KELLEY DRYE

Client Advisory

Alien Tort Claims Act

July 2004

Outsourcing to a foreign country and its workforce may be good. The Alien Tort Claims Act ("ATCA") is not.

Recently Kelley Drye has been called upon to defend U.S. corporations in United States Federal Courts on tort claims brought by citizens of foreign countries for injuries suffered on foreign soil due either to products made by U.S. corporations or to actions of U.S. corporations, their foreign subsidiaries, or their business partners. The claims are based on the ATCA and seek the whole lineup of U.S.-type damages, including punitive damages. Many recent cases involve claims of foreign workers of U.S. corporations for injuries suffered in the foreign workplace caused by human rights violations.

Normally, U.S. courts would reject such claims and have them referred to the country of origin. The State Department has opposed ATCA suits on the ground that they may adversely affect U.S. business interests in dealing with foreign countries and that increasing opportunities for U.S. business abroad is an important aspect of U.S. foreign policy. However, on June 29, 2004, the United States Supreme Court breathed life in these claims, ruling that the ATCA *may* be the basis for the assertion of tort claims in U.S. courts based on violations of the present day "law of nations", and established guidelines for the lower Federal Courts to follow to determine whether a particular alleged tort claim constitutes a violation of international law. This Advisory discusses the Supreme Court's decision and how it may affect U.S. corporations doing business in foreign countries.

Overview

The ATCA is ancient and so economical in its language as to border on the cryptic. Adopted in 1789, it provides in full:

> "The [Federal] 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."

That's all there is. The "law of nations", i.e., "international law", is not defined. Nor is it found defined in any legal treatise. In 1789, the ATCA was meant to include only tort claims based on piracy, infringement of the rights of ambassadors, and violations of "safe conducts". For the first 170 years after its adoption, the ATCA was the basis for jurisdiction in only *one* case. In recent years, however, human rights activists have begun to push the envelope in an attempt to have the ATCA interpreted to include such tort claims as forced labor, extrajudicial killings, torture, sexual assault, deliberately exposing foreign workers or other aliens to known dangerous conditions in the workplace or environment, cruel and inhuman treatment, arbitrary arrest and detention, kidnapping, and denial of freedom of association, on the basis such "heinous actions" violate present-day recognized international law.

Originally ATCA claims were asserted in U.S. Courts only against foreign governments or their military or security personnel. Now, U.S. corporations doing business in foreign countries are being sued directly under the ATCA for alleged human rights violations against their foreign workers, union leaders, or other foreign citizens committed either directly by managers of the U.S. corporations working in the foreign country or by personnel of the foreign government allegedly acting at the behest, or in the interest of the U.S. corporation, its foreign subsidiary or local business partner.

There are currently pending ATCA suits against Coca-Cola (in the Southern District Court of Florida), DaimlerChrysler (in the Northern District Court of California), Drummond (in the Northern District Court of Alabama), Exxon Mobil (in the District Court for the District of Columbia), Fresh Delmonte Produce (in the Southern District of Florida), and Unocal (in the Ninth Circuit Court of Appeals). These suits are based on human rights violations. For example, in the DaimlerChrysler suit, in which Kelley Drye is involved, a class of workers at the Mercedes Benz facility in Argentina allege claims of kidnapping, torture and murder arising from DaimlerChrysler's plant managers allegedly informing the military the names of employee union supporters.

U.S. corporations which have been sued under the ATCA for environmental-caused harms arising from mining or chemical operations include Freeport-McMoRan, Texaco and Union Carbide.

A number of U.S. corporations, including Dow Chemical, Monsanto, Occidental, and Hercules have been sued recently in the Eastern District Court in New York in an ATCA action in which Kelley Drye is involved. The plaintiffs are a class of Vietnamese nationals who allege that the U.S. Military's use of herbicides manufactured by the U.S. corporation defendants caused them personal injury in violation of the "laws of nations".

In the most recent case, Titan and CACI have been sued under the ATCA by a class of Iraqi prisoners and former prisoners for the private company defendants alleged involvement in abuses in U.S.-controlled prisons in Iraq.

The questions before the house in these suits are:

- does the ATCA merely give the Federal district courts jurisdiction to entertain ATCA claims limited to the three tort claims envisioned when the ATCA was enacted in 1789, namely, piracy, infringement of the rights of ambassadors, and violations of

"safe conducts", or do the Federal district courts have the authority to fashion new torts as violative of international law, as contended by the human rights activists;

- does the ATCA permit suits only against foreign governments and individual officials of those governments or does it permit suits against private actors such as U.S. corporations, their foreign subsidiaries, and local business partners.

The Second, Ninth, and Eleventh Circuit Courts of Appeal had answered the first question in the affirmative and the Second Circuit in Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) had held that the ATCA may be used to sue private individuals and not just state actors.

The Supreme Court Decision

And then the Supreme Court spoke in June of this year in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). It is the first ATCA case to reach the Supreme Court. It does not involve foreign workers or traditional human rights violations. Rather, it involves the abduction of a Mexican citizen in Mexico by other Mexicans at the request of the U.S. Government to be brought to trial in the United States for the murder of an agent of the U.S. Drug Enforcement Administration. The Supreme Court found that the tort violation claimed - - arbitrary arrest and detention - - did not rise to a level of a violation of international law in the specific circumstances of that case.

However, the language of the *Alvarez* decision is broad enough to permit legal mischief in the lower courts' interpretation of the scope of the ATCA. Specifically, the Supreme Court divided six to three on the threshold question of whether claims under the ATCA today remain limited to the three violations of the law of nations recognized in 1789. The majority answered that question in the negative, holding that the ATCA grants discretion to district courts to recognize, as a matter of common law, new tort claims "based on the present-day law of nations". Although the majority

cautioned that the district courts should be "restrained" in the exercise of this discretion, the real fear is that in the hands of certain innovative activist jurists the ATCA could be the next tort vehicle to hammer U.S. corporations' bottom lines.

The Supreme Court specifically did not decide, but left open the question whether U.S. corporations and other private actors could be sued directly under the ATCA for their purported ATCA violations - - the implication being they could be sued when allegedly acting in concert with a state actor, such as a foreign government or, in the case of Iraq, with our own military.

Punchline

Rather than closing the door to ATCA claims against U.S. corporations, the Supreme Court left the door "ajar" for such claims, depending on the resolution of complex international law/ "law of nations" issues and discretionary factors. However, we believe that there still remain threshold matters for a Federal district court which can be addressed by a motion to dismiss or for summary judgment. Thus, even after the Supreme Court decision in *Alvarez*, U.S. corporations may still be able to obtain early dismissals of ATCA claims as a matter of law.

Kelley Drye has broad experience in defending ATCA claims and has been successful in obtaining summary dismissals on behalf of its clients. We did so for Union Carbide in the Bhopal litigation and most recently for Hercules in the Agent Orange litigation.

If you have any questions about the ATCA or wish further information, contact any of the following: **William A. Krohley** (212-808-7747 or wkrohley@kelleydrye.com); **William C. Heck** (212-808-7817 or wheck@kelleydrye.com); or **Paul F. Doyle** (212-808-7786 or pdoyle@kelleydrye.com).