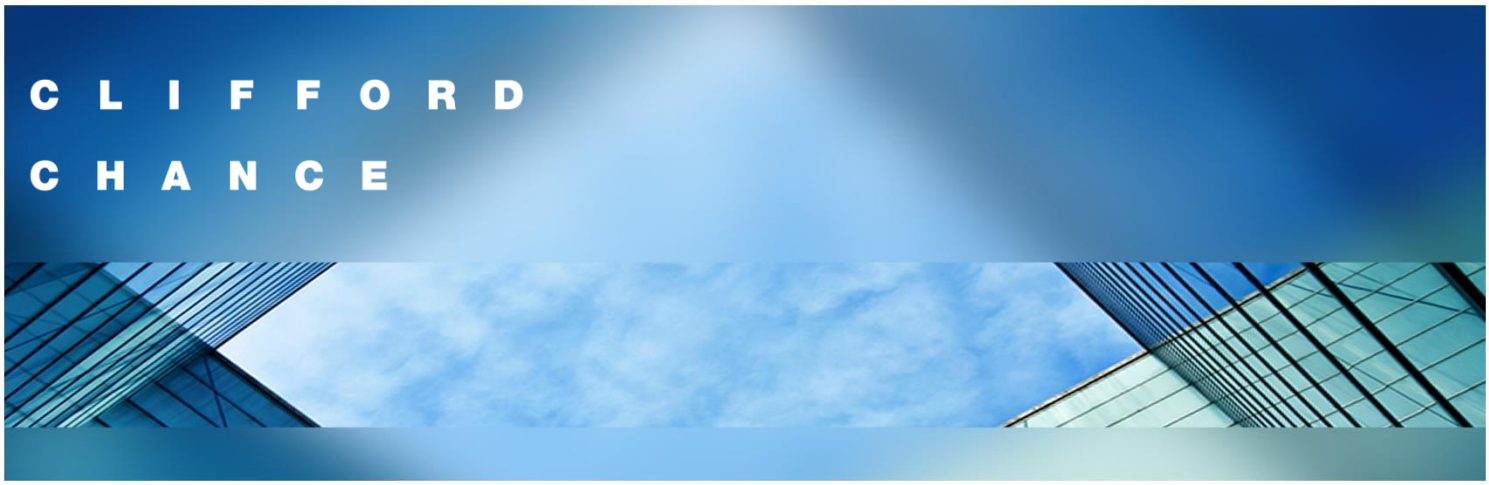

U.S. SUPREME COURT CLOSES DOOR TO HUMAN RIGHTS LAWSUITS AGAINST FOREIGN CORPORATIONS UNDER THE ALIEN TORT STATUTE

On April 24, 2018, the Supreme Court held in *Jesner v. Arab Bank, PLC* that foreign corporations may not be sued in U.S. courts for human rights violations under the Alien Tort Statute ("ATS"). For nearly four decades foreign plaintiffs have used the ATS to sue corporations for allegedly committing, financing, or otherwise facilitating human rights violations committed outside the United States, in cases presenting significant financial and reputational risk. While corporate officers and employees may still be sued under the ATS, *Jesner* effectively ends the ATS liability risk to foreign corporations.

As a practical matter, judicial decisions for some time have been limiting the scope of the ATS, and plaintiffs have been pursuing other avenues to liability, such as civil lawsuits under the Anti-Terrorism Act, 18 U.S.C. § 2333, which provides U.S. nationals with a cause of action for damages related to acts of international terrorism, under common law doctrines, and in jurisdictions outside the United States. Meanwhile, corporations have taken on human rights obligations through compliance with other statutes and norms imposing diligence and disclosure obligations, as well as through voluntary adoption of international human rights standards within their policies. Notwithstanding the restrictive result in *Jesner*, the challenges of navigating the ever-changing business and human rights legal and regulatory landscape continue to evolve.

Key issues

- Foreign corporations can no longer be sued for alleged violations of international human rights under the ATS. Foreign corporate employees and officers may still be sued.
- *Jesner* leaves open the question whether U.S. corporations may be sued under the ATS, though the ATS has primarily been used as the jurisdictional basis to sue foreign defendants.
- Human rights lawsuits against corporations have gained traction in other jurisdictions, and mandatory human rights diligence and disclosure obligations on corporations are on the rise. Corporations are also voluntarily adopting international human rights standards within their policies.
- Clifford Chance will continue to work with clients on human rights policies and diligence or developing an appropriate response to claims of involvement in human rights abuses.

Background

The ATS and Prior Supreme Court Decisions

The ATS provides that "[t]he district courts [of the United States] shall have 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. Enacted in 1789, the ATS saw little use until 1980 when the U.S. Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*, 630 F.2d 876, recognized a claim under the ATS against the former Paraguayan Inspector General of Police by family members of the victim of a kidnapping, torture, and murder in Paraguay on the ground that the plaintiffs alleged a violation of the law of nations. Since *Filártiga*, plaintiffs have brought ATS suits against corporations in numerous instances, alleging participation in or facilitation of human rights violations in countries around the world on the grounds that the corporations provided banking services to, sold products to, or hired security from the individuals or groups that actually committed those violations.

The Supreme Court addressed the ATS twice before *Jesner*. In 2004, in *Sosa v. Alvarez-Machain*, 542 U.S. 692, the Supreme Court restricted the types of conduct that constituted violations of the law of nations under the ATS. The Court explained that the ATS is "strictly jurisdictional," and found that "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" of its enactment. The Court instructed that an ATS claim should proceed only if it "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of . . . 18th-century paradigms"—violation of safe conducts, infringement of the rights of ambassadors, and piracy. The Court also cautioned that courts should consider the "practical consequences" of allowing an ATS claim to go forward and raised in a footnote the "related consideration . . . whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."

In 2013, the Supreme Court again addressed the ATS in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108. As we explained here, the question before the court was whether Dutch, British, and Nigerian corporations could be sued under the ATS for allegedly aiding and abetting the Nigerian government in committing violations of international human rights in Nigeria in connection with its efforts to stop protests against oil drilling in the Ogoni region of the Niger Delta. The Second Circuit had dismissed the case on the ground that international law does not recognize corporate liability. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

The Supreme Court ultimately avoided the question of corporate liability, holding instead that the widely-recognized presumption against extraterritorial application of U.S. statutes barred the plaintiffs' claims. Noting that the claims were filed by foreign plaintiffs against foreign defendants for conduct occurring outside the United States, the Court held that the ATS did not provide jurisdiction over such claims. The Supreme Court left open the question whether the ATS provides jurisdiction over claims against foreign corporations generally.

Jesner v. Arab Bank

The plaintiffs in *Jesner* were non-U.S. citizens who were victims of terrorist attacks in the Middle East that occurred between 1995 and 2005. They alleged that Arab Bank, a major Jordanian financial institution, used its New York branch to clear U.S. dollar transactions that financed the attacks and to launder money for a Texas-based charity engaged in financing terrorism. The plaintiffs sued Arab Bank under the ATS, asserting that the bank violated international law by financing terrorism, engaging in genocide, and aiding and abetting crimes against humanity. In December 2015, the Second Circuit dismissed the case, following its *Kiobel* rule that corporations may not be sued under the ATS.

The Supreme Court heard oral argument on October 11, 2017. The *Jesner* plaintiffs argued that, in 1789, "it was 'unquestionable' that corporations could be held liable for torts," and that it was a mistake to ask whether international law itself provided for corporate liability. According to the plaintiffs, a victim of a violation of the law of nations could sue whoever committed that violation, whether an individual or a corporation. Arab Bank countered that corporate liability is not a recognized norm of international law, and therefore corporations could not commit violations of the law of nations.

Many others, including the U.S. government, the Jordanian government and Central Bank of Jordan, business groups, NGOs, international law scholars, and two U.S. Senators weighed in with *amicus curiae* briefs, demonstrating the widespread interest in the case.

The Supreme Court's Decision

In a decision authored by Justice Kennedy, the controlling parts of which were joined by four other Justices thus creating a majority, the Supreme Court categorically foreclosed the liability of foreign corporations for human rights claims under the ATS, holding that "foreign corporations may not be defendants in suits brought under the ATS," on the basis that it would be an inappropriate exercise of judicial discretion to recognize foreign corporate liability.

The Court began by assuming that acts of terrorism and facilitation of banking transactions to enable those acts violate well-settled principles of international law. The Court focused on whether the judiciary has the authority to recognize claims against foreign corporations for those violations under the ATS.

Noting that the ATS does not explicitly authorize corporate liability, the Court turned to the two-part framework elaborated in *Sosa* to determine whether courts should recognize claims against foreign corporations. In declining to recognize such a private cause of action, the majority relied on the "Court's general reluctance to extend judicially created private rights of action," on the basis that Congress is better-positioned to assess and weigh the public interest in doing so, pointing to precedent in *Correctional Services Corporation v. Malesko*, 534 U.S. 61 (2001), in which the Court declined to recognize a cause of action for corporate liability in domestic civil rights cases because "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." Against this background, the majority stated that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations." The majority also observed that although the ATS was intended to

promote international relations by ensuring a remedy for foreign plaintiffs for international law violations, here and in other ATS cases, the opposite was occurring. Quoting the U.S. government's *amicus curiae* brief, the Court observed that "[f]or 13 years, this litigation has 'caused significant diplomatic tensions' with Jordan, a critical ally in one of the world's most sensitive regions." The Court reasoned that the fact that "the ATS implicates foreign relations is itself a reason for a high bar to new private causes of action for violating international law.'" Two of the five Justices in the majority (Justices Alito and Gorsuch) wrote separately to expand further on their views that a private cause of action by foreign plaintiffs against foreign defendants is categorically unavailable under the ATS—and in recognizing such an action, *Sosa* may have been wrongly decided.

For Justices Alito and Gorsuch, the judicial reluctance to create causes of action was sufficient to decide the case. The plurality engaged in additional, more expansive analysis. First, the plurality found highly persuasive the Second Circuit's determination in *Kiobel* that there is no "specific, universal, and obligatory norm that corporations are liable for violations of international law." Noting, as the Second Circuit in *Kiobel* court had, that the charters of most international criminal tribunals, including the Nuremberg tribunals, exclude corporations from their jurisdiction, the plurality stated, "'The singular achievement of international law since the Second World War has come in the area of human rights,' where international law now imposes duties on individuals as well as nation-states. It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities." The plurality concluded that "there is at least sufficient doubt" regarding whether "the international community has . . . taken that step, at least in the specific, universal, and obligatory manner required by *Sosa*."

The plurality also looked to the Torture Victim Protection Act ("TVPA"), which amended the ATS to provide a cause of action for victims of torture committed by individuals and which the Supreme Court has held excludes lawsuits against corporations. The plurality found the Congressional decision to exclude corporate liability in the TVPA was highly persuasive, given the overlapping subject matter of the TVPA and the ATS. The plurality identified additional considerations counselling against finding a cause of action against foreign corporations, including the availability of other remedies for the plaintiffs and the danger that doing so might subject U.S. corporations to suits in foreign courts, ultimately dampening global investment that is often a prerequisite to the expansion of human rights protections.

The dissenters, in an opinion authored by Justice Sotomayor, would have held that the ATS does not categorically foreclose corporate liability and remanded the case to the Second Circuit to determine "whether the allegations here sufficiently touch and concern the United States" and "whether the international law norms alleged to have been violated . . . are of sufficiently definite content and universal acceptance to give rise to a cause of action under the ATS."

Implications

The Supreme Court's decision in *Jesner* effectively puts an end to ATS litigation in U.S. courts against foreign corporations for alleged human rights violations. As a practical matter, however, the volume of ATS litigation had already been reduced

dramatically by the Supreme Court's decision in *Kiobel* that the ATS does not apply extraterritorially. Thus, plaintiffs already have been pursuing other avenues such as civil lawsuits under the Anti-Terrorism Act, and under common law doctrines. Moreover, *Jesner* potentially leaves open the possibility of ATS litigation against foreign corporate officers and employees and U.S. corporations, so some attempts to file new ATS lawsuits may continue. Meanwhile, plaintiffs are likely to continue to look elsewhere for favorable venues; human rights-related litigation in other jurisdictions is on the increase, with prominent cases going on in the United Kingdom, Canada and the Netherlands, for example. There is a clear international focus on promoting transnational accountability for corporate activity with human rights impacts.

In parallel, human rights-related obligations on corporations have been increasing through other means, including diligence and disclosure obligations under foreign and U.S. federal and state laws, such as California's Transparency in Supply Chains Act. Corporations are increasingly voluntarily embracing international human rights standards within their policies and business relationships. Accordingly, managing the ever-changing business and human rights legal and regulatory landscape will continue to require attention and diligence.

Clifford Chance's international network of business and human rights attorneys will continue to work with clients to advise on mitigating both corporate human rights impacts and related business risk. We seek to support clients in achieving effective solutions, whether by advising on human rights policies and diligence or developing an appropriate response to claims of involvement in human rights abuse.

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