Pleading Alien Tort Statute Cases in the US: Heightened Pleading in International Cases

As recently discussed on this blog, the US Supreme Court case of *Ashcroft v. Iqbal* will have important ramifications for private international law cases filed in US federal courts. That case requires that a complaint state a "plausible" claim for relief to survive a motion to dismiss. While it is too soon to have a full sense of *Iqbal*'s impact across the entire private international law field and civil litigation generally in the US, a recent Alien Tort Statute case decided by the US Court of Appeals for the Eleventh Circuit perhaps offers an important clue about where we are heading in pleading international cases in US federal courts.

In *Sinaltrainal v. Coca-Cola Company*, a group of consolidated plaintiffs, who were trade union leaders in Colombia, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA) alleging that their employers–two bottling companies in Colombia–collaborated with Colombian paramilitary forces (and, in one case, conspired with local police officials) to murder and torture plaintiffs. Coca-Cola was allegedly connected to the bottlers through a series of alter ego and agency relationships, but was not alleged to be directly liable for the murder and torture; rather, the conduct was allegedly committed by paramilitary and local officials acting in concert with the local management of the bottling facilities. The district court dismissed the case for lack of subject matter jurisdiction against the Coca-Cola defendants in *Sinaltrainal I* because Coca-Cola did not have the requisite control to be liable for the bottlers' alleged actions, and in *Sinaltrainal II* the district court similarly dismissed the complaints against the bottlers for insufficiently pleading a conspiracy. This appeal followed to the Eleventh Circuit.

In a nutshell, the complaint alleged that defendants conspired with paramilitary forces and/or the local police to rid their bottling facilities of unions. As to the complaints alleging violation of the ATS, the appellate court held that the plaintiffs mere recital that paramilitary forces were in a relationship with and assisted by the Colombian government did not state a plausible allegation of state action. Slip op. at 23. This was so because the complaints needed to sufficiently

(read plausibly) plead that "(1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the defendants, or their agents, conspired with the state actors, or those acting uncer color of law, in carrying out the tortious acts." *Id.* Finding the war crimes exception inapplicable, this meant that plaintiffs needed to plead "factual allegations" to support their conclusion of a relationship between the paramilitary and the Colombian government, which they did not do. *Id.* (noting that the complaint alleged merely that the paramilitary were "permitted to exist" and "assisted" by the Colombian government). As to the complaint alleging conspiracy, the court held that the mere recital of an alleged conspiracy without alleging "when" the conspiracy occurred and "with whom" the conspiracy was entered into likewise fails to state a claim under the ATS. *Id*. at 30. As described by the the Eleventh Circuit, "[t]he scope of the conspiracy and its participants are undefined." *Id*. Similar rationales were applied to the TVPA claims. *Id*. at 32-33. At bottom, the Eleventh Circuit has required clear statements of government action and clear identification of the scope and participants in an alleged conspiracy to survive a motion to dismiss in ATS and TVPA cases.

In the pre-*Iqbal* era, it is likely that the complaint would have survived a motion to dismiss in that there were some factual allegations that could have given rise to a cause of action. The allegation of government action and conspiracy based on information and belief would have entitled the plaintiffs to at least some discovery in the pre-*Iqbal* era to prove their case. In that *Iqbal* now requires heightened pleading, the Eleventh Circuit has been clear that a plaintiff must plead facts that make the allegation of unlawful conduct plausible on the face of the complaint. In other words, plaintiffs will not have the guarantee of discovery to help make out their case.

There are important outcomes to this decision. To begin with, it shows that the next wave of ATS litigation will be fought at the motion to dismiss phase for failure to plead plausible claims. Rather than focusing on legal theories–for instance, whether a certain type of liability is contemplated under the ATS–courts will now be asked to focus on whether the facts alleged in plausible detail unlawful activity. Such an approach to pleading will be tough for plaintiffs in ATS cases because plaintiffs may not have access to the facts necessary to prove such claims as conspiracy, especially given the necessity of discovery from foreign

governments and officials. This places plaintiffs lawyers in a tough position. Even in cases where they believe under Rule 11 of the Federal Rules of Civil Procedure that the "factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," they may in fact not be entitled to any discovery. As such, plaintiffs lawyers may need to think twice about filing these cases.

Second, courts are now be empowered to create heightened pleading pleading standards in ATS cases. This means that the tide of ATS litigation may be stemmed through motions practice on factual as opposed to legal issues.

Third, it is likely that we will see *Iqbal* play itself out in myriad ways in international law cases generally. The most important way is that it is now much harder to allege private international law violations in US courts because such violations frequently require court-ordered discovery to enable plaintiffs and their lawyers to investigate activities occurring abroad.

It is now clear that the new pleading regime established by the US Supreme Court is having important ramifications in international civil litigation cases in the United States. The question, of course, is whether the new pleading standards announced by the Court are the appropriate standards for private international law cases. Will such cases needlessly be hampered by heightened pleading standards that may well be impossible to meet in cases involving foreign goverenments, foreign governmental entities, and foreign facts?