WILK AUSLANDER

Wilk Auslander LLP
1515 Broadway
New York, NY 10036

T 212 981 2300
F 212 752 6380
wilkauslander.com

SDNY Holds that Foreign Laws Do Not Protect Non-Party Bank from Disclosure

---

February 26, 2013

By: Jay S. Auslander
Natalie Shkolnik

In the most recent decision by Judge Griesa of the United States District Court for the Southern District of New York ("SDNY"), in the highly contentious proceedings commenced by a group of bondholders to enforce judgments in excess of $1.6 billion against the Republic of Argentina[1], the Court ordered third party Banco de la Nacion Argentina ("BNA") to produce documents located abroad in response to a post-judgment subpoena. In doing so, the Court rejected BNA's argument that compliance violates the laws of foreign countries in which such documents are located, including Spain, Brazil, Bolivia, Chile, Panama, Paraguay, Cayman Islands, and Argentina. Moreover, the Court held that compliance was warranted even if it violates the laws of Uruguay (another locus of the responsive documents).

Specifically, the Court held that BNA failed to meet its burden to show that the laws of Spain, Brazil, Bolivia, Chile, Panama, Paraguay, Cayman Islands, and Argentina prohibit disclosure of the documents sought by the subpoena given that (i) each of these country's laws have an exception for disclosures made pursuant to a court order; (ii) the applicable statutes, on their face, provide no basis for holding that such an exception applies only to a court order from the country's own court; and (iii) BNA provided no further authority for such a limiting interpretation of each applicable statute.

With respect to Uruguay, the Court held that its privacy laws would "likely" be violated by BNA's compliance with the subpoena. Nevertheless, relying on a multi-factor test used in the Second Circuit, the Court found that compliance with the subpoena by BNA is warranted even if it violates the laws of Uruguay, because (i) information regarding a party's assets for purposes of enforcing a judgment is crucial and the importance weighs in favor of compelling disclosure; (ii) the subpoena is sufficiently specific to the extent that it is tailored to identify assets to satisfy a judgment; (iii) the United States' interest in enforcing its judgments outweighs the foreign countries' interest in protecting its banking customers' records; (iv) NML cannot secure the requested information through alternative means because, even according to BNA, it may be impossible to do so in Uruguay, and it would require complicated judicial proceedings in the other Countries; (v) BNA failed to show that it would suffer any hardship as a result of the requested disclosure; and (vi) BNA has acted in bad faith in its failure to raise the "foreign law" argument for several months while objecting to the disclosure on other grounds.[2]

---

[1] *NML Capital, Ltd. v. Republic of Argentina* 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013).

[2] Indeed, the only non-dispositive factor that the Court conceded weighs in BNA's favor is that the documents sought by NML are all located outside the United States.

The directed disclosure by BNA of what Judge Griesa termed "Argentina's financial circulatory system" is a significant development in this contentious matter. Yet, how the Court implements its ruling remains to be seen: at the conclusion of its decision, the Court indicated that it will hold another hearing to determine the next steps that need to be taken by the parties and BNA.

* * *

Wilk Auslander actively follows nationwide legal developments concerning issues relating to judgment enforcement, and is available to provide a consultation to prospective clients concerning every aspect of judgment enforcement remedies and asset recovery. For more information, or if you have any questions concerning our firm's practice in the area of judgment enforcement litigation, please contact Jay S. Auslander at jauslander@wilkauslander.com or Natalie Shkolnik at nshkolnik@wilkauslander.com.