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Former Alstom Executive Wins Acquittal of FCPA Counts

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On February 26, 2020, a Connecticut federal judge overturned a former Alstom SA executive's foreign bribery convictions after finding that prosecutors had failed to prove that the defendant was an agent of the company's United States subsidiary. The court let stand the executive's convictions on four money laundering counts. While the judge's decision does not call into question the Second Circuit's ruling that foreign nationals may only violate the FCPA outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern, it is a setback for prosecutors in FCPA cases. There are three main lessons from the decision. First, it shows that determining whether an agency relationship exists is a highly fact-based analysis that imposes a high evidentiary bar. Second, prosecutors will need to adapt how they pursue FCPA cases, either by charging cases differently to avoid relying on the "agency" aspect of the FCPA, or by taking special care to introduce sufficient evidence to meet the rigorous and specific requirements of proving that a defendant acted as an agent. Finally, while the decision implicates FCPA prosecutions of foreign nationals acting entirely outside of the United States, there remains a wide avenue for prosecution of multinational companies for misconduct and does not impact existing best practices for corporate compliance.

Background

Lawrence Hoskins was convicted in November 2019 for his role in a multi-year, multimillion-dollar foreign bribery and money laundering scheme. He was convicted of seven counts of violating the Foreign Corrupt Practices Act ("FCPA") and four money laundering counts.

Hoskins was a British citizen who was employed from 2001 to 2004 by a British subsidiary of Alstom. The evidence at trial demonstrated that Hoskins engaged in a conspiracy to pay bribes to officials in Indonesia in exchange for assistance in securing a $118 million contract, known as the Tarahan project, for Alstom Power Inc. ("API"), an Alstom subsidiary based in Connecticut, and its consortium partner, Marubeni Corporation, to provide power-related services for the citizens of Indonesia. The bribes were paid to a high-ranking member of the Indonesian Parliament and the President of the state-owned and state-controlled electricity company in Indonesia, Perusahaan Listrik Negara. To conceal the bribes, Hoskins and his co-conspirators retained two sham consultants, purportedly to provide API with consulting services on the Tarahan project. The evidence presented at trial showed that the primary purpose of hiring the consultants was to conceal the bribes to Indonesian officials.

The FCPA counts required the jury to decide if Hoskins, a British citizen and Alstom executive who did not work in the United States, was an "agent" of API, Alstom's U.S. subsidiary. The FCPA criminalizes bribing foreign officials, but it applies only to those who take some action in the United States, issuers of stock traded in the United States, and United States companies, citizens, and residents, as well as their "agents." In 2016, U.S. District Judge Janet Bond Arterton ruled that a non-resident foreign national, such as Hoskins, cannot be charged with conspiracy to violate the FCPA or with aiding and abetting a violation of the FCPA, unless the government can show that he acted as an agent of a "domestic concern" or while physically present in the United States. The Second Circuit affirmed in 2018. In particular, the Second Circuit stated that "the FCPA clearly dictates that foreign nationals may only violate the statute outside the United States if they are agents, employees, officers, directors, or shareholders of an American issuer or domestic concern. *Untied States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018). Because Hoskins did not travel to the United States while the bribery scheme was ongoing, the government's only way to prove that he violated the FCPA was by showing that he acted as an agent of a domestic concern, *i.e.*, API, the United States Alstom subsidiary involved in the Tarahan project.

At trial, the government argued that Hoskins served as API's agent when it came to hiring the consultants that facilitated bribe payments in the bribery scheme. The jury accepted the government's arguments and returned guilty verdicts on all seven FCPA counts, as well as four of five money laundering charges.

Post-Trial Decision

Following the verdict, Hoskins moved for a judgment of acquittal on all counts or, in the alternative, for a new trial. In her February 26, 2020 decision, Judge Arterton reviewed the evidence and concluded that, while the government had proven that API *generally* controlled the Indonesian power project and set the terms for choosing the consultants used to pay bribes, the mere fact that Hoskins executed those directions was not sufficient to show that Hoskins served as API's agent. Judge Arterton reasoned that an essential element of agency is the principal's right to control the agent's actions throughout the course of conduct, not merely the right to control the broader project on which the purported agent worked. Judge Arterton found that, even though API controlled key specifications in the efforts to retain consultants on the Tarahan Project, including who to retain, how much to pay them, and additional terms of the consultancy agreements, the evidence could not support the conclusion that Hoskins acted subject to API's control such that he was its agent, even in the light most favorable to the verdict. Furthermore, Hoskins did not report to anyone in API, and API did not retain the authority to fire or reassign Hoskins, or otherwise evaluate his performance. Judge Arterton emphasized that formal reporting lines and the ability to terminate the agency relationship were particularly important to the analysis.

Takeaways

The government is likely to appeal Judge Arterton's decision, though the opinion itself does not call into question or otherwise limit the Second Circuit's landmark 2018 ruling. Rather, this decision demonstrates the nuanced, fact-based analysis courts will need to undertake to determine whether an agency relationship exists. In this case, the government had to conform its proof at trial to the Second Circuit's decision, which left a single, narrow pathway for the government to prove an FCPA offense: establish that Hoskins was API's agent. The government is now on notice of the potentially high bar in certain cases to prove agency and will have to plan its cases accordingly. The government could either marshal additional evidence of control, or it may look to charge cases differently to avoid having to rely on the agency requirement of the FCPA as the sole basis to sustain a conviction.

Finally, while the *Hoskins* decision may complicate FCPA prosecutions of certain individuals – namely foreign nationals acting entirely outside of the United States, foreign executives of American issuers or companies headquartered in the United States could still be prosecuted for violations of the FCPA, as could executives of foreign corporations whose conduct occurs, at least in part, in the United States. Corporations with international operations should therefore continue to apply appropriate best practices with their compliance programs to mitigate foreign bribery risks.