

2015

Transactional Enforcement Discovery

Aaron D. Simowitz

New York University School of Law; Columbia Law School

Recommended Citation

Aaron D. Simowitz, *Transactional Enforcement Discovery*, 83 Fordham L. Rev. 3293 (2015).

Available at: <http://ir.lawnet.fordham.edu/flr/vol83/iss6/15>

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TRANSNATIONAL ENFORCEMENT DISCOVERY

Aaron D. Simowitz*

Joseph Stiglitz described the current Argentine sovereign debt crisis as “America throwing a bomb into the global economic system.”¹ And yet, the U.S. Supreme Court decided to tackle only one head of this massive hydra. Presented with numerous issues arising from the controversy, the Court granted certiorari only on the issue of whether the Foreign Sovereign Immunities Act (FSIA) blocked Argentina’s creditors from obtaining discovery of Argentina’s worldwide financial transactions. Justice Scalia, writing for the Court, concluded that because the FSIA says nothing on its face about discovery—it says nothing about discovery.

But the majority did not grapple with the worldwide nature of the discovery granted. It assumed, without deciding, that worldwide discovery in aid of enforcement of a judgment is usually appropriate. This prompted Justice Ginsburg to dissent. Justice Ginsburg wrote that U.S. courts should not assume that the “sky may be the limit” for post-judgment discovery, especially given that other countries typically have far more limited document production. For Justice Ginsburg, discovery in aid of enforcement of a judgment is presumptively about U.S. courts looking to U.S. law about assets in the United States.

The split in the Court reflects deep confusion and disagreement among U.S. courts on the role of discovery in an era of worldwide hunts for assets to satisfy unpaid judgments and arbitral awards. Courts have struggled to define the limits of worldwide enforcement discovery for one overriding reason: U.S. courts—following the Supreme Court’s lead—have applied tests and concepts developed for pretrial discovery to the very different world of post-judgment enforcement discovery. Post-judgment enforcement discovery differs in its purposes, its presumptions, and its problems. This Article grapples with each and proposes new approaches to tackling two obstacles to enforcement discovery—restrictions on discovery and on execution.

* Fellow, New York University School of Law; Lecturer in Law, Columbia Law School. I owe great thanks to Linda Silberman, Franco Ferrari, Richard Epstein, Pamela Bookman, and the participants in the New York University Lawyering Colloquium for their insightful comments, suggestions, and critiques. I also owe special thanks to Teresa Teng and Neto D.C.B. Waite for their exceptional research assistance. I am also indebted to my wife for her input, patience, and support.

1. Peter Eavis & Alexandra Stevenson, *Argentina Finds Relentless Foe in Paul Singer’s Hedge Fund*, N.Y. TIMES DEALBOOK (July 30, 2014, 10:35 PM), <http://dealbook.nytimes.com/2014/07/30/in-hedge-fund-argentina-finds-relentless-foe/>.

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INTRODUCTION

Judgments matter. When a court renders a money judgment, it states that a defendant has breached its obligations under a sovereign’s public or private law. The court empowers the plaintiff—now the creditor—to demand payment from the defendant—now the debtor. The creditor is likewise empowered to seize the debtor’s assets and to sell them to the highest bidder. The creditor can take this judgment to the courts of other sovereigns and expect that they too will grant it these extensive powers over the debtor.

And yet courts and scholars have underestimated or ignored the differences between the pretrial and post-judgment worlds. In *Republic of Argentina v. NML Capital*,² both the majority opinion and Justice Ginsburg’s dissent exhibit a failure to appreciate the significant difference between pretrial merits discovery and discovery in aid of enforcement. This is not exceptional but rather symptomatic of U.S. courts’ tendency to treat enforcement discovery like garden-variety merits discovery. This failure has led to widespread confusion and disagreement—on display in the clashing *NML* opinions—particularly when parties seeking transnational

2. 134 S. Ct. 2250 (2014).

enforcement discovery are faced with obstacles interposed by foreign sovereigns.

This Article is the first to assess the fundamental differences between merits and enforcement discovery—different purposes, different standards of relevance, and different due process interests, to name just a few examples. To this point, U.S. courts have struggled to formulate clear standards for transnational enforcement discovery due to the unwarranted reliance on concepts developed for pretrial merits discovery. New standards proposed here will permit new answers to a classic conflict in transnational discovery—conflicts with foreign statutes restricting discovery—and to the emerging conflict highlighted by the dueling *NML* opinions—conflicts with statutes restricting seizures of assets.

In *NML*, a group of U.S.-based hedge funds obtained judgments against Argentina totaling approximately \$1.7 billion.³ U.S. federal courts became the battleground for the dispute, taking up numerous questions, including the interpretation of the sovereign debt instruments that gave rise to the judgments, the ability of a U.S. court to enjoin the actions of a foreign sovereign, and the power of a U.S. court to order discovery into sovereign assets throughout the world.⁴ Argentina submitted certiorari petitions on each of these issues. The U.S. Supreme Court granted only the petition on the question of discovery.⁵

The Court decided the case narrowly, holding that the Foreign Sovereign Immunities Act⁶ (FSIA) said nothing on its face about discovery—and therefore had nothing to say about discovery.⁷ But the *NML* opinions highlighted a deeper conflict on the role of extraterritorial asset discovery. The seven-Justice majority assumed, without deciding, that extraterritorial asset discovery was essentially always appropriate. Justice Ginsburg dissented. She noted that post-judgment asset discovery must be “relevant” to the enforcement of the judgment.⁸ If an asset cannot be seized, sold, and applied to the judgment, discovery of that asset cannot be “relevant” to satisfaction of the judgment. From this premise, she reached two conclusions: first, that U.S. courts should presumptively look to U.S. law to govern what assets are subject to seizure, even if the assets are located abroad, and second, that whatever a foreign court may do in enforcing a U.S. judgment is not “relevant” to the U.S. judgment.⁹ In other words, a U.S. judgment is about what happens in the United States, to assets in the United States, under U.S. law.

3. Sophia Pearson, *Singer Seeks Order to Keep Argentine Lawyer in U.S.*, BLOOMBERG (Nov. 5, 2014, 11:40 AM), <http://www.bloomberg.com/news/articles/2014-11-05/singer-seeks-order-to-keep-argentine-lawyer-in-u-s->.

4. *See* *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 257 (2d Cir. 2012).

5. *NML*, 134 S. Ct. at 2254.

6. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in 28 U.S.C §§ 1330, 1602–1611).

7. *NML*, 134 S. Ct. at 2256–58.

8. *Id.* at 2259 (Ginsburg, J., dissenting).

9. *See id.*; *infra* notes 56–58 and accompanying text.

This is a local, territorial view of enforcement discovery. The great weight of authority from the lower U.S. courts paints a different picture.¹⁰ Most lower courts see themselves as actively engaged in helping their judgment creditors seek out assets around the world—appointing themselves, as one *NML* district court did, as “clearinghouse[s]” for information on all the debtor’s assets.¹¹ This approach looks both home and abroad for any avenues that could lead to satisfaction of the judgment. Accordingly, these courts see few limitations, if any, on extraterritorial asset discovery. This is a transnational view of enforcement—that judgment enforcement is, by nature, likely to be transnational.

No court or scholar has directly addressed this tension to resolve when and whether a court should order worldwide enforcement discovery. Indeed, these questions are unanswerable without a better understanding of how extraterritorial asset discovery serves the aims of the judgment enforcement system—a subject also unexplored by courts or scholars. Arthur von Mehren and Donald Trautman identified the bedrock purposes of the judgment enforcement system in their seminal work on recognition of foreign judgments, among them a “concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent” and “a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff’s choice of forum.”¹²

A robust presumption in favor of extraterritorial asset discovery certainly contributes to the certainty and expedition of satisfying judgments. But the importance of court-ordered discovery in this process was heavily debated in the *NML* litigation (and also unremarked on by the Supreme Court). On this subject, the irreconcilable adversaries turned suddenly humble, with Argentina arguing that the funds had done a masterful job locating assets without court-ordered discovery and the funds countering that they never could have found any assets without the courts’ timely assistance.¹³ In the modern era of judgment enforcement, where the assets at issue are far more likely to be intangible—such as brokerage accounts, LLC interests, and electronic funds transfers—enforcement discovery has redoubled importance.¹⁴

Von Mehren and Trautman’s less obvious purpose for judgment enforcement—that the forum of adjudication should not be yoked to the

10. See *infra* notes 82–101 and accompanying text.

11. See *NML*, 134 S. Ct. at 2254.

12. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1603–04 (1968).

13. See, e.g., Petition for Writ of Certiorari at 6–8, *NML*, 134 S. Ct. 2250 (No. 12-842), 2013 WL 122883; Brief in Opposition at 7, *NML*, 134 S. Ct. 2250 (No. 12-842), 2013 WL 8479866; see also *id.* at 21–22 (“[I]f creditors cannot obtain the information needed to locate even non-immune assets to satisfy a judgment in their favor—despite having won the case on the merits—then enforcement against a recalcitrant sovereign such as Argentina becomes nearly impossible.”).

14. See *infra* note 79 and accompanying text.

location of the debtor's assets—has profound implications for transnational enforcement discovery. It counsels that courts rendering a judgment should take an active role in locating assets in other jurisdictions, guiding judgment creditors to where they can pursue satisfaction of their judgment. The importance of the judgment rendering court as guide is magnified where other jurisdictions will refuse to enforce a judgment without a jurisdictional nexus (for example, a showing that the debtor has property in the jurisdiction) or will charge the creditor sometimes steep fees to recognize the foreign judgment.¹⁵

Argentina and its central bank, itself a target of extraterritorial asset discovery, also strongly objected to the New York federal court appointing itself the “clearinghouse” for all information on Argentina's assets, in whatever country, in whomever's hands.¹⁶ The New York court did not examine its authority to take this step—but it would have found itself the latest in a long, but not unbroken, line of courts to do so. The great weight of authority is that, where asset discovery is concerned, United States courts treat enforcement as transnational, enthusiastically searching for assets around the world. In the context of arbitration awards, scholars, arbitrators, and courts have become quite comfortable with the notion that arbitrators and courts at the seat of arbitration should take an active role in ensuring enforceability of the award.¹⁷ Enforcement of arbitral awards is, unlike judgments, the subject of a widely adopted treaty, the New York Convention.¹⁸ But this does not necessarily mean that a judgment, conversely, is territorially bounded in nature. Indeed, many U.S. states have adopted comparatively generous judgment enforcement laws in the express hope that their judgments will be liberally enforced abroad.¹⁹ The question is therefore not: When should extraterritorial asset discovery be granted? But: When should it be refused?

15. See, e.g., Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 198–200 (2005) (discussing costs and requirements of enforcing foreign money judgments in Germany); see also Yves P. Piantino, *Recognition and Enforcement of Money Judgments Between the United States and Switzerland: An Analysis of the Legal Requirements and Case Law*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 91, 133–36 (1997).

16. Corrected Brief of Defendant-Appellant at 16, *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), 2011 WL 5967280 (“[T]he district court held a second hearing on the pending motions at which it declared that it could serve as ‘a clearinghouse for information . . . that might lead to attachments or executions *anywhere in the world.*’ In expressing this view, the court disregarded the fact that the attachments NML has sought ‘anywhere in the world’ have, in almost every case, as described above, been denied by the courts of those foreign jurisdictions.” (alteration in original) (citation omitted)).

17. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 920 (2d ed. 2001); DAVID D. CARON ET AL., *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* 53 (2006).

18. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter *New York Convention*], implemented by An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201–208 (2012)).

19. See *infra* note 108 and accompanying text.

This is the immediate question that drove Justice Ginsburg to dissent from an otherwise unanimous opinion in *NML*. Justice Ginsburg stated that a “court in the United States has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign’s property in order to execute a U.S. judgment against the foreign sovereign,” and that, “[u]nless and until” the judgment creditor can show that foreign law would permit the execution on the debtor’s assets, “I would be guided by the one law we know for sure—our own.”²⁰

The Court’s diverging viewpoints highlighted that there is no established conflict of laws framework for when extraterritorial asset discovery should be granted or refused. Extraterritorial enforcement discovery typically can encounter two obstacles: restrictions on discovery (immunity from disclosure) and restrictions on execution (immunity from seizure and sale).

The Court has set down two prominent markers on the questions of when American pretrial discovery should overcome foreign restrictions. In *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*,²¹ the Court overturned sanctions for failure to comply with a document production order because “petitioner’s failure to satisfy fully the requirements of this production order was due to inability fostered neither by its own conduct nor by circumstances within its control,” as it is “hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction.”²² However, in *Societe Nationale Industrielle Aerospatiale v. United States District Court*,²³ the Court emphasized that a foreign law prohibition does not necessarily excuse compliance with an American production order.²⁴ The Court stated that “[i]t is well settled that such [foreign blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”²⁵

Since *Aerospatiale*, courts and commentators have extensively explored the reach and limits of transnational pretrial discovery. Neither courts nor commentators have explored the reach and limits of post-judgment discovery. Indeed, when courts have confronted the issue, they have attempted to apply, without modification, the rules developed for pretrial discovery. But post-judgment discovery is a far different creature, with its own purposes, procedures, and problems. At a minimum, the test announced in *Aerospatiale* must be substantially modified to account for the facts that a debtor resisting production is presumably acting in bad faith by refusing to pay or bond a judgment, that the remedies available for bad faith behavior pretrial—such as contempt sanctions or an adverse

20. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2259 (2014) (Ginsburg, J., dissenting).

21. 357 U.S. 197 (1958).

22. *Id.* at 211.

23. 482 U.S. 522 (1987).

24. *Id.* at 544 n.29.

25. *Id.*; see also *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 (9th Cir. 1981) (“*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law.”).

inference—are either unavailable or ineffective, and that the due process interests of a debtor are significantly reduced when a judgment or arbitral award is rendered.

The split in the Court's *NML* opinions shone a bright light on the complete absence of authority on the second source of conflict with American transnational discovery—restrictions on execution. There are four potential rules for conflicts between extraterritorial discovery and exemptions from execution. The *NML* majority assumed that extraterritorial asset discovery is typically permissible. Justice Ginsburg argued that discovery should be blocked where U.S. law would bar execution—essentially exporting U.S. law on immunity from execution to other nations. A third approach is that U.S. courts could refuse asset discovery when the foreign nation where the asset sits would bar execution. Finally, U.S. courts could refuse discovery where essentially no country would permit execution, attempting to divine a customary international law norm barring, for example, seizure of consular property. This final rule best serves the purposes of judgment enforcement and reflects the transnational nature of judgments and post-judgment asset discovery.

Part I of this Article explores in depth the fundamental differences between merits and enforcement discovery. Part II applies these insights to developing conflict rules to govern when extraterritorial assets discovery should be granted or refused when faced with foreign restrictions on discovery. Part III tackles the same question with regard to foreign and domestic restrictions of execution of assets.

I. A DIFFERENT DISCOVERY

In 1936, Robert P. Patterson, who would later turn down a seat on the Supreme Court to become Secretary of War,²⁶ considered five post-judgment subpoenas served on third-party stockbrokers in an attempt to recover a judgment of nearly \$300,000.²⁷ Judge Patterson stated: “To be sure, the subpoenas are a fishing excursion, but a judgment creditor is entitled to fish for assets of the judgment debtor. Otherwise he will rarely obtain satisfaction of his judgment from a reluctant judgment debtor.”²⁸

This statement captures the essence of the difference between pretrial and post-judgment discovery. American pretrial discovery is certainly broad.²⁹ Commentators and scholars have often noted its breadth in comparison to

26. J. Garry Clifford, *Introduction to ROBERT PORTER PATTERSON, THE WORLD WAR I MEMOIRS OF ROBERT P. PATTERSON: A CAPTAIN IN THE GREAT WAR* xiii, xiv–xv (J. Garry Clifford ed., 2012).

27. *Capital Co. v. Fox*, 15 F. Supp. 677, 678 (S.D.N.Y. 1936).

28. *Id.* (Lathrop v. Clapp. 40 N.Y. 328 (1869)).

29. *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 506 (1947); *see also* Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513, 532 (2010).

the more limited document production permitted in most civil law countries.³⁰ But pretrial discovery is still no “fishing excursion.”

Post-judgment or post-award discovery—“enforcement discovery”—by necessity partakes of different values than pretrial discovery. When a judgment or award is rendered, the ground shifts decisively between the parties. In a merits proceeding, the purpose of pretrial discovery is to obtain information to determine the truth or falsity of certain claims, without permitting discovery when the burdens of production are out of proportion to the likelihood of producing probative evidence. The court must guard carefully against discovery requests calculated to impose expense or to force settlement, rather than to produce useful information. It is a delicate task.

Post-judgment, the court’s job is to turn the paper judgment into actual relief—into cash.³¹ For noncompliant debtors, this is done by locating assets, seizing them, selling them, and applying that amount to the outstanding judgment. In the view of some courts, the court shifts from impartial adjudicator to ally in the quest to vindicate both the creditor’s interests and the court’s outstanding judgment.³²

In *NML*, the Supreme Court waded hip-deep into these muddy waters. The ongoing saga of the Argentine sovereign debt litigation constitutes one of the most influential transnational disputes of the decade. In the throes of one financial crisis, Argentina issued large amounts of sovereign debt. In the throes of the next financial crisis, Argentina found itself unable to satisfy these obligations. Argentina approached the purchasers of its sovereign debt and asked them to accept so-called exchange bonds as a trade-in for the original sovereign bonds—essentially, to accept a substantial haircut off the value of the original bonds.³³ A few U.S.-based hedge funds, led by Paul Singer’s Elliott Management Corporation, had purchased the Argentine debt at a discount on the secondary market. They refused to take a haircut and made clear their intention to seek the full value of the sovereign bonds.³⁴

Perhaps unsurprisingly, Argentina had found it somewhat difficult to issue debt at attractive rates. To give prospective lenders some comfort, the bonds were governed by New York law, enforceable in New York courts,

30. See Donncadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the EU Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431, 443 (2004); see also Keith Y. Cohan, Note, *The Need for a Refined Balancing Approach When American Discovery Orders Demand the Violation of Foreign Law*, 87 TEX. L. REV. 1009, 1044 (2009).

31. For a money judgment, at least. For other forms of relief, a judgment places the court in a managerial role over the obligations of the defendant. See Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1127–28 (2014) (“[T]he availability of contempt sanctions means that the court has committed itself to manage the parties’ compliance with the decree and has put its own prestige on the line to back up this commitment.”).

32. See *infra* notes 82–94 and accompanying text.

33. See *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 252 (2d Cir. 2012).

34. See *id.* at 253.

and contained broad waivers of sovereign immunity.³⁵ The funds—labeled “holdout funds” or “vulture funds,” depending on whom you ask³⁶—sued in the Southern District of New York. The court held that Argentina owed the funds the full amount of the bonds.³⁷ That was the easy part.

Argentina countered that, although it might owe the funds the full amount of the original bonds, it was entitled to pay its other creditors—specifically, the more compliant creditors that had accepted the exchange bonds—ahead of the holdout funds.³⁸ The funds responded that the “*pari passu*” clause in the bonds prevented this by requiring that all holders of the bonds be paid “at least equally.”³⁹ The funds followed up with two additional requests for the New York court: first, that it issue an injunction barring Argentina from paying the exchange bond holders ahead of them and barring various banks from processing any such payments, and second, that it compel Argentina and various third parties to reveal the nature of Argentina’s financial transactions around the world.⁴⁰

The district court ruled against Argentina on the *pari passu* issue and issued both the injunction and orders compelling worldwide discovery of Argentina’s assets.⁴¹ The Second Circuit affirmed each decision.⁴² At oral argument on the injunctive issue, Argentina’s counsel averred that his client would not comply with the court’s order, regardless of how the Second Circuit ruled.⁴³ After its defeat before the appellate court, Argentina disavowed this position in seeking certiorari from the Supreme Court.⁴⁴ It

35. *See id.* at 253–54.

36. *See, e.g.*, John Muse-Fisher, *Starving the Vultures: NML Capital v. Republic of Argentina and Solutions to the Problem of Distressed-Debt Funds*, 102 CALIF. L. REV. 1671, 1685 (2014).

37. *See NML*, 699 F.3d at 254.

38. *See id.* at 252.

39. *See id.* at 258–59 (“[W]e conclude that in pairing the two sentences of its *Pari Passu* Clause, the FAA manifested an intention to protect bondholders from more than just formal subordination.”).

40. *See, e.g.*, *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 256 & n.4 (2d Cir. 2012); *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 175–76 (2d Cir. 2011); *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 124–27 (2d Cir. 2009); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 & n.2 (2d Cir. 2007).

41. *See NML Capital, Ltd. v. Republic of Argentina*, No. 03 Civ. 2507 (TPG), 2011 WL 3897828, at *1 (S.D.N.Y. Sept. 2, 2011), *aff’d sub nom.* *EM Ltd. v. Republic of Argentina*, 695 F.3d 201 (2d Cir. 2012), *aff’d sub nom.* *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014) (granting discovery); *see also NML*, 699 F.3d at 250–51 (affirming district court orders holding that Argentina had violated the *pari passu* clause and issuing the injunctions).

42. *See supra* note 41.

43. Response of Appellees to the Republic of Argentina’s March 29 Proposal at 3, *NML*, 699 F.3d 246, 2013 WL 1790907 (“At the most recent hearing before this Court, Argentina’s counsel declared that Argentina would not ‘voluntarily obey’ any order ‘other than’ the one it ‘proposed.’” (citation omitted)).

44. *See Reply Brief of Petitioner* at 12–13, *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (No. 13-990), 2014 WL 2201061 (“To be clear, absent relief Argentina will comply with the orders under review.”); *see also* Alison Frankel, *In New SCOTUS Brief, Argentina Pledges to Comply with U.S. Courts*, REUTERS (May 30, 2014),

did no good. The Court denied certiorari on both the *pari passu* issue and the injunctive issue.⁴⁵

The only issue that the Court took up was whether worldwide discovery of Argentina's assets was appropriate. The issue was framed not, however, as whether worldwide discovery was permissible, but rather as whether the FSIA barred discovery of Argentina's assets. The FSIA contains well-known jurisdictional immunities for foreign sovereigns and foreign sovereign instrumentalities.⁴⁶ These were explicitly waived in the terms of the Argentine bonds themselves.⁴⁷ However, the FSIA also confers immunities from execution for the assets of foreign sovereigns and foreign sovereign instrumentalities. These provisions provide that the property of a sovereign is only subject to execution if it is located in the United States and if the property itself is used for commercial purposes (the commercial use exception is somewhat broader for sovereign instrumentalities).⁴⁸

Argentina raised several distinct but related arguments. First, it argued that the FSIA's exemptions from execution necessarily imply restrictions on discovery. From this premise, Argentina argued two conclusions: first, that the funds must present evidence that its assets would be subject to seizure under the FSIA *before* receiving any discovery, and second, that the FSIA's immunity from execution shielded even non-sovereign third parties holding Argentine assets (predominantly banks) from asset discovery.⁴⁹

The funds' response was three-fold. First, the funds argued that the FSIA says nothing about discovery and, indeed, the legislative history demonstrates that this was a conscious and considered omission. Second, the funds contended that, even if the FSIA had something to say about discovery, any such protections would not extend to third parties holding sovereign assets. Third, the funds objected to the notion that creditors would be able to present evidence that sovereign assets could be seized under the FSIA without receiving any discovery. Such a rule, they argued, would effectively immunize sovereign assets from execution as creditors could discover only those assets that the sovereign chose to make available (presumably, none). The overarching theme of their argument was that the FSIA is a "comprehensive" scheme that should not be supplemented by U.S. courts.

At argument, the Justices, Justice Ginsburg excepted, heaped scorn on the notion that the FSIA, *sub silentio*, imposed restrictions on discovery.⁵⁰ Justice Ginsburg appeared to be the only member of the Court sympathetic

<http://blogs.reuters.com/alison-frankel/2014/05/30/in-new-scotus-brief-argentina-pledges-to-comply-with-u-s-courts/>.

45. The Court denied certiorari in the injunction matter and on the *pari passu* issue on the same day it announced its decision in the discovery case. *See* *NML Capital, Ltd. v. Republic of Argentina*, 727 F.3d 230 (2d Cir.), *cert. denied*, 134 S. Ct. 2819 (2013).

46. *See infra* note 201 and accompanying text.

47. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014).

48. *See id.*

49. *See* Brief for Petitioner at 28, *NML Capital*, 134 S. Ct. 2250 (No. 12-842), 2014 WL 768310.

50. *See generally* Transcript of Oral Argument, *NML*, 134 S. Ct. 2250.

to Argentina's argument that the restrictions on execution necessarily implied restrictions on discovery. All seemed well for the funds until Ted Olson, counsel for the creditors, approached the podium. The Court, seemingly as a whole, expressed grave concern that untrammelled discovery could reach into areas of intense sovereign sensitivity—such as, for example, jet fighters.⁵¹ Mr. Olson responded that the discovery requests at issue concerned only financial transactions, but this seemed to make no impression on the Court. Several members of the Court expressed the belief that the United States would strongly object to such discovery of its assets (indeed, the United States had already said as much in its amicus briefs supporting Argentina at the certiorari and merits stage).⁵² Skepticism seemed to come from all angles. In one colloquy, Justice Scalia queried whether a New York judgment would carry with it exemptions from execution imposed by New York law, hypothesizing a fictional New York Homestead Act.⁵³ (Justice Sotomayor responded, correctly, that it would not.⁵⁴)

The Court's opinion seemed to bear no marks of this late-breaking skepticism. Justice Scalia, writing for the Court, concluded that the FSIA says nothing about discovery—and therefore, says nothing about discovery. He essentially adopted the funds' argument regarding timing: if the creditors did not know what assets were out there, they could hardly be expected to plead that Argentina's assets were amenable to execution under the FSIA.⁵⁵ The Court did not engage with the appropriateness of transnational enforcement discovery generally. It simply assumed, without deciding, that such discovery was appropriate in this case.

Justice Ginsburg authored a highly economical but pointed dissent. She abandoned her tack at oral argument that the execution immunities in the FSIA necessarily included restrictions on discovery, but launched a subtler attack on the majority's reasoning. Federal Rule of Civil Procedure 69 refers judgment creditors to state procedures for discovery⁵⁶ and execution and, acting in concert with them, imposes the restriction that asset discovery be "relevant" to satisfaction of the judgment.⁵⁷ Justice Ginsburg queried: How can discovery of assets not available for seizure be relevant to satisfaction of the judgment? She echoed the widely held belief that American discovery is broad to the point of offending other sovereigns and suggested, presumptively at least, that a U.S. court should look to U.S. law for its assumptions as to what is or is not open for seizure and therefore relevant for purposes of discovery.⁵⁸

51. *See, e.g., id.* at 34.

52. *Id.* at 52.

53. *See id.* at 42–44.

54. *See id.* at 48.

55. *NML*, 134 S. Ct. at 2256–57.

56. Rule 69 also permits creditors to seek discovery under federal law. *See* FED. R. CIV. P. 69(a)(2).

57. *See id.* 26(b)(1); *infra* note 80 and accompanying text.

58. *NML*, 134 S. Ct. at 2259 (Ginsburg, J., dissenting).

A. *Merits Vs. Enforcement Discovery*

The Court seems to have settled the application of the FSIA to transnational asset discovery. But the Court did nothing to shed light on whether and when transnational enforcement discovery, as a general matter, is available. Indeed, the split between the majority and Justice Ginsburg highlighted the absence of guiding authority on transnational discovery in aid of enforcement.

The overriding reason for this absence of authority, and the resulting confusion on display in the clashing *NML* opinions, is that courts have consistently failed to appreciate the differences between merits discovery and enforcement discovery. In fact, the two mechanisms are similar only in that they both lead to the production of information. Beyond that, they have different purposes, different standards, different presumptions, different means to deter bad faith conduct, and differing sovereign interests. These differences must be analyzed in order to formulate workable approaches to transnational enforcement discovery.

1. Purposes

Pretrial merits discovery serves a multitude of purposes: “to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify, and frame the issues involved, and to enable a party to obtain the information needed to prepare for trial.”⁵⁹ The revisions that liberalized discovery under the Federal Rules flowed from the “utopian” principle that “better mutual knowledge would enable the two sides to agree on the facts and issues, settle more cases, and reduce the number of issues and length of trials.”⁶⁰

This is the central irony of pretrial discovery under the Federal Rules (widely followed by the states)⁶¹: It was made broader to better narrow the civil justice process further down the road, at trial or in settlement negotiations.⁶² To put it mildly, the ability of liberal pretrial discovery to achieve these purposes has come under heavy criticism. The Supreme Court observed: “It is clear from experience that pretrial discovery . . . has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.”⁶³ This experience (particularly with the

59. 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 2001 (3d ed. 2014) (Purposes and Problems of Discovery).

60. WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 234 (1968).

61. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

62. Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 406 (2001) (“[P]ermitt[ing] reasonable discovery under a claim or defense standard would appear to meet the original rulemakers’ hope that discovery would encourage not only accurate adjudication but also settlement or the dropping of weak claims.”).

63. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34–35 (1984).

massive costs of e-discovery) has led to a long running “containment” movement in pretrial discovery.⁶⁴ Courts and commentators have made clear that pretrial discovery is “not designed to permit a plaintiff to make broad-based allegations without any basis for a belief in those allegations and then to invade the defendant’s records in an attempt to determine whether or not a cause of action exists.”⁶⁵ These concerns motivated, in part, the Court’s decisions to tighten pleading standards such that unsupported allegations could be quickly culled at the motion to dismiss stage.⁶⁶

Post-judgment asset discovery, however, serves not the purposes of adjudication but the very different purposes of judgment enforcement. Von Mehren and Trautman touched on these purposes in their seminal work on recognition of foreign judgments.⁶⁷ They identified the purposes, among others, of promoting satisfaction of judgments, frustrating the attempts of scofflaw debtors, and ensuring that the mere location of the defendant’s assets does not become the determinative factor in choosing a forum to adjudicate the dispute.⁶⁸

These different purposes manifest themselves in the details of enforcement discovery in numerous ways. For example, creditors are entitled to begin asset discovery with phenomenally broad (by the standards of pretrial discovery) requests that are essentially aimed at uncovering “all matter relevant to the satisfaction of the judgment,”⁶⁹ including “any and all” assets in which the debtors have an interest, whether in the debtor’s hands or in that of a third party (often referred to as a garnishee).⁷⁰ These requests can be directed to the debtor, a garnishee, or any other party that could have any information that could lead to the debtor’s assets.

There are numerous reasons for this breadth. In pretrial discovery, the plaintiff is presumed to have some knowledge of the defendant’s alleged misdeeds. Indeed, the plaintiff must have such information to satisfy the standards of notice pleading and to survive a motion to dismiss.⁷¹ A newly minted judgment or award creditor frequently has no information whatsoever about the debtor’s assets—or in the words of Justice Scalia’s *NML* opinion: “[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.”⁷²

In addition to breadth, post-judgment discovery must be *fast*. In a manual issued by the Department of Justice, the government observes that

64. See generally Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747 (1998).

65. 8 WRIGHT, MILLER & MARCUS, *supra* note 59, § 2001.

66. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

67. See generally von Mehren & Trautman, *supra* note 12.

68. See *id.* at 1603–04.

69. N.Y. C.P.L.R. 5223 (McKinney 2015).

70. *Young v. Torelli*, 522 N.Y.S.2d 918, 920 (App. Div. 1987).

71. See Dennis J. Connolly, *Twombly/Iqbal Pleading Requirements in Preference and Fraudulent-Transfer Cases*, AM. BANKR. INST. J., July–Aug. 2010, at 22.

72. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2257 (2014).

assets not seized in the first nine months are likely never to be seized at all.⁷³ Certainly, pretrial discovery is not designed to move slowly. Recollections fade, documents are lost or are deleted, witnesses move away or die.⁷⁴ But the defendant is not presumed to be hiding or secreting evidence such that the adjudicative function of the court will be frustrated. If they do, spoliation penalties loom. Not so post-judgment.⁷⁵

Von Mehren and Trautman also observed that a functioning judgment enforcement system should frustrate the tactics of scofflaw debtors. This has some overlap, of course, with their statement that a judgment enforcement system should be fast and efficient. Nevertheless, it has additional implications for post-judgment discovery. For example, scofflaw debtors frequently attempt to transfer their assets to nominal third parties, to trusts that will shield the assets from enforcements, or to creditors that they would rather pay ahead of their current antagonist.⁷⁶ Enforcement activities are frequently directed at uncovering and clawing back these “fraudulent conveyances.”⁷⁷ This requires discovery not only of assets currently owned by the debtor, or information reasonably calculated to lead to assets currently owned by the debtor, but also of information on any assets that may have been owned by the debtor during the pendency of the dispute or the debt.

In *NML*, the Court encountered the last and perhaps least obvious of the von Mehren and Trautman purposes of judgment enforcement: that the forum where the debtor’s assets are located not perforce become the forum of adjudication.⁷⁸ This purpose directly informs the availability of transnational enforcement discovery.

Von Mehren and Trautman’s framework acknowledges that creditors often must go beyond the forum of adjudication to obtain satisfaction of a judgment. This typically cannot happen without the assistance of various courts—the courts of other sovereigns, who recognize and enforce the judgment and, as important, the judgment-rendering court, which, by compelling broad enforcement discovery, assists the judgment creditor in finding which sovereigns have territorial power over the debtor’s assets.

Perhaps it was once true that this process of locating a debtor’s assets could occur without discovery. Some assets—buildings, equipment, oil tankers, private planes—are easier to locate than others—brokerage

73. U.S. DEP’T OF JUSTICE, JUDGMENT COLLECTION MANUAL, available at <http://www.justice.gov/tax/readingroom/JCM2004/04jcmtax.htm> (last visited Apr. 23, 2015).

74. See, e.g., *Estrada v. Burnham*, 341 S.E.2d 538, 544 (N.C. 1986) (“With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed . . .”).

75. See *infra* Part I.A.4.

76. See generally Douglas G. Baird, Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985).

77. Note, *Good Faith and Fraudulent Conveyances*, 97 HARV. L. REV. 495, 495 (1983) (“Since the enactment of the Statute of Elizabeth in the sixteenth century, fraudulent conveyance law has protected creditors by invalidating certain transactions that render debtors’ assets unreachable.”).

78. Von Mehren & Trautman, *supra* note 12, at 1603–04.

accounts, wire transfers, LLC interests. It is certainly true, however, that these other assets, intangible property that in practice cannot be located without discovery, have become dominant.⁷⁹

Von Mehren and Trautman's third purpose of judgment enforcement highlights the essential cleavage in transnational asset discovery. Some courts have viewed post-judgment discovery as a floodlight, designed to illuminate the debtor's assets anywhere in the world, such that the creditor can seek them out, domesticate its U.S. judgment in those jurisdictions, and seize those assets. Other courts have viewed post-judgment discovery as narrow and focused—a spotlight designed to reveal those assets seizable in the rendering court's territorial jurisdiction. This split represents not just a divide on the appropriate use of post-judgment asset discovery but a disagreement on the fundamental nature of judgments. Some courts have embraced a world in which a judgment rendered in a significant commercial or tort suit almost certainly will be used (or could be used) transnationally. Others have continued to conceive of judgments as fundamentally local: what other sovereigns do with a U.S. judgment is their business.

In U.S. federal court, post-judgment discovery is governed by Federal Rule of Civil Procedure 69, which states that “[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.”⁸⁰ State law typically provides that creditors may obtain discovery of “all matter relevant to the satisfaction of [a] judgment.”⁸¹

When considering requests for transnational enforcement discovery, many federal courts have interpreted these provisions to provide that “[a] judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located.”⁸² These courts certainly allow that discovery “should be reasonably calculated to lead to assets that can be levied upon pursuant to a writ of execution,”⁸³ but reject the notion that “discovery is limited to material likely to lead to discovery of assets

79. See Aaron D. Simowitz, *Siting Intangibles*, 46 N.Y.U. J. INT'L L. & POL. (forthcoming 2015); see also CAROL CORRADO, CHARLES HULTEN & DANIEL SICHEL, FED. RESERVE BD., *INTANGIBLE CAPITAL AND ECONOMIC GROWTH* (2006), available at <http://www.federalreserve.gov/pubs/FEDS/2006/200624/200624pap.pdf> (concluding that a majority of all U.S. corporate assets are intangible).

80. FED. R. CIV. P. 69(a)(2). The relevant provision for merits discovery under the Federal Rules is Rule 26(b)(1), which in turn provides: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.” *Id.* 26(b)(1). Rule 69(a) discovery is subject to the same limitations as that of Rule 26, which provides that a party may obtain information “reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

81. See, e.g., N.Y. C.P.L.R. 5223 (McKinney 2014).

82. Nat'l Serv. Indus., Inc. v. Vafla Corp., 694 F.2d 246, 250 (11th Cir. 1982); see also Credit Lyonnais, S.A. v. SGC Int'l, Inc., 160 F.3d 428, 430 (8th Cir. 1998) (holding that federal law “allows judgment creditors to conduct full post-judgment discovery to aid in executing judgment”).

83. Minpeco, S.A. v. Hunt, No. 81 Civ. 7619 (MEL), 1989 WL 57704, at *1 (S.D.N.Y. May 24, 1989).

subject to [the rendering court's] writ."⁸⁴ These courts have rejected the local or territorial view on a variety of grounds. They have reasoned that Rule 69 embodies an intent "to provide the post-judgment creditor with an *efficient* means of uncovering the existence of assets upon which he may levy to satisfy the judgment."⁸⁵

These courts also have expressed a belief that it is appropriate for the judgment-rendering court to take an active role in guiding the creditor's search for assets around the globe. The rendering court should not require "judgment creditors to serve interrogatories upon [judgment debtors], from each jurisdiction, that asked only about assets in that jurisdiction."⁸⁶ Moreover, "[t]here is no reason why, simply because the judgment must be registered in each district in which execution is sought, discovery as to assets must occur in each jurisdiction."⁸⁷ These courts also have noted that Rule 69 has been given a broad construction in numerous other contexts, for example in permitting discovery from third parties, even if they are not charged with holding executable assets.⁸⁸ In a seminal decision, the Eleventh Circuit rejected the notion "that a party is entitled to seek discovery of information only with respect to the state in which the action is pending."⁸⁹ The court stated simply: "A judgment creditor is entitled to discover the identity and location of any of the judgment debtor's assets, wherever located."⁹⁰

State courts mostly have taken a similar approach. New York courts, for example, have strongly endorsed generous enforcement discovery. One court noted that "public policy mandates that no obstacle be put in the path of a judgment creditor seeking to enforce the judgment of a court of competent jurisdiction."⁹¹ It held that the creditor could pursue discovery of "funds outside the jurisdiction" which would then "be subject to [attachment under] the laws of the situs jurisdiction."⁹² Another New York trial court held Bank of America in contempt for failing to respond to extraterritorial asset discovery, noting that "[t]he dispute involves New York residents," that "the New York Court had jurisdiction over the parties

84. *Id.*

85. *Dering v. Pitassi*, No. 88-2278, 1988 WL 115806, at *1 (E.D. Pa. Oct. 26, 1988) (emphasis added); *see also SEC v. Guieseppe*, No. 81-1836, 1987 WL 9415, at *1 (S.D.N.Y. Apr. 3, 1987) (noting that intent of Rule 69 is to provide "an effective and efficient means of securing the execution of judgments").

86. *Minpeco*, 1989 WL 57704, at *2.

87. *Id.*

88. *See id.*; *Caisson Corp. v. Cnty. W. Bldg. Corp.*, 62 F.R.D. 331, 334-35 (E.D. Pa. 1974) (granting order requiring the sole stockholder of debtor corporation to answer questions concerning entities with which the debtor has or had a relationship); *Monticello Tobacco Co. v. Am. Tobacco Co.*, 12 F.R.D. 344, 345 (S.D.N.Y. 1952) (granting order compelling the attorney for plaintiff to answer questions concerning payment in aid of execution of a judgment entered for defendants).

89. *Nat'l Serv. Indus., Inc. v. Vafla Corp.*, 694 F.2d 246, 250 (11th Cir. 1982).

90. *Id.*; *see also First Fed. Sav. & Loan Assoc. v. Fisher*, 422 F. Supp. 1, 3 (N.D. Ga. 1976).

91. *Raji v. Bank Sepah-Iran*, 529 N.Y.S.2d 420, 423-24 (Sup. Ct. 1988) (citing *Siemens & Halske v. Gres*, 354 N.Y.S.2d 762 (Sup. Ct. 1973)).

92. *Id.*; *see also Gavilanes v. Matavosian*, 475 N.Y.S.2d 987, 988 (Civ. Ct. 1984).

initially,” that “[t]he judgment was rendered in New York and New York has continuing jurisdiction to enforce its subpoenas in supplementary proceedings,” and that “[t]he court can find no legal nor practical reason why the bank should not respond.”⁹³ The court added that “Plaintiff still has a long road to hoe to reach judgment debtors['] funds but the Bank’s refusal to answer [the discovery request] is not justified.”⁹⁴

New York courts did not exactly have legislative encouragement in crafting a robust approach to transnational enforcement discovery. New York Judiciary Law section 2-b “bars the service of a New York subpoena outside the state no matter how much justification there may be for it.”⁹⁵ But New York courts, “[r]ealizing that it’s unfair, if not absurd, to impede the collection of a duly rendered New York judgment by the imposition of an artificial restriction such as that imposed by [Judiciary Law] § 2-b,” have “often found ways around it.”⁹⁶ Following the courts’ lead, the New York legislature passed C.P.L.R. 5224(a-1), “an amendment enacted in 2006, establish[ing] the extraterritorial reach of a subpoena *duces tecum*, subjecting a corporation to ‘the full disclosure prescribed by [CPLR 5223] whether the materials sought are in the possession, custody or control of the [corporation] within or without the state.’”⁹⁷

U.S. federal courts have taken a similarly enthusiastic approach to post-arbitral award discovery. For example, Judge Alvin Hellerstein of the Southern District of New York considered one award creditor’s efforts—in his words, “yet another episode in the saga of petitioner and judgment creditor[’s] . . . efforts to collect on its judgment”—to collect on an English arbitral award issued two years earlier.⁹⁸ The award creditor had obtained recognition of the award in New York and issued discovery requests on several garnishee banks, including for information from Bank of India’s Mumbai branch office. The Bank of India “limit[ed] its responses to materials available from within its New York branch,” but by doing so, “misconstrued the scope of its obligations under New York law.”⁹⁹ The court stated that “[t]here is no question that [the creditor] served its subpoenas on Bank of India in state, by service upon Bank of India’s New York branch,” nor “is there any question that [the creditor] seeks the

93. *Gavilanes*, 475 N.Y.S.2d at 991.

94. *Id.* The court asked, perhaps channeling the creditor’s frustration: “How onerous can it be to comply with the request, when the account number of the judgment debtor is provided on the subpoena?” *Id.*

95. N.Y. C.P.L.R. 5224 cmt. C5224:5 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel’s commentary); *see also* DAVID D. SIEGEL, *NEW YORK PRACTICE* § 383 (4th ed. 2005).

96. N.Y. C.P.L.R. 5224 cmt. C5224:5 (author Richard C. Reilly, recompiling David D. Siegel’s commentary); *see also* *Coutts Bank (Switz.) Ltd. v. Anatian*, 713 N.Y.S.2d 45, 47–48 (App. Div. 2000); *Standard Fruit & S.S. Co. v. Waterfront Comm.*, 371 N.E.2d 453, 455 (N.Y. 1977).

97. *CE Int’l Res. Holdings, LLC v. S.A. Minerals Ltd. P’ship*, No. 12-CV-08087(CM)(SN), 2013 WL 2661037, at *5 (S.D.N.Y. June 12, 2013) (quoting N.Y. C.P.L.R. 5224(a-1)).

98. *Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 236 (S.D.N.Y. 2011).

99. *Id.* at 237–38.

production of materials in Bank of India's possession, custody, or control."¹⁰⁰ Therefore, the "Bank of India must produce the materials [the creditor] seeks, even if those materials are located outside New York."¹⁰¹

Granted, arbitral awards are more clearly transnational creatures. Enforcement of arbitral awards is governed by the New York Convention, a treaty signed by over 150 countries.¹⁰² There are vigorous debates about the transnational character of arbitral awards—such as the effects of a set aside at the seat of the arbitration on the enforcement of the award¹⁰³—but many arbitrators and arbitral institutions have adopted the position that they have an affirmative obligation to ensure enforceability of the award,¹⁰⁴ including some consideration of where assets are located.¹⁰⁵ Similarly, many commentators have pushed courts to take a more active role in ensuring enforceability of awards, including vigorous use of interim measures.¹⁰⁶

But this distinction may be less than it seems. American states have adopted a remarkably open approach to enforcement of foreign judgments—a decision not without cost.¹⁰⁷ This openness comes not from magnanimity but from the hope and desire that U.S. judgments will be well received abroad.¹⁰⁸ In light of this policy, it would be strange indeed for U.S. courts to treat U.S. judgments and judgment enforcement discovery as if they were purely local in scope.

2. Relevance

Federal Rule of Civil Procedure 26 states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s

100. *Id.* at 238.

101. *Id.*

102. *Two New State Parties to the New York Convention*, 1958 N.Y. CONVENTION GUIDE, http://www.newyorkconvention1958.org/index.php?lvl=cmepage&pageid=7&id_news=467 (last visited Apr. 23, 2015).

103. *See, e.g.*, Filip De Ly, *Forum Shopping and the Determination of the Place of Arbitration*, in *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* 53 (Franco Ferrari ed., 2013) [hereinafter *FORUM SHOPPING*]; Loukas Mistelis, *Setting Aside of Arbitral Awards and Forum Shopping in International Arbitration: Delocalization, Party Autonomy and National Courts in Post-Award Review*, in *FORUM SHOPPING*, *supra*, at 277; Linda Silberman & Maxi Scherer, *Forum-Shopping and Post-Award Judgments*, in *FORUM SHOPPING*, *supra*, at 313.

104. *See* Martin Platte, *An Arbitrator's Duty to Render Enforceable Award*, 20 J. INT'L ARB. 307, 307 (2003). *But see* Christopher Boog & Benjamin Moss, *The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award*, *KLUEWER ARB. BLOG* (Jan. 28, 2013), <http://kluwerarbitrationblog.com/blog/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/>.

105. *See* Platte, *supra* note 104, at 312–13.

106. *Id.*

107. *See* Christopher A. Whytock, *Some Cautionary Notes on the “Chevronization” of Transnational Litigation*, 1 *STAN. J. COMPLEX LITIG.* 467, 468 (2013).

108. *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 *GEO. WASH. INT'L L. REV.* 173, 175–76 (2008); *see also* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 *BERKELEY J. INT'L L.* 150, 205–06 (2013).

claim or defense.”¹⁰⁹ In addition, “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”¹¹⁰ The concept of relevance is the key check on unbridled, overbroad pretrial discovery.

Jeffrey Stempel and David Herr, writing on the 2000 amendments to Rule 26 intended to narrow the scope of available pretrial discovery, observed that, for the first standard, “[a]n item of information sought is relevant to a claim or defense if the requesting party can articulate a logical relationship between the information sought and possible proof or refutation of the claim or defense at trial.”¹¹¹ On the good cause standard, Stempel and Herr wrote that a party requesting discovery not logically related to a current claim or defense should show the information’s importance to the case, the likelihood of obtaining the information, and that the probity of the information will outweigh “the purported discovery vices of increased cost, delay, or harassment.”¹¹² Even “[i]f the requesting party makes this showing, the opponent may still be able to avoid this discovery if it can demonstrate that the burden of the subject-matter discovery outweighs its benefit.”¹¹³

Enforcement discovery must be “relevant” to execution—but this connection is necessarily loose. The information sought need not lead to assets subject to the power of the court issuing discovery. The information could well be for the purpose of guiding the creditor to other jurisdictions where it would domesticate its judgment and use the execution processes of those courts.

Judge Clifford Scott Green observed that “the limits of the concept of relevancy in connection with discovery in aid of execution of judgment, as here, must be somewhat different,” because “of the fact that there is no longer an action pending which may be utilized by reference to its subject matter to assist in definition of the scope of discoverable matter.”¹¹⁴ Judge Green set broad limits on discovery from third-party garnishees, stating that discovery must be relevant to finding assets of the judgment debtor and cannot be used for harassment or to discover assets of the third party itself and that, “[m]ore significantly, it is clear that in an attempt to discover

109. FED. R. CIV. P. 26(b)(1).

110. *Id.*

111. Stempel & Herr, *supra* note 62, at 408–09.

112. *Id.* at 421. Stempel and Herr identify the following factors:

[T]he reason the information is important to the case; the reason that the information is at least potentially likely to emerge from the discovery requested; and why permitting the discovery will be more consistent with full factual development and accurate adjudication rather than furthering the purported discovery vices of increased cost, delay, or harassment of others. If the requesting party makes this showing, the opponent may still be able to avoid this discovery if it can demonstrate that the burden of the subject-matter discovery outweighs its benefit.

Id.

113. *Id.*

114. *Caisson Corp. v. Cnty. W. Bldg. Corp.*, 62 F.R.D. 331, 333 (E.D. Pa. 1974).

assets by which to satisfy its judgment, plaintiff is entitled to a very thorough examination of the judgment debtor.”¹¹⁵

Courts taking this approach have noted that discovery proceedings and execution proceedings are separate.¹¹⁶ Indeed, Rule 69 separates them into two provisions.¹¹⁷ This approach also necessarily implies that a judgment-rendering or enforcing court views a judgment as transnational. A U.S. court rendering or enforcing a judgment accepts that the creditor is likely to take that judgment abroad to further its search for assets.

The related, and perhaps, necessary conclusion that follows from this premise is that creditors enjoy a strong presumption in favor of transnational enforcement discovery. Creditors clearly enjoy the ability to obtain information from the debtor or from third parties that could, even in attenuated fashion, lead to the debtor’s assets. This includes shining a light on the debtor’s assets around the world and, if third-party garnishees are subject to the court’s adjudicative jurisdiction, any assets held by third-party garnishees anywhere in the world.

David Siegel, the dean of New York state civil procedure scholars, considered what is “matter relevant to the satisfaction of the judgment” and noted that “[t]his is a generous standard and permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor’s property, present or potential” and that any “attempt to delineate the inquiries that can be made or the materials that can be elicited would be futile.”¹¹⁸

Some federal courts, however, have taken an approach akin to pretrial discovery, requiring some threshold showing of relevance before compelling discovery against third-party garnishees. For example, one federal district court—essentially adopting the timing argument later advanced by Argentina before the Supreme Court—stated that, at the outset, “a judgment creditor must make a threshold showing of necessity and relevance when attempting to obtain discovery of a non-judgment debtor pursuant to Rule 69(a).”¹¹⁹ Without this showing, the court reasoned that it could not answer the “crucial question” of whether the financial records sought would lead to satisfaction of the judgment.¹²⁰ In this instance, the creditor was attempting to identify and claw back fraudulent transfers. However, the court held the creditor’s “desire to void [the allegedly fraudulent] transactions is too far removed from a present ‘aid of the judgment or execution’ as contemplated by Rule 69(a).”¹²¹

A New York court recently took a similarly narrow approach. The judgment had traveled a somewhat circuitous route to New York. The

115. *Id.* at 335.

116. *See, e.g.,* *Mid-Dakota Clinic, P.C. v. Kolsrud*, 603 N.W.2d 475, 476 (N.D. 1999).

117. *See* FED. R. CIV. P. 69(a).

118. N.Y. C.P.L.R. 5223 cmt. C5223:2 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel’s commentary) (“Relevancy is the central theme.”).

119. *Blaw Knox Corp. v. AMR Indus., Inc.*, 130 F.R.D. 400, 403 (E.D. Wis. 1990).

120. *Id.*

121. *Id.* at 404.

creditor obtained a Lebanese judgment, obtained recognition of the foreign money judgment in Maryland, and then registered the judgment as a sister state judgment in New York. The judgment creditor then attempted to obtain discovery from a foreign bank by serving its New York branch.¹²² The discovery requests encompassed any assets of the debtor in any foreign branch of the bank.¹²³ The bank refused to respond on the grounds of the separate entity rule and foreign secrecy laws that it alleged would subject the bank to civil and criminal penalties if it and its employees complied with the discovery requests.¹²⁴

The court denied the plaintiff's motion to compel, first because the plaintiff could not prove that any of the judgment debtor's activities had taken place in New York. Second, the court stated that discovery was but the first step toward execution, and because assets were not located in the jurisdiction, discovery efforts would seem wasteful: "For the Court to start down this path, knowing that the ultimate goal is unavailable in this jurisdiction, would be an unproductive waste of judicial resources."¹²⁵ The First Department, the state intermediate appellate court for Manhattan, upheld that decision, suggesting that the denial was appropriate because the "underlying dispute did not originate in the United States, the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters provides an alternative recourse, and ordering compliance raises the risk of undermining important interests of other nations by potentially conflicting with their privacy laws or regulations."¹²⁶

3. Due Process

Due process gives defendants the right to be free from the power of sovereigns with whom they have no contacts. Due process interests also give defendants the right to be free from needlessly burdensome discovery.¹²⁷ Federal Rule of Civil Procedure 26 embodies this value, among others, in giving courts the power to limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."¹²⁸

The "burden" on a party engaged in pretrial discovery weighs far more heavily than the "burden" on a judgment debtor. The calculus changes because the due process interests of a judgment debtor have either been

122. *Ayyash v. Koleilat*, 957 N.Y.S.2d 574, 576 (Sup. Ct. 2012).

123. *Id.* at 579–80.

124. *Id.* at 579.

125. *Id.* at 582.

126. *Ayyash v. Koleilat*, 981 N.Y.S.2d 536, 536 (App. Div. 2014) (internal citations omitted).

127. See, e.g., John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Can E-Discovery Violate Due Process? Part 1*, LAW TECHNOLOGY NEWS (June 7, 2013), available at <http://www.skadden.com/insights/can-e-discovery-violate-due-process-part-1>.

128. FED. R. CIV. P. 26(b)(2)(c)(iii).

extinguished by the judgment¹²⁹ or significantly reduced.¹³⁰ The gulf between a defendant and a debtor is best illustrated by one profound difference—a defendant cannot be haled into court wherever it has property; a debtor can.¹³¹

Courts have little solicitude for the “burden” of judgment or award debtors. The due process interests of the debtor are reduced—accordingly the debtor has little ground to object to the necessarily broad and encompassing discovery request of asset discovery. The debtor also holds the keys to its own salvation. This need not consist simply of paying the judgment, although that is certainly an option. The debtor typically can obtain a stay of discovery as of right by posting a supersedeas bond.¹³² The bond secures the creditor’s judgment and obviates the need for recourse to the debtor’s assets. Accordingly, appeal of the judgment can proceed at its usual stately pace. Judgment debtors are loath to do this. If the object of the exercise is to avoid paying a judgment, posting collateral for a bond in the home of the enforcing court will necessarily be unattractive. Of course, if the debtor’s sole object is to avoid paying a valid judgment, it should not be heard to complain of burdens.

Debtors have had their due process interests diminished by the rendering of a judgment or an award against them—but not so with garnishees. Garnishees are mere third parties caught holding the debtor’s assets. Garnishees, like third-party witnesses, are presumed to have “no dog in th[e] fight.”¹³³ Indeed, the Supreme Court recognized this principle in holding that, in some circumstances, a third-party witness may immediately appeal a discovery order because “the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.”¹³⁴ The Federal Rules recognize this burden by requiring that courts balance the need for the information with the expense imposed¹³⁵ and by empowering courts to quash subpoenas that impose an undue burden on a third party.¹³⁶

The Court has never directly recognized that third-party witnesses enjoy any due process protection from assertions of jurisdiction, but most courts

129. See generally James E. Berger & Charlene Sun, *Personal Jurisdiction and the New York Convention*, INT’L LITIG., Summer 2012, at 2.

130. See Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT’L ARB. 439, 444 (2012) (arguing that, although the *Shaffer* distinction between pre- and post-judgment is relevant for both award and judgment enforcement actions, it is nevertheless “surprising and indefensible” to hold “that a foreign country judgment may be enforced in New York without the necessity of having jurisdiction over the judgment debtor or his property”).

131. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 309 n.14 (1980) (Brennan, J., dissenting) (citing *Shaffer v. Heitner*, 433 U.S. 186, 210–11 nn.36–37 (1976)).

132. See 11 WRIGHT, MILLER & MARCUS, *supra* note 59, § 2905 (Stay upon Appeal).

133. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). See generally Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968 (2004).

134. *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 18 n.11 (1992).

135. FED. R. CIV. P. 26(b)(2)(C)(3).

136. *Id.* 45(d)(3)(iv).

have assumed as much as each discovery request carries with it the possibility of a contempt judgment.¹³⁷ Of course, a judgment on liability and a contempt judgment are very different creatures, but “it is unclear which way that should cut.”¹³⁸ However, the Second Circuit held that a foreign company could be compelled to provide testimony in New York, even though jurisdiction was obtained only by service of process, because “a person who is subjected to *liability* by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.”¹³⁹ The Second Circuit also rejected the argument that a non-party witness should “command solicitude simply because it is an entity foreign to New York and the United States.”¹⁴⁰

The related law of *seizing* assets from garnishees also sheds light on this question. The burden of responding to broad discovery requests is not the only or even the most important burden. Due process interests require that the court be aware of the hardship of criminal prosecution that could be leveled at a third-party garnishee after complying with American discovery.¹⁴¹ And yet, U.S. courts have little patience for noncompliant garnishees facing criminal prosecution as a result of seizure of assets.¹⁴² Numerous courts have observed, in effect, that if a multinational entity cannot comply with the demands of U.S. law, perhaps it should relinquish the privileges of doing business in the United States.¹⁴³ Courts have carved out a sort of exception for multinationals that could not reasonably anticipate being caught between the demands of U.S. law and the requirements of another sovereign.¹⁴⁴ This exception has seldom been applied—and, at the least, it certainly does not apply to banks, the entity that most typically finds itself in the uncomfortable position of holding a debtor’s assets that one sovereign would seize and another would shield.¹⁴⁵

This rough treatment of third-party banks at the hands of U.S. courts may be surprising, but it reflects the conclusion that these multinational garnishees had adequate notice that they could be subjected to the irreconcilable demands of multiple sovereigns and, indeed, that these

137. See Scott, *supra* note 133, at 978.

138. First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 20 (2d Cir. 1998).

139. *Id.*

140. *Id.*

141. Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat, 902 F.2d 1275, 1277 (7th Cir. 1990).

142. In the pointed words of the Second Circuit: “If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and [a foreign country], perhaps it should surrender to one sovereign or the other the privileges received therefrom.” First Nat’l City Bank v. IRS, 271 F.2d 616, 620 (2d Cir. 1959).

143. If a defendant or garnishee has “voluntarily elected to do business in numerous foreign host countries,” it “has accepted the incidental risk of occasional inconsistent governmental actions [and] cannot expect to avail itself of the benefits of doing business here without accepting the concomitant obligations.” United States v. Bank of Nova Scotia, 740 F.2d 817, 828 (11th Cir. 1984).

144. See Simowitz, *supra* note 79.

145. See JPMorgan Chase Bank, N.A. v. Motorola, Inc., 846 N.Y.S.2d 171, 181 (App. Div. 2007).

multinationals have derived substantial benefit from operating across sovereign boundaries. Moreover, third-party garnishees have typically derived benefits from holding the debtors' assets—a bank deposit, brokerage account, or electronic funds transfer all being excellent examples.

There would seem to be little reason to be more solicitous of third parties in discovery proceedings than in garnishment proceedings. It therefore appears that the interests of debtors and their third-party garnishees must be viewed as altered in post-judgment proceedings.¹⁴⁶

4. Sanctions for Misconduct

Discovery requests in the United States are broad by design but are not without limits. A party responding to merits discovery always has the opportunity to decide for itself whether a particular document is relevant or privileged.¹⁴⁷ But there are tools in place to punish parties that exercise this power in bad faith, such as issuing an adverse inference, contempt penalties, or dismissal of claims.¹⁴⁸

These remedies are ineffectual in post-judgment practice. In a merits proceeding, an adverse inference or dismissal of claims are powerful tools. In post-judgment practice, they are irrelevant.¹⁴⁹ Similarly, a contempt sanction is normally something that parties in merits litigation strive to avoid. In post-judgment practice, a contempt judgment means little to a scofflaw debtor with an already outstanding and unsatisfied judgment (although it still can be very persuasive to a garnishee). For these reasons, the debtor does not and should not have the freedom to decide what is “relevant” to a post-judgment discovery request.

Indeed, the clashing *NML* opinions highlight this difference, albeit without explicit acknowledgement. Justice Scalia's majority opinion rejects the argument that “if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing

146. Third-party witnesses are also still protected by the requirements of Federal Rule of Civil Procedure 45, which state, inter alia, that no witness shall be commanded to appear more than “100 miles [from] where the person resides, is employed, or regularly transacts business in person.” FED. R. CIV. P. 45(c)(1)(A).

147. See, e.g., Ann K. Hadrava, *The Amendment to Federal Rule of Civil Procedure 26(b)(1) Scope of Discovery: An Empirical Analysis of Its Potential “Relevancy” to Employment Discrimination Actions*, 26 OKLA. CITY U. L. REV. 1111 (2001).

148. See *Linde v. Arab Bank, PLC*, 706 F.3d 92, 95 (2d Cir. 2013) (upholding that “District Court’s orders imposing sanctions pursuant to Federal Rule of Civil Procedure 37(b) for the Bank’s failure to comply with several of that court’s discovery-related orders”); see also Paul Robert Eckert, *Utilizing the Doctrine of Adverse Interferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative*, 37 WM. & MARY L. REV. 749, 787 (1996); Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1034 (1978) (noting that “some courts, including the Supreme Court in a brief per curiam opinion, have suggested that indulgence of discovery abuses and the narrowly remedial orientation toward discovery sanctions are inappropriate in light of the need to deter all litigants from exploiting the dilatory potential of discovery,” and that “[t]hese courts have urged that such deterrence requires the use of sanctions whose effect is more directly punitive”).

149. There are exceptions, such as litigation at the enforcement stage of issues such as alter ego liability or against garnishees.

discovery of information pertaining to that property,” noting that the very “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.”¹⁵⁰ These statements embody an assumption that courts will decide what is and is not executable.

Justice Ginsburg’s dissent singles out this passage in particular for disagreement. She states that “[w]ithout proof of any kind that other nations broadly expose a foreign sovereign’s property to arrest,” a creditor’s enforcement discovery should be limited to categories of assets made available for seizure by U.S. law.¹⁵¹ This approach allows the debtor to decide what assets are or are not available for execution. In pretrial discovery, this is standard—the producing party has the power to decide for itself what is responsive to discovery requests. If the producing party believes that responsive documents are shielded by privilege, it typically produces a privilege log, which allows an adversarial examination of privilege claims.¹⁵² But, naturally, these obligations become bound up in the gamesmanship of litigation.¹⁵³ Strong sanctions provide both specific and general deterrence of bad faith conduct.¹⁵⁴

Post-judgment, these sanctions are ineffective—but the incentive for gamesmanship is that much stronger. Accordingly, the initial determination of what assets could be available to satisfy the judgment or award cannot be placed in the debtor’s hands but must reside with the court.¹⁵⁵

5. Cost and Abusive Practices

Concerns about the “cost and delay” inherent in U.S. civil discovery have become ubiquitous, particularly with the rise of electronic discovery.¹⁵⁶

150. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2257 (2014).

151. *Id.* at 2259 (Ginsburg, J., dissenting).

152. See, e.g., Vaughn v. Rosen, 484 F.2d 820, 826–28 (D.C. Cir. 1973); see also 8 WRIGHT, MILLER & MARCUS, *supra* note 59, § 2016 (Assertion of Privilege).

153. See Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 265 (D. Md. 2008) (“In actuality, lawyers infrequently provide all the basic information called for in a privilege log, and if they do, it is usually so cryptic that the log falls far short of its intended goal of providing sufficient information to the reviewing court to enable a determination to be made.”).

154. *Id.* (noting that counsel “should be wary of filing a response to a Rule 34 document production request that asserts privilege/protection as a basis for refusing to make requested production without having a factual basis to support each element of each privilege/protection claimed for each document withheld, because doing so is a sanctionable violation”).

155. Justice Ginsburg’s proposal would appear to allow creditor’s to prove that a foreign sovereign would open up more assets than the United States to execution. This would require the creditor, operating without knowledge of the nature or extent of the debtor’s assets, to make a showing for multiple countries regarding multiple types of assets, presumably involving extensive briefing and testimony on foreign law. This system would trade greater solicitude for debtors (particularly foreign sovereign) for an enormous loss of speed and even more post-judgment expense for valid creditors.

156. For an excellent examination of the origins and effects of this “cost and delay” narrative, see Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085 (2012).

The U.S. Judicial Conference Advisory Committee on Civil Rules convened a conference of lawyers, federal judges, and legal scholars to address exactly this issue in 2010 at Duke Law School. The conference produced a proposed package of amendments to the Federal Rules to reduce these perceived evils.¹⁵⁷ One conference paper observed that the Federal Rules' stated goal "to secure the just, speedy, and inexpensive determination of every action" may have become "an empty promise," and that "[c]ivil litigation has become too cumbersome, expensive and time consuming, and the exponential growth of electronically stored information . . . over the past decade has simply added strains to an already overburdened system."¹⁵⁸

Courts enforcing judgments do not typically concern themselves with the costs and expenses of the judgment debtor. Quite the contrary—the judgment debtor is typically regarded as putting the creditor to further, unnecessary, and unjust expense by refusing to satisfy the judgment.¹⁵⁹ This conviction is reflected in the widespread adoption of post-judgment interest rates that, at present, typically exceed market returns.¹⁶⁰ High post-judgment interest rates compensate creditors for dispossession of their funds over the dispute's length and prevent unjust enrichment of debtors. Post-judgment interest is also designed to promote speedy satisfaction of judgments and discourage post-judgment gamesmanship by debtors.¹⁶¹

A third-party witness in enforcement proceedings, or even a garnishee, faces lower burdens than a defendant in a plenary proceeding. One federal district court observed that "it is well recognized that merely making a submission to the court imposes a far less significant burden on that party than bringing the party into a lawsuit."¹⁶² The court noted that a subpoena in aid of enforcement "imposes an even lighter burden than a typical subpoena, which may delve into aspects of a company's business that are sensitive, and which may require extensive legal analysis as well as internal

157. See *Federal Committee on Rules of Practice and Procedure Opens "Duke Rules Package" for Comment*, DUKE LAW (Aug. 22, 2013), <http://law.duke.edu/news/federal-committee-rules-practice-and-procedure-opens-duke-rules-package-comment/>.

158. FED. COURTS COMM'N, ASSOC. OF THE BAR OF THE CITY OF N.Y., PROPOSALS FOR THE 2010 DUKE CONFERENCE REGARDING THE FEDERAL RULES OF CIVIL PROCEDURE 2 (2010), available at <http://www.abcnyc.org/pdf/report/uploads/20071920-NYCBARProposalsforDukeConference.pdf>.

159. See generally Note, *Transfer of Assets Pending Stay of Execution As Contempt of Court*, 49 YALE L.J. 580 (1940).

160. See, e.g., 28 U.S.C. § 1961 (2012); N.Y. C.P.L.R. 5004 (McKinney 2014); Minbeob [Civil Act], Act. No. 471, Feb. 22, 1958, art. 379 (S. Kor.); MINPO [MINPO] [Civ. C.] art. 404 (Japan); Código de Comercio [CCo.] [Commercial Code] art. 362 (Mex.).

161. See Thierry J. Senechal & John Y. Gotanda, *Interest As Damages*, 47 COLUM. J. TRANSNAT'L L. 491, 496 (2009) ("Without interest, the losing respondent's obligations are lessened. Because the resulting cost to the respondent for the breach is less, the respondent may not be sufficiently deterred from breaching the contract. It may even delay the resolution of the dispute, because the respondent profits from the use of the claimant's money while the dispute is in the process of being resolved.")

162. *Licea v. Curacao Drydock Co., Inc.*, No. 4:13-MC-00874 (S.D. Tex. Sept. 9, 2014). Special thanks to Trey Childress and Bryce Cullinane for pointing out this case.

resources in crafting objections and providing responses.”¹⁶³ By contrast, for a subpoena in aid of enforcement: “[T]here is no discovery being asked of the Garnishees beyond the amount of their indebtedness to the Judgment Debtor. It is a question that can be answered in an instant.”¹⁶⁴

The concern for “abusive” practices is also recast. Courts express great frustration with the various practices of scofflaw debtors—for example, fraudulent transfers—in an attempt to evade enforcement entirely or to force the creditors to settle for a significant discount off the face value of the judgment. Legislatures also have gone to great lengths to corral recalcitrant debtors. New York law, for example, provides not only for contempt sanctions for failure to obey a subpoena¹⁶⁵ or a restraining notice,¹⁶⁶ but also for arrest of a debtor concealing property if the debtor is about to leave the state or is concealed therein.¹⁶⁷

6. Good and Bad Faith

The Third Restatement of the Foreign Relations Law of the United States placed the issue of transnational discovery front and center. The Restatement devoted a separate section to transnational discovery, carving it off from jurisdiction to prescribe generally.¹⁶⁸ This new section was motivated, in part, by the belief that “[n]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States.”¹⁶⁹ The Restatement’s new section, however, was principally (perhaps exclusively) concerned with “pretrial or investigative techniques,” particularly in antitrust cases.¹⁷⁰

The Restatement, in some respects, made life much harder for parties resisting U.S. discovery. In particular, it made explicit that the threat of criminal sanctions by a foreign sovereign was not a sufficient basis to withhold discovery.¹⁷¹ But the Restatement gave to noncompliant targets of discovery in the same breadth that it took away. The Restatement also added a “good faith” exception—in other words, that the discovery target could be excused from production after making good faith efforts to secure the compliance of the sovereign interposing objections to the discovery.¹⁷²

163. *Id.*

164. *Id.*

165. N.Y. C.P.L.R. 2308 (McKinney 2014).

166. *Id.* 5251.

167. *Id.* 5250; *see also* *Assocs. v. Park*, 949 N.Y.S.2d 134, 135 (App. Div. 2012).

168. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987).

169. *Id.* reporters’ cmt. 1.

170. *Id.*

171. *Id.* reporters’ cmt. 4; *see also* *United States v. First Nat’l Bank of Chi.*, 699 F.2d 341, 345 (7th Cir. 1983) (“The fact that foreign law may subject a person to criminal sanctions in the foreign country if he produces certain information does not automatically bar a domestic court from compelling production.”).

172. In practice, this often results in a sort of unconvincing *Kabuki* where the discovery target “asks” a sovereign for clearance to disclose, while making clear that it is acting under

It is difficult to imagine a situation in which a “good faith” judgment debtor would refuse to post a bond. Of course, not all judgments and awards deserve to be enforced, hence the various provisions of judgment enforcement law¹⁷³ and of the New York Convention that permit limited defenses to arbitral award enforcement.¹⁷⁴ But for the court that has rendered the judgment, defenses to enforcement are irrelevant; for a court has already agreed to enforce a judgment, the time for defenses is past. The only reason a debtor could have for refusing to post a bond, if it has assets sufficient to do so, is that it never intends to satisfy the judgment. This hardly seems consistent with “good faith”—even if the debtor could make an apparently “good faith” attempt to secure clearance from the resistant sovereign to release documents.

7. Sovereign Interests

The United States certainly has a strong interest in providing a forum for adjudication for a wide variety of cases. The Restatement recognizes a non-exhaustive list of these cases, including matters involving residents, nationals, and parties who have consented to jurisdiction in the United States.¹⁷⁵ The Supreme Court has repeatedly emphasized the importance of the “the interests of the forum State” in narrowing both specific¹⁷⁶ and general jurisdiction.¹⁷⁷

American states have also, in varying ways, expressed strong interests in providing a forum of adjudication. For example, New York General Obligations Law section 5-1402 provides that any person can sue a foreign party in New York pursuant to a contract that provides for New York law and the jurisdiction of New York courts, if the amount in controversy is at least \$1 million.¹⁷⁸ New York law also bars any courts from dismissing such a suit under *forum non conveniens*.¹⁷⁹

The interest of a sovereign in ensuring enforcement of its judgments is also certainly strong. Two federal courts of appeal have described this interest as “vital.”¹⁸⁰ Whenever a court issues an order, it “has put its own prestige on the line to back up this commitment.”¹⁸¹ But it is not

compulsion. *See, e.g., Gucci Am., Inc. v. Weixing Li*, No. 10 Civ. 4974 (RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011).

173. *See* Emilio Bettoni, Note, *Recognition and Enforcement of Foreign Money Judgments Despite the Lack of Assets*, 10 N.Y.U. J.L. & BUS. 155, 157 (2013).

174. New York Convention, *supra* note 18.

175. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421.

176. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

177. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 765 (2014) (“[R]espondents have failed to show that it would be more convenient to litigate in California than in Germany, a sovereign with a far greater interest in resolving the dispute.”).

178. N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2014).

179. N.Y. C.P.L.R. 327(b) (McKinney 2014).

180. *See Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992); *Reinsurance Co. of Am. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1280 (7th Cir. 1990).

181. *Bray*, *supra* note 31, at 1128.

immediately clear how strong this interest is where a U.S. court is recognizing and enforcing a foreign judgment or award.

In the context of arbitral awards, the analysis may be somewhat simpler. Article III of the New York Convention provides that signatory states shall not “impose[] substantially more onerous conditions” on the enforcement of foreign arbitral awards than on enforcement of domestic awards.¹⁸² The United States might well violate its obligations under the Convention if its courts announced a doctrine whereby international awards were less likely to receive the full panoply of U.S. enforcement discovery than domestic awards. In addition, current case law requires that an arbitral award cannot be enforced in the United States without a jurisdictional nexus, either through jurisdiction over the debtor or over its assets.¹⁸³

Even for judgments, however, the U.S. interest is greater in enforcing a foreign judgment than in adjudicating a purely foreign claim. In the United States, judgment enforcement is governed by state law. Although there is significant variation among state law approaches, they are fairly united as “generous forum[s] in which to enforce judgments for money damages rendered by foreign courts.”¹⁸⁴ This is not *noblesse oblige*, but pure self-interest. As the New York Court of Appeals observed, New York’s judgment enforcement law “was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.”¹⁸⁵ American states have expressed their strong interest in providing foreign judgments with the full breadth of enforcement mechanisms in the hopes that foreign sovereigns will accord U.S. judgments the same courtesy.

It is possible to understand the breadth of U.S. enforcement discovery in the same way—as an affirmative statement of policy that broad post-judgment and post-award discovery should be a worldwide norm. The U.S. Congress made exactly such a statement in passing the current version of 28 U.S.C. § 1782, which provides for U.S.-style discovery in aid of proceedings before foreign tribunals. The United States created this mechanism, which arguably disadvantages U.S.-based companies, “in the hopes that foreign countries would be encouraged to reciprocate with procedural improvements of their own.”¹⁸⁶ U.S. laws on enforcement

182. New York Convention, *supra* note 18, at 2519.

183. *See* Silberman, *supra* note 130, at 444.

184. *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 792 N.E.2d 155, 159 (N.Y. 2003).

185. *Id.*

186. *See* *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999) (citing H.R. Doc. No. 88-88, at 20 (1963)); *see also* *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004) (noting that 28 U.S.C. § 1782 was the culmination of a process to “investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements.” (quoting Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743; S. Rep. No. 2392, at 3 (1958))). One federal district court has specifically held that 28 U.S.C. § 1782 is not limited to “claims-based” discovery, but can also be used for “asset-based” discovery. *In re* Application of

discovery—for example, New York’s recent amendments to make clear the extraterritorial application of its enforcement subpoenas—could be construed as representing a similar U.S. interest.

At the very least, this interest outstrips the U.S. interest in adjudicating the much maligned foreign-cubed action—a suit with foreign plaintiffs, foreign defendants, and foreign conduct. The Supreme Court noted in its most recent curbs to both prescriptive¹⁸⁷ and adjudicative¹⁸⁸ jurisdiction that each case involved foreign parties and foreign conduct. At a minimum, the U.S. interest in enforcing a purely foreign judgment likely exceeds its interest in adjudicating a purely foreign controversy.¹⁸⁹

The Restatement (and in turn, the Supreme Court) also assumed a basic comparative point: that American discovery laws are far broader than, and in constant tension with, the vast majority of other nations’ discovery systems. Much of the Restatement’s analysis was therefore motivated by a desire not to unreasonably aggravate sovereign tensions caused by this difference. This may be true pretrial but perhaps not post-judgment. The battle is not between American-style broad discovery and other nations’ focused document production but typically between a creditor from a state that endorses broad post-judgment discovery and a debtor from a state that also endorses broad post-judgment discovery.¹⁹⁰

The United Kingdom, for example, takes a famously robust approach to enforcement. Justice Ginsburg observed as much in her dissent to the Supreme Court’s decision in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*,¹⁹¹ which held that due process bars “preliminary injunctions stopping a party sued for an unsecured debt from disposing of assets pending adjudication.”¹⁹² She noted that worldwide “preliminary asset-

Gorsoan Ltd. & Gazprombank OJSC for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding, No. 13 MISC. 397 PGG, 2014 WL 7232262, at *9 (S.D.N.Y. Dec. 10, 2014). Disagreement remains, however, on whether 28 U.S.C. § 1782 authorizes discovery of documents held abroad by U.S. residents. *See* Application of Sarrio, S.A., 119 F.3d 143, 145–46 (2d Cir. 1997).

187. *See* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 286 n.11 (2010) (Stevens, J., concurring in the judgment) (“[V]irtually all ‘foreign-cubed’ actions—actions in which ‘(1) foreign plaintiffs [are] suing (2) a foreign issuer in an American court for violations of American securities laws based on securities transactions in (3) foreign countries’—would fail Under these circumstances, the odds of the fraud having a substantial connection to the United States are low.” (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 547 F.3d 167, 172 (2d Cir. 2008) (internal citations omitted))); *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1676 (2013) (Breyer, J., concurring in the judgment) (“Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages.”).

188. *See* *Daimler AG v. Bauman*, 134 S. Ct. 746, 773 (2014) (Sotomayor, J., concurring in the judgment).

189. *See supra* note 108 and accompanying text.

190. For a comparative analysis of prejudgment enforcement mechanisms prepared by counsel for the Madoff trustee, *see* Timothy S. Pfeifer, Denise D. Vassel & Ralph A. Siciliano, *Offshore Asset Recovery: Investigations and Legal Proceedings*, INT’L L. PRACTICUM, Spring 2012, at 56 (“Many of these extraordinary remedies are not available under New York or U.S. law.”).

191. 527 U.S. 308 (1999).

192. *Id.* at 338 (Ginsburg, J., dissenting).

freeze injunctions have been available in English courts since the 1975 Court of Appeal decision in *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*¹⁹³ She also observed that “increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity.”¹⁹⁴ In 2013, the U.K. High Court reaffirmed the ability of English courts to issue worldwide discovery orders to any parties subject to its jurisdiction.¹⁹⁵ The House of Lords did clarify, however, that a court’s discovery power did not extend to third parties entirely outside the court’s jurisdiction—a third party could not be compelled to travel to the United Kingdom to submit to jurisdiction and examination there.¹⁹⁶

Swiss law imposes a duty to disclose all the debtor’s assets, wherever located, on the debtor, any third parties holding the debtor’s assets, or any third parties who simply have information about the debtor’s assets.¹⁹⁷ Failure to do so may subject the debtor or third parties to criminal sanctions. Germany and Portugal have inquisitorial enforcement systems, where an unsatisfied judgment is referred to a court officer who is empowered to examine the debtor and to search various government records for information on the debtor’s assets. If these fail to produce assets to satisfy the judgment, the enforcement officer is empowered to make an application to the court to seek information from third parties.¹⁹⁸ Just this snapshot of foreign approaches to post-judgment discovery suggests broad agreement that all information about the debtor’s assets, even in the hands of third parties, is generally available. This relatively broad approach stands in stark contrast to the pretrial discovery system of, by way of example, Germany, which has none.¹⁹⁹

193. *Id.* at 339 (citing [1975] 2 Lloyd’s Rep. 509).

194. *Id.* at 338–39 (citing Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 32–38 (1996)).

195. *See Cruz City 1 Mauritius Holdings v. Unitech Ltd.*, [2013] EWHC (Comm) 1323.

196. *See Masri v. Consol. Contractors Int’l Co.*, [2009] UKHL 43, [2010] 1 A.C. 90 (appeal taken from Eng.).

197. The Swiss Code of Civil Procedure, Part 2, Title 10: Enforcement of Decision, Chapter 1, Article 335(2), provides that, “[i]f a decision relates to the payment of money or provision of security, it is enforced according to the provisions of the [Debt Enforcement and Bankruptcy Act],” which in turn imposes the obligation of the debtor and third parties. *See SR 272 Art. 335*, FED. AUTHORITIES SWISS CONFEDERATION, <http://www.admin.ch/ch/e/rs/272/a335.html> (last visited Apr. 23, 2015).

198. *See ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE]*, Dec. 5, 2005, BUNDESGESETZBLATT, Teil I [BGBL I] 3202, as amended, §§ 802c, 802l (Ger.); Artigo 833.º-A (Diligências prévias à penhora).

199. Gregory P. Sreenan & Jeffrey B. Shalek, *Blocking Statutes and Their Effect on American-Style Discovery Abroad*, BRIEF, Fall 1995, at 59–60 (“Germany’s system is set up so that from the outset to the completion of the litigation process, the finder of fact and the interpreter of law is the same person: the judge. The judge decides what witnesses the court will hear, the judge alone questions the witnesses, and the judge records the testimony in summary fashion.”).

As for sovereigns, the *NML* Court does seem to have made clear that U.S. courts should not look to provide more protections than those conferred in the FSIA itself. The U.S. Congress has enacted a “comprehensive” scheme governing claims against foreign sovereigns and foreign sovereign instrumentalities.²⁰⁰ The FSIA provides both jurisdictional immunities and, even if those are waived, immunities from execution.²⁰¹ Given the ample protections provided by Congress, and the “comprehensive” nature of the statute, U.S. courts repeatedly have declined to engraft further protections for defendant sovereigns onto Congress’s scheme.²⁰² Indeed, the *NML* majority took exactly this tack.²⁰³ To the extent that the United States has a sovereign interest in refraining from ordering discovery of sovereign assets, it is firmly up to the political branches to enact such restrictions.

B. *NML and Extraterritorial Discovery*

The two strands of thought in U.S. case law stem from two contested theoretical planks in enforcement discovery. The majority position among U.S. courts rests on two propositions: first, that discovery and execution are separate, and second, that creditors enjoy a strong presumption in favor of extraterritorial enforcement discovery. The minority position largely flows from a tendency to treat merits and enforcement discovery as essentially similar.

Justice Scalia’s opinion for the *NML* majority channels the principles of broad transnational enforcement discovery without directly invoking them (in part, because the majority accepted the funds’ argument that Argentina waived any argument regarding the breadth of Rule 69 and relied solely on the FSIA). The majority stated simply that it would be improper to interpose any of the FSIA restrictions before the funds even knew what property was potentially available for seizure.²⁰⁴ This simple statement implies a strong commitment to disclosure of any assets by the debtor, anywhere in the world, before the sorting of seizable from immune assets begins. It also necessarily dictates that this sorting will be done by the court and not by the debtor when it responds to discovery requests.

These principles enable a rigorous examination of two prominent obstacles to worldwide enforcement discovery: restrictions on discovery and restrictions on execution. It also sheds light on one of the mysteries of the *NML* opinions. Two of the Court’s most analyzed international law opinions in recent memory—*Morrison v. National Australia Bank*²⁰⁵ and

200. *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (describing the FSIA as “a comprehensive framework for resolving any claim of sovereign immunity”).

201. *See* 28 U.S.C. §§ 1330, 1602–1611 (2012).

202. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2285, 2291 (2010); *Altmann*, 541 U.S. at 699; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

203. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014) (“Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act’s text. Or it must fall.”).

204. *Id.* at 2257–58.

205. 561 U.S. 247 (2010).

*Kiobel v. Royal Dutch Petroleum*²⁰⁶—hold that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”²⁰⁷

Yet, neither *Morrison* nor *Kiobel* makes any appearance in the *NML* opinions. (It was raised at argument, albeit briefly.²⁰⁸) It may be that the majority simply regarded it as waived, although the Court’s enthusiasm to reach the issue in *Kiobel* suggests that sudden restraint on this front is unlikely. That leaves two possibilities. The first is that perhaps long-standing practice (as in the extraterritorial application of the antitrust laws) still can influence that analysis of whether a statute applies abroad. The Court echoed, without directly invoking, decades of federal court case law setting out a strong presumption in favor of extraterritorial enforcement discovery. Perhaps this strong presumption played a role in the Court’s decision not to address the issue.

The other possibility highlights the importance of state law in enforcement discovery. Rule 69(a)(2) states: “In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.”²⁰⁹ The rule permits the creditor to seek discovery under either federal law or the applicable state law. (State law, per Rule 69(a)(1), provides the applicable execution procedures.) *Morrison* and *Kiobel* are opinions about federal statutory construction. They are not more than that. States are entitled to, and do, have their own policies regarding extraterritoriality. Indeed, the New York Court of Appeals recently made plain that the extraterritorial reach of federal and state antitrust law should not be “viewed as coextensive.”²¹⁰

Indeed, the subpoenas at issue in *NML* were issued under New York law. New York courts, as described above, have long taken a robustly extraterritorial approach to enforcement discovery. In fact, the New York legislature specifically enacted C.P.L.R. 5224(a-1) to “establish[] the extraterritorial reach of a subpoena *duces tecum*.”²¹¹ *Morrison* and *Kiobel* impose no bar. This not only answers one of many mysteries of the *NML* opinions, but also makes plain that the strong presumption in favor of extraterritorial enforcement discovery comes at least as much from the states as from the federal government.

206. 133 S. Ct. 1659 (2013).

207. *Morrison*, 561 U.S. at 255.

208. Transcript of Oral Argument, *supra* note 50.

209. FED. R. CIV. P. 69(a)(2).

210. *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 196 (N.Y. 2012) (“For a Donnelly Act claim to reach a purely extraterritorial conspiracy, there would, we think, have to be a very close nexus between the conspiracy and injury to competition in this state.”).

211. *CE Int’l Res. Holdings, LLC v. S.A. Minerals Ltd. P’ship*, No. 12-CV-08087(CM)(SN), 2013 WL 2661037, at *5 (S.D.N.Y. June 12, 2013).

II. RESTRICTIONS ON DISCOVERY

Transnational asset discovery typically runs into two roadblocks: restrictions on discovery and restrictions on execution. Certainly the challenges of these two types of restrictions are different, but they both constitute the expression of a sovereign that certain assets should be shielded from the judgment enforcement process.

Foreign blocking statutes—laws aimed at preventing disclosure of certain information in the face of discovery requests coming from other sovereigns—have seen a great deal of analysis from both courts and commentators. Indeed, the subject is treated at length in the Third Restatement of the Foreign Relations Law of the United States²¹² and in the Supreme Court's *Aerospatiale* decision.²¹³ These sources, however, are concerned exclusively with pretrial discovery. Despite the fact that many of their concerns and conclusions pertain only to pretrial discovery, they have been extended into the post-judgment realm without sufficient appreciation for the significant differences between discovery designed to adjudicate a claim and discovery designed to promote satisfaction of an award or judgment. Indeed, Justice Ginsburg referred to *Aerospatiale* for the proposition that U.S. discovery is typically broader than that permitted by other nations.²¹⁴ True, pretrial; post-judgment, perhaps not so.

A. *The Aerospatiale Test: A Tool Designed for Pretrial Discovery*

Foreign restrictions on discovery may embody many policy values, such as bank secrecy²¹⁵ or personal data privacy.²¹⁶ States also may enact them “[a]s a classic form of asset protection” designed to “disentitle judgment creditors from access to financial information that describes the assets, and identifies the custodian for purposes of enforcement,” with the purpose of “deliberately hobb[ing] the judgment creditors’ attempts to discover and

212. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1987).

213. *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 552 (1987) (Blackmun, J., concurring in part and dissenting in part) (“The presence of these interests creates a tension between the broad discretion our courts normally exercise in managing pretrial discovery and the discretion usually allotted to the Executive in foreign matters.”).

214. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2259 (2014) (Ginsburg, J., dissenting) (citing *Aerospatiale*, 482 U.S. at 542).

215. *See, e.g., Gucci Am., Inc. v. Weixing Li*, No. 10 Civ. 4974 (RJS), 2011 WL 6156936, at *5 (S.D.N.Y. Aug. 23, 2011), *vacated*, 768 F.3d 122 (2d Cir. 2014) (“According to the Bank, Chinese bank secrecy laws prohibit the disclosure of customer account information without consent. The Bank argues that, because production of the information sought by Plaintiffs could subject the Bank to civil and criminal liability, the appropriate way for Plaintiffs to make a request for documents is through the Hague Convention.”).

216. *See* Carla L. Reyes, Note, *The U.S. Discovery-EU Privacy Directive Conflict: Constructing a Three-Tiered Compliance Strategy*, 19 DUKE J. COMP. & INT’L L. 357, 357 (2009) (“The steady increase of trans-border litigation has brought the conflict between U.S. discovery rules and EU data protection laws into sharp focus and spurred intense debate.”).

reach assets.”²¹⁷ These enactments are commonly termed foreign “blocking” statutes.

Blocking statutes are the most common and most discussed obstacle to transnational discovery. The Supreme Court took up their effect on pretrial merits discovery in its 1987 *Aerospatiale* decision, where the Court held the U.S. discovery requests demanding documents located abroad did not necessarily offend foreign “judicial sovereignty.”²¹⁸ The Court noted: “The French ‘blocking statute’ does not alter our conclusion. It is well settled that such statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”²¹⁹ Simply put, “American courts are not required to adhere blindly to the directives of such a statute.”²²⁰

In commenting on the French blocking statute, the Court recognized an important principle at work in the push-and-pull between discovery and blocking statutes: “Extraterritorial assertions of jurisdiction are not one-sided.”²²¹ A U.S. discovery order may “have some impact in France,” while “the French blocking statute asserts similar authority over acts to take place in this country.”²²² A U.S. court certainly need not defer to such a foreign statute where it seeks “to provide the nationals of such a country with a preferred status in our courts” and “[i]t would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation.”²²³ The French blocking statute, “if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality.”²²⁴

Rather than set out a bright-line rule,²²⁵ the Court laid out a non-exhaustive list of relevant factors, essentially adopting the test proposed in the Restatement.²²⁶ The Court looked to: (1) the importance of the information to the proceedings; (2) the specificity of the request; (3) whether the information originated in the United States; (4) whether the

217. David J. Cook, *Financial Regime Change: Enforcement of Judgments Against Offshore Entities and Foreign States, Their Agencies, and Instrumentalities*, 18 *NEW ENG. J. INT’L & COMP. L.* 29, 41–42 (2012).

218. *Aerospatiale*, 482 U.S. at 557–58.

219. *Id.* at 544 n.29 (citing *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 204–06 (1958)).

220. *Id.*

221. *Id.*

222. *Id.* (“The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign.”).

223. *Id.*

224. *Id.* (noting that this bar would cover “even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge”).

225. *Id.* at 543–44 (“[T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners’ proposed general rule would generate.”).

226. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 442 (1987).

information could be obtained in another way; and (5) a balancing of the national interests of the United States against that of the foreign sovereign where the information is held.²²⁷

The Court raised several concerns for lower courts to bear in mind when considering “[t]he exact line between reasonableness and unreasonableness.”²²⁸ The Court observed that “[s]ome discovery procedures are much more ‘intrusive’ than others” and contrasted “an interrogatory asking petitioners to identify the pilots who flew flight tests” with “a request to produce all of the ‘design specifications, line drawings and engineering plans and all engineering change orders and plans and all drawings.’”²²⁹

The Court then urged “American courts, in supervising pretrial proceedings,” to “exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position.”²³⁰ The Court noted that “[j]udicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests,” and that “[w]hen it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses.”²³¹ By way of example, the Court noted that “the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence.”²³² Thus, “[o]bjections to ‘abusive’ discovery that foreign litigants advance should therefore receive the most careful consideration.”²³³

Overall, the Court turned to the then-current draft of the Restatement—*itself* concerned only with pretrial discovery—to urge lower courts to exercise caution: “[N]o aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the request for documents associated with investigation and litigation in the United States.”²³⁴

B. Using a Pretrial Tool for Post-Judgment Problems

The Court’s repeated emphasis on “pretrial proceedings” is telling. Each of the concerns noted by the Court either fall away or are greatly diminished post-judgment. Nevertheless, lower courts have applied the

227. *See* *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1475 (9th Cir. 1992).

228. *Aerospatiale*, 482 U.S. at 546.

229. *Id.* at 545 (citing app. 29).

230. *Id.* at 546.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* at 549 (quoting RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 437, reporters’ cmt. 1 (Tentative Draft No. 7, Apr. 10, 1986)).

Aerospatiale test to post-trial enforcement discovery without significant modification—albeit typically with some generosity toward the judgment creditor.

For example, the Ninth Circuit took up “a number of difficult questions regarding a sensitive area of law and foreign relations” posed by a request for transnational enforcement discovery.²³⁵ An American corporation “won a default judgment for fraud and breach of contract against . . . a corporation organized under the laws of the People’s Republic of China (PRC) and an arm of the PRC government.”²³⁶ The creditor served several discovery requests on the debtor attempting to gain information in its “assets worldwide.”²³⁷ After some delay, the debtor sought guidance from the PRC government on how the PRC’s State Secrecy Act applied to the requests and was informed “that almost all of its financial information was classified a state secret and could not be disclosed.”²³⁸

The Ninth Circuit applied the standard *Aerospatiale* analysis. In considering the importance of the documents, the court noted: “[T]he information sought is not only relevant to the execution of the judgment, it is crucial. Without information as to [the debtor]’s assets, [the creditor] cannot hope to enforce the judgment. The execution proceedings, and in some sense the underlying judgment itself, will be rendered meaningless.”²³⁹ On the other hand, the court noted that the debtor “has no United States office,” that “[a]ll of its employees, and all of the documents” requested are located in the PRC, and that “[t]his factor weighs against requiring disclosure.”²⁴⁰

The debtor did not assert that the information could be obtained from another source. Nevertheless, the court concluded that, even if the creditor could obtain information from the debtor’s parent corporation, it would not contain the “core financial information” to which the creditor was entitled.²⁴¹ The court stated: “[The creditor] appears to have done everything in its power to collect information which will enable it to enforce the judgment. To date, it has been unsuccessful. The absence of other sources for the information [the creditor] seeks is a factor which weighs strongly in favor of compelling disclosure.”²⁴²

In considering the balance of national interests, the court noted that the United States has a “substantial” interest “in vindicating the rights of American plaintiffs” and a “vital” interest “in enforcing the judgments of its courts.”²⁴³ On the PRC side of the ledger, the PRC had specifically

235. See *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1471 (9th Cir. 1992).

236. *Id.*

237. *Id.* at 1472.

238. *Id.*

239. *Id.* at 1475.

240. *Id.*

241. *Id.* at 1476.

242. *Id.*

243. *Id.* at 1477 (citing *In re Ins. Antitrust Litig.*, 938 F.2d 919, 933 (9th Cir. 1991)).

admonished the debtor not to turn over the documents.²⁴⁴ Nevertheless, the court concluded that the PRC had expressed no hesitation about disclosing the information voluntarily for marketing purposes prior to the litigation and that “[t]he only likely ‘adverse’ effect on the PRC economy will be that [the creditor] may be able to collect its judgment, something the PRC has no legitimate state interest in preventing.”²⁴⁵

The Ninth Circuit went on to consider the hardship to the debtor, invoking the Supreme Court’s admonition that threat of criminal prosecution is a “weighty excuse” for nonproduction.²⁴⁶ The court noted that the debtor “has in fact been ordered by the Chinese government to withhold the information, and has been told that it will bear the ‘legal consequences’ of disclosing the information,” and that it “therefore seems to be placed in a difficult position, between the Scylla of contempt sanctions and the Charybdis of possible criminal prosecution.”²⁴⁷ But the court dismissed this concern, stating that the debtor always holds the keys to its own salvation: “[T]he discovery dispute arose only because [the debtor] refused to post a supersedeas bond or letter of credit to stay execution of the judgment pending appeal, as required by [Federal Rules of Civil Procedure] 62(d).”²⁴⁸ The court noted that the debtor “even now could post a supersedeas bond pending the outcome of its petition for certiorari, or it could pay the judgment,” and that “[e]ither of these courses of action would keep it from having to violate either the district court’s orders or the PRC’s laws.”²⁴⁹

Finally, the court considered whether the “discovery order is likely to be unenforceable, and therefore to have no practical effect,” noting that, if so, “that factor counsels against requiring compliance with the order.”²⁵⁰ The court concluded that “[i]n this case, it may be impossible to force [the debtor] to comply,” and that “[t]he imposition of sanctions in the amount of \$10,000 a day, sanctions which have already grown larger than the underlying judgment, has failed to move” them: “Compliance therefore seems unlikely, a factor counseling against compelling discovery.”²⁵¹

Nonetheless, the court noted that “the discovery and contempt orders may be of some significance.”²⁵² The court observed that, although the debtor “apparently has no assets in the United States, it has in the past done substantial business in this country” and that “[s]hould it wish to do business here in the future, it would have to pay the judgment or risk having

244. *Id.*

245. *Id.*

246. *Id.* (quoting *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, 357 U.S. 197, 211 (1958)).

247. *Id.*

248. *Id.*

249. *Id.* at 1477–78 (noting because the debtor “could—and still can—avoid the hardship disclosure would place on it, that hardship is not a factor weighing against disclosure”).

250. *Id.* at 1478.

251. *Id.*

252. *Id.*

its assets seized and its business interrupted.”²⁵³ The court also expressed some optimism that “a clear statement that foreign corporations which avail themselves of business opportunities in the United States must abide by United States laws might have a substantial effect on the way [the debtor] and other corporations do business in the United States in the future.”²⁵⁴ In sum, the court concluded that, although “full compliance by [the debtor] with the order of the district court is unlikely,” the “order may nonetheless produce partial compliance, and might be effective in other ways as well” and that, “[w]hile the likelihood of noncompliance does weigh against compelling disclosure, we think the weight of this factor is lessened by these mitigating circumstances.”²⁵⁵

In the end, the court held that “the balance tips significantly (although not overwhelmingly)” in the creditor’s favor and upheld the subpoenas.²⁵⁶ Notably, the court’s language suggested its conception of the judgment as essentially transnational in nature: “[The creditor] can seek to execute the judgment in whatever foreign courts have jurisdiction over [the debtor’s] assets, but [the creditor] needs discovery in order to determine which courts those are.”²⁵⁷

Some judgment creditors have not been so fortunate. The Seventh Circuit upheld a district court’s refusal to compel post-judgment interrogatories “in favor of Romania’s laws protecting national secrecy.”²⁵⁸ An American creditor obtained a default judgment against a Romanian debtor—both reinsurance companies—and sought to discover assets both inside and outside Romania.

Judge Bauer, writing for the panel, proceeded to balance the “vital national interests” at stake. The court allowed that “the courts of the United States undoubtedly have a vital interest in providing a forum for the final resolution of disputes and for enforcing these judgments,” but held that “[t]his rather general interest, however, is not as compelling as,” to name a few examples, protection of U.S. patents or antitrust policy, or cases where the United States is a party.²⁵⁹ The court observed that this case was a mere “private dispute between two reinsurance corporations,” in which “[t]he

253. *Id.*

254. *Id.* (“Our recent decision in *Insurance Antitrust* is instructive. In that case, the court concluded that an injunction against Lloyd’s of London would not be enforced by the British courts. It nonetheless upheld the injunction because it could be enforced within the United States, and because it would send a message to companies who wished to do business in the United States in the future.” (citing *In re Ins. Antitrust Litig.*, 938 F.2d 919, 933 (9th Cir. 1991))).

255. *Id.*

256. *Id.*

257. *Id.* (“Beijing may be *able* as a practical matter to conceal its assets from the district court and therefore avoid execution of [the creditor’s] judgment, but it has no right to do so, and it certainly has no right to avail itself of the United States judicial system for purposes of appeal while at the same time seeking to evade the judgments of that judicial system.”); *see also* *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*, 744 F. Supp. 1215, 1218 (E.D.N.Y. 1990).

258. *Reinsurance Co. of Am., Inc. v. Administratia Asigurarilor de Stat*, 902 F.2d 1275, 1277 (7th Cir. 1990).

259. *Id.* at 1280.

disputed materials are the subject of a post-judgment interrogatory request and not vital to the case-in-chief.”²⁶⁰ In such a case, although “there is unquestionably a vital national interest in protecting the finality of judgments and meaningfully enforcing these decisions, this interest alone does not rise to the level of those found in” other cases.²⁶¹

Against this, the court weighed “the Romanian interest in protecting its state and so-called ‘service’ secrets,” noting that, “[g]iven the scope of its protective laws and the strict penalties it imposes for any violation, Romania places a high price on this secrecy.”²⁶² The court observed that “[u]nlike a blocking statute, Romania’s law appears to be directed at domestic affairs rather than merely protecting Romanian corporations from foreign discovery requests” and held that, “[g]iven this choice between the relative interests of Romania in its national secrecy and the American interest in enforcing its judicial decisions, we have determined that Romania’s, at least on the facts before us, appears to be the more immediate and compelling.”²⁶³

The court then went on to consider the hardship to the Romanian debtor, noting that “[t]hose persons forced to comply with this discovery order would be Romanian citizens subject to the criminal sanctions of the law protecting state secrets.”²⁶⁴ The court placed great weight on this factor, notwithstanding the Restatement’s view that criminal penalties alone are not sufficient to refuse a request for discovery.

Judge Easterbrook wrote separately to express serious frustration with the court’s decision. Judge Easterbrook observed that the recently defunct Romanian regime had declared everything “secret.”²⁶⁵ The debtor invoked “Romania’s secrecy laws, which forbid it to disclose any information in its hands, even information about assets located outside Romania.”²⁶⁶ The “effect is that no judgment against Romania may be collected.”²⁶⁷ Judge Easterbrook observed that the debtor is an arm of the Romanian state, that the United States would permit execution against its assets under the FSIA, and that the FSIA should “eclipse[] any attempt by the foreign defendant to create its preferred list by using its domestic secrecy law.”²⁶⁸ In short, “[i]f we allow foreign states to exempt themselves after the fashion of (the old) Romania, we might as well forget about the FSIA.”²⁶⁹

Judge Easterbrook also took issue with the court’s statement that “a suit by the government is ‘more important’ than private litigation.”²⁷⁰ Rather, “enforcement of contracts is a subject of the first magnitude,” and, in

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 1280–81.

264. *Id.* at 1281.

265. *Id.* at 1283 (Easterbrook, J., concurring).

266. *Id.*

267. *Id.*

268. *Id.* at 1284.

269. *Id.*

270. *Id.*

addition, “[t]he gravity of the nation’s interest is no less when it decides to enforce vital rules through private initiative.”²⁷¹ The majority’s analysis further breaks down when a “judgment has been rendered and the prevailing party seeks to discover assets,” a “problem[] which the Restatement does not discuss.”²⁷² Judge Easterbook concluded: “A prevailing party is entitled to relief; so much has been determined by the judgment. At this point resort to secrecy laws does nothing but nullify the rendering nation’s substantive law.”²⁷³

These cases demonstrate a principle that should be readily apparent: pretrial and post-judgment discovery are very different creatures. Neither the *Aerospatiale* test, nor the Restatement approach on which it was based, were designed with the post-judgment enforcement discovery in mind. At a minimum, transnational asset discovery requires substantial modification to the approach taken by the Supreme Court and the Restatement.

C. A Post-Judgment Approach for Enforcement Discovery

The uncritical extension of *Aerospatiale*’s pretrial discovery framework to post-judgment asset discovery is problematic and unwarranted. In *Aerospatiale*, the Court viewed itself as stepping foot into very dangerous waters—the perceived conflict between broad American pretrial discovery and more restrictive approaches typically used elsewhere. The Restatement expressed similar trepidation, observing that no body of American law had provoked more conflict than American discovery.²⁷⁴

Accordingly, the Court emphasized caution for pretrial discovery: “American courts, in supervising pretrial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position” and when evidence is demanded abroad, “the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses.”²⁷⁵ The Court then emphasized that, while courts should always be mindful of cost and expense in the pretrial discovery process, the costs may be even higher where documents and witnesses must be transported from abroad and, accordingly, there will be greater scrutiny of any claims that “abusive” discovery practices are being used to force a settlement.²⁷⁶ When a foreign state or foreign sovereign instrumentality is concerned, caution is all the more important.²⁷⁷

271. *Id.*

272. *Id.*

273. *Id.* (“A court would need to know the ‘importance’ of the substantive rule, which is not well correlated with the enforcement mechanism. (The antitrust laws are ‘more important’ than the littering laws, although the former are largely enforced by private suits and the latter by public prosecutions.)”).

274. *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 549 (1987); *supra* note 234 and accompanying text.

275. *Aerospatiale*, 482 U.S. at 546.

276. *Id.* at 546–47.

277. *See id.* at 547.

These concerns articulated by the *Aerospatiale* Court fall away, or at least diminish considerably, in the context of post-judgment enforcement discovery. Accordingly, the test announced by the Court should be substantially modified. As discussed above, there is a strong presumption that the judgment creditor is entitled to “free rein”²⁷⁸ to seek “all matter relevant to the satisfaction of the judgment.”²⁷⁹

Simply put, the private factors announced by the Court in *Aerospatiale* have little or no applicability to post-judgment enforcement discovery against debtors. Against third-party garnishees, they only have relevance where the third party could not have reasonably anticipated being subject to competing demands from different sovereigns (at least, if the law of discovery is to be brought into line with the law of asset seizures, as seems sensible).

The Supreme Court recognized in its recent decision in *Atlantic Marine Construction Co. v. U.S. District Court*²⁸⁰ that the private factors normally present in a court’s decision to grant a transfer or a motion for forum non conveniens dismissal are irrelevant when the parties have consented to a forum selection agreement.²⁸¹ A judgment is a compulsory contract created by the court between creditor and debtor—similar to an equitable trust, the court creates the relationship between the parties. The debtor is bound to deliver a sum certain to the creditor. Failure to do so subjects it to penalties, such as statutory post-judgment interest. For arbitral awards, this relationship is even stronger, as the arbitral tribunal necessarily draws its power from the actual consent of the parties, whereas a court may draw it from presence, purposeful availment, or targeting of the jurisdiction where the court sits. When this involuntary contract forms, unlike pretrial discovery, there seems no reason to attend to the private factors of the *Aerospatiale* test for a debtor.

III. RESTRICTIONS ON EXECUTION

Foreign discovery restrictions are not the only obstacle to transnational asset discovery. The question that split the federal courts of appeals and, later, the Supreme Court, was subtly different. Post-judgment asset discovery must be “relevant” to satisfying the judgment. If an asset cannot be seized, sold, and applied to a judgment, it cannot be “relevant” to satisfaction of a judgment. If a statute provides that a certain class of assets is exempt from execution, they cannot be “relevant” to satisfaction of a

278. Carrick Realty Corp. v. Flores, 598 N.Y.S.2d 903, 904 (Civ. Ct. 1993).

279. Tech. Multi Sources, S.A. v. Stack Global Holdings, Inc., 845 N.Y.S.2d 357, 357 (App. Div. 2007) (quoting N.Y. C.P.L.R. 5223).

280. 134 S. Ct. 568 (2013).

281. See *id.* at 582 (“[A] court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests.”).

judgment.²⁸² Homestead exemptions are the classic example; indeed, Justice Scalia raised them at oral argument in the *NML* case.²⁸³

This seems simple enough. Unfortunately, that is where the simplicity ends. The *NML* argument and opinions raised this issue in a particular context—the FSIA’s restrictions on execution on assets owned by a foreign sovereign or by a foreign sovereign instrumentality. The FSIA provides several such exemptions, for example, for assets directly owned by a foreign state that are not used for a commercial purpose.²⁸⁴ The entire controversy before the Court could be summarized as: Do these exemptions have any relevance to discovery?

Restrictions on execution, both foreign and domestic, have not before been analyzed as a conflict of laws problem. The split in the *NML* opinions highlights this gap. The majority ignores the problem, essentially adopting (without referring to) the line of authority holding that discovery is separate from execution. This is a simple—and perhaps the best—rule, but it cannot stand ipse dixit, particularly in light of the requirement that discovery be “relevant” to satisfaction on an award.²⁸⁵ This rule would seem to require more support than the majority’s somewhat casual assertion that the debtor needs to find out what property is available before litigating issues of executability.²⁸⁶ Perhaps, but what then?

Justice Ginsburg’s dissent grapples with the issue, arguing that domestic exemptions from execution should be extended abroad, at least for sovereigns, at least presumptively.²⁸⁷ This is a modest rule, but it too overlooks the unique concerns of post-judgment enforcement discovery. To take one example: Whose law applies to an asset that can move, rapidly and at the will of the debtor, from state to state?²⁸⁸ A functioning judgment enforcement system cannot accept the answer that an asset’s mere and perhaps temporary presence in a state that would shield it is sufficient to defeat post-judgment asset discovery.

The Court unanimously rejected Argentina’s chief argument, that the FSIA, which says nothing explicit about discovery, contains an implicit restriction on discovery.²⁸⁹ But Justice Ginsburg split from her colleagues

282. *See infra* notes 56–58 and accompanying text.

283. *See supra* note 53 and accompanying text.

284. 28 U.S.C. § 1610(a) (2012).

285. *See id.*

286. *See* Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2257 (2014) (“Argentina maintains that, if a judgment creditor could not ultimately execute a judgment against certain property, then it has no business pursuing discovery of information pertaining to that property. But the 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.”).

287. *See id.* at 2259 (Ginsburg, J., dissenting).

288. Lynn LoPucki observed that the ability of a debtor to rapidly move intangible assets across sovereign boundaries would dramatically curtail satisfaction of judgments. *See generally* LoPucki, *supra* note 194.

289. *NML*, 134 S. Ct. at 2256 (majority opinion) (“There is no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets. Argentina concedes that no part of the Act ‘expressly address[es] [post-judgment]

on a subtler distinction. In her dissent, she maintained that U.S. courts should presumptively look to U.S. law as a guide for which assets are available for execution—if they are immune, discovery should be barred as not relevant to satisfaction of the judgment. The majority assumed, without deciding, that extraterritorial post-judgment discovery is typically appropriate and that, at any rate, imposing an evidentiary burden on the creditor before it has any idea what the debtor owns would be premature.

This disagreement highlighted an issue that has thus far been unexplored: When should exemptions on execution restrict transnational asset discovery? Or more to the point: Whose exemptions should restrict discovery? There are at least four possibilities: (1) Never and nobody's. This was the approach assumed by the majority. (2) The exemptions of the court ordering discovery—in *NML*, the U.S. court—should govern worldwide. This was Justice Ginsburg's approach. (3) The exemptions of the state where the asset currently sits should govern. (4) And lastly, that exemptions should only restrict transnational discovery where essentially every jurisdiction would bar seizure of a particular class of assets (perhaps, for example, consular property).

The *NML* majority assumed the first rule while Justice Ginsburg adopted the second—but with neither opinion considering the issues implicated by the choice.

A. *The “Sky May Be the Limit”*

In the *NML* decision, the Supreme Court assumed (and the government conceded) that, in the ordinary case, “the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States.”²⁹⁰ In her dissent, Justice Ginsburg decried this as assuming that the “sky may be the limit.”²⁹¹ Justice Ginsburg observed that property must be subject to attachment to be “relevant” to judgment satisfaction and therefore discoverable and, from that premise, argued that U.S. courts should look to their own laws for any assumptions about which property is subject to execution. For example, under the FSIA, sovereign property not used for commercial purposes or not in the territorial United States would be excluded.²⁹²

Justice Ginsburg's objection has intuitive appeal. In some quarters, U.S. courts have a reputation for riding roughshod over foreign law.²⁹³ Foreign states have, on some occasions, complained of rough treatment at the hands

discovery.’ Quite right.” (quoting Brief for Petitioner, *supra* note 49, at 22) (internal citations omitted)).

290. *Id.* at 2255 (quoting *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 208 (2d Cir. 2012), *aff'd sub nom. NML*, 134 S. Ct. 2250).

291. *Id.* at 2259 (Ginsburg, J., dissenting).

292. *See* 28 U.S.C. § 1610(a) (2012).

293. *See, e.g.,* Jenia Iontcheva, *Sovereignty on Our Terms*, 110 *YALE L.J.* 885, 885 (2001) (“The court extended a questionable line of precedents that displaced the Hague Convention in the management of discovery in federal courts.”).

of U.S. courts (Argentina being a recent, and vocal, example).²⁹⁴ One could easily count this admittedly bold assumption of authority as another example of American legal adventurism.

But, in the context of transnational post-judgment enforcement discovery, the majority's approach has much to recommend it. First, it fits well with the realities of post-judgment enforcement discovery practice. Second, it avoids a potentially troubling extension of U.S. law—in this instance, U.S. law on property exemptions from execution—to other nations.

The *NML* Court did not particularly concern itself with the on-the-ground realities of post-judgment enforcement discovery. But the majority's generous assumption comports well with established practices from lower courts. Post-judgment discovery requests are necessarily broad—typically “all assets”—and without qualification. Limitations, such as, say, “all assets that are not consular in nature,” would place in the debtor's hands the ability to make determinations about what assets are or are not consular—in other words, which assets are available to satisfy a potential judgment. As discussed above, this is unacceptable in post-judgment discovery, where it is more likely that the producing party is acting in bad faith and, at the same time, there are few means to deter bad faith conduct. Although garnishees are not assumed to be acting in bad faith, they are typically considered to have less at stake—they are simply holding the debtor's assets, without any direct interest in them.

In addition, the due process interests of the parties apply pressure to keep discovery requests in merits proceedings from becoming pure “fishing expeditions.” These interests are reduced or extinguished post-judgment. When a party goes from defendant to debtor, its due process interests are necessarily diminished in a variety of ways, including its interest in being free from broad discovery requests.²⁹⁵

B. Domestic Exemptions Abroad

The heart of Justice Ginsburg's dissent are her statements that “[a] court in the United States has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property in order to execute a U.S. judgment against the foreign sovereign,” and therefore, “[w]ithout proof of any kind that other nations broadly

294. In just one example of Argentina's public relations campaign, it issued an official communiqué on June 26, 2014, later republished in several newspapers as a full-page advertisement, stating that the communiqué “serves as a warning to the United States about the consequences of its acts, in view of the international responsibility that falls on it with regard to decisions adopted by its judiciary.” *Official Communique of the Argentine Government*, WASH. POST, June 29, 2014, at B8, available at <http://www.embassyofargentina.us/fil/ckFiles/files/officialcommuniqueoftheargentinesgovernment-argentinapays.pdf> (paid advertising); see also Julian Ku, *Here Comes That Frivolous Argentina ICJ Claim! Oh, and They Have No Jurisdiction Either!*, OPINIO JURIS (Aug. 7, 2014 1:46 PM), <http://opiniojuris.org/2014/08/07/comes-frivolous-argentina-icj-claim-oh-jurisdiction-either/>.

295. See *supra* Part I.A.3.

expose a foreign sovereign's property to arrest, attachment or execution, a more modest assumption is in order."²⁹⁶

These statements essentially set forth two principles: first, that the United States should extend its law of exemptions from execution to other nations (at least for sovereigns and their instrumentalities), and second, that judgment creditors should have the initial burden of proving that foreign law would permit execution against these assets if it would be barred under U.S. law.

The most natural defense of Justice Ginsburg's proposed rule is that it is merely a presumption in favor of the debtor when U.S. law would shield the debtor's assets from execution. But this approach overlooks the differences between merits and enforcement discovery and, in doing so, comes into conflict with the purposes of the FSIA.

Numerous courts have held that general discovery against foreign sovereigns necessarily must be limited unless a plaintiff can establish that the FSIA's jurisdictional immunity does not apply—otherwise being subjected to the cost and inconvenience of U.S.-style discovery would devalue that very immunity.²⁹⁷ This poses “something of a chicken and egg problem” as the discovery may be necessary to uncover the very facts that would support a waiver of jurisdictional immunity.²⁹⁸

This problem would be even more acute in post-judgment enforcement discovery. Under Justice Ginsburg's proposed rule, a creditor would have to show, before obtaining any asset discovery, that sovereign assets both were used for a commercial purpose and located in the United States. This showing would likely be impossible, particularly for intangible assets that have no readily ascertainable situs (such as the very assets at issue in *NML*). In practice, the availability of assets for execution would be a matter for the political branches. It was the stated purpose of the FSIA to take litigation and execution against sovereigns out of the hands of the political branches.²⁹⁹

296. *NML*, 134 S. Ct. at 2259.

297. See Tyler B. Robinson & Erin Bradrick, *Judgment Enforcement in the United States Against Sovereign States: Some Interesting Procedural Questions*, 4 DISP. RESOL. INT'L 151, 155 (2010); see also *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314–15 (11th Cir. 2009); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849–52 (5th Cir. 2000).

298. Robinson & Bradrick, *supra* note 297, at 155; see also *Kelly*, 213 F.3d at 849.

299. See *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011); see also Kristina Duffy, *Walters v. Industrial and Commercial Bank of China, Ltd.*, 25 N.Y. INT'L L. REV. 153, 157–58 (2012) (“Petitioners did not state the specific accounts or funds they sought to attach, they did not describe the property with sufficient particularity for the court to determine if the property fell within one of the exceptions. The court held that the burden of identifying assets should remain on the judgment debtors, because petitioners can use discovery to obtain sufficient information about the property.”); J.F. Hulston, *Chinese Assault Rifles, Giant Pandas, and Perpetual Litigation: The “Rights Without Remedies” Dead-End of the FSIA*, 77 MO. L. REV. 511, 513 (2012) (“[T]he practical application of execution provisions under the FSIA is so extremely restrictive as to make the enforcement of judgments against foreign sovereigns nearly impossible.”).

C. *Foreign Exemptions at Home*

But these objections are simply answered: shift the presumption; place the burden of showing immunity from execution on the debtor, not the creditor. This squarely raises the question of whose law should apply to the execution—or the eventual possibility of execution—against a debtor’s assets. Many assets can move from place to place. Some assets have no “place.”³⁰⁰

It is not at all clear that the exemptions from execution of the state where the asset happens to be located should apply to bar discovery. Post-judgment asset discovery only can be had for those assets that are “relevant” to satisfaction of the judgment—but this typically includes all assets that could be applied to the judgment. This obligation is not only geographically broad, it is also temporally broad—it applies to assets that are now or could become seizable. This temporal breadth is embodied in the continuing obligation of debtors and garnishees subject to post-judgment asset discovery. By contrast, pre-judgment asset discovery captures only those assets that a party has at the moment of service. Post-judgment asset discovery is forever—or at least lasts until the judgment is satisfied or expires.

This temporal breadth of post-judgment asset discovery would then suggest that if an asset could in the future become subject to execution, it should be subject to asset discovery. It is therefore not sufficient simply to say that the debtor must have the burden of showing that its asset is in a state that would not execute on the asset because of its law on exemptions from execution. The debtor would have to show that there was no way that the asset could become subject to execution by, for example, moving to another jurisdiction without the same exemption.

Real property would seem like an obvious candidate. But asset discovery is intended not only to uncover the existence of the asset but also all information relevant to seizure of the asset. This is particularly true for information that pertains to who owns or controls the asset, for example, asset tracing information.³⁰¹

Valuable real property is seldom directly owned.³⁰² A creditor could very reasonably demand information related to real property in a state that exempts it from execution in the hopes of finding that it is owned through corporate entities that could open it up to de facto seizure by, for example, seizing membership interests in the corporate entity that holds the property (or the interests in the corporate entity that owns the corporate entity that owns the corporate entity that owns the real property). By seizing and selling those interests, the creditor could effectively sell the real property and apply its value to the outstanding judgment.

300. See Simowitz, *supra* note 79.

301. See, e.g., *In re Williams*, 328 S.W.3d 103, 118, 120 (Tex. App. 2010).

302. See James W. Reynolds, *Get Real: Using LLCs to Invest in Property*, BUS. L. TODAY, Mar.–Apr. 1995, at 44 (“Prior to the advent of limited liability companies, partnerships (both general and limited) and, to a lesser extent, S corporations were the legal forms traditionally favored for organizing closely held investments in real property.”).

This is not the only complication that would bedevil this approach. U.S. legislatures and courts have long been clear that a debtor, subject to the court's in personam power, can be compelled to bring assets into the jurisdiction.³⁰³ Once within the territorial borders of the enforcing state, the asset can be executed upon, in other words, seized by the sheriffs or marshals, sold, and applied to the judgment. The New York Court of Appeals recently expanded this principle to encompass garnishees as well. In its decision in *Koehler v. Bank of Bermuda*,³⁰⁴ the court made clear that a garnishee holding the debtor's assets can be compelled to deliver them into New York, even if the debtor is not subject to personal jurisdiction in New York.³⁰⁵

And so the debtor's burden would increase. The debtor would have to show that the asset was located in a jurisdiction with an applicable exemption from execution, that the asset was owned in such a way that did render it effectively subject to seizure through some upstream ownership interest, and that the asset could not be delivered into the enforcing court's hands, either by the debtor or a garnishee.

At argument, Justice Scalia raised the classic property immunity from execution: the homestead exemption.³⁰⁶ To take that example: a debtor could show that she owned her mansion directly, that it was in a state with an applicable homestead exemption, and that the mansion was not capable of being moved (presumably the easiest showing of the three). That would render the mansion not "relevant" to satisfaction of the judgment. Perhaps this would be cold comfort to the debtor resisting asset discovery—she would have to reveal quite a bit of information simply to block further discovery. But some important information, such as valuation, still could be shielded.

D. An International Exemptions Norm

The extension of domestic exemptions from execution appears unreasonable; the recognition of foreign exemptions fraught with complications. This leaves a fourth and final possibility: that the debtor

303. *In re Gaming Lottery Sec. Litig.*, No. 96 Civ. 5567 (RPP), 2001 WL 123807, at *3 (S.D.N.Y. Feb. 13, 2001) (out-of-state bank accounts); *Miller v. Doniger*, 814 N.Y.S.2d 141, 141 (App. Div. 2006) (out-of-state bank account); *Starbare II Partners, L.P. v. Sloan*, 629 N.Y.S.2d 23, 23 (App. Div. 1995) (out-of-state artworks); see also David Gray Carlson, *Critique of Money Judgment (Part Two: Liens on New York Personal Property)*, 83 ST. JOHN'S L. REV. 43, 189–90 (2009) ("The rule that emerges from *Grupo Mexicano* is that persons over whom a court has jurisdiction can be ordered to fetch property located outside New York. In *In re Gaming Lottery Securities Litigation*, the court did not hesitate in ordering a judgment debtor to collect an amount due from a Scottish bank and bring the proceeds into New York.").

304. 911 N.E.2d 825 (N.Y. 2009).

305. *Id.* at 831.

306. See *supra* note 53 and accompanying text. See generally George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950) ("Most jurisdictions in the United States have legislative provisions, commonly referred to as homestead laws, designed to protect the family home from the reach of certain classes of creditors and to prevent alienation by the owner without the consent of his spouse.").

could show that no state would permit execution on a particular asset. Or, perhaps, that even if a handful of states would permit such an execution, exemption from execution is so widespread as to constitute customary international law.

In theory, this is an appealing limiting principle. After a creditor propounded a request for asset discovery, a debtor could reveal the existence of an asset, a customary international law norm that the asset would be immune from execution, and enough information to establish that the asset falls into this category. The debtor could avoid disclosing the same information protected under the third approach (e.g., valuation), as well some of the thornier topics of ownership and mobility.

The challenge would be in proving up the supposed customary international norm of freedom from execution. Proving up any sort of customary international law in disputes between purely private parties, or even disputes involving a sovereign, is notoriously tricky.³⁰⁷

This may be one area in which sovereigns have a distinct advantage. Justice Ginsburg writes that U.S. courts should look to domestic law as a “guide” because “our law coincides with the international norm.”³⁰⁸ She cites the “Findings and Declaration of Purpose” of the FSIA, which states that, “[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”³⁰⁹

This may not have been accurate in 1976 and may not be accurate now. But if the initial presumption lies with the debtor to show that international law forbids execution on an asset, this congressional finding would appear sufficient for a sovereign debtor to at least meet that burden in the first instance.

CONCLUSION

The dueling opinions in *NML* raised far more questions than they answered. The Court’s holding was narrow: the FSIA does not constrain discovery. The language of the majority opinion, however, suggests an expansive view of transnational enforcement discovery, where creditors are entitled to know the full extent of the debtor’s assets before any other collateral issues are litigated. Justice Ginsburg’s dissent suggests a much more constrained role for transnational enforcement discovery, where courts will look inward to U.S. assets and U.S. law.

The tealeaves left behind by the *NML* opinion do make one proposition quite clear: transnational enforcement discovery has barely been explored

307. See generally Paul L. Hoffman, *The “Blank Stare Phenomenon”*: Proving Customary International Law in U.S. Courts, 25 GA. J. INT’L & COMP. L. 181 (1996).

308. Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2259 (2014) (Ginsburg, J., dissenting).

309. 28 U.S.C. § 1602 (2012).

by U.S. courts. Lower courts are struggling with an increasing volume of unpaid awards and judgments in which creditors are more than ever looking abroad for assets to seize and sell.³¹⁰ The tools they have been handed were designed for the very different world of pretrial merits discovery.

Enforcement discovery has its own purposes, presumptions, and problem. Enforcement discovery is necessarily separate from execution. Courts can and should step fully into the role of guiding creditors on the worldwide search for assets. Creditors should enjoy a strong presumption of enforcement discovery even in the face of obstacles such as restrictions on discovery or execution. Only then can enforcement discovery effectuate the purposes of the transnational judgment and award enforcement system.

310. The title of the 2014 conference hosted by the Institute for Transnational Arbitration was "Modern Enforcement of Arbitral Awards: 'Show Me the Money.'" See INST. FOR TRANSNAT'L ARB., 26TH ANNUAL ITA WORKSHOP: MODERN ENFORCEMENT OF ARBITRAL AWARDS: "SHOW ME THE MONEY" (2014), *available at* <http://www.cailaw.org/media/files/ITA/EventBrochures/2014/ita-workshop.pdf> (last visited Apr. 23, 2015).