U.S. SUPREME COURT REJECTS CORPORATE LIABILITY FOR INTERNATIONAL HUMAN RIGHTS VIOLATIONS

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U.S. Appellate Litigation Alert

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The U.S. Supreme Court recently held in *Jesner v. Arab Bank, PLC*[1] that foreign corporations cannot be sued under the Alien Tort Statute ("ATS"). This statute, enacted by the first Congress in 1789, is a jurisdictional statute that allows foreign individuals to bring lawsuits in U.S. district courts for any tort "committed in violation of the law of nations or a treaty of the United States."[2] Throughout most of its long history, the ATS was rarely invoked. That changed around 1980, when foreign plaintiffs used the statute to successfully bring suit in federal district court against a former police officer of another country, who was living in New York at the time, for his role in the torture and death of their family member overseas. Following that case,[3] foreign plaintiffs began to use the ATS more often to file suit in the United States against individuals and multinational corporations for committing (or aiding and abetting) various human rights violations that were considered a violation of the law of nations. As a result of the recent decision in *Jesner*, foreign plaintiffs can no longer use the ATS to sue foreign corporations in U.S. courts.

FACTS/BACKGROUND

Jesner involved thousands of foreign citizens who were victims of terrorist attacks in Israel, the West Bank and Gaza. The plaintiffs alleged that the Jordan-based Arab Bank facilitated financial transactions to terrorists who perpetrated these attacks, including distributing large sums of money to the families of deceased suicide bombers. Just a few years ago, the Supreme Court held that defendants under the ATS must have a sufficient connection to the United States and that the ATS does not apply when all of the relevant conduct took place outside of the United States.[4] In *Jesner*, Arab Bank maintained a chartered branch in New York that allegedly had some involvement in relevant transactions. The Court did not need to decide this issue involving the extraterritorial application of the ATS in *Jesner* because it resolved the case on other grounds.

OPINION

In a splintered, 5–4 opinion, the Supreme Court affirmed the decision of the Second Circuit that the plaintiffs' claims could not proceed against Arab Bank under the ATS. Writing for the majority, Justice Kennedy pointed out that allowing lawsuits like this one against foreign corporations could create significant diplomatic tensions with

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other countries, and such a result would run counter to the original purpose of the ATS, which was to create harmony in international relations. Illustrating the Court's reluctance to extend judicially created rights, he added that expanding new grounds for lawsuits in an arena that triggers potential foreign policy issues should be left to Congress. Chief Justice Roberts and Justices Thomas, Alito and Gorsuch joined Justice Kennedy on these points. Justice Sotomayor wrote a dissent, joined by Justices Ginsburg, Breyer and Kagan, in which she criticized immunizing corporations that violate human rights from liability under the ATS.

CONCLUSION

Although the Supreme Court held that *foreign* corporations cannot be sued under the ATS, it did not decide the issue of whether foreign citizens could bring suit against a *U.S.-based* corporation under the ATS. Given the language of the Court's holding and its discussion of foreign policy-related considerations, this issue remains an open question under *Jesner*. In addition, U.S. corporations may face other potential litigation over human rights-related issues, such as consumer class actions or shareholder actions that are outside the scope of this opinion and the ATS. Therefore, while the Court's decision certainly narrows the reach of the ATS, it should not cause any business to relax its vigilance as to human rights issues.

Notes:
[1] *Jesner v. Arab Bank*, PLC, No. 16-499, -- U.S. --, 2018 WL 1914663 (Apr. 24, 2018).
[2] *See* 28 U.S.C. § 1350 (“The district courts shall have original jurisdiction of 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.”).
[3] *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
[4] *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013).

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