

FSIA: U.S. Supreme Court Upholds Immunity for Sovereign Property in Terrorism Cases

Last week, the U.S. Supreme Court resolved a circuit split regarding the sovereign immunity of a foreign state's property in cases involving the enforcement of a judgment obtained under the terrorism exception, section 1605A, of the Foreign Sovereign Immunities Act (FSIA).¹

When a judgment debtor fails to pay, the judgment creditor is ordinarily permitted to execute on the debtor's property to satisfy the judgment. For foreign states debtors, the FSIA grants blanket immunity from execution to their property, but carves out limited exceptions in certain situations where the asset is "used for a commercial activity in the United States" as provided in section 1610(a).² Additionally, judgment creditors of a foreign state cannot collect directly from the assets of its agencies or instrumentalities. That is because, by "default," a foreign state's agencies or instrumentalities "are considered separate legal entities that cannot be held liable for acts of the foreign state."³ In recent years, however, Congress amended the FSIA and added section 1610(g) to make the property of an agency or instrumentality of a foreign state, against whom a section 1605A judgment has been rendered, available to satisfy that judgment regardless of certain characteristics of legal separateness.

U.S. victims of a terrorist attack carried out by Hamas in Jerusalem obtained section 1605A judgments against the Islamic Republic of Iran. The judgment creditors then learned that the University of Chicago was in possession of various antiquities that were on loan from Iran. They sought to execute on those ancient artifacts to satisfy their judgments under various statutory provisions including sections 1610(a) and (g). One of their arguments was that section 1610(g) alone provided a basis for lifting the property's immunity without regard to section 1610(a)'s additional requirements.

The district court rejected the argument, and the U.S. Court of Appeals for the Seventh Circuit affirmed. In this instance, the artifacts were immune from execution because they were not being used "by the foreign state itself" as required under section 1610(a).⁴ The fact that the university was putting the antiquities to a commercial use in the United States was irrelevant. By contrast, in other cases, the Second, Ninth and District of Columbia Circuits had concluded that section 1610(g) "provided a freestanding

¹ *Rubin v. Islamic Republic of Iran*, No. 16-534, 2018 WL 987348 (U.S. Feb. 21, 2018).

² 28 U.S.C. §§ 1609, 1610(a).

³ *Rubin*, 2018 WL 987348, at *5.

⁴ *Rubin v. Islamic Republic of Iran*, 830 F.3d 470, 473 (7th Cir. 2016), *aff'd*, 2018 WL 987348.

exception to attachment and execution immunity.”⁵ Under that rule, the antiquities would have been available to satisfy the judgment against Iran. The judgment creditors petitioned the Supreme Court for review.

The Court accepted the case, but focused narrowly on resolving the circuit split on whether section 1610(g) supplied an independent basis for removing the immunity afforded to sovereign property. In a unanimous decision authored by Justice Sonia Sotomayor, the Court agreed with the Seventh Circuit. It found that section 1610(g) abrogated the default rule respecting an agency or instrumentality’s legal separateness. In other words, the assets of an agency or instrumentality would be treated as the property of the foreign state itself for purposes of enforcing a section 1605A judgment. But section 1610(g) “does not provide a freestanding basis” for stripping a foreign state’s property of the immunity to which it is otherwise entitled under the FSIA.⁶ Thus, a section 1605A judgment creditor must still satisfy one of the other exceptions to immunity when seeking to execute on the assets of a foreign state or its agencies and instrumentalities under section 1610(g).

The Court’s decision does not change the law in any context outside the enforcement of terrorism judgments obtained under section 1605A.

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⁵ *Rubin*, 2018 WL 987348 at *4 n.3 (citing *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016); *Weinstein v. Islamic Republic of Iran*, 831 F.3d 470 (D.C. Cir. 2016); *Kirschenbaum v. 650 Fifth Avenue and Related Properties*, 830 F.3d 107 (2d Cir. 2016)).

⁶ *Id.* at *10. Justice Elena Kagan took no part in the consideration or decision of this case.

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Please feel free to contact any of the persons listed below if you have any questions on this important development:



Joseph D. Pizzurro

Partner

jpizzurro@curtis.com

New York: +1 212 696 6196



Robert B. Garcia

Partner

robert.garcia@curtis.com

New York: +1 212 696 6052



Kevin A. Meehan

Associate

kmeehan@curtis.com

New York: +1 212 696 6197



Juan O. Perla

Associate

jperla@curtis.com

New York: +1 212 696 6084