

November 21, 2019

Jury Convicts Foreign National of FCPA Violations under Agency Theory

On November 8, 2019, a Connecticut jury found Lawrence Hoskins, a British national and former executive of the French power and rail transportation company, Alstom S.A., guilty of participating in a scheme to bribe Indonesian officials in violation of the Foreign Corrupt Practices Act (“FCPA”), as well as three counts of money laundering and two counts of conspiracy.¹ The U.S. government’s prosecution of Hoskins led to a seminal decision by the Second Circuit that reined in the FCPA’s extraterritorial reach over foreign nationals under secondary liability theories, such as conspiracy and aiding and abetting.² The Second Circuit, however, did allow the government to proceed against Hoskins under the theory that Hoskins acted as an agent of Alstom’s U.S. subsidiary, and remanded the case for trial.³ While Hoskins was not an issuer, a domestic concern or a person whose own conduct in the territory of the United States brought him within the ambit of the FCPA, the jury found him liable as an agent of Alstom’s U.S. subsidiary, which was a domestic concern.⁴ In addition to the lessons of the Second Circuit’s decision, Hoskins’s trial and conviction indicate how in the future the DOJ may prosecute FCPA cases that depend on an agency theory of liability.⁵

The Allegations

In 2014, Alstom S.A. pleaded guilty to a two-count criminal information charging the company with violating the FCPA’s accounting provisions by falsifying its books and records and failing to implement adequate internal controls. The company agreed to pay a \$772 million fine to resolve the charges, which related to a scheme involving the payment of millions of dollars in bribes to government officials in various countries, including in Indonesia.⁶ In addition, Alstom Power Inc. and Alstom Grid Inc., two U.S.

¹ See Press Release, Dep’t of Justice, *Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy* (Nov. 8, 2019), available [here](#) (hereinafter “DOJ Trial Press Release”).

² *United States v. Hoskins*, 902 F.3d 69, 97–98 (2d Cir. 2018); see Paul, Weiss Client Memorandum, “The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories” (Aug. 27, 2018), available [here](#).

³ *Hoskins*, 902 F.3d at 97–98.

⁴ See Paul, Weiss Client Memorandum, “The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories” (Aug. 27, 2018), available [here](#).

⁵ See Paul, Weiss Client Memorandum.

⁶ See Press Release, Dep’t of Justice, *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges* (Dec. 22, 2014), available [here](#) (hereinafter “DOJ Alstom Press Release”).

subsidiaries, both entered into deferred prosecution agreements, admitting that they had conspired to violate the anti-bribery provisions of the FCPA. Alstom Power is headquartered in Windsor, Connecticut.

According to the companies' admissions, Alstom S.A., Alstom Power and Alstom Grid, through various executives and employees, paid bribes to government officials in connection with power, grid and transportation projects for state-owned entities around the world. In total, Alstom S.A. admitted to paying more than \$75 million in bribes to secure \$4 billion in projects, with a profit to the company of approximately \$300 million.⁷

In Indonesia, Alstom S.A., Alstom Power and other subsidiaries admitted to paying bribes to government officials—including a high-ranking member of the Indonesian Parliament and high-ranking members of Perusahaan Listrik Negara, the state-owned electricity company—in exchange for assistance in securing contracts to provide power-related services valued at approximately \$375 million. To conceal the bribes, Alstom S.A. retained two consultants to serve as conduits for the payments to the government officials.⁸ Among these contracts was one for an infrastructure project valued at \$118 million.⁹

In 2013, the DOJ also charged five individuals related to the scheme, including four corporate executives of Alstom S.A. and its subsidiaries. Among them was Lawrence Hoskins, Alstom S.A.'s former senior vice president for the Asia region, who was charged in a second superseding indictment on July 30, 2013, with, among other things, conspiring and aiding and abetting the other three executives, who worked for Alstom's U.S. subsidiary, to violate the FCPA.¹⁰ Specifically, Hoskins was said to have conspired to facilitate the payment of bribes in connection with a contract for the Tarahan Project.¹¹

The Second Circuit's Decision

In 2015, Hoskins successfully moved to dismiss the conspiracy count of the indictment against him, arguing that, as a citizen of the United Kingdom who worked in France at a French subsidiary of Alstom S.A., he did not fall within any categories of defendants enumerated under the FCPA.¹² The FCPA imposes liability on (i) "issuers" (and their officers, directors, employees and agents) of securities listed on

⁷ *Id.*

⁸ See DOJ Trial Press Release.

⁹ See Paul, Weiss Client Memorandum; see DOJ Trial Press Release.

¹⁰ See Paul, Weiss Client Memorandum; see DOJ Trial Press Release.

¹¹ Third Superseding Indictment, *United States v. Hoskins*, No. 3:12-CR-238, 2015 WL 11018855 (D. Conn. Apr. 15, 2015).

¹² Lawrence Hoskins's Motion to Dismiss Count One of the Third Superseding Indictment, *United States v. Hoskins*, No. 3:12-CR-238, 2015 WL 1379234 (D. Conn. June 4, 2015); see also Lawrence Hoskins's Motion to Dismiss the Second Superseding Indictment, *United States v. Hoskins*, No. 3:12-CR-238, 2014 WL 12873999 (D. Conn. July 31, 2014).

U.S. stock exchanges,¹³ (ii) “domestic concerns” or American companies and persons, and their officers, directors, employees and agents¹⁴ and (iii) foreign persons who acted in furtherance of the bribery scheme while in the territory of the U.S.¹⁵ Hoskins argued that the text of the statute “demonstrates an affirmative legislative intent to exclude certain persons from liability.”¹⁶

The government appealed the dismissal to the Second Circuit. As discussed in more detail in our August 27, 2018, client memorandum entitled “The Second Circuit Rejects FCPA Liability for Foreign Persons under Accessory Liability Theories,” the Second Circuit unanimously rejected the DOJ’s expansive theory of extraterritorial jurisdiction under the FCPA.¹⁷ The DOJ claimed that defendants, like Hoskins, who may not fit the statutory definition of defendants under the FCPA, may still be found guilty of the underlying substantive offense under an aiding and abetting theory of liability or of conspiracy to commit the offense.¹⁸ Although the Second Circuit rejected the DOJ’s theory of extraterritorial jurisdiction, it found that Hoskins could still be convicted of violating the FCPA if the DOJ could prove that Hoskins was an agent of a domestic concern. Accordingly, the Second Circuit remanded Hoskins’s case to the District Court to determine whether he acted as an agent of Alstom’s U.S. subsidiaries.¹⁹

Hoskins’s Trial

During the two-week trial of Hoskins in October and November 2019 in the District of Connecticut, the central issue was whether Hoskins acted as an agent of Alstom Power, Alstom’s U.S. subsidiary, in connection with the bribery scheme. The prosecution portrayed Hoskins as playing a vital role in negotiating contracts and choosing the consultants to carry out the bribes as an agent of Alstom Power. The DOJ argued that by itself Alstom’s formal corporate structure, which showed Hoskins working for the parent company, did not demonstrate which employees were in control of the Tarahan Project.²⁰ Instead, the DOJ relied on testimony from former employees of Alstom Power, as well as Hoskins’s communications with employees at Alstom Power, to prove that Hoskins acted as an agent of Alstom Power. The DOJ also argued that the evidence at trial demonstrated that Alstom Power had final authority over compensation

¹³ 15 U.S.C. §78dd-1.

¹⁴ 15 U.S.C. §78dd-2.

¹⁵ 15 U.S.C. §78dd-3.

¹⁶ *Hoskins*, 902 F.3d at 78.

¹⁷ *Hoskins*, 902 F.3d at 92; see Paul, Weiss Client Memorandum.

¹⁸ *Id.* at 78.

¹⁹ *Hoskins*, 902 F.3d at 98.

²⁰ Transcript of Jury Trial at 1339, *United States v. Hoskins*, No. 3:12-CR-238 (D. Conn. Oct. 28, 2019). In their closing arguments, the DOJ said “...you’re not going to learn about the relationship between the defendant and [Alstom’s U.S. subsidiary] on the Tarahan Project by looking at the org charts.”

for the consultants that paid the bribes and Hoskins negotiated with the consultants on behalf of Alstom Power.²¹

In an effort to show that Hoskins did not act as an agent of Alstom Power, the defense presented expert witness testimony about the company's corporate structure and evidence that Alstom S.A., the parent company, and not Alstom Power, controlled which consultants were hired. Hoskins also contended that because he was a senior official at the parent company, which oversaw the hiring of consultants, he could not have been an agent of the parent's subsidiary.

In instructing the jury regarding the meaning of agency, the court did not fully accept either party's position. Rather, Judge Arterton relied on the traditional definition of agency, as cited in the Second Restatement of Agency and in other Connecticut state court precedents.²² According to the final jury instructions, to find that Hoskins acted as an agent of Alstom Power, the jurors had to conclude that "there must be, one, a manifestation by the principal that the agent will act for it; two, acceptance by the agent of the undertaking; and, three, an understanding between the agent and the principal that the principal will be in control of the undertaking."²³

Judge Arterton further instructed the jury that a formal agreement was not required for Hoskins to be considered an agent and the jurors could infer an agency relationship "circumstantially from the words and actions of the parties involved."²⁴ Finally, Judge Arterton instructed the jury that they could find Hoskins to be an agent for "some business purposes and not others." Accordingly, the DOJ only needed to prove that Hoskins was an agent of Alstom Power in "connection with the specific events related to the Tarahan Project" and not for all purposes.²⁵

The jury returned a guilty verdict against Hoskins after a day of deliberations.

Implications

Hoskins's trial and conviction suggest that while the government may not be able to rely on conspiracy or aiding and abetting theories of liability to extend the reach of the FCPA against non-U.S. persons or companies, it may still rely on an agency theory for such a purpose. Given the vague and broad definitions of agency, reliance on a jury being able to apply such concepts correctly at trial may not be a winning defense

²¹ *Id.*

²² Restatement (Second), Agency §1, comment b. *See also Washington Mut. Bank v. Coughlin*, 2015 WL 467478 at *5 (Conn. Super. Ct. Jan. 8, 2015) (citing *Beckenstein v. Potter & Carrier, Inc.*, 191 Conn. 120, 133 (Conn. 1983)).

²³ Transcript of Jury Trial at 1246–47.

²⁴ *Id.*

²⁵ *Id.*

strategy, particularly when the existence of a bribery scheme cannot be contested at trial because of corporate resolutions and other individuals' guilty pleas.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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