CLEARY GOTTLIEB Alert Memo

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Second Circuit Clarifies the Pleading Standard for Claims of Aiding and Abetting Human Rights Violations

On October 2, 2009, the Second Circuit issued a decision in Presbyterian Church of Sudan v. Talisman Energy, Inc. ("Talisman"), which should be of great interest to corporations doing business around the world, including in countries with questionable human rights records.[1] Talisman clarified the scope of corporate liability under the Alien Torts Claim Act ("ATCA") by holding that companies may be liable for aiding and abetting violations of international law only when they provide substantial assistance to the primary violator, typically a state organization, *and* do so with the *purpose* of furthering the violation. The Second Circuit's pleading standard for aiding and abetting under international law is thus more stringent than the familiar domestic standard, which requires only substantial assistance with knowledge.

I. Background of ATCA and Pre-Talisman Precedents

ATCA was enacted by the First Congress in 1789 to provide for federal court jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations." In Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the Supreme Court held that while ATCA was solely a jurisdiction-conferring statute, federal courts may recognize private causes of action by aliens for certain torts in violation of international law. The Court limited such claims to "a narrow class" of international norms "accepted by the civilized world and defined with a specificity comparable to the features" of three "eighteenth century paradigms" – violation of safe conducts, infringement of the rights of ambassadors and piracy.

The Second Circuit first applied the standards announced by Sosa in Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), where it held that there was ATCA jurisdiction over aiding and abetting claims against corporations that did business with the South African apartheid regime. However, the two members of the Khulumani majority split on the proper mens rea standard for pleading aiding and abetting under ATCA. Judge Katzmann said that under the applicable customary international law standard, an aider or abettor must substantially assist the principal "for the purpose of facilitating the commission

[1] Presbyterian Church of Sudan v. Talisman Energy, Inc., Docket No. 07-0016-cv (available at http://www.ca2.uscourts.gov/decisions/isysquery/7d99d145-a9a8-4f58-ab13-eb32243ee540/4/doc/07-0016-cv_opn.pdf).

of such a crime." While Judge Hall agreed with Judge Katzmann that there was jurisdiction for aiding and abetting claims under ATCA, he proposed a lesser standard of culpability, derived from domestic principles, under which a defendant can be liable as an aider and abettor when it offers substantial assistance with knowledge, even if it does not have a specific intent that the criminal enterprise succeed. Due to the division on the Khulumani panel, it was "thus left to a future panel . . . to determine whether international or domestic federal common law is the exclusive source from which to derive" the appropriate mens rea requirement for claims under ATCA for aiding and abetting violations of the law of nations. Although the Khulumani plaintiffs filed a certiorari petition, the Supreme Court did not review the Second Circuit's decision because it could not convene a quorum of Justices, presumably due to investments in some of the defendant companies.

II. The Second Circuit's Decision In Talisman

In Talisman, Sudanese nationals brought suit in the Southern District of New York against Talisman Energy, whose indirect subsidiary was involved in oil operations in the Sudan. Plaintiffs alleged that Talisman aided and abetted the Sudanese regime, and conspired with it, to commit genocide, torture, war crimes and crimes against humanity by the government. In affirming the dismissal of the complaint, the Court's unanimous decision adopted Judges Katzmann's analysis in Khulumani in holding that international law, not domestic law, is the source for determining the elements of liability for aiding and abetting under ATCA. The Court also agreed with Judge Katzmann that customary international law requires that to be found liable, a party must have acted "with the purpose of facilitating the violation."

In finding that there is an international consensus for a mens rea standard that "is purpose rather than knowledge alone," the Court also made clear that "no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." Notably, the Second Circuit's holding calls into question the district court's decision following remand of Khulumani from the Second Circuit,[2] which found that aiding and abetting under ATCA only required that an "aider or abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations." Talisman appears to have abrogated this lower aiding and abetting standard under ATCA.

In addition to addressing the standard for aiding and abetting, Talisman also addressed plaintiffs' claims of conspiracy to commit violations of international law. Without determining if the theory of joint criminal enterprise could be asserted under ATCA, the Court found that the mens rea element was identical to that for aiding and abetting and affirmed the dismissal of the conspiracy claims for the same reasons as the aiding and abetting claims.

[2] In re South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

Finally, because the Second Circuit held that plaintiffs did not meet the required mens rea standard, the Court stated that it need not address whether corporations (as opposed to individuals) could ever be liable under ATCA (an issue which the Khulumani majority also left open). It also only mentioned in passing the views of the Executive Branch that the plaintiffs' claims under ATCA might harm the foreign relations of the United States, which views the Supreme Court in Sosa had indicated should be given "serious weight."

III. Implications for Companies with Global Business

Following the potential confusion created by Khulumai, the recent Talisman decision provides some comfort for companies doing business abroad. The Second Circuit has now clarified that claims under ATCA will be subject to a more stringent aiding and abetting standard, as plaintiffs cannot merely claim that defendants had knowledge that their activities might be assisting human rights abuses that are taking place in foreign nations. Rather, they will have to make plausible allegations that the defendants acted with the purpose of facilitating such crimes in order to withstand a motion to dismiss.

Although Talisman provided some clarity, several open questions remain, including:

- Whether district court judges will strictly enforce Talisman's holding that in order to state a claim for aiding and abetting under ATCA, plaintiffs must allege that defendants substantially assisted a violation of international for the purpose of furthering the crime, and that mere knowledge of the violation is insufficient.

- Whether ATCA imposes liability on corporations as it does with natural persons for violations of international law.

- Whether prudential concerns about the deleterious effects of litigation on the United States's foreign relations may warrant dismissal.

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