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Legal Sidebar

Iran's Central Bank Asks Supreme Court to Consider Whether the Bank's Assets Abroad are Immune from Attachment to Satisfy Terror Judgments

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Update: *The Supreme Court on January 13, 2020, granted review and vacated the decision below, remanding to the Second Circuit for reconsideration in light of section 1226 of the National Defense Authorization Act for FY 2020 (P.L. 116-92), which amended section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (22 U.S.C. § 8772) to make the assets at issue in this case available for execution to satisfy the judgment.*

The original post from May 30, 2018 follows.

Iran's central bank, Bank Markazi, has asked the Supreme Court to reverse a decision by the U.S. Court of Appeals for the Second Circuit (Second Circuit) , which concluded that the bank's assets held in Luxembourg may be ordered transferred to New York for possible satisfaction of terrorism judgments obtained under the Foreign Sovereign Immunities Act (FSIA). At issue is Bank Markazi's right to payment of bond proceeds of about $1.68 billion being held by, reflected on the books of, and recorded as a debt owed by Clearstream Banking, S.A. (Clearstream), a financial institution in Luxembourg specializing in bond and equity investments. The plaintiffs are a group of judgment creditors against Iran who prevailed in actions they brought under the terrorism exception to the FSIA, including the victims of the 1983 Marine Corps barracks bombing in Beirut, Lebanon (awarded damages in *Peterson v. Islamic Republic of Iran*), as well as victims of other terrorist attacks supported by Iran. They are owed approximately $3.8 billion in compensatory damages. Iran defaulted in each of their cases.

At the district court level, the plaintiffs argued that the bond proceeds at issue were actually held as cash at JP Morgan Chase in New York and were thus subject to the court's turnover order to partially satisfy their judgments. The district court found that the bond proceeds were located in Luxembourg and were thus immune from attachment under the FSIA because the FSIA execution immunity exceptions applied only to foreign sovereign assets *in the United States*. ("Execution immunity" refers to the immunity of the property of foreign sovereigns to attachment by a court unless an exception applies. For an explanation of

the exceptions for executing terrorism judgments, see this Legal Sidebar.) While this holding was consistent with Second Circuit case law up to that time, the Second Circuit held that an intervening Supreme Court decision, *Republic of Argentina v. NML Capital, Ltd.*, vitiated previous case law on the subject. In *NML Capital*, the Court held 7-1 that plaintiffs were entitled to discovery to locate sovereign assets held outside the United States by a third party because the text of the FSIA with respect to execution immunity states that property *in the United States* is entitled to immunity. Writing for the Court, Justice Scalia stated that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA] text. Or it must fall." Dismissing the U.S. government's concerns with respect to the possible adverse foreign policy repercussions of the ruling, the *NML* Court advised that such apprehensions be directed to Congress.

Although *NML* addressed only post-judgment discovery and not specifically execution immunity, the Second Circuit read the case more broadly, finding that no FSIA immunity applies to property belonging to a foreign sovereign unless it is located in the United States. Rather, the court reasoned, under the Federal Rules of Civil Procedure, the state law where the district court is located provides the rules regarding the attachment of assets located outside the court's jurisdiction, regardless of whether the judgment debtor is a foreign sovereign or anyone else (so long as the custodian of the asset is not a foreign sovereign). Because the New York high court had held that state law permits courts to order persons within their jurisdiction to bring assets under their control into the state from overseas for levying in satisfaction of judgments, the Second Circuit deemed that what actually mattered was whether the district court can exercise personal jurisdiction over Clearstream.

The Second Circuit noted that the plaintiffs were not assured victory, even if personal jurisdiction were to be found. The court explained the catch: once the asset is brought into the United States, it will be subject to the FSIA's execution immunity rules, and an applicable exception will need to exist before turnover can be ordered. The appellate court also professed its mindfulness with respect to the potential foreign policy ramifications of its holding, which seemed to the court to be at odds with the purpose of the FSIA "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." Nonetheless, the court felt itself bound by the *NML* Court's interpretation of the FSIA. Any problem arising from its decision, the court noted, would be up to Congress or the Supreme Court to fix.

Bank Markazi decided to go with the Supreme Court option, essentially asking the Court to overrule *NML* or at least deem the relevant language in it to be dicta that need not be followed. The bank argues that the Second Circuit ruling "upends decades of practice, creates an incoherent regime that Congress could not have intended, puts the United States in violation of international law, and threatens disastrous consequences for the nation's foreign relations." Bank Markazi would interpret the FSIA's omission of any mention of foreign sovereign property *outside* the United States as preserving the status quo in that regard, i.e., keeping such property subject to absolute immunity in U.S. courts rather than eliminating immunity without limitation, except for possible limitations under state law.

This appeal would not be Bank Markazi's first trip to the Supreme Court, should the Court grant certiorari. The Court in 2016 held in another case also captioned *Bank Markazi v. Peterson* that Congress may amend the law applicable to pending litigation in a manner that favors one side, which in that case permitted the plaintiffs to obtain the turnover of $1.75 billion in bond assets held in a New York bank account without regard to limitations set forth in the FSIA or elsewhere. Iran has lodged a complaint with the International Court of Justice to dispute that result.

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