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Second Circuit Highlights Bank Regulators' Actions in Weighing Alien Tort Statute Claims

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In *Licci v. Lebanese Canadian Bank*, the Second Circuit reaffirmed its prior rulings that international law does not recognize corporate liability for crimes under international law, and so dismissed claims by foreign nationals against a non-US bank for aiding and abetting a terrorist organization—Hezbollah. *Licci* is significant, however, because the Court nonetheless found that the bank's alleged use of its New York correspondent account could be sufficient at the pleading stage to allege that the bank intended to aid and abet Hezbollah's terrorist activities. That finding appears to have been driven, in part, by two US government actions against the bank which detected a breakdown in the bank's compliance policies and procedures and led the US Department of the Treasury to designate the bank as a bank "of concern" for laundering money to Hezbollah. Thus, *Licci* highlights that, although plaintiffs continue to face a high bar in pleading terrorism-related claims against banks, actions by bank regulators can provide support for those claims. *Licci* was issued just days before the Treasury Department and Federal Banking Agencies issued a joint statement seeking to encourage correspondent banking relationships and dispel certain "myths" about the anti-money laundering and sanctions enforcement regime. The coincidental timing of *Licci* and the joint statement only underscores the inherent complexity and risks for US and foreign banks surrounding their correspondent banking relationships.

Background

The plaintiffs in *Licci*[1] were foreign nationals who were harmed by Hezbollah rocket attacks on northern Israel. Plaintiffs sued Lebanese Canadian Bank ("LCB") under the US Alien Tort Statute ("ATS"),[2] which allows non-US parties to bring civil tort claims against non-US parties in US federal court for crimes under international law. Plaintiffs argued that Hezbollah's attacks on Israel were crimes under international law and that LCB aided and abetted those attacks by wiring millions of dollars through LCB's correspondent bank account in New York to Hezbollah's financial arm, the Shahid (Martyrs) Foundation ("Shahid").

Four earlier *Licci* decisions addressed personal jurisdiction and ultimately held that New York federal courts had personal jurisdiction over LCB based in part on LCB's use of its New York correspondent account to transfer money to Shahid.[3] With respect to the bank's renewed motion to dismiss for lack of subject matter jurisdiction under the ATS, a New York federal district court then concluded that plaintiffs' injuries did sufficiently touch and concern the United States because "the banking services through which they were harmed occurred through LCB's use of" a New York correspondent bank account. Nonetheless, the district court dismissed the claims because plaintiffs had not sufficiently pleaded facts to support the court's subject matter jurisdiction under the ATS by showing that LCB intended to harm the plaintiffs (a requirement to plead

1 No. 15-1580, 2016 US App. LEXIS 15557 (2d Cir. Aug. 24, 2016).

2 28 USC. § 1350 (2012).

3 The prior decisions can be found at: *Licci v. Am. Express Bank Ltd.*, 704 F. Supp. 2d 403 (S.D.N.Y. 2010); *Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50 (2d Cir. 2012); *Licci v. Lebanese Canadian Bank, SAL*, 18 N.Y.3d 952 (2012); *Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013).

aiding and abetting liability under international law).[4] It was that decision that was on appeal to the Second Circuit here.

In considering the appeal the Second Circuit in *Licci* also relied in part on two US government actions against LCB which bolstered plaintiffs' allegations and are important to assessing the opinion: (i) a civil forfeiture action initiated by the United States against LCB property in which the government alleged, among other things, that LCB and Hezbollah were complicit in a money laundering scheme that involved $329 million in wire transfers from accounts at LCB in Lebanon to the United States through correspondent bank accounts with US financial institutions;[5] and (ii) a determination by the Treasury Department's Financial Crimes Enforcement Network (FinCEN) that LCB "is a financial institution of primary money laundering concern."[6] As the Second Circuit remarked, in making its finding against LCB, FinCEN "noted that while LCB is based in Lebanon, it 'maintains extensive correspondent accounts with banks worldwide, including several US financial institutions.'"[7] These US government actions, taken together with a declaration submitted by plaintiffs from a former Israeli intelligence agent regarding LCB's alleged activities, lent support to the allegations in plaintiffs' complaint.[8]

The Second Circuit's Decision

The Second Circuit affirmed the dismissal of the claims, but on grounds different than those relied upon by the lower court. The Second Circuit first detailed the "jurisdictional predicates" that must be met before a court may exercise subject matter jurisdiction over an ATS claim: (i) the complaint pleads a violation of international law; (ii) the complaint rebuts the presumption against extraterritorial application of US law; (iii) international law recognizes liability for the defendant; and (iv) customary international law recognizes the theory of liability.[9]

The Court readily confirmed that plaintiffs had pleaded crimes under international law in alleging that LCB aided and abetted Hezbollah's acts of genocide and crimes against humanity. The Court then discussed that to overcome the presumption against extraterritoriality plaintiffs must show that the relevant conduct (a) sufficiently touches and concerns US territory; and (b) states a claim for a violation of international law.

The *Licci* plaintiffs claimed that "LCB used its correspondent banking account in New York to facilitate dozens of international wire transfers for the Shahid, an entity alleged to be an integral part of Hezbollah."[10] After distinguishing this case from those where plaintiffs alleged a wrong that only occurred abroad, the Second Circuit concluded that plaintiffs' allegations that LCB transferred money to Hezbollah through New York "'touch[ed] and concern[ed]' the United States with sufficient force to displace the presumption," so long as the second prong of the extraterritoriality analysis was satisfied.[11] With respect to the second prong, the Court concluded that plaintiffs' allegations were sufficient to state a claim under international law for aiding and abetting Hezbollah's crimes—a claim that requires *intentional* conduct.[12]

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4 *Licci v. Lebanese Canadian Bank, SAL*, No. 08-cv-7253, 2015 US Dist. LEXIS 51512, *13, *15 (S.D.N.Y. Apr. 14, 2015).

5 *Id.* at *10-11; *see also United States v. Lebanese Canadian Bank, SAL*, No. 11-cv-9186 (S.D.N.Y. 2011), Compl. ¶¶ 31-33.

6 76 Fed. Reg. 9403 (2011).

7 2016 US App. LEXIS 15557, at *12 (quoting 76 Fed. Reg. at 9404).

8 Uzi Shaya, a former Israeli Intelligence officer, stated that Hezbollah "has always used the funds held under the name Shahid . . . to prepare for and carry out a wide range of terrorist and other violent activities" and that "the millions of dollars of wire transfers . . . significantly enhanced Hizbollah's ability to plan and carry out terrorist and other violent actions, including the rocket attacks" at issue in plaintiffs' complaint. Declaration of Uzi Shaya at ¶¶ 10, 14, *Licci v. Am. Express Bank, LTD.*, (S.D.N.Y. 2009) (No. 1:08-cv-07253-GBD), ECF No. 45. Courts may consider this type of additional evidence outside the complaint in determining subject matter jurisdiction.

9 2016 US App. LEXIS 15557, at *20-21.

10 *Id.* at *27.

11 *Id.* at *24-35. The court cited to *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*") where plaintiffs were Nigerian nationals who alleged that non-US defendants enlisted the Nigerian Government to suppress civil protests in Nigeria. *Kiobel II* held that defendant's US corporate presence, without more, could not overcome the presumption against the ATS's extraterritorial reach. Therefore, the presumption was self-evident and plaintiffs' claims fell beyond the ATS.

12 2016 US App. LEXIS 15557, at *35-41

Plaintiffs claimed that LCB had an official policy to support Hezbollah's anti-Israeli activities and had actual knowledge that Hezbollah owned and controlled bank accounts at LCB in Shahid's name. Thus, plaintiffs argued that LCB intentionally facilitated the wire transfers to further Hezbollah's goals. The US government's actions against LCB, which alleged links between LCB and illegal activities by Hezbollah, provided support to Plaintiffs' allegations. On this record, the Court found that plaintiffs had stated a claim that LCB through a New York correspondent account had facilitated wire transfers to purposefully provide "practical assistance" to Hezbollah and that these wire transfers had a "substantial effect" on Hezbollah's ability to carry out the rocket attacks.

Nonetheless, the Second Circuit ultimately affirmed the dismissal of the complaint because, based on prior Second Circuit precedent, corporations cannot be held liable for crimes under international law.[13]

Regulators Opine on Correspondent Banking

Coincidentally, *Licci* was decided on August 24, 2016, just days before a joint statement was issued on August 30, 2016 by the US Department of the Treasury and the Federal Banking Agencies (FBAs) on foreign correspondent banking (the "Joint Statement").[14] According to a Treasury blog post of August 30, the Joint Statement was intended to "dispel certain myths about US supervisory expectations,"[15] namely that the anti-money laundering (AML) and sanctions enforcement regime is not premised on "zero tolerance," and that there is no "general expectation" for US correspondent banks to conduct due diligence on the individual customers of foreign financial institutions (i.e., to know your customer's customers ("KYCC")).

The Joint Statement highlights the critical importance of correspondent banking relationships to "[t]he global financial system, trade flows, and economic development," and the need to protect correspondent banking relationships from abuse. The Joint Statement appears to be a response to the de-risking activities of many US and global banks, and recent reports highlighting the risks of this trend.[16] De-risking in this context is largely understood to be a bank's withdrawal or termination of correspondent banking relationships, typically on a wholesale basis, without assessing individualized customer risk or risk-mitigation. Contributing factors to this de-risking phenomenon appear to be uncertainty in supervisory expectations, and AML and sanctions enforcement risk.

With respect to the "myth" of "zero tolerance," the Joint Statement encourages banks to continue engaging in correspondent banking relationships, stating that the overwhelming majority—95%—of AML and anti-terror financing compliance deficiencies are corrected by banks with "appropriate, specific, and risk-based due diligence policies, procedures, and processes that are reasonably designed to assess and manage the risks inherent with [correspondent banking] relationships." The Joint Statement emphasizes that criminal prosecutions "typically" are brought when a bank lacks proper policies and procedures, or sufficient evidence of willful wrongdoing exists, and observes that the most prominent recent penalties imposed on banks "generally involved a sustained pattern of serious violations" and "did not involve unintentional mistakes."

And with respect to so-called KYCC obligations, the Joint Statement confirms that no "general expectation" exists, but nevertheless highlights that, in some circumstances, banks may be required "to request additional

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13 Citing *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), affirmed on other grounds at 133 S. Ct. 1659 (2013).

14 US Department of the Treasury and Federal Banking Agencies Joint Fact Sheet on Foreign Correspondent Banking: Approach to BSA/AML and OFAC Sanctions Supervision and Enforcement (Aug. 30, 2016), available at: https://www.treasury.gov/press-center/press-releases/Documents/Foreign%20Correspondent%20Banking%20Fact%20Sheet.pdf.

15 Treasury Notes, Complementary Goals—Protecting the Financial System from Abuse and Expanding Access to the Financial System, by Nathan Sheets, Adam Szubin and Amias Gerety (Aug. 30, 2016), available at: https://www.treasury.gov/connect/blog/Pages/Complementary-Goals---Protecting-the-Financial-System-from-Abuse-and-Expanding-Access-to-the-Financial-System.aspx.

16 *See, e.g.*, Financial Stability Board, Progress report to G20 on the FSB action plan to assess and address the decline in correspondent banking (Aug. 25, 2016), available at: http://www.fsb.org/wp-content/uploads/Progress-report-to-G20-on-the-FSB-action-plan-to-assess-and-address-the-decline-in-correspondent-banking.pdf; Christine Lagarde, Managing Director of the International Monetary Fund, Relations in Banking—Making it Work for Everyone (speech delivered on July 18, 2016), available at: http://www.imf.org/en/News/Articles/2016/07/15/13/45/SP071816-Relations-in-Banking-Making-It-Work-For-Everyone; International Monetary Fund Staff Discussion Note, The Withdrawal of Correspondent Banking Relationships: A Case for Policy Action (June 2016), available at: https://www.imf.org/external/pubs/ft/sdn/2016/sdn1606.pdf.

information" concerning the activity underlying a foreign bank's transactions "in accordance with the suspicious activity reporting rules and sanctions compliance obligations."

Implications

Although *Licci* had no relationship to the Joint Statement, the decision nonetheless highlights certain points made in the Joint Statement. Even though *Licci* affirmed the lower court's dismissal, the Second Circuit recognized a set of circumstances under which terror victims could use US correspondent banking transfers to plead that a foreign bank aided and abetted a crime under international law. Although dicta, this analysis offers important insights for future cases. Like the Joint Statement, which stresses the continued importance of correspondent banking and the infrequency of intentional wrongdoing implicating money laundering and terrorist financing activities—*Licci* suggests that pleading an aiding and abetting claim based on correspondent bank account transfers is not easy.

But, *Licci* and the Joint Statement also make clear that sustained patterns of apparent wrongdoing can indicate conduct that "did not involve *unintentional* mistakes," which conduct may subject a bank to civil claims and enforcement actions by US regulators. *Licci* shows that in addition to regulatory sanctions and penalties, actions by bank regulators can directly affect, if not set-up, private litigation. In *Licci*, the US government's actions as to LCB bolstered plaintiffs' allegations by suggesting that LCB's correspondent account activity was part of an intentional plan to assist Hezbollah. Given the complexity of anti-terror, AML, and sanctions regulations and compliance, *Licci* highlights an important and potentially critical aspect of the civil liability risks that can arise from correspondent banking relationships, and the challenges that banks must confront in managing regulatory and compliance risks in these areas.

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