

Alert

Republic of Argentina v. NML Capital

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The Supreme Court issued its decision yesterday in *Republic of Argentina v. NML Capital*, No. 12-842, holding that the Foreign Sovereign Immunities Act (FSIA) does not limit the scope of discovery available to a judgment creditor in post-judgment execution proceedings against a foreign sovereign.

As part of NML's efforts to collect on various litigation judgments entered against Argentina following its default on bond obligations, NML sought discovery of Argentina's assets around the world in an attempt to locate Argentine property that might be subject to attachment and execution. Those efforts included subpoenas served on Bank of America and Banco de la Nacion Argentina, both of which had offices in New York. The subpoenas generally sought information about Argentina's accounts, balances, transaction histories and funds transfers. Argentina and the banks sought to quash the subpoenas, contending that they violated the FSIA by seeking discovery of Argentina's extraterritorial assets that were beyond the reach of U.S. courts. The district court denied the motion to quash, and the Second Circuit affirmed. Only Argentina sought review in the Supreme Court.

Justice Scalia, writing for a majority of seven justices, affirmed. The Court held that the FSIA does not limit discovery in post-judgment execution proceedings against a foreign sovereign. The core of Argentina's argument was that FSIA prohibits the execution or attachment of a foreign sovereign's property except in certain narrowly defined circumstances (e.g., the sovereign's commercial property in the United States). So, according to Argentina, the FSIA must also limit discovery in aid of execution as to that immune property—if a judgment creditor could not ultimately execute on particular property, Argentina argued, it has no business seeking discovery about it, as the discovery would not be "relevant." But the Court pushed aside that argument, relying on the FSIA's plain language. The FSIA, the Court observed, enacted a "comprehensive" set of legal standards governing claims of immunity that is completely silent as to discovery in aid of execution. What's more, nothing in the FSIA's text suggests that Congress intended to confer absolute immunity to a foreign state's extraterritorial assets anywhere in the world: rather, the FSIA's text immunizes only the foreign state's assets "in the United States" (subject to certain enumerated exceptions); and the foreign state's extraterritorial assets might well be subject to attachment and execution under the laws of some other jurisdiction where the property is located.

To be sure, it may turn out that NML ultimately cannot execute against certain extraterritorial property, but the whole point of the subpoenas, the Court noted, is that NML “does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction’s law.” In other words, the decision whether Argentina’s extraterritorial property may be subject to attachment or execution under the laws of the relevant jurisdiction is a question for another day. For now, NML may proceed with discovery to find out where Argentina’s property is. Finally, the court noted that if international-relations concerns really were worrisome, Congress could jump in and amend the FSIA accordingly.

One practical effect of the opinion, of course, is that here NML can continue its efforts in the district court to seek information about Argentina’s assets around the world. It is not a foregone conclusion that the opinion will open the floodgates for similar discovery in other litigations, as the impact of the decision could be limited by how it came to the Supreme Court. Argentina, the opinion notes, waived several arguments it might have made to resist the

subpoenas. For example (although perhaps only because Argentina belatedly raised it in its reply brief), the Court notes the question whether, even in the ordinary case involving private litigants, the federal rules permit a U.S. court to order discovery about the judgment debtor’s assets outside the United States courts’ jurisdiction. Argentina never made the argument, so the Court assumed, without deciding for now, that the courts had that power. Furthermore, the Court emphasized that a district court always retains discretion to limit discovery when, for example, concerns of international comity or burdens on foreign states might warrant. Argentina’s history of attempts to avoid its judgments certainly did not do it any favors on the equities. The decision, however, certainly must be read as reaffirming the broad scope of post-judgment discovery in aid of enforcement, including against foreign sovereigns.

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