Are We Witnessing the Demise of Alien Tort Statute Litigation?

Over the past few months, various US federal courts have handed down opinions that may presage a more limited role for the Alien Tort Statute in US litigation. The Alien Tort Statute provides US district courts with 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. In a series of cases starting with *Filartiga v. Pena-Irala*, US courts had been willing to give a robust reading to the statute, thus allowing recovery in cases that pushed the envelope for violations of customary international law. When the Supreme Court issued its most recent opinion on the statute in *Sosa v. Alvarez-Machain*, hope existed in some quarters that the statute would be more narrowly construed by US lower courts. Decisions following that case, however, continued to follow caselaw allowing for robust recovery.

We may be witnessing a subtle sea change in ATS litigation, which is surprisingly being accomplished not by the US Supreme Court but by US lower courts. In the past six months, five decisions in particular have changed the litigating landscape substantially and will make it harder for plaintiffs to plead and prove ATS cases. These decisions span various subject areas, but each contributes to reining in ATS cases. A short summary of these cases follows.

In *Sarei v. Rio Tinto*, the Ninth Circuit has been willing to consider applying exhaustion of remedies requirements in ATS cases, thus allowing district court judges to dismiss ATS cases unless a plaintiff can show that all local legal remedies have been exhausted or that such remedies are unavailable, ineffective, or futile. In *Turedi v. Coca-Cola* and *Aldana v. Del Monte Fresh Produce*, the Second and Eleventh Circuits have been willing to affirm ATS dismissals on grounds on *forum non conveniens*. In *Sinaltrainal v. Coca-Cola*, the Eleventh Circuit relied on heightened pleading standards enunciated in the Supreme Court's *Iqbal* and *Twombly* decisions, discussed here, to impose a higher standard of pleading on ATS claimants. Finally, and perhaps most importantly, the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, ruled that in order to find aiding and abetting liability under the ATS, a plaintiff must show "that a defendant purposefully aided and abetted a violation of international

law." In changing the standard from mere knowledge to purpose, the Second Circuit has placed a heavier burden on plaintiffs bringing ATS claims.

The upshot of these decisions is that from pleading to proof to discretionary doctrines like *forum non conveniens* US federal courts are perhaps closing the door on many ATS cases. While this movement will be favorable to defendants, at the level of process it is a surprising outcome for several reasons. Congress has known since *Filartiga* that there was potential for ATS abuse and has done nothing about it. In the wake of congressional silence, US courts had been hesitant for 28 years to restrict the statute's use, and rather looked to the US Supreme Court to provide guidance. The Supreme Court's guidance in *Sosa* was opaque at best. Faced with such minimal direction, US lower courts have been forced to make a choice regarding the ATS. Momentum appears to be gathering in favor of choosing to limit ATS litigation. As such, US lower courts have been forced to use discretionary judicial doctrines to cabin the reach of a congressional statute.

While it may be too soon to say that the death knell has sounded for ATS litigation, these developments show that we may be witnessing the demise of ATS litigation.