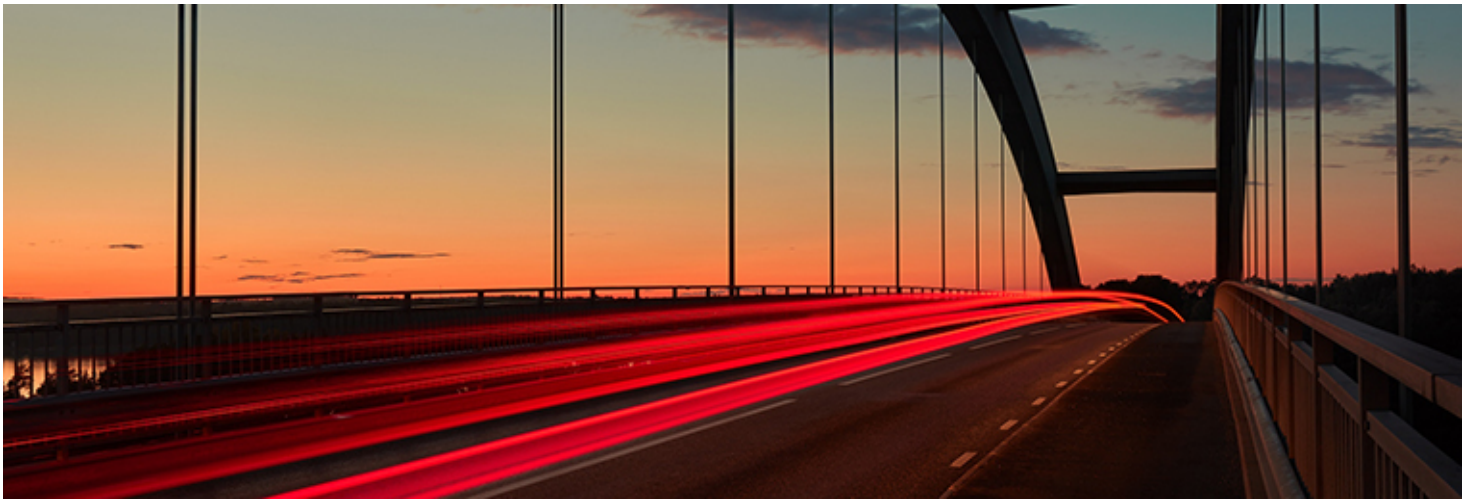

US v. Hoskins: in setback for DOJ, court grants post-trial motion for acquittal on all FCPA counts

White Collar Alert

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Since 2013, one of the most closely watched criminal prosecutions under the Foreign Corrupt Practices Act (the FCPA) has been that of Lawrence Hoskins, former vice president of the French conglomerate Alstom S.A., a case that over the past seven years has been up and down on appeal and which generated a significant interlocutory decision from the Court of Appeals for the Second Circuit in 2018 − discussed in a prior DLA Piper alert here. In November 2019, Hoskins was convicted of almost all counts − six counts of violating the FCPA and additional counts relating to money laundering. (Hoskins's conviction was discussed in a second DLA Piper alert here.)

In yet another twist in this prosecution for the Department of Justice (DOJ), on February 26, 2020, trial Judge Janet Bond Arterton (D. Ct.) granted Hoskins's post-trial motion for acquittal on all FCPA counts (while denying his motion on the money-laundering counts), essentially on the grounds that the government had failed to prove that Hoskins was an "agent" of a US entity.

While this surprising ruling is an extremely fact-bound one, it further calls into question DOJ's aggressive approach to a narrow but significant class of potential defendants in FCPA cases.

Hoskins faced charges in the District of Connecticut for his role in a conspiracy in which a US subsidiary of Alstom (Alstom Power International or API) bribed government officials to win a US$118 million contract to build

power plants in Indonesia (the Tarahan Project). Hoskins was never employed by the US subsidiary, but he had approval authority over the hiring of the outside "consultants" used to execute the bribery scheme. In 2014, the French company pleaded guilty to two counts of violating the FCPA and paid a US$772 million criminal penalty to DOJ.

The wrinkle in Hoskins's case was jurisdictional: Hoskins did not neatly fall into any of the three classes of persons over whom FCPA jurisdiction exists. He was not a US citizen, was not employed by a US company, and never set foot in the US while working for Alstom. The trial court granted in large part Hoskins's motion to dismiss the charges on these grounds, and the DOJ appealed that decision.

The Second Circuit Court of Appeals concluded, *inter alia*, 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." *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018). Thus, because Hoskins "did not travel [to the United States] while the bribery scheme was ongoing," *id*. at 72, he could not be liable for violations of the FCPA unless he was an agent of a domestic concern.

So at trial the overarching factual question for the jury on the FCPA counts was whether Hoskins was an "agent" of Alstom's US subsidiary. Following the presentation of evidence, Judge Arterton instructed the jury to consider the definition of "agent" to include:

1. a manifestation by the principal that the agent will act for it
2. the agent's acceptance of an "undertaking" − meaning "acts or services" for the principal and
3. an understanding that the principal is "in control" of those acts or services.

Judge Arterton clarified that "one may be an agent for some business purpose and not others." In this case, agency had to be "in connection with the specific events related to the contract known as the Tarahan project."

After his conviction, Hoskins moved for a judgment of acquittal. The court granted that motion as to all the FCPA counts, holding that "the evidence adduced at trial cannot support the conclusion that Mr. Hoskins acted subject to API's control such that Mr. Hoskins was an agent of" the US company.

The court reasoned as follows:

> Thus, the Court sees no evidence upon which a rational jury could conclude that Mr. Hoskins agreed or understood that API would control his actions on the Tarahan Project, as would be required to create an agency relationship. Nor does the Court see any evidence upon which a rational jury could conclude that API actually had the authority or ability to control Mr. Hoskins's actions. The Government has thoroughly demonstrated that API was the business leader of the Tarahan Project, that it exercised authority and leadership over which consultants were hired for that project and according to what terms, and that Mr. Hoskins worked with API on that project. The Government has also demonstrated that Mr. Hoskins could not control API, and that he may have performed tasks upon request by API employees. But it has identified no evidence introduced at trial which, even when drawing inferences favorable to the Government, could entitle a rational finder of fact to conclude beyond a reasonable doubt that there was an understanding between Mr. Hoskins and API that API would be in control of Mr. Hoskins's actions on the Tarahan Project or that API did control Mr. Hoskins's actions in a manner consistent with agency relationships. Because Mr. Hoskins cannot be convicted of the FCPA violations charged in Counts One through Seven unless he was an agent of a domestic concern, the Court concludes that the evidence introduced at trial cannot support his conviction on those counts. Thus, Defendant's motion for acquittal under Rule 29(c) is granted as to Counts One through Seven.

In sum, Judge Arterton opined that she "harbor[ed] significant doubt" that Hoskins was an agent of the US company because there was no "persuasive evidence" that the US company "had authority to control Mr. Hoskins or that he agreed to be so controlled."

Conclusion

The Hoskins case involves unique facts and Judge Arterton's opinion is unlikely to be the last word. The government will almost certainly file an appeal.

But the case marks a notable setback for DOJ's FCPA Unit, which often takes aggressive jurisdictional positions in its investigations of individuals and companies. Because these investigations are so often conducted and resolved prior to any court involvement, those aggressive positions typically go untested. Thus, while whether the Second Circuit will affirm Judge Arterton's agency analysis remains to be seen, the decision represents an important check on DOJ in cases premised on an agency theory.

However, the fact that the court upheld Hoskins's money-laundering convictions also serves as a reminder that DOJ's statutory arsenal in foreign bribery cases remains broad and formidable.

Learn more about the implications of this case by contacting any of the authors.

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