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SPECIAL EDITION

STATES OF CONFLICT: NAVIGATING SOVEREIGN & STATES DISPUTES AND ENFORCEMENT

INTRODUCTION

"So long as there is no higher legal order above that of the state, the state itself is the highest, the sovereign legal order or legal community"

- Hans Kelsen

We are delighted to present this special edition of the Disputes Magazine, Sovereign & States Disputes and Enforcement. In this issue, our contributors examine the theme across a broad range of geographies and legal perspectives. This special edition represents the culmination of a successful year within the Disputes community, and a complementary magazine for our upcoming Sovereign & States Disputes and Enforcement Summit in February 2024, an event bringing global practitioners together from the international asset recovery and sovereign disputes communities.

We would like to extend our sincere thanks to our contributors for this issue. We hope you enjoy reading it.

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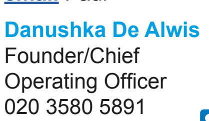

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CONTENTS

English Enforcement Efforts Proceed - Pain for Spain as English Court refuses to set aside Registration of ICSID Award 4

The Five W's – Who? What? Where? When? Why? of Enforcement 6

Where should Creditors look when seeking to Enforce Awards against Sovereign Debtors? 10

The Impact of Corruption Allegations on Post-Arbitral Award Proceedings: Enforcement and Set Aside 12

The Code of Conduct for Arbitrators in International Dispute Resolution - The Inaugural Step in ISDS Reform 14

Illegality Objection in Investor-State Disputes - Claimant Diligence Pays! 16

Identifying Sovereign Assets for Enforcement of Arbitral Awards 18

The ICSID Enforcement Architecture and Compliance with the International Commitments assumed by the US under the ICSID Convention at stake before the USCA D.C. Circuit - an Occam's Razor look at the pending appeals in next-era and 9REN 20

Facilitating Enforcement against States - a Case for Service by Electronic Means 23

U.S. Economic Sanctions Implications for Sovereign Disputes 25

The Use of 28 USC §1782 in Identifying Assets of Sovereigns and States in the United States 27

Enforcement in the United States against Alter Egos of Foreign Sovereigns - Developments on the Venezuela Front 29

The Identification of generally recognised Rules of International Law on State Immunity by the European Court of Human Rights 32

When recovering against a Sovereign, Know Your Opponent 34

Tension between Pro-Arbitration Culture and Respect of Sovereign Immunity in Switzerland 36

Update on OIC Arbitration 38

Enforcement of International Arbitral Awards in Luxembourg 40

The Current Status of the Energy Charter Treaty - and where it goes from here 42

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ENGLISH ENFORCEMENT EFFORTS PROCEED

PAIN FOR SPAIN AS ENGLISH COURT REFUSES TO SET ASIDE REGISTRATION OF ICSID AWARD

Authored by: Jon Felce (Partner) and Tulsi Bhatia (Associate) - Cooke, Young & Keidan

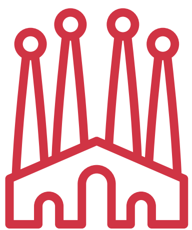
The impact of the CJEU's decision in Slovak Republic v Achmea[1] has been at the forefront of attempts by EU states to frustrate attempts to procure and enforce intra-EU arbitration awards. In the last year alone, this has led to awards being set aside at the seat of arbitration[2], attempts by the European Commission to intervene in enforcement proceedings[3], anti-enforcement and anti-anti-enforcement injunctions[4], arguments about whether state courts are competent to declare intra-EU ICSID arbitrations inadmissible[5], and attempts to enforce rejected[6].

Against that background, the English Court's recent judgment in Infrastructure Services Luxembourg SARL & Anr. v Republic of Spain[7], in which registration of an intra-EU ICSID award was upheld, and which follows earlier interim decisions paving the way for enforcement against Spain's assets, emphasises the potential benefits of seeking to enforce in the English jurisdiction especially post-Brexit.

Background

Over the past few years, many claims have been brought against Spain by investors in Spain's renewable energy industry for breaching obligations under the Energy Charter Treaty ("ECT"). In June 2018, the claimants in the present case were awarded approximately €120 million, as the Tribunal found that Spain had breached the fair and equitable treatment standard[8] under the ECT.

Thereafter, the claimants brought an ex parte application before the English High court for registration of the award under the Arbitration (International Investment Disputes) Act 1966 ("1966 Act"), which was granted by Cockerill J in 2021. The judgment in question relates to the application by Spain to set aside the decision registering the award.



Spain's challenge

Spain applied to have the registration of the award set aside on two grounds. The first was sovereign immunity. This was broadly based upon the lack of jurisdiction of the arbitral tribunal to make the award and the English court to register it. The second was material non-disclosure by the claimants when

1 Case C-284/16

2 For example, in Poland v PL Holdings (Case Number T 1569-19) (Swedish Supreme Court, 14 December 2022).

3 For example, Infrastructure Services Luxembourg and another v Kingdom of Spain [2023] EWHC 234 (Comm) (English High Court, 27 January 2023)

4 For example, NextEra Energy Global Holdings B.V. v. Kingdom of Spain, 2023 WL 2016932 (D.D.C. Feb. 15, 2023) and 9REN Holding S.À.R.L. v. Kingdom of Spain, 2023 WL 2016933 (US District Court in Washington DC, 15 February 2023)

5 Docket Nos I ZB 43/22, I ZB 74/22 and I ZB 75/22 (German Federal Court of Justice, 27 July 2023).

6 Blasket Renewable Invs., LLC, v. Kingdom of Spain, 2023 WL 2682013 (US District Court for the District of Columbia, 29 March 2023).

7 [2023] EWHC 1226 (Comm)

8 Article 10(1) of the ECT

applying for registration of the award, in alleged breach of their duties of full and frank disclosure on an ex parte application. The court found that there were no facts to support the latter ground and dismissed Spain's submissions on that ground. This article outlines some of the aspects of the first ground.

At the heart of Spain's objection was a series of infamous decisions of the CJEU which have concluded that arbitration clauses in both intra-EU bilateral investment treaties and Article 26 of the ECT (when applied so intra-EU disputes) are contrary to EU law.

Spain submitted that it was immune to the Court's adjudicative authority under s. 1 of the State Immunity Act 1978 ("SIA") and that (by reason of the aforementioned cases) no exceptions under the SIA applied.

The Court first addressed whether Spain had submitted to the jurisdiction and thereby engaged s. 2(2) SIA. Spain argued that its consent to Article 54 of the ICSID Convention (the "Convention"), which provides inter alia that contracting states shall recognise awards rendered pursuant to the Convention as binding and enforce pecuniary obligations imposed by such awards within its territories as if they are final judgements of their own Courts, did not constitute its written submission to the Court's jurisdiction. Only an express submission would satisfy s. 2(2). The Court disagreed.

Second, Spain argued that s. 9 SIA – by which a state that has agreed in writing to submit disputes to arbitration is not immune as respect proceedings which relate to the arbitration - did not apply, on the basis that its offer of arbitration in the ECT did not extend to the claimants, depriving the Tribunal of jurisdiction. The Court rejected the idea that the arbitration provisions in the ECT were by some means partial, applying only to some investors and not others, depending upon whether those investors were resident within EU member states or elsewhere. Spain also initially advanced, but then withdrew, a contention that s. 9(1) SIA applied only to commercial arbitrations and not those involving sovereign acts (which argument in any event the judge stated was materially flawed).

Spain also relied upon the intra-EU objection to argue that the parties had not agreed to arbitrate the dispute and therefore that the Award was invalid. This was similarly rejected by the Court.

A fundamental aspect of the Court's approach concerned the terms and effect of the Convention, the 1966 Act and the Supreme Court's recent decision in the case of Micula v Romania[9]. In the latter, enforcement of an award was allowed, and the Court held that the UK's obligations under the Convention (which predated its accession to the EU) were not impacted by EU treaties. Further, whilst there was "scope for some additional defences against enforcement, in certain exceptional or extraordinary defences which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention"[10], there were no such additional defences available in this case, save for potentially those based on the SIA if any such defence had been available.

Comment

This case importantly emphasises the benefits of seeking to enforce awards (and judgments) in the English Court, not least in cases such as this where enforcement in certain other jurisdictions appears to face an uphill struggle. The judgment also provides a salutary warning to future award debtors seeking to resist enforcement – the judge making clear that he had produced a very detailed judgment to explain the context in which ICSID awards were to be enforced in the face of multiple grounds of opposition by Spain, thereby seeking to discourage states in a similar position to Spain from adopting a similar approach (it may also assist claimants on ex parte ICSID award registration applications, as from personal experience the evidence on such issues can result in extensive evidence in order to comply with duties of full and frank disclosure). With Spain and several other EU states amid battles at various stages, whether initial ICSID arbitrations, annulment proceedings or enforcement, the Court's decision offers significant promise to potential and actual ICSID award creditors in their efforts to obtain recoveries from EU states which have for several years now used the arguments underpinning Achmea to seek to frustrate claims and their enforcement.

9 [2020] UKSC 5
10 See paragraph 78 of Micula.

THE FIVE W'S

WHAT? WHO? WHEN? WHERE? WHY?

OF ENFORCEMENT

Authored by: Noor Kadhim (Counsel) and Paul Grelon (Solicitor) - Fieldfisher

Introduction

Enforcing arbitral awards against states and state entities presents unique challenges in circumstances where the respondent does not voluntarily comply with the payment demand. This article describes those challenges and sets out pre-emptive measures designed to assist claimants in anticipating and overcoming them based on intelligent preliminary work combined with the implementation of effective cross-sectoral strategy throughout the process[1].

Pre-emptive due diligence: the 'Who' of enforcement

Who is the claimant?

Going into a dispute with a state or state-owned entity will not usually be an arms-length affair but more likely a David against Goliath situation. Often it is after the arbitration award is issued when the war really begins. Usually, a state will have vastly more resources at its disposal, a bigger wallet than individuals, and may employ bad faith tactics to dissuade creditors from seeking to monetise an award. The first aspect of due diligence is not legal but factual. A creditor should establish whether there are political considerations that might motivate a state to refuse payment. Readers may be familiar with the Stati claimants' frustrated attempts spanning more than a decade to enforce their £500M award against Kazakhstan, which has challenged the seizures in every jurisdiction possible, claiming fraud on the part of the creditors[2].

In the similarly long-running case of Francesco Becchetti and others against Albania[3], the claimant group obtained an ICSID award currently valued at over £125M after Becchetti's television station (which was heavily critical of the Albanian government) was expropriated. After failing to annul the award, Albania continues to fight tooth and nail to prevent a pay-out, even threatening to leave the ICSID Convention as a final resort. In this case, part of the state's actions included allegedly fabricating criminal charges against Becchetti for tax evasion, thereby threatening to make the aggrieved investor's life difficult practically, from a travel perspective, even if his lawyers are successful in the civil enforcement action.

In these situations, it is crucial to obtain the correct and most cost-effective combination of investigative and public relations assistance, including carrying out 'on the ground' intelligence work to establish key pressure points designed to create leverage in the enforcement process. The legal battle, in such cases, can only deliver a limited result for the 'persona non grata' in enforcement proceedings.

1 As the authors are English law qualified, and due to space constraints, the article will address the English law position on enforcement, providing an unqualified opinion only other jurisdictions (such as France) where such examples are appropriate for contextual reasons.

2 Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (SCC Case No. 116/2010)

3 Hydro S.r.l. and others v. Republic of Albania (ICSID Case No. ARB/15/28)

A caveat emptor for claimants is that most intermediaries whose assistance is sought may claim to have the requisite experience and knowledge of the state or jurisdiction(s) in the matter, but often do not; the pre-enforcement due diligence involved in putting a claimant's own legal teams to the test should never be underestimated.

Who is the respondent?

In tandem with carrying out due diligence on a claimant, it is wise to understand the opponent. Not all states are alike. As a first consideration, it is important to assess the state of solvency of a state and, by extension, a state entity. Does it have funds to satisfy an award? Assuming it is a developing state (where these concerns usually arise), is it on favourable terms with the World Bank, the IMF, the European Bank for Reconstruction and Development (amongst others) and can the legal team find the direct contact details for the country representatives responsible for meting out financial assistance that could be targeted with the enforcement action? For instance, the financial health of a Kyrgyzstan which has limited oil and gas resources and depends on gold exports, remittances from Kyrgyzstanis working abroad and external state support (for example, from Russia) is very different to an oil-rich Kazakhstan. It may be useful to carry out desktop searches on bank loans due to the state, or export programmes to overseas partners (potentially other states) in which monies are due or undertake more extensive searches into assets held outside the country, in order to determine how long and how challenging the enforcement process will be. In addition, local counsel's input is worth seeking for insight into the financial position of specific ministries or state entities. In Iraq, for instance, anecdotal evidence suggests the Ministry of Oil possesses its own budget and does not rely on the Ministry of Finance and is autonomous in making certain decisions such as choosing its legal counsel. This may be similar in other countries in which there is less decentralisation. It is therefore vitally important to understand the financial capacity of the opponent.

Asset considerations: the 'What' of enforcement

Which assets to seize, and seize first?

The identification of enforceable state assets is critical. A list should be compiled from the outset as to the assets and their ease of enforcement, with funds held in bank accounts being ideal targets, followed by public securities and real property. A preliminary question is then whether the assets may risk being caught by state immunity from enforcement defences in the applicable jurisdiction(s). If enforcing in England, the UK Sovereign Immunity Act 1978 (SIA) applies. By way of example, in AIG Capital Partners Inc. and another v. Republic of Kazakhstan and others[4], the claimants brought a claim against Kazakhstan under the US-Kazakhstan BIT regarding the termination and expropriation by the state of a housing project. Kazakhstan did not comply with the ICSID award, which the claimants sought to enforce against shares and cash held by third parties in London on behalf of the National Bank of Kazakhstan. The SIA provides that state property is immune from enforcement unless it is intended for commercial use. The claimants contended that these assets were intended for use for commercial purposes so fell outside the protections of the SIA. But there are certain caveats. The SIA provides that a state's central bank funds enjoyed full immunity from enforcement, regardless of whether the property was used for commercial purposes. This decision underlines the risk that a defaulting state may be immune from execution against an ICSID award, even if prima facie, the assets in question are commercial in character.

Another, less obvious, asset is revenue income from a business partner. In the case by Standard Chartered against Tanzania[5], the claimant was successful ultimately in locating and freezing revenue owing from a joint venture partner due to the state, thereby diverting payment to the claimant.

The size of the award can also make a difference in whether and how long it takes to enforce. Below a certain amount (say, $20M, in most instances) the cost and time is disproportionately high relative to value, in pursuing an enforcement action where the state is entrenched in its position. Above a certain amount (such as $1BN) it becomes too important a fight for the state to lose. Anecdotally, the 'sweet spot' is in the region of $100M.

Who owns the assets?

A related question is the identity of the legal owner of the assets in question. This also becomes relevant when dealing with state entities: for example, it is not always a fait accompli to enforce against a state vis-à-vis the actions of its entities, when such actions cannot be attributed to the state. Equally, when assets of a seemingly separate entity are deemed effectively to belong to a state that is subject to sanctions, this may cause problems in the enforcement process, such as in the Al-Kharafi v Libya[6] case (described below).

Location of assets: the 'Where' of enforcement

Where are the assets?

A key consideration is where the targeted assets are located. Assuming they include real property, this can be checked in public registers or databases. Local counsel may be able to assist with this process. It is worth noting that some jurisdictions are opaquer than others in terms of what can easily be searched without a court order: this includes Switzerland where third party assets of numerous states and state officials are located. It may also be useful to engage a corporate investigator with trustworthy contacts on the ground to search for assets that may not be easily identifiable. In this respect it is important not only to locate an investigator with experience, but one who will use lawful means to carry out their investigation so as to preserve

4 [2005] EWHC 2239

5 Standard Chartered Bank v. The United Republic of Tanzania, ICSID Case No. ARB/10/12

6 French Court of Cassation, No 19-25.108 and No 19-21.964.

the reputation of the claimant and the integrity of the award. The enforcement process is also much more challenging, generally, when enforcing against assets on the state's own territory, because the state's own courts are usually not impartial and independent of the state.

When enforcing within the relevant state

The key to enforcing within the state itself is to move fast and capitalise on momentum, especially momentum derived from small but strategically timed gains. It is usual to incentivise local counsel and enforcement officials with commission, but it is vital at the outset to vet counsel, their credentials and independence. It is an ongoing process throughout the proceedings to make sure one is not dealing with a politically compromised team on the ground, who may have an interest in frustrating the enforcement process. This could be either because they have a financial interest, or because they are menaced by threats of criminal sanctions or suchlike by the state apparatus. It is also preferable to have a direct line with the enforcement officials (such as bailiffs or court clerks), who will be central figures in the battle and whom one must always keep onside.

The focus on enforcing within certain states is to emphasise nuisance value (for example, seizing telecoms masts, private planes used by statesmen (for non-state related purposes), vehicles (non-diplomatic)), rather than focus solely on value. The aim is to bring the decision makers to the table to come to a settlement so that the creditor does not continue to apply pressure and cause embarrassment both in-country and in the state's external relations.

When enforcing outside the relevant state

When enforcing against assets held in another jurisdiction (when it is not an ICSID award[7]) it is important to consider whether the process to obtain exequatur of the judgment is straightforward (such as if the state in which the assets are located is signed up to reciprocal enforcement treaties with that of the state of the seat of arbitration), and whether the state is signed up to treaties such as the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards ("NYC"). Arguably, however, it is even more important to conduct diligence into the trade relationship of the enforcing state with the state against which enforcement is sought. For example, in the case of Becchetti v Albania, Italy is an important trading partner of Albania. This could be a reason why the state of Italy allegedly refused diplomatically to support Mr Becchetti in his enforcement efforts.

Obstacles to enforcement: the 'Why' (not) of enforcement

Once pre-emptive due diligence is completed on the parties and (where necessary) intelligence is obtained to ensure that a state will not prove obstructive in combatting a politically sensitive award, and after a thorough audit of the asset position is undertaken to establish the path of least resistance against the most easily monetizable assets in the most favourable jurisdictions, the time comes to beauty parade the best lawyers on the ground and mobilise the chosen team in the legal battle against those assets. Obtaining an enforceable domestic judgment may be the next step in the process. It is important to find a legal team that is wise to the tips and tricks that a state may use in the domestic courts. Although certain law firms may be competent in running the arbitration proceedings, not all will have the requisite experience to conduct the enforcement process thoroughly.

Possible state 'defences' to combat an enforcement action

It is likely an award creditor will encounter a sovereign immunity defence from a state respondent regarding execution against its assets, even if the state's claim that it is immune from being sued proved fruitless. Whether it is successful will depend on the laws governing state immunity in the jurisdiction where the award is being enforced: these vastly differ from state to state. In Svenska v Lithuania[8], Svenska (a Swedish company) entered into a joint venture contract governed by Lithuanian law, with AB Geonafta, a Lithuanian State-owned entity in the oil and gas exploration and production field. The arbitration, which was seated in Denmark, included an irrevocable waiver of all sovereign immunity claims by the Lithuanian government and Geonafta. In the ensuing ICC arbitration, the tribunal found the Lithuanian government to be bound by the arbitration agreement, having directly signed the contract. After obtaining a favourable award, Svenska applied to enforce it in England, whose courts granted an exequatur judgment.[9] Lithuania subsequent challenge on grounds of sovereign immunity culminated in the Court of Appeal, which concluded by examining the parties' intentions, and determined that in any event the SIA does not grant immunity to states where they agreed to the arbitration in writing.[10] As a result, the Lithuanian government was also not immune from the enforcement proceedings.

However, it is not inconceivable that some states may change their laws at the eleventh hour to frustrate a creditor's enforcement attempts. This happened in the well-known Yukos case[11], when (prior to the war in Ukraine) France changed its rules on sovereign immunity from enforcement under the Sapin II Act[12] by mandating that a judge preliminarily approve any enforcement measure on assets belonging to a foreign state. This was one of the reasons that the Yukos shareholders could not enforce in France against Rosneft, the Russian state-owned oil company. In contrast with the Svenska decision in the UK courts, under the Sapin II Act, it is not enough now for the state to have

7 The ICSID Convention seeks to facilitate international investment by providing a means of resolving investment disputes separate from any domestic courts. The ICSID Convention established the ICSID, which administers arbitrations under its Arbitration Rules. Each Contracting State commits to enforcing an arbitral award issued by a tribunal under the ICSID Convention as if that award were a final judgment of its own courts.

8 Svenska Petroleum Exploration AB v. AB Geonafta and the Republic of Lithuania, ICC Case introduced 12 June 2000.

9 2005] EWHC 2437 (Comm)

10 [2006] EWCA Civ 1529

11 Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. 2005-04/AA227)

12 Economic Modernisation Act 2016-1691 of 9 December 2016, known as the "Sapin II Act".

waived its rights to claim immunity by signing an arbitration clause. It must expressly have consented to enforcement against such assets or ring-fenced them for the purposes of the proceedings, or such assets must be specifically used otherwise than for the purposes of public service and they are expressly linked to the entity against which the proceedings are initiated. This greatly restricts the pool of French-located state assets against which a creditor can enforce.

Sanctions

Something else to be aware of is sanctions-affected states, whose assets may be out of reach for that reason alone. In Al-Kharafi v Libya, the French Supreme Court blocked enforcement of an award in favour of a Kuwaiti company (Al-Kharafi) against assets belonging to a Libyan sovereign wealth fund, Libyan Investment Fund. The court did so on the grounds that the assets, which were already frozen due to international sanctions, could not be seized without prior authorisation from the competent EU member state's authority. As the Kuwaiti company had not sought prior authorisation from the French Treasury, being the competent authority under the Regulation, the court held all attachments to be invalid.

In the UK, the sanctions regime (particularly regarding Russian sanctions, currently) is constantly changing and it is important to seek specialist advice from sanctions lawyers if considering enforcing against a potentially sanctions-affected entity.

Public policy

Under the NYC, a court may refuse recognition and enforcement of an arbitral award if it would be contrary to its own state's public policy, as defined by the domestic law of that state. In Soleimany v. Sokimany[13], the English Court of Appeal refused to enforce an award concerned with an illegal contract for the smuggling of carpets out of Iran, holding that it would be contrary to public policy to enforce an award which on its face related to a contract considered illegal at the place of performance.

Timing: the 'When' of enforcement

Last but not least, timing is crucial in enforcement. Award creditors enforcing against the governments of politically turbulent states need to be mindful of the current political climate, including the timing and likely outcome of elections, and a state's economic priorities, when considering the best time to apply pressure. An example is a case the authors are currently assessing, concerning enforcement against Pakistani state assets on behalf of Turkish government-backed claimants. Given that the elections are upcoming and the incoming government (if it is from an opposing political faction) may not be as sympathetic to the interests of foreign investors as the previous administration, it may be wise for such investors to bide their time.. In these circumstances, it is best to wait and see which party takes power, and work with well-connected but neutral political analysts before initiating any process.

Another example is that of NML Capital v Argentina, which went all the way to the US Supreme Court[14]. This case demonstrated that changes in government may also mean changes in economic or diplomatic priorities, which can then create opportunities for negotiation and settlement. Here, Argentinian officials proved more willing to settle claims arising from their predecessors' conduct than their own, with Argentina's abrupt settlement of a more than decade-long, US$1 billion dispute. After years of highly contentious litigation – including attachment of an Argentinian navy ship – a settlement agreement with the private equity fund (dubbed 'vultures') which had bought the initial investors' claim against the state, came only months after the election of President Mauricio Macri, who had promised to revitalise Argentina's economy.

Conclusion

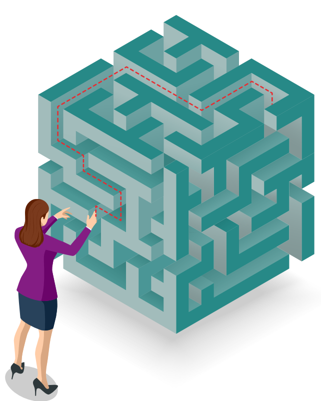
The battle against a state does not stop when the award is in hand. It becomes multi-faceted, and takes on more than just a legal dimension, when the enforcement process is in full swing. To prevent the victor of an arbitration that has dissipated sweat equity and costs from being consigned to a fate akin to that of Phyrrus[15], the right strategy combined with the correct budget from the outset is essential. Due diligence should be conducted from the start: on the opponent, its relationship with the claimant, the nature and location of the assets, and the experience and credentials of the team in place (which will include investigators, law enforcers, public relations experts, lawyers, political analysts, and more). The coordinated implementation of excellent strategy also comes at a cost: few battles were ever won 'on the cheap'. States will be banking on the ineptitude or under-resourced status of their adversaries. It is for the new generation of award creditors to prove them wrong.

13 [1999] QB 785.
14 Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014)
15 The unfortunate king of Epirus who defeated the Romans in 279 BCE but lost many of his troops in the process.

WHERE SHOULD CREDITORS LOOK WHEN SEEKING TO ENFORCE AWARDS AGAINST SOVEREIGN DEBTORS?

Authored by: Michael Sweeney (Associate) - Burford Capital

The growing consensus among enforcement lawyers is that enforcing judgments and arbitral awards against sovereign states is becoming harder.



Beyond the maze of legal and procedural hurdles already encoded in the US Foreign Sovereign Immunities Act (1976), a spate of recent developments has made the pursuit of sovereign debtors more difficult.

In March 2018, the European Court of Justice found, in the now-famous Achmea ruling, that arbitration clauses contained in intra-EU bilateral investment treaties (BITs) were incompatible with EU law.

Then, in November 2021, the same court held in Bank Sepah v Overseas Financial Ltd et al. that absent a prior authorisation from a competent national authority, European law prohibited the attachment of assets already frozen under international sanctions.

While the Achmea ruling led to EU courts refusing to enforce arbitral awards between EU parties under BITs and Energy Charter Treaties, Sepah upended numerous carefully planned recovery campaigns against pariah states like Russia and Iran. It also led to the lifting of two attachments previously secured against Libya in France.

With national courts regularly raising further evidentiary tests, creditors might be forgiven for thinking they should forgo legal recovery routes altogether, instead opting for alternatives such as diplomatic-style lobbying or public relations campaigns.

But legal redress remains the most potent weapon for award-holders facing "won't pay" sovereign debtors, and providing they invest properly in research work, enforcement teams will continue to find suitable assets to prompt effective court action.

At the core of recovery campaigns, creditors should continue to seek high-value commercially active assets situated overseas. Those assets should be unsanctioned and ideally in enforcement-friendly jurisdictions, albeit not – if the creditor is European – in an EU state.

For sure it is a complicated matrix; but for sovereign debtors, avoiding international exposure is also difficult and no government that wishes to be part of the global finance system is invulnerable.

Virtually all states own expensive properties in western capitals. While the great majority of these are embassy buildings protected by sovereign immunity provisions, researchers should always verify how properties are being used before discounting them. Commercial activities are not unheard of, and where money is being made the assets become viable attachment targets.

A team I once worked in found that a sovereign debtor was advertising its former US embassy building for long term private let. As well as soliciting rental offers on its official website, the state's foreign ministry had hired a sales agency to produce a glossy marketing document, setting out property specifications and pricing options, as well as room-by-room photographs. All of it was essential evidence for counsel trying to convince a judge that the building was no longer fulfilling protected diplomatic functions.

More commonly, researchers will need to look further down corporate ownership structures, to state-owned-entities possessing overseas bank accounts, transport infrastructure or goods-in-transit. Here, identifying assets may be the easy part; harder will be evidencing that owner-entities are "alter egos" of the state - "so exclusively controlled" by the government that "a relationship of principal and agent is created", per the US Supreme Court's Bancec guidelines of 1983.

This work can be painstaking. Assets will be identified but discounted because the SOEs that own them are run at arm's-length from the state. Others will be homed in on because the holding entities can be shown to have "no effective separate existence" from the government, subject "to the controlling will of the state", per the UK Privy Council's Gécamines v FG Hemisphere ruling of 2012.

Energy companies become especially interesting in this context. By and large, governments in the Middle East and former Soviet region tend to keep a firm eye over their hydrocarbon resources, often the lifeblood of their economies. Government officials oversee decision-making at some SOEs on a day-to-day basis, dominating company boards and making decisions on hiring and firing and the use of company profits.

Since such companies also trade on global markets, they are also prime enforcement targets with internationally exposed assets. Liquid natural gas suppliers own or charter vessels carrying cargoes into enforcement-friendly jurisdictions. Crude oil producers contract with western buyers for payment in US dollars, with receivables funds sometimes sitting for weeks in traceable US bank accounts before transiting to the SOE.

In 2009, lawyers for Yukos Capital Sarl forced Russian oil giant Rosneft to make full payment of its USD 419 million arbitral debt, after attaching receivables monies sitting in the accounts of US oil buyers. A New York judge found that the funds were - technically and traceably - the property of Rosneft, and the resulting freezing order dealt a hammer blow to the company's operations.

The same combination of close government control and overseas exposure also applies to many state-owned airlines. Air Tanzania saw its aircraft grounded three times between 2017 and 2019, each time after creditors mounted arguments in international courts that the planes were owned and controlled by the Tanzanian state.

Precisely to negotiate the myriad of legal doctrines guiding counter-sovereign enforcement work, researchers need to be flexible and creative. Demonstrating ownership and control can be difficult and registries and databases are just the start of the process; freedom of information requests, interviews, social media trawling and site visits all have their place. The process should be ongoing, iterative, and interactive, with close contact between investigators and legal counsel asking what do we need? and how might we get it?

A team I worked in found it impossible to obtain a SOE's articles of association from an official government registry without endangering the document collector. The papers were important to prove the unusual functioning of the entity and its close relationship to the state. Fortunately, the British Library in London held a full archive of the country's government gazette, which had printed all amended version of the entity's articles going back to the late 19th century.

Sovereign asset tracing research is rarely quick and frequently frustrating, but where investigative teams are properly briefed, and work closely with enforcement counsel, their work remains essential for creditors seeking to force governments to make good on their obligations. It is not worth throwing the towel in yet.

THE IMPACT OF CORRUPTION ALLEGATIONS ON POST-ARBITRAL AWARD PROCEEDINGS: ENFORCEMENT AND SET ASIDE

Authored by: Katrina Limond (Senior Associate) and Nadia Jahnecke (Trainee) - Allen & Overy

Introduction

The parties have battled through exchange of written pleadings, an arbitration hearing and the tribunal issues the award. What next?

If the award debtor does not pay up after proceedings, the award creditor may take the award before a local court for recognition and enforcement. In response, the award debtor may seek to resist enforcement, challenge the award, or both. In the English courts, these procedures are governed by sections 58, 66-71 and 101-104 of the Arbitration Act (AA) 1996.

However, what happens if corruption allegations are raised or developed at this stage? This article summarises the position under English law in relation to arbitral awards made in the territory of a New York Convention state, and briefly compares it with Switzerland and France.

Set aside and refusal to enforce

An arbitration award is legally binding under s. 58(1) of the AA 1996. Recognition and enforcement of the award shall not be refused under s. 103(1), unless one of the grounds set out in ss. 103(2)-(3) apply. For the purposes of corruption allegations, under s. 103(3), the court may exercise its discretionary power and refuse the award if it "would be contrary to public policy to recognise or enforce the award".

S. 68 permits the challenge of an award for serious irregularity, which includes "the award or the way in which it was procured being contrary to public policy" (under s. 68(2)(g)). In these circumstances, the court may do the following with the award in whole or in part: (a) remit it to the tribunal; (b) set it aside; or (c) declare it to be of no effect (s. 68(3)).

Relevance of corruption

"Public policy" is not defined in the AA 1996, or elsewhere in legislation. In practice, English courts apply a "know it when you see it" approach. A contract may be contrary to public policy if it was entered into with the objective of committing a criminal act, evading a statute, committing a civil wrong or involved bribery or corruption. The same approach to public policy is applied for the purposes of setting aside an award and resisting enforcement.[1]

It is for the party raising illegality or corruption to prove its claim, on an ordinary civil standard of proof (i.e. that the allegation is more likely than not). Despite the civil standard of proof, English courts in practice require a high threshold to be met to establish illegality or corruption.

1 Betamax Ltd v State Trading Corporation, [2021] UKPC 14, para 21; Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWHC 1108 (Comm), para 12.

For example, the claimant in National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another,[2] had argued that a gas supply agreement was procured by or executed through corruption. Having heard evidence in detail over 30 days, the arbitration tribunal found no corruption. On the claimant's application to challenge the partial award under s. 68 of the AA 1996 before the High Court, Burton J held that where a contract was preceded by, but was causally unaffected by, a failed attempt to bribe, there was no basis in English public policy for refusing to enforce the contract on the ground that it was "tainted".[3] To decide otherwise would provide for substantial uncertainty.[4]

English court approaches to corruption allegations

The English courts are reluctant to interfere with an award on grounds of corruption.

Where a party waits until the challenge or enforcement stage to adduce evidence of corruption, the English courts will generally dismiss corruption allegations. In Alexander Bros v Alstom,[5] the High Court rejected Alstom's request to refuse enforcement on this basis, noting that Alstom had had the chance to make an overt corruption argument before the arbitrators, but failed to do so.

Under s. 73 of the AA 1996, if a party does not raise the issue before the arbitration tribunal, it will lose the right to raise such an objection at the set-aside or enforcement stage. In Province of Balochistan v TCC,[6] Knowles J held that the Province of Balochistan was barred from raising corruption allegations in set aside proceedings because it failed to raise the allegation as an objection to jurisdiction in the ICC proceedings (despite having argued corruption in parallel ICSID proceedings).

In practice, for the English courts to entertain corruption allegations, a party must generally demonstrate that new and compelling evidence emerged after the arbitration award that was not available before.[7] There is also older authority, that the English courts may refuse to enforce awards where the underlying contract and investment were illegal in its origin. In Soleimany v Soleimany,[8] the Court of Appeal refused to enforce the award on the basis that it concerned an illegal contract to smuggle carpets out of Iran, saying that the English courts cannot enforce a contract that is illegal under English law or the law of the country of performance.

Other jurisdictions

The approach of the English courts is not, however, universal. The Alstom case, an arbitration seated in Geneva under the ICC Rules, demonstrates different jurisdictional approaches. Alstom sought to refuse enforcement of the award in Switzerland,[9] France[10] and England.[11] Similar to the English High Court,[12] the Swiss Federal Court rejected Alstom's request to refuse enforcement, noting that it lacked jurisdiction to rectify or complete findings of fact and that the "implicit allegation of corruption" advanced by the defendants was already considered by the tribunal and not proven.[13]

However, the Paris Court of Appeal rejected the application to enforce the award on the basis that there was "serious, precise, and consistent" evidence of corruption in the performance of the underlying contracts.[14] Enforcement of such an award in France would therefore be contrary to public policy. This contrasting decision reflects the French Cour de cassation's comparative willingness to set aside awards on corruption grounds for public policy reasons,[15] even where corruption was already raised in the arbitration.[16]

Conclusion

The AA 1996 and the English courts prioritise the enforcement of arbitral awards over airing corruption allegations, especially where a party has waited until the post-award phase to raise such allegations.

2 National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another [2016] EWHC 510 (Comm).
3 National Iranian Oil Co v Crescent Petroleum Co International Ltd and Another [2016] EWHC 510 (Comm), para 49.
4 Ibid.
5 Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited [2020] (Comm) EWHC 1584, paras 29 and 147-150.
6 Province of Balochistan v Tethyan Copper Company Pty Limited [2021] EWHC 1884 (Comm), paras 272 and 276-278.
7 National Iranian Oil Company (NIOC) v. Crescent Petroleum Company International Ltd [2016] EWHC 510 (Comm), para 49; Westacre Investments Inc. v Jugoimport SPDR Holding Co. Ltd. and Others [1999] Q.B. 740, para 42.
8 Soleimany v Soleimany [1998] EWCA Civ 285, para 67.
9 A. & B. v. Z., Federal Supreme Court of Switzerland (Swiss Supreme Court), 3 November 2016, 4A_136/2016.
10 Alstom Transport SA v. Alexander Brothers Ltd, Paris Court of Appeal, 28 May 2018, Case No. 16/1118.
11 Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited [2020] (Comm) EWHC 1584.
12 Alexander Brothers Limited (Hong Kong S.A.R) v. (1) Alstom Transport SA (2) Alstom Network UK Limited [2020] (Comm) EWHC 1584, para 220.
13 A. & B. v. Z., Federal Supreme Court of Switzerland (Swiss Supreme Court), 3 November 2016, 4A_136/2016, paras 49-50.
14 Alstom Transport SA v. Alexander Brothers Ltd, Paris Court of Appeal, 28 May 2018, Case No. 16/11182, p 5.
15 Cass. Civ. 1st, 7 September 2022, Sorelec v. Libya, No. 20-22.118.
16 Cass. Civ. 1st, 23 March 2022, Kyrgyzstan v. Belokon, No. 17-17.981.

THE CODE OF CONDUCT FOR ARBITRATORS IN INTERNATIONAL DISPUTE RESOLUTION

THE INAUGURAL STEP IN ISDS REFORM

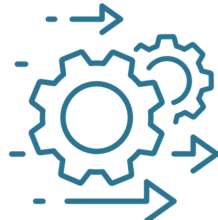
Authored by: Anna Korshunova (Associate) - LALIVE

In July 2023, during its 56th annual session in Vienna, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the Code of Conduct for Arbitrators in International Dispute Resolution (the "Code").

Background

The inception of the Code traces back to 2017. It emerged from the focus of the UNCITRAL Working Group III on investor-State dispute settlement ("ISDS") reform aimed at addressing mounting criticism of the system. Recognised as the inaugural stride in the ISDS reform agenda, the Code epitomises the potential of Working Group III to spearhead transformative reforms within the ISDS domain.

The Code is a collaborative work product of the Secretariats of the International Centre for Settlement of Investment Disputes ("ICSID") and UNCITRAL. They based the text on a thorough analysis of standards from codes of conduct in investment treaties, arbitration rules, and rules of international courts and tribunals. The drafters shared multiple versions for review and incorporated feedback from State delegates and various stakeholders made publicly available on ICSID and UNCITRAL official platforms.



Application & Enforcement

The Code regulates the conduct of arbitrators in investor-State disputes and can be rendered binding in several ways:

(1) Incorporation through a multilateral instrument on ISDS reform, which States are currently considering as a potential path forward;

(2) Incorporation in investment treaties or other instruments of consent (domestic laws, investment contracts);

(3) Case-by-case agreement of the parties;

(4) Incorporation in procedural rules and adjudicators' declarations, e.g. by amending ICSID and UNCITRAL Rules.

ICSID has already declared its intention to ensure the Code's harmonious integration within ICSID's operational framework.

During the drafting, it was indicated that the Code should include sanctions for non-compliance that would be sufficiently strict to have a deterrent effect. Yet, the final text does not expressly stipulate any such sanctions. Instead, it emphasises self-regulation, urging arbitrators to step down if they are unable to comply with the Code.

The Code also points to potential challenges or disqualifications of an arbitrator, but availability of any such actions would depend on the consent instrument or applicable arbitral rules. Moreover, UNCITRAL encourages arbitral institutions to address non-compliance, such as by reducing fees or publishing information about the timeliness of decisions.

Key Providsions

1. Independence and Impartiality

The Code reinforces the paramount obligation of arbitrators to maintain independence and impartiality.

Restricting "Double-Hatting":
The text establishes rigorous rules concerning "double-hatting" – a practice, where arbitrators also act as counsel or experts in other ISDS cases. This has been a topic of debate, as some feel it compromises ISDS integrity by casting doubts on arbitrators' neutrality. Conversely, others believe that such roles offer arbitrators a broader perspective and caution that stringent regulations might discourage emerging arbitrators from accepting roles. The Code seeks to harmonise these contrasting views.

It explicitly bars arbitrators from serving as counsel or expert in any ISDS case involving the same measure or parties for three years after their arbitrator role. A "measure" in this context includes any law, regulation, procedure, requirement, conduct or practice of a State that allegedly affects the investor's protected rights in breach of an instrument of consent.

The "double-hatting" prohibition further extends to proceedings involving identical provisions within the same instrument of consent, but this limitation lasts just one year. For example, an arbitrator handling a claim based on article 10 of the Energy Charter Treaty ("ECT") on fair and equitable treatment may not act as a legal representative in another proceeding concerning the same article. However, the fact that several proceedings were initiated under the same dispute settlement provision of the same treaty does not preclude the arbitrator from acting in both proceedings.

The parties retain the right to opt out of the Code's provisions on double hatting by mutual agreement.

Mandatory Disclosure:
The Code not only embodies the foundational principle of disclosing potential conflicts, often seen in arbitration rules, but also enumerates specifics that must be disclosed in every situation.

Prohibition of ex parte communications:
Direct, one-sided communications by an arbitrator are explicitly forbidden by the Code.

2. Efficiency of proceedings

To counter criticisms about the dwindling efficiency of ISDS proceedings – specifically concerns about prolonged timelines – the Code introduces the following obligations:

Duty of Due Diligence:
The Code obliges arbitrators to diligently execute their roles, apportion sufficient time to each dispute, and make decisions promptly. Accepting additional responsibilities or cases that might compromise this diligence or induce delays is discouraged.

Case Load Transparency:
Although the Code stops short of adopting David Caron's proposed "Rule of X", i.e. a limit on the number of cases that arbitrators can simultaneously handle, it underscores the importance of transparency. Prospective arbitrators must reveal their current engagements, permitting parties to assess the arbitrator's capability to devote necessary time to their matter.

Equitable Compensation:
The Code also mandates that fees and expenses of an arbitrator are reasonable and align with the consent instrument or applicable rules, emphasizing fairness and efficiency.

3. Confidentiality

The Code reinforces arbitrator's duty of maintaining the confidentiality of proceedings. This extends to deliberations, draft awards, and other related content, except when parties opt for transparency.

4. Tribunal Assistants

Another topic that has sparked considerable discussion in recent years is the appropriate role of tribunal assistants. The Code steps in to provide guidance on this issue.

It stipulates that arbitrators cannot delegate their decision-making authority. While assistants are permitted to draft preliminary decisions or awards, this must always be done under the arbitrator's close supervision. To foster trust and clarity, arbitrators must secure party consent regarding the assistant's duties, role, and compensation. Should a party believe that an assistant fails to adhere to the Code, they can notify the arbitrator, potentially leading to the assistant's dismissal or replacement.

Conclusion

In an era demanding greater transparency and accountability, the introduction of the Code of Conduct for Arbitrators in International Investment Disputes is a remarkable step. The Code establishes a potentially binding universal standard that would permit a harmonised approach to ethical requirements for arbitrators of investor-State disputes. Its adoption underscores a commitment to bolstering the integrity and fairness of the arbitration process and stands as a testament to collaborative advancements in global legal frameworks.

Yet, as the Code's commentary aptly notes, "[t]he application of the Code would largely depend on how the Code is implemented." Thus, as the ISDS reform progresses, pivotal questions hover: Will the Code be ubiquitously endorsed? And what measures will ensure compliance?

ILLEGALITY OBJECTION IN INVESTOR-STATE DISPUTES

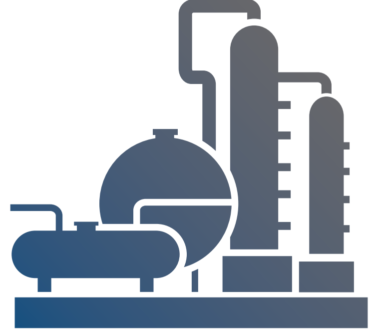
CLAIMANT DILIGENCE PAYS!

Authored by: Alex Marine (Head of Enforcement) - Deminor

Introduction

In July 2022, an ICSID tribunal gave its decision in MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia. The Award is a fascinating read - the case could arguably rival some of the best political crime thrillers. It was the culmination of a decade-long, very public, spat between one of Hungary's largest businesses and the Croatian government over the management of Croatia's largest oil and gas company, Industrija Nafte dd (INA). The case featured allegations of bribery, a convicted former prime minister who tried to flee Croatia in a car driven by his daughter, an alleged middleman who suffered a sudden "attack of conscience," and an Interpol red notice ignored by Hungary.

This case also provides an excellent illustration of the high standard required to prove allegations of illegality and the way in which they play out before arbitral tribunals, especially when compared with the approach taken by some national courts.



MOL v Croatia

Without delving too far into the detail of the case, this dispute stems from the privatisation of INA in the mid-2000s. At that time, MOL became the largest shareholder alongside the Croatian State, and was vying for management control. As noted by the Tribunal, corruption allegations were "at the heart of the dispute." Specifically, Croatia accused MOL of bribing Dr Ivo Sanader, the prime minister from 2003 to 2009, in exchange for his agreement to MOL acquiring management control.

When considering Croatia's bribery allegations, the Tribunal noted "the serious nature of the allegation itself, and the serious consequences" that would flow from a finding of corruption.

It ruled that Croatia had to prove "to an appreciably higher standard than a mere balance of probabilities" [i.e., more likely than not] that "the alleged act of bribery did take place, that it did involve those accused of it, and that it did lead to…"

Dr Sanader giving the green light to MOL taking over INA.

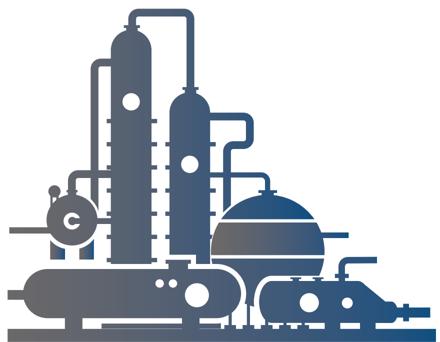
Perhaps unusually, Croatia relied heavily on the testimony of the intermediary who allegedly received the bribe on Sanader's behalf, a Croatian businessman named Robert Jezic.

He testified for over 10 hours, with the Tribunal noting that "the corruption allegation stands or falls by Mr Jezic. Without him …[Croatia] …has no case." Croatia also produced documents indicating suspicious payments totalling €10 million from two Cypriot companies to a Swiss entity, allegedly on behalf of Dr Sanader.

The Tribunal found that Croatia had failed to prove bribery, and questioned Mr Jezic's motivation in giving evidence for Croatia. The Tribunal noted that Mr Jezic was never prosecuted (including for unrelated offences) and was allowed to keep bribery proceeds, despite his central role in the alleged corruption. If there was an out-of-court deal between prosecutors and Mr Jezic, Croatia staunchly refused to disclose it. Further, the Tribunal "found [Jezic] evasive, and …a witness who [when challenged]… would pluck an explanation out of the air…"

The Tribunal was careful to note that its decision did not mean there was no bribe, but rather that Croatia had failed to prove it. Arguably, the Tribunal had no choice but to say this.

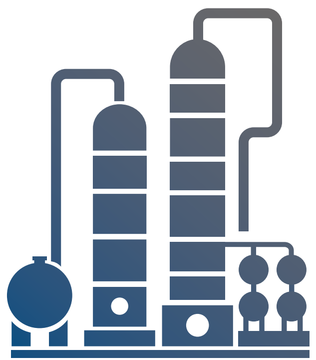
By the time of the Award, Sanader had served several years in a Croatian prison following his conviction for this as well as other offences.



Approach by national courts

The Tribunal's approach can be contrasted with decisions emanating from France in recent years, where courts appear to have no difficulty setting aside arbitral awards when presented with 'indications' of corruption or other illegality. Two examples come to mind – Belocon v Kyrgyzstan and Sorelec v Libya. In the former, an UNCITRAL tribunal in 2014 held that Kyrgyzstan had failed to prove its allegations of money laundering against Belocon and ordered it to pay compensation. Nevertheless, in 2017, the Paris Court of Appeal set the award aside because there were 'indications' of illegality, an approach endorsed by the French Court of Cassation in early 2022.

In Sorelec, the Paris Court of Appeal annulled a €452 million award in favour of a French construction company as there were "serious, specific and consistent" indications of corruption despite the fact that Libya had not raised these allegations in the arbitration. The French Court of Cassation upheld this decision in late 2022, stating that the power of the French courts to review arbitral awards for compliance with international public policy was not limited by the evidence adduced in arbitration.



A funder's view

These cases, and allegations of corruption, bring several issues to mind for a litigation funder. First, no responsible provider of legal finance would want to back a claimant who had engaged in illegality and now wants to (ab)use international arbitration as a means of benefitting from such conduct. That said, careful consideration needs to be given to otherwise meritorious claims against states where the rule of law is less than satisfactory and where the criminal justice system could be influenced by powerful business or political figures. Moreover, allegations of improper criminal proceedings are often central to claims for breach of the state's duty to ensure fair and equitable treatment of foreign investors.

Second, as some practitioners have noted, allegations of illegality are on the rise and tend to be raised more often post-arbitration, as part of set-aside proceedings or during enforcement.

While not all courts take the same approach as those in France, the risk of the respondent state raising an illegality objection must be considered.

Hence, claimant diligence becomes crucial when considering whether to back an investor's claim or recovery efforts against a sovereign debtor. Relevant questions could include: how robust is the sovereign debtor's criminal justice system? Is it possible to independently verify that no illegal conduct took place? Would it be possible to refute any such allegations effectively if they were made? How would such allegations affect the case or enforcement strategy?

While this adds another layer of complexity, claimant diligence does pay!

IDENTIFYING SOVEREIGN ASSETS FOR ENFORCEMENT OF ARBITRAL AWARDS

Authored by: Rishab Gupta (Barriter) and Shreya Jain (Principal Associate) - Twenty Essex and Shardul Amarchand Mangaldas

Enforcing arbitral awards against States comes with its unique set of challenges. States enjoy several privileges that are not available to private debtors. These include unique rules for service, immunity from being sued in foreign courts, immunity from attachment of assets in foreign jurisdictions as well as deference towards considerations of comity and lack of a sovereign insolvency regime.

These privileges reflect a balance between two competing interests of sovereigns: (i) principles of sovereign equality and comity, which aim to protect States from defending litigations and seizure of their property by courts of other States; and (ii) promoting enforcement of contracts by ensuring that States pay their commercial debts.

This article discusses key considerations and strategies in identifying sovereign assets for enforcement of arbitral awards.

Which assets?

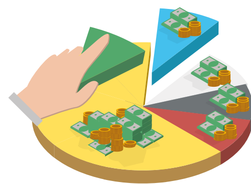
Under the doctrine of sovereign immunity, a State cannot be subject to the jurisdiction of the courts of another State (jurisdictional immunity) and a State's assets are generally immune from execution by courts of another State (execution immunity). In certain jurisdictions (e.g. China, Hong Kong), this immunity is absolute – albeit, at least in case of China, this is set to change soon.[1] Most other jurisdictions follow the restrictive immunity approach, which allows for two key exceptions: (i) when a State waives its immunity; or (ii) when the assets against which execution is sought are used for a commercial purpose.

Under the first exception (waiver), there are two key requirements:

1. First, a waiver must ideally be express and in writing. However, this is not a complete procedural bar as several jurisdictions recognise an implied waiver of jurisdictional (but not execution) immunity based on the State's consent to an arbitration agreement or a jurisdiction clause.
2. Second, waivers for jurisdictional and execution immunity must be separate, and the latter must specify the assets for which immunity is waived. In the absence of a specific waiver, courts may decline to attach such assets. For instance, in Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, the Lao government expressly waived immunity to attachment and execution in its arbitration agreement, but did not designate specific assets for attachment. When the award holder sought to attach the Lao Central Bank's assets, the English High Court found that the immunity over execution of the Bank's assets had not been waived.[2]

Under the second exception, sovereign immunity does not extend to State assets being used for a commercial purpose. What constitutes 'commercial' is defined by municipal law and varies across jurisdictions. However, it is generally determined by considering the current use of the asset (not its source or historical use). Further, while a profit-making motive is helpful to show commerciality, its absence is not dispositive. Applying these standards, activities such as sale and purchase of goods, real estate transactions, repayment of loans, corporate investments and employment contracts have been considered 'commercial', and funds used in those activities would not be immune. By contrast, assets used for governmental purposes, e.g., property used for diplomatic/consular purposes, distributions from international organizations such the World Bank and central bank reserves, have been considered 'sovereign' assets and, accordingly, are immune from execution.

1 On 1 September 2023, China adopted the Foreign State Immunity Law, which states that from 1 January 2024, foreign States can be sued in Chinese courts in certain cases.
2 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, [2013] EWHC 2466 (Comm).



Whose assets?

The next step is to identify whose assets can be attached. The pool of commercial assets directly owned by States is limited as States seldom engage in commercial activities in their own name. Rather, they do so through State-Owned Entities (SOEs), incorporated as independent entities.

In order to reach assets of the SOEs located abroad, award holders must (i) pierce the corporate veil between the State and the SOE; and (ii) identify commercial assets owned by the SOE that are not immune.

The legal test to pierce corporate veil is again a question of municipal law and varies across jurisdictions. Typically, a party must demonstrate either or both of the following tests: first, that the SOE is an alter ego of the State (which entails a high threshold); and second, that the SOE was used as an instrument to hide fraud, abuse rights or violate public order.

Applying this test, the US Court of Appeals allowed an award holder to attach assets of a Venezuelan state-owned oil company on the basis that the company was an alter ego of the State.[3] By contrast, the Quebec Court of Appeal recently vacated an attachment over funds of Air India (a State-owned airline) lying with the International Air Transport Association, which had been previously attached towards enforcement of an award against India.[4] Although the alter-ego test was met, the Court did not find any evidence that Air India was used as an instrument to perpetuate fraud, abuse rights or violate public order, which was a requirement under Canadian law.

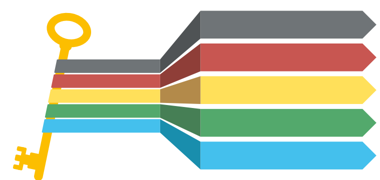
Locating and attaching assets

Given the challenges with attaching State assets, it is important for award-holders to identify commercial assets of the State as early as possible. A preliminary step is to engage asset tracing agencies which can assist in locating commercial assets of the State (using the current and historical use patterns), as well as their liquidity and location, for targeted enforcement efforts.

Similarly, judicial discovery tools are critical to any enforcement strategy in identifying and attaching assets. For example, an asset tracing report may lack details of which specific State entity owns the asset – without which it is difficult to apply for an order of attachment. Further, assets tracers usually do not disclose sources and therefore, the information collected by an asset tracer may not be admissible as evidence before a court. By contrast, judicial discovery tools allow award-holders to obtain updated and actionable information about assets located within and outside that jurisdiction which can then be used to seek immediate attachment.

While the scope of discovery tools may vary across jurisdictions, they will typically allow the award-holder to: (i) compel disclosure of information about the assets and their location from States and third parties (e.g., through ex-parte Norwich Pharmacal orders, if fraud is suspected); and (ii) seek post-award and pre-award attachment over such assets. Although less common, pre-award attachment is available in several jurisdictions if the applicant can show a risk of dissipation of assets.

Further, if State assets are available with third parties, turnover or garnishee orders can be used to compel such parties to deposit these assets with the court.



Key takeaways

While enforcement against sovereign debtors has its unique challenges, parties can benefit by adopting certain best practices.

At the outset, at the stage of contracting, parties should negotiate waivers of jurisdictional and sovereign immunity in their contracts with States. As discussed above, these waivers should ideally be express, separate for jurisdictional and execution immunity, and specify assets for which enforcement immunity is waived. For this, it may be necessary to conduct preliminary due diligence on sovereign assets. Parties should also consider structuring their investments to take advantage of protections under the bilateral investment treaties with the host States – which can give them a remedy under the treaty, in parallel to any contractual remedies.

Once a dispute arises and before the award is rendered, parties should consider undertaking extensive due diligence on sovereign assets. If this exercise is delayed until after the award is issued, there is a risk that the State may dissipate assets or shift commercial assets to other governmental purposes to protect them from attachment before the award is rendered. Early due diligence will also help gather evidence for seeking immediate attachment once the award is issued, as well as tracking dissipation of assets in case the State takes steps to dissipate before the award is issued. Any evidence of dissipation could in turn prove vital in attachment proceedings.

Once the award is issued, parties must take immediate steps towards attachment of assets. The choice of enforcement jurisdiction should be determined after considering the location of assets as well as the relevant municipal law (including local rules on service, discovery, attachment and sovereign immunity). Even if the value of the attached assets is not sufficient to fully satisfy the award, the subsequent publicity and political pressure may create sufficient pressure to compel States to negotiate a favourable settlement. This can be further incentivised by asserting diplomatic pressure through the party's home State. Lastly, parties may also consider monetising the award through alternative means, such as through sale of rights in the award or by obtaining funding for enforcement proceedings.

3 Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, 932 F.3d 126, 149–151 (3d Cir. 2019), cert. denied, 140 S. Ct. 2762 (2020).

4 Air India, Ltd v. C. CC/Devas (Mauritius) Ltd., 2022 QCCA 1264; We understand that this judgment has been suspended pending an appeal to the Supreme Court of Canada, see Air India Ltd. v. C. CC/Devas (Mauritius) Ltd., 2022 QCCA 1439.

THE ICSID ENFORCEMENT ARCHITECTURE AND COMPLIANCE WITH THE INTERNATIONAL COMMITMENTS ASSUMED BY THE US UNDER THE ICSID CONVENTION AT STAKE BEFORE THE USCA D.C. CIRCUIT

AN OCCAM'S RAZOR LOOK AT THE PENDING APPEALS IN NEXT-ERA AND 9REN

Authored by: Alberto Fortún (Partner) and Borja Álvarez[1] (Senior Associate) - Cuatrecasas

The protracted story of ICSID (ECT) awards brought for enforcement to the D.C. Circuit in the US is well known. After withstanding for several years unwarranted stays of enforcement (where the competent ICSID ad hoc committees had previously lifted the provisional stays of enforcement) based on the "inherent powers" doctrine,[2] a long line of ICSID award creditors are now closely scrutinizing the docket of the United States Court of Appeals ("USCA") for the D.C. Cir. for news on the appeals of the enforcement cases of 9REN and NextEra.

Spain filed the notices of appeal back in March 2023 and, fast-forward in these consolidated cases, the final briefs were submitted simultaneously on 10 August 2023 by the respective counsel of record. The dispute has received significant attention from stakeholders and numerous amici curiae have been filed, among others, by the European Commission, the Chamber of Commerce of the US, the Kingdom of The Netherlands and also by highly reputed international law commentators, including Profs. C. Schreuer, L. Mistelis, C. von Wobeser, or C. Tietje (to name just a few). Oral arguments are expected to take place in the following months and current estimates are that the USCA decisions on appeal may come to light during the Q1 of 2024.

Unpacking the apparent complexities of the case (application of Occam's razor principle): the question at stake is whether an ICSID award holder can establish jurisdiction in an ICSID Contracting State to enforce an ICSID award. The answer ought to be: Yes, undoubtedly.

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2 See per omnes the stays granted in August 2019 in connection with the Antin enforcement (D.D.C., case 1:18-cv-01753-EGS-MAU); or in June 2021 in connection with the InfraRed enforcement (D.D.C., case 1:20-cv-00817-JDB). Both cases are currently stayed pending the appeals in 9REN and NextEra.

The appeals currently pending before the USCA D.C. Cir touch upon many relevant facets of the law of enforcement of investor-state decisions. Tons of pages will surely be published in the following months as to the position taken by D.C. courts in connection with this wave of ICSID awards rendered in intra-EU ECT disputes after the CJEU decisions in Achmea, Komstroy and PL Holdings. In February 2023, the US District Court for the D.C. (J. Tanya Chutkan) dismissed Spain's motions to dismiss for lack of jurisdiction in both 9REN and NextEra, and those orders are the subject of Spain's current appeals.[3] The cases are likely to go up all the way to the US Supreme Court, so more chapters of this series will be unveiled.

Spain asks the USCA D.C. Cir. to reverse judge Chutkan's decision that grounded its jurisdiction over Spain on the "arbitration exception" of the US Foreign Sovereign Immunities Act ("FSIA"). The District Court held, in essence, that under the D.C. Cir. precedents of Stileks and Chevron, the "assertion that a party lacked a legal basis to enter an arbitration agreement is not a challenge to the jurisdictional fact of that agreement's existence but rather a challenge to that agreement's arbitrability." Spain's jurisdictional defense is to be treated as a question of arbitrability (an issue pertaining to the award's merits) and "Spain thus cannot deploy that argument here as a backdoor challenge to FSIA jurisdiction."[4] While the reasoning and holding of the court correctly distinguishes the issues of "existence" and "scope" ("arbitrability", for US arbitration practitioners) of the arbitration agreement, among the highly relevant issues present in this dispute, there is yet one that goes to the core of the architecture of the ICSID adjudication and simplified enforcement mechanism put in place back in 1965 in the Washington Convention. We suggest that US courts may find a much more clear-cut response to the question at stake in these disputes.

Establishing jurisdiction by an ICSID award-creditor to enforce its award before the courts of an ICSID Contracting State should pose no difficult or burdensome barrier and this legal matter ought to receive a straightforward response from US courts: by acceding the ICSID Convention and becoming an ICSID Contracting State, Spain effectively waived its sovereign jurisdictional immunity vis-à-vis all ICSID Contracting States in connection with enforcement claims of ICSID awards. Leading international commentators have underscored the erga omnes nature[5] of the obligation imposed on contracting states under Article 54(1) ICSID Convention ("Each Contracting State shall recognise an award rendered pursuant to this Convention and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.") and there is no other plausible reading of Articles 53-54 of the ICSID Convention.

It follows that the so-called "waiver exception" under the FSIA applies and D.C. courts hold jurisdiction[6] over Spain. Having established jurisdiction, the rest of the case is quite straightforward under the "US Enabling Statute" (22 U.S.C. § 1650a). Spain's last-resort "forum non conveniens" and "comity" defensive arguments are, in our view, hardly convincing.

Investors are asking US courts to act as directly mandated under the ICSID Convention, the FSIA and the US Enabling Statute. A clear-cut syllogism helps understand the matter:

Premise A: The FSIA gives US federal courts jurisdiction over a civil action against a foreign sovereign that has "waived its [jurisdictional] immunity either explicitly or by implication" (22 U.S.C. § 1605(a)(1)).

Premise B: By ratifying the ICSID Convention (Articles 53-54 thereof), Spain waived its immunity to be named defendant in cases brought before the courts of other ICSID Contracting States seeking enforcement of ICSID awards.

Conclusion: The Court holds jurisdiction over Spain under the FSIA.

Premise A admits very little discussion. While Spain appears to rely on the general proposition that implied waivers are to be construed narrowly, the D.C. Cir. has held that it is sufficient that the state indicate its "amenability" to suit in US courts.[7]

3 USCA D.C. Cir. decided to handle as related cases the cases of 9REN (#23-7031) and NextEra (#23-7032) as well as the Blasket case (#23-7038) where judge Leon, also of the D.D.C., declined jurisdiction under the FSIA). However, Blasket does not refer to an ICSID award but rather to an UNCITRAL award rendered in Switzerland. This brief comment focuses on the appeals related to the 9REN and NextEra ICSID awards.

4 9REN and NextEra Memorandum Opinions of 15 February 2023 (J. Tanya Chutkan), pp. 12-14 (NextEra), pp. 11-13 (9REN).

5 For a comprehensive review of commentaries, see USCA Cases #23-7031 and 23-7032, Amicus Curiae brief of international scholars in support of appelle and affirmance (6 July 2023), Section II (pp. 20-30).

6 We respectfully disagree with judge Chutkan's obiter reasoning in note 1 of the NextEra memorandum opinion of 15 February 2023 suggesting that the an existing arbitration agreement is also required under the "waiver exception." It is correct that Article 25 does not create per se an obligation to arbitrate investor-state disputes (said agreement was rather former formed upon Spain's standing and unconditional offer made in Article 26 of the ECT). However, Spain's waiver of its jurisdictional immunity in contemplation of enforcement actions brought in other ICSID Contracting States is not premised on Article 25 but on Article 54 of the ICSID Convention. This imposes an erga omnes obligation upon all ICSID Contracting States.

7 See Wye Oak Tech., Inc. v. Republic of Iraq, 24 F.4th 686, 697 (D.C. Cir. 2022).

Turning to Premise B (i.e., ICSID Contracting States waived their jurisdictional immunity before the courts of other ICSID Contracting States in connection with ICSID awards), as aptly explained in the appellee's final brief, "ICSID Convention member states did just that when they ratified a treaty specifically designed for enforcing arbitral awards against foreign sovereigns […]."[8] Undoubtedly, Spain contemplated the possibility of being named defendant in ICSID enforcement actions brought before the courts of another ICSID Contracting State, like US courts, which Spain unconditionally accepted (Article 54(1) ICSID Convention), hence, waiving its jurisdictional immunity in ICSID enforcement actions. This is precisely the holding of the 2nd Cir. in Blue Ridge v. Argentina[9] and the outcome reached worldwide by courts[10] of other ICSID Contracting States (including Spanish courts, which correctly applied the ICSID Convention and granted enforcement of the Pey Casado award against Chile[11]).

Moreover, and based on the same provision (Article 54(1) ICSID Convention), the US also undertook to honor its obligation to enforce the pecuniary obligations imposed by ICSID awards rendered under the ICSID Convention. As eloquently explained by the UK Supreme Court in the Micula v. Romania case, "failure of any Contracting State to enforce an award in accordance with Article 54 would undermine the Convention Scheme on which investors and Contracting States all rely."[12] In the same vein, the England & Wales High Court recently permitted the enforcement of the Antin ICSID award against Spain, and remarked that the "[EU law – related] difficulties in which Spain finds itself does not assist it here, given the United Kingdom's own treaty obligations under the ICSID Convention, which are owed to all signatories of the ICSID Convention."[13]

Blue Ridge in the US (and many other decisions rendered all over the world) reflect the correct reading of Articles 53-54 of the ICSID Convention (in our view, the only plausible one). By contrast, Spain's argument invites the US to breach its Article 54 ICSID obligations on grounds related to EU domestic law. Having failed in its claim for an implied ECT disconnection clause raised in the underlying ICSID arbitrations and annulment cases, Spain has "doubled down" on its bet and now invokes an intra-EU disconnection clause, which it adds right into the crux of the ICSID framework. It is hard to conceive of a more flagrant distortion of the ICSID enforcement mechanism, the same mechanism from which US, Spanish, Dutch ad Luxembourgish investors (among many other nationalities) have availed themselves when effectively enforcing ICSID awards in the courts of numerous ICSID Contracting States.

As to the implications of a contrary result (arguably, that enforcement jurisdiction in the US is not available to ICSID-award holders), we must concur with the views expressed by several amici curiae:

> ***If U.S. courts fail to apply rules of general application established in a multilateral treaty to some of the richest and most developed States party to that treaty, other States will foreseeably feel themselves less bound by the same rules. It would be difficult to resist the narrative that some of the largest capital-exporting economies refused to abide by the same reciprocal obligations that they expect other States to comply with […]. Other States would be encouraged to demand that they too be exempted from the enforcement of ICSID awards, ultimately eroding the effectiveness of the framework established by the ICSID Convention and the rule of international law.[14]***

Hopefully, the USCA D.C. Cir. will honor the international commitments assumed erga omnes by the US under the ICSID Convention (i.e., vis-à-vis other ICSID Contracting States). We will see how the appeals unfold.

8 USCA Cases #23-7031 and 23-7032, NextEra and 9REN Final brief (10 Aug. 2023), pp. 29-30.

9 See Blue Ridge Investments, L.L.C. v. Republic of Argentina, 735 F.3d 72 (2d Cir. 2013).

10 A complete reference may be found in the Amicus Curiae brief of international scholars in support of appelle and affirmance (6 July 2023), Section II.A (pp. 20-30).

11 See Order and Decree rendered on 6 March 2013 by the Court of Instance No. 101 of Madrid in the ICSID enforcement action Victor Pey Casado and President Allende Foundation v. Republic of Chile.

12 Micula and others v. Romania, [2020] UKSC 5, paras. 105-106.

13 Infrastructure Servs. Lux. S.a.r.l. v. Kingdom of Spain, [2023] EWHC 1226 (Comm) (U.K.), para. 80.

14 Amicus Curiae brief of international scholars in support of appelle and affirmance (6 July 2023), at p. 32.

FACILITATING ENFORCEMENT AGAINST STATES

A CASE FOR SERVICE BY ELECTRONIC MEANS

Authored by: Ruth Byrne KC (Partner), Charity Kirby (Senior Associate), and Liam Petch (Associate) - King & Spalding International

Enforcement of arbitral awards against states can be very difficult from the outset. One aspect of the difficulty that is often overlooked is the question of service. Taking England & Wales as an example, the service provisions set forth in section 12(1) of the State Immunity Act 1978 (the "SIA") remain "exclusive and mandatory",[1] meaning that service can only be affected by the Foreign, Commonwealth & Development Office ("FCDO") on the applicable Ministry of Foreign Affairs ("MFA").

As noted by Stephens JSC (dissenting) in General Dynamics v Libya, this means that a state who cannot, as a matter of practicality, be served, or who chooses to obstruct attempted service by diplomatic means (even where it has fully participated in the underlying arbitral proceedings) enjoys de facto immunity from the enforcement of arbitral awards.[2]

While state immunity principles rightly dictate deference by the English courts, a regime that permits any defaulting award debtor to delay or stifle enforcement efforts because of technical issues with service is obviously undesirable. Recent case law confirming the circumstances in which service of arbitral awards on states can be affected by the FCDO via electronic means may, however, provide some cause for optimism.

General Dynamics v Libya

In the leading case of General Dynamics v Libya, the Supreme Court held by a majority of 3:2 that when seeking to enforce an award against a state, either the arbitration claim form or the order giving permission to enforce must be served on the state by the FCDO. That was the case in spite of the FCDO advising that it was "not possible" and "too dangerous" to serve at the MFA in Libya.[3]

In reaching its decision, the Supreme Court was clear that "a defendant state, although aware of the arbitration award, will normally be unaware of the attempt to enforce the award against it in the jurisdiction in question until it is given notice of the proceedings and so, from its point of view the proceedings are only instituted against it once the order is served".[4]

Emphasising the doctrine of sovereign immunity, the Court held that it did not have the power to dispense with the strict service requirements set out in the SIA.[5] While political instability in Libya had prevented effective service in that case, the Court did not consider that a sufficient basis for impugning the system of service via diplomatic channels:

> *"The exceptional circumstances encountered in the present case cannot diminish the value of the rule as a means of protecting the interests of both parties and the United Kingdom as the forum state."[6]*

1 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶341A.
2 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, Dissenting Opinion of Stephens JSC, ¶109.
3 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶336C.
4 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶342F.
5 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶360H.
6 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶362E.

Although the clarity provided by the Supreme Court was arguably welcome, the reality is that General Dynamics may frustrate claimants seeking to enforce unpaid awards against States.

Service through diplomatic channels often takes months, and further delays in the enforcement of awards which frequently take years to obtain – and often in circumstances where the action of a State has decimated the claimant's business – is far from desirable. Further, as evidenced in General Dynamics, it seems that, if the FCDO is not able to serve on the relevant MFA, there is then no means of enforcement. While General Dynamics is a very recent authority, its impact lays at odds with the reality of communication methods in 2023.

European Union v Syria

One answer to this may be found in the recent High Court decision in European Union v Syria[7] in which the court declared that Syria had been validly served with documents instituting proceedings by way of an email sent by the FCDO to the Syrian MFA. As was the case in General Dynamics, the well-documented unrest in Syria had made service of hard copy documents by diplomatic means unrealistic.

While service on states via email itself is not a new concept, the Court's decision in EU v Syria is a helpful indication of how courts are likely to interpret the Supreme Court's guidance in General Dynamics moving forward. Of particular note, the Court highlighted that:

i. There is no prescription in section 12(1) SIA as to the method by which the FCDO transmission must take place;[8]

ii. The method of service employed by the FCDO must not be contrary to or prohibited by local law;[9]

iii. It was not relevant that service on a defendant in England and Wales by email is not permitted under the provisions of the CPR;[10]

iv. Given the Syrian MFA email address was sourced from its public website, the position was not "materially different from making a document drop-off facility available";[11]

v. Expert evidence indicated that service by email was not prohibited under Syrian law;[12]

vi. The FDCO received a read receipt and no mail delivery error or other bounce-back message indicating that its email was undeliverable.[13]

Where are we now?

While the Court's guidance that the FCDO may affect service on a respondent state via email is welcome, the question remains: when will it do so?

As noted by Lord Lloyd-Jones JSC in General Dynamics, in effecting service, "the FCDO will, no doubt, exercise its judgment, its expertise and its experience in deciding what may be attainable and the time and manner in which it may be attainable".[14] Yet, despite receiving an email read receipt in EU v Syria, the FCDO indicated that it would not be willing to provide a certificate of service as conclusive evidence that the claim documents had been served.[15] The point was not discussed in the judgment, but plainly the FCDO reached that decision notwithstanding the circumstances which made service of hard copy documents practically impossible. Perhaps the FCDO may be more willing to provide such a certificate in future, in the light of the Court's judgment in EU v Syria.

Any route ultimately taken by the FCDO should be pragmatic. If local law expert evidence provides that service via email or other means of electronic communication is not prohibited by domestic law, it seems only sensible that service be affected by those means. The benefits of doing so would extend far beyond those cases where political unrest or conflict results in hard copy service being made impossible. As noted above, hard copy service by diplomatic channels often causes months of delay. In contrast, email transmission is (as noted by the court in EU v Syria) practically instant. If the respondent state can be considered to have received the relevant claim documents "at the time it arrived by such electronic transmission",[16] that must address the Supreme Court's concerns that "the defendant state [must] receiv[e] notice of the proceedings against it so that it ha[s] adequate time and opportunity to respond to proceedings of whatever nature which affect[s] its interests".[17]

This is of course of no assistance to claimants seeking to enforce against States in which (i) service via email is unlawful; and (ii) service in hard copy to the MFA is practically impossible. While a full examination of potential solutions or reforms is beyond the scope of this article, clear authority, or indeed a change to the law, such that any method of service permitted or accepted by a respondent State in an underlying arbitration constitutes an "agreed" method for the purposes of section 12(6) SIA would be a significant step in the right direction. Either way, if service was commonly affected by email, the typical delays we see in enforcement against states could be reduced greatly. Such an approach would reflect modern life, while representing no undue incursion on the sovereignty of states.

7 European Union v Syria [2023] EWHC 1116 (Comm).
8 European Union v Syria [2023] EWHC 1116 (Comm), ¶28.
9 European Union v Syria [2023] EWHC 1116 (Comm), ¶29.
10 European Union v Syria [2023] EWHC 1116 (Comm), ¶36.
11 European Union v Syria [2023] EWHC 1116 (Comm), ¶36.
12 European Union v Syria [2023] EWHC 1116 (Comm), ¶41.
13 European Union v Syria [2023] EWHC 1116 (Comm), ¶¶39, 40.
14 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶339F and § 21(d) SIA 78.
15 European Union v Syria [2023] EWHC 1116 (Comm), ¶10.
16 European Union v Syria [2023] EWHC 1116 (Comm), ¶39.
17 General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, ¶352A.

U.S. ECONOMIC SANCTIONS IMPLICATIONS FOR SOVEREIGN DISPUTES

Authored by: Kian Meshkat (Of Counsel) - Ferrari & Associates

The expansive scope of United States economic sanctions programs—comprised of the laws and regulations administered by the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC")—can have a considerable impact on legal disputes involving a sovereign state or instrumentality targeted by U.S. sanctions, irrespective of the dispute's location or forum. When a U.S. sanctioned target is involved in a dispute, failure to adequately assess relevant sanctions risks, prohibitions, and available OFAC license authorizations related to your involvement can result in potential violations of applicable laws or invoke certain sanctions-related retaliatory measures. For example, legal counsel intending to represent the sanctioned target, or the party seeking to enforce a judgment entered in their favor, may be prohibited from doing so unless authorised by OFAC. Even a contractually stipulated arbitral tribunal can be targeted by OFAC sanctions, as illustrated by the August 11, 2023[1] designation of the Russian Union of Industrialists and Entrepreneurs, known as RSPP, that operates a Russian-based arbitration center. This article provides a high-level overview on the intersection of U.S. sanctions and sovereign disputes.

U.S. Sanctioned Sovereigns and Instrumentalities

Firstly, it is important to understand at the outset of a dispute whether any sanctioned target is involved in the dispute (as a party or otherwise). OFAC's sanctions programs impose full blocking sanctions not just on the governments of Iran, Venezuela, Cuba, North Korea, and Syria, but also any entity or individual that meets the corresponding regulations' broad definition of the "blocked government." In addition, certain countries and regions have been targeted by less comprehensive sanctions programs—e.g., Russia, Belarus, Crimea, Burma, and Afghanistan—where many state-owned or controlled entities and government officials are sanctioned and have been identified on OFAC's sanctions lists. Furthermore, in accordance with the so-called OFAC "50 Percent Rule," entities owned 50% or more, whether individually or in the aggregate, by a sanctioned person(s), can also be subject to the same sanctions authorities as the corresponding sanctioned person(s).

U.S. Sanctions Prohibitions and Risks

Secondly, all relevant U.S. legal implications stemming from the sanctioned targets involvement should be assessed. In general, OFAC sanctions programs' prohibitions and/or blocking requirements apply to U.S. persons, which include any U.S. citizen, permanent resident alien, entity organised under the laws of the U.S. (including foreign branches), or any person in the U.S.

Full blocking sanctions require all property interests of the target that are within the possession or control of U.S. persons to be blocked, and U.S. persons are prohibited from engaging in virtually any transactions with them.

1 See https://home.treasury.gov/news/press-releases/jy1690.

Furthermore, as the statutory basis for nearly all such programs is the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705, in most instances these prohibitions also extend to non-U.S. persons whose conduct "causes" a U.S. person to violate the relevant order or regulation, even indirectly. Numerous IEEPA-related enforcement actions have penalised non-U.S. businesses where their transaction with a sanctioned target caused such violations through an otherwise minimal nexus with the U.S. (i.e., "U.S. nexus"). In many instances,[2] this occurs where the underlying payments made between two foreign banks for a commercial transaction involving a sanctioned target is processed by a U.S. financial institution.

There are also so-called "secondary" sanctions considerations for non-U.S. persons who intend on dealing with a sanctioned target, even where the underlying conduct isn't prohibited (i.e., no U.S. nexus is present). Numerous U.S. sanctions laws authorise the imposition of full blocking sanctions and/or less restrictive measures by the U.S. government on persons who engage in certain specified conduct, based on an evaluation of a range of factors consistent with U.S. foreign policy and national security interests. For example, Section 1(a)(vii) of E.O. 14024 authorises the U.S. government to impose full blocking sanctions on any person determined "…to have acted or purported to act for or on behalf of, directly or indirectly, the Government of the Russian Federation or any persons [blocked under that Order]…"

OFAC License Authorization

Finally, where OFAC sanctions programs' prohibitions or so-called "secondary" sanctions risks would be invoked, the next step prior to proceeding is determining whether any applicable OFAC licenses are available. OFAC issues "general" and "specific" licenses, where the former is publicly available and self-executing for specified transactions that would otherwise be prohibited. For prohibited transactions with no available general license or statutory exemptions, concerned parties will need to submit a written application to OFAC requesting a specific license, which the agency may grant at its discretion. If there is no U.S. nexus in the intended transaction involving a sanctioned target (i.e., it wouldn't be legally prohibited), but "secondary" sanctions risks are present, historically speaking OFAC's published guidance has indicated that non-U.S. persons do not risk such sanctions exposure where the transaction would be generally licensed or exempt if engaged in by a U.S. person. See e.g., OFAC's FAQ #980.[3]

Examples of instances where OFAC license authorization may be required in disputes involving sanctioned sovereigns or their instrumentalities include:

(1) Legal representation by counsel of a sanctioned target, and receipt of payment for legal services; or

(2) Entering into a settlement agreement or enforcement of a judgment/ arbitral award.

Legal and Other Dispute Related Services

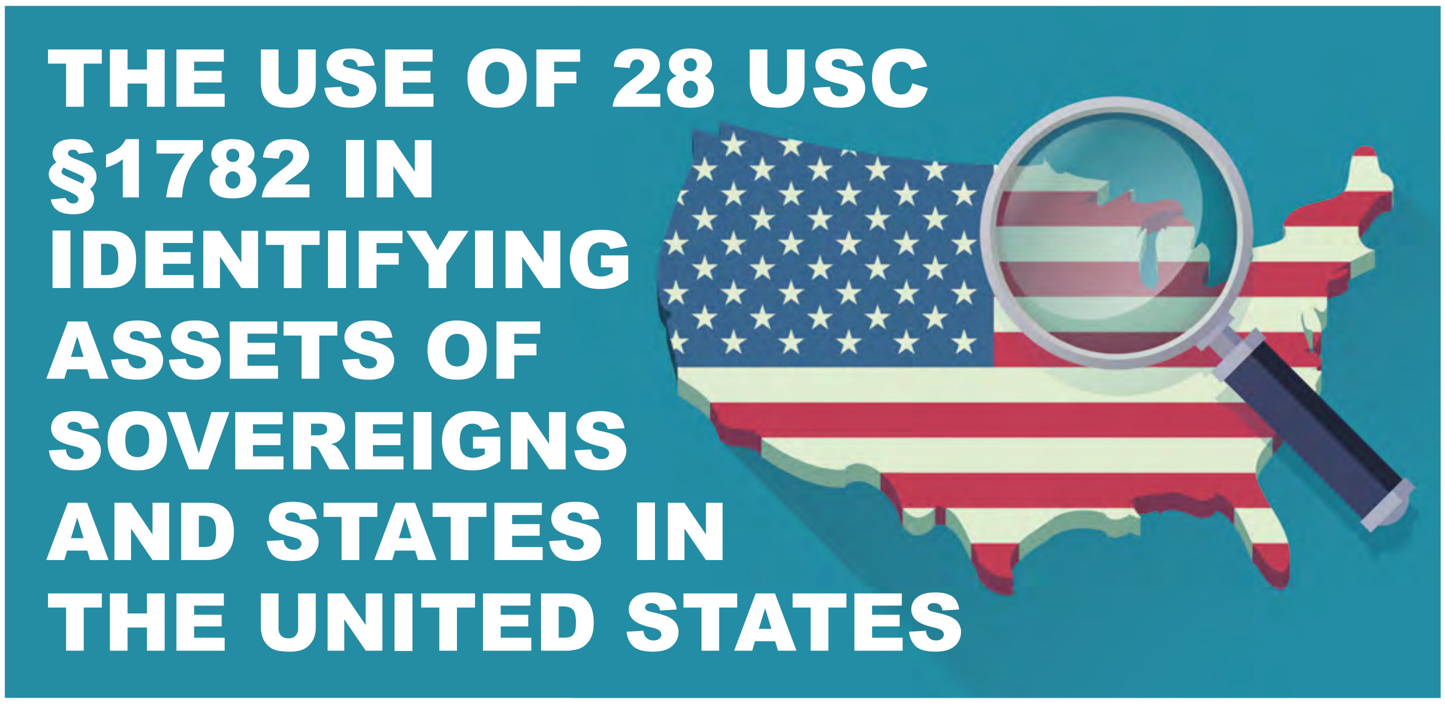
Legal counsel and other third-party service providers for sovereign disputes should resolve any OFAC licensing issues prior to being engaged. Many OFAC sanctions programs provide a general license for the provision of certain categories of legal services to, and payment from, sanctioned targets, including but not limited to representation of persons named as defendants in legal, arbitration, or administrative proceedings before any U.S. federal court or agency. See e.g., 31 C.F.R. § 591.506. To a lesser extent, the scope of such available general licenses also specifically covers related services such as private investigators or expert witnesses.

Settlement Agreements and Judgment Enforcement

OFAC regulations generally prohibit entering into a settlement agreement or the enforcement of any judgments or arbitral awards through execution, garnishment, or other judicial process, against blocked property. See e.g., 31 C.F.R. § 515.203(e). This would include settlement agreements involving a blocked sovereign, or attempts to remove its sovereign immunity from attachment or execution before U.S. courts pursuant to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605 (e.g., the FSIA's commercial activity). However, even in several cases where the Government of Venezuela attempted to use such regulations to its advantage, arguing that the entry or enforcement of a judgment would be in violation of applicable OFAC prohibitions, it has been unsuccessful. See e.g., Koch Minerals Sàrl v. Venezuela., 514 F. Supp. 3d 20 (D.D.C. 2020). Instead, courts have interpreted their ability to determine the parties' rights and obligations regarding blocked property under OFAC regulations to be unencumbered, while noting that the plaintiff would still have to obtain an OFAC license prior to satisfying any judgment that a court may issue.

2 See https://ofac.treasury.gov/media/917606/download?inline.
3 See https://ofac.treasury.gov/faqs/980.

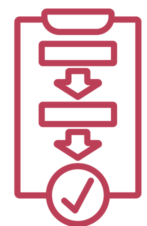
THE USE OF 28 USC §1782 IN IDENTIFYING ASSETS OF SOVEREIGNS AND STATES IN THE UNITED STATES



Authored by: Daniel Rubel (Partner) - Zeichner Ellman & Krause

Introduction

28 USC §1782 (“1782”) is a US statutory mechanism that provides litigants outside of the US an opportunity to access broad US discovery through document production and eliciting testimony from a third-party witness via a deposition. It is a very effective weapon that can be utilised to locate a sovereign’s assets.



Requirements and Procedure for 1782 Application

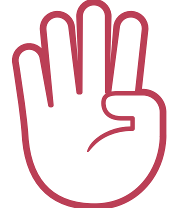
The applicant must demonstrate that it can satisfy three requirements in order for the court to grant the 1782 application.

(1) The person from whom discovery is sought must reside or be found within the US court’s district;

(2) The discovery must be for use in a foreign proceeding before a foreign tribunal; and

(3) The application must be made by an interested person (i.e., a party to the foreign proceeding).

The 1782 application can be filed ex parte in the US federal court for permission to subpoena a third party located in the US, which often leads to more expedited decisions. The US Court has discretion to grant or deny the application, or, in some circumstances, provide notice to the party being served with the subpoena, which can give the third party an opportunity to oppose the application.



Four Discretionary Factors

In 2004, the US Supreme Court, in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264-65, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004), established four discretionary factors that the court should analyze when considering a 1782 application:

(1) Whether the evidence sought is within the foreign tribunal’s jurisdictional reach, and thus accessible absent 1782 aid (i.e. whether the party based in the US holding the information sought is a party to the foreign proceeding);

(2) The nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to US federal court judicial assistance;

(3) Whether the request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the US; and

(4) Whether the subpoena contains unduly intrusive or burdensome requests.

Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C.S. §§ 1330, 1602, is a statutory framework for resolving any claim of immunity, and any sort of immunity defense raised by a foreign sovereign in a US court. The FSIA applies to a foreign sovereign, or its agency or instrumentality. See 28 U.S.C.S. § 1603(b)(2).

The FSIA is the sole basis for obtaining jurisdiction over a foreign state in the US courts. Under the FSIA, a foreign sovereign and its instrumentalities are immune from suit in the US courts unless a specific statutorily defined exception applies. Absent such an exception, the immunity conferred by the FSIA strips courts of both subject matter and personal jurisdiction over the foreign state. The FSIA permits courts to exercise jurisdiction over foreign sovereigns in any case in which the foreign state has waived its immunity either explicitly or by implication in an unambiguous or unmistakable matter. The US Courts have determined that a sovereign cannot assert immunity in a 1782 proceeding.

Relationship Between FSIA and 1782

Republic of Argentina v. NML Capital, 573 U.S. 134 (2014)

The US Supreme Court held that the FSIA does not immunise a foreign country debtor from post judgment discovery of information about the location of its extraterritorial assets. This case involved an application for issuances of subpoenas to third-party US banks, in order to identify Argentinian assets that may have been subject to the execution of a judgment. The Supreme Court found that the FSIA sets forth two types of immunity for foreign sovereigns: (1) the immunity of foreign sovereigns from the jurisdiction of US courts; and (2) the immunity of a foreign state's property in the US, under certain circumstances, from attachment, arrest and execution. There is no provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets, to locate assets of the sovereign. The Court held that to the extent that the sovereign expresses concern that the subpoenas will reveal sensitive information, it is asserting a claim of privilege, and not a claim of immunity.

Mare Shipping Inc. v. Squire Sanders (US) LLP, 574 Fed. Appx. 6 (2d Cir 2014)

The Second Circuit, in relying on Republic of Argentina, found that in the context of a 1782 application filed to obtain information held by a third-party law firm relating to a sovereign, the sovereign could not assert the FSIA as a defense to withhold discovery.

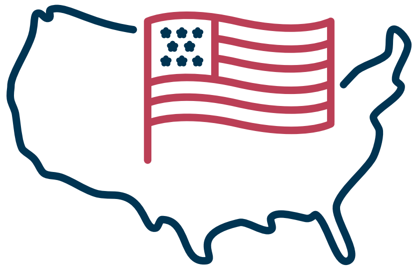
Jacubovich v. Israel, 816 Fed. Appx. 505 (2d Cir. 2020)

The Second Circuit rejected the argument that Israel implicitly waived its foreign sovereign immunity in this action because it submitted to a separate 1782 proceeding in connection with a related criminal action. The Court found that Israel's participation in the 1782 action did not meet any of the three examples which would constitute a waiver of FSIA: (1) "where a foreign state has agreed to arbitration in another country;" (2) "where a foreign state has agreed that the law of a particular country should govern a contract;" and (3) "where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity."

The Court held that conduct short of a responsive pleading is insufficient to meet this stringent waiver standard of the FSIA, and participation in 1782 discovery, in no way, evidences an intent of waiver. Moreover, the Court found that a determination that such an act constituted a waiver would undermine 1782's "twin aims:" to "provid[e] efficient means of assistance to participants in international litigation in our federal courts" and to "encourag[e] foreign countries by example to provide similar means of assistance to our courts."

Conclusion

1782 can be critical in utilizing the extensive US discovery regime in locating and identifying a sovereign's assets. Courts don't apply sovereign immunity afforded under the FSIA to discovery requests or proceedings, including 1782 proceedings. By participating in a 1782 proceeding, a sovereign doesn't waive its immunity under FSIA, which encourages a sovereign's cooperation in a 1782 action. The broad US discovery available under 1782 can therefore be fully utilised to identify information concerning the location of a sovereign's assets which is possessed by a sovereign with a presence in the US, or a US third party, such as a bank, or service providers like accountants or law firms.



ENFORCEMENT IN THE UNITED STATES AGAINST ALTER EGOS OF FOREIGN SOVEREIGNS

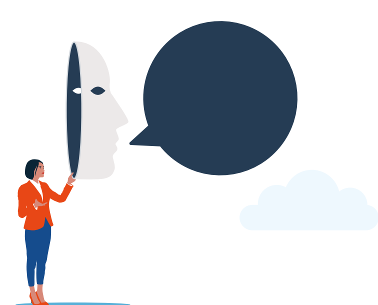
DEVELOPMENTS ON THE VENEZUELA FRONT

Authored by: Alexander Yanos (Partner), Apoorva Patel (Counsel), and Robert Poole (Senior Associate) - Alston & Bird

Introduction

In the United States, when creditors seek to collect on a judgment or award rendered against a sovereign state, instrumentalities of that state are presumptively off limits for enforcement. But, as with most rules, there are exceptions. For example, where the state so extensively controls an instrumentality as to render it an alter ego, or if corporate formalities of an instrumentality are being abused to perpetrate a fraud or similar injustice, courts will disregard corporate formalities for purposes of enforcement.

Currently, the alter ego concept is at the forefront of high-profile ongoing litigation in the federal District Court for the District of Delaware. In Delaware, creditors of the Bolivarian Republic of Venezuela ("Venezuela") are seeking to attach the assets of its national oil company, Petróleos de Venezuela, S.A. ("PDVSA"). This article presents developments in those efforts and offers insights on a federal appellate court's recent approach to the alter ego question in that case.



The Crystallex Proceedings

In 2018, Crystallex International Corporation proved in Delaware District Court that PDVSA was the alter ego of Venezuela, rendering the oil company's United States assets vulnerable to enforcement in relation to Venezuela's debts. Crystallex showed that Venezuela used PDVSA's assets as its own and directed PDVSA to take certain actions to further the government's political ends. That finding opened the door for Crystallex to: (a) attach PDVSA's shares in its United States subsidiary, Petróleos de Venezuela Holding, Inc. ("PDVH"), which in turn is the ultimate owner of CITGO Petroleum Corporation; and (b) commence proceedings that could potentially lead to an auction of PDVSA's shares in PDVH.

Following the 2018 Crystallex decision, other creditors commenced proceedings seeking to attach PDVSA's assets in Delaware to recoup their own judgments against Venezuela and

PDVSA. However, in January 2019, the United States Government withdrew its recognition of the government organised by Nicolás Maduro, (then and now, the de facto President of Venezuela), and instead recognised a government organised by Juan Guaidó as the only legitimate government of Venezuela. In part because of this change, the Delaware District Court refused to give its 2018 decision in the Crystallex case the effect of collateral estoppel, and instead required the new creditors to again prove the alter ego relationship between Venezuela and PDVSA based on the new circumstances concerning the recognised government of Venezuela.

Later, the court would clarify that the "pertinent time" for analyzing the alter ego relationship is "the period between the filing of the motion seeking a writ of attachment and the subsequent issuance and service of that writ."

The court, in so holding, made clear that it would not look at Venezuela's relationship with PDVSA as of the date Venezuela's debt accrued. Nor would the court look solely at the date of the application for an attachment (many applications had been filed before the United States recognised the Guaidó presidency). The creditors had to account for all facts regarding PDVSA and Venezuela as they developed between filing their motions for writs of attachment and the eventual order resolving those motions. As a result, some creditors filed new attachment motions with evidence that PDVSA and Venezuela remained alter egos after 2019—even under the Guaidó administration.

Ultimately, in March 2023, as discussed further below, the post-Crystallex creditors succeeded in establishing that PDVSA remained the alter ego of Venezuela in a case called in OI European Group B.V. v. Bolivarian Republic of Venezuela ("OIEG"). A federal appellate court—the US Court of Appeals for the Third Circuit—affirmed that finding in July 2023. This ruling has greatly expanded the list of creditors seeking to participate in the auction of PDVSA's shares in PDVH.

The Standard For Determining An Alter Ego Relationship Between Foreign Sovereigns And Foreign State Instrumentalities In The US Federal Courts

The alter ego analysis is not laid out by statute, but by federal common law. Specifically, the United States Supreme Court's 1983 decision in First National City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec") is a key decision governing whether a state instrumentality is the alter ego of a foreign sovereign. In that case, Cuba established Bancec as a state-owned credit institution for foreign trade. Bancec sought to collect on a letter of credit issued by Citibank, and just days later, the Cuban government nationalised and seized Citibank's assets in Cuba and dissolved Bancec. Citibank counterclaimed in Bancec's suit on the letter of credit in US District Court. Ultimately, the Supreme Court held that because Bancec was Cuba's alter ego, Citibank could offset Bancec's claim against it with the value of its assets that Cuba had seized.

The Supreme Court applied principles of equity in deciding not to give effect to Bancec's separate juridical status. The Court refused to apply the law of the state that established the government instrumentality (here Cuba) because doing so "would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts." And while the Court recognised a presumption that the separate legal personality established by a foreign sovereign should typically be respected, the Court "decline[d] to adhere blindly to the corporate form where doing so would cause … an injustice."

Notably, the Supreme Court did not set out any "mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality should be disregarded." The Court emphasised that its conclusion that Bancec was Cuba's alter ego was "[i] nstead … the product of the application of internationally recognised equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law."

More recently, in its 2018 decision in Rubin v. Islamic Republic of Iran, the Supreme Court distilled Bancec's equitable analysis into several factors to aid the assessment of whether a state instrumentality is the alter ego of a foreign government for purposes of permitting joint enforcement of the foreign state's legal obligations.

These factors include:

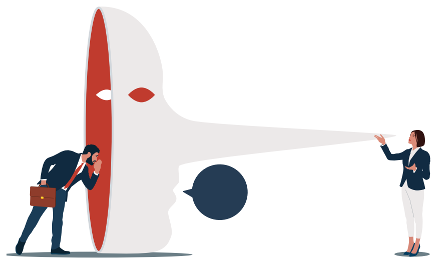
(1) the level of economic control by the government;

(2) whether the entity's profits go to the government,

(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and

(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations."



The Appellate Court's 2023 Alter Ego Decision Affirming PDVSA's Alter Ego Status

In its March 2023 decision in OIEG, the Delaware District Court applied the Rubin factors to find that PDVSA remained the alter ego of Venezuela. The District Court found that an alter ego relationship existed, irrespective of whether one analyzed the question in

terms of the relationship of the Guaidó government to PDVSA, the Maduro government to PDVSA, or both.

Inherently, the facts supporting the alter ego analysis for each regime differed slightly. Mr. Guaidó exerted control only over PDVSA's assets in the territories outside of Venezuela that recognised his government. Mr. Maduro, on the other hand, maintained control over PDVSA's assets within Venezuela. When considering the Maduro regime's control over PDVSA, the District Court found that Mr. Maduro had done little to change the conduct supporting the court's 2018 alter ego decision. With respect to the Guaidó government, the District Court found that Mr. Guaidó exerted extensive control over PDVSA within the United States—including using PDVSA's corporate assets to fund his government.

In affirming the District Court's decision in July 2023, the Third Circuit came to two notable conclusions regarding the alter ego analysis:

First, it determined that the actions of the Guaidó and Maduro governments, combined, represented the totality of Venezuela's sovereign relationship to PDVSA. The Third Circuit found that "the relevant 'government' in a Bancec analysis is the foreign country's sovereign, which transcends any administrator," and that a "sovereign" does not change even in the transition of the form and administration of its government.

Second, the Third Circuit clarified the relevant timeframe for examining Venezuela's actions for purposes of the alter ego analysis, concluding that courts "should consider all relevant facts up to the time of the service of the writ of attachment." The Third Circuit explained that this approach avoids "unnecessarily leav[ing] room for manipulation." In this regard, the court drew guidance from the Supreme Court's charge in Bancec that the alter ego analysis should apply equitable principles to avoid fraud or injustice. Specifically, the Third Circuit expressed concern that limiting the factual examination only to "how a state acts after learning that its actions surrounding an instrumentality are under scrutiny" would invite fraud or injustice. For example, a state could "quickly scale back oversight, announce laudable (but long-away) reforms, [and] pass promises of new corporate independence … All while its practices dating back to the injury show an alter ego relationship." Similarly, the Third Court considered that limiting the alter ego inquiry to the time of injury was also inadequate, as "a state determined to avoid creditors might simply drop vulnerable assets into a new instrumentality and thus create juridical entities whenever the need arises."

Conclusion

While the efforts of Venezuela's creditors to seize shares of PDV Holding continue, the Third Circuit's decision in OIEG offers important lessons for creditors pursuing enforcement actions in US courts against foreign state instrumentalities to satisfy a sovereign's liabilities.

The decision reflects the wide latitude accorded to judges under the equitable framework the Supreme Court articulated in Bancec.

Courts should engage in a flexible alter ego analysis that properly takes into account the specific circumstances of each case. Indeed, plaintiff-creditors should take note of the Third Circuit's temporal framework for the alter ego analysis in evaluating changes in a state's relationship with its instrumentalities from the time of injury to the present.

THE IDENTIFICATION OF GENERALLY RECOGNISED RULES OF INTERNATIONAL LAW ON STATE IMMUNITY BY THE EUROPEAN COURT OF HUMAN RIGHTS

Authored by: Julie Bastien (Lawyer) - Bonifassi Avocats

How does the European Court of Human Rights articulate the rights guaranteed by Article 6§1 of the European Convention on Human Rights and the rules of State immunity which bind the States Parties to the Convention?

In its assessment of the legality of a restriction of the right to a court, as guaranteed by Article 6§1 of the European Convention on Human Rights (hereinafter "the Convention"), and more particularly of the right to the enforcement of a 'judgment' , the European Court of Human Rights (hereinafter "the Court" or "the ECtHR") has to determine whether the restriction pursues a legitimate aim and is proportionate.

> ***The ECtHR considers that the grant of immunity to a State in civil proceedings "pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty".[1]***

Moreover, the Court has consistently ruled that a measure adopted by a State which "reflect[s] generally recognised rules of public international law on State immunity cannot be regarded in principle as imposing a disproportionate restriction to the right of access to a court".[2]

In this context, when a case concerning a restriction to the right to access to a court on the ground of the State's compliance with the rules related to State immunity is referred to the Court, the latter determines what constitutes the generally recognised rules of international law relating to the grant of State immunity and whether the restriction applied by the State is provided for by these rules.[3]

1 ECtHR (Grand Chamber), 23 March 2010, Cudak v. Lithuania, 15869/02, §60; see also ECtHR (Decision), 27 January 2022, Association des victimes du Joola v. France, 21119/19, §26.

2 ECtHR (Grand Chamber), 21 November 2001, Fogarty v. United Kingdom, 37112/97, §36.

3 See for instance ECtHR (decision), 12 December 2002, Kalogeropoulou and others v. Greece and Germany, 59021/00.

For instance, in the case Kalogeropoulou and others v. Greece and Germany, the Court ruled that it did not "find it established […] that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity." The ECtHR nevertheless noted that this observation "[did] not preclude a development in customary international law in the future".[4]

In another case, the Court ruled that it was "not aware of any trend in international law towards a relaxation of the rule that foreign States are immune from execution in respect of their property serving as the premises of consular or diplomatic mission in the forum State."[5]

In these two cases, the Court concluded that there had been no violation of Article 6§1 of the Convention by the State.

In its attempts to identify the generally recognised rules of international law related to State immunity, the Court had to rule on the binding value of the provisions of the United Nations Convention on Jurisdictional Immunities of States and their Properties of 2004.

The Court's case-law has mainly developed around immunity from jurisdiction and more particularly in cases relating to employment contracts with the State, which are covered by Article 11 of the 2004 Convention. In cases concerning Lithuania and France, the Grand Chamber of the ECtHR considered that Article 11 of the International Law Commission Draft Articles of 1991, on which Article 11 of the 2004 Convention was based, constituted customary international law, with regard to the following elements:

"The report appended to the 1991 Draft Articles stated that the rules formulated in Article 11 appeared to be consistent with the emerging trend in the legislative and treaty practice of a growing number of States (ILC Yearbook, 1991, Vol. II, Part 2, p. 44, paragraph 14). This must also hold true for the 2004 United Nations Convention. Furthermore, it is a well-established principle of international law that, even if a State has not ratified a treaty, it may be bound by one of its provisions in so far as that provision reflects customary international law, either "codifying" it or forming a new customary rule (see the judgment of the International Court of Justice in the North Sea Continental Shelf cases, ICJ Reports 1969, p. 41, § 71). Moreover, there were no particular objections by States to the wording of Article 11 of the ILC's Draft Articles, at least not by the respondent State. As to the 2004 United Nations Convention, Lithuania has admittedly not ratified it but did not vote against its adoption either."[6]

The Court's reasoning was not met with unanimous approval and some criticism has been raised with regard to the Court's conclusion that Article 11 of the 2004 Convention had to be regarded as customary international law.[7] In a recent case, the ECtHR acknowledged the divergences of views on the content of customary law but considered that, in the case referred to it, the Court did not have to resolve this issue.[8]

So far, the Court has not ruled on the value of other provisions of the 2004 Convention.

Yet, a case has been referred to the Court about immunity from enforcement. In the framework of this case, the ECtHR should soon assess whether the obligation to obtain a prior judiciary authorisation to be able to implement a compulsory enforcement measure against the assets of a central bank reflects generally recognised rules of international law on State immunity, and consequently assess whether it is a proportionate restriction to the right to a court. The ECtHR could thus rule on the binding value of Article 19 of the 2004 Convention.[9] This judgment could have consequences on the ability of central banks' assets to be seized in France and in other jurisdictions where such prior authorisation is requested.

Thus, the ECtHR's case-law regarding the assessment of the binding value of the provisions of the 2004 Convention and more generally regarding the identification of generally recognised rules of international law on State immunity could yet be subject to evolutions, notably in the area of immunity from enforcement.

4 ECtHR (decision), 12 December 2002, Kalogeropoulou and others v. Greece and Germany, 59021/00.
5 ECtHR (decision), 3 March 2005, Manoilescu and Dobrescu v. Romania and Russia, 60861/00.
6 Ibid, §66. See also ECtHR (Grand Chamber), 29 June 2011, Sabeh El Leil v. France, 34869/05, §§57-58.
7 See for instance UK Supreme Court, 18 October 2017, Benkarbouche v. Secretary of State for Foreign and Commonwealth Affairs, §29.
8 ECtHR, 5 April 2022, Benkarbouche and Janah v. The United Kingdom, 19059/18 and 19725/18, §64.
9 Case communicated to the ECtHR on 23 May 2022, Novoparc Healthcare International Limited v. France, 33015/18 (Bonifassi Avocats assists the claimant in this case).

WHEN RECOVERING AGAINST A SOVEREIGN, KNOW YOUR OPPONENT

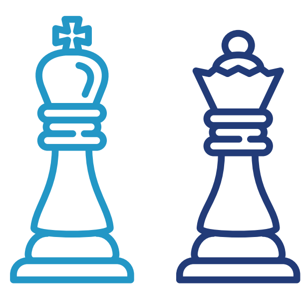
Authored by: Ashley Messick (Managing Director) - J.S. Held

This year, my friend was invited to participate in a poker tournament in Las Vegas. Knowing nothing about poker, she hired a professional player to teach her. Over several evenings, he trained her and taught the rest of us in attendance. My big takeaway from these gatherings was that while there certainly is significant skill involved, what sets the real professionals apart is their ability to read their opponents.

Identifying tells, recognising patterns in behaviour, and the ability to profile your opponent makes for better decision-making and an increased chance for success. The same applies for asset recovery – particularly when you are dealing with a sovereign.

For every sovereign recovery assignment, it is important to take a two-pronged approach. On one hand you must identify and map out the sovereign's assets, the structures (and complexities) through which they are held, their value, and location. This global view allows one to subsequently assess enforcement prospects, associated costs, and the likely timing against each asset and begin to build a recovery strategy. That is, however, only half of the process and will only get award holders so far. Equally – if not more important – is being able to read one's opponent (i.e., the State). Alongside the asset tracing work, it is critical to understand the political landscape; who are the key decisionmakers and what makes them tick? How are certain events like elections or a big push to attract foreign direct investment likely to play out? Which state companies, projects, or assets are near and dear to the government or critical to the economy? Where is the State exposed?

All of these are essential questions that must be answered if you want to bring the State to the negotiating table; and this is always the objective. Who wants to undergo the slow and costly process of enforcing an award piecemeal across multiple jurisdictions? Once you know the political landscape, you can then truly start building a comprehensive and holistic recovery strategy.



For all those lawyers reading this, enforcement and asset seizure is only one weapon in your arsenal. A comprehensive strategy, especially when dealing with a large award, encompasses more than enforcement. Strategic communications and lobbying can be equally important tools as is looking for back channels and avenues to maintain a dialogue with the State. To be effective and to use these tools properly, you must know your opponent.

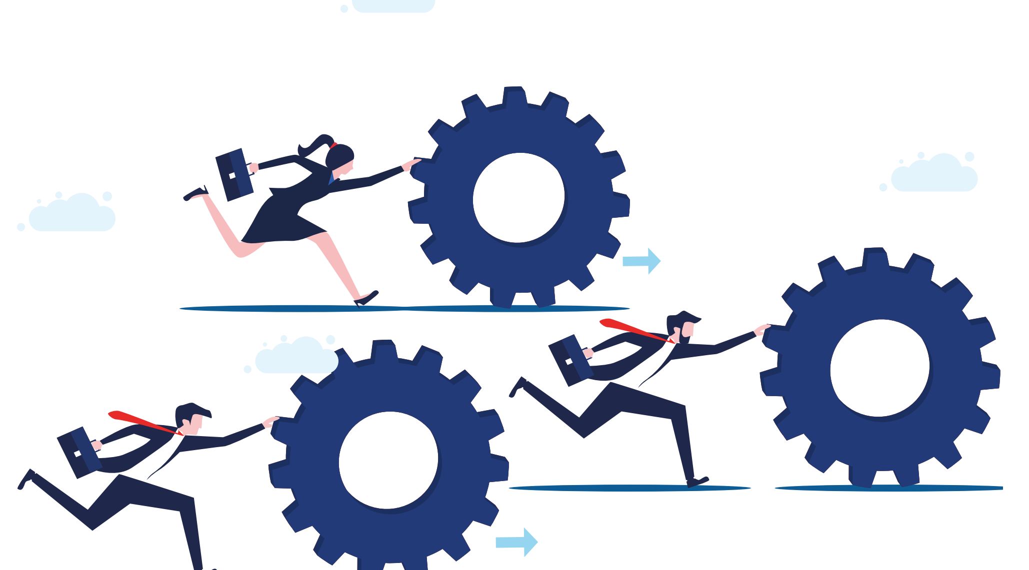
Consider Perenco versus Ecuador.

After Ecuador defaulted on its undertaking to pay a USD 374 million ICSID award in the summer of 2021, Perenco engaged us to develop their recovery strategy and advise on enforcement. After an exhaustive asset tracing assignment, we had identified significant potential assets – both in terms of value and disruption – in over a dozen jurisdictions where the legal regime offered decent prospects for successful enforcement. Each jurisdiction came with different costs and different timelines. For a few, they also came with certain benefits such as interim measures, automatic recognition of ICSID awards, or no adverse costs.

However, we needed to know which lever should be pulled, when it should be pulled, and what other tools we could deploy to amplify and accomplish our work (i.e., the which, the when, and the what). To answer these questions, we needed to understand the political backdrop in Ecuador and identify what would best motivate President Guillermo Lasso and his government to come to the negotiating table.

President Lasso was elected in May 2021 by a narrow victory on a platform of strengthening the economy and improving Ecuador's creditworthiness abroad. Under his leadership Ecuador rejoined ICSID, revised a USD 1.5 billion funding plan from the International Monetary Fund and demonstrated a strong desire to attract foreign direct investment with a more United States-oriented stance than previous governments.

As the then newly appointed Foreign Minister, Juan Carlos Holguin, stated, "[Ecuador's] primary objective … [is] to promote the image of the new Ecuador…more confidence, more investment, more development, more employment, and more wealth for all." The country aimed to attract USD 30 billion in foreign investment during Lasso's four years of administration. This was a key pillar of his government's agenda.



At the time that we were analysing and considering the "which, when, and what" question, President Lasso was facing domestic pressure. It was against this landscape that we refined and finalised our strategy deciding to kick off recovery measures with a bang by attacking the very thing that Lasso was aiming to promote and turn around: Ecuador's economy and creditworthiness.
So, while we geared up to go after Ecuador's assets in several jurisdictions – all of which would take time and incur potentially significant costs to realise – we made our first move in a jurisdiction where we could move quickly, with little financial recourse, and make a lot of noise. This initial play was aimed at exerting pressure on President Lasso, the Minister of Finance, and the Central Bank rather than simply asset seizure.

At the end of July 2022, Perenco served notice on the banks that served as trustees for Ecuador's sovereign bonds in Luxembourg, just days before the coupons were due to be paid thereby raising the possibility of Ecuador defaulting on its obligations to bondholders. Perenco didn't just take legal action in Luxembourg; they told the world about it. Domestic and international media was abuzz with Ecuador's potential default with market watchers speculating as to how Ecuador would respond. Within days the government came out publicly and stated that it would pay its debt and shortly thereafter agreed to pay Perenco in full plus interest.

Would this have been the result if Perenco went after an oil trade or a receivable following months of recognition proceedings? I think not.

While success in poker requires significant luck as well as skill, thankfully recovery does not. With the right tools, if you know who is sitting across the table from you, it's largely a game of skill – although sometimes a bit of luck can help.

TENSION BETWEEN PRO-ARBITRATION CULTURE AND RESPECT OF SOVEREIGN IMMUNITY IN SWITZERLAND

Authored by: Benoît Mauron (Partner) and Anton Vallélian (Associate) - LALIVE

As States become more and more involved in international commerce, is the 'Swiss connection' requirement to lift sovereign immunity still compatible with Switzerland's international obligations?

As one of the world's largest financial, banking and trading centres and home to many of the world's largest international organisations ("IO"), Switzerland is an obvious choice for enforcement against sovereigns – something reinforced by the pro-arbitration approach of its jurisdictions and their restrictive interpretation of State immunity.

In practice, however, satisfying the general international law requirements to lift sovereign immunity is not always sufficient. The case must also have a connexion to Switzerland, a century-old domestic law requirement that has recently been affirmed by the Swiss Federal Supreme Court ("SFSC") in decision 5A_406/2022 of 17 March 2023 on the enforcement of an ICSID award against Spain.

Connection to Switzerland Requirement Reaffirmed in SFSC Decision 5a_406/2022

On 4 April 2022, Schwab Holding AG ("Schwab Holding") relied on an ICSID award to apply for the attachment of trademarks, patents, real estate, bank accounts, and other assets allegedly belonging to the Kingdom of Spain.[1] The award was one of several holding Spain liable under the Energy Charter Treaty, due to renewable energy reforms. Schwab Holding's application was denied in first and second instances, so it took the case to the SFSC where it argued that the connection to Switzerland requirement did not apply to the enforcement of ICSID awards for the following two main reasons:

(1) Article 54(1) ICSID Convention, which states that parties ought to treat ICSID awards as decisions of domestic courts, precludes such an additional requirement; and

(2) This requirement breaches Article 54(3) ICSID Convention, under which enforcement of ICSID awards is governed by the rules applying to the execution of judgments in the State where enforcement is sought.

The SFSC rejected these arguments. It held that the connection test was allowed under Article 54(1) ICISD Convention as it did not amount to a review of the content of the award. It also considered that this was a procedural requirement of the law governing the execution of judgments in Switzerland, as allowed under Article 54(3) ICISD Convention.

Addressing the connection to Switzerland test, the SFSC recalled that it is met for instance when the claim originated from or was to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland has not been considered sufficient to create such connection. Unfortunately for the petitioner, this requirement was not satisfied in the present case.

In the authors' view, this conclusion is unwarranted and, arguably, in breach of international law.

Atavistic Domestic Law Restrictions v. Modern International Law Tendency

This connection to Switzerland requirement has nothing to do with international law, whether conventional or customary, but is based entirely on Swiss domestic procedural law.[2]

The SFSC first introduced it (implicitly) in its 1918 Dreyfus decision.[3] It dates back to a world largely at war, with fewer than 80 sovereign States, and without today's framework of international trade and arbitration.

In those days, Switzerland's neutrality had few exceptions, hence the necessity to have a good reason to side against a sovereign, but that justification has not substantially changed to reflect the times. According to more recent decisions from the SFSC:

1 The decision is anonymised. It however transpires from the facts that the dispute arises from ICSID case ARB/15/37 between OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain.

2 SFSC Decision 106 Ia 142, para. 3.

3 SFSC Decision 44 I 49, para. 3.

"A State is not obliged by international law to allow recognition or enforcement pro-ceedings against foreign States for non-sovereign matters. Rather, it is entitled to impose a certain self-restraint in this respect within the framework of its domestic law. According to its national law, each State must therefore determine, by regulating the local jurisdiction of its authorities, the limits within which it feels itself called upon to decide disputes arising from the non-sovereign actions of foreign States."[4]

While the justification has not changed in a century, the world has moved on, leaving the relevance of this requirement and the extent of the 'self-restraint' mentioned by the SFSC open to question.

First, States are more and more active in commercial affairs, notably through States-owned entities. As sovereign actors become an increasingly established feature of international commerce, so too do disputes involving them. According to the ICC's latest statistics, 19.8% of new cases with the ICC involved a State or State entity. This represents 228 cases per year – an 85% increase in just four years[5] and there is no reason to believe that other arbitral institutions have not experienced a similar increase. If one also takes into consideration investment treaty arbitrations, these numbers cast light on the volume of cases where enforcement against sovereigns is involved.

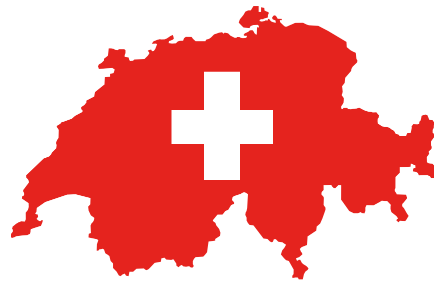
Second, Swiss neutrality is perhaps now more nuanced than it has ever been and Switzerland is certainly more integrated in the international community (joining the UN in 2002 and the UN Security Council as a non-permanent member in 2023). In recent times, it has also deviated from its historical "self-restraint" by implementing sanctions other than those decided by the UN Security Council (e.g., Russian invasion of Ukraine).

Finally, is the proposition that "a State is not obliged by international law to allow recognition or enforcement proceedings against foreign States"[6] still true today? Switzerland has ratified several international treaties on immunity, including the 1972 European Convention on State Immunity, its additional protocol as well as the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.[7] None of these treaties contain such a general restriction to enforcement. Although they include some reservation in favour of domestic law, this, arguably, does not allow limitations broadly preventing the enforcement of awards against sovereigns.

Preventing enforcement also impedes creditors' rights to equal treatment and access to justice – fundamental rights that are now enshrined in the European Convention on Human Rights ("ECHR") and the UN Covenants (another body of rules that did not exist in 1918 but now limit Switzerland's prerogative to self-restraint).

Abandoning the connection to Switzerland test would also be in line with the development of immunity for IOs. This has seen Article 6 ECHR (right to a fair trial) prevail over immunity if an organisation does not provide for an alternative dispute resolution mechanism in disputes of a private law character[8].

Whether or not the connection to Switzerland requirement is, in principle, compatible with Switzerland's international obligations, Swiss courts must ensure that its application does not constitute a violation of international obligations. In other words, the rules on immunity must be interpreted to reconcile the interests of States to carry out their tasks as public authorities without hinderances or foreign influences, and those of private actors transacting with States to receive what they legitimately expected from their contracts.



Conclusion and Take Away

Four days after Decision 5A_406/2022, Swiss courts had another opportunity to consider the Swiss connection test in the context of an application to attach the assets of the Republic of Uzbekistan. In that case, Uzbekistan had signed a document guaranteeing payment with explicit references to Swiss legal remedies and the State's assets in Switzerland. The connection to Switzerland was therefore only textual, yet was considered sufficient to justify enforcement.[9]

While this development is obviously positive for enforcement in Switzerland, it promotes a somewhat form-over-substance approach. This seems at odds with the balance to be struck between granting States a degree of immunity to guarantee the fulfilment of sovereign tasks (and the ensuing promotion of Switzerland's international relations) and preserving the integrity of international trade (given the increasing involvement of States as economic or commercial actors).

In conclusion, parties must be careful and anticipate potential immunity defences. To this end – and in view of the SFSC's rather formalistic approach – we would recommend having detailed waivers in contracts with sovereigns ideally complying with the requirements of foreseeable enforcement jurisdictions.

4 SFSC Decision 106 Ia 142, para. 3. See also Decision 144 III 411, para. 6.3.2.

5 ICC Dispute Resolution 2020 Statistics, p. 11.

6 SFSC Decision 106 Ia 142, para. 3.

7 The UN Convention on Immunity was ratified by Switzerland on 16 April 2010 (with entry into force once ratified by 30 States.) It is considered to be a codification of customary international law (SFSC Decisions 4A_331/2014, dated 31 October 2014; 4A_542/2011 and 4A_544/2011, dated 30 November 2011; 136 III 575).

8 SFSC Decisions 4C_518/1996, dated 25 January 1999 and 130 I 312. See also Waite and Kennedy v. Germany [GC], No. 26083/94, ECHR 1999-I and Beer and Regan v. Germany [GC], No. 28934/95, 18 February 1999.

9 SFSC Decision 5A_469/2022, dated 21 March 2023, para. 3.1.

UPDATE ON OIC ARBITRATION

Authored by: Solomon Ebere (Partner) - DWF Law

Formally known as the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference ("OIC"), the OIC Investment Agreement is a multilateral investment agreement concluded in Baghdad in June 1981, which entered into force in February 1988. The OIC is the second largest intergovernmental organisation after the United Nations. The OIC counts 57 Member States. Out of these 57 Member States, 27 have ratified the OIC Investment Agreement.

The majority of these States are located in the Middle East and North Africa but many States in sub-Saharan Africa, as well as Pakistan or Indonesia have also ratified the OIC Investment Agreement.

For approximately 30 years, the OIC Investment Agreement went almost unnoticed and unused. However, in 2011 it was rediscovered when a Saudi national relied on it to bring a claim against Indonesia. From thereon, 9 arbitrations were initiated under the OIC Investment Agreement, including three claims related to the events during and after the revolution in Libya causing the downfall of the Qaddafi regime. More recently, another political event in the Middle East led to yet another use of the OIC Investment Agreement, namely the use by State-owned entities of this treaty against hostile neighbouring countries.

On 5 June 2017, Saudi Arabia, the UAE, Bahrain and Egypt severed diplomatic relations with Qatar and banned Qatar-registered planes and ships from utilising their airspace and sea routes, along with Saudi Arabia blocking Qatar's only land crossing. This diplomatic crisis, often referred to as the Qatar blockade, prompted various Qatari State-owned entities to retaliate by among other things relying on the OIC Investment Agreement to bring claims against in turn Saudi Arabia, the Bahrain, Egypt and the UAE. Media group BeIN Corporation was the first to commence such proceedings, soon followed by Qatar Airways and other well-funded State-owned entities.

The Qatar blockade ended in January 2021 and many of these arbitrations were discontinued. However, this development has laid the foundations for other State-owned entities in Member States to use the OIC Investment Agreement as a new legal weapon, should their activities suffer from a diplomatic and/or economic crisis.

In parallel and in a faraway land, France, the Paris Court of Appeal posed limitations on the use of the OIC Investment Agreement by way of two decisions, seemingly curtailing the use of this popular instrument.

First, on 25 June 2019, the Paris Court of Appeal decided, in the context of an appeal against the award rendered by the tribunal in KCI v Gabon, that the most favoured nation ("MFN") clause in the OIC Investment Agreement did not allow the claimant KCI to import more favourable procedural provisions, including in this case an umbrella clause from another treaty. This is because, the court continued, it would have enabled the claimant to unjustifiably extend the Tribunal's jurisdiction to decide the issue of whether Gabon had complied with its contractual obligations vis-à-vis KCI.

Then on 23 March 2021, the Paris Court of Appeal annulled an OIC award for improper constitution of the Tribunal. In this case, DS Construction FZCO v Libya, Libya failed to participate in the constitution of the Tribunal. In addition, the appointing authority under the OIC Investment Agreement, i.e., the Secretary General of the OIC did not make the appointment when solicited. Thereafter, the claimant applied to the Secretary General of the Permanent Court of Arbitration in The Hague ("PCA") to step in and appoint Libya's co-arbitrator on its behalf. The Claimant argued inter alia that the MFN clause in the OIC Investment Agreement allowed the import of a more favourable dispute resolution provision from other treaties, which enabled the PCA to intervene, as well as raised the risk of denial of justice if nothing was done. The PCA agreed with the claimant and appointed Libya's co-arbitrator. Libya later challenged the award rendered by the tribunal so constituted.

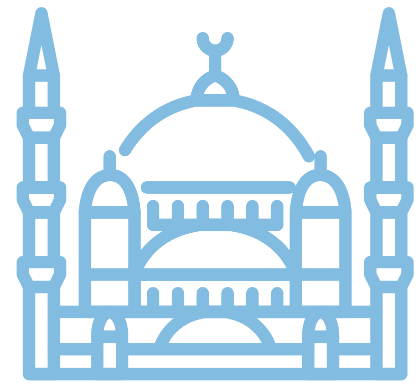
In its judgment, the Paris Court of Appeal considered that the MFN clause in the OIC Investment Agreement did not allow the import of more favourable dispute resolution provisions from other treaties. The Court did so on the basis that both the context and the purpose of the dispute resolution provision in the OIC Investment Agreement (Article 17) establish that the State parties to the treaty had no intention to allow the import of dispute resolution provisions other than the ad hoc procedure set out therein. Therefore, the Court continued, the tribunal had been improperly constituted and annulled the award.

This is not to say that Libya's approach in DS Construction FZCO v Libya, namely failing to appoint its co-arbitrator, is a recipe for success for respondent States in OIC arbitrations. This is because the Paris Court of Appeal in this latest decision opined that the Claimant should have, but did not, initiate proceedings before the judge acting in support of the arbitration - the juge d'appui – and ask it to appoint Libya's co-arbitrator.

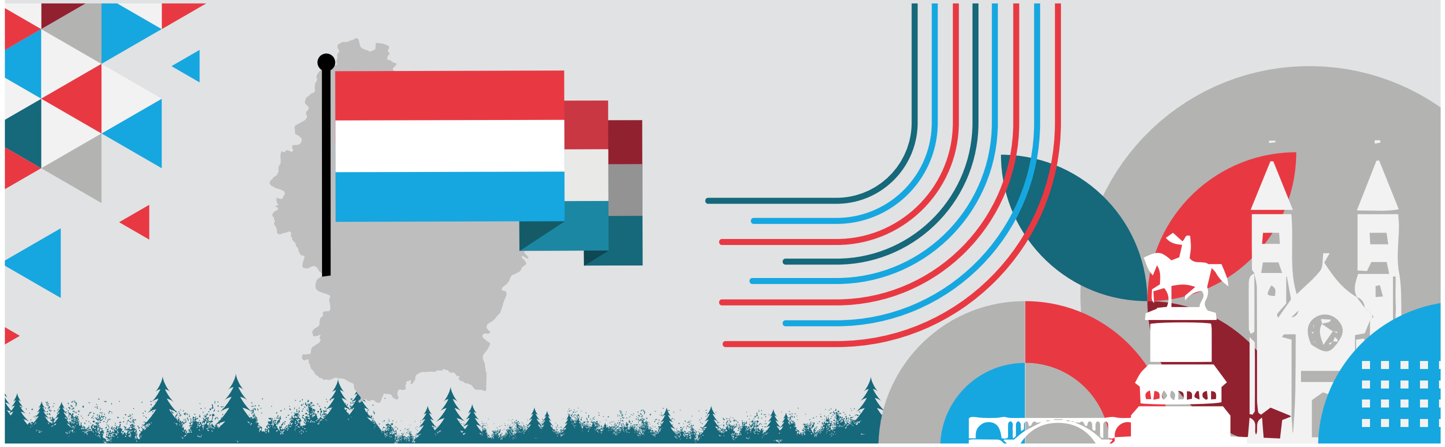
Under French law, its courts have universal jurisdiction to constitute tribunals to prevent a denial of justice, should a deadlock arise.

This is even if the arbitration bears no connection to France. In the recent OIC case Trista Energy v Libya, where the State had initially refused to appoint its co-arbitrator, the mere commencement of proceedings before the juge d'appui and the scheduling of a hearing led Libya to agree to appoint a co-arbitrator on the eve of the scheduled hearing. The Tribunal was thereafter constituted and with it useful guidance for claimants facing tactical inaction from respondent States.

OIC arbitration is here to stay. New cases continue to be brought under the OIC Investment Agreement. In addition, there has been increasing talks about the (slow) progress made in the establishment of an OIC Arbitration Centre in Istanbul, Turkey. Therefore, one can reasonably assume that OIC arbitration will continue to be fertile ground for astute lawyers.



ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN LUXEMBOURG



Authored by: Laure-Helene Gaicio-Fievez (Partner) and Fabio Trevisan (Partner) - BSP

The Grand Duchy of Luxembourg has a favourable setting for arbitration generally, as well as for the enforcement of arbitral awards.

The existence of the award, and the fact that it has obtained the exequatur are sufficient elements for obtaining interim remedies, while the latter is not necessary in the first phase. However, the effects of the award should not be stayed in the home jurisdiction for any reason. In a recent case, a title which had lost its efficiency was set aside by the court, who declared it did not meet the test to serve for an attachment.

The attachment procedure is therefore very simple: a copy of a valid award is provided to the bailiff with a list of identified third parties who are potentially debtors of the award debtor (we refer to such entity as the attached third party). It is not necessary to have any proof of this capacity or the effective existence of assets. For example, an attachment can be served by a bailiff within the hands of each and every bank licensed in Luxembourg, without it being necessary to identify a bank account number.

Once the bailiff has served the attached third party, and if this third party indeed is a debtor of the award debtor, it must freeze all assets owed to the award debtor, whatever those assets are, without limiting the freeze to the amount of the award.

This applies even where a State is an award debtor. Indeed, in contrast to the French and Belgian legislations, under Luxembourg law the applicant does not initially have to prove the nature of the State funds attached. Therefore, at the stage of the conservatory measure, all funds shall be attached provisionally. No prior authorisation from any authority is therefore required to initially attach such assets, while in the validation case the argument can be raised.

In a recent case, an award creditor of a State went even further attaching the assets of a Luxembourg company that it claimed was an emanation of the State. The award creditor limited itself to alleging this capacity of emanation but did not even try to prove it. We are of the opinion that such a stand is extreme and questionable as it was presented, but it properly reflects how Luxembourg is currently favourable to enforcing arbitral awards.

Once a conservatory measure (attachment) is served, the award debtor may challenge it in front of the judge sitting in summary proceedings either to have the attachment lifted or at least limited to the amount granted by the award.

First of all, it should be emphasised that, except where an exceptional urgency is recognised by the court (the threshold to that extent is pretty high), such proceedings may take from several weeks to several months.

Secondly, the issue with summary proceedings is that the judge lacks jurisdiction if the matter is not clearly and indisputably a breach of the law. Should the case raised by the attached debtor not be crystal clear, only the judge sitting on the merits ruling on the validation of the attachment will be able to lift the attachment, or confirm it.

Having assets attached with third parties for a period of time clearly puts pressure on an award debtor. In a recent case where the depositary bank of bonds had been attached, the award debtor proceeded to pay the award creditor to avoid bad publicity, and being in default according to other indentures.

Once a conservatory measure is in place, to have it confirmed and validated, it is necessary to obtain the recognition of the award in Luxembourg. Therefore is it common practice to stay the attachment proceedings until the court has dealt with the issue of the recognition of the award. This also has an impact on the award debtor as if the summary judge declared itself incompetent, it can sometimes be years until a decision is handed down on the merits in regards to the validation or lifting of the attachment.

According to the New Code of Civil Procedure (the 'NCCP'), Luxembourg state courts can recognise two different types of international awards:

(1) The President of the district court can grant the exequatur to an international arbitral award rendered in Luxembourg, so that the parties may seek its enforcement or its annulment in Luxembourg (Articles 1233 to 1244 NCCP). In this case, an arbitral award may only be enforced in the Grand Duchy of Luxembourg by virtue of an exequatur order issued by the President of the district court of the jurisdiction in which the award was rendered. However, and in addition to that, the NCCP states that dismissal of the action to set aside also confers exequatur on the arbitration award rendered in Luxembourg, or those of its provisions that are not affected by the Court of Appeal's ruling. The exequatur may not be granted if the award is manifestly affected by one of the grounds for annulment provided for in Article 1238 NCCP.

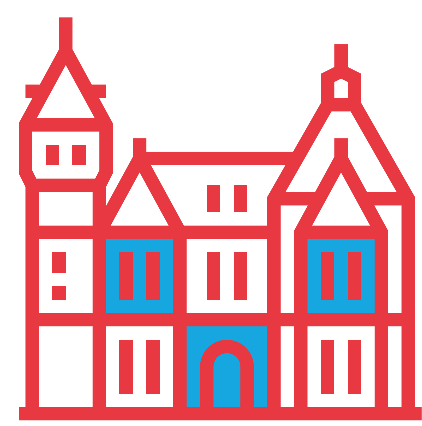
(2) The President can grant the exequatur to an international arbitral award rendered abroad, so that the parties may seek its enforcement in Luxembourg (Articles 1245 to 1249 NCCP). A foreign arbitral award – which is defined as an award rendered outside Luxembourg – may only be enforced in the Grand Duchy of Luxembourg by virtue of an enforcement order issued by the President of the district court of the jurisdiction in which the person against whom enforcement is sought is domiciled or resident, or, alternatively, of the jurisdiction of the place where the award is to be enforced. The enforcement of a foreign award is an ex parte procedure and will only be adversarial if the defendant appeals the decision of the President of the district court. The exequatur cannot be granted if the award is clearly affected by one of the grounds for annulment.

The clear-cut position adopted by the Luxembourg courts when it comes to annulled awards should be emphasised, compared to certain jurisdictions. Indeed, in 2017, the Court of Appeal ruled that 'the court does not confer effect in Luxembourg on an award that has no effect in its country of origin'[1].

The Court of Appeal based its solution on the primacy of the New York Convention, derived from the reference made by the former Article 1251 NCCP[2], which sets out the grounds for refusal of exequatur under Luxembourg law, but reserves the application of international conventions. Thus, according to the foregoing reasoning adopted by the Luxembourg Court of Appeal, an award that has been set aside at its seat will not be enforceable in Luxembourg, and no validation of a conservatory measure could be granted.

Once the recognition of the award has been obtained, the award creditor can move to have the attachment validated. It is only once this validation is granted by the court that the award creditor will have knowledge of the amount attached in Luxembourg through a summons to order the third party to declare what was held at the date of service of the attachment.

If the State is an award debtor, the validation of the attachment may lead to discussions on the nature of the funds, and the property subject to the enforcement measures. Indeed, the scope of immunity from execution covers only public funds or public property. Some assets are thus protected by immunity from execution. These are assets used for the performance of a public service or the exercise of public authority. However, States can also be holders of commercial assets, not intended for public usage, and therefore not subject to the immunity from execution. Attachment on such assets can therefore be validated.



1 Cour d'Appel, 27 April 2017, n°59/17.

2 The same concept is now expressed in Article 1246 NCCP.

THE CURRENT STATUS OF THE ENERGY CHARTER TREATY

AND WHERE IT GOES FROM HERE

Authored by: Jiries Saadeh (Partner) - Fietta

What is the Energy Charter Treaty?

The Energy Charter Treaty (ECT) is a multilateral investment treaty that entered into force in 1998. It establishes a legal framework designed to promote long-term international cooperation in the energy sector. As well as individual states, the European Union is (currently) a signatory to the treaty.

The ECT provides the usual investor protections common to bilateral investment treaties – including the obligation on States parties to encourage and create stable, equitable, favourable and transparent conditions for investors of other states parties.

In order to qualify for the protection afforded by the ECT, investments must be associated with "Economic Activity in the Energy Sector". In practice, this includes activities such as:

(i) Oil and gas exploration,

(ii) Construction and operation of power generation facilities, including those powered by renewable energy,

(iii) Decommissioning of energy-related facilities, including oil rigs, oil refineries and power generating plants.

Each state party has given its unconditional consent to the submission of disputes to international investor-state arbitration.

What is the current status of the ECT?

The ECT has been subject to significant and repeated criticism over the past few years. The first murmur of discontent came in 2016, when Italy withdrew from the treaty (likely part of a wider backlash in Italy against ISDS).

During 2022 and into 2023, several more EU member states have announced their intention to withdraw. These include Germany, Slovenia, Poland, the Netherlands, France, Spain and Luxembourg. The reasons are diverse. For example:

- Poland's vice minister for climate change stated that the Polish government thinks "nothing is going to come out of this modernisation process" (an ongoing process to reform the ECT, which is discussed further below). Legislation before the Polish parliament also cites the incompatibility of the intra-EU application of the ECT with EU law.
- Spain's deputy prime minister has been quoted as saying that the reform effort "will fail to ensure the alignment of the ECT with the Paris Agreement and the objectives of the European Green Deal".
- The Netherlands has said that it does "not see how the ECT has been sufficiently aligned with the Paris Agreement".

As alluded to by Poland's vice minister for climate change, the timing of these announcements preceded the expected vote by the state parties to the ECT

regarding amendments to its text. The vote was scheduled to take place on 22 November 2022. However, reportedly due to a failure of the European Commission to gain the consensus of EU Member States, the vote was called off at the eleventh hour. It was postponed again in April 2023 and has yet to take place. At the time of writing, no new date for the vote has been fixed.

Proposed amendments to the ECT

Ironically, the proposed amendments to the ECT were negotiated to address some of the very criticisms now being levelled at the treaty by states wishing to withdraw. In particular, it has been thought necessary for some time to update the investor protection provisions to address concerns about the impact of the ECT on climate mitigation efforts.

Negotiations lasted approximately five years, culminating in an announcement on 24 June 2022 that the states parties to the ECT had reached an agreement in principle on the modernised text. The modernised ECT contains certain notable changes.

(1) Alignment between the ECT and the Paris Agreement, a legally binding international treaty on climate change. For example, the EU and the UK opted to carve-out fossil fuel related investments from investment protection under the ECT, including for existing investments after 10 years (instead of 20 years under the current ECT).

(2) A provision stating that an investor from a contracting party that is part of a regional economic integration organisation (REIO), such as the EU, cannot bring an investor-state arbitral claim against another contracting party member of the same REIO — i.e., prohibiting what is referred to as "intra-EU arbitration". This addresses one of Poland's stated concerns, noted above, and those of other EU States.

(3) A narrowed definition of a qualifying "investment" and "investor". An "investment" must fulfil a list of characteristics, such as the commitment of capital, the expectation of gain or profit, be made for a certain duration or involve the assumption of risk. An "investor" cannot hold the nationality—or permanent residency—in the contracting party hosting the investment, and must demonstrate that it carries on substantial business activity in the host state.

(4) Provision for a list of measures that constitute a violation of the ECT's fair and equitable treatment (FET) standard, including a description of the circumstances that give rise to an investor's legitimate expectations.

(5) Clarification that the treaty's expropriation provision covers indirect expropriations, identifying in this context the types of measures that cannot be considered an indirect expropriation. As a general rule, non-discriminatory measures that are adopted to protect legitimate policy objectives, such as public health, safety and the environment (including with respect to climate change mitigation and adaptation), will not constitute indirect expropriation.

(6) A provision that the treaty's observance of undertakings clause — i.e., umbrella clause — only applies to breaches of specific written commitments made through the exercise of governmental authority.

As noted, however, the continuing upheaval of various states notifying their intention to leave the ECT means that no vote has yet taken place on whether to formally adopt the modernised text. If adopted, the modernised ECT would only enter into force 90 days after its ratification by three-quarters of the treaty's contracting parties.

Where does the ECT go from here?

There are many criticisms of the ECT, as there are of the investment treaty system more broadly. These are persistent and undoubtedly need addressing. Perhaps surprisingly, given the backlash against it, the ECT has nevertheless been at the forefront of seeking to find a solution to those concerns. It is no small achievement for the states parties to the ECT that they devised and agreed a modernised text that would implement a raft of substantive changes.

But events seem to be overtaking the treaty, with new announcements arriving in quick succession of states looking to leave. In early September 2023, the UK was the latest to sound the alarm, announcing that it would review its membership of the ECT should member states fail to vote on the new text by November 2023. The momentum certainly seems to be against the ECT and, if it survives at all, it will likely be little more than a rump of its former self.

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