

Federal Judge Acquits Ex-Alstom Executive on FCPA Charges Post Jury Verdict

March 2, 2020

On February 26, a long-running legal battle over the scope of the Foreign Corrupt Practices Act (“FCPA”) took another turn when a federal trial court judge ordered that former Alstom executive Lawrence Hoskins be acquitted of the FCPA charges against him.

Hoskins was initially charged in 2013, but during the course of pre-trial litigation, the U.S. Court of Appeals for the Second Circuit ruled that a nonresident foreign national like Hoskins cannot be found liable for violating the anti-bribery provisions of the FCPA under conspiracy or accomplice theories if he could not otherwise be held directly liable under the statute. Accordingly, at trial, the government sought to prove that Hoskins had been acting as an *agent* of a U.S.-based company when he allegedly helped to oversee a bribery scheme in Indonesia. The jury agreed with the government, finding that Hoskins had been an agent of French industrial company Alstom S.A.’s U.S. subsidiary at the relevant times and convicting Hoskins of conspiracy and substantive FCPA charges, as well as money-laundering charges.

Post-verdict, Hoskins moved for a judgment of acquittal on the basis that the government had failed to introduce sufficient evidence to support the requisite agency findings, and Judge Janet Bond Arterton of the U.S. District Court for the District of Connecticut agreed, ordering that Hoskins be acquitted of the FCPA charges, reasoning that although the U.S. subsidiary and Alstom worked together when the corrupt practices occurred, there was no evidence that the U.S. subsidiary *controlled* Hoskins’s actions sufficient to show an agency relationship. The Court, however, upheld Hoskins’s money-laundering convictions.

While the Court’s opinion is heavily fact-based, it shows the real impact of the Second Circuit’s decision narrowing the reach of the FCPA to nonresident foreign nationals, and the potential difficulties DOJ may have prosecuting non-U.S. persons for FCPA violations on an agency theory.

Background

As discussed in depth in a prior Davis Polk [client update](#), Hoskins, a British national, worked as an executive for Alstom’s U.K. subsidiary. According to the government, he helped oversee a bribery scheme to win a \$118 million contract to build power stations in Indonesia. The scheme involved hiring local consultants who would then transmit bribes to government officials; Hoskins allegedly assisted in the hiring of these individuals with the knowledge that some of the payments to the consultants would be used for bribes. In 2013, the U.S. Department of Justice (“DOJ”) charged Hoskins with FCPA and money-laundering violations. (Alstom itself [settled charges](#) with the government for these and other alleged corrupt practices in 2014.)

The FCPA's anti-bribery provisions apply to three categories of persons and entities: (1) **foreign or domestic issuers of U.S.-registered securities** and their officers, directors, employees, or agents who make use of interstate commerce in furtherance of a corrupt payment; (2) **"domestic concerns,"** which includes U.S. nationals, residents, and companies and their employees, agents, and other related persons if they make use of U.S. interstate commerce and, for certain U.S. persons, for conduct outside the United States regardless of whether they use U.S. interstate commerce; and (3) any other person or entity who, **while in the United States,** acts in furtherance of a corrupt payment.

Legal Theories: Conspiracy or Agency

The government argued that although Hoskins was not a U.S. national, was not in the United States at any of the relevant times, and did not work for an issuer of U.S.-registered securities, it could still prosecute him for FCPA offenses on two grounds: (i) that he was a co-conspirator with Alstom's U.S.-based subsidiary (a domestic concern) in the bribery scheme and (ii) that because of his working relationship with the U.S.-based subsidiary—Alstom Power Inc. ("API")—he was an "agent" of API.

The District Court, and later the Second Circuit Court of Appeals, **disagreed with DOJ on their first theory,** finding that Hoskins could not be liable as a co-conspirator unless he fell within one of the three enumerated classes. The Second Circuit, however, left open the possibility of finding Hoskins culpable as an agent of API. The government proceeded to trial on that theory and convicted Hoskins of the charged FCPA offenses, as well as money laundering offenses.

Agency Theory and the Court's Opinion

After his conviction, Hoskins moved for a judgment of acquittal, arguing, as relevant, that there was "not a shred of evidence that anyone at API had the right to (or actually did) exercise any control over any work that Mr. Hoskins performed, let alone in connection with" the bribery scheme. The District Court **agreed,** finding that the government "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" or "that API did control Mr. Hoskins's actions in a manner consistent with agency relationships." The Court thus overruled the verdict, acquitting Hoskins of the FCPA convictions, and ordering that, should its decision of acquittal be overturned on appeal, the government would have to commence a new trial against Hoskins in order to show he was liable as an agent of the U.S. company.

In reaching this conclusion, the Court reasoned from traditional agency principles, under which there are three requirements for an agency relationship: "(1) manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; *and* (3) the understanding of the parties that the principal is to be in control of the undertaking." This third requirement—the principal's control of the undertaking—was the crux of the issue in the *Hoskins* case.

The Court held that the control element is essential to a finding that one person is another's agent, and that for this control element to exist, the principal must be able to control the agent's actions. The Court further stated that agency goes beyond a simple agreement for one person to do something for another—it is a "fiduciary relationship," meaning that the agent must act loyally and in good faith toward the principal. Another crucial component of an agency relationship is the principal's right to fire, reassign, or demote the agent, or to affect the agent's compensation.

Hoskins argued that because he actually had the authority to approve or reject the contracts at issue in the bribery scheme, and was not subject to firing, demotion, or reassignment from API, he could not have been an agent. DOJ countered that it had presented “overwhelming documentary evidence” that Hoskins took orders from API and carried those orders out according to API’s instructions. For DOJ, this should have been sufficient to show that Hoskins was acting as Alstom’s agent, because it demonstrated that API was in control of the contracts at issue in the scheme, and that Hoskins was taking orders from API in carrying out the undertaking.

The Court accepted that the government had shown API controlled the corrupt hiring of consultants and that API gave Hoskins instructions, which he followed. Nevertheless, this was not enough to show that Hoskins was API’s agent, because there was no evidence that API had the right to control Hoskins’s actions. The Court characterized Hoskins’s carrying out instructions from API as “assistance,” which was not indicative of API’s right to control Hoskins. Of particular importance, there was no indication that API had any right to terminate Hoskins’s employment or involvement in the undertaking, and if API did not have the ability to fire Hoskins or remove him from the project, then no agency relationship could exist.

While the Court acquitted Hoskins of the FCPA charges against him, it denied his motion as to his money laundering convictions, where it found the evidence presented at trial was sufficient to sustain the jury’s verdicts.

Potential Implications

As an initial matter, DOJ may appeal the District Court’s rulings, but it is not clear that DOJ will do so. For one thing, the opinion is heavily fact-based: Hoskins himself was not employed by the U.S. subsidiary, raising the factual question of whether the U.S. subsidiary was controlling his actions. Where, for example, the relevant foreign individual is employed by the foreign subsidiary of a U.S. company, it would likely be more straightforward for the government to establish that the individual was acting as the U.S. company’s employee or agent. Further, the money laundering convictions have been sustained, and even if the government were successful in overturning the judgments of acquittal, the Court alternatively granted Hoskins’s motion for a new trial on the FCPA charges. Regardless of how this plays out in this particular case, the Court’s decision is a reminder that the Second Circuit’s narrowing of the extraterritorial application of the FCPA has real teeth.

The Second Circuit’s 2018 ruling that the government cannot use conspiracy or accomplice theories of liability to reach a person unchargeable as a principal is not without controversy. It directly contradicted DOJ’s views in its 2012 [Resource Guide to the U.S. Foreign Corrupt Practices Act](#), which stated that foreign nationals and companies may be liable for conspiring to violate the FCPA “even if they are not, or could not be, independently charged with a substantive FCPA violation.” Other courts have also disagreed with the Second Circuit. In 2019, the U.S. District Court for the Northern District of Illinois [found](#) that the Second Circuit’s holding in *Hoskins* contradicts Seventh Circuit precedent on accomplice and conspiracy liability, setting up a potential future circuit split between the Second and Seventh Circuits on this issue.

The District Court’s *Hoskins* ruling is a reminder that resort to an agency theory, as a way to avoid the implications of the Second Circuit’s opinion, potentially creates a heavy burden for the government. It remains to be seen how much of an obstacle Second Circuit law will be for DOJ in future FCPA prosecutions, given the heavily fact-based nature of the issue, but the District Court’s ruling may further incentivize DOJ to bring FCPA cases against non-U.S. persons in other Circuits, when available, to avoid the issue.

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The Court's opinion can be found [here](#).

Previous Davis Polk client alerts discussing the *Hoskins* case can be found [here](#) and [here](#).

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