

Client Update

U.S. Supreme Court Limits Enforcement of Terrorism-Related Judgments against Foreign Sovereigns

The U.S. Supreme Court recently resolved a disagreement over interpretation of the Foreign Sovereign Immunities Act of 1976 (“FSIA”) in favor of foreign states. The Supreme Court’s February 21, 2018 decision in *Rubin v. Islamic Republic of Iran*, No. 16-534, makes clear that a judgment cannot be enforced against sovereign assets unless the FSIA contains a specific exception to immunity to execution for those assets.

The FSIA, which governs all actions against foreign states and their agencies and instrumentalities in the United States, provides certain exceptions to immunity, with different exceptions for lawsuits and enforcement of judgments. The exception at issue in the *Rubin* case caused interpretive difficulties because it provides that assets of agencies and instrumentalities of a designated “state sponsor of terrorism” can be reached to enforce a judgment that terrorism victims had obtained against the state itself. Several appellate courts, including the United States Court of Appeals for the Second Circuit, had interpreted this provision to mean that a terrorism-related judgment may be enforced against all of a foreign sovereign’s assets in the United States, even if those assets would otherwise be immune.

The Supreme Court’s decision in *Rubin* rejects that broad reading of the terrorism exception to sovereign immunity. Even in the charged context of compensating victims of terrorism, the Supreme Court held that plaintiffs must show that a specific exception to immunity applies to the foreign sovereign assets against which they seek to execute the judgment. Judgment creditors seeking to enforce judgments against foreign sovereigns will have to rely on these narrower exceptions, such as the exception for assets used for commercial activity in the United States. In light of the *Rubin* decision, however, it may merely be a matter of time before Congress acts to enhance the ability of plaintiffs to satisfy terrorism-related judgments against foreign sovereigns.

The FSIA was enacted in 1976 because of growing recognition that international law permitted states to be sued based on their commercial activities abroad and permitted their commercial assets to be used to satisfy resulting judgments. The FSIA’s exceptions to sovereign immunity

follow this distinction between immunity to lawsuits and immunity to enforcement actions. Consequently, a judgment creditor must show that one of the exceptions for enforcement applies to an asset regardless of the basis of the original lawsuit. The exceptions for enforcement generally focus on the nature of the asset. The most important exception covers assets used for commercial activity in the United States.

In 2008, Congress amended the FSIA to permit civil lawsuits against certain foreign states for supporting terrorist activity. In 2008, Congress also added a provision to the FSIA, 28 U.S.C. § 1610(g), which expanded the assets available to be seized for enforcement of certain terrorism-related judgments. The primary function of Section 1610(g) was to expand the group of entities associated with a foreign sovereign whose assets were subject to execution on a terrorism-related judgment. Similar to respect for the separateness of corporate entities, U.S. courts generally do not hold agencies and instrumentalities of a foreign sovereign liable for the acts of the foreign sovereign where they are distinct and independent entities. Section 1610(g) abrogates the doctrine of respecting corporate separateness for enforcement of judgments under the terrorism exception. Therefore, an instrumentality of a foreign state organized as a corporate entity, such as a state-owned oil company, may be the subject of an enforcement action where the state has been found liable under the terrorism exception.

Rubin concerned a judgment obtained against Iran by victims of a suicide bombing carried out by Hamas in 1997. The victims sought to use Section 1610(g) to execute their judgment against Iranian assets in the United States. The targeted asset in *Rubin* was the Persepolis Collection, a set of 30,000 ancient clay tablets held on loan from Iran and held by the University of Chicago since 1937. None of the other exceptions to immunity from judgment enforcement applied to the Persepolis Collection. For example, the display of the tablets at an academic institution does not constitute a commercial activity by Iran. The United States Courts of Appeals for the Second, Ninth and D.C. Circuits, in other cases, had interpreted Section 1610(g) as permitting execution against any asset owned by a foreign state or its agencies or instrumentalities irrespective of whether the property was used in a commercial activity or fell within another specific exception to immunity. Disagreeing with those other appellate courts, the United States Court of Appeals for the Seventh Circuit held that Section 1610(g) did not create a separate exception that stripped the Persepolis Collection of immunity from execution of a judgment.

The Supreme Court granted review and adopted the Seventh Circuit's narrower reading of Section 1610(g). According to the Supreme Court's decision, Section 1610(g) only expands the number of foreign state-related entities against which a judgment under the terrorism exception can be enforced. A party seeking to execute against a foreign sovereign's assets must still show that the property falls within one of the specific exceptions to immunity from enforcement based on the nature of the asset.

The Supreme Court explained that the rejection of the broader reading of Section 1610(g) is "consistent with the historical practice of rescinding execution immunity primarily in the

context of a foreign state’s commercial acts.” Emphasizing that Congress struck a “delicate balance” in the FSIA, the Supreme Court rejected the argument that the legislative purpose of assisting victims of terrorism warranted a more expansive reading of Section 1610(g). This outcome is consistent with the views expressed by the U.S. Solicitor General in *Rubin* and continues the trend of recent Supreme Court opinions interpreting FSIA exceptions narrowly, such as last year’s decision in *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*, which increased the difficulty of prevailing on an exception for lawsuits relating to expropriation.

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