Discovering New Ways to Deter Terrorism: The ATA and the Cross-Border Discovery Catch-22

Federal judges have a variety of tools to sanction litigants who fail to comply with discovery orders.[1] After years of discovery disputes in *Linde v. Arab Bank, PLC*,[2] the district judge issued "severe" sanctions against Arab Bank, which, according to the bank's attorneys, turned a multi-billion-dollar case "into a show trial."[3] The plaintiffs are thousands of victims and family members of victims of Palestinian terrorist attacks that occurred in Israel between 1995 and 2004.[4] The plaintiffs alleged that the bank violated the Anti-Terrorism Act (ATA) by providing material support and resources to foreign terrorists with the knowledge or intention that they would be used in the preparation or execution of the aforementioned attacks.[5] The allegations included claims that the bank assisted in administering a "death and dismemberment benefit plan," and provided other types of financial services to terrorist organizations.[6]

During the pretrial discovery phase of the case, Arab Bank refused to produce a sizable portion of the requested materials, claiming that doing so would subject them to liability under foreign law. The district court applied a commonly used balancing test, holding that the plaintiffs' interests in receiving information vital to the litigation, coupled with the United States' interest in combating terrorism, outweighed the bank's privacy interests and potential hardship, as well as the interests of the implicated foreign countries in

1. *Cf.* Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1099-1100 (1987) (discussing "wide range of sanctions" available to judges in analogous context of evidence destruction).

2. No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013). *Linde* is actually a series of cases consolidated for the purposes of discovery and other pretrial proceedings. Linde v. Arab Bank, PLC, 269 F.R.D. 186, 207 n.1 (E.D.N.Y. 2010) (listing consolidated cases).

3. Transcript of Oral Argument at 2, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), *available at* http://www.appellate.net/transcripts/Linde_v_ArabBank_plc_Oral_Arugment.pdf.

4. *See Linde*, 2013 WL 203404, at *2.

5. *See* 18 U.S.C. § 2333 (2006); *Linde*, 2013 WL 203404, at *2.

6. *See Linde,* 2013 WL 203404, at *3. Plaintiffs claim these "plans" incentivized the terrorist attacks that injured them. The families of terrorists would receive money from the bank by "obtaining an official certification" that their deceased relative was a "martyr," which would include an "individualized martyr identification number" that would have to be presented to the bank in order to demonstrate their "entitlement" to the benefits. *Id.* The "financial services," which the bank allegedly provided, included: "maintaining bank accounts, making wire transfers, and otherwise facilitating the movement of funds." *Id.*

enforcing their banking-secrecy laws.[7] The bank, however, refused to produce the requested discovery despite the district court's order.[8] Years after the bank's initial refusal, the district court issued sanctions.[9]

The district court's sanctions will provide the plaintiffs with two key advantages at trial.[10] First, it will allow the jury to essentially infer that the missing discovery would have established the bank's liability. Second, the bank will be precluded from making any argument or offering any evidence at trial that the plaintiffs could have refuted with the missing discovery.

Arab Bank subsequently filed an interlocutory appeal of this order to the Second Circuit, asking the court to vacate it by, among other things, issuing a writ of mandamus. The bank argued that the Second Circuit had jurisdiction to review the sanctions order because the headlines of a potential multi-billion-dollar jury verdict claiming the bank had "blood on [its] hands" could lead to a run on the bank from both its correspondent banks and customers, effectively crippling it before an appeal could be heard.[11] Moreover, the bank also contended that compliance with the order would destroy the privacy rights of thousands of customers, and an appeal could not repair that damage once done. The bank asked the court to issue a writ of mandamus to vacate the sanctions order, claiming that it violates the established limits for civil sanctions on parties acting in good faith during discovery. In addition, the Kingdom of Jordan filed an amicus curiae brief arguing the sanctions violated the principles of international comity.[12]

The plaintiffs countered that the court did not have jurisdiction to vacate the sanctions order because, among other things, the district court's order was not

7. *See* Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310, 317 (E.D.N.Y. 2006) (overruling defendant's objections to producing discovery), *aff'd*, 2007 WL 812918 (E.D.N.Y. Mar. 14, 2007).

8. *See id.* at 311.

9. *See* Linde v. Arab Bank, PLC, 269 F.R.D. 186, 191-92 (E.D.N.Y. 2010) (granting plaintiffs' motion for sanctions).

10. Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404, at *7 n.31 (2d Cir. Jan. 18, 2013) (noting jury instructions recommended within district court's sanctions order). The plaintiffs, however, would likely argue that they would have a greater advantage if the information they seek—which they believe would establish liability under the ATA—was produced rather than relying on a *possible* inference.

11. Transcript of Oral Argument at 4, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), *available at* http://www.appellate.net/transcripts/Linde_v_ArabBank_plc_Oral_Arugment.pdf ("If there was an adjudication under this flawed instruction that it was a terrorist accomplice its correspondent banks would abandon it, its depositors would flee . . . ."); *id.* at 6 ("This is not an ordinary case. It would be a determination that there is blood on the hands of a bank . . . ."); *see also* Brief for Defendant-Appellant & Special Appendix at 19, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), 2011 WL 1111197, at *19 ("Customers and correspondent banks are unlikely to do business with a bank that has been adjudicated a supporter of terrorism.").

12. Motion for Leave to File Amicus Curiae Brief in Support of Arab Bank, PLC at 4, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), *available at* http://lettersblogatory.com/wp-content/uploads/2012/03/Jordan-Amicus.pdf ("This punishment is an affront to the Kingdom's sovereignty and is inconsistent with well-established principles of international law and comity.").

an indisputable abuse of its discretion.[13] The plaintiffs argued that the bank did not, as it claimed, act in good faith, and countered that the order's inferences would still require the support of independent evidence. Additionally, they posited that the preclusion order only prevents the bank from unjustly benefiting from the evidence they refuse to produce.[14]

The ATA provides a civil cause of action for the victims of international terrorism. Before its enactment, it was difficult for victims of terrorism to be made whole from the damages inflicted upon them. The statute allows plaintiffs to collect treble damages and attorneys' fees from those that injure an American citizen "by reason of an act of international terrorism."[15] Although the phrase "international terrorism" was left ambiguous, courts have looked to congressional intent to determine which activities fall within the definition's scope. In *Boim v. Holy Land Foundation for Relief & Development*, the Seventh Circuit held that, under certain circumstances, individuals or entities could be liable under the ATA for donating to the Palestinian terrorist organization Hamas.[16] Courts have largely relied on this case's reasoning to establish "material support," which includes providing financial services, as within the scope of "international terrorism," and thus creating liability under the ATA.[17] Additionally, courts have also required that a financial institution must "knowingly" provide material support to terrorists in order to be found liable.[18] Plaintiffs who file suit against banks under the ATA rely heavily on records that document the bank's actions. Indeed, such evidence is directly relevant to proving a bank acted with the required scienter to be held liable.

The Federal Rules of Civil Procedure state: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense," and the "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[19] The scope of pretrial discovery has been referred to as "sweeping, virtually creating a presumption of discoverability."[20] Courts can order a party under their jurisdiction to produce discovery under that party's

13. Plaintiffs-Appellees' Redacted Brief & Addendum at 28, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), 2011 WL 1836086, at *28.

14. *See* Transcript of Oral Argument at 16-17, 20, Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404 (2d Cir. Jan. 18, 2013), *available at* http://www.appellate.net/transcripts/Linde_v_ArabBank_plc_Oral_Arugment.pdf.

15. 18 U.S.C. § 2333(a) (2006).

16. *See* 549 F.3d 685, 690-91 (7th Cir. 2008).

17. *See* Wultz v. Islamic Republic of Iran, 755 F. Supp. 2d 1, 44 (D.D.C. 2010) ("Material support or resources, however, can include 'even the provision of basic banking services,' so long as other elements of § 2339A(a), such as knowledge, are met." (quoting Weiss v. Nat'l Westminster Bank PLC, 453 F. Supp. 2d 609, 620 (E.D.N.Y. 2006) (internal quotation marks omitted))).

18. *See Boim*, 549 F.3d at 702.

19. FED. R. CIV. P. 26(b)(1).

20. JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 770 (2011).

"possession, custody or control," no matter where it is located.[21] Considered by most of the world's judicial systems to be invasive and overreaching, the Federal Rules' discovery provisions demanding production often conflict with foreign laws mandating concealment.

In 1987, the Supreme Court held that foreign law does not "deprive an American court of the power to order a party subject to its jurisdiction to produce evidence."[22] The Court endorsed a balancing test that addresses the sensitive and fact-specific inquiries these issues implicate.[23] In ATA banking cases, courts have consistently ordered the production of discovery located abroad in violation of the laws of the country where the discovery is located—generally weighing the interests of the plaintiffs in gathering important evidence to make their case, and of the United States in combating terror, more heavily than the defendant and foreign nation's interest in avoiding liability and enforcing their laws.[24] When a district judge balances the interests at stake and decides to order discovery, despite the potential liability for the producing party under foreign law, failure to obey the court's orders can result in sanctions. Indeed, the consequences can be devastating; the sanctions at a court's disposal include the adverse-inference instruction and the right to suppress evidence.[25] When imposing sanctions, case law dictates that district courts should consider, among many factors, the harshness of the sanctions, the degree to which the sanctions are needed to reestablish the evidentiary balance upset by the nondisclosure, and the nondisclosing party's degree of fault.[26]

Once a district judge orders discovery, the orders are usually interlocutory and not subject to immediate appeal because they can be reviewed after final judgment in the case.[27] There are numerous exceptions to this rule, however, which include the issuance of a writ of mandamus. The All Writs Act enables appeals courts to issue a writ of mandamus instructing a district court to

21. *See* Hickman v. Taylor, 329 U.S. 495, 502 (1947), *superseded by* FED. R. CIV. P. 26(b)(3).

22. *See* Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 544 n.29 (1987).

23. *See id.* at 544 n.28 (suggesting factors listed in 1986 draft of *Restatement of Foreign Relations Law* "are relevant to any comity analysis"). These factors are now expressed in the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(c) (1987). The *Restatement*'s factors are: the material's importance to the litigation; the request's level of specificity; whether the materials originated in the United States; whether there are alternative ways to secure the materials; and to what extent noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the nation where the information is located. *See id.*

24. *See, e.g.*, Wultz v. Bank of China Ltd., No. 11 Civ. 1266(SAS), 2012 WL 5378961 (S.D.N.Y. Oct. 29, 2012) (compelling production despite possible liability under Chinese law); Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 456 (E.D.N.Y. 2008) (compelling production despite possible liability under French law); Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33, 58 (E.D.N.Y. 2007) (compelling production despite possible liability under English law).

25. *See* FED. R. CIV. P. 37(b)(2)(A) (listing various sanctions available to court).

26. *See* Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 707 (1982).

27. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982).

remedy an erroneous order.[28] Nevertheless, mandamus is warranted only under circumstances such as "judicial usurpation of power" or "clear abuse of discretion" by the lower court.[29] Moreover, the party seeking issuance of the writ must have no other suitable means of attaining the relief it seeks. Even if a case falls within the scope of the aforementioned requirements, the court still has discretion to consider whether issuance is "appropriate under the circumstances."[30]

In *Linde*, the Second Circuit held that the privacy implications of a potential judgment, as well as the economic and diplomatic ramifications, were not extraordinary enough to warrant review. The court rejected use of this power "even if the District Court *incorrectly* resolved any singular factual or legal question."[31] The court held that warnings of a run on the bank or "financial and political destabilization" were too speculative, and indirectly linked to the sanctions at issue.[32]

Typically, terrorist organizations use foreign banks and financial institutions to fund their attacks and activities. Thus, the circumstances surrounding ATA banking cases will almost always implicate records located abroad and generate discovery disputes that place banks in the catch-22 between United States courts demanding production and foreign laws mandating concealment. If district courts continue to weigh the respective interests in favor of the plaintiff and the production of evidence abroad, the consequences for defendants in these cases could be dire. In *Linde*, the Second Circuit established that sanctions allowing adverse-inference instructions and evidence-preclusion orders are effectively unreviewable until after a final judgment. If similar sanctions are ordered in ongoing and future ATA banking discovery disputes, the plaintiffs in these cases will proceed to trial with significant settlement leverage.

While these discovery and evidentiary disputes raise difficult questions and implicate a variety of important interests, courts should continue to order the production of evidence abroad and sanction litigants that refuse to comply. The alternative would render the ATA moot. If foreign banking-secrecy laws effectively shield evidence located abroad, plaintiffs bringing suit under the ATA would be unable to prove their cases. Indeed, the plaintiffs in these cases must prove that the banks acted with the requisite scienter to be held liable. When foreign banks are the accused parties, almost all evidence required to prove such a claim will inevitably be located abroad. Congress intended for the ATA to "empower[] victims" of international terrorism "with *all* the weapons

28. 28 U.S.C. § 1651(a) (2006).

29. Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 390 (2004) (internal citations omitted).

30. *See id.* at 380-81.

31. Linde v. Arab Bank, PLC, No. 10-4519-cv(L), 2013 WL 203404, at *2 (2d Cir. Jan. 18, 2013) (emphasis added).

32. *Id.* at *23.

available in civil litigation," including discovery.[33] While concerns of international comity should be considered, it is well established that legislative intent can override those concerns.[34] Congress's intent was to use discovery as one of those weapons; limiting discovery would effectively render the ATA moot, hardly 'empowering' the victims of terrorism.

Although harsh, the sanctions at issue are not unjust, nor will their application create a "show trial." The plaintiffs will still be required to submit independent evidence in support of their claim and then the jury will decide, based on the merits of the evidence presented, whether the documents the bank withheld likely had the content they are *allowed* (but not required) to infer. Additionally, limiting evidence the bank can offer prevents the bank from benefiting from evidence it withheld from the plaintiffs. Without this order, Arab Bank officials could testify at trial that they closed terrorist accounts but then invoke banking secrecy and refuse to answer questions about when or why they did so. It would be analogous to a criminal defendant taking the stand and answering direct examination, but then refusing cross-examination on the grounds of Fifth Amendment privilege.[35] The absence of these orders *would* actually lead to "show trials," where banks could escape liability by withholding important documents—effectively enjoying the benefits and avoiding the hindrances of the laws and courts of the United States.

If ATA plaintiffs are unable to access vital discovery to prove their cases, they will not be the only ones harmed; the United States public will suffer as well. The possibility of significant civil damages in United States courts and the subsequent economic ramifications of such awards can deter banks from doing business with terrorists. The ATA's legislative history suggests that Congress viewed private suits under the Act as "infused with the public interest."[36] Indeed, there is some evidence that ATA suits have already begun to incentivize banks to implement greater efforts to prevent terrorists from utilizing their services.[37] In fact, this would not be the first time private civil

33. 137 CONG. REC. S4511-04 (daily edition Apr. 16, 1991) (emphasis added).

34. *See* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1185 (2007) ("To be sure, the comity doctrines are default rules only; courts will not interfere with a legislative determination that America's interests are advanced despite (or because of) the international conflict.").

35. *See* United States v. Rubin, 836 F.2d 1096, 1099-1100 (8th Cir. 1988) (noting analogy in context of violating foreign law).

36. *Linde*, 2013 WL 203404, at *17 (quoting Minpeco, S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523-24 (S.D.N.Y. 1987)) (internal quotation marks omitted).

37. *See* PIERRE-LAURENT CHATAIN ET AL., WORLD BANK, PREVENTING MONEY LAUNDERING AND TERRORIST FINANCING: A PRACTICAL GUIDE FOR BANK SUPERVISORS 31-36 (2009) [hereinafter WORLD BANK] (recommending methods of risk assessment); Zach Pontz, *Israeli Mercaz HaRav Massacre Victims Sue Bank of China for $1 Billion in NY*, ALGEMEINER (Oct. 23, 2012), http://www.algemeiner.com/2012/10/23/israeli-mercaz-harav-massacre-victims-sue-bank-of-china-for-1-billion-in-ny/ ("As for whether or not the case may deter future financial institutions from committing the same errors as The Bank of China, Ms. Darshan-Leitner says the evidence is pretty clear: 'We know several banks are taking steps to make sure their money is terror-free because they don't want to be liable, they don't want to face civil lawsuits for hundreds of

litigation could play a role in bankrupting terrorism. The Ku Klux Klan was "brought to its knees" by private civil litigation, as opposed to government or military action.[38]

Today, more than ever before, foreign banks enjoy the benefits of our markets and protections of our laws. It would be unjust if foreign banks could enjoy those advantages while simultaneously avoiding their hindrances. Banks that conduct business in the United States make a choice, and sometimes that choice can present disadvantages as well. If foreign banks decide that it would be more beneficial to turn a blind eye to terrorists that utilize their services than to remain under the personal jurisdiction of United States courts, then that is their prerogative. Until a bank (or any organization or individual) makes that choice, however, it has impliedly accepted the risks of being under control of two legal systems that may, at times, conflict with each other. While under the control of two legal systems, banks should fail in any argument that suggests the United States' interest in combatting terrorism and providing remedies to victims of terrorism should yield to foreign interests of enforcing banking secrecy. There will always be banks willing to provide material support for terrorist organizations, as long as it makes financial sense for them to do so.[39] Ordering discovery, and implementing sanctions that will balance the evidentiary gap stemming from noncompliance, will fulfill congressional intent and allow plaintiffs to present their case. There is no doubt that the victims of international terrorism deserve to hold accountable those providing material support to the terrorists that victimize them. The most important outcome of ATA litigation, however, will be the threat of civil litigation as a significant deterrent against rendering material support to terrorists in the future.[40] By cutting off the "oxygen of terrorism," civil litigation will decrease the operational capacity of terrorists and, in turn, will inevitably shorten the list of victims (and plaintiffs) able to file suit under the ATA.[41]

Matthew J. Smith

millions of dollars.'").

38. *See* Jack D. Smith & Gregory J. Cooper, *Disrupting Terrorist Financing with Civil Litigation*, 41 CASE W. RES. J. INT'L L. 65, 77 (2009).

39. *Evaluating the Justice Against Sponsors of Terrorism Act: Hearing on S. 2930 Before the Subcomm. on Crimes & Drugs of the S. Comm. on the Judiciary*, 111th Cong. (July 14, 2010) (statement of Lee S. Wolosky, Partner, Boies, Schiller & Flexner LLP), *available at* http://www.judiciary.senate.gov/pdf/07-14-10%20Wolosky%20Testimony.pdf.

40. *See* WORLD BANK, *supra* note 37, at 28-30 (outlining significant risk exposure of banks financing terrorism).

41. Colin Powell, Sec'y of State, U.S. Dep't of State, Remarks Concerning Department of Justice Shutting Down Several Financial Networks Exploited by Terrorist Groups (Nov. 7, 2001), *available at* http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks11_07.htm ("[M]oney is the oxygen of terrorism. Without the means to raise and move money around the world, terrorists cannot function.").