FSIA DOES NOT IMMUNIZE SOVEREIGNS AGAINST POST-JUDGMENT DISCOVERY OF WORLDWIDE ASSETS

On June 16, 2014, the U.S. Supreme Court ruled that the Foreign Sovereign Immunities Act ("FSIA") does not immunize a foreign sovereign judgment debtor from post-judgment discovery of information about assets held outside the United States.[1] In a 7-1 decision authored by Justice Antonin Scalia,[2] the Court explained that any claim of immunity must be grounded in the FSIA's text, because Congress intended the statute to be a "comprehensive framework" for sovereign immunity determinations. Since the FSIA's text does not provide immunity from post-judgment discovery in aid of execution, there is none.

BACKGROUND

This case arose from Argentina's debt default in 2001. Most bondholders agreed to restructure their Argentine debt, but NML Capital and others ("NML") refused to go along. They sued the Republic in New York federal court, which had jurisdiction because Argentina had waived its immunity from suit in its contract with bondholders. NML obtained 11 favorable judgments for a total of about $2.5 billion.

For nearly a decade Argentina has refused to pay, forcing NML to pursue multiple post-judgment execution actions. In its efforts to locate attachable assets, NML subpoenaed Bank of America ("BOA"), a U.S. bank, and Banco de la Nación Argentina, an Argentine bank with a branch in New York, requesting discovery of documents related to the Republic's worldwide account balances, transaction histories, electronic transfer records, debts, and business relationships. Argentina and BOA moved to quash the subpoenas on the grounds that discovery of a sovereign's worldwide assets was a violation of execution immunity under the FSIA.[3] Unpersuaded by this argument, the district court approved NML's request and agreed to be a "clearinghouse for information" about Argentina's assets located around the world. [4]

On appeal, the Second Circuit affirmed the lower court's decision because the order involved discovery, not attachment, and was directed at third parties, not Argentina. The Second Circuit differed with a prior decision by the Seventh Circuit, in which the Seventh Circuit held that because of the FSIA's grant of general immunity from attachment, a judgment creditor must first identify assets that are attachable under the FSIA before seeking discovery about those assets.[5] The Supreme Court granted *certiorari*, agreeing to hear the case.

[1] *Republic of Argentina v. NML Capital*, No. 12-842, 573 U.S. __ (2014) (slip op.) [hereinafter, "*NML*"].

[2] Justice Sonia Sotomayor did not take part in the decision. Justice Ruth Bader Ginsburg dissented.

[3] Under the FSIA, a sovereign's property is generally immune from attachment, arrest, and execution unless it is "used for a commercial activity in the United States" and any one of a series of enumerated conditions is met. 28 U.S.C. §§ 1609, 1610.

[4] *NML*, at 3.

[5] *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 209 (2d Cir. 2012), *declining to follow Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011).

THE SUPREME COURT RULED ON A "SINGLE, NARROW QUESTION"

The Court began its analysis by assuming that, in an execution proceeding that did not involve a sovereign, a district court would be able to order discovery about the judgment debtor's worldwide assets from third party banks pursuant to the ordinary discovery rules that apply in federal court (the "Federal Rules").[6] However, because Argentina had not raised questions about the scope of discovery available under the Federal Rules, the Court made it clear that the "single, narrow question" before it was whether the FSIA required a different outcome when the judgment debtor is a foreign sovereign. The short answer is no.

Emphasizing that the FSIA's "comprehensive framework" replaced the old common-law immunities regime in actions against foreign states, the Court concluded that any claim of immunity must stand or fall on the statute's text. Strictly speaking, the FSIA confers only two types of immunities: immunity from suit and immunity from execution.[7] The Court declared: "There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets."[8]

Argentina's arguments to the contrary did not persuade the Court. First, Argentina claimed that before the enactment of the FSIA, U.S. courts afforded a foreign state's assets absolute immunity from execution, regardless of location. And this absolute immunity from execution entailed immunity from discovery in aid of execution. Second, when it passed the FSIA, Congress codified this absolute immunity with only a few exceptions. Because the FSIA does not explicitly authorize discovery of assets beyond a court's enforcement power, a court cannot inquire into a foreign state's assets that are immune from execution (such as assets held outside the United States).

The Court reasoned, however, that even if Argentina's description of the pre-FSIA law were accurate, the FSIA explicitly immunizes only sovereign property located "*in the United States*" and thus does not protect assets located abroad.[9] The fact that some assets may be immune from execution (*e.g.*, diplomatic or military property) did not change the outcome. The Court explained that the purpose of NML's subpoena is that it "*does not yet know*" whether such property is attachable or not.[10] Argentina cannot protect property from discovery based on its "self-serving legal assertion" that those assets are immune.[11]

The Court's narrow ruling does not foreclose all avenues for limiting broad discovery requests of information about sovereign property. On the contrary, the Court stated affirmatively that "other

[6] Generally, federal judges may approve discovery requests "regarding any nonprivileged matter that is relevant to any party's claim or defense." *NML*, at 4, *citing to* Fed. R. Civ. Pro. 26(b)(1).

[7] *See* 28 U.S.C. §§ 1604, 1609.

[8] *NML*, at 7-8. Also, the Court found that the FSIA lacked the "plain statement" necessary to displace the otherwise applicable federal discovery rules. *Id.* at 8, *citing to Société National Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 539 (1987) [hereinafter, "*Aérospatiale*"].

[9] *Id.* at 9, *citing to* 28 U.S.C. § 1609 (emphasis added by the Court).

[10] *Id.* at 10 (emphasis in original).

[11] *Id.*

sources of law"—such as defenses based on privilege, burden and comity—will continue to "bear on the propriety of discovery requests of this nature and scope."[12]

IMPLICATIONS

This decision presents challenges for foreign states that are subject to execution proceedings in the United States. Entities that hold U.S. judgments against foreign sovereigns have one less barrier to overcome in reaching attachable assets. But the decision does give sovereigns clear guidance as to the types of arguments they should be making to defend against overly broad discovery orders. As such, the impact of the decision may turn on how lower courts view arguments based on burden, privilege, relevance, and comity in deciding whether to grant, deny or limit broad post-judgment discovery requests of information about a foreign state's assets.

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[12] *Id.* at n. 6, *quoting Aérospatiale*, 482 U.S. at 543-44 and n. 28 (noting that "settled doctrines of privilege and the discretionary determination by the district court whether the discovery is warranted, which may appropriately consider comity interests and the burden that the discovery might cause to the foreign state," may be used to limit discovery requests.)