

Client Alert

International Arbitration Practice Group

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Recent New York Decisions Bolster Right to Broad Discovery in Aid of Judgments

New York is a key venue for the enforcement of judgments and arbitral awards, and two recent decisions concerning post-judgment discovery demonstrate that while courts will apply their execution and garnishment authority with great care, they will permit judgment creditors latitude to take broad discovery in order to locate assets and enforce duly-rendered judgments in both the sovereign and non-sovereign contexts.

Sanctions Issued Against Argentina for Failure to Comply with Post-Judgment Discovery

On August 13, 2015, in *NML Capital, Ltd. v. Republic of Argentina*, the U.S. District Court for the Southern District of New York (SDNY) imposed sanctions against the Republic of Argentina for its failure to comply with a discovery order concerning Argentina's assets.¹ The *NML Capital* decision is the most recent decision in a decades-long dispute concerning Argentina's default on its sovereign debt instruments in 2001, which has led to the entry of multiple judgments against Argentina, all of which Argentina has refused to satisfy. The dispute has generated a series of decisions by the Second Circuit.²

In its order, the district court unequivocally stated that "any property of the Republic in the United States except diplomatic or military property is deemed to be used for commercial activity."³ As a result of the sanctions order, Judge Griesa rendered all non-diplomatic and non-military Argentine assets subject to attachment pursuant to the commercial activities exception of the Foreign Sovereign Immunities Act (FSIA). This action is noteworthy because the FSIA generally limits attachment and execution against sovereigns to property in the United States that is used for a commercial activity in the United States, a standard that has often proven difficult to satisfy, and which has led many judgments against foreign states to go unsatisfied. The district court's ruling order effectively shifted the burden of proof to the sovereign state to demonstrate that its assets should not be

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considered commercial in nature for purposes of applicability of the FSIA.

Judge Griesa's decision was issued just two months after another recent decision of the same court in which Judge McMahon imposed sanctions against alleged alter-egos of the judgment-debtor Zimbabwe for their repeated failure to comply with court orders directing them to produce certain Board meeting minutes and resolutions.⁴ Judge McMahon precluded the alleged alter-egos from relying upon those documents in opposing the Plaintiffs' motion for a declaration finding them to be alter-egos of Zimbabwe, and found it "appropriate that the trier of fact should draw an adverse inference about the contents of those documents; namely, that had they been produced, they would have supported Plaintiffs' argument and undermined the [alleged alter-egos'] argument that they are in fact not alter-egos of the Government of Zimbabwe."⁵ Judge McMahon further directed the alleged alter-egos to produce any and all evidence of their "non-alter-ego status" within 30 days of the order, and held that the alleged alter-egos would be precluded from offering any evidence on the issue of whether they were alter-egos of Zimbabwe after this date.

Together, these decisions appear to illustrate the U.S. courts' growing impatience for discovery misconduct in the post-judgment enforcement context and reaffirm prior Second Circuit precedent recognizing that nothing in the FSIA alters the ordinary rule favoring broad post-judgment discovery seeking information potentially relevant to the judgment-creditor's global collection efforts.⁶

Scope of Separate Entity Rule and General Personal Jurisdiction Clarified

On August 11, 2015, the First Department of the Supreme Court of the State of New York, Appellate Division (First Department) upheld a discovery order in *In re B&M Kingstone, LLC v. Mega International Commercial Bank Co., Ltd.*⁷ The respondent, Mega International Commercial Bank (Mega Bank), sought to overturn a ruling by the Supreme Court of the State of New York (New York County) (Supreme Court) which had directed the New York branch of Mega Bank (Mega Bank NY) to fully respond to an information subpoena – including information regarding accounts and records of judgment debtors held at branches outside of New York State – served upon it by B&M Kingstone.

Mega Bank is an international banking corporation headquartered in Taipei with 128 branches worldwide and a single branch in New York. The information subpoena sought information essential to the enforcement of a money judgment obtained against a group of judgment debtors. Relying on the United States Supreme Court's decision in *Daimler AG v. Bauman*,⁸ Mega Bank argued that the New York courts lacked personal jurisdiction over it with respect to compelling Mega Bank to produce information held outside of New York. Mega Bank contended that, pursuant to *Daimler*, "a court could not exercise general jurisdiction over an entity unless the entity could fairly be regarded as at home in the forum jurisdiction [and] merely operating a branch office in the forum jurisdiction was insufficient to establish general jurisdiction."⁹

In *Daimler*, the Supreme Court held that a corporation is subject to general personal jurisdiction only where it is "at home,"¹⁰ which the Supreme Court generally limited to a corporation's state of incorporation or the state of its principal place of business.

The Appellate Division rejected Mega Bank's argument that *Daimler* precluded the court from exercising general jurisdiction over Mega Bank. The court, while acknowledging the Supreme Court's ruling in *Daimler*, determined that the court's exercise of personal jurisdiction in this case did not rise and fall upon it

“because [Mega Bank NY] consented to the necessary regulatory oversight in return for permission to operate in New York” by registering as a foreign bank branch with the New York State Department of Financial Services. Through such registration, Mega Bank NY consented to the court’s jurisdiction to compel Mega Bank NY to comply with the subpoenas.¹¹ Notably, the court’s reasoning borrowed largely from a previous decision of the U.S. District Court for the Southern District of New York, in which Judge Hellerstein held that the New York branch of Banco Bilbao Vizcaya Argentina (S.A.) (BBVA) was subject to general jurisdiction for purposes of compelling compliance with a subpoena served on it.¹² With respect to Mega Bank’s argument that New York’s separate entity rule precluded compliance with the information subpoena,¹³ the court noted that Mega Bank had not contended that “compliance with the information subpoena would be onerous or unduly expensive or that the requested information is not available in New York.”¹⁴ This proved key as the court observed that “the court’s general personal jurisdiction over the bank’s New York branch permits it to compel that branch to produce any requested information that can be found through electronic searches performed there.”¹⁵

The *Mega Bank* decision provides an important refinement to recent decisions concerning personal jurisdiction and the “separate entity rule” that New York courts have developed to curtail the use of enforcement devices against banks.

Conclusions

Taken together, the *NML Capital* and the *Mega Bank* decisions appear indicative of a trend towards assisting judgment-creditors in their efforts to enforce judgments against recalcitrant judgment debtors. The cases are particularly relevant to judgment creditors involved in enforcement proceedings against foreign sovereigns wielding the FSIA as a shield against their payment obligations as well as against foreign banks wielding the separate entity rule and the nuances of general personal jurisdiction to evade payment of the judgment debts of their account holders – regardless of the location of those accounts.

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¹ *NML Capital, Ltd. v. Republic of Argentina*, Case No. 08-cv-6978 (TPG), Doc. 456 (Aug. 13, 2015).

² See, e.g., *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254 (2d Cir. 2012); *NML Capital, Ltd. v. Banco Central de la Republica Argentina*, 652 F.3d 172 (2d Cir. 2011); *Aurelius Capital Partners, LP v. Republic of Argentina*, 379 Fed. Appx. 74 (2d Cir. 2010); *EM Ltd. v. Republic of Argentina*, 389 Fed. Appx. 38 (2d Cir. 2010); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120 (2d Cir. 2009); *Seijas v. Republic of Argentina*, 352 Fed. Appx. 519 (2d Cir. 2009); *Mazzini v. Republic of Argentina*, 282 Fed. Appx. 907 (2d Cir. 2008); *Fontana v. Republic of Argentina*, 415 F.3d 238 (2d Cir. 2005); *EM Ltd. v. Republic of Argentina*, 131 Fed. Appx. 745 (2d Cir. 2005); *EM Ltd. v. Republic of Argentina*, 382 F.3d 291 (2d Cir. 2004).

³ *NML Capital*, No. 08-cv-6978, Doc. 456.

⁴ *Funnekotter v. Agric. Dev. Bank of Zimbabwe*, No. 13 CIV. 1917 CM, 2015 WL 3526661, at *6 (S.D.N.Y. June 3, 2015).

⁵ *Id.* at *6.

⁶ See *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012), *aff’d sub nom. Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 189 L. Ed. 2d 234 (2014).

⁷ *B & M Kingstone, LLC v. Mega Int'l Commercial Bank Co.*, 131 A.D.3d 259, 15 N.Y.S.3d 318 (1st Dep't 2015).

⁸ *Daimler AG v. Bauman*, 134 S. Ct 746, 760 (2014).

⁹ *B & M Kingstone*, 15 N.Y.S.3d at 321.

¹⁰ *Daimler*, 134 S. Ct at 760.

¹¹ *B & M Kingstone*, 15 N.Y.S.3d at 323.

¹² *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561 (S.D.N.Y. 2015), *appeal dismissed sub nom. Vera v. Cuba*, No. 14-3743-CV L, 2015 WL 5201675 (2d Cir. Sept. 8, 2015).

¹³ *B & M Kingstone*, 15 N.Y.S.3d at 324.

¹⁴ *Id.*

¹⁵ *Id.*