U.S. Supreme Court Rejects Limits on Post-Judgment Discovery Into Foreign States’ Assets

Supreme Court Holds That Post-Judgment Discovery Into the Overseas Assets of a Foreign State Is Not Barred by the Foreign Sovereign Immunities Act

SUMMARY
The U.S. Supreme Court held today that the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 et seq., does not bar post-judgment discovery into the overseas assets of a foreign state. In Argentina v. NML Capital Ltd., No. 12-842 (June 16, 2014), a divided Court affirmed the Second Circuit and held that a discovery order requiring two nonparty financial institutions, Bank of America and Banco de la Nación Argentina, to disclose documents relating to all accounts maintained by or on behalf of Argentina—including assets and transactions in foreign states—does not violate Argentina’s sovereign immunity. The Court held that the FSIA does not limit post-judgment discovery to only those assets that U.S. courts can attach under the FSIA: assets held and used for commercial purposes in the United States. The Court declined to give any significant weight to the contention that the order created difficult and competing obligations for the financial institutions subject to the subpoenas. The decision increases burdens on financial institutions holding assets of foreign sovereigns and expands district courts’ power to order post-judgment foreign discovery.

BACKGROUND
In 2001, as a result of the worst economic crisis in its history, Argentina defaulted on billions of dollars in bonds. Although most bondholders agreed to voluntary restructurings, some bondholders—including distressed-debt funds such as NML Capital Ltd. (NML)—did not. NML instead sought and obtained
judgments against the Republic. NML then served subpoenas on two nonparty financial institutions, Bank of America (BOA) and Banco de la Nación Argentina (BNA), seeking documents relating to “all accounts maintained by or on behalf of Argentina without territorial limitation.” Over objections from the Republic, BOA, and BNA, the district court granted NML’s motion to compel the banks’ compliance with the subpoenas, holding that the extraterritorial discovery did not infringe on Argentina’s foreign sovereign immunity. The Second Circuit affirmed, and the Supreme Court granted review.

THE SUPREME COURT’S DECISION

In a 7-1 decision, the Supreme Court today ruled that the FSIA does not bar post-judgment discovery into a foreign sovereign’s overseas assets. In an opinion by Justice Scalia, the Court observed that the FSIA establishes “a comprehensive framework for resolving any claim of sovereign immunity” and thus “any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text.” The Court reasoned that, because there is no provision in the FSIA “forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets,” the Act does “not shield from discovery a foreign sovereign’s extraterritorial assets.” The Court therefore concluded that the FSIA does not place any bar on NML’s discovery into Argentina’s foreign assets.

The Supreme Court expressly declined to address whether the Federal Rules of Civil Procedure or state laws impose limits on post-judgment and extraterritorial discovery into the assets of a judgment debtor. The Clearing House had argued as an amicus (in a brief authored by Sullivan & Cromwell LLP) that Rules 69 and 45 and New York state law did not permit the post-judgment discovery at issue, but the Court did not address those arguments on the ground that they had not been raised by Argentina. The Court simply assumed without deciding that “in a run-of-the-mill execution proceeding . . . , the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor’s assets located outside the United States.”

IMPLICATIONS

In the wake of this decision, financial institutions may be compelled to navigate onerous and contradictory obligations imposed by U.S. courts and foreign regulatory regimes. Today’s decision means that potentially sensitive financial information regarding a foreign sovereign’s holdings can now be discoverable in U.S. courts in certain circumstances. Increased post-judgment discovery into foreign assets is likely to require financial institutions to incur significant discovery costs and may well subject the

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1 EM Ltd. v. Republic of Argentina, 695 F. 3d 201, 204 (2d Cir. 2012) (emphasis added).
2 Id.
3 Argentina v. NML Capital Ltd., No. 12-842, slip op. at 6-7, (June 16, 2014).
4 Id. at 9.
5 Id. at 5.
institutions and their employees to repercussions from foreign regulators—as some of the disclosures called for will likely violate foreign laws—as well as from clients whose confidential information is the subject of the discovery orders. In addition, the Court's decision may have negative foreign policy repercussions for the United States. Because the Supreme Court reserved the question of what types of post-judgment and extraterritorial discovery the Federal Rules permit, however, it is possible that nonparties may be able to challenge such discovery under the Rules. Nonparties also may be able to challenge discovery requests on the basis of international comity interests or the foreign burdens imposed by such requests.

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