United States Congress Considering Legislation Relating to Pleading

As was recently reported on this blog, this past May the United States Supreme Court decided the case of *Ashcroft v. Iqbal*, which will have relevance for pleading private international law cases in United States federal courts. The five-member majority in *Iqbal* (Justice Kennedy joined by Chief Justice Roberts and Justices Scalia, Thomas, & Alito) 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* 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*.

On Wednesday, Senator Arlen Specter of Pennsylvania introduced a bill to return pleading standards in United States federal courts back to the "standards set forth by the Supreme Court of the United States in *Conley v. Gibson*, 355 U.S. 41 (1957)." That standard, which was overturned by *Twombly*, merely required that the complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Likewise, *Conley* provided that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." That approach to pleading, generally described as "notice pleading," enabled plaintiffs to describe their case in the complaint in very

general terms and then to use the mechanics of discovery to prove up their claims at trial and/or force settlement before trial. In overturning that case in *Twombly* and in clarifying in *Iqbal* that in *all* civil cases a complaint must meet the heightened pleading standard of plausibility, the Supreme Court has moved pleading in the the United States ever so slightly towards the civil law's "fact pleading" standard.

Senator Specter's bill would return the United States to the simple "notice pleading" of the pre-*Twombly* era. A couple of observations are in order. *First*, it is clear that *Iqbal* is a blockbuster decision. As recently described by Adam Liptak in the *New York Times*: "The most consequential decision of the Supreme Court's last term got only a little attention when it landed in May. . . . But the lower courts have certainly understood the significance of the decision, *Ashcroft v. Iqbal*, which makes it much easier for judges to dismiss civil lawsuits right after they are filed. They have cited it more than 500 times in just the last two months." The impact for private international law cases will be substantial in that those 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.

Second, Congress has now entered the fray given the importance of that decision to all civil cases. While Senator Specter's bill may be elegant in its simplicity, one wonders whether a bill more carefully crafted and detailed might be in order. For instance, might it be useful to have a carve out for cases, such as private international law ones, that pose unique pleading problems. Or, might it be useful for Congress to more precisely detail the discretion to be employed by district court judges in reviewing civil complaints. To be sure, both *Conley*'s liberal standard and *Iqbal*'s heightened standards are not studies in clarity. Thus, it might be better to provide more-focused principles to be employed by the courts in civil cases rather than merely returning to *Conley*'s opaque standard.

Finally, it should be asked from a comparative perspective whether US courts and Congress might look to the experience of fact pleading abroad before returning to the *Conley* standard. In Europe, there is a rich experience with heightened pleading standards that might provide concrete rules for application in the United States. For instance, perhaps moderating principles of judicial administration might be explored to lessen the seemingly blunt pronouncements in *Twombly* and

Iqbal. This would be especially relevant in private international law cases, where cases sit at the interstices of the common law and civil law divide.

At bottom, private international lawyers should keep a close watch on these developments.