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Legal Sidebar

Iran's Central Bank Will Have Its Day in the Supreme Court

10/28/2015

On October 1, 2015, the Supreme Court agreed to hear Bank Markazi v. Peterson, in which the Central Bank of Iran is seeking to prevent the turnover of $1.75 billion in frozen bonds to victims of Iran-sponsored terrorism. The appellees are a group of more than 1,300 plaintiffs who have judgments against Iran for its involvement in the 1996 Khobar Towers attack, the 1983 Marine barracks bombing in Lebanon, the 1998 attacks on two U.S. Embassies in Africa, a 1990 assassination in New York City, a hostage-taking in Lebanon in 1984, and various terrorist bombings in Jerusalem. Iran did not appear in court to challenge its liability, and the validity of the judgments is not at issue in this enforcement action. The plaintiffs seek to execute on those judgments, totaling about $4.5 billion in compensatory damages, by attaching certain bonds. The bonds are held in the name of Clearstream, a Luxembourg securities intermediary, which is handling them for an Italian bank, which, in turn, holds them for the benefit of Bank Markazi, the central bank of Iran. In order to facilitate execution on the bonds, Congress passed a statute as part of the Iran Threat Reduction and Syria Human Rights Act of 2012 (ITRA) to sweep away possible obstacles. This, Bank Markazi argues, is an unconstitutional violation of the separation of powers because it effectively directs the outcome of a pending court case.

Under the Foreign Sovereign Immunities Act (FSIA), a sovereign foreign government and its agencies are generally immune from suit in U.S. courts for their sovereign or public acts, as distinguished from commercial activities. One provision of the FSIA, however, authorizes suits for money damages, under certain circumstances, against a foreign state-sponsor of terrorism for causing "personal injury or death ... by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking." The FSIA also provides for attachment and execution of the property in the United States of a foreign state in the case of a judgment based on the terrorism exception. Iran has amassed a debt of some $46 billion under the terrorism exception, the bulk of which remains outstanding, mostly due to the scarcity of Iranian assets in the United States under the current sanctions regime.

The attempt to reach the $1.75 billion in the Clearstream account at Citibank, New York, began in 2008, when judgment holders secured a court order restraining Citibank from transferring or disposing of the funds in the account. In 2009, the U.S. District Court for the Southern District of New York found that the bonds were not held in the name of Bank Markazi, and that they could not be attached because the court was bound to follow New York law which would not allow attachment of securities that Clearstream maintained on its books, not for Bank Markazi, but for an Italian bank, to which it had transferred them, allegedly to be held for the benefit of Bank Markazi. The court, therefore, had ruled that the bonds could not be attached to satisfy the judgment against Iran under section 201 of the Terrorism Risk Insurance Act (TRIA) unless fraud could be shown with respect to the nominal owner of the bonds. In the meantime, the restraints remained in place. Another avenue using the FSIA exception to the general rule against attachment of the property of a foreign state was apparently foreclosed because it does not permit execution against the property "of a foreign central bank or monetary authority held for its own account."

So Congress stepped in, while the case was still pending, enacting the ITRA provision (section 8772) to set forth a road map for the court to execute against the bonds being held by Citibank for Clearstream. It identified the property in question with specificity—"the financial assets ... the subject of proceedings ... in Peterson et al. v. Islamic Republic of Iran et al., ... that were restrained ... by court order dated June 27, 2008... so long as such assets remain restrained by

court order." The statute provides that, upon the court's determining "whether Iran holds equitable title to, or the beneficial interest in" the $1.75 billion in bonds, "and that no other person possesses a constitutionally-protected interest in [the] bonds," "notwithstanding any other provision of law ... and preempting any inconsistent provision of State law," those bonds "shall be subject to execution or attachment in aid of execution in order to satisfy any judgment to the extent of any compensatory damages awarded against Iran for damages for personal injury or death caused by an act of torture, extrajudicial killing, aircraft sabotage, or hostage-taking, or the provision of material support or resources for such an act."

The district court made the appropriate determinations to issue a judgment requiring Citibank to hand over the assets. Bank Markazi appealed to the U.S. Court of Appeals for the Second Circuit, invoking the Civil War era case *United States v. Klein*, in which the Supreme Court invalidated a law making presidential pardons inadmissible as proof of loyalty necessary to prevail in claims against the United States, finding it interfered with judicial power under Article III, § 1 because it "prescrib[ed] a rule for the decision of a cause in a particular way." Bank Markazi views the ITRA provision as doing exactly the same thing, but the Second Circuit viewed it differently, stating that the law merely "retroactively changes the law applicable in this case, a permissible exercise of legislative authority" rather than usurping judicial control over the matter by directing how the old law is to be applied to the facts of the case. The court noted the feature of the law that "explicitly leaves the determination of certain facts to the courts," and did not view as significant Bank Markazi's concerns that these determinations could effectively lead to only one result. Bank Markazi's challenges to the law as inconsistent with the Treaty of Amity with Iran and as an unconstitutional taking without compensation were also rejected.

Asked for his views by the Supreme Court, the Solicitor General on August 19 urged the Court to decline review of the case, essentially agreeing that the Second Circuit got it right. Moreover, he wrote:

> Even if there might be contexts in which a change in the law applicable only to one case would raise separation-of-powers concerns, this case would not be an appropriate vehicle to consider such concerns. Section 8772 pertains to the rules governing execution against a foreign state's property in satisfaction of a judgment against the foreign state. Claims against foreign sovereigns have long been uniquely subject to changes in law and other actions by the political Branches, including changes that could affect a single case.

The Solicitor General also disagreed with Bank Markazi's contention that the dispute has important international ramifications beyond the assets at issue, viewing the Treaty of Amity as irrelevant to the case and brushing aside Bank Markazi's fears that the law undermines confidence in U.S. financial markets:

> ...Section 8772 is a narrowly tailored provision that Congress enacted to permit execution on a terrorism judgment against the assets beneficially owned by the central bank of a state sponsor of terrorism—assets that were being held in the United States in violation of U.S. sanctions laws and regulations. In the view of the United States, the law-abiding members of the international community should not find such legislation cause for alarm.

The Supreme Court nevertheless granted certiorari in the case to determine whether "§8772 - a statute that effectively directs a particular result in a single pending case - violates the separation of powers." It is expected to hear oral arguments sometime in the winter.

Posted at 10/28/2015 11:02 AM