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Expert Analysis

The ATA: Some Sense Brought Back Into the Mix

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The Second Circuit's decision in *Linde v. Arab Bank*, 882 F.3d 314 (2d Cir. Feb. 9, 2018) has reintroduced some much needed discipline into the application of the Anti-Terrorism Act (ATA). The ATA, enacted in 1990, provides a private right of action for victims of an "act of international terrorism." The statute was intended to allow victims of terrorist attacks to sue the terrorists and the terrorist organizations responsible for those attacks. But over the past decade, courts have increasingly allowed plaintiffs to pursue claims under the ATA against banks in addition to, and often instead of, the terrorists actually responsible for the atrocities. Those lawsuits frequently center on the banks' provision of routine financial services to individuals or organizations accused of being connected to terrorism. The decisions in those cases, however, generally have given short shrift to a key element of the ATA: the requirement that a defendant commit an "act dangerous to human life." Indeed, in an article previously published in this journal, we questioned the shaky foundation for finding that bank transactions qualify as "acts dangerous to human life." See Lanier Saperstein and Geoffrey Sant, "Bad Acts Make Bad Law," N.Y.L.J. (Sept. 5, 2012).

> Judge Posner's rhetorical flourish, while clever, was not, and should not be, sufficient for satisfying a key statutory element of the ATA.

The basis cited by courts for claiming that bank transactions are "dangerous to human life" frequently was a rhetorical flourish by Judge Richard Posner of the Seventh Circuit in *Boim v. Holy Land Foundation for Relief and Development* (known as *Boim III*), 549 F.3d 685, 690 (7th Cir. 2008) (en banc). Judge Posner stated that financial donations may be considered "acts dangerous to human life" by equating giving money to Hamas with "giving a loaded gun to a child (which is also not a violent act), [but which] is an act dangerous to human life." Applying the reasoning of *Boim III*, courts throughout the country have, over the last 10 years, expanded the scope of the ATA to reach even the provision of routine banking services. Now, the Second Circuit has called into question the Seventh Circuit's reasoning in *Boim III*. That is important because, in our view, Judge Posner's rhetorical flourish, while clever, was not, and

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should not be sufficient for satisfying a key statutory element of the ATA.

'Boim'

In *Boim III*, the parents of a boy killed by Hamas in Israel sued several non-profit organizations in the United States that allegedly provided financial support to Hamas. The key issue was whether the provision of financial assistance to Hamas constituted an act of "international terrorism" giving rise to liability under the ATA. After finding that the ATA imposed only primary, not secondary, liability, the court found an "alternative and more promising ground for bringing donors to terrorist organizations within the grasp of" the ATA. While acknowledging that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability," the Seventh Circuit nevertheless concluded that through a complex "chain of incorporations by reference, Congress has expressly imposed [primary] liability on a class of aiders and abettors [under the ATA]."

The first link in that complex chain was the statutory definition of "international terrorism," which requires "activities that … involve violent acts or acts dangerous to human life" that violate U.S. criminal laws. See 18 U.S.C. §2331(1). Judge Posner in *Boim III* concluded that "giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life'" that violates federal criminal statutes prohibiting the provision of material support in furtherance of the killing or injuring of an American Citizen abroad.

Post-'Boim'

Seemingly driven by an understandable desire to reach a favorable outcome for victims of terrorism, other courts have expanded *Boim III*'s reasoning beyond financial donations to known terrorist organizations include even the routine processing of wire transfers by financial institutions.

Recently, however, the Second Circuit reined in this expansive view of primary liability under the ATA. Breaking from post-*Boim* jurisprudence, the Second Circuit in *Linde v. Arab Bank*, 882 F.3d 314 (2d Cir. Feb. 9, 2018) held that each of the statutory elements of an act of "international terrorism" must be met before primary liability may be imposed under the ATA. The provision of material support to a terrorist organization under 18 U.S.C. §2339B, on its own, is not enough; to qualify as "international terrorism," a defendant's actions must also involve violence or endanger human life and appear to be intended to intimidate a civilian population or influence a government. The Second Circuit explained that primary liability may be imposed, for example, on "a person who voluntarily acts as a suicide bomber for Hamas in Israel [and] thereby provide[s] material support to that terrorist organization while also committing a [violent] act of terrorism *himself*" that is intended to intimidate civilians or coerce governments. Id. at 326 (emphasis added).

The Second Circuit, in diplomatic fashion, called into question Judge Posner's reasoning in *Boim III* that monetary donations to a known terrorist organization satisfy the requirements of the ATA, especially those pertaining to endangering life and intimidating a civilian population or government. Without deciding the issue, the Second Circuit stated, "We conclude only that providing routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to … 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 influence or affect governments." The Second Circuit stated that its conclusion was reinforced by a decision that it had issued earlier in the ATA context, holding "the mere provision of routine banking services to organizations and

individuals said to be affiliated with terrorists does not necessarily establish causation" under the ATA. Id. at 327 (quoting *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 124 (2d Cir. 2013).

Secondary Liability

Boim III and its progeny likely resorted to the complex chain of statutory incorporations by reference because, before 2016, there was no secondary liability under the ATA. Motivated by an understandable desire to help victims of terrorism obtain favorable outcomes even if those results did not necessarily flow from the statute, courts engaged in what we consider judicial contortions in order to impose what they described as "primary" liability on defendants. What those courts, in effect, were doing was imposing secondary liability on financial institutions under the guise of primary liability. With the enactment of the Justice Against Sponsors of Terrorism Act (JASTA) in 2016, which provides for aiding and abetting liability under the ATA for acts of international terrorism involving designated Foreign Terrorist Organizations, courts now have a safety valve. They need not engage in mental gymnastics and can impose, where appropriate, aiding and abetting liability on defendants.

When imposing secondary liability under JASTA, courts should avoid committing the same mistakes. Rather than imposing secondary liability in an expansive manner unhinged from the text of the statute, courts would be wise to ensure that all three elements specified by Congress as necessary for aiding and abetting liability have been met, which will include, among other things, applying a six-factor balancing test. The Second Circuit's decision in *Linde v. Arab Bank* again serves as a guide in this respect.

JASTA was enacted after *Linde* was tried in the district court. The jury, therefore, was not instructed, and made no findings, as to the civil elements of aiding and abetting. Despite the plaintiffs' urging, the Second Circuit refused to conclude as a matter of law that the bank was secondarily liable under the ATA without the benefit of any district court proceedings on secondary liability or jury findings on certain disputed material facts.

Other courts should demonstrate similar restraint because imposing terrorist-related liability on financial institutions for the provision of routine financial services is far from cost-free. If secondary liability is imposed in an unconstrained manner, banks will cease doing business in risky regions or with categories of risky customers in order to avoid the risk of accidentally providing banking services to bad actors. This process, known as de-risking, has already further destabilized troubled regions and has stripped vulnerable communities of stable financial institutions. To avoid being held as financial guarantors of terrorism committed by third parties, banks may profile customers and recipients of wire transfers, or refuse altogether to serve certain classes of people based on religion, ethnicity or nationality.

To take one example, banks understandably are skittish about wiring money to Syrian charities. Even if a bank conducts heightened due diligence and ensures that 99.9 percent of the transfers go to help Syrian refugees, so long as one dollar gets into the wrong hands, the bank may be exposed to civil lawsuits seeking hundreds of millions dollars in damages, not to mention the reputational harm that comes along with those lawsuits. Unfortunately, it is easy to allege terrorist financing—all it takes is a computer and a printer—and those allegations have an expensive and profound impact on the financial institutions targeted and the customers and regions served. Courts must look beyond mere and often inflammatory allegations and apply the law in a measured fashion.