

U.S. Appeals Court Upholds Bondholder's Discovery of Argentina's Foreign Assets

On Monday, an influential New York federal appeals court affirmed a decision ordering Argentina's banks in the United States to disclose documents regarding the sovereign's foreign-held assets. Bondholder NML Capital Ltd. ("NML") had issued subpoenas to Bank of America and Banco de la Nación Argentina for the documents in 2010. Argentina tried to quash the subpoenas, arguing that, because property located abroad is immune from attachment under the Foreign Sovereign Immunities Act ("FSIA") the subpoenas were improper. Whether such foreign-located property is indeed immune from attachment is an unsettled question in FSIA jurisprudence.

The Second Circuit notably side-stepped the FSIA question, holding that the FSIA did not apply because NML was not seeking confirmation of an attachment order—it sought only to enforce a discovery order, an order that the Court readily affirmed under the expansive federal and New York judgment-creditor procedures. Further, the subpoenas did not implicate Argentina's immunities because they were directed at two private banks. Although attachment immunity was deemed irrelevant, the Court suggested that it sees the issue on the horizon, stating that "if and when NML moves past the discovery stage and attempts to execute against Argentina's property, Argentina will be protected by principles of sovereign immunity in this country or in others" but only "to the extent that immunity has not been waived."

The decision is the latest in the decade-long effort of the so-called "vulture fund" NML to collect on defaulted Argentinian bonds. In early-to-mid 2010 NML served the subpoenas on the banks demanding information about property held by Argentina, its agencies, instrumentalities, political subdivisions and their employees, as well as the current president, Cristina Fernández de Kirchner and her late husband, former president Néstor Kirchner. The subpoenas contained no territorial limitations and Argentina and both banks lodged objections with the Manhattan federal trial court. Neither the trial court nor the Second Circuit was persuaded by Argentina's immunity arguments, with the district court going so far as to state that it intended to serve as a "clearinghouse for information" in NML's efforts to find and attach Argentina's assets.

To date, NML has secured U.S. judgments against Argentina to the tune of approximately \$1.6 billion, with summary judgment awarded on another \$900 million worth of claims. It remains to be seen whether this new decision will enhance NML's collection efforts.

For further information or advice regarding these issues, please contact:

Eric Lewis at eric.lewis@lewisbaach.com or +1.202.659.7203

Manuel Varela at manuel.varela@lewisbaach.com or +1.202.659.7874

Claire DeLelle at claire.delelle@lewisbaach.com or +1.202.659.7217

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