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Cross-Border Commercial Litigation: Three New Cases from the Second Circuit

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The Second Circuit has issued a number of key decisions this fall that will have long-lasting impacts on the rights and remedies of U.S. and non-U.S. parties with cross-border business. Last month, we explained that *Aguas Lenders Recovery Group* (see our Client Alert) confirmed that non-signatory, non-U.S. entities may be bound to contractual forum/venue agreements made by their predecessors, allowing suit to be brought in the U.S. This month, we highlight three additional decisions:

- *Presbyterian Church of Sudan v. Talisman Energy, Inc.*: Protecting private commercial entities from liability under the Alien Tort Claims Act for human rights violations by non-U.S. governments on projects/enterprises outside the U.S.
- *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.*: Dramatically changing the operation of maritime "Rule B" liens and unburdening the electronic funds transfer system.
- *Aurelius Capital Partners v. Republic of Argentina*: Narrowly applying the "commercial activity" requirement for attaching sovereign assets under the Foreign Sovereign Immunities Act.

These and other developments will be added to the discussions in Proskauer on International Litigation and Dispute Resolution on the expansion/contraction of U.S. jurisdiction over acts outside the U.S., provisional/pre-judgment relief in international litigation, and suing non-U.S. sovereigns and attaching sovereign assets.

Limiting Claims Against Corporate Defendants For Alleged Human Rights Abuses

In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the Second Circuit held that corporate defendants cannot be secondarily liable under the Alien Tort Claims Act ("ATCA") for alleged human rights or other international law violations committed by foreign governments unless the corporation provided substantial assistance with the purpose of aiding the violation. The opinion (click here) provides clear guidance and narrowly interprets the scope of "aiding and abetting" liability under the ATCA, as well as potential "conspiracy" claims.

Talisman is a key development in ATCA law because a prior decision – *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) – permitted "aiding and abetting" claims, but left undecided the standard for such claims, opening the door to attenuated claims against deep-pocket defendants. Importantly, in *Talisman*, the Court looked to international law for determining the scope of aiding and abetting liability and rejected the application of the more lenient U.S. standard, which requires only substantial assistance plus knowledge of the primary violation. *Talisman*'s narrow reading of the ATCA likely will stem the tide of ATCA claims against corporate defendants. It remains critical, however, that corporations doing business outside the U.S. diligently monitor their relations and dealings with government and quasi-governmental entities to avoid ATCA claims, as well as potential violations of the Foreign Corrupt Practices Act.

ATCA provides for U.S. federal 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." In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the United States Supreme Court limited ATCA claims to a "modest number of international law violations" that are "accepted by the civilized world and defined with specificity comparable to the features of 18th century paradigms" in place at the time ATCA was enacted.

In *Talisman*, the plaintiffs were citizens of Sudan who brought ATCA claims in federal court in New York seeking to hold Talisman, a Canadian corporation, liable for injuries they incurred as a result of the Sudanese Government's campaign to displace them from land that surrounded oil fields. Talisman indirectly owned an entity that invested in oil exploration in Sudan. Plaintiffs alleged that Talisman aided and abetted and conspired with the Sudanese Government to violate customary international law governing genocide, torture, war crimes, and crimes against humanity. Specifically, the plaintiffs asserted that Talisman assisted the Government's campaign by upgrading the roads and infrastructure, providing financial assistance through the payment of royalties to fouthe Government, and offering logistical support to the military. The district court dismissed the plaintiffs' claims on summary judgment.

The Second Circuit affirmed the dismissal. After briefly discussing the history of ATCA, the Court observed that "the decisive issue in this case is whether accessorial liability can be imposed absent a showing of purpose," a question that had been left undecided two years earlier in *Khulumani*. In *Talisman*, the Court drew on the reasoning of *Sosa* to hold that "the scope of liability for ATCA violations should be derived from international law," not U.S. law, because "[r]ecognition of secondary liability in no less significant a decision than whether to recognize a whole new tort in the first place." The Court then held that, under international law (including precedent from the Nuremberg trials and the Rome Statute of the International Criminal Court), aiding and abetting liability requires proof of purposeful assistance, not mere knowledge of a violation. With respect to the case at hand, the Court observed that it was "not enough for plaintiffs to establish Talisman's complicity in depopulating areas"; rather, "plaintiffs must establish that Talisman acted with the purpose to assist the Government's violations of customary international law." The Court found no support in the factual record for the contention that Talisman purposefully aided and abetted the Government's conduct. The Court agreed with the District Court's findings that the acts attributed to Talisman "generally accompany any natural resource development business or the creation of any industry," and that "[n]one of the acts was inherently criminal or wrongful."

The Court also briefly addressed the plaintiffs' conspiracy claims. The Court found that international law has not adopted a theory of conspiracy liability analogous to U.S. law. Under international law, "joint criminal enterprise" requires a showing of intent identical to that for aiding and abetting, which the plaintiffs had failed to establish. Accordingly, the Court affirmed the dismissal of the conspiracy claims.

Notably, in affirming the dismissal of the plaintiffs' claims, the Court assumed, without deciding, that corporate entities may be held liable under international law to the same extent as individuals. Thus, this issue has not been conclusively resolved.

Rejecting Use of "Rule B" Maritime Liens to Attach Electronic Fund Transfers Passing Through New York Banks

In *Shipping Corp. of India, Ltd. v. Jaldhi Overseas Pte Ltd.*, the Second Circuit overruled its 2002 decision in *Winter Storm Shipping Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002) and held that electronic fund transfers ("EFTs") located at intermediary banks are exempt from maritime attachment because they are not the "property" of the defendant. The practical effect of *Jaldhi* (click here) is that plaintiffs in maritime cases will have more difficulty locating and attaching assets using "Rule B" liens, entities will be more inclined to engage in U.S. dollar transactions – and that the Southern District of New York (the cross-roads for nearly all international EFTs) will no longer be the "go to" District for such liens. Spared from the overwhelming flood of lien applications, judges in the SDNY may subject lien applications to somewhat greater scrutiny.

EFTs are essentially instructions to transfer funds from one bank account to another. When the originator and beneficiary of an EFT are not members of the same bank or banking consortium, an EFT must pass through an intermediary bank. A large volume of international EFTs transacted in United States currency pass through intermediary banks located in New York City, home to the Southern District of New York.

Rule B of the Supplemental Rules for Admiralty or Maritime Claims permits a plaintiff in a maritime case to attach the defendant's "tangible or intangible personal property" located in the district if the defendant is not found within the district. Rule B was developed in part to allow creditors to attach the assets of a vessel located abroad in light of the fact that "a ship may be here today and gone tomorrow."

In *Winter Storm*, the Court relied on federal forfeiture law to hold that Rule B permits the attachment of EFTs located at intermediary banks in New York. Following *Winter Storm*, maritime attachment filings in the Southern District of New York dramatically increased. As the *Jaldhi* Court recognized, "maritime plaintiffs now seek writs of attachment pursuant to Rule B long before the defendant's property enters the relevant district, often based solely on the speculative hope or expectation that the defendant will engage in a dollar-denominated transaction that involves an EFT during the period that the attachment order is in effect." From October 1, 2008 to January 31, 2009 alone, maritime plaintiffs filed 962 lawsuits in the Southern District seeking to attach $1.35 billion in assets. The maritime filings during this period accounted for nearly 33% of all lawsuits filed in the Southern District. Major banking institutions in New York were faced with a surge in attachment orders, which required them to hire additional staff to process the attachments. To avoid facing potential Rule B attachments, lawyers began advising maritime clients to avoid engaging in dollar-denominated transactions, which threatened the viability of the dollar in international transactions.

In *Jaldhi*, the plaintiff (an Indian shipping company) obtained an *ex parte* maritime attachment order against the assets of a Singapore-based shipping company. The plaintiffs attached approximately $4.8 million in EFTs at intermediary banks in New York, both coming from and going to the defendant. The district court granted the defendant's motion to vacate the attachment order to the extent it covered EFTs of which the defendant was a beneficiary. The district court certified the order for interlocutory appeal to the Second Circuit.

The Second Circuit recognized both "the doctrinal knot created by *Winter Storm* and its progeny," and the effect of the decision on international commerce. The Court examined *Winter Storm* and concluded that it was wrongly decided. The Court noted that the key issue was whether an EFT at an intermediary bank is the defendant's "property." In this regard, the Court rejected *Winter Storm*'s reliance on a federal criminal forfeiture statute because, in the forfeiture context, ownership of funds is irrelevant so long as they are traceable to a crime. *Jaldhi* looked instead to state law. The Court observed that New York U.C.C. § 4-A-503 permitted courts to restrain EFTs at originator or beneficiary banks, but did not permit restraint of EFTs at intermediary banks. Accordingly, the Court concluded that because EFTs at intermediary banks were not the "property" of the defendant under state law, they were immune from maritime attachment.

The Second Circuit's decision in *Jaldhi* should eliminate the undesirable effects caused by the *Winter Storm* decision. In particular, *Jaldhi* should reduce the volume of maritime attachments in New York federal courts, lessen the resultant pressure on banking institutions, and ameliorate concerns about *Winter Storm*'s effect on the declining status of the dollar in international transactions.

Narrowly Interpreting Ability to Attach Foreign Sovereign Assets In the U.S.

In *Aurelius Capital Partners v. Republic of Argentina*, the Second Circuit adopted a restrictive reading of the Foreign Sovereign Immunities Act ("FSIA") to prevent creditors in a U.S. lawsuit from attaching pension funds held in U.S. accounts by an Argentine sovereign entity. The decision (click here) is an important development in the use of attachment orders in lawsuits involving foreign governments, potentially signaling hostility to the use of U.S. courts to seize sovereign assets despite the express allowance for such relief under the FSIA.

In 2001, Argentina defaulted on payments of debt instruments issued to bondholders. Because Argentina waived sovereign immunity in connection with issuing the bonds, many bondholders, including the plaintiffs in *Aurelius*, obtained judgments against the Republic and attempted to collect on the judgments. However, a number of these attempts failed because the property sought to be attached was either shielded by the FSIA or did not belong to Argentina. Under 28 U.S.C. § 1610, property in the United States of a foreign state is immune from attachment or execution unless the property is "used for a commercial activity in the United States" and one or more exceptions from sovereignty immunity applies, including waiver.

On October 21, 2008, a law was introduced in Argentina's legislature requiring that all pension funds previously in the hands of private management – including approximately $200 million in pension funds in New York institutions – be transferred to the National Social Security Administration (the "Administration"). The legislation was enacted on December 9, 2008.

In October and November 2008, after the pension fund law was proposed but before it was enacted, the *Aurelius* plaintiffs obtained restraining orders preventing the removal of approximately the New York-based pension funds and blocking their imminent transfer to the Administration. On December 11, 2008, two days after nationalization law became final, the district court issued writs of execution on the pension funds, holding that the Administration was a political subdivision of the Republic and therefore subject to the court's jurisdiction. The district court held that the pension funds were "used for a commercial activity in the United States" for purposes of the FSIA because they were invested to earn a profit. The Republic, the Administration, and the private corporations holding the pension funds appealed.

The Second Circuit decision reversed. The Court examined the language of § 1610 permitting attachment of foreign state assets "used for a commercial activity in the United States" and concluded that, to be subject to attachment, the pension funds must have been used for commercial activity by the foreign state at the time of attachment. Because the attachment order became effective immediately upon passage of the law, "neither the Administration nor the Republic had the opportunity to use the funds for any commercial activity whatsoever." Therefore, the Court held, the pension funds did not qualify for the exemption and were immune from attachment.

The Second Circuit's decision in *Aurelius* underscores the potential complexities in enforcing a judgment against a non-U.S. sovereign. The restrictive reading of both the FSIA and the facts in *Aurelius* – *i.e.*, demanding new commercial activity by Argentina even though it had nationalized longstanding commercial accounts – also potentially signals a concern that, despite the express provisions of the FSIA permitting attachment of sovereign assets, U.S. courts should exercise restraint before permitting plaintiffs to seize sovereign assets.