

## Argentina Ruling Doesn't Address Non-FSIA Discovery Limits



*Law360, New York (June 18, 2014, 2:52 PM ET)* -- In its latest decision interpreting the Foreign Sovereign Immunities Act (FSIA), the U.S. Supreme Court made clear that any claim of immunity by a foreign state must rise or fall based on the text of the FSIA. Because the FSIA does not spell out any immunity or special protections for foreign states that have already lost civil suits and are the target of post-judgment discovery, foreign states cannot rely on the FSIA to resist such discovery.

### Facts of *Argentina v. NML*

In 2001, in the midst of a severe economic downturn, Argentina defaulted on its debt obligations. NML Capital Ltd., a bondholder, sued Argentina for its unpaid debts in federal district court in New York. The FSIA did not shield Argentina from suit in federal court because the bond indenture agreement between Argentina and NML contained a broad waiver of Argentina's immunities. NML prevailed in each of its 11 actions against Argentina, yielding judgments of \$2.5 billion.

After Argentina failed to pay, NML sought to execute its judgments against Argentina's property, initiating attachment proceedings in federal district court. For more than a decade, NML pursued discovery regarding Argentina's property and assets, including through third-party discovery of banks where Argentina maintained accounts.

In particular, NML subpoenaed two banks with operations in New York City, requesting information about Argentina's balances and transaction history. In response, the banks produced information about accounts and documents located in New York, but refused to agree to the extraterritorial discovery sought in the subpoenas.

The banks and Argentina moved to quash on the ground that the subpoenas sought information about property that was immune from attachment under the FSIA. The district court denied the motions to quash, and the United States Court of Appeals for the Second Circuit affirmed that decision.

## **Property Protected by the FSIA**

The FSIA significantly limits the types of property that may be attached or executed in satisfaction of a judgment obtained in the United States against a foreign state. Critically, a foreign state's property is immune from attachment or execution unless it is "property in the United States" and meets other enumerated requirements.

## **The "Single, Narrow Question" Before the Supreme Court**

Argentina petitioned the Supreme Court to decide whether post-judgment discovery is limited to those assets that are potentially subject to execution under the FSIA or, rather, whether such discovery may be ordered with respect to all assets of the foreign state regardless of their location or use.

Argentina's petition, according to the court, raised a "single, narrow" question: Do the usual rules of post-judgment discovery apply to discovery targeting the property of a foreign state or does the FSIA specify a different rule?

## **FSIA Does Not Alter the Rules of Post-Judgment Discovery**

The court held that the FSIA does not limit or alter post-judgment discovery and, as a result, the federal discovery rules applied to NML's discovery requests.

The court's holding was based on its long-standing deference to the political branches in determining when to exercise judicial power over foreign states. The court explained that the FSIA is intended to be a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state."

As a result, the court refused to glean from the FSIA any additional immunities or protections that are not clearly set forth in the text of the statute itself. Because the FSIA does not forbid or limit post-judgment discovery, and contains no "plain statement" deviating from the federal discovery rules, the court refused to find that the FSIA limits post-judgment discovery in any way.

## **Other Potential Limits to Post-Judgment Discovery**

Looking beyond the FSIA, however, the court acknowledged the possibility of other limitations on post-judgment discovery against foreign states, including, for example, arguments based on privilege, burden and comity. The court found that none of those other potential limits on discovery were properly presented or preserved by Argentina in its appeal.

While the court offered little guidance as to the merits of these other arguments, lower court decisions do lend some support to their viability.

In rejecting Argentina's arguments regarding the FSIA, for example, the Second Circuit suggested that

Congress intended for “sensitive governmental documents of a foreign state” to be protected from disclosure by governmental privilege rules. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 210 (2d Cir. 2012) (quoting H.R. Rep. No. 94-1487, at 23). Courts have also recognized that international comity can require a United States court to abstain from ordering production of documents located overseas. E.g., *Motorola Credit Corp. v. Uzan*, 293 F.R.D. 595, 601 (S.D.N.Y. 2013).

At the end of the day, though, the Supreme Court addressed only the narrow question before it, and declined the opportunity to limit extraterritorial discovery against Argentina based on sources of law outside of FSIA. The court’s decision thus serves as a reminder that litigants should look to all applicable federal and state law principles when litigating their discovery disputes, and should be sure to preserve those issues for appeal as well.

—By Barbara R. Mendelson, J. Alexander Lawrence and Daniel Matza-Brown, Morrison & Foerster LLP

*Barbara Mendelson and J. Alexander Lawrence are partners and Daniel Matza-Brown is an associate in Morrison & Foerster's New York office.*

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