

Client Alert

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Second Circuit Decision in *Harrison v. Republic of Sudan* Serves as an Important Reminder of Foreign Financial Institutions' Obligations Under the TRIA

In an important decision for financial institutions, the Second Circuit Court of Appeals affirmed three turnover orders of the Southern District of New York that attached assets of the Republic of Sudan to satisfy a default judgment of \$314,705,896 under the Foreign Sovereign Immunities Act. See *Harrison v. Republic of Sudan*, No. 14-cv-121 (2d Cir. Sept. 23, 2015). The three turnover orders, which were entered pursuant to the Terrorism Risk Insurance Act of 2002 (TRIA), required three foreign financial institutions (Respondent Banks) to turn over an undisclosed amount of funds, plus accrued interest, in order to satisfy the plaintiffs' outstanding default judgment against Sudan.

The *Harrison* Case

On October 4, 2010, the *Harrison* plaintiffs brought suit against Sudan in the US District Court for the District of Columbia. The plaintiffs were sailors and spouses of sailors injured in the October 12, 2000, bombing of the *USS Cole*; the plaintiffs alleged that Sudan provided material support to Al-Qaeda, whose operatives perpetrated the suicide attack on the vessel. The bombing of the *USS Cole* killed 17 sailors and injured 39 others.

After the plaintiffs filed their complaint, Sudan failed to serve a timely answer or other responsive pleading, so the Clerk of Court entered a default against Sudan. On March 30, 2012, the district court entered a default judgment against Sudan in the amount of \$314,705,896.

On October 2, 2012, the plaintiffs registered the judgment in the Southern District of New York, seeking to execute against multiple banks holding frozen Sudanese assets. The plaintiffs also registered the judgment in the Northern District of California for the same purpose. On September 20, 2013, the US District Court for the Southern District of New York entered an order permitting the plaintiffs to seek attachment and execution of the judgment, which Sudan failed to challenge.

Subsequently, the plaintiffs filed several petitions seeking turnover of Sudanese assets, including against Respondent Banks. In a series of orders, the district court granted each of these petitions, thereby requiring Respondent Banks to turn over frozen Sudanese assets. The plaintiffs' petitions have not been limited to Respondent Banks; indeed, dozens of banks, including several of the United States' and the world's largest banks, have been brought into the litigation.

Before the District Court and the Court of Appeals, Sudan argued that these turnover orders were unlawful because (1) service was made on Sudan's Minister of Foreign Affairs at the Sudanese Embassy in Washington, as opposed to at the Ministry of Foreign Affairs in Khartoum, and (2) the plaintiffs did not first procure either an Office of Foreign Assets Control (OFAC) license or a case-specific Statement of Interest by the Department of Justice. The Court of Appeals rejected both of these arguments and affirmed the turnover awards. Respondent Banks were not actively involved in the litigation before the Court of Appeals.

The TRIA

A little over a year after the 9/11 terrorist attacks, Congress enacted the TRIA in order to aid victims of terrorism in satisfying judgments against foreign sponsors of terror. The TRIA applies to judgments against a terrorist party on a claim based upon an act of terrorism. The definition of “terrorist party” includes a terrorist, a terrorist organization (as defined in the Immigration and Nationality Act) or a foreign state designated as a “state sponsor of terrorism” under the Export Administration Act of 1979 or the Foreign Assistance Act of 1961. Currently, three countries are designated as state sponsors of terrorism: Iran, Sudan, and Syria.

The TRIA provides that blocked assets of a terrorist party shall be subject to execution, or attachment in aid of execution, in order to satisfy a judgment to the extent of any compensatory damages for which it has been held liable. The US Government has blocked the assets of numerous terrorist parties, including the Government of Sudan. These blocks take the form of Executive Orders, such as Executive Orders 13067 and 13412 for Sudan.

The Executive Orders for Sudan block “all property and interests in property of the Government of Sudan that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches.” The term “United States person” is defined as, inter alia, any entity organized under the laws of the United States (including foreign branches), as well as any individual or entity in the United States. This broad definition means that financial institutions across the globe must be wary. For instance, the Respondent Banks in the *Harrison* litigation were foreign financial institutions with New York branches. By having New York branches, these foreign financial institutions fell within the *Harrison* court’s jurisdiction.

Financial institutions must be ever cognizant of the United States’ restrictions on terrorist parties. Should a financial institution receive notice that a plaintiff is pursuing a turnover award, it should consult counsel and be prepared to turn over blocked funds if the court issues a turnover award.

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