14-4375-cv(L)

14-4378-cv(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: VITAMIN C ANTITRUST LITIGATION

THE RANIS COMPANY, INC.,

Appellant-Cross-Appellee,

—against—

HEBEI WELCOME PHARMACEUTICAL CO. LTD.,
NORTH CHINA PHARMACEUTICAL GROUP CORPORATION,

Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR APPELLANT-CROSS-APPELLEE THE RANIS COMPANY, INC.

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RULE 26.1 DISCLOSURE

Appellant-Cross-Appellee and plaintiff below, The Ranis Company, Inc., is the representative of the Direct Purchaser Damages Class certified in the District Court proceeding (the "Judgment Creditor"). The Judgment Creditor has no parent corporation. No publicly held corporation owns 10% or more of its stock.

PRELIMINARY STATEMENT

The Judgment Creditor appeals from the Memorandum Decision and Order of the U.S. District Court for the Eastern District of New York (Cogan, J.), dated October 22, 2014 (the "Order"), denying the Judgment Creditor's motion for a turnover order pursuant to Federal Rule of Civil Procedure 69(a)(1) and N.Y. CPLR § 5225(a) against one of the defendants below, North China Pharmaceutical Group Corporation ("NCPG").

The District Court entered a money judgment against defendants below and Appellees-Cross-Appellants NCPG and Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei Welcome") (together, the "Judgment Debtors"). Appendix ("A-") 138-139 (the "Judgment"). Thereafter, the Judgment Creditor sought—among other post-judgment relief—an order pursuant to Federal Rule of Civil Procedure 69(a)(1) and N.Y. CPLR § 5225(a) requiring the Judgment Debtors to deliver or convey certain bank deposits and securities in satisfaction of the Judgment.

By the Order, the District Court (Cogan, J.) granted the Judgment Creditor's turnover motion as to Hebei Welcome, but denied it in relation to NCPG. The District Court held that NCPG's assets are immune from execution under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (the "FSIA"). Special Appendix ("SPA-") 1-8.

NCPG is not currently a "foreign state" within the meaning of the FSIA because an agency of the Chinese government transferred ownership of NCPG to a separate financing company back in 2009. That fact is undisputed. SPA-3-4. As a result, and as the Judgment Creditor argued to the District Court, its property cannot be entitled to immunity from execution under 28 U.S.C. § 1609. Execution immunity under that section adheres only to property "of a foreign state."

But the District Court held that NCPG's assets are nonetheless immune from execution because NCPG had formerly been an instrumentality of China when the action was first brought. SPA-1-8. The Judgment Creditor respectfully submits that the District Court erred in its construction of the execution immunity statute, 28 U.S.C. § 1609, and its relationship to the jurisdictional immunity statute, section 1604.

Although immunity from subject matter jurisdiction for purposes of 28 U.S.C. § 1604 may turn on the status of a putative defendant when the action is brought, immunity from execution under section 1609 is a separate issue and is

conferred only on the property "of a foreign state." If the owner of the property is no longer a "foreign state" within the meaning of the statute, that property cannot be immune from execution.

Therefore, to determine whether property is immune from execution, the relevant time for assessing the sovereign status of the owner is not when the underlying suit was brought (as with the issue of subject matter jurisdiction), but instead when the execution or attachment on the property is sought. Because NCPG is no longer an instrumentality of China within the meaning of the FSIA, its property is not immune from execution. The District Court should have granted the Judgment Creditor's turnover motion in relation to NCPG's assets.

JURISDICTION

The District Court had ancillary enforcement jurisdiction within the meaning of *Peacock v. Thomas*, 516 U.S. 349, 356-59 (1996) and jurisdiction pursuant to 28 U.S.C. § 1331 to determine whether to issue a post-judgment turnover order against NCPG pursuant to Rule 69(a)(1) of the Federal Rules of Civil Procedure. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 to review the Order, a final judgment disposing of the Judgment Creditor's claim to a turnover order in relation to NCPG's assets. The Judgment Creditor noticed this appeal on November 21, 2014, within 30 days of the issuance of the decision under review dated October 22, 2014.

ISSUE PRESENTED

Whether for purposes of determining immunity from attachment, arrest or execution on a judgment debtor's property under 28 U.S.C. § 1609, the judgment debtor's status as an "foreign state" within the meaning of 28 U.S.C. § 1603 is to be determined at the time the execution on its property is sought, or instead at the commencement of the litigation as is the case with determining the question of a party's immunity from subject matter jurisdiction pursuant to 28 U.S.C. § 1604.

STATEMENT OF THE CASE

A. Prior Proceedings

On December 2, 2008, the Judgment Creditor filed the Third Amended Class Action Complaint against the Judgment Debtors and others alleging that certain Chinese vitamin C manufacturers violated the Sherman Act, 15 U.S.C. § 1. On February 12, 2014, the U.S. District Court for the Eastern District of New York entered the Third Amended Judgment and Final Decree in favor of the Judgment Creditor as representative of a certified Direct Purchaser Damages Class, in the approximate amount of $148 million plus post-judgment interest against the Judgment Debtors, jointly and severally. A-146-148.

The Judgment Debtors appealed the Judgment (case no. 13-4791) but they elected not to obtain a stay of execution by posting a supersedeas bond pursuant to Federal Rule of Civil Procedure 62(d). The District Court denied their motions for

an unsecured stay of execution and/or for the District Court to abstain from executing on the Judgment. SPA-8-10.

On April 25, 2014, the Judgment Creditor filed a motion seeking orders in aid of execution on the Judgment, including an order directing each of the Judgment Debtors to deliver or convey certain assets in satisfaction of the Judgment pursuant to Federal Rule of Civil Procedure 69(a)(1) and N.Y. CPLR § 5225(a). The District Court denied the turnover motion as to NCPG's assets on the basis of foreign sovereign immunity. SPA-1-8.

B. The Memorandum Decision and Order

The District Court cited the undisputed fact that, whereas NCPG had been owned by an agency of the Chinese government when the action was brought, since 2009 it has been owned by a separate financing company. SPA-3.[1] The District Court acknowledged that as a result, under *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), NCPG would no longer qualify as a "foreign state" within the meaning of the FSIA. SPA-4 ("the subsidiary of an instrumentality is not

[1] At the time the operative Third Amended Class Action Complaint against the Judgment Debtors was filed in December 2008, NCPG was majority owned by the State-owned Assets Supervision and Administration Commission of Hebei Province, an agency of the government of the People's Republic of China (the "SASAC"). A-150; A-278; SPA-3. In June 2009, the Hebei provincial government restructured the ownership of NCPG, transferring ownership to Jizhong Energy Group, Co. Ltd., a Fortune Global 500 financing company. A-150; A-278; SPA-3.

protected by sovereign immunity"); SPA-7 ("It is, of course, true that this tiered ownership would be insufficient to satisfy *Dole*'s requirement that '[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares.'").

The District Court explained that the FSIA concerns two distinct types of immunity. Section 1604 deprives the courts of subject matter jurisdiction to hear a claim against a "foreign state" unless certain exceptions pertain. Because subject matter jurisdiction is ordinarily determined by the facts as they exist at the time a suit is filed, whether a defendant is a "foreign state" for purposes of jurisdictional immunity turns on the status of the defendant and the applicability of the exceptions when the action is brought. SPA-1-5. The District Court also cited authorities for the proposition that once jurisdiction is established, subsequent events do not ordinarily destroy subject matter jurisdiction. SPA-5 (citing *Olympia Exp., Inc. v. Linee Aeree Italiane, S.P.A.*, 509 F.3d 347, 349 (7th Cir. 2007)).

The District Court acknowledged that section 1609 is different. That statute by its terms makes the property "of a foreign state" immune from attachment or execution unless certain exceptions pertain. The District Court described the question of whether an entity's status as a sovereign instrumentality for purposes of section 1609 should be determined at the time it is sued or at the time execution is sought as "an issue of first impression." SPA-5. The District Court further

observed that the Judgment Creditor's plain language reading of section 1609, that if the defendant is no longer a "foreign state," its property is no longer the property "of a foreign state," has "a certain commonsense appeal." *Id.*

But the District Court nonetheless held that "NCPG's undisputed status as an instrumentality of the Chinese government at the time that it was sued means that its property retains immunity throughout this litigation, including through execution proceedings." SPA-7. The District Court adopted this new rule for three stated reasons:

First, the District Court decided "it would be incongruous to find that an entity remains an instrumentality of a foreign sovereign for purposes of FSIA jurisdiction, but that its property may nevertheless be attached." SPA-6. Second, citing *Dole Food*, the District Court suggested that the definition of "foreign state" under 28 U.S.C. § 1603 is supposed to be determined, for any and all purposes, at the time a lawsuit is brought. *Id.* Third, the District Court decided that a predictable rule conferring permanent residual execution immunity on the property of a former sovereign instrumentality "protects an important reliance interest" consistent with the purpose of the FSIA. SPA-6-7.

STANDARD OF REVIEW

This is an appeal from a conclusion of law concerning the applicability of the FSIA to post-judgment turnover proceedings pursuant to Federal Rule of Civil

Procedure 69(a)(1) and the N.Y. CPLR where the District Court's determination was made on undisputed facts presented in affidavits or exhibits. The standard of review of the District Court's conclusions of law is *de novo*. *New York State Elec. & Gas Corp. v. FirstEnergy Corp.*, 766 F.3d 212, 221 (2d Cir. 2014).

SUMMARY OF ARGUMENT

The Judgment Creditor respectfully submits that the plain meaning of 28 U.S.C. § 1609 decides this appeal. The statute confers immunity only on property "of a foreign state." 28 U.S.C. § 1609. Section 1603 supplies the meaning of "foreign state," which also has been conclusively construed by the Supreme Court in *Dole Food* to exclude indirect subsidiaries of sovereign instrumentalities such as NCPG. 28 U.S.C. § 1603; *Dole Food*, 538 U.S. at 477. There is no ambiguity to resolve. There is no cause to look beyond the statute.

Jurisdictional immunity and execution immunity operate independently. Jurisdictional immunity under section 1604 is not at issue in the turnover proceeding below. That subject matter jurisdiction (an exception to section 1604 immunity or federal diversity jurisdiction) is determined by the facts at the outset of a case, and is not lost by subsequent events, is of no moment.

The FSIA simply does not apply to the turnover action below because it involves no property owned by a foreign sovereign. For that same reason, where a foreign sovereign no longer owns the targeted property because it has privatized

the judgment debtor, that such private property could be subject to judgment enforcement by U.S. legal process offends neither the interests of international comity nor any legitimate reliance interest on the part of the foreign sovereign.

ARGUMENT

A. Execution Immunity Inures Only in the Property of a "Foreign State"

Section 1609 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1609, SPA-38.

Execution immunity inures in the property itself, but only if it is the property "of a foreign state." *Id.*; *Walters v. Indus. & Commercial Bank of China Ltd.*, 651 F.3d 280, 291 (2d Cir. 2011) (where the "targeted property is owned by a foreign sovereign, execution immunity inures in the property itself"). Of course, if the property is not owned by a foreign state, it is not immune from execution.

There is no ambiguity in the plain meaning of section 1609. Property "of a foreign state" means property owned by a foreign state. 28 U.S.C. § 1609, SPA-38. The language is in the present tense. The statute does not confer immunity on property *previously owned* by a foreign state or on property of a *former foreign state*. *See Dobrova v. Holder*, 607 F.3d 297, 301 (2d Cir. 2010) ("Congress' use of

a verb tense is significant in construing statutes") (citation and internal quotation marks omitted). The statute does not immunize anything more than property "of a foreign state."

Faced with an unambiguous statute, the District Court's resort to notions of international comity and reliance interests was misplaced. "[S]tatutory analysis necessarily begins with the plain meaning of a law's text and, absent ambiguity, will generally end there. This is because, in ascertaining Congress's intent, if the statutory text is unambiguous, no further inquiry is necessary." *Dobrova*, 607 F.3d at 301 (citations and internal quotation marks omitted).

Because execution immunity inures in the property targeted by the execution, the relevant time for determining whether section 1609 applies to the property is when the attachment or execution is sought. This is consistent with the application of the exceptions to immunity under §§ 1610-1611. *See, e.g.*, *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) ("Thus, the property that is subject to attachment and execution must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued.") (emphases in original).

NCPG is not a foreign state. The definition of "foreign state" is found in 28 U.S.C. § 1603. A "foreign state . . . includes a political subdivision of a foreign

state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603, SPA-31-32. "[A]n agency or instrumentality of a foreign state" includes "any entity . . . a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* The Supreme Court has confirmed that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Dole Food*, 538 U.S. at 477.

Because NCPG is not a "foreign state" within the meaning of the FSIA, its property is not the property "of a foreign state" entitled to immunity pursuant to 28 U.S.C. § 1609.

B. Execution Immunity and Jurisdictional Immunity Operate Independently

The District Court decided "it would be incongruous to find that an entity remains an instrumentality of a foreign sovereign for purposes of FSIA jurisdiction, but that its property may nevertheless be attached." SPA-6. But jurisdictional immunity and execution immunity are entirely separate issues. "[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently." *Walters v. Indus. & Commercial Bank of China Ltd.*, 651 F.3d 280, 288 (2d Cir. 2011).

The District Court further cited *Dole Food* for the proposition that "a defendant's status under § 1603 must be determined at the time of filing." SPA-6.

But *Dole Food*'s pronouncement that instrumentality status be determined at the time suit is filed was in the context of determining immunity from subject matter jurisdiction. *See Dole Food*, 538 U.S. at 478 (discussing subject matter jurisdiction and comparing FSIA jurisdictional immunity with federal diversity jurisdiction); *see also Leith v. Lufthansa German Airlines*, 897 F. Supp. 1115, 1116 (N.D. Ill. 1995) ("Once [FSIA] jurisdiction attached we do not believe that Congress intended it to terminate because of subsequent events, just as a change in citizenship destroying diversity does not end a diversity suit originally properly brought").

The proceeding below is a turnover action, and jurisdictional immunity under section 1604 is not at issue. *Walters*, 651 F.3d at 292 ("in this turnover action only execution, not jurisdictional, immunity is at issue"). Therefore, that the existence or absence of subject matter jurisdiction is determined by the circumstances at the time the action is brought, and is not lost by subsequent events, is of no moment.

CONCLUSION

For the foregoing reasons, the Judgment Creditor respectfully requests that the decision below denying its turnover motion in relation to NCPG's assets on the basis of sovereign immunity be reversed and the matter remanded for further proceedings consistent with that reversal.

Dated: New York, New York
January 16, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point Times New Roman proportional font.

Dated: January 16, 2015

Respectfully submitted,

/s/ Michael S. Kim
Michael S. Kim

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE VITAMIN C ANTITRUST LITIGATION	:	MASTER FILE 06-MD-1738 (BMC) (JO)
This document relates to:	:	
ANIMAL SCIENCE PRODUCTS, INC., et al.,	:	
Plaintiffs,	:	05-CV-453
v.	:	
HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al.,	:	
Defendants.	:	

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

In this multi-district antitrust class action, plaintiffs, having obtained judgment pursuant to a jury verdict of approximately $148 million, seek post-judgment discovery and orders in aid of execution. Defendants Hebei Welcome Pharmaceutical Co., Ltd. ("Hebei") and North China Pharmaceutical Group Corporation ("NCPG") oppose plaintiffs' requests. Familiarity with the facts is presumed, and the facts will be set forth only as necessary to explain the Court's rulings.

I. Sovereign Immunity as to NCPG

The Foreign Sovereign Immunities Act ("FSIA") "confers on foreign states two kinds of immunity." Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014). The first is immunity from jurisdiction: "a foreign state shall be immune from the jurisdiction of the

courts of the United States . . . except as provided in sections 1605 to 1607." 28 U.S.C. § 1604. The definition of "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," § 1603(a), and an "agency or instrumentality", in turn, is defined as any entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." § 1603(b).

The FSIA's "second immunity-conferring provision states that 'the property in the United States of a foreign state shall be immune from attachment[,] arrest [,] and execution except as provided in sections 1610 and 1611 of this chapter.'" NML Capital, 134 S. Ct. at 2256 (quoting 28 U.S.C. § 1609). "[T]he property of an agency or instrumentality of a foreign state is afforded narrower protection from execution than the property of the foreign state itself. . . . While all property of an agency or instrumentality engaged in commercial activity under § 1610(b) is potentially subject to attachment or execution, attachment or execution of property of the foreign state itself [under § 1610(a)] is strictly limited to those assets that are themselves used for commercial activity." Walters v. Industrial and Commercial Bank of China, Ltd., 651 F.3d 280, 290-91 (2d Cir. 2011).

Both §§ 1610(a) and 1610(b) only permit "attachment in aid of execution, or . . . execution" on sovereign property located in the United States. See Autotech Techs. LP v. Integral Research and Dev. Corp., 499 F.3d 737, 750-51 (7th Cir. 2007) ("The FSIA did not purport to authorize execution against a foreign sovereign's property, or that of its instrumentality, wherever that property is located around the world. We would need some hint from Congress before we felt justified in adopting such a breathtaking assertion of extraterritorial

jurisdiction.").[1] Further, § 1610(c) precludes any execution on sovereign property unless the FSIA's requirements are met.

The parties agree that, at the time the First Amended Class Action Complaint naming NCPG was filed in this action, NCPG qualified as an instrumentality of China, as 100% of its shares were owned by the provincial government in Hebei through the State-owned Assets Supervision and Administration Commission ("SASAC") of Hebei Province. However, in 2009, NCPG came to be directly owned, in its entirety, by Jizhong Energy Group, Co., Ltd. ("Jizhong"), a financing company through which the Hebei provincial government manages NCPG and several other state-owned companies. Jizhong is itself owned entirely by the SASAC. Therefore, NCPG is now 100% owned by a company that is itself 100% owned by the Chinese government.

Plaintiffs seek turnover orders directed at shares of stock owned by NCPG in a publicly-traded subsidiary, North China Pharmaceutical Corp., Ltd., and have served restraining notices seeking to encumber NCPG's assets. Because it is undisputed that NCPG has no assets in the United States, and that plaintiffs did not comply with § 1610(c) in any event, if NCPG is a "foreign state" (or an instrumentality thereof), plaintiffs' requests for relief must be denied as to NCPG.

---

[1] I recognize that in rejecting the argument that § 1609 renders a sovereign's foreign assets immune from discovery, the Supreme Court noted that § 1609, by its terms, only protects sovereign property "in the United States." NML, 134 S. Ct. at 2257. I do not believe that, in making this statement, the Court intended to call into question the substantial body of prior case law holding that a United States court may not levy on a foreign sovereign's extraterritorial assets. See, e.g., Autotech, 499 F.3d at 750; Af-Cap Inc. v. Republic of Congo, 383 F.3d 361, 367 (5th Cir. 2004) ("[U]nder § 1610(a) of the FSIA, a court is prohibited from executing against the property of a foreign state unless that property is: (1) in the United States; and (2) used for commercial activity in the United States."); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1477 (9th Cir. 1992) ("It is true that section 1610 does not empower United States courts to levy on assets located outside the United States."); Fidelity Partners, Inc. v. Philippine Export and Foreign Loan Guarantee Corp., 921 F. Supp. 1113, 1119 (S.D.N.Y. 1996) ("Under the FSIA, assets of foreign states located outside the United States retain their traditional immunity from execution to satisfy judgments entered in United States courts."). Rather, the Supreme Court's observation was to explain one reason why it rejected Argentina's argument that the FSIA conferred immunity from discovery.

It is well-established that a defendant's status as an instrumentality of a foreign state – at least for the purposes of jurisdictional immunity under the FSIA – is determined by the facts as they exist at the time the suit is filed. See, e.g., Dole Food Co. v. Patrickson, 538 U.S. 468, 478, 123 S. Ct. 1655 (2004); Abrams v. Societe Nationale des Chemins de Fer Francais, 389 F.3d 61, 64-65 (2d Cir. 2004). Thus, although it is equally well-established that the subsidiary of an instrumentality is not protected by sovereign immunity, see Dole, 538 U.S. at 477, the 2009 change in NCPG's formal ownership structure would not change its status as an instrumentality for the purposes of FSIA jurisdiction.

As noted, however, execution immunity is a separate question. See Walters, 651 F.3d at 289-90. Plaintiffs contend that NCPG's status as an instrumentality at the time the lawsuit was filed is irrelevant for the purposes of execution immunity; I should consider whether NCPG qualifies as an agency or instrumentality now, when execution is sought, because otherwise its property is not that of a foreign state within the meaning of § 1609. Defendants raise two arguments in response: first, that an entity that is an instrumentality at the start of the case remains so for all purposes throughout the litigation, including execution; and second, that NCPG in any event still qualifies as an "organ" of the Chinese government under § 1603(b).[2]

The parties have not cited any cases that directly address the situation at hand, in which an entity that indisputably qualified as an instrumentality of a foreign state at the start of litigation undergoes an ownership change before execution proceedings begin. In Aurelius Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 130 (2d Cir. 2009), the Second Circuit stated that "the property that is subject to attachment and execution must be 'property in the United States of a foreign state' and must have been 'used for a commercial activity' *at the*

[2] Defendant raised its argument that NCPG is an "organ" of the Chinese state for the first time in their Reply papers.

time the writ of attachment or execution is issued." (emphasis in original). But in Aurelius, whether the property was in the United States and actually belonged to a foreign state was not at issue;[3] rather, that case turned on whether the foreign state had used the property for commercial activities. See id. at 130-31. Similarly, defendant's citation to Autotech Technologies LP v. Integral Research and Dev. Corp., 499 F.3d 737 (7th Cir. 2007), provides little illumination: in that case, there was no dispute as to the defendant's status as an instrumentality of Belarus.

It seems this is an issue of first impression. It is safe to say that it is rare for a defendant to lose its status as a foreign state during litigation. See Olympia Exp., Inc. v. Linee Aeree Italiane, S.P.A., 509 F.3d 347, 349 (7th Cir. 2007) (noting that the court "found only two previous cases in which the defendant ceased to be a 'foreign state' after the suit was filed," and holding that defendant's change in status did not alter the basis of the court's FSIA jurisdiction) (citing Leith v. Lufthansa German Airlines, 897 F. Supp. 1115 (N.D. Ill. 1995), and Matton v. British Airways Bd., Inc., No. 85 Civ. 1268, 1988 WL 117456, at *3 (S.D.N.Y., Oct. 27, 1988)). And none of the cases just cited dealt with the question of whether an entity's status as an instrumentality should be determined at the time it is sued or at the time execution is sought.

"[T]he FSIA's provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently." Walters, 651 F.3d at 288. Indeed, plaintiffs' position has a certain commonsense appeal: if the defendant is no longer a "foreign state," its property is no longer the property "of a foreign state." 28 U.S.C. § 1609.

[3] Due to the particular facts of the case – the Republic of Argentina had given a broad waiver of its sovereign immunity with regards to the bonds at issue – there was a dispute as to whether the Administración Nacional de Seguridad Social (the "Administration") was a separate "agency or instrumentality" or a "political subdivision" of Argentina, and thus whether the Administration was bound by Argentina's waiver. See Aurelius, 584 F.3d at 130-31. But there was no dispute that the property at issue was that of a foreign state or instrumentality thereof.

On the other hand, it would be incongruous to find that an entity remains an instrumentality of a foreign sovereign for the purposes of FSIA jurisdiction, but that its property may nevertheless be attached. "[T]he asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice to create a 'right without a remedy' in circumstances where there is jurisdiction over a foreign state for purposes of obtaining a judgment, but its property is immune from attempts to execute the judgment." Walters, 651 F.3d at 289. Further, § 1610 expressly incorporates by reference the definition of "foreign state" contained in § 1603; and again, Dole Food made it clear that a defendant's status under § 1603 must be determined at the time of filing. Dole Food, 538 U.S. at 478.

Ultimately, the purpose of the FSIA weighs decisively in favor of finding NCPG's assets immune. "The purpose of foreign sovereign immunity – 'to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns' – does not fall out of the picture when a foreign-state entity is privatized." Olympia Exp., Inc., 509 F.3d at 352 (quoting Dole Food Co., 538 U.S. at 352). Although the Seventh Circuit made this statement in the context of considering whether a change in status would permit an otherwise untimely jury demand, the rationale applies with even greater force here. The potential for attachment of sovereign property would cause

> a foreign government [to] think twice before privatizing one of its instrumentalities that has been sued in a U.S. court. The timing of foreign governments' decisions on whether and when to privatize their instrumentalities would be affected, creating a complication in these governments' decision-making process that could be an irritant in their relations with the United States."

Id. at 352.

This is readily apparent in the facts of this case. Holding that China's reorganization of NCPG's formal ownership structure inadvertently opened the door for plaintiffs to execute on

what would otherwise have been sovereign property – sovereign property located in China, no less – would create a statutory trap for unwary foreign governments, inconsistent with the principles of comity underlying the FSIA. Although applying the "time of filing" rule in the execution context may lead to a somewhat odd result in the rare case in which a state-owned entity is privatized during the pendency of the litigation, the predictability of this rule protects an important reliance interest of foreign states on the FSIA's grant of immunity. I therefore hold that NCPG's undisputed status as an instrumentality of the Chinese government at the time that it was sued means that its property retains immunity throughout this litigation, including through execution proceedings.

Moreover, I also note that despite the language above referring to "privatization," NCPG has not been "privatized" in any economic or financial sense. Rather, as noted, where at the time of filing NCPG was 100% owned by SASAC, it is now 100% owned by Jizhong, which is itself 100% owned by SASAC. It is, of course, true that this tiered ownership would be insufficient to satisfy Dole's requirement that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." 538 U.S. at 477. But NCPG's complete, albeit indirect, ownership by the Chinese state, combined with the appointment of NCPG's directors by the government; close control and supervision by the government; and treatment as a state-owned entity under Chinese law suggests that defendant's argument that NCPG is an "organ" of the Chinese state has some merit. See European Community v. RJR Nabisco, Inc., 764 F.3d 129, 144 (2d Cir. 2014) (status as "organ" of foreign state determined by consideration of "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the

entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.") (quoting Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004)). Nevertheless, I need not reach this issue in light of my conclusion that NCPG retains its status as an instrumentality for the purposes of this litigation, and, in light of defendants' raising this argument for the first time in reply, I do not. See, e.g., United States v. Yousef, 327 F.3d 56, 115-16 (2d Cir. 2003) ("We will not consider an argument raised for the first time in a reply brief.").

NCPG's assets are protected by sovereign immunity under the FSIA, and may only be executed upon consistent with the exceptions found in that statute. Plaintiffs' requests for Orders in aid of execution as to NCPG are denied, and any restraining notices purporting to encumber NCPG's assets are dissolved.

II. Defendant's Motion to Stay Execution And / Or Abstain From Executing the Judgment

Defendants request that I stay execution of the judgment against Hebei. Defendants also argue that I should decline to enforce the Judgment as "void" and that international comity concerns counsel in favor of abstaining from execution proceedings, including discovery, against both defendants.

"In deciding whether to order a stay of judgment pending appeal, a court must consider (1) whether the petitioner is likely to prevail on the merits of his appeal, (2) whether, without a stay, the petitioner will be irreparably injured, (3) whether issuance of a stay will substantially harm other parties interested in the proceedings, and (4) wherein lies the public interest." Morgan Guar. Trust Co. v. Republic of Palau, 702 F. Supp. 60, 65 (S.D.N.Y. 1988). If judgment is stayed pending appeal, a court will usually require the appellant to post a supersedeas bond in the full amount of the judgment.

> Requiring a supersedeas bond serves three important purposes:
>
> [F]irst, it permits the appellant to appeal without risking satisfying the judgment prior to appeal and then being unable to obtain a refund from the appellee after the judgment is reversed on appeal; second, it protects the appellee against the risk that the appellant could satisfy the judgment prior to the appeal but is unable to satisfy the judgment after appeal; and third, it provides a guarantee that the appellee can recover from the appellant the damages caused by the delay incident to the appeal[.]

Id. However, a district court has the discretion to waive the bond requirement, in whole or in part, where circumstances warrant.

Defendants argue that Hebei would be forced into bankruptcy were it forced to pay the full amount of the judgment (or post it as a bond), and that Hebei's Chinese creditors would be prejudiced if Hebei was rendered insolvent. This argument seems quite immaterial to me. Plaintiffs are among Hebei's creditors – at least as far as the courts of the United States are concerned. If Hebei were forced into bankruptcy and liquidated – consistent with what defendants represent to be the requirements of Chinese bankruptcy law – plaintiffs would get nothing. Plaintiffs therefore have an interest in Hebei avoiding bankruptcy, as does Hebei, and as do Hebei's other creditors. Hebei's purported potential insolvency thus gives it a measure of "debtor's leverage," and incentivizes both sides to negotiate a resolution of the Judgment. I do not see why in equity I should intervene to decisively tilt the scales in Hebei's favor. It is, after all, a tortfeasor that a jury has found has substantially injured plaintiffs by its misconduct.

Even if I assume for present purposes that defendants have shown a likelihood of success on appeal, I would still deny their motion for a stay as to Hebei. Their showing on the remaining factors is insufficient. Defendants have not offered to post *any* security pending appeal. It is true that the Judgment exceeds Hebei's revenues and assets. But that does not mean that Hebei is unable to post *any security whatsoever* pending its appeal. Had Hebei suggested it was willing

to post some significant portion of security, I might have set the amount at an amount that Hebei could afford. Similarly, as alluded to above, defendants' concerns about Hebei being thrown into Chinese bankruptcy proceedings assumes that the only option is to force Hebei to pay the entire judgment in one lump sum, rather than working out a payment schedule that would permit it to keep operating while satisfying the judgment it owes to plaintiffs; such a payment schedule would be in the interest of all parties. Finally, notwithstanding its sovereign immunity, there is no dispute that NCPG could post the bond or pay the judgment in full. See Richmark, 959 F.2d at 1476-77.

As for the public interest, defendants cite only a generalized public interest in "maintaining relations with China." Future encounters in the South China Sea may seriously strain Sino-U.S. relations; the presence or absence of a stay of the Judgment will not. Defendants' professed concern does not outweigh the public interest in enforcing the antitrust laws and judgments of United States courts.

The Court also rejects defendants' arguments that execution should be stayed because the judgment was "void" for lack of subject matter or personal jurisdiction. If I accepted that the judgment is void, I would have to vacate it. I do not accept that, and even if I did, I do not have jurisdiction to vacate the judgment because of the pending appeal. Defendants' jurisdictional arguments will be resolved by the Second Circuit in due course. Unless and until the Circuit vacates the judgment, plaintiffs have a right to enforce it

Similarly, I will not abstain from execution based on international comity. At several points throughout this litigation, defendants' arguments regarding foreign sovereign compulsion, the act of state doctrine, and international comity have been rejected. Defendants' repackaging of these arguments in the judgment execution context is not persuasive.

III. Plaintiffs' Request for Orders in Aid of Execution

Plaintiffs have moved for turnover orders pursuant to New York C.P.L.R. § 5225, aimed at defendants' deposits with certain banks. Plaintiffs have also requested an order requiring installment payments pursuant to C.P.L.R. § 5226, and have served restraining notices on defendants pursuant to C.P.L.R. § 5222. Defendants raise a number of arguments in opposition, including that none of these requests for relief were properly served; that these requests are in any event barred by New York law; and that applying Article 52 of the C.P.L.R. to defendants' property would be unconstitutional. I have already ruled that NCPG's assets are protected by sovereign immunity, so the discussion that follows applies to Hebei only.

A. Service

Defendants contend that neither plaintiffs' motions for relief, nor its restraining notices, were properly served. Plaintiffs served both by sending copies to defendants' U.S. counsel and by mailing copies from plaintiffs' counsel's Hong Kong office to defendants in China.

Federal Rule of Civil Procedure 69(a)(1) provides that "[a] money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution – and in proceeding supplementary to and in aid of judgment – must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies." Under the New York C.P.L.R., a restraining notice may be served by an attorney, but a turnover order requires a motion on notice requesting an order of the court. Compare N.Y. C.P.L.R. § 5222(a) with N.Y. C.P.L.R. § 5225(a). Both provisions of the C.P.L.R. state that the judgment debtor must be served, either with the restraining notice or notice of motion for a turnover order, "personally in the same manner as a summons or by registered or certified mail."

Defendants rely principally on Sonera Holding B.V. v. Cukurova Holding A.S., No. 11 Civ. 8909, 2012 WL 6644636, at *4-5 (S.D.N.Y. Dec. 21, 2012), vacated on other grounds, 750 F.3d 221 (2d Cir. 2014). There, the judgment creditor had served the Turkish debtor with a restraining notice through its United States counsel. The creditor had argued that a restraining notice was a type of post-judgment discovery under Rule 69(a)(2), and such "discovery papers" must be served on counsel. See Fed. R. Civ. P. 5(a)(1)(C) & (b)(1). The Sonera court rejected that argument, holding that a restraining notice is not a discovery paper, and that service therefore had to be accomplished via the Hague Convention. See Sonera, 2012 WL 6644636, at *4-5.

First, I reject defendants' argument that plaintiffs' *motions* for turnover orders and other relief – as distinct from plaintiffs' restraining notices – were improperly served on defendants. A motion for a turnover order is just that: a motion requesting relief from the court, which must be served on counsel for a represented party pursuant to Rules 5(a)(1)(D) and 5(b)(1). See N.Y. C.P.L.R. § 5225(a) (providing for a "motion"). Rule 5 governs service of these motions, notwithstanding the statement in C.P.L.R. 5225(a) requiring service "personally in the same manner as a summons or by registered or certified mail," because "under Rule 69(a) if there is an applicable federal statute, it is controlling, as is also any relevant Civil Rule, since those rules have the force of a statute." Schneider v. Nat'l R.R. Passenger Corp., 72 F.3d 17, 19 (2d Cir. 1995). Defendants have cited no authority to the contrary; Sonera did not address service of a motion.

As for the restraining notices, I agree with defendants that their service was deficient. As Sonera observed, under New York law "the restraining notice serves as a type of injunction prohibiting the transfer of the judgment debtor's property." 2012 WL 6644636, at *4 (quoting

Aspen Indus., Inc. v. Marine Midland Bank, 421 N.E.2d 808, 810 (N.Y. 1981)). Plaintiffs argue that a restraining notice qualifies as a "written notice" under Rule 5(a)(1)(E). But aside from the word "notice," a restraining notice bears little similarity to the types of papers usually served under Rule 5(a)(1)(E). See 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1143, at 420-22 & n.8 (3d ed. 2004) (listing notice of application to confirm arbitration award; written notice of a party's death; and notice of motion among the "wide variety of notices" required to be served under Rule 5).

Thus, because no provision of the Federal Rules controls, service must be accomplished "personally in the same manner as a summons or by registered or certified mail." See N.Y. C.P.L.R. § 5222(a). And because China, like Turkey in Sonera, does not permit service by mail, plaintiffs' service of the restraining notices was ineffective. See Sonera, 2012 WL 6644636, at *4-5.

That is not the end of the matter, however, because plaintiffs further argue that I should, in my discretion, issue an Order declaring service on defendants' counsel effective. I agree. First, it is clear that if plaintiffs filed a motion requesting an Order having the same effect as the restraining notices they have served,[4] that motion and any Order that followed could be served on counsel. Second, it is equally clear that defendants have received adequate notice of the restraints that plaintiffs request. Indeed, employees of Hebei have submitted several affidavits supporting defendants' opposition to plaintiffs' efforts to enforce the judgment. Further, for the entirety of this litigation, Hebei has regularly accepted service of process and other judicial documents without requiring resort to the Hague Convention; as recently as March 20, 2014, they waived service of the Second Amended Complaint in the Indirect Purchaser action.

[4] They did so initially; I denied that motion as unnecessary in light of the New York rules permitting service by an attorney.

Regardless of whether their prior actions operated as a complete waiver of Hague service, it is clear that defendants' sudden insistence on service through the Hague Convention is solely for the purpose of delay.

Even where service of process to initiate an action is concerned, and the due process considerations are correspondingly greater, substitute service is "neither a last resort nor extraordinary relief. . . . It is merely one means among several which enables service of process on an international defendant." Knit With v. Knitting Fever, Inc., Civil Action Nos. 08–4221, 08–4775, 2010 WL 4977944, at *3 (E.D. Pa. Dec. 7, 2010) (quoting Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1015 (9th Cir. 2002)). All that is required is that the method of service is "not prohibited by international agreement," Fed. R. Civ. P. 4(f)(3), and comport with constitutional notions of Due Process by providing "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Knit With, 2010 WL 4977944 at *3-4 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652 (1950)).

Service on counsel is not prohibited by the Hague Convention. See In re Cathode Ray Tube (CRT) Antitrust Litig., ---- F. Supp. 2d ----, 2014 WL 1091044, at *4 (N.D. Cal. Mar. 13, 2014) (rejecting argument that "because China objected to Article 10 [of the Hague Convention], service on Defendant can only be effected through the Chinese Central Authority in Beijing," and holding that "[p]laintiffs did not seek to effect service by Chinese postal channels: Defendant was served through its counsel's Washington, D.C. office. The Hague Convention does not prohibit this, and as this Court has noted, it is a common method of service under Rule 4(f)(3)") (citations omitted); see also Knit With, 2010 WL 4977944, at *4 ("Repeatedly, courts around the country have found that service upon a foreign defendant through counsel is

appropriate 'to prevent further delays in litigation.'") (collecting cases). And, as noted above, defendants plainly have adequate notice of the restraining notices, as their interests are currently being well-represented by their United States counsel.

Requiring service of these restraining notices on defendants through the Hague Convention would be expensive, time-consuming, and uncertain. It would also be pointless, as defendants are fully aware of the restraining notices already. Therefore, I grant plaintiffs request for an Order authorizing substitute service on defendants' counsel. Defendants' motion to dissolve the restraining notices for improper service is granted, but plaintiffs may re-serve the restraining notices as to Hebei on defendants' counsel, at which point they will be effective.[5]

B. Turnover Orders Against Hebei

Plaintiffs move for an order requiring defendants to turn over money belonging to Hebei held in accounts at certain banks. Defendants argue that plaintiffs have identified the wrong parties, and that the turnover orders should be directed at the banks themselves. Defendants have also submitted affidavits from a Hebei employee stating that these accounts no longer exist, and argue that applying Article 52 extraterritorially would be unconstitutional.

The turnover orders are properly directed at defendants themselves. It is true that the Court of Appeals recently limited the scope of N.Y. C.P.L.R. § 5225(b) in Commonwealth of the N. Mariana Island v Canadian Imperial Bank of Commerce, 21 N.Y.3d 55, 967 N.Y.S.2d 876 (2013) ("NMI"). There, in answering a question certified by the Second Circuit, the New York Court of Appeals held that a judgment creditor could not obtain a turnover order against a bank

[5] Having held that the restraining notice against Hebei was effective, I need not reach the question of whether the restraining notices served against defendants' banks were effective as to those banks' overseas branches in light of the separate entity rule, a question currently pending before the New York Court of Appeals following certification from the Second Circuit. See Tire Eng'g & Distribution LLC v. Bank of China, Ltd., 740 F.3d 108, 117-18 (2d Cir. 2014) (certifying questions); Tire Eng'g & Distribution LLC v. Bank of China, Ltd., 22 N.Y.3d 1113 (2014) (accepting certified questions), withdrawn in part, 22 N.Y.3d 1152 (2014).

to garnish a debtor's property that the bank itself did not hold, but was instead held by a foreign subsidiary of the bank over which the court lacked personal jurisdiction. See id. at 64. In reaching this conclusion, the Court of Appeals held that because it uses the term "possession or custody," and omits the word "control," N.Y. C.P.L.R. § 5225(b) requires actual possession or custody, and not constructive possession. See id. at 62-64.

However, the Court of Appeals explicitly distinguished the situation before it from cases similar to the one at bar, where a turnover order is directed at the judgment debtor itself:

> In Miller v Doniger, 28 A.D.3d 405 (1st Dep't 2006), the judgment debtor, who was in New York, was directed to turn over his out-of-state Wachovia bank accounts to the judgment creditor. Similarly, in Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V., 41 A.D.3d 25 (1st Dep't 2007), the Appellate Division observed that "a turnover order merely directs a defendant, over whom the New York court has jurisdiction, to bring its own property into New York," 41 A.D.3d at 31. Thus, "[h]aving acquired jurisdiction of the person, the court [ ] can compel observance of its decrees by proceedings in personam against the owner within the jurisdiction" (Koehler, 12 N.Y.3d at 539). However, in these cases, the *garnishee was directed to deliver assets already within its possession*.

Id. at 64 (emphasis added).

Defendants appear to argue that by citing these cases with evident approval and distinguishing them from the case before it, the Court of Appeals actually overruled them *sub silento*. It did not. Gryphon Dom. VI and the other cases cited above remain good law. In Gryphon, the Appellate Division held that a trial court erred in failing to include the judgment debtor's overseas bank accounts in a turnover order. 41 A.D.3d 25, 36. As the court observed,

> the turnover order properly should have included bank accounts. The IAS court and the defendants rely on Matter of Delaney, 256 N.Y. 315 (1931). However, that case was interpreting a provision of the Civil Practice Act, narrower than its subsequently enacted CPLR counterparts. In Delaney, the Court of Appeals stated, "The money deposited with the bank belongs to the bank and is not the property of the depositor. The property of the depositor is the indebtedness of the bank to it." Id. at 319. The Court noted that "the delivery of tangible

> personal property may be compelled" under Civil Practice Act § 792, and that the bank's indebtedness to its depositor was not tangible. Id. at 319, 321. However, CPLR 5225 is not limited to tangible personal property; rather, it applies to 'money or other personal property' in which the judgment debtor has an interest.

Id. It seems clear from this passage, and the passage from NMI quoted above, that under New York law, the intangible right to the deposits in a bank account remains within the *actual* "possession or custody" of the depositor, and that such deposits are therefore properly the subject of a turnover order directed at the judgment debtor. See NMI, 21 N.Y.3d at 64; Gryphon, 41 A.D.3d at 36; see also In re Gaming Lottery Sec. Litig., No. 96 Civ. 5567, 2001 WL 123807 (S.D.N.Y. Feb. 13, 2001).[6]

Defendants also argue that plaintiffs' requested turnover order would "regulate commercial conduct in China, namely the disposition of the bank accounts" at issue, in violation of the dormant commerce clause. In support, defendants cite Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004), and similar cases, for the proposition that "a statute will be invalid *per se* if it has the practical effect of 'extraterritorial' control of commerce occurring entirely outside the boundaries of the state in question."

This argument merits little discussion. The proposed turnover order does not "regulate commercial conduct in China" any more than a turnover order directed at a New Jersey defendant would "regulate" interstate commerce. Rather, the turnover order requires a defendant subject to this Court's personal jurisdiction to turn over specific assets in satisfaction of a

[6] Defendants' argument was no doubt based in part on this Court's observation that serving defendants might be ineffective. This was not a legal ruling. The Court was noting that when it comes to executions, serving a judgment debtor, not physically present in the jurisdiction, to seek a turnover of assets is usually ineffective, and more effective execution can usually be obtained against third parties holding the debtor's assets. Here, for example, defendants already owe plaintiffs in excess of $140 million – and they are not paying. If the Court orders them to turnover assets, they may not comply with that order either. We would then proceed to contempt proceedings, the remedy for which might well be a penalty or fine, which defendants might not pay either. Ultimately, seizing funds from non-party banks – which have no skin in the game and would therefore presumably comply with any court order – is more likely to achieve a recovery.

judgment entered against it. As noted, "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property." Koehler v. Bank of Bermuda, Ltd., 12 N .Y.3d 533, 541 (2009). Whatever constitutional considerations the exercise of this power may implicate are questions of personal jurisdiction, and not the Commerce Clause; defendants cite no authority that conflates requiring a defendant to pay a judgment with "regulating" foreign or interstate commerce.

Defendants' argument regarding Due Process similarly is merely a retread of its argument that this Court lacks personal jurisdiction. Defendants' attempt to repackage this argument into attacking New York State's "legislative jurisdiction" is unpersuasive. Again, the "disposition of [defendants'] assets" simply is not "regulation." Rather, it is the exercise of the Court's judicial power, and defendants cite no authority suggesting otherwise. If this Court has personal jurisdiction over Hebei, it has the power to order Hebei to turn over property. If defendants believe that they will prevail in the Second Circuit on their arguments that the Court lacks such jurisdiction, they should have posted a bond.

Plaintiffs' motion for a turnover order as to the Hebei bank accounts is granted. Of course, defendants can only turn these accounts over if they actually exist, and their employee avers that they do not. That is an issue that must be resolved through discovery; I address the parties' discovery dispute below.

Defendants' request that this turnover order be stayed pending appeal is denied. Defendants have shown no sound basis for staying this order, particularly as I have resolved the FSIA issue as to NCPG in their favor and thus their concerns regarding the sovereign interests of China are largely moot.

C. Installment Payments Pursuant to C.P.L.R. § 5226

Plaintiffs request an order requiring defendants to make installment payments pursuant to N.Y. C.P.L.R. § 5226. However, as defendants point out, § 5226 requires a showing that "that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation." Plaintiffs have not identified the income stream they seek to attach; therefore their request for an order requiring installment payments is denied without prejudice for renewal after discovery.

IV. Discovery

Finally, plaintiffs seek to compel discovery from defendants. Defendants categorically refuse to provide any discovery regarding their foreign assets. Defendants provide several reasons for resisting their discovery obligations: (1) that compelling discovery is premature, as defendants have requested SASAC's consent, and that this Court's judgment is void for lack of personal and subject matter jurisdiction; (3) that assets in China are not "relevant to execution,"; (4) that applying New York enforcement mechanisms in China would be unconstitutional; and (5) discovery should be contingent on SASAC consent, because defendants face possible criminal sanctions under Chinese law if they disclose information regarding their assets.

I have already rejected many of these arguments. I will not stay execution due to the purported "voidness" of the judgment; *a fortiori*, I will not stay discovery either. And as set forth above, defendants' arguments regarding the dormant commerce clause are meritless.

I reject defendants' argument that all of the discovery plaintiffs seek is automatically "irrelevant to execution" because it is located overseas. Their only support for this position is *dicta* from the recent Supreme Court decision in NML stating that U.S. courts "generally lack

authority in the first place to execute against property in other countries." 134 S. Ct. at 2257. That may be so, but it is inapplicable here for two reasons: first, plaintiffs seek orders directed at the debtors themselves, directing them to bring property into this jurisdiction (although I have held that these orders are only effective as to Hebei, due to NCPG's sovereign immunity); and second, the Supreme Court's *holding* in NML was that potential defenses to execution do not necessarily preclude discovery in aid of execution. See id. ("[T]he reason for these subpoenas is that NML does not yet know what property Argentina has and where it is, let alone whether it is executable under the relevant jurisdiction's law. . . . They ask for information about Argentina's worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina's self-serving legal assertion will not automatically prevail; the District Court will have to settle the matter.").

NCPG, like Argentina, is protected by sovereign immunity. And I have held that this immunity precludes the use of the attachment devices that plaintiffs seek to use here. But that does not mean that all of its worldwide assets will necessarily be held to be immune in the jurisdiction in which they are found. And Hebei's assets, of course, are not protected by any immunity at all.

Defendants also argue that discovery should not be compelled based on international comity,[7] because of the purported risk of prosecution that defendants might face should they turn over documents relating to their assets. Defendants cite a "myriad" of Chinese laws, including

[7] Defendants' request that I order any compelled production to be contingent on SASAC consent is superfluous. If SASAC, acting on behalf of the Chinese government, consents to the production, defendants have no remaining defenses to producing asset-related documents. If SASAC does not consent, I would have to engage in the same comity analysis in determining whether to order production in any event.

laws barring the removal of accounting archives from China and laws regarding trade secrets. But the primary law in question is the Law of the People's Republic of China on Protecting the State Secrets (the "State Secrets Law").

"[T]he threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law." Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 555, 107 S. Ct. 2542 (1987). Defendants have "the burden of showing that such law actually bars [the] production" at issue, and to meet that burden they "must provide the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law." British Intern. Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90 Civ. 2370, 2000 WL 713057, at *8 (S.D.N.Y. June 2, 2000); see also id. ("[A]part from the conclusory assertions of its foreign law expert, [defendant] has not offered any corroborative detail to establish that its interpretation of [the foreign law at issue] is the correct one. Accordingly, it has not met its burden.").

Defendants have not made the requisite showing of actual conflict with foreign law. Usually, a party claiming that production would violate foreign law might submit reports from experts on the foreign law, or statements from the foreign government itself, that would permit the reviewing court to analyze the relevant foreign law in detail. See id. Defendants have not. Instead, they cite expert reports from other cases in which other Chinese parties have sought to resist subpoenas from United States plaintiffs. These are not directly applicable here, as they involve requests to banks or auditors to turn over information about third parties, rather than requests to the parties themselves. They also cite to several client memoranda by American law firms, which shed little light on the question at hand except to say that that China's State Secrets Law is vague and broad. And they cite to some of the Chinese laws themselves, but provide no

indication as to whether those laws would necessarily apply to the disclosure of the discovery that plaintiffs seek.

As to Hebei, its connection to the Chinese state is attenuated: Hebei is a subsidiary of a publicly traded company, North China Pharmaceutical Corp., Ltd., in which NCPG owns a minority stake. As discussed above, NCPG is owned by Jizhong, which is in turn owned by the government. Defendants have not substantiated their claim that the asset-related documents of a company with any investment by the Chinese government, no matter how attenuated, qualify as "state secrets" under Chinese law.

NCPG's relationship with the Chinese government is closer than Hebei's. Buried in defendants' citations are references to a case in which a Chinese court held that the historical real estate holdings of a local government housing authority were state secrets that could not be disclosed. This case perhaps suggests that plaintiffs' discovery requests as to the assets of the state-owned NCPG – which include requests for information regarding real estate holdings – might be barred by foreign law. But then again, they might not, as the Chinese State Secrets Law may treat direct state ownership of real estate differently than ownership through a company like NCPG. I do not know the answer, because defendants have not told me.

Nor is it immediately apparent that the discovery requested would violate the other Chinese laws cited by defendants. Given the attenuated relationship between Hebei and the Chinese government, it is not clear whether Hebei's records would qualify as "State-owned archives" under Article 24 of the Archival Law of the People's Republic of China. Because of its closer relationship to the Chinese government, I can intuit that NCPG's records might so qualify; but again, defendants have not given me a basis for concluding that they do. Although Article 7 of the 1998 Procedures for the Administration of Accounting Archives states that

entities may not "lend out their accounting records," it specifically provides that "the records may be made available for consultation or copying" in certain circumstances. Article 10 of the Anti-Unfair Competition Law appears to only forbid obtaining "business secrets" by certain illicit means not applicable here. And finally, Articles 2 and 11 of the 2010 Tentative Provisions on the Protection of Central Enterprise Trade Secrets provide that trade secrets can be state secrets, thus vaguely incorporating the already-vague State Secrets Law itself. It was defendants' burden to demonstrate that these murky laws actually barred the discovery requested by plaintiffs; instead, defendants merely cite them without elaboration.

Nevertheless, given the ambiguity of the Chinese laws cited by defendants, in an abundance of caution I will presume that these laws bar production. Even so, I would grant plaintiffs' motion to compel. In determining whether to compel a defendant to produce documents where production would violate foreign law, courts in this Circuit employ the five-factor test set forth in the Restatement (Third) of Foreign Relations Law of the United States § 442(1)(c). See Linde v. Arab Bank, PLC, 269 F.R.D. 186, 193 (E.D.N.Y. 2010). Those factors are: (i) "the importance to the investigation or litigation of the documents or other information requested;" (ii) "the degree of specificity of the request;" (iii) "whether the information originated in the United States;" (iv) "the availability of alternative means of securing the information;" and (v) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." Restatement (Third) Foreign Relations Law § 442(1)(c). Courts may also additionally consider the hardship of the request on the resisting party and that party's good faith. See Minpeco S.A. v. Conticommodity Servs., Inc., 116 F.R.D. 517, 523 (S.D.N.Y. 1987).

The requested documents are plainly of critical importance to the litigation – there is no other way for plaintiffs to identify defendants' assets in order to execute the Judgment. This factor weighs in favor of plaintiffs.

Plaintiffs have narrowed their original requests. Plaintiffs request "documents concerning each defendant's (1) cash and cash equivalent assets; (2) investment assets available for sale; (3) real estate holdings; (4) durable assets (such as equipment); and (5) secured debts encumbering any of the foregoing." Although these are fairly broad categories of information, plaintiffs' requests are reasonably limited in time: from their most recent letter, it appears that plaintiffs only request these documents for the last six months. On balance, this factor weighs slightly in favor of plaintiffs.

It is undisputed that all of the documents are in China. This factor weighs in favor of defendants.

As for the availability of other means, defendants suggest in passing that plaintiffs should be required to proceed under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. There is no legal requirement of first resort to the Hague Convention. See Societe Nationale Industrielle Aerospatiale, 482 U.S. at 542-44. Instead, a court must scrutinize in each case "the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective." Id. at 544.

The parties' briefing sheds little light on the viability of the Hague Convention as an alternative means for acquiring discovery in China. Nevertheless, two recent decisions have analyzed this question in detail, reaching opposite conclusions. Compare Gucci America, Inc. v. Weixing Li, No. 10 Civ. 4974, 2011 WL 6156936, at *8-9 (S.D.N.Y. Aug. 23, 2011), vacated on other grounds, --- F.3d ----, 2014 WL 4629049 (2d Cir. 2014) with Tiffany (NJ) LLC v. Andrew,

276 F.R.D. 143, 152-54 (S.D.N.Y.), report and recommendation aff'd, 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011). The court in Gucci held that resort to the Hague Convention to obtain information from China would be "unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules." Gucci, 2011 WL 6156936, at *8 (quoting Societe Nationale Industrielle Aerospatiale, 482 U.S. at 542). In Tiffany, the court was unable to conclude that resort to the Hague Convention was "futile," and thus found that this factor weighed in favor of nondisclosure. See Tiffany, 276 F.R.D. at 156.

I agree with the reasoning in Gucci, and find that use of the Hague Convention procedures would cause unnecessary expense and delay. First, as Gucci pointed out, there is no requirement that plaintiffs prove that Hague Convention requests be "futile" before a court can forgo its procedures; such a requirement would be in tension with the Supreme Court's refusal to require the Hague Convention as a means of first resort in Societe Nationale Industrielle Aerospatiale. See Gucci, 2011 WL 6156936, at *7-8. Second, both Gucci and Tiffany agreed that "China typically processe[d] Hague Convention requests within six-to-twelve months and that approximately 50% of such requests are granted." Gucci, 2011 WL 6156936, at *7; Tiffany, 276 F.R.D. 153. A delay of up to a year and a chance of success equal to a coin flip is not, in my view, a viable alternative to defendants simply producing the asset-related documents.

The fifth factor, the balance of national interests of the United States and China, has been called "the most important factor." Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1476 (9th Cir. 1992). Richmark dealt with a situation markedly similar to the one here: a plaintiff was seeking to execute a judgment against a Chinese state-owned company that refused to comply in post-judgment discovery due to its stated fear of prosecution under the Chinese state secrets law. Unlike here, though, the Chinese State Secrets Bureau had specifically

forbidden the defendant from turning over the documents in question. The Ninth Circuit stated that neither the defendant nor the Chinese government had

> identified any way in which disclosure of the information requested here will significantly affect the PRC's interests in confidentiality. Those interests, as set forth by the State Secrecy Laws themselves, are in 'matters involving national security and interest.' Collection of the Laws of the People's Republic of China 1363 Art. 2 (1989). This is defined to include information which "concern[s] the national economy and social development" or disclosure of which may 'diminish the country's economic, technological and scientific strength.' Id. at Art. 8, Art. 4(7). There is no indication that [defendant], much less the economy of the PRC as a whole, will be adversely affected at all by disclosure of this information. The only likely 'adverse' effect on the PRC economy will be that [plaintiff] may be able to collect its judgment, something the PRC has no legitimate state interest in preventing.

Id. at 1477. China's State Secrecy Law has been updated since Richmark, but its stated purpose remains similar:

> Where divulgence of any of the following issues which are relevant with the national security and interests may cause any harm to the national security and interests with respect to the politics, economy, national defense, foreign affairs and etc., such issues shall be cognized as the State secrets: . . .

Law of the People's Republic of China on Protecting the State Secrets, Art. 9 (2010).

The law then proceeds to list six categories of information that may qualify as a state secret – of which only the fourth, describing "[c]onfidential issues involved in the national economic and social development" appears directly relevant here – as well as a seventh catch-all category that apparently could encompass anything.[8] The statements of purpose for the other

[8] Article 9 of the statute reads as follows:

Where divulgence of any of the following issues which are relevant with the national security and interests may cause any harm to the national security and interests with respect to the politics, economy, national defense, foreign affairs and etc., such issues shall be cognized as the State secrets:

1. Confidential issues involved in the significant decisions on the State affairs;

2. Confidential issues involved in the national defense development and in the activities of the armed forces;

3. Confidential issues involved in the diplomatic activities and in activities related to foreign countries, and the secrets of which the State shall fulfill the obligations of confidentiality to foreign countries;

4. Confidential issues involved in the national economic and social development;

laws cited by defendants are similarly broad. See Tentative Provisions on the Protection of Central Enterprise Trade Secrets, Art. 1 (2010) ("strengthening the protection of central enterprise trade secrets and safeguarding the interests of central enterprises against infringement"); Procedures for the Administration of Accounting Archives, Art. 1 (1998) ("the goal of strengthening administration of accounting archives, unifying the different systems for accounting archive administration, and better serving the development of the socialist market economy"); Archival Law of the People's Republic of China, Art. 1 (1996) ("the purposes of strengthening the management, collection and arrangement of archives and effectively protecting and using archives in the service of socialist modernization"); Anti-Unfair Competition Law of the People's Republic of China, Art. 1 (1993) ("the purpose of ensuring the healthy development of the socialist market economy, encouraging and protecting fair competition, preventing acts of unfair competition, and safeguarding the legitimate rights and interests of operators and consumers").

The analysis of Chinese interests in Richmark applies here. To be sure, China has some interest in enforcing these laws. Nonetheless, disclosure of defendants' assets – especially as to Hebei, an entity several tiers removed from the Chinese government – would not cause any harm to China's asserted interests: it would not harm the Chinese economy, nor China's "national economic and social development," nor any of the other broadly phrased State interests described above. Indeed, the Chinese Government, through its Ministry of Commerce ("MOFCOM"), has

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5. Confidential issues involved in the science and technology;

6. Confidential issues involved in the activities in protecting the security of the State and in the investigation of crimes; and

7. other confidential issues which are cognized by the State secret-protection administration.

Confidential issues of the political parties which fall into any of the aforementioned types shall be cognized as the State secrets.

been participating in this case as *amicus* for years. Since this litigation began, neither defendants nor their *amicus* ever objected that producing documents during the merits phase would run afoul of the State Secrecy Law or any other Chinese law. See In re Vitamin C Antitrust Litig., 237 F.R.D. 35, 37 (E.D.N.Y. 2006); see also, e.g., Defendant Hebei Welcome's Response to Plaintiffs' Second Request For Production of Documents, 06-MD-1738, Docket No. 205-1.[9]

Given that the interests implicated by discovery during the merits and execution phase are broadly similar, and that the Chinese government still has not indicated that discovery would violate its laws, I cannot say that China's interest in maintaining confidentiality of defendants' assets is particularly strong. See Richmark, 959 F.2d at 1476 (noting, in weighing China's interest in confidentiality, the fact that China's State Secrecy Bureau "did not express interest in the confidentiality of this information prior to the litigation . . . It is only now, when disclosure will have adverse consequences for [defendant], that the PRC has asserted its interest in confidentiality"). Indeed, as in Richmark, it seems the only effect of requiring defendants to disclose this information is to make it more likely (although far from certain) that plaintiffs will be able to enforce their judgment.

[9] Specifically, in denying defendants' motion for a stay pending resolution of their motions to dismiss, Magistrate Judge Orenstein observed that:

> [R]egardless of how interests of comity may affect the disposition of the dismissal motion, it plainly has no bearing on the instant application for a stay of discovery. At the initial conference, I explicitly inquired whether the Ministry – the only agency of the PRC government that has expressed an interest in this litigation – had 'a position on this issue of whether discovery should move forward.' The Ministry's counsel answered with a flat 'No, Your Honor.' Thus, to the extent that the defendants argue that the pursuit of discovery in this case may foment a dispute with a foreign sovereign, it is clear that that sovereign's representative had no such concern, or at least none sufficient to warrant risk of an affront to the sovereignty of the United States inherent in taking the position that discovery should not go forward in this case simply because Chinese companies are among the parties.

In re Vitamin C Antitrust Litig., 237 F.R.D. at 37.

Whatever the strength of the interests of China in enforcing its State Secrecy Law and other laws, they must be weighed against "the United States' interests in vindicating the rights of American plaintiffs and in enforcing the judgments of its courts. The former interest has been described as substantial, and the latter as vital." Id. at 1477 (citations and quotations omitted). Although these interests of the United States will not compel production in every case, here, they outweigh the interests of China in confidentiality. See Minpeco, 116 F.R.D. at 523 ("[A]lthough the interest of the United States in criminal and civil enforcement suits is normally stronger than its interest in private disputes, the formal posture of these cases is less significant in that the plaintiffs here are asserting private rights of action under the antitrust, commodities, and racketeering statutes" that Congress intended to be enforced by private attorneys general); see also In re Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51, 54 (E.D.N.Y. 2010) ("[T]his is a case involving violations of antitrust laws whose enforcement is essential to the [United States'] interests in a competitive economy. . . . enforcement through private civil actions such as this one is a critical tool for encouraging compliance with the country's antitrust laws."). The balancing of national interests weighs in favor of disclosure.

The final factors to be considered are the good faith of, and potential hardship to, defendants. There is no indication in the record that defendants have not acted in good faith.

As for hardship, plaintiffs argue – and I agree – that defendants' claimed risk of criminal prosecution is speculative. But that is beside the point. Even if criminal prosecution were certain, defendants could not show hardship from compelled production, because the purportedly untenable situation in which defendants find themselves is entirely of their own creation. This "discovery dispute arose only because [defendants] refused to post a supersedeas bond or letter of credit to stay execution of the judgment pending appeal . . . [defendants] even now could post

a supersedeas bond pending the outcome of its petition for certiorari, or it could pay the judgment. Either of these courses of action would keep it from having to violate either the district court's orders or the PRC's laws." Richmark, 959 F.2d at 1477. The choice defendants face is not between disobeying the Court's discovery orders or facing criminal sanctions in China: they also have the option of posting a bond or paying the judgment. They still could, and that they choose not to do so is no basis for resisting discovery.

On balance, the international comity factors listed above weigh in favor of granting plaintiffs' motion to compel.

CONCLUSION

Plaintiffs' renewed motion for turnover orders [874] is granted as to Hebei and denied as to NCPG. Defendants' motion to stay enforcement proceedings and dissolve restraining notices is [884] is granted in part and denied in part; specifically, the motion to dissolve restraining notices is granted as to NCPG, but denied as to Hebei, and their motion for an unsecured stay is denied. Plaintiffs' motion to compel discovery [910] is granted. Finally, plaintiffs' motion for leave to register the judgment in other districts [859] is denied without prejudice to renewal after discovery.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
October 22, 2014

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1603

§ 1603. Definitions

Effective: February 18, 2005
Currentness

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub.L. 109-2, § 4(b)(2), Feb. 18, 2005, 119 Stat. 12.)

Notes of Decisions (367)

28 U.S.C.A. § 1603, 28 USCA § 1603
Current through P.L. 113-209 approved 12-16-2014

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Currentness

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

Notes of Decisions (151)

28 U.S.C.A. § 1604, 28 USCA § 1604
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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1605

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

Effective: January 28, 2008
Currentness

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(7) Repealed. Pub.L. 110-181, Div. A, § 1083(b)(1)(A)(iii), Jan. 28, 2008, 122 Stat. 341

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e), (f) Repealed. Pub.L. 110-181, Div. A, Title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341

(g) Limitation on discovery.--

(1) In general.--(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.--(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.--The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.--A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892; amended Pub.L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(a), Apr. 24, 1996, 110 Stat. 1241; Pub.L. 105-11, Apr. 25, 1997, 111 Stat. 22; Pub.L. 107-77, Title VI, § 626(c), Nov. 28, 2001, 115 Stat. 803; Pub.L. 107-117, Div. B, Ch. 2, § 208, Jan. 10, 2002, 115 Stat. 2299; Pub.L. 109-304, § 17(f)(2), Oct. 6, 2006, 120 Stat. 1708; Pub.L. 110-181, Title X, § 1083(b)(1), Jan. 28, 2008, 122 Stat. 341.)

Notes of Decisions (1097)

28 U.S.C.A. § 1605, 28 USCA § 1605
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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1609

§ 1609. Immunity from attachment and execution of property of a foreign state

Currentness

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.)

Notes of Decisions (12)

28 U.S.C.A. § 1609, 28 USCA § 1609
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Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1610

§ 1610. Exceptions to the immunity from attachment or execution

Effective: August 10, 2012
Currentness

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers

Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver.--The President may waive any provision of paragraph (1) in the interest of national security.

(g) Property in certain actions.--

(1) In general.--Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of--

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) United States sovereign immunity inapplicable.--Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) Third-party joint property holders.--Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896; amended Pub.L. 100-640, § 2, Nov. 9, 1988, 102 Stat. 3333; Pub.L. 100-669, § 3, Nov. 16, 1988, 102 Stat. 3969; Pub.L. 101-650, Title III, § 325(b)(9), Dec. 1, 1990, 104 Stat. 5121; Pub.L. 104-132, Title II, § 221(b), Apr. 24, 1996, 110 Stat. 1243; Pub.L. 105-277, Div. A, § 101(h) [Title I, § 117(a)], Oct. 21, 1998, 112 Stat. 2681-491; Pub.L. 106-386, Div. C, § 2002(g)(1), Oct. 28, 2000, 114 Stat. 1543; Pub.L. 107-297, Title II, § 201(c)(3), Nov. 26, 2002, 116 Stat. 2337; Pub.L. 110-181, Div. A, Title X, § 1083(b)(3), Jan. 28, 2008, 122 Stat. 341; Pub.L. 112-158, Title V, § 502(e)(1), Aug. 10, 2012, 126 Stat. 1260.)

DETERMINATION OF PRESIDENT

PRESIDENTIAL DETERMINATION NO. 2001-03

<Oct. 28, 2000, 65 FR 66483>

DETERMINATION TO WAIVE ATTACHMENT PROVISIONS RELATING TO BLOCKED PROPERTY OF TERRORIST-LIST STATES

Memorandum for the Secretary of State [and] the Secretary of the Treasury

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 2002(f) of H.R. 3244, "Victims of Trafficking and Violence Protection Act of 2000 [section 2002(f) of Pub.L. 106-386, Div. C, Oct. 28, 2000, 114 Stat. 1543, amending this section]," (approved October 28, 2000), I hereby determine that subsection (f)(1) of section 1610 of title 28, United States Code, which provides that any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S. App. 5(b), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701--1702), and proclamations, orders, regulations, and licenses issued pursuant thereto, be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state claiming such property is not immune from the jurisdiction of courts of the United States or of the States under section 1605(a)(7) of title 28, United States Code, would impede the ability of the President to conduct foreign policy in the interest of national security and would, in particular, impede the effectiveness of such prohibitions and regulations upon financial transactions. 5Therefore, pursuant to section 2002(f) of H.R. 3244, the "Victim's [sic; probably should be "Victims"] of Trafficking and Violence Protection Act of 2000," I hereby waive subsection (f)(1) of section 1610 of title 28, United States Code, in the interest of national security. This waiver, together with the amendment of subsection (f)(2) of the Foreign Sovereign Immunities Act [probably means subsec. (f)(2) of this section] and the repeal of the subsection (b) of section 117 of the Treasury and General Government Appropriations Act, 1999 [Pub.L. 105-277, Div. A, § 101(h) [Title I, § 117(b)], Oct. 21, 1998, 112 Stat. 2681-491; see Tables for classification] [amending section 1606 of this title], supersedes my prior waiver of the requirements of subsections (a) [amending this section]

and (b) of said section 117, executed on October 21, 1998 [Presidential Determination No. 99-1, Oct. 21, 1998, 63 f.R. 59201, formerly set out as a note under this section].

The Secretary of State is authorized and directed to publish this determination in the **Federal Register.**

WILLIAM J. CLINTON

Prior similar determinations of the President were as follows:

Presidential Determination No 99-1, Oct. 21, 1998, 63 FR 59201.

Notes of Decisions (147)

28 U.S.C.A. § 1610, 28 USCA § 1610
Current through P.L. 113-209 approved 12-16-2014

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 97. Jurisdictional Immunities of Foreign States

28 U.S.C.A. § 1611

§ 1611. Certain types of property immune from execution

Effective: August 1, 1996
Currentness

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

CREDIT(S)

(Added Pub.L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2897; amended Pub.L. 104-114, Title III, § 302(e), Mar. 12, 1996, 110 Stat. 818.)

Notes of Decisions (15)

§ 1611. Certain types of property immune from execution, 28 USCA § 1611

28 U.S.C.A. § 1611, 28 USCA § 1611
Current through P.L. 113-209 approved 12-16-2014

End of Document

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 4

Rule 4. Summons

Currentness

(a) Contents; Amendments.

(1) ***Contents.*** A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or--if unrepresented--of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) ***Amendments.*** The court may permit a summons to be amended.

(b) Issuance. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons--or a copy of a summons that is addressed to multiple defendants--must be issued for each defendant to be served.

(c) Service.

(1) ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent--or at least 60 days if sent to the defendant outside any judicial district of the United States--to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) ***Failure to Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B)the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) ***Time to Answer After a Waiver.*** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent--or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person. A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1)in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and--if the agent is one authorized by statute and the statute so requires--by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought--or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk--or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) ***Federal Claim Outside State-Court Jurisdiction.*** For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) ***Validity of Service; Amending Proof.*** Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be

made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) ***State Law.*** On a showing that personal jurisdiction over a defendant cannot be obtained in the district where the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; April 29, 1980, effective August 1, 1980; amended by Pub.L. 97-462, § 2, January 12, 1983, 96 Stat. 2527, effective 45 days after January 12, 1983; amended March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 17, 2000, effective December 1, 2000; April 30, 2007, effective December 1, 2007.)

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 4.1

Rule 4.1. Serving Other Process

Currentness

(a) In General. Process--other than a summons under Rule 4 or a subpoena under Rule 45--must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a federal statute, beyond those limits. Proof of service must be made under Rule 4(l).

(b) Enforcing Orders: Committing for Civil Contempt. An order committing a person for civil contempt of a decree or injunction issued to enforce federal law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued.

CREDIT(S)

(Adopted April 22, 1993, effective December 1, 1993; amended April 30, 2007, effective December 1, 2007.)

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5

Rule 5. Serving and Filing Pleadings and Other Papers

Currentness

(a) Service: When Required.

(1) ***In General.*** Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) Service: How Made.

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address--in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address;

(E) sending it by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing--in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Serving Numerous Defendants.

(1) ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) ***Required Filings; Certificate of Service.*** Any paper after the complaint that is required to be served--together with a certificate of service--must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) ***How Filing Is Made--In General.*** A paper is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed. A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules.

(4) ***Acceptance by the Clerk.*** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

CREDIT(S)

(Amended January 21, 1963, effective July 1, 1963; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 23, 1996, effective December 1, 1996; April 17, 2000, effective December 1, 2000; April 23, 2001, effective December 1, 2001; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5.1

Rule 5.1. Constitutional Challenge to a Statute--Notice, Certification, and Intervention

Currentness

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

CREDIT(S)

(Adopted April 12, 2006, effective December 1, 2006; amended April 30, 2007, effective December 1, 2007.)

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title II. Commencing an Action; Service of Process, Pleadings, Motions, and Orders

Federal Rules of Civil Procedure Rule 5.2

Rule 5.2. Privacy Protection For Filings Made With the Court

Currentness

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(1) the last four digits of the social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) the minor's initials; and

(4) the last four digits of the financial-account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 5.2(c) or (d); and

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

(A) the docket maintained by the court; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

CREDIT(S)

(Adopted April 30, 2007, effective December 1, 2007.)

HCCH
HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW
CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ

14. CONVENTION ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 15 November 1965)

The States signatory to the present Convention,
Desiring to create appropriate means to ensure that judicial and extrajudicial documents to be served abroad shall be brought to the notice of the addressee in sufficient time,
Desiring to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.
This Convention shall not apply where the address of the person to be served with the document is not known.

CHAPTER I – JUDICIAL DOCUMENTS

Article 2

Each Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Articles 3 to 6.
Each State shall organise the Central Authority in conformity with its own law.

Article 3

The authority or judicial officer competent under the law of the State in which the documents originate shall forward to the Central Authority of the State addressed a request conforming to the model annexed to the present Convention, without any requirement of legalisation or other equivalent formality.
The document to be served or a copy thereof shall be annexed to the request. The request and the document shall both be furnished in duplicate.

Article 4

If the Central Authority considers that the request does not comply with the provisions of the present Convention it shall promptly inform the applicant and specify its objections to the request.

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Service Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Dixième session (1964)*, Tome III, *Notification* (391 pp.).

Article 5

The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either –

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.

Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.

If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.

That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Article 6

The Central Authority of the State addressed or any authority which it may have designated for that purpose, shall complete a certificate in the form of the model annexed to the present Convention.

The certificate shall state that the document has been served and shall include the method, the place and the date of service and the person to whom the document was delivered. If the document has not been served, the certificate shall set out the reasons which have prevented service.

The applicant may require that a certificate not completed by a Central Authority or by a judicial authority shall be countersigned by one of these authorities.

The certificate shall be forwarded directly to the applicant.

Article 7

The standard terms in the model annexed to the present Convention shall in all cases be written either in French or in English. They may also be written in the official language, or in one of the official languages, of the State in which the documents originate.

The corresponding blanks shall be completed either in the language of the State addressed or in French or in English.

Article 8

Each Contracting State shall be free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents.

Any State may declare that it is opposed to such service within its territory, unless the document is to be served upon a national of the State in which the documents originate.

Article 9

Each Contracting State shall be free, in addition, to use consular channels to forward documents, for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose.

Each Contracting State may, if exceptional circumstances so require, use diplomatic channels for the same purpose.

Article 10

Provided the State of destination does not object, the present Convention shall not interfere with –

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Article 11

The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those provided for in the preceding Articles and, in particular, direct communication between their respective authorities.

Article 12

The service of judicial documents coming from a Contracting State shall not give rise to any payment or reimbursement of taxes or costs for the services rendered by the State addressed.

The applicant shall pay or reimburse the costs occasioned by –-

a) the employment of a judicial officer or of a person competent under the law of the State of destination,

b) the use of a particular method of service.

Article 13

Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. It may not refuse to comply solely on the ground that, under its internal law, it claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not permit the action upon which the application is based.

The Central Authority shall, in case of refusal, promptly inform the applicant and state the reasons for the refusal.

Article 14

Difficulties which may arise in connection with the transmission of judicial documents for service shall be settled through diplomatic channels.

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that –

a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention,

and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each Contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this Article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled –

a) the document was transmitted by one of the methods provided for in this Convention,

b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled –

a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

b) the defendant has disclosed a *prima facie* defence to the action on the merits.

An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.

Each Contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.

This Article shall not apply to judgments concerning status or capacity of persons.

CHAPTER II – EXTRAJUDICIAL DOCUMENTS

Article 17

Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention.

CHAPTER III – GENERAL CLAUSES

Article 18

Each Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence.

The applicant shall, however, in all cases, have the right to address a request directly to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 19

To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions.

Article 20

The present Convention shall not prevent an agreement between any two or more Contracting States to dispense with –

a) the necessity for duplicate copies of transmitted documents as required by the second paragraph of Article 3,

b) the language requirements of the third paragraph of Article 5 and Article 7,

c) the provisions of the fourth paragraph of Article 5,

d) the provisions of the second paragraph of Article 12.

Article 21

Each Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the following –

a) the designation of authorities, pursuant to Articles 2 and 18,

b) the designation of the authority competent to complete the certificate pursuant to Article 6,

c) the designation of the authority competent to receive documents transmitted by consular channels, pursuant to Article 9.

Each Contracting State shall similarly inform the Ministry, where appropriate, of –

a) opposition to the use of methods of transmission pursuant to Articles 8 and 10,

b) declarations pursuant to the second paragraph of Article 15 and the third paragraph of Article 16,

c) all modifications of the above designations, oppositions and declarations.

Article 22

Where Parties to the present Convention are also Parties to one or both of the Conventions on civil procedure signed at The Hague on 17th July 1905, and on 1st March 1954, this Convention shall replace as between them Articles 1 to 7 of the earlier Conventions.

Article 23

The present Convention shall not affect the application of Article 23 of the Convention on civil procedure signed at The Hague on 17th July 1905, or of Article 24 of the Convention on civil procedure signed at The Hague on 1st March 1954.
These Articles shall, however, apply only if methods of communication, identical to those provided for in these Conventions, are used.

Article 24

Supplementary agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention, unless the Parties have otherwise agreed.

Article 25

Without prejudice to the provisions of Articles 22 and 24, the present Convention shall not derogate from Conventions containing provisions on the matters governed by this Convention to which the Contracting States are, or shall become, Parties.

Article 26

The present Convention shall be open for signature by the States represented at the Tenth Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 27

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 26.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 28

Any State not represented at the Tenth Session of the Hague Conference on Private International Law may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 27. The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for such a State in the absence of any objection from a State, which has ratified the Convention before such deposit, notified to the Ministry of Foreign Affairs of the Netherlands within a period of six months after the date on which the said Ministry has notified it of such accession.
In the absence of any such objection, the Convention shall enter into force for the acceding State on the first day of the month following the expiration of the last of the periods referred to in the preceding paragraph.

Article 29

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification referred to in the preceding paragraph.

Article 30

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 27, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 31

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 26, and to the States which have acceded in accordance with Article 28, of the following –

a) the signatures and ratifications referred to in Article 26;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 27;
c) the accessions referred to in Article 28 and the dates on which they take effect;
d) the extensions referred to in Article 29 and the dates on which they take effect;
e) the designations, oppositions and declarations referred to in Article 21;
f) the denunciations referred to in the third paragraph of Article 30.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 15th day of November, 1965, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Tenth Session of the Hague Conference on Private International Law.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

McKinney's CPLR § 5222

§ 5222. Restraining notice

Effective: May 4, 2009
Currentness

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail.

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in the notice that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice except as set forth in subdivisions (h) and (i) of this section. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except as set forth in subdivisions (h) and (i) of this section, and except upon direction of the sheriff or pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor

or obligor, for any damages sustained by reason of the restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money.

(c) Subsequent notice. Leave of court is required to serve more than one restraining notice upon the same person with respect to the same judgment or order. A judgment creditor shall not serve more than two restraining notices per year upon a natural person's banking institution account.

(d) Notice to judgment debtor or obligor. Except where the provisions of section fifty-two hundred twenty-two-a of this article are applicable, pursuant to subdivision (a) of such section, if a notice in the form prescribed in subdivision (e) of this section has not been given to the judgment debtor or obligor within a year before service of a restraining notice, a copy of the restraining notice together with the notice to judgment debtor or obligor shall be mailed by first class mail or personally delivered to each judgment debtor or obligor who is a natural person within four days of the service of the restraining notice. Such notice shall be mailed to the defendant at his or her residence address; or in the event such mailing is returned as undeliverable by the post office, or if the residence address of the defendant is unknown, then to the defendant in care of the place of employment of the defendant if known, in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by the return address or otherwise, that the communication is from an attorney or concerns a judgment or order; or if neither the residence address nor the place of employment of the defendant is known then to the defendant at any other known address.

(e) Content of notice. The notice required by subdivision (d) of this section shall be in substantially the following form and may be included in the restraining notice:

NOTICE TO JUDGMENT DEBTOR OR OBLIGOR
Money or property belonging to you may have been taken or held in order to satisfy a judgment or order which has been entered against you. Read this carefully.

YOU MAY BE ABLE TO GET YOUR MONEY BACK
State and federal laws prevent certain money or property from being taken to satisfy judgments or orders. Such money or property is said to be “exempt”. The following is a partial list of money which may be exempt:

1. Supplemental security income, (SSI);

2. Social security;

3. Public assistance (welfare);

4. Spousal support, maintenance (alimony) or child support;

5. Unemployment benefits;

6. Disability benefits;

7. Workers' compensation benefits;

8. Public or private pensions;

9. Veterans benefits;

10. Ninety percent of your wages or salary earned in the last sixty days;

11. Twenty-five hundred dollars of any bank account containing statutorily exempt payments that were deposited electronically or by direct deposit within the last forty-five days, including, but not limited to, your social security, supplemental security income, veterans benefits, public assistance, workers' compensation, unemployment insurance, public or private pensions, railroad retirement benefits, black lung benefits, or child support payments;

12. Railroad retirement; and

13. Black lung benefits.

If you think that any of your money that has been taken or held is exempt, you must act promptly because the money may be applied to the judgment or order. If you claim that any of your money that has been taken or held is exempt, you may contact the person sending this notice.

Also, YOU MAY CONSULT AN ATTORNEY, INCLUDING ANY FREE LEGAL SERVICES ORGANIZATION IF YOU QUALIFY. You can also go to court without an attorney to get your money back. Bring this notice with you when you go. You are allowed to try to prove to a judge that your money is exempt from collection under New York civil practice law and rules, sections fifty-two hundred twenty-two-a, fifty-two hundred thirty-nine and fifty-two hundred forty. If you do not have a lawyer, the clerk of the court may give you forms to help you prove your account contains exempt money that the creditor cannot collect. The law (New York civil practice law and rules, article four and sections fifty-two hundred thirty-nine and fifty-two hundred forty) provides a procedure for determination of a claim to an exemption.

(f) For the purposes of this section "order" shall mean an order issued by a court of competent jurisdiction directing the payment of support, alimony or maintenance upon which a "default" as defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of this article has been established subject to the procedures established for the determination of a "mistake of fact" for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of this article except that for the purposes of this section only a default shall not be founded upon retroactive child support obligations as defined in paragraph (a) of subdivision one of section four hundred forty of the family court act and subdivision one of section two hundred forty and paragraph b of subdivision nine of section two hundred thirty-six of the domestic relations law.

(g) Restraining notice in the form of magnetic tape or other electronic means. Where such person consents thereto in writing, a restraining notice in the form of magnetic tape or other electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon a person other than the judgment debtor or obligor. A restraining notice in such form shall contain all of the information required to be specified in a restraining notice under subdivision (a), except for the original signature or copy of the original signature of the clerk or attorney who issued the restraining notice. The provisions

of this subdivision notwithstanding, the notice required by subdivisions (d) and (e) shall be given to the judgment debtor or obligor in the written form set forth therein.

(h) Effect of restraint on judgment debtor's banking institution account into which statutorily exempt payments are made electronically or by direct deposit. Notwithstanding the provisions of subdivision (b) of this section, if direct deposit or electronic payments reasonably identifiable as statutorily exempt payments as defined in paragraph two of subdivision (l) of section fifty-two hundred five of this article were made to the judgment debtor's account during the forty-five day period preceding the date that the restraining notice was served on the banking institution, then the banking institution shall not restrain two thousand five hundred dollars in the judgment debtor's account. If the account contains an amount equal to or less than two thousand five hundred dollars, the account shall not be restrained and the restraining notice shall be deemed void. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Nothing in this subdivision shall alter the exempt status of funds that are protected from execution, levy, attachment, garnishment or other legal process, under section fifty-two hundred five of this article or under any other provision of state or federal law, or affect the right of a judgment debtor to claim such exemption.

(i) Effect of restraint on judgment debtor's banking institution account. A restraining notice issued pursuant to this section shall not apply to an amount equal to or less than the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 [1] or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor) except such part thereof as a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. This amount shall be equal to seventeen hundred sixteen dollars on the effective date of this subdivision, and shall rise to seventeen hundred forty dollars on July twenty-fourth, two thousand nine, and shall rise thereafter in tandem with the minimum wage. Nothing in this subdivision shall be construed to limit a banking institution's right or obligation to restrain or remove such funds from the judgment debtor's account if required by 42 U.S.C. § 659 or 38 U.S.C. § 5301 or by a court order. Where a judgment debtor's account contains an amount equal to or less than ninety percent of the greater of two hundred forty times the federal minimum hourly wage prescribed in the Fair Labor Standards Act of 1938 or two hundred forty times the state minimum hourly wage prescribed in section six hundred fifty-two of the labor law as in effect at the time the earnings are payable (as published on the websites of the United States department of labor and the state department of labor), the account shall not be restrained and the restraining notice shall be deemed void, except as to those funds that a court determines to be unnecessary for the reasonable requirements of the judgment debtor and his or her dependents. Nothing in this subdivision shall alter the exempt status of funds which are exempt from execution, levy, attachment or garnishment, under section fifty-two hundred five of this article or under any other provision of state or federal law, or the right of a judgment debtor to claim such exemption.

(j) Fee for banking institution's costs in processing a restraining notice for an account. In the event that a banking institution served with a restraining notice cannot lawfully restrain a judgment debtor's banking institution account, or a restraint is placed on the judgment debtor's account in violation of any section of this chapter, the banking institution shall charge no fee to the judgment debtor regardless of any terms of agreement, or schedule of fees, or other contract between the judgment debtor and the banking institution.

(k) The provisions of subdivisions (h), (i) and (j) of this section do not apply when the state of New York, or any of its agencies or municipal corporations is the judgment creditor, or if the debt enforced is for child support, spousal support, maintenance or alimony, provided that the restraining notice contains a legend at the top thereof, above the caption, in sixteen point bold type with the following language: “The judgment creditor is the state of New York, or any of its agencies or municipal corporations, AND/OR the debt enforced is for child support, spousal support, maintenance or alimony.”.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

McKinney's CPLR § 5225

§ 5225. Payment or delivery of property of judgment debtor

Currentness

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession or custody of money or other personal property in which he has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239.

(c) Documents to effect payment or delivery. The court may order any person to execute and deliver any document necessary to effect payment or delivery.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 52. Enforcement of Money Judgments (Refs & Annos)

McKinney's CPLR § 5226

§ 5226. Installment payment order

Currentness

Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is receiving or will receive money from any source, or is attempting to impede the judgment creditor by rendering services without adequate compensation, the court shall order that the judgment debtor make specified installment payments to the judgment creditor. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. In fixing the amount of the payments, the court shall take into consideration the reasonable requirements of the judgment debtor and his dependents, any payments required to be made by him or deducted from the money he would otherwise receive in satisfaction of other judgments and wage assignments, the amount due on the judgment, and the amount being or to be received, or, if the judgment debtor is attempting to impede the judgment creditor by rendering services without adequate compensation, the reasonable value of the services rendered.

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENTXIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

LITERAL PRINT

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.