SULLIVAN & CROMWELL LLP

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Anti-Terrorism Act Liability for Financial Institutions

Jury Verdict Against Arab Bank PLC Under Anti-Terrorism Act; Second Circuit Analyzes Requisite Scienter for Pleading ATA Violation

SUMMARY

The past decade has witnessed a surge in the number of cases brought under the federal Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.* ("ATA"), against financial institutions, oil companies, food distribution companies, and other major corporations. September 22, 2014 marked two more notable events in this rapidly developing area of the law. First, in what has been one of the most high-profile ATA actions to date, a jury in the Eastern District of New York found Arab Bank PLC liable for ATA violations in *Linde* v. *Arab Bank, PLC*, No. 04-CV-2799. On the same day, the U.S. Court of Appeals for the Second Circuit reinstated ATA claims against National Westminster Bank ("NatWest"), holding that to violate the ATA, a defendant need only have knowledge that, or be deliberately indifferent to whether, it provided material support to a terrorist organization, and need not have knowledge of whether that support actually aided terrorist activities. *See Weiss* v. *National Westminster Bank PLC*, No. 13-1618-cv.

BACKGROUND

The ATA provides for a private right of action for treble damages to any U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism." 18 U.S.C. § 2333(a). The statute defines "international terrorism" to include "activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States." 18 U.S.C. § 2331(1)(A). In ATA cases filed against financial institutions, plaintiffs have alleged that a financial institution violated the criminal laws prohibiting persons from knowingly providing material support to a foreign terrorist organization ("FTO"), as designated by the U.S. Department of State, or to an organization that engages

in terrorist activity, which includes soliciting funds for an FTO. 18 U.S.C. § 2339B(a)(1). "Material support" is defined broadly to include the provision of "financial services." 18 U.S.C. § 2339B(g)(4).

JURY VERDICT IN *LINDE* V. *ARAB BANK, PLC* (E.D.N.Y.)

From 2004 to 2011, a total of 13 civil lawsuits were filed in the U.S. District Court for the Eastern District of New York against Arab Bank, alleging that Arab Bank was involved in facilitating terrorist financing. One of these actions, *Linde* v. *Arab Bank, PLC*, No. 04-CV-2799 (E.D.N.Y.), was filed in July 2004 by the victims and their families of 24 suicide bombings and other terrorist attacks linked to Hamas. The plaintiffs alleged that Arab Bank violated the ATA by knowingly providing banking services to (i) Hamas; (ii) charitable organizations that funded Hamas and the Palestinian Islamic Jihad; and (iii) the Saudi Committee in Support of the Intifada Al Quds (the "Saudi Committee"), which allegedly provided "insurance" benefits to the families of deceased terrorists, including members of Hamas.

During discovery in *Linde*, Arab Bank withheld the production of certain customer bank account records on the basis of non-U.S. bank secrecy laws. On July 12, 2010, the Honorable Nina Gershon sanctioned Arab Bank for refusing to produce those records. Among other things, the district court concluded that Arab Bank had not acted in good faith by, among other things, writing letters to non-U.S. banking regulators requesting permission to produce the account records that were "calculated to fail" and that mischaracterized plaintiffs' claims.

As a sanction, the district court ordered that, at trial, it would instruct the jury that it could infer that Arab Bank knowingly (i) "provided financial services to organizations designated by the United States as [FTOs], and to individuals affiliated with the FTOs"; and (ii) "processed and distributed payments on behalf of the Saudi Committee to terrorists, including those affiliated with named terrorist organizations and those who are unaffiliated, their relatives, or representatives." In addition, the court precluded Arab Bank from (i) "making any argument or offering any evidence regarding its state of mind or any other issue that would find proof or refutation in withheld documents"; and (ii) "introducing in pre-trial motions or at trial any evidence withheld on foreign bank secrecy grounds."

Arab Bank appealed and petitioned the Second Circuit for a writ of mandamus challenging the sanctions. On January 18, 2013, the Second Circuit dismissed the appeal for lack of jurisdiction and denied the mandamus petition, holding that although the sanction was severe, it was not equivalent to a default judgment, that the district court did not clearly abuse its discretion, and that Arab Bank could challenge the sanction on ordinary appellate review following a final judgment. On June 30, 2014, the U.S. Supreme Court denied Arab Bank's petition for a writ of certiorari.

The district court also denied Arab Bank's motion for summary judgment on causation grounds. The district court interpreted Second Circuit precedent to require that, with respect to causation, a plaintiff need prove only that a defendant's acts "were a substantial factor in the sequence of responsible

causation," and that the plaintiff's "injury was reasonably foreseeable or anticipated as a natural consequence" of those acts.

In addition, the district court excluded from trial evidence (i) of Arab Bank's compliance practices and (ii) that certain organizations were not terrorist organizations, but were, in fact, known and endorsed by the United States and other countries. The court concluded that evidence of compliance with non-U.S. law was irrelevant to the alleged violations of the ATA and that expert testimony regarding whether specific organizations, such as the Saudi Committee, had humanitarian intentions in aiding Palestinians improperly concerned the state of mind of those organizations. Arab Bank, seeking to challenge the causation and evidentiary rulings, filed another unsuccessful mandamus petition to the Second Circuit.

On September 22, 2014, after a 30-day trial presided over by the Honorable Brian Cogan and two days of deliberation, a jury concluded that Arab Bank was liable for violating the ATA with respect to all 24 of the relevant terrorist attacks. The jury instructions included an adverse inference instruction substantively identical to the language proposed by the district court in its sanctions order. Witnesses at trial included a former Israeli military official, who testified for plaintiffs that Arab Bank transferred over $4 million during 2000-2001 to as many as two dozen Hamas members, and that he was only able to review limited account information because of the Bank's refusal to produce additional documents (a fact that the plaintiffs' lawyers also highlighted during closing arguments). After the verdict, one juror was quoted as saying that "the money and the financing is the oxygen for the terrorists."

Damages will be determined in a subsequent trial, which is yet to be scheduled. Arab Bank has stated its intention to appeal the verdict; its press release cites as "significant errors" the adverse rulings discussed above.

SECOND CIRCUIT OPINION IN *WEISS* V. *NATIONAL WESTMINSTER BANK PLC*

On September 22, 2014, the Second Circuit addressed the requisite scienter for liability under 18 U.S.C. § 2333(a) predicated upon a violation of 18 U.S.C. § 2339B(a)(1), which prohibits providing material support to FTOs or organizations that engage in terrorist activity. In reinstating ATA claims against NatWest, the Second Circuit held that such liability can be sustained where the defendant had knowledge that, or exhibited deliberate indifference to whether, it provided material support to a terrorist organization, irrespective of whether that support aided terrorist activities.

In *Weiss*, the Honorable Dora Irizarry of the Eastern District of New York granted NatWest summary judgment on ATA claims brought by 200 plaintiffs who were victims of terrorist attacks by Hamas in Israel, holding that there was no triable issue on whether NatWest had the requisite scienter for liability under 18 U.S.C. § 2333(a). The district court concluded that there was insufficient evidence of NatWest's knowledge or suspicion of terror financing, despite its provision of banking services to a non-profit

("Interpal") that was designated by the U.S. government as a Specially Designated Global Terrorist ("SDGT") for transferring money to Hamas.

On appeal, the Second Circuit vacated the judgment and remanded the case to the district court. The Second Circuit held that Section 2333(a) incorporates the knowledge requirement of Section 2339B(a)(1), which, following *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010), "prohibits the knowing provision of *any* material support to terrorist organizations without regard to the types of activities supported." In other words, "Section 2339B(a)(1) does not require a showing that [the defendant] knew it was providing material support for terrorist activity."

The Court held that because Hamas is designated as an FTO, to establish liability, plaintiffs were required to show only that NatWest provided material support to Interpal with "actual knowledge that Interpal provided material support to Hamas, or . . . deliberate indifference to whether Interpal provided material support to Hamas." The Second Circuit concluded that the district court erroneously "focused on NatWest's employees' knowledge of Interpal's *terror financing* as opposed to their knowledge of Interpal's financing of *a terrorist organization*."

The Second Circuit further found that the district court "gave inappropriate weight" to the determination of certain British authorities—namely, the Charity Commission for England & Wales, the Metropolitan Police Special Branch, and the Bank of England—to condone NatWest's relationship with Interpal. The Second Circuit noted that the findings of those British authorities relied only on the conclusion that Interpal did not support Hamas' terrorist activities, not "whether Interpal provided any material support to Hamas, regardless of purpose." In addition, "[e]ven if the British authorities had investigated whether Interpal provided material support to Hamas for any purpose and had concluded that Interpal had no links to Hamas at all, . . . in the face of contrary findings—in this case by the United States Treasury Department—such views of foreign governments could not support summary judgment."

The Second Circuit concluded that plaintiffs had presented sufficient evidence to create a triable issue of fact on the question of scienter based on (i) evidence of NatWest's knowledge of Interpal's SDGT designation, including that Interpal provided payments to Hamas; (ii) evidence of NatWest's knowledge of payments from Interpal's accounts at NatWest to Hamas and other suspected terrorist organizations; (iii) evidence that NatWest "had accounts for people connected to Hamas"; and (iv) testimony from the head of NatWest's Group Security and Fraud Office that NatWest would terminate a customer relationship for suspected terror financing only if the customer was convicted or if there was clear evidence that the funds were used to directly support terrorist activities.

The Second Circuit instructed the district court on remand to consider NatWest's other arguments for dismissal, including standing and causation.

IMPLICATIONS

The Arab Bank verdict and the Second Circuit's *Weiss* decision mark a continuation of the recent increase in the number of ATA lawsuits brought against major financial institutions, oil companies and food distribution companies.

Arab Bank has stated that it will appeal the verdict. Regardless of the outcome of that appeal, banks (and other corporations) involved in U.S. litigation involving documents located outside the United States should be cognizant of the various U.S. and non-U.S. legal issues surrounding the production of those documents. In view of the district court's sanctioning of Arab Bank for failure to produce such documents despite the fact that it had sought permission from its non-U.S. bank regulators, companies should be aware of (i) the importance of demonstrating that they have undertaken significant, good-faith efforts to navigate the conflict posed by the intersection of U.S. discovery rules and non-U.S. blocking or bank secrecy statutes, and (ii) the potentially severe consequences for refusing to produce documents after being ordered to do so by a U.S. court.

As with Arab Bank, regardless of whether NatWest ultimately will succeed in its defense on grounds other than scienter, the Second Circuit's rejection of NatWest's reliance on British authorities' condoning of its relationship with the entity at issue is instructive. The Second Circuit's focus on Interpal's SDGT designation, in contrast to the findings of British authorities, underscores the importance for non-U.S. banks to ensure regular communication with relevant U.S. regulators regarding anti-money laundering and sanctions compliance. In addition, the decision further highlights the importance of maintaining comprehensive and robust anti-money laundering and sanctions compliance measures in accordance with U.S. law.

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