

SECOND CIRCUIT VACATES JURY VERDICT IN ATA CASE

On February 9, 2018, in *Linde v. Arab Bank*,¹ the United States Court of Appeals for the Second Circuit issued an important decision making it more difficult for plaintiffs to hold financial institutions primarily liable under the Anti-Terrorism Act ("ATA")² for injuries they sustain in terror attacks. The court held that the mere provision of routine banking services to a terrorist organization (in this case, Hamas) does not by itself constitute "material support" to terrorists,³ but rather that plaintiffs also must show that the provision of those services met the definition of an "act of international terrorism," including the "inten[t]" to intimidate or coerce a civilian population, or to influence government policy or conduct through intimidation, coercion, or certain violent acts.⁴ As a result of this decision, ATA lawsuits against financial institutions and other commercial defendants will be less likely to succeed based on primary liability theories, but rather will focus on secondary liability theories of aiding and abetting and conspiracy, which Congress created through the 2016 Justice Against Sponsors of Terrorism Act ("JASTA").

BACKGROUND

The *Linde* case involves 16 plaintiffs who were victims or relatives of the victims of three terrorist attacks in Israel perpetrated by Hamas in 2002 and 2003. In 2004 the plaintiffs sued Arab Bank in the United States District Court for the Eastern District of New York under the ATA's civil remedies provision, alleging that Arab Bank facilitated the attacks by knowingly processing funds transfers for Hamas and Hamas controlled charities, which in turn financed the terrorist attacks. Plaintiffs argued that the charities used the funds to disseminate Hamas

¹ *Linde v. Arab Bank*, 16-2119-cv (L) (2d Cir. 2018).

² 18 U.S.C. § 2333.

³ 18 U.S.C. § 2339B.

⁴ 18 U.S.C. §§ 2331(1), 2333(a).

propaganda, support Hamas-affiliated terrorists, make payments to the families of Hamas suicide bombers and, in some cases, make payments for suicide bombings.

The trial court instructed the jury that providing "material support" to a foreign terrorist organization in violation of Section 2339B of the ATA "is itself an act of international terrorism" leading to civil liability under Section 2333(a)—specifically, that "as a matter of law, if you find the plaintiffs have proved by a preponderance of the evidence that the defendant violated Section 2333B . . . you must find that plaintiffs have proved that defendant committed an act of international terrorism." The jury entered a verdict of liability against Arab Bank.

Rather than proceed to trial on damages, the parties stipulated to a \$100,000,000 judgment and entered into a confidential settlement agreement allowing for an appeal, with the final settlement amount to be determined by the result on appeal. In *Linde*, the Second Circuit has now held that the trial court's instruction was erroneous and has vacated the judgment and remanded the case.

The Second Circuit addressed three principal grounds that are relevant to financial institutions and other companies facing pending or potential ATA lawsuits.⁵

PRIMARY LIABILITY UNDER THE ATA

The Second Circuit held that the trial court erred in instructing the jury that a finding of "material support" to terrorists automatically constitutes an "act of international terrorism" leading to liability. The Second Circuit focused on the ATA's civil remedies provision, which provides a cause of action to civil plaintiffs—specifically, to "any national of the United States injured in his person, property or business by reason of an act of international terrorism." In turn, the ATA defines "act[s] of international terrorism" as "activities that (A) involve violent acts which involve or endanger human life in violation of the criminal laws of the United States; (B) appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States."⁶

The Second Circuit held that although providing financial services to a known terrorist organization may constitute material support to the organization, it does not automatically do so. "Specifically, . . . providing financial services to a known terrorist organization may afford material support to the organization even if the services themselves do not involve violence or endanger life and do not manifest the apparent intent required by" the definition of "act of international terrorism." Accordingly, the Second Circuit held that for primary liability to attach, the plaintiffs also had to prove that Arab Bank's conduct met each element of Section 2331's definition of "act of international terrorism."⁷

The Second Circuit reconciled its decision with the Seventh Circuit's decision in *Boim v. Holy Land Foundation for Relief and Development*, in which the Seventh Circuit upheld liability for giving direct monetary donations to Hamas with the

⁵ Clifford Chance submitted an *amicus* brief to the Second Circuit on behalf of the Institute of International Bankers in support of Arab Bank.

⁶ 18 U.S.C. 2333(1).

⁷ *Linde*, at 25.

knowledge that Hamas used the funds to finance terrorist acts, analogizing "giving money to Hamas" to "giving a loaded gun to a child."⁸ According to the Second Circuit, the court in *Boim* did not hold that material support of terrorism is always an act of terrorism, but rather that it can be, if the plaintiff satisfies the definitional requirements of an act of international terrorism. The Second Circuit declined to decide whether it would conclude that direct monetary donations to a terrorist organization such as in *Boim* would satisfy that definition.

SECONDARY LIABILITY UNDER THE ATA

The Second Circuit also held that plaintiffs were entitled to rely on JASTA's amendment of the ATA to provide for aiding and abetting liability. JASTA authorizes civil suits against anyone who "aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism."⁹

While agreeing that plaintiffs could rely on JASTA, the Second Circuit noted that it could not conclude that the jury findings in this case necessarily satisfied an aiding and abetting claim, because there was no aiding and abetting charge and because the provision of material support does not automatically satisfy the elements of aiding and abetting. Rather, "aiding and abetting an act of international terrorism requires more than the provision of material support to a designated terrorist organization. Aiding and abetting requires the secondary actor to be "aware" that by assisting the principal, it is itself assuming a "role" in terrorist activities.¹⁰ Thus, for Arab Bank to have been liable for aiding and abetting Hamas's terrorist acts, the jury had to find that Arab Bank was "generally aware" that it was thereby playing a "role" in Hamas's act of international terrorism.¹¹

CAUSATION

The *Linde* court also addressed the issue of causation. Under Second Circuit precedent plaintiffs must prove that the defendant's actions proximately caused the injuries giving rise to the lawsuit for civil liability to attach.¹² The court in *Linde* stated that under JASTA, plaintiffs could show causation on the theory that Arab Bank aided and abetted acts of terrorism by others, and that those terrorist acts caused plaintiffs' injuries. Because there was no dispute that the Hamas terrorists caused the plaintiffs' injuries, causation was not a separate ground for reversal.¹³

The Second Circuit vacated the judgment and remanded the case for further proceedings—which, were it not for the parties' settlement, would likely have required a jury trial on the aiding and abetting claim. However, because the

⁸ 549 F.3d 685, 690 (7th Cir. 2008) (*en banc*).

⁹ Justice Against Sponsors of Terrorism Act ("JASTA") § 4(a), codified at 18 U.S.C. § 2333(d)(2). See https://www.cliffordchance.com/briefings/2016/09/jasta_expanded_liabilityunder.html.

¹⁰ *Linde*, at 31.

¹¹ *Linde*, at 32.

¹² *Rothstein v. UBS AG*, 708 F.3d 82 (2d Cir. 2013); see also *O'Neil v. Al Rajhi Bank (In re Terrorist Attacks of Sept. 11, 2001)*, 714 F.3d 118 (2d Cir. 2013) (holding that the mere provision of routine banking services to terrorists does not necessarily support causation); *Fields v. Twitter No. 16-17165* (9th Cir. 2018) (holding that in the absence of facts alleging that an ISIS attack "was in any way impacted, helped by, or the result of ISIS's presence on the social network" Twitter, plaintiffs could not state an ATA claim).

¹³ *Linde*, at 36.

parties settled the matter with the amount depending only upon the result in the Second Circuit, no jury trial will occur.

RAMIFICATIONS

The *Linde* decision has significant ramifications for ATA liability for financial institutions and commercial entities for providing routine services to individuals or groups that commit terrorist acts. Because routine financial services and commercial services themselves are highly unlikely to involve violent acts, endanger life or manifest an intent to coerce a civilian population, plaintiffs will have difficulty proving a primary violation of the ATA, even under the material support provision.

Risk remains under JASTA's aiding-and-abetting and conspiracy provision. Even under that provision, however, *Linde* holds that a plaintiff must prove the elements of aiding and abetting and conspiracy, which include requirements of knowledge and intent—i.e., that the defendants were "aware" that by participating in the transactions they were assuming a "role" in the terrorist activities.

Moreover, although the point was not addressed in *Linde*, because JASTA imposes liability "against anyone who "aids and abets, by knowingly providing substantial assistance, or who conspires *with the person who committed such an act of international terrorism*," plaintiffs may need to show that the defendant aided and abetted or conspired with a person who actually committed, planned, or authorized, the terrorist attacks. The District Court for the Southern District of Illinois recently so held in a case involving an alleged conspiracy between a European bank and Iran, which in turn allegedly provided material support to Hezbollah.¹⁴ The court dismissed the complaint on the ground that it alleged the defendant bank conspired with Iran, not with Hezbollah.

To date, few cases have been litigated under JASTA's secondary liability provisions. Secondary liability for financial institutions and other commercial service providers thus remains an open battleground, which is likely to be the focus of future lawsuits brought under the ATA.

¹⁴ *Shaffer v. Deutsche Bank AG*, 16-CR-497 (S.D. Ill. Dec. 7 2017).

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