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SECOND CIRCUIT REVIEW

Expert Analysis

Jurisdiction Over Assets to Enforce Judgment for Terrorist Acts

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This month we discuss *Weinstein v. Islamic Republic of Iran*,[1] in which the U.S. Court of Appeals for the Second Circuit affirmed an order of the District Court for the Eastern District of New York appointing a receiver to attach property of Bank Melli Iran (Bank Melli) in satisfaction of a prior judgment against the Islamic Republic of Iran.

In its decision, written by District Judge Jed S. Rakoff, sitting by designation, and joined by Circuit Judges Amalya Kearse and Peter Hall, the Second Circuit ruled that the district court had an independent basis to exercise subject matter jurisdiction over the assets of an instrumentality of a foreign state, notwithstanding that the instrumentality was not itself a party to the underlying action that gave rise to the judgment.

In the first appellate decision addressing the issue, the Second Circuit held that the plain language and the legislative history of the Terrorism Risk Insurance Act of 2002 (TRIA)[2] and the related amendments to the Foreign Sovereign Immunities Act (FSIA)[3] make clear that their provisions were intended to enable the victims of terrorism to enforce judgments by attaching the blocked assets of instrumentalities or agencies of terrorist states regardless of whether the instrumentality or agency was a party to the underlying action. The court also held that the separation of powers doctrine did not preclude the application of the TRIA to enforce judgments obtained prior to the enactment of the law.

Procedural History

The issues on appeal arose from a motion of Jennifer Weinstein Hazi to appoint a receiver to sell property owned by Bank Melli, which Ms. Hazi sought to attach and sell in partial satisfaction of a judgment against Iran.

On Feb. 25, 1996, a suicide bombing in Jerusalem orchestrated by the terrorist organization Hamas severely injured Ira Weinstein, Ms. Hazi's father and a U.S. citizen residing in New York. Mr. Weinstein later died from his injuries. On Oct. 27, 2000, his widow, another administrator of his estate, and his children, brought suit in the U.S. District Court for the District of Columbia for wrongful death and other torts against Iran, the Iranian Ministry of Information and Security, and certain Iranian officials, alleging that they had provided monetary support for Hamas' attack. The district court exercised jurisdiction under §1605(a)(7) of the FSIA.[4] The defendants failed to appear and the court entered default judgment for the plaintiffs in the amount of over $183 million.[5]

> The Second Circuit ruled that the district court had an independent basis to exercise subject matter jurisdiction over the assets of an instrumentality of a foreign state.

Following the entry of judgment, the plaintiffs registered the judgment in the U.S. District Court for the Eastern District of New York and served a subpoena on the Bank of New York that led to the identification of Bank Melli as a possible instrumentality of Iran. The plaintiffs sought to attach certain of Bank Melli's assets in the United States, under the TRIA. The district court, however, determined that Bank Melli's assets were not attachable under the TRIA because they were not "blocked assets," as required by the TRIA.[6]

Subsequently, on Oct. 25, 2007, the Department of Treasury designated Bank Melli as a "proliferat[or] of weapons of mass destruction" and froze its assets.[7] On Oct. 31, 2007, Ms. Hazi filed a motion seeking appointment by the district court of a receiver, pursuant to Federal Rule of Civil Procedure 69, to sell property owned by Bank Melli in Forest Hills, Queens, which Ms. Hazi sought to attach and sell in partial satisfaction of the judgment against Iran. Ms. Hazi argued that the property was now subject to attachment under the TRIA because Bank Melli's assets had been frozen.

Bank Melli moved to dismiss the proceeding against it and to stay appointment of a receiver pending resolution of its motion to dismiss. In its motion to dismiss, Bank Melli did not contest that it was an instrumentality of Iran or that its assets had been blocked, but argued, inter alia, that attachment of its property would violate the Treaty of Amity between the United States and Iran; that attachment would constitute a taking in violation of the Takings Clause of the Fifth Amendment and the Treaty of Amity; and that the blocking of its assets violated the so-called "Algiers Accords" between the United States and Iran.

The district court (Wexler, J.) denied Bank Melli's motion to dismiss and appointed a receiver, but stayed the proceedings pending resolution of Bank Melli's appeal of the appointment of the receiver.[8]

The Second Circuit Decision[9]

Bank Melli's Jurisdictional Argument. Bank Melli first argued that the district court lacked subject matter jurisdiction to hear Ms. Hazi's motion to appoint a receiver because the proceeding was "an independent controversy" for which the TRIA did not provide an independent source of jurisdiction.[10]

In the underlying action in which Ms. Hazi obtained the judgment, the district court had exercised jurisdiction over Iran under a section of the FSIA. That section abrogates sovereign immunity for any foreign state designated by the State Department as a state sponsor of terrorism when such a state commits a terrorist act or provides material support for the commission of a terrorist act and the act results in the death or personal injury of a U.S. citizen.[11]

The district court later exercised jurisdiction over Bank Melli in the ancillary proceeding pursuant to §1609 of the FSIA which provides that property of a foreign sovereign is immune from attachment and execution except as proved in §§1610 and 1611 of the FSIA and §201(a) of the TRIA.

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These provisions state, in relevant part, that when a party "has obtained a judgment against a terrorist party on a claim based on an act of terrorism…the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution and attachment."[12]

Bank Melli argued on appeal that §201(a) does not provide an independent basis for jurisdiction over an instrumentality of a terrorist state when the instrumentality was not itself a party to the underlying action, but rather simply provides an additional ground for abrogating immunity from attachment for a party that has been the subject of a valid judgment.

The Second Circuit rejected Bank Melli's argument, stating that it was "belied by the plain language of Section 201(a), and well as by its history and purpose."[13] The court noted that under Bank Melli's interpretation, the parenthetical language in §201(a) permitting attachment of blocked assets of agencies or instrumentalities would be superfluous because "the agency or instrumentality would itself have been a 'terrorist party' against which the underlying judgment had been obtained."[14] Thus, the court reasoned, if the provision were not interpreted as an independent grant of jurisdiction, "the parenthetical would be a nullity."[15]

Notwithstanding its finding that the statutory language was unambiguous, the Second Circuit looked to the legislative history of the TRIA as well. The court's decision noted the clear statement by Senator Tom Harkin, one of the sponsors of the TRIA, that the law "establishes once and for all, that…judgments [against terrorist states] are to be enforced against any assets available in the U.S."[16]

Based on both the language of the statutory provision and the legislative history, the Second Circuit "f[ou]nd it clear beyond cavil that Section 201(a) of the TRIA provides courts with subject matter jurisdiction over post-judgment execution and attachment proceedings against property held in the hands of an instrumentality of the judgment-debtor."[17]

Bank Melli's Constitutional Argument. Bank Melli also argued that the TRIA was unconstitutional as applied because the judgment at issue occurred prior to the enactment of the TRIA and, thus, application of the TRIA to the case would "mandate[] the reopening of a final judgment in violation of the separation of powers doctrine of Article III of the U.S. Constitution."[18]

In its argument, Bank Melli relied on *Plaut v. Spendthrift Farms Inc.*, in which the Supreme Court held that "retroactive legislation [that requires] its own application in a case already finally adjudicated…does no more and no less than 'reverse a determination once made, in a particular case' [and thus] exceeds the power of Congress."[19]

The court rejected Bank Melli's separation of powers argument, as well. The court explained that the executive branch's blocking of Bank Melli's assets—which, in turn, provided the district court jurisdiction to attach those assets—did not effectuate a revision of the 2002 judgment. Rather, the TRIA overrode an earlier presumption that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status."[20] Thus, according to the court, the TRIA simply "render[s] a judgment more readily enforceable against a related third party. The judgment itself [is] in no way tampered with, and separation of powers thus in no way offended."[21]

Bank Melli's Other Arguments. Bank Melli also argued that the TRIA, as applied, violated a provision of the Treaty of Amity between Iran and the United States. Bank Melli argued that the treaty required that Iranian companies "be treated as distinct and independent entities from their sovereign." The court rejected this argument, holding that the relevant provision simply "put[] foreign corporations on equal footing with domestic corporations."[22]

The court held that there was no conflict between the Bank Melli being on equal footing with U.S. corporations and the district court's exercise of jurisdiction. Additionally, the court noted that if the TRIA did conflict with the Treaty of Amity, it would have to be read as abrogating the treaty and, thus, would apply nonetheless.

Bank Melli next argued that the attachment of its assets violated the Takings Clause, because it was a taking of physical property, not for a public purpose and without just compensation. The court found this argument without merit, explaining that "where Bank Melli's assets are subject to attachment to satisfy a judgment against its foreign sovereign, the underlying purpose of the Takings Clause is in no way violated by attachment of Bank Melli's assets."[23]

The Second Circuit's ruling in 'Weinstein' clarifies that federal courts have subject matter jurisdiction under the FSIA and the TRIA over the instrumentalities and agencies of designated terrorist states for purposes of satisfying a judgment even when the instrumentality or agency is not itself accused of an act of terrorism.

Finally, Bank Melli argued that attachment of its assets violated the so-called Algiers Accords entered into by the United States and Iran following the 1979 hostage crisis.[24] Under the Accords, the United States unblocked Iranian assets that had been blocked during the crisis and agreed "to ensure the mobility and free transfer of all Iranian assets within its jurisdiction."[25]

Bank Melli argued that the order blocking its assets violated this provision of the Accords. The Second Circuit, however, found that while the Accords unblocked assets blocked during the hostage crisis, "nothing in the Accords suggests that the United States is precluded from blocking Iranian assets based on subsequent events unrelated to the hostage crisis."[26]

Conclusion

The Second Circuit's ruling in *Weinstein* clarifies that federal courts have subject matter jurisdiction under the FSIA and the TRIA over the instrumentalities and agencies of designated terrorist states for purposes of satisfying a judgment even when the instrumentality or agency is not itself accused of an act of terrorism. *Weinstein* is the first Court of Appeals decision addressing this question, and it likely will guide other courts considering jurisdictional challenges under the TRIA in the future.

1. *Weinstein v. Islamic Rep. of Iran*, Docket No. 09-3034-cv, 2010 WL 2365526, at 1 (2d Cir. June 15, 2010).
2. Pub. L. No. 107-297, 116 Stat. 2322, 2337, codified at 28 U.S.C. §1609, note.
3. 28 U.S.C. §1609.
4. The FSIA provides the exclusive basis for subject matter jurisdiction over civil actions against foreign state defendants. Section 1605(a)(7) provides that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case "…in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources…for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency…." 28 U.S.C. §1605(a)(7). This provision was designed to permit United States citizens to bring civil actions against specifically-designated foreign state sponsors of terrorism, including Iran. See, e.g., *Sutherland v. Islamic Republic of Iran*, 151 F.Supp.2d 27 (D.D.C.2001) (holding Iran liable for American kidnapped and tortured by Hizbollah); *Eisenfeld v. Islamic Republic of Iran*, 172 F.Supp.2d 1 (D.D.C.2000) (holding Iran liable for death of American students in bombing by Hamas).
5. *Weinstein v. Islamic Rep. of Iran*, 184 F.Supp.2d 13, 21-22 (D.D.C. 2002).
6. *Weinstein v. Islamic Republic of Iran*, 299 F.Supp.2d 63, 64-65, 74-76 (E.D.N.Y. 2004).
7. Executive Order 13,382 provides that all property and interest in property in the United States of person and entitles listed in the order or subsequently listed "are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in." Exec. Order 13,382, 70 Fed Reg. 38,567 (June 28, 2005). Bank Melli was added to the list on Oct. 25, 2007.
8. *Weinstein v. Islamic Rep. of Iran*, 624 F.Supp.2d 272 (E.D.N.Y. 2009).
9. In addition to the arguments it presented to the district court, Bank Melli made two arguments for the first time on appeal. The Second Circuit addressed both of these arguments, the first because it related to subject matter jurisdiction, which may be raised at any time, and the second because federal courts have a strong interest in addressing constitutional challenges to separation of powers. *Weinstein*, 2010 WL 2365526, at 2, 5. The Second Circuit's opinion consisted primarily of analysis of the newly raised arguments and they are the focus of this column.
10. Id. at 2.
11. Id.
12. TRIA §201(a), 116 Stat. at 2337.
13. *Weinstein*, 2010 WL 2365526, at 3.
14. Id.
15. Id.
16. Id at 4 (quoting 148 Cong. Rec. S11524, at S11528 (Nov. 19, 2002) (statement of Sen. Harkin).
17. Id. at 4.
18. Id. at 5.
19. *Plaut v. Spendthrift Farms Inc.*, 514 U.S. 211, 225 (1995) (quoting The Federalist No. 81, at 545 (J. Cooke, ed. 1961)).
20. *Weinstein*, 2010 WL 2365526, at 5 (quoting *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627-28 (1983)).
21. *Weinstein*, 2010 WL 2365526, at 5.
22. Id. at 8.
23. Id. at 9.
24. The Accords are memorialized in the Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) and The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981), reprinted in 20 I.L.M. 223 (1981); 81 Dep't of State Bull. No.2047, February 1981 at 1.
25. 20 I.L.M. at 224.
26. *Weinstein*, 2010 WL 2365526, at 10.