

February 12, 2018

## **Second Circuit Vacates and Remands Judgment against Arab Bank in Antiterrorism Act Lawsuit**

On February 9, 2018, the United States Court of Appeals for the Second Circuit handed down a decision recognizing important limitations on the scope of the Antiterrorism Act (“ATA”).<sup>1</sup> The Court vacated the district court’s judgment against Arab Bank following a six-week jury trial, and remanded the case to the district court. In doing so, the Second Circuit clarified the elements a plaintiff must plead and prove to establish that a defendant committed an “act of international terrorism” under the ATA. The Second Circuit also became one of the first courts in the nation to provide guidance on the ATA’s new secondary liability provision.

This decision is important because of the recent proliferation of ATA cases brought by enterprising plaintiffs’ lawyers. Plaintiffs have sought to expand the universe of defendants subject to liability under the ATA by bringing litigation against, *inter alia*, financial institutions and pharmaceutical suppliers and manufacturers that do business with sovereign governments and government agencies that allegedly have some connection to terrorist organizations. Likewise, plaintiffs have sought to expand the definition of what is considered a terrorist organization, as shown by a recent case brought under the ATA concerning banking services allegedly provided to Mexican drug cartels. The Second Circuit’s opinion should make those efforts more difficult, clarifying the strict requirements to pleading and proving an “act of international terrorism.”

We discuss the opinion and its implications below.

### **The Antiterrorism Act**

The ATA created a civil action for damages for United States nationals injured by acts of international terrorism. It was enacted in 1992, in response to the hijacking and murder of Leon Klinghoffer by the Palestine Liberation Organization aboard the Achille Lauro cruise ship. The statute provides that “[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefore in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”<sup>2</sup>

Importantly for purposes of the Court’s decision, the ATA defines “international terrorism” as:

Activities that –

- (A) Involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) Appear to be intended –
  - (i) to intimidate or coerce a civilian population;
  - (ii) to influence the policy of a government by intimidation or coercion; or
  - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.<sup>3</sup>

Prior to 2016, the ATA provided a civil remedy only against the principals perpetrating acts of international terrorism; it did not provide a civil remedy against secondary actors that, while not committing international terrorist acts themselves, facilitated acts by others.<sup>4</sup> Nonetheless, plaintiffs could seek to bring claims for providing material support to terrorists as primary liability claims under the ATA pursuant to 18 U.S.C. § 2339B, which makes it a felony knowingly to provide material support to a designated foreign terrorist organization (“FTO”). The ATA recognizes that providing financial services is a form of material support.<sup>5</sup>

On September 28, 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (“JASTA”),<sup>6</sup> which expanded ATA civil liability to reach those who aid and abet, by knowingly providing substantial assistance, or who conspire with the person who committed such an act of terrorism, where such acts were planned, committed or authorized by an FTO.<sup>7</sup> JASTA expressly was not limited to terrorist acts occurring after the statute’s enactment, but rather allowed for secondary liability claims to be asserted as of the date the act of international terrorism was committed, planned or authorized.<sup>8</sup>

### **History of the Arab Bank Litigation**

Plaintiffs on the consolidated appeal are victims, or the relatives of victims, of three terrorist attacks committed in Israel by Hamas between March 2002 and June 2003.<sup>9</sup> Along with hundreds of other victims of Hamas attacks and their surviving relatives, plaintiffs brought actions in the Eastern District of New York against Arab Bank beginning in July 2004. Plaintiffs generally allege that Arab Bank facilitated the terrorist attacks by knowingly providing financial services to Hamas, Hamas-controlled charities, and

the “Saudi Committee for the Support of the Intifada Al-Quds,” an entity that made payments to the families of Hamas suicide bombers.<sup>10</sup>

Plaintiffs asserted that Arab Bank’s provision of financial services to Hamas, its leaders, operatives and affiliated charities constituted acts of international terrorism.<sup>11</sup> Plaintiffs relied on 18 U.S.C. § 2339B, which makes it a felony to knowingly provide material support to an FTO, as the underlying criminal violation for the alleged acts of terrorism.

Based on Arab Bank’s refusal to produce requested banking records due to the bank-secrecy laws of certain countries, including Lebanon and Egypt, the district court imposed extreme discovery sanctions. The district court ordered, *inter alia*, that it would allow the jury to infer that the bank had knowingly provided banking services to terrorists in the relevant time period, and that the bank was prohibited from making any argument or offering any evidence of its state of mind that might be contained in the withheld documents.<sup>12</sup>

Following a six-week trial, the jury found Arab Bank liable for injuries resulting from the terrorist attacks, and the district court substantially denied Arab Bank’s post-trial motions.<sup>13</sup> Rather than proceed to a scheduled bellwether trial on damages, the parties stipulated to a damages award of \$100,000,000, which the district court certified as final.<sup>14</sup> At the same time, the parties entered into a confidential settlement, providing that the bellwether plaintiffs would be paid various monetary amounts depending on whether the certified judgment was affirmed, reversed, or vacated, and the parties agreed to forego retrial in the event of vacatur and remand.<sup>15</sup>

### **Arab Bank’s Appeal**

Arab Bank argued on appeal that the judgment should be reversed on three grounds:

- the district court incorrectly instructed the jury on the ATA’s “act of international terrorism” element, 18 U.S.C. § 2331(1);
- the bank was unfairly prejudiced by discovery sanctions; and
- the district court incorrectly instructed the jury that it needed to find proximate cause, rather than but-for cause, as an element of plaintiffs’ claim, but nonetheless the evidence at trial was insufficient as a matter of law to permit a finding that the bank’s provision of financial services was either a proximate cause or but-for cause of plaintiffs’ injuries.

### **The Second Circuit's Opinion**

The Court ruled that the district court improperly instructed the jury as to the ATA's "act of international terrorism" element, and rejected plaintiffs' contention that the error was harmless. As a result, the Court vacated the judgment and remanded the case to the district court. It did not reach the other issues raised on appeal because of the parties' settlement foregoing retrial in lieu of a specified money payment.<sup>16</sup>

#### ***The "Act of International Terrorism" Instruction***

The district court charged the jury that, as a matter of law, proof that Arab Bank violated § 2339B—which criminalizes the provision of material support to an FTO—necessarily proved the bank's commission of an act of international terrorism.<sup>17</sup> On appeal, the Second Circuit held this was error. For an act to constitute an "act of international terrorism" under § 2331(1), *one* of the required elements is that the act would violate federal or state law if it had been committed within the U.S. A violation of § 2339B certainly satisfies that *part* of the definition. But, to qualify as international terrorism, the act must meet the other elements of § 2331(1) as well—meaning it must *also* involve violence or endanger human life; appear to be intended to intimidate or coerce a civilian population or influence or affect government; and it must have occurred primarily outside the U.S.<sup>18</sup> Thus, the district court was required to charge that all these elements be met for Arab Bank to be found liable. It was error to instruct the jury that a finding that Arab Bank provided material support to Hamas in violation of § 2339B was alone sufficient to prove the bank's commission of an act of international terrorism.<sup>19</sup>

The Court harmonized its decision with the Seventh Circuit's decision in *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7<sup>th</sup> Cir. 2008). In *Boim*, the jury found that defendants, which had donated money to Hamas and Hamas-affiliated charities knowing that Hamas used such money to finance the killing of Israeli Jews, were liable under the ATA.<sup>20</sup> The Seventh Circuit rejected the argument that such donations could not be found to be acts of international terrorism as a matter of law—not by holding that such donations are always acts of terrorism—but rather by holding that they are acts of terrorism if the requirements of § 2331(1) are met.<sup>21</sup> The Seventh Circuit further found that the jury could properly reach this conclusion, analogizing the donation of money to Hamas with "giving a loaded gun to a child," *i.e.*, that it was an act "dangerous to human life."<sup>22</sup> Comparing this case to *Boim*, the Second Circuit noted that it need not conclude whether a jury could find that direct donations to a known terrorist satisfy § 2331(1)'s definitional requirements for an act of terrorism. It concluded, however, that providing routine financial services to members of a terrorist organization is not so akin to providing "a loaded gun to a child as to excuse the charging error here and compel a finding that as a matter of law, the services were violent or life-endangering acts that appeared intended to intimidate or coerce civilians or to influence or affect governments."<sup>23</sup>

***The Instruction Error Was Not Harmless***

Plaintiffs made two arguments urging the Court to affirm the judgment despite the instruction error.

First, plaintiffs argued that the jury's causation determination was the functional equivalent of a finding that Arab Bank's actions endangered human life and appeared intended to further terrorist intimidation or coercion.<sup>24</sup> The Court rejected this argument, noting that the causation instruction did not require any such finding and the jury's finding of causation was not the equivalent of finding that Arab Bank met the § 2331(1)'s definition of an act of international terrorism.<sup>25</sup>

Second, plaintiffs argued that Congress's post-trial enactment of JASTA to provide for aiding and abetting liability eliminated the requirement to show that Arab Bank's own actions involved violence or danger and appeared intended to intimidate or coerce civilians or to influence or affect government. The Court notably agreed that, under an aiding and abetting theory, plaintiffs would not have to prove that the bank's own acts constituted international terrorism satisfying the definitional requirements of § 2331(1).<sup>26</sup> Nevertheless, the Court concluded that the instructional error was not harmless because there was insufficient evidence for the Court to conclude that plaintiffs would have succeeded on a secondary liability theory as a matter of law.<sup>27</sup>

For example, the jury was not instructed, and therefore made no findings, as to the various elements of aiding and abetting.<sup>28</sup> Nor were they instructed as to the factors relevant to the element of substantial assistance. Importantly, the Court held that aiding and abetting an act of international terrorism under JASTA requires more than the provision of material support to a terrorist organization—aiding and abetting requires that the secondary actor be “aware” that, by assisting the principal, it is itself assuming a role in terrorist activities.<sup>29</sup> This “awareness” does not require proof of the specific intent required for criminal aiding and abetting liability (an intent to participate in a criminal scheme as something he wishes to bring about and seek by his action to make it succeed); nor does this “awareness” require knowledge of the specific attacks.<sup>30</sup> But it does require a general awareness that the bank was playing a role in the terrorist's violent or life-endangering activities. This scienter requirement is different from that required under § 2339B, which requires only knowledge of the organization's connection to terrorism, not intent to further its terrorist activities or awareness that one is playing a role in those activities.<sup>31</sup> Thus, the Court concluded that the evidence presented could not compel a finding of secondary liability as a matter of law and, as a result, the error was not harmless.<sup>32</sup>

Finally, Arab Bank argued that, rather than vacate and remand, the Court should reverse the verdict, because the evidence presented was legally insufficient to prove causation under either a but-for standard or a proximate cause standard.<sup>33</sup> The Court noted that Arab Bank's challenge was based on plaintiffs' trial theory that Arab Bank itself committed an act of international terrorism. The Court held that it did not need to reach that question because, after JASTA, plaintiffs were not limited in a new trial to proving their claim on a theory of Arab Bank's primary liability; rather they could prove Arab Bank's liability on an

aiding and abetting theory, under which they need only to show that the acts of terrorism caused their injury, not that Arab Bank's substantial assistance was the cause.<sup>34</sup> Therefore causation did not provide grounds for reversal.<sup>35</sup>

### **Implications of the Decision**

The Second Circuit opinion has several implications for defendants facing ATA claims. With respect to primary liability claims, the Court made clear that the provision of financial services in violation of § 2339B does not, in and of itself, constitute an act of international terrorism. Plaintiffs must prove—and, in the first instance, plead—all of the requirements of § 2331(1). This significantly heightens a plaintiff's burden to overcome a motion to dismiss, and, if the case proceeds, makes it more difficult to prove plaintiff's claims at trial. In particular, as ATA litigation continues to expand, reaching financial institutions and pharmaceutical companies, among others, it will be a difficult hurdle for plaintiffs to plead and prove that reputable corporations engaged in conduct "intended to intimidate or coerce a civilian population or to influence or affect a government" or that such a defendant's act "involved violence or endanger[ed] human life."<sup>36</sup>

The Court also provided much-needed guidance on ATA aiding and abetting claims. *First*, the Court noted that, under an aiding and abetting theory, plaintiffs need not prove that defendant's own acts constituted international terrorism under § 2331(1). *Second*, the Court held that aiding and abetting an act of international terrorism under JASTA requires more than the provision of material support to a terrorist organization—aiding and abetting requires that the secondary actor be "aware" that, by assisting the principal, it is itself assuming a role in terrorist activities. The court stated that this "awareness" does not require proof of the specific intent demanded for criminal aiding and abetting liability or require knowledge of the specific attacks at issue. But it does require a general awareness that the defendant was playing a role in the terrorist's violent or life-endangering activities. *Third*, the Court held that a plaintiff need only show that the act of terrorism, not the act of the aider and abettor, caused plaintiffs' injury. Each of these holdings gives some clarity to litigants navigating this new statutory scheme.

\* \* \*

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:

Jack Baughman

+1-212-373-3021

[jbaughman@paulweiss.com](mailto:jbaughman@paulweiss.com)

Jessica S. Carey

+1-212-373-3566

[jcarey@paulweiss.com](mailto:jcarey@paulweiss.com)

Roberto J. Gonzalez

+1-202-223-7316

[rgonzalez@paulweiss.com](mailto:rgonzalez@paulweiss.com)

Jeh Charles Johnson

+1-212-373-3093

[jjohnson@paulweiss.com](mailto:jjohnson@paulweiss.com)

Brad S. Karp

+1-212-373-3316

[bkarp@paulweiss.com](mailto:bkarp@paulweiss.com)

Daniel H. Levi

+1-212-373-3497

[dlevi@paulweiss.com](mailto:dlevi@paulweiss.com)

---

<sup>1</sup> *Linde v. Arab Bank, PLC*, Nos. 16-2119-cv (L), 16-2098-cv (CON), 16-2134-cv (CON), on appeal from the United States District Court for the Eastern District of New York. The decision was authored by Judge Raggi, and joined by Judge Carney and Judge Kaplan (sitting by designation).

<sup>2</sup> 18 U.S.C. § 2333(a).

<sup>3</sup> 18 U.S.C. § 2331(1).

<sup>4</sup> See *Rothstein v. UBS AG*, 708 F.3d 82, 97 (2d Cir. 2013) (the ATA's "statutory silence on the subject of secondary liability means there is none").

<sup>5</sup> 18 U.S.C. § 2339A(b)(1); § 2339B(g)(4).

<sup>6</sup> Pub. L. No. 144-222, 130 Stat. 854 (Sept. 28, 2016) (codified at 18 U.S.C. § 2333(d)(2)).

<sup>7</sup> 18 U.S.C. § 2333(d)(2).

<sup>8</sup> *Id.*

<sup>9</sup> Opinion at 4.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 10. Plaintiffs' claim that Arab Bank aided and abetted Hamas's acts of international terrorism was dismissed, as JASTA had not yet been enacted. *Id.*

<sup>12</sup> The Second Circuit declined to review the order before trial, 706 F.3d 92 (2d Cir. 2013) and the Supreme Court denied a writ of certiorari. 134 S. Ct. 2869 (2014). While Arab Bank again raised this issue to the Second Circuit in this most recent appeal, the Court did not reach the issue. Opinion at 37.

<sup>13</sup> Opinion at 5.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 5-6.

16 Although not raised by either party on appeal, the Court first engaged in analysis as to whether the parties' settlement affected  
its jurisdiction to hear the appeal. It concluded that it had both the statutory and constitutional authority to do so. Opinion at  
15-21.

17 Opinion at 22.

18 Opinion at 23 (citing *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 68 (2d Cir. 2012)).

19 *Id.* at 25.

20 549 F.3d at 690.

21 *Id.*

22 *Id.*

23 Opinion at 26-27.

24 *Id.* at 28. The jury was instructed that, in order to find proximate cause, it must find that (1) Arab Bank's "unlawful acts were a  
substantial factor in the sequence of events ... causing plaintiffs' injuries," and (2) those "injuries were reasonably foreseeable or  
anticipated as a natural consequence of such acts." *Id.* at 28-29 (ellipsis in original).

25 *Id.* at 29.

26 *Id.*

27 *Id.* at 29-30.

28 The three elements are: (1) "the party whom the defendant aids must perform a wrongful act that causes injury," (2) "the  
defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time he provides the  
assistance," and (3) "the defendant must knowingly and substantially assist the principal violation." Opinion at 30 (citing  
18 U.S.C. § 2333 Statutory Note (Findings and Purpose § 5) and *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983)).

29 Opinion at 31.

30 *Id.*

31 *Id.* at 32.

32 *Id.* at 33.

33 *Id.* at 35.

34 *Id.* at 36.

35 *Id.* at 37.

36 18 U.S.C. § 2331(1)(B).