in *Kiobel* the Court left open the possibility that the ATS may provide jurisdiction over claims that "touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application." And Justice Breyer, in an opinion concurring in the judgment, suggested that the ATS provides jurisdiction when the defendant is "an American national," or where "the defendant's conduct substantially and adversely affects an important American national interest." And certain human rights violations would still be actionable in U.S. courts under statutes, such as the Torture Victims Protection Act, which have explicit grants of extraterritorial jurisdiction. Further litigation can be expected on those contours of jurisdiction.

The Supreme Court had previously adopted a second limiting principle with respect to the ATS, holding that the ATS confers jurisdiction only over claims involving "a relatively modest set" of "heinous actions" that violate "specific, universal, and obligatory" norms of international law.[2] Consistent with this principle, defendants will often be able to obtain dismissal of ATS claims by arguing that the norm that the defendants allegedly violated is not sufficiently specific, universal, and obligatory to be actionable under the ATS. For example, in *Best Medical Belgium, Inc. v. Kingdom of Belgium*,[3] the plaintiffs claimed that a Belgian court had acted with racially discriminatory animus when it resolved bankruptcy proceedings against them. Jones Day argued, and the district court agreed, that an isolated incident of racial discrimination is not actionable under the ATS.

In addition to ATS claims, plaintiffs frequently assert claims against corporations based on state law or foreign law, relying on diversity or supplemental jurisdiction. Such claims will likely become even more common now that the Kiobel decision precludes similar claims under the ATS. For example in *Bowoto v. Chevron Corp.*, plaintiffs alleged that Chevron aided and abetted Nigerian government security forces in committing certain human rights abuses. In addition to claims under the ATS, plaintiffs alleged assault, battery, negligence, and civil conspiracy claims under California and Nigerian law, relying on diversity and supplemental jurisdiction. After a five-week trial, the jury returned a complete defense victory for Chevron, and the Ninth Circuit affirmed the judgment.[4]

Even when a U.S. court does assert jurisdiction over plaintiffs' claims (whether under the ATS or under diversity or supplemental jurisdiction), defendants can raise a number of other defenses:

Personal Jurisdiction. Because so-called "specific" personal jurisdiction is typically unavailable for claims arising from overseas conduct, plaintiffs have often relied on "general" personal jurisdiction, which subjects a corporation to suit on claims unrelated to the forum state when it has sufficiently "continuous and systematic" contacts with the state. The Supreme Court narrowed the scope of such jurisdiction in its 2011 decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, which restricted general jurisdiction over corporations to states in which their contacts "are so 'continuous and systematic' as to render them essentially at home in the forum State."[5] Under this standard, it should not be possible to assert general jurisdiction over a non-U.S. corporation in a U.S. forum. Even as to U.S. corporations, this standard may provide an effective weapon against being subjected to suit in unfavorable jurisdictions.

The Court will likely expand on its *Goodyear* decision (and possibly *Kiobel* as well) in *DaimlerChrysler AG v. Bauman*, in which the Court granted certiorari on April 22, 2013.[6] DaimlerChrysler, a German company, was sued for alleged human rights violations by its Argentine subsidiary. The jurisdictional basis for suing in the U.S. was that DaimlerChrysler has another subsidiary that sells the company's autos in the U.S. The Supreme Court took the case to address the question whether a court may exercise general personal jurisdiction against a foreign corporation for conduct occurring outside the U.S., based solely on the fact that an indirect subsidiary of the corporation does business in the forum state.

Political Question and Act of State Doctrines. Lawsuits claiming that private corporations are complicit in wrongdoing committed by a foreign state can be just as disruptive of U.S. foreign relations as suits filed directly against the foreign state, because U.S. courts still must sit in judgment of the state's sovereign acts. As a result, defendants often may seek dismissal under the political question doctrine or "act of state" doctrine. For example in *Corrie v. Caterpillar*, Palestinians who were allegedly injured when the Israeli Defense Force used Caterpillar bulldozers to raze buildings in the West Bank sued Caterpillar, claiming that the company had aided and abetted Israeli human rights violations. The court dismissed the suit under the political question doctrine, concluding "[f]or this court to preclude sales of Caterpillar products to Israel would be to make a foreign policy decision and to impinge directly upon the prerogatives of the executive branch of government." Alternatively, the court dismissed the suit under the act of state doctrine because it would require the court to "judg[e] the validity of a foreign sovereign's official acts … in a region where diplomacy is delicate and U.S. interests are great."[7]

Derivative Sovereign Immunity. In some cases, a corporate defendant may be entitled to derivative sovereign immunity. For example, the Fourth Circuit in *Butters v. Vance* held that a private contractor headquartered in Virginia was entitled to such immunity when it followed the commands of a foreign sovereign employer. As the court explained, "[a]ll sovereigns need flexibility to hire private agents to aid them in conducting their governmental functions…. To abrogate immunity would discourage American companies from entering lawful agreements with foreign governments and from respecting their wishes even as to sovereign acts."[8]

Forum Non Conveniens. Under the common law doctrine of *forum non conveniens*, a court may dismiss a case if it determines that a forum in another country is a more appropriate place to hear the case. Courts often grant such motions when foreign plaintiffs file claims against foreign corporations, given that trial of a foreign plaintiff's claims in the United States is likely to be less convenient, and only "a complete absence of due process in the alternative forum" will render the alternative forum inadequate.[9]

SUITS AGAINST FOREIGN STATES

Plaintiffs also attempt to circumvent FSIA immunity by suing foreign states directly for their sovereign acts but recasting the action as a commercial dispute. Under the FSIA, certain lawsuits that are "based upon a commercial activity" are not entitled to FSIA immunity. The term "commercial activity" is defined narrowly: a foreign state "engages in commercial activity … where it exercises *only* those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns."[10]

Foreign states thus can often successfully argue that their conduct was not commercial activity. For example, in *Best Medical*, plaintiffs claimed that the Belgian government had failed to deliver various investment subsidies and other incentives that it had allegedly promised the plaintiffs. Jones Day argued, and the court agreed, that promoting commerce and awarding government subsidies "are not … commercial activit[ies] available to private parties." Because the FSIA's commercial activity exception did not apply, the court dismissed plaintiffs' claims for lack of subject matter jurisdiction.

Again, even when a plaintiff does successfully argue that an exception to FSIA immunity applies, foreign states may also be able to seek dismissal on grounds of act of state, political question, or *forum non conveniens*, as discussed above.

SUITS AGAINST FOREIGN OFFICIALS

Another strategy plaintiffs frequently use to circumvent FSIA immunity is to sue the foreign officials who allegedly committed or ordered the act in question, rather than the foreign state. Prior to the Supreme Court's decision in *Samantar v. Yousuf*,[11] this strategy was generally unsuccessful because most courts held that foreign officials were entitled to FSIA immunity. But in *Samantar*, the Court concluded that the FSIA does not govern foreign officials' entitlement to immunity.

Foreign officials are, however, still entitled to common law sovereign immunity. In particular, a foreign official is entitled to sovereign immunity with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state. An individual

acts in his official capacity when he acts within the scope of his official duties. And a suit enforces "a rule of law against the state" when the lawsuit would require the court to sit in judgment of the propriety of the state's sovereign acts. Therefore, consistent with these principles, a foreign official is entitled to broad protection from liability in U.S. courts for actions taken on behalf of a foreign sovereign.

Even if a foreign official is not entitled to common law sovereign immunity, he may still be able to assert one or more other defenses. Because plaintiffs cannot sue foreign officials under the FSIA, they typically must proceed under the ATS, which as discussed above has a limited scope of jurisdiction. And foreign officials may also assert the act of state and political question doctrines, as well as *forum non conveniens*, discussed above. For example in *Best Medical*, Jones Day successfully argued that the act of state doctrine barred claims against three officers of a Belgian court. As the Court explained, "[t]he act of state doctrine limits the power of the United States courts to examine and impugn the acts of another sovereign.... As a result, United States courts cannot entertain a suit arising from acts taken by a state official on behalf of that state." Finally, foreign officials may seek dismissal for lack of personal jurisdiction.

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The authors wish to thank David Strandness and Charles T. Kotuby Jr., associates in the Washington Office, for their assistance in the preparation of this Commentary.

ENDNOTES

1 *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2013 WL 1628935 (U.S. Apr. 17, 2013). Jones Day filed an amicus brief in support of the respondents in the case, on behalf of a group of professors of international law and federal jurisdiction.

2 *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (internal quotation marks omitted).

3 *Best Medical Belgium, Inc. v. Kingdom of Belgium*, 2012 WL 6651976 (E.D. Va. Dec. 20, 2012). Jones Day represented the defendants in this case and successfully obtained dismissal of all claims against them.

4 *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010). Jones Day successfully defended Chevron in this case.

5 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). Jones Day represented Goodyear before the Supreme Court and successfully obtained reversal of the lower court's judgment.

6 *DaimlerChrysler AG v. Bauman*, No. 11-965 (Apr. 22, 2013).

7 *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007).

8 *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000).

9 *Tang v. Synutra Int'l, Inc.*, 2010 WL 1375373 (D. Md. Mar. 29, 2010), *aff'd*, 656 F.3d 242 (4th Cir 2011).

10 *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (emphasis added).

11 *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). Jones Day represented the defendant in this case before the Supreme Court.