Managing Legal Risks through CSR in Light of Recent Alien Tort Statute Decisions

By Michael A. Levine

Risk management is an important goal that corporations seek to achieve by implementing corporate social responsibility and sustainability (hereinafter collectively referred to as CSR) standards (code of conduct, or code) and programs. More specifically, corporations face an array of legal risks related to their business operations. One specific type of legal risk, particularly for companies with global operations and a U.S. presence, relates to potential claims under the Alien Tort Claims Act (ATSA), also called the Alien Tort Statute (ATS).

The ATS provides district courts with original jurisdiction 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.” 28 U.S.C. § 1350. Companies that operate within the United States may be subject to ATS litigation for acts that occur wholly outside the United States’ geographical confines. By way of brief background, and in substance, the U.S. Supreme Court in *Sosa v. Alvarez-Machain* recognized that under certain circumstances a plaintiff may obtain relief under the ATS for violations of customary international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004). Recently, there has been a series of ATS decisions that will become part of the calculus of legal risk management for multinational corporations, and they are discussed below.

Over the past few months, U.S. federal courts on the circuit and district court levels have handed down decisions affecting and interpreting exhaustion and standing requirements; venue; jurisdictional scope; pleading standards; and requisite *mens rea* for accessorial liability, among other issues, in ATS litigation. On balance, most of the decisions are favorable to company-defendants, as these courts have generally taken a tougher position on pleading and venue requirements. On the other hand, one circuit court has allowed an ATS litigation to proceed without requiring the plaintiffs to have first exhausted all remedies within the country in which acts complained of allegedly occurred.

Jurisdiction

Standing. *Doe VIII, et al. v. Exxon Mobil Corp.* Eleven anonymous Indonesian residents alleged that Indonesian soldiers, acting as security personnel for Exxon Mobil, committed violent acts while under the direction of Exxon. *Doe VIII, et al. v. Exxon Mobil Corp.*, No. 07-1022 (RCL), 2009 WL 3112823, at *1 (D. D.C. Sept. 30, 2009). The plaintiffs claim they were terrorized by soldiers hired by Exxon to protect a natural gas plant in the region. Id. at *2. The defendants moved to dismiss the case under eight separate theories, one of which was lack of standing. The issue before the court was whether non-resident aliens have standing to sue in U.S. courts. In this particular case, the plaintiffs’ ATS claim had been dismissed in 2001, leaving the case to proceed only on state law issues. The court found the plaintiffs lacked standing because they were non-resident aliens and did not address other alleged bases for dismissal. The court reasoned that “where a non-resident alien is harmed in his own country, he cannot and should not expect entitlement to the advantages of a United States court.” Id. at *4. In this case the court reasoned the parent subsidiary, a U.S. corporation, was insufficiently connected to the location where the events occurred; therefore, the plaintiffs lacked standing to bring a claim before a U.S. court.

Exhaustion of Remedies. *Sarei v. Rio Tinto*. Mining company Rio Tinto PLC has appealed a U.S. District Court ruling allowing class action plaintiffs to pursue their claims in the United States without having to exhaust remedies in Papua New Guinea, where the plaintiffs reside and the alleged incidents, including allegations of racial discrimination, war crimes, and crimes against humanity, giving rise to the claims that allegedly occurred during a civil war on Bougainville Island. See *Sarei v. Rio Tinto*, PLC, No. 02-56256, 2008 U.S. App. LEXIS 25279, at *1 (9th Cir. Dec. 16, 2008, notice of appeal filed Aug. 28, 2009).

Rio Tinto is appealing the decision in *Sarei v. Rio Tinto*, No. CV 00-11695, (C.D. Cal. July 31, 2009). In the decision, Judge Margaret M. Morrow declined to impose a prudential exhaustion requirement on several of the

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ATS claims against Rio Tinto. Applying the Sosa test, the court concluded that the “nexus” between the claims and the United States was weak. See Sosa, 542 U.S. at 703. The court agreed with the en banc plurality of the Ninth Circuit holding that courts should carefully consider prudential exhaustion with respect to claims that do not involve matters of “universal concern.” Sarei.

The court reasoned that because the plaintiffs’ claims concerning alleged crimes against humanity, war crimes, and racial discrimination were of “universal concern,” the exhaustion requirement did not apply to them. On the other hand, the court held that it would apply a two-step prudential exhaustion analysis to the plaintiffs’ other claims (which it did not find to be of universal concern) for alleged violations of “the right to health, life, and security of the person; cruel, inhuman, and degrading treatment; international environmental violations, and a consistent pattern of gross human rights violations.” The court gave the plaintiffs 30 days to file a status report indicating whether they intend to pursue any or all of the claims.

In response to the district court’s ruling, the plaintiffs filed a status report indicating their intent to abandon their environmental tort claims to which defendants responded by filing the above-mentioned notice of appeal.

Personal Jurisdiction


In 2004, the plaintiffs, Argentinean residents and citizens, sued DCAG in the Northern District of California under the ATS, alleging that military security forces had kidnapped, detained, or tortured them or their relatives at the direction of an Argentine-based DCAG subsidiary.

Writing for the Ninth Circuit, Judge Dorothy Nelson stated that the Northern District of California correctly dismissed the case for lack of personal jurisdiction, but noted that the appellants could file claims in Germany and Argentina. Id. According to Judge Nelson, while a subsidiary may be considered the agent of its parent for jurisdictional purposes, personal jurisdiction over the parent will lie only when the parent exerts “pervasive and continual” control over the subsidiary, and, if so, only when the subsidiary performs a domestic function that the parent would otherwise perform itself. Id. at *5-6.

Under this test, the court concluded that the plaintiffs had failed to establish that DCAG exerted “pervasive and continual” control over its U.S. subsidiary, which the court found to be largely autonomous in distributing vehicles in this country. Id. at *28. Judge Nelson noted that it was the subsidiary, not the parent company, that decided where to distribute its products. Id. at *17. Moreover, even assuming that DCAG did exert pervasive control over its subsidiary, the plaintiffs nonetheless failed to demonstrate that DCAG would undertake to perform substantially similar services in the absence of its subsidiary. Id. at *32.

Forum Non Conveniens


The Second Circuit agreed with the district court’s inference that plaintiffs had engaged in forum shopping, given that CCI, a Turkish company, had its principal place of business in Istanbul, and the plaintiffs had not alleged contact by CCI with the United States. Id. at *5. Further, the alleged injuries stemmed from alleged assaults and arrests by the Turkish police arising from their labor dispute with Efsane and CCI in Istanbul, Turkey. Id.

Additionally, the court rejected the plaintiffs’ contentions that the Turkish justice system is corrupt and found that Turkey was an alternative and adequate forum for plaintiffs’ claims. Id. at *6. Upon reviewing the U.S. Supreme Court’s Sosa factors, which balance public and private interests in a forum non conveniens inquiry, the Second Circuit concluded that the factors strongly favored adjudicating the dispute in Turkey. Id. at *8; see Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (affirming the district court’s decision to dismiss a warehouse owner’s action for damages against an oil company based on forum non conveniens, when jurisdiction was appropriate, but venue was not), distinguished by, Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp., 549 U.S. 422, 434–35 (2007) (deciding whether a federal court may dismiss a case based on forum non conveniens before definitively ascertaining its own jurisdiction).

Aldana et al. v. Del Monte Fresh Produce N.A. Inc. On August 13, 2009, the Eleventh U.S. Circuit Court of Appeals affirmed a lower court’s dismissal of this ATS case on forum non conveniens grounds, holding that Guatemala was an available alternate forum for the claims asserted, and the location of all the relevant evidence. Aldana v. Del
The plaintiffs filed suit against their former employer, Del Monte, and its wholly owned Guatemalan subsidiary, asserting ATS and Torture Victim Protection Act (TVPA) claims based on events alleged to have taken place in Guatemala during a labor dispute. The U.S. Southern District of Florida dismissed the action for failure to state claims for which relief may be granted, which the plaintiffs appealed to the Eleventh Circuit. The Eleventh Circuit, affirmed in part, vacated in part, and remanded. On remand, the district court dismissed the action again, this time on *forum non conveniens* grounds, and the plaintiffs appealed again. On appeal, the Eleventh Circuit held that the district court did not abuse its discretion in dismissing the action on *forum non conveniens* grounds. *Id.*

Writing for the court, Judge Stanley Marcus stated that the district court correctly applied the *forum non conveniens* test, which he noted is used by Florida state courts, federal courts, and has been adopted by the Florida Supreme Court. The Eleventh Circuit held that the district court correctly determined that there was an adequate alternate forum in Guatemala which possessed jurisdiction over the whole case; that all relevant factors of private interest favored the alternate forum; that public interest factors further tipped the balance of trial in favor of the alternate forum; and that the plaintiffs would not suffer undue inconvenience or prejudice in the alternate forum. *Id.*

**Pleadings**

**Sinaltrainal v. Coca-Cola.** The plaintiffs, the Colombian union, Sinaltrainal, and other labor leaders, brought ATS and TVPA claims against Coca-Cola, its Guatemalan subsidiary, and the companies and owners of two bottling companies, Panamco, LLC and Panamco Industrial de Gas-eosas, S.A. The plaintiffs alleged that the defendants collaborated with paramilitary forces or the local police, resulting in the murder and torture of union leaders employed by the bottling plants. The plaintiffs’ claims against the defendants and Coca-Cola were based upon conspiracy, aiding and abetting, and vicarious liability theories.

The U.S. District Court for the Southern District of Florida dismissed the four consolidated cases, which Sinaltrainal promptly appealed to the Eleventh Circuit. The Eleventh Circuit affirmed the dismissal based on the plaintiffs’ “failure to sufficiently plead allegations to connect the paramilitary forces, who perpetrated the wrongful acts, with the Colombian government.” *Sinaltrainal v. Coca-Cola,* No. 06-15851, 2009 WL 2431463, at *1 (11th Cir. Aug. 11, 2009). The Eleventh Circuit also noted that the complaint “failed to sufficiently plead factual allegations to connect the Panamco Defendants to actionable torture.” *Id.*

The complaint contained allegations of persecutions and murders of over 4,000 Colombian trade unionists since 1986. The complaint, however, did not state that the defendants caused the violence; instead, the plaintiffs claimed that the defendants should be held liable for “capitalizing on [the] hostile environment in a bid to rid their bottling factories of unions.” *Id.* at *21.

When dismissing the case at the district level, the court found that the allegations in each of the four complaints failed to invoke the court’s subject matter jurisdiction under the ATS. According to the Eleventh Circuit, in order for the lower court to have properly asserted subject matter jurisdiction over these ATS claims, the complaint had to contain pleadings sufficient to alleged that the paramilitaries were “state actors” or that they were acting under the “color of law” and that the defendants conspired with the state actors in carrying out the tortious acts. *Id.* at *3. Moreover, the court held the “war crimes exception” that allows ATS claims to be brought against a non-state actor did not apply to this case because the plaintiffs did not allege that the attacks occurred during a Columbian civil war.

In its decision, the Eleventh Circuit relied in part upon two recent Supreme Court cases that drastically modified Rule 8(a) of the Federal Rules of Civil Procedure in connection with notice pleading requirements. *See Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1940 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 585 (2007).

The State Secrets Privilege

**Mohamed v. Jeppesen Dataplan.** On August 31, 2009, the Ninth Circuit Court of Appeals reversed and remanded a case brought by a plaintiff who alleged ATS violations against Jeppesen Dataplan, a Boeing Company subsidiary. The plaintiffs alleged that U.S. Central Intelligence Agency (CIA), alongside other government officials and agencies, operated an “extraordinary rendition program,” which gathered intelligence by apprehending suspected foreign nationals and transferring them in secret to other foreign countries, where they were detained and interrogated. The plaintiffs cited publicly available materials in support of their pleadings. Further, according to more publicly available materials, plaintiffs alleged that Jeppesen Dataplan provided the CIA with “flight planning and logistical support services to the aircraft and crew on all flights transporting” the plaintiffs. *Mohamed v. Jeppesen Dataplan,* No. 08-15693, 2009 WL 2710198, at *7 (9th Cir. Aug. 31, 2009). Accordingly, the plaintiffs alleged that Jeppesen played an “integral” role in conduct that
they claimed violated the ATS, and that Jeppesen provided this assistance with actual or constructive knowledge of what would happen to the plaintiffs. Id. In sum, the plaintiffs alleged that under the ATS, Jeppesen is liable for actively participating in alleged abductions and acting as co-conspirator to alleged acts of torture allegedly committed in violation of customary international law and therefore cognizable under the ATS.

Before Jeppesen filed an answer, the U.S. government intervened, asserting that the state secrets privilege required that the case be dismissed. The district court agreed with the United States and dismissed the complaint. The plaintiffs appealed to the Court of Appeals for the Ninth Circuit arguing that the state secrets privilege doctrine had been misapplied. The Ninth Circuit reversed and remanded the case, concluding that the subject matter was not a state secret and that “Federal Rule of Civil Procedure 12(b)(6) precludes prospective consideration of hypothetical evidence.” Id. at *4.

The U.S. government argued that the plaintiff would not be able to establish a prima facie case without using privileged evidence. The Ninth Circuit rejected the argument based on the fact that Jeppesen had not filed an answer, discovery had not yet begun, and because the appeal before the court was based on a 12(b)(6) motion that begs for a limited review. Id. at *24. The Ninth Circuit was not asked to determine whether the plaintiffs would ultimately prevail on the merits, but solely to rule upon whether the plaintiffs had properly stated a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6).

In advising the district court on remand, the Ninth Circuit clarified that the government must first assert privilege concerning secret evidence sought to be discovered or presented, and only then could the district court consider whether first, the evidence was privileged, and second, whether the evidence was indispensable either to the plaintiff’s prima facie case or to a valid defense. The court concluded that the case should only be dismissed if the evidence in issue was found to be indispensable to either party. Id. at *26.

Accessorial Liability: Purpose, Not Just Knowledge, Required

Presbyterian Church of Sudan v. Talisman Energy Inc.

In a decision that will severely limit the viability of certain ATS claims, on October 2, 2009, the Second Circuit raised the mens rea standard for finding aiding and abetting liability under the ATS, from mere knowledge to purposeful acts. In Presbyterian Church of Sudan v. Talisman Energy Inc., the Second Circuit ruled that “liability can be imposed only where it is shown that a defendant purposefully aided and abetted a violation of international law.” Presbyterian Church of Sudan v. Talisman Energy Inc., No. 07-0016-cv, 2009 U.S. App. LEXIS 21688, at *40 (2d Cir. 2009). In Talisman, Sudanese plaintiffs alleged that Talisman Energy Inc., a Canadian corporation, worked with the Sudanese government to create a “buffer zone” around its oil fields, build all-weather roads and infrastructure, and improve the airstrips, which helped the government displace civilians. Id. at *53. The court held that under the Sosa v. Alvarez-Machain principles articulated by the Supreme Court, “the standard for imposing accessorial liability under the ATS must be drawn from international law.” Id. at *6. The court reasoned that if the standard was mere knowledge, then the ATS would provide the plaintiffs with a means of imposing embargos or international sanctions through civil actions in the United States. Id. at *55. Here, the plaintiffs failed to provide sufficient evidence to show that Talisman acted “with the purpose of facilitating” the conduct at issue. Id. at *41. Therefore, although the plaintiffs were able to show that the Sudanese government may have violated customary international law, they were nonetheless unable to provide evidence that Talisman acted with the purpose of supporting the government’s activities. The Talisman decision, coupled with the higher pleading requirement articulated in Iqbal, place a heavier burden on plaintiffs bringing ATS claims.

Conclusion

Based on a review of the cases discussed above, it may be said that U.S. courts spent the summer and early fall rendering decisions that have further delineated the reach of ATS claims. The courts considered many factors that will have a substantial impact upon whether ATS claims may proceed. First, in Sarei, the Ninth Circuit said that there must be a sufficient “nexus” between the claims alleged and the United States; however, it allowed plaintiffs’ claims to proceed without first requiring the plaintiffs to exhaust their remedies in the host country. Second, before a plaintiff may bring a foreign parent corporation to court in the United States based upon its U.S. subsidiary’s actions, the plaintiff must first show that the parent exerted “pervasive and continual” control over the subsidiary. Bauman. Third, the scope of cases brought on a Secondary Liability theory has been dramatically narrowed by the Talisman decision. There, the Second Circuit clarified and limited its own jurisprudence by raising the mens rea standard for accessorial liability from mere knowledge to purposeful acts. Fourth, in multiple jurisdictions, in order to avoid a dismissal based on forum non conveniens, the plaintiffs must demonstrate that either no other alternative forum exists or that undue inconvenience or prejudice will be suffered if it is not heard by the U.S. court in which the case is filed. Aldana; Turedi. Finally, courts have considered and heightened the pleading requirements for ATS claims.

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The Sinaltrainal court applied higher pleading requirements based on recently decided U.S. Supreme Court decisions. Courts will now evaluate whether the plaintiffs have sufficiently pleaded factual allegations connecting the defendants to an allegedly actionable ATS violation under the stricter Iqbal standard. Moreover, when drafting their pleadings, plaintiffs must assess whether the state secrets doctrine is likely to be asserted in opposition to their case, and if so, must support their pleadings with publicly available evidence in order to defeat a defendant’s motion to dismiss on that basis. Mohamed.

ATS litigation risks are still significant for companies that have a presence within the United States and operate globally. CSR programs may serve to mitigate those risks but the complex lines between permissible and actionable conduct are constantly being re-drawn by ATS litigation and the judicial decisions that shape ATS jurisprudence. Now, more than ever, counsel has an important role in advising corporations with global operations. This includes counseling them about the likely impact of, and the risks posed by, their business processes, and providing real-time, privileged assessments of emerging risks, including those presented by changes in the law. Stakeholders will continue to scrutinize corporate conduct in light of the judicial construction of the ATS. Accordingly, corporations, and their counsel, must periodically re-evaluate and may, on occasion, need to reset CSR programs and standards in light of these developments.