

Justice Against Sponsors of Terrorism Act (“JASTA”)



**Changes in Anti-Terrorism Act Liability
Resulting from JASTA**

November 2016

Introduction

- After the 9/11 attacks, victims brought suit against many defendants, including Saudi Arabia
- Victims alleged that Saudi Arabia closely supervised and funded charities that supported Al Qaeda
 - Saudi Arabia strenuously denies such allegations
- Saudi Arabia and the Saudi charities were dismissed from the 9/11 suits on grounds of foreign sovereign immunity.
- In response, Congress enacted the Justice Against Sponsors of Terrorism Act (“JASTA”)

Background

- JASTA was first introduced in Congress in 2009-2010
 - Focus on allowing suit to proceed against Saudi Arabia
 - Advertised as pro 9/11 victims
 - Promoted by plaintiffs' lawyers

Background

- JASTA enacted in 2016
 - Obama veto: Sovereign immunity is key policy objective
 - Concern for US-Saudi Relations
 - Concerns about retaliation against US
 - Congressional veto override
 - 9/11 victims are sacrosanct
 - Should be afforded “day in court”

Background

- JASTA makes two changes to the law
 - First, JASTA add a new Foreign Sovereign Immunities Act (“FSIA”) exception
 - **Here:** injury in the United States, due to an act of International Terrorism in the United States
 - **Anywhere:** due to tortious acts of foreign state or its agents, wherever they occur
 - Compare tort exception, which requires all tortuous conduct to occur in the United States
 - Exception not limited to 9/11 or Saudi Arabia

Background

- Second, JASTA also contains less discussed provision that expands the Anti-Terrorism Act (“ATA”) by adding secondary liability to the ATA in some instances
 - Congress appears to have believed that this provision was necessary to assist with actions against Saudi Arabia
 - This is the more relevant change for non-government entities, such as banks
 - However, banks with government entity customers may find that the changes to the FSIA may also affect the practices of those customers and may affect how the bank wishes to handle their accounts

The Anti-Terrorism Act (“ATA”)

- Provides a civil cause of action
- For a US national (or his/her estate)
- Injured “by reason of” an Act of International Terrorism
- Treble damages and attorneys fees

The Anti-Terrorism Act (“ATA”)

- Classic ATA liability case against attackers
 - Default judgment against PLO
 - Default judgment against Al Qaeda

The Anti-Terrorism Act (“ATA”)

- ATA has also been used against *donors* to direct actors
 - E.g., donors to Hamas, that intended their donations to facilitate humanitarian endeavors, held liable
 - This is primary liability
 - Underlying violations may involve
 - 18 U.S.C. § 2339A (providing material support to terrorists)
 - 18 U.S.C. § 2339B (providing material support or resources to designated FTOs)
 - 18 U.S.C. § 2339C (prohibitions against financing of terrorism)
 - 18 U.S.C. § 2332d (financial transactions with state sponsors of terrorism)

The Anti-Terrorism Act (“ATA”)

- ATA has also been used against *service providers* to direct actors
 - E.g., bank alleged to have made payments to families of suicide bombers

The Anti-Terrorism Act (“ATA”)

- Courts have rejected ATA claims against service providers to third parties
 - E.g., bank alleged to have provided banknotes to Iran
 - E.g., correspondent banks for suppliers who provided chemical precursors to Iraq

Successful Defenses

- Successful ATA defenses have often focused on remoteness
 - Lack of causation, e.g., *Rothstein v. UBS*
 - Lack of knowledge, e.g., *Al Jazeera*
- Plaintiffs have sometimes tried to use conspiracy or aiding and abetting to circumvent ATA limits
 - But leading courts rejected secondary liability under the ATA
 - *Rothstein v. UBS*

How JASTA Changes the ATA

- JASTA adds claims for conspiracy and aiding and abetting to ATA
 - Only if international terrorism was committed, planned or authorized by designated Foreign Terrorist Organization (“FTO”)
 - State Department lists FTOs, e.g., Al Qaeda, Hamas, Hezbollah
 - Significant limit on secondary liability

How JASTA Changes the ATA

- Because JASTA *adds* secondary liability, it supports the conclusion that Congress did not think that the pre-JASTA ATA allowed secondary liability
 - Otherwise, Congressional decision to *add* secondary liability makes no sense
 - Otherwise, Congressional limit on secondary liability to FTOs meaningless
 - Enacted in context of *Rothstein*

How JASTA Changes the ATA

- Secondary liability is not limited to claims involving Saudi Arabia and other governments
- Secondary liability is not limited to claims involving 9/11 attacks
 - Can apply to any international terrorist attack by an FTO

Scope of Secondary Liability under JASTA

- Conspiracy
 - Plaintiffs’ lawyers have already taken a broad view
 - However, JASTA requires conspiracy *with* the FTO
 - Common law should require specific intent to advance the terrorist objective of the conspiracy

Scope of Secondary Liability under JASTA

- Aiding and abetting
 - “knowingly providing substantial assistance”
 - Abettor’s action not illegal by itself, rather it is unlawful only if it supports primary actor’s wrongdoing
 - Good argument that there must be actual knowledge that assistance is going to be used to accomplish terrorism

Scope of Secondary Liability under JASTA

- Aiding and abetting
 - Causation
 - Substantial *assistance* has proximate cause component
 - ATA still requires injury “by reason of” an act of international terrorism, and this quoted language is a term of art that requires causation

Trends in ATA/JASTA Litigation

- Plaintiffs' lawyers are aggressive
 - *Twitter* lawsuit
 - *Al Jazeera* lawsuit
- JASTA will exacerbate this trend
- Jousting over scope of JASTA

Trends in ATA/JASTA Litigation

- Plaintiffs' lawyers like to follow news
 - Capitalize on articles about business with terror link
 - Road map for allegations
 - Create sympathy
- Plaintiffs' lawyers like to follow adverse enforcement actions
 - Banks may be precluded from denying certain facts

De-Risking

- Charities
- Informal money transmission businesses
- State Sponsors of Terrorism
- Trade finance transactions
- Politically Exposed Parties (PEPs)
- Other customers, depending on business

Bank Customers That Are Sovereign Nations

- Secondary liability if sovereign supports FTO?
- Divesting of US assets?
 - Saudi Government appears to have said it will not
 - May not be practical economically or politically
 - Can be more difficult than anticipated to place assets beyond US reach
- Attachment of assets to satisfy judgment?
 - JASTA does not waive sovereign immunity for attachment of assets

Legislative Amendments

- Some Republicans have expressed “buyer’s remorse”
- But any changes will be difficult

Questions



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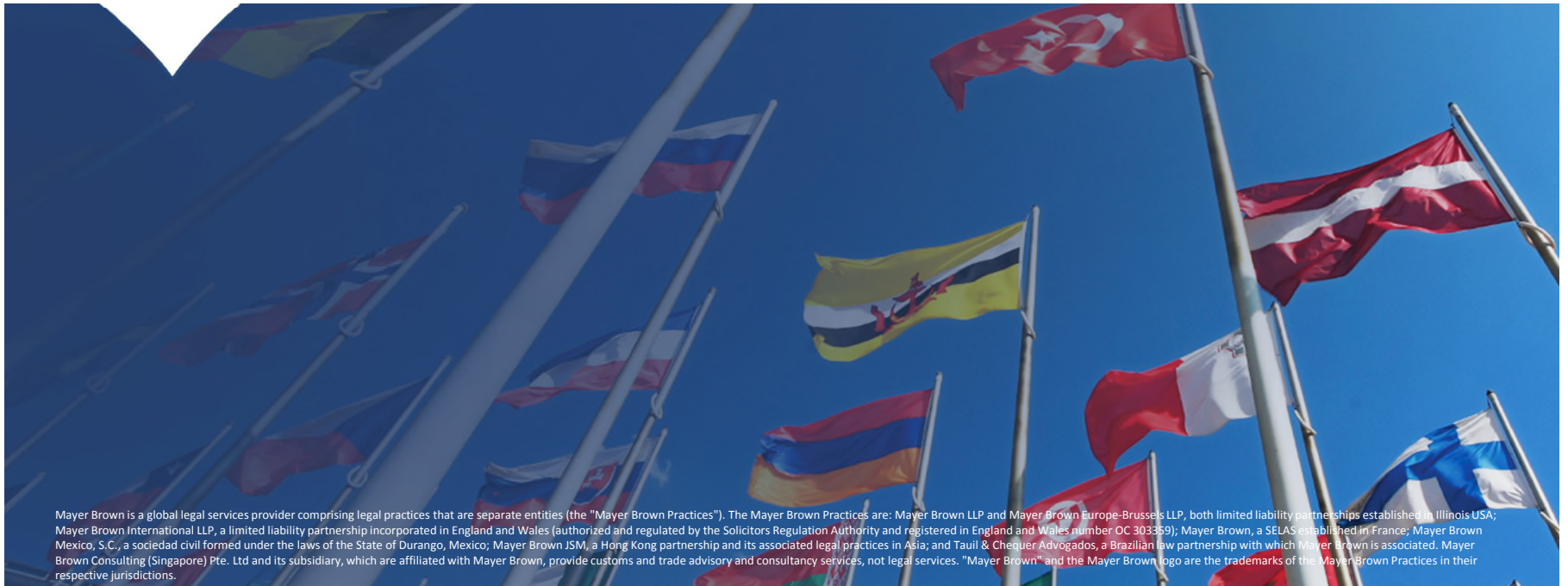
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- <https://www.mayerbrown.com/experience/The-ATA-JASTA-and-Other-Anti-Terrorism-Statutes/>

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