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The US Alien Tort Statute: The Prospect of Corporate Liability in the United States with Respect to Human Rights Violations Abroad

United States Federal Courts are increasingly called to resolve disputes involving allegations of human rights abuses occurring outside of the country. Many of these claims are brought under the statute referred to either as the Alien Tort Statute (ATS) or the Alien Tort Claims Act (ATCA), 28 U.S.C. §1350. Adopted in 1789 by the first Congress and modified only slightly since then, the ATS today provides in its entirety that: "The district courts shall have original jurisdiction of 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."

The modern application of the ATS began in 1980 with the Second Circuit's decision in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), involving allegations of physical torture. In 2004, the Supreme Court considered the ATS's modern application for the first time in *Sosa v. Alvarez-Machain,* 124 S.Ct. 2739 (2004). The *Sosa* case arose out of the capture, torture and murder of a Drug Enforcement Administration (DEA) agent in Mexico. After investigation, the DEA determined that a Mexican citizen, Humberto Alvarez-Machain was involved in the incident. After attempts to have Alvarez extradited to the United States failed, the DEA approved a plan whereby Alvarez was abducted from his house in Mexico, held overnight in a hotel and brought to El Paso, where he was arrested by US officials. Alvarez was subsequently acquitted and returned to Mexico. He later brought suit in the US against Jose Francisco Sosa and others under the Federal Tort Claims Act and the ATS. Alvarez claimed his ATS suit was cognizable because his abduction and detention violated the customary law of nations.

The court held that the ATS is jurisdictional and confers the US federal courts with the power to hear cases concerned with a certain subject. In examining what that subject encompassed, the court rejected the notion that the ATS created a new cause of action for torts in violation of international law. Still, the court declined to limit causes of action under the Act to those included when the ATS was enacted, and rather stated that the ATS provides jurisdiction over a narrow set of common law actions derived from the law of nations but with the potential for personal liability. Justice Souter cautioned that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" familiar when the ATS was enacted.

The court announced that in recognizing new causes of action under the ATS "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." Applying this standard, the court did not recognize arbitrary detention as a general cause of action under the ATS and thus concluded that Sosa's action was not cognizable. This case left several controversial issues unresolved, including whether a corporate defendant may be held liable under the Act for complicity in human rights violations.

In 2003, prior to the Supreme Court's decision in *Sosa*, the Second Circuit considered the issue of corporate liability in *Flores v. Southern Peru Copper Corp.*, 406 F.3d 65 (2d Cir. 2003), and held that claims could be brought under the ATS against private actors, including corporations, for acts of genocide, as such acts violate customary international law regardless of whether they are undertaken by state or private actors.

A 2005 case from the Southern District of New York – *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Presbyterian Church II)*, 374 F. Supp. 2d 331 (S.D.N.Y.

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2005) – dealt specifically with the situation of corporate secondary liability under the ATS. *Presbyterian Church II* involved allegations that the two defendants, Talisman Energy, Inc. and the Republic of the Sudan, had collaborated to commit gross human rights violations, collectively amounting to genocide. Previously, in *Presbyterian Church I*, the District Court had denied a motion to dismiss, *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Presbyterian Church I)*, 244 F. Supp. 2d 289, 321-22 (S.D.N.Y. 2003) holding that corporations could be held liable for violations of *jus cogens* norms, and that international law recognizes theories of secondary liability such as conspiracy, and aiding and abetting. In *Presbyterian Church II*, the District Court reconsidered the motion to dismiss under the standards set forth in *Sosa* and *Flores*. The Court held that both cases were consistent with its original holding, and accordingly denied the motion.

In 2004, another judge in the Southern District of New York expressly rejected the approach taken in *Presbyterian Church I* and concluded that secondary liability is not recognized under the ATS, stating that for courts to recognize such liability "would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court has mandated for the lower federal courts" in *Sosa. In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004). Thus the issue remains unresolved and, as such, susceptible to further litigation.

Latham's International Dispute Resolution Practice Group has demonstrated expertise in dealing with ATS cases. For example, Richard C. Bress, a partner in the Washington D.C. office, has successfully defended Monsanto and other major chemical companies against a class action under the ATS arising out of events dating back to the Vietnam War. ■

Joining Third Parties to an Arbitration

This article reviews briefly some of the many issues and considerations that arise whenever a party to arbitration proceedings seeks to join a third party to those proceedings, normally against the will of that third party.

Either party to a bilateral arbitral process may wish to join a third party to the arbitration. For example, a claimant in a commercial dispute may want to join as respondent with the parent of a project company with which it has signed the agreement to arbitrate, or a respondent in such a dispute may want to join its suppliers. But the nature of the arbitral process presents challenges to joining parties that have not signed the underlying arbitration agreement. Some tribunals have found ways to overcome this hurdle, allowing third parties to be drawn into an arbitration, while others have resisted attempts to do so.

Participation on the basis of *amicus curiae* intervention offers an alternative form of third party involvement in arbitration proceedings, particularly in cases of substantial public interest, as is often the case with investment treaty arbitrations against host governments. However, this form of participation, which is of course initiated by the intervener itself, is beyond the scope of the present article.

The "Group of Companies" Doctrine

In international arbitration an entity can be deemed to be a party to an agreement to arbitrate even if it has not signed that agreement. Several tribunals have applied the so-called "group of companies" doctrine, which holds that an agreement signed by a company belonging to a group may bind – as a party to the agreement – another member of the same group, particularly the ultimate parent. The application of this doctrine can be decisive because it has both procedural and substantive effects. For example, the parent of a project company may, on the basis of the doctrine, not only be joined to an arbitration but also face liability under a contract signed exclusively by the project company. The question of whether or not the doctrine is applicable in any given case may turn upon the law applicable to the arbitration. For example, if the contract is governed by English law, the "group of companies" doctrine more likely will not be applied by the tribunal since the English High Court recently held that the doctrine forms no part of English law.[1]

The Relevance of Applicable Law, Place of Arbitration and Arbitration Rules

If an entity is not a party to the arbitration agreement, joining that entity to the arbitration can present significant challenges. Most national laws and arbitration rules do not address the joining of third parties explicitly. As a general rule in commercial arbitration, a third party may be joined only if all parties, including the third party, consent. The choice of law, place of arbitration and arbitration rules, however, can affect the possibilities of joining third parties to an arbitration in any given case. The choice of law can be relevant as, for instance, national laws differ on extending arbitrations to third party beneficiaries of an agreement to arbitrate. Regarding the place of arbitration, the parties have to keep in mind that, in some jurisdictions, not only all parties but also the tribunal have to consent. Particularities can also arise from the applicable arbitration rules. For example, the Rules of the London Court of International Arbitration provide that a third party may be joined to an arbitral proceeding provided such third person and the applicant party have consented, even if the other party objects.

Conclusion

The possibility of joining third parties to an arbitration should be taken into consideration when drafting arbitration clauses, commencing arbitration proceedings and even when selecting arbitrators. The factors that might determine the prospects for the successful joining of third parties are many, and the above summary is by no means comprehensive. Among relevant factors, however, the "group of companies" doctrine can have considerable effects, as can the various legal parameters of the arbitration, most of which will be set by the relevant arbitration clause. Latham's International Dispute Resolution Practice Group is very experienced in advising on such issues, whether at the time of drafting the arbitration agreement or following the commencement of arbitration.

[1] *Peterson Farms Inc. v. C&M Farming Ltd.* [2004] EWHC 121. ■

New York Courts Authorized to Grant Preliminary Injunctions and Pre-Award Attachments in International Arbitrations

In a reform that expands the power of the court system in one of the world's leading financial centers, New York recently authorized its courts to provide preliminary relief in connection with international arbitrations, whether they are taking place in New York or beyond its borders.

In October 2005, the legislature amended Section 7502(c) of the Civil Practice Law and Rules (CPLR) to allow New York courts to entertain applications for attachment orders and preliminary injunctions "in connection with an arbitration that is pending or that is to be commenced inside or outside this state" and without regard to "whether or not it is subject" to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Section 7502(c) states that such an order may be issued "only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief."

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This over-due change had been repeatedly urged by practitioners and academics alike, who argued that judicial assistance in the form of provisional relief was essential to address the tactics of recalcitrant parties who attempt to avoid or undermine the arbitral process. As one commentator observed, provisional relief is sometimes required to ensure that a victory in the arbitration does not prove a hollow one. The amendment effectively reverses the Court of Appeals' long-standing decision in *Cooper v. Ateliers de la Motobecane SA*, 57 N.Y.2d 408 (1982), which ruled that the CPLR did not empower courts to grant attachments in arbitrations and that provisional relief generally was inconsistent with the New York Convention and the ethos of arbitration. Although the CPLR was amended in 1985 in the wake of *Cooper*, subsequent cases interpreted these changes restrictively and ruled that they applied only in domestic arbitrations. With the expansion of international arbitration, the *Cooper* position became increasingly isolated as many other courts made provisional relief available in international arbitrations. This led to the anomalous situation in which federal courts in New York would entertain attachment applications but NY state courts could not.

Significantly, the new provision gives trial courts the authority to enter provisional relief for arbitrations outside the state of New York. This makes it possible for a party involved in an international arbitration in Paris to apply to the New York courts for an order attaching assets in New York during the pendency of the arbitration – a potentially powerful tool. The 2005 amendments retained Section 7502(c)'s previous standard requiring the court to determine that the arbitration award would be "ineffectual" in the absence of the requested relief. This leaves open the question of whether this standard was meant to stand alone, or whether the party seeking relief must also demonstrate the three traditional grounds for provisional relief: irreparable harm, likelihood of success on the merits and a balancing of the equities. Courts have reached different conclusions, although it appears that more have ruled that Section 7502(c)'s standard does not displace the traditional test.

Future cases will resolve these questions and explore the scope of the new provision. But in the interim there can be little doubt that New York has taken an important step in supporting international arbitration both within and beyond its borders. ■

News in Brief

- **International Centre for Settlement of Investment Disputes (ICSID) amends its rules and procedures.** Starting on April 10, 2006, ICSID has amended its Arbitration Rules and Administrative and Financial Regulations. The amendments are wide-ranging and will have a particularly strong impact upon the ICSID arbitral process. Some of the most significant changes concern provisions relating to provisional measures, preliminary objections, publication and legal reasoning of ICSID awards, attendance by third parties at hearings and the making of *amicus curiae* submissions. The ICSID Additional Facility Rules (which may apply in certain NAFTA proceedings) have been amended in the same fashion as the ICSID Arbitration Rules.
- **Dutch subsidiary of Nomura Securities wins treaty arbitration against the Czech Republic.** Nomura Securities, the Japanese investment bank, has succeeded in its treaty-based claim against the Czech Republic over the seizure of its Czech banking subsidiary in 2000. The arbitral tribunal ruled that the Czech Republic had breached a number of the substantive provisions of a bilateral investment treaty between the Netherlands and the Czech Republic when it put the banking subsidiary into forced administration and sold it to a rival entity within the Czech Republic. Damages will be decided at a later hearing, although the government has said that it will try to reach a settlement.
- **Unites States and Peru sign Trade Promotion Agreement.** On April 12, 2006, the United States and Peru signed the Peru Trade Promotion Agreement (PTPA). In addition to eliminating trade barriers between the US and Peru, the PTPA, which is yet to be approved by the US Congress, provides increased protection to US investors in Peru. The PTPA is part of a US drive to conclude trade agreements with the Andean countries before the end of this year, when the existing

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Andean Trade Preference Act is due to expire. The US concluded negotiations with Colombia on February 27, 2006 and suspended negotiations with Ecuador recently after the announcement by Ecuador of its new oil laws, which provide for a 60 percent state share in oil revenues. Oil companies argue that the new rules violate production sharing contracts signed between 1992 and 2002 and have threatened international arbitration. Given recent events in Bolivia, an early agreement with that country also appears highly unlikely.

- **CAFTA enters into force with Honduras and Nicaragua.** The Central America–Dominican Republic Free Trade Agreement (CAFTA-DR) entered into force for Honduras and Nicaragua in April 2006. CAFTA-DR was signed in August 2004 by the United States, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua. All but Costa Rica have now ratified the Agreement. For further details of the Agreement, see the November 2005 edition of this newsletter.
- **New ratifications of 1965 Washington Convention (ICSID) and 1958 New York Convention.** Over recent months, a number of states have implemented two of the world's leading international arbitration treaties, leaving only a very small number of states outside of each treaty regime. On January 25, 2006, Syria ratified the Washington Convention, ICSID, which has now been ratified by 144 states worldwide. Through an Ordinance dated July 14, 2005, Pakistan implemented the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards into its domestic law. The Ordinance provides for a reciprocity reservation (so that Pakistan will apply the New York Convention only to awards made in the territory of other states that have ratified the Convention). Liberia also acceded to the New York Convention on December 15, 2005.
- **French court allows enforcement proceedings against Congo-Brazzaville.** A Paris court has upheld a move by a private creditor, Walker International Holdings (a British Virgin Islands-registered US investment company) to attach funds from Congo-Brazzaville in the latest stage of legal proceedings to recover about US $40 million-worth of debts from the African state. The decision represents the latest chapter in a long saga of attempted recovery by private creditors of Congo-Brazzaville, which has seen lawsuits filed in France, the UK, the US, Monaco and the Cayman Islands. ■

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The editorial board of this publication consists of Stephen Fietta (LO), Emily Finn (NY), Jeroen Van Kwawegen (NY), Jose Manuel Garcia Represa (PA) and Sebastian Seelmann-Eggebert (HH).

David J. McLean
New York
+1-212-906-1200
david.mclean@lw.com

Mark D. Beckett
Paris
+33 (0)1 40 62 20 00
mark.beckett@lw.com

Robert G. Volterra
London
+44 20 7710 1000
robert.volterra@lw.com

Complete details of attorney bios can be found on our Web site at www.lw.com/attorney.

Brussels
+32 (0)2 788 60 00

Chicago
+1-312-876-7700

Frankfurt
+49 69 60 62 60 00

Hamburg
+49 40 41 40 30

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+852-2522-7886

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+1-213-485-1234

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Moscow
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New Jersey
+1-973-639-1234

New York
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Paris
+33 (0)1 40 62 20 00

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+86 21 6101-6000

Silicon Valley
+1-650-328-4600

Singapore
+65-6536-1161

Tokyo
+81-3-6212-7800

Washington, D.C.
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