Heightened Pleading Standards in US Private International Law Cases

On Monday, the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which concerned whether current and former federal officials, including FBI Director Robert Mueller and former Attorney General John Ashcroft, are entitled to qualified immunity against allegations they knew of or condoned racial and religious discrimination against individuals detained in the wake of the September 11 attacks. The case presented the following legal issue: "Whether a conclusory allegation that a cabinet level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*." Pet. for Cert. I. The Court concluded in an opinion authored by Justice Kennedy, that, among other things, Iqbal failed to comply with the pleading standards of the Federal Rules of Civil Procedure because the complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination. Slip op. at 23.

Outside of its specific *Bivens* context, this case is important generally for private international law cases in the United States. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) has made clear that the heightened standards of pleading announced in 2007 in *Bell Atlantic v. Twombly* should be applied in cases beyond the antitrust context. In *Twombly*, the Court held that to comply with Federal Rule of Civil Procedure 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief") that a complaint must contain "enough facts to state a claim to relief that is plausible on its face." There had been some confusion in the lower federal courts as to whether that heightened pleading standard of plausibility applied in cases outside of the antitrust context. The Court in *Iqbal* has now answered that question in the affirmative, generally requiring all civil plaintiffs to meet the following standard: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Slip op. at 14. As such, enough facts must be plead to allow "the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint must therefore show more than "a sheer possibility that the defendant has acted unlawfully." *Id*.

The impact on private international law cases in the US federal courts will be profound. Indeed, plaintiffs in such cases will now have to allege not simply a short and plain statement of alleged illegal activities, but enough specific facts so that a court may determine that the complaint is beyond the realm of mere possibility. General recitations of alleged illegal conduct and hopes for discovery to make out claims looking towards summary judgment will now no longer be enough to allow cases to go forward in US federal district court. As such, the preliminary motion to dismiss has now been converted in most cases to a motion for summary judgment. At bottom, plaintiffs will now find it harder to stay in federal district court, and defendants will now be armed with another defensive weapon, in many cases dispositive, in resisting private international litigation.

It should be asked whether this shift from the simple notice pleading countenanced by the Federal Rules to a form of heightened pleading is a good thing. The Court appears to be taken with the belief that US courts are being deluged with frivilous claims. As such, plaintiffs should be required to plead more than the possible to stay in federal court. But, the Federal Rules themselves seem to contemplate that most cases will proceed on to summary judgement and/or trial. The Court's rule will be especially problematic in private international law cases. Such cases often require extensive discovery to make out claims, as the acts and/or occurrences allegedly giving rise to unlawful activity occur outside the borders of the United States and present unique problems of factual development given their transnational dimension. Under *Iqbal*, private international plaintiffs will not be able to depend on access to such discovery simply by filing a complaint.

In sum, surviving a motion to dismiss in private international law cases in US federal courts is now much harder and plaintiffs would be well served to conduct extensive and, to be sure, expensive fact development in advance of filing their complaint.