THE GUIDE TO **INVESTMENT TREATY PROTECTION AND ENFORCEMENT**

Editors
Mark Mangan and Noah Rubins QC

The Guide to Investment Treaty Protection and Enforcement

Editors

Mark Mangan and Noah Rubins QC

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2021
For further information please contact insight@globalarbitrationreview.com

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-856-7

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Akerman LLP

Aluko & Oyebode

Attorney-General's Chambers of Singapore

AZB & Partners

Colombia's National Agency for Legal Defence of the State

Compass Lexecon

Dechert LLP

Dentons

Drew & Napier LLC

Freshfields Bruckhaus Deringer LLP

Hanotiau & van den Berg

Herbert Smith Freehills LLP

Karl-Heinz Böckstiegel

Kim & Chang

King & Spalding LLP

King & Wood Mallesons

Latham & Watkins

Michael Hwang Chambers LLC

Mitchell Silberberg & Knupp LLP

MGC Arbitration

Norton Rose Fulbright

Obeid & Partners

One Essex Court

Peter & Kim

Pillsbury Winthrop Shaw Pittman LLP

Quinn Emanuel Urquhart & Sullivan LLP

Steptoe & Johnson LLP

Templars

Three Crowns LLP

Twenty Essex

Wolf Theiss

WongPartnership LLP

Publisher's Note

Global Arbitration Review is delighted to publish *The Guide to Investment Treaty Protection and Enforcement*.

For newcomers, GAR is the online home for international arbitration specialists. We tell them all they need to know about everything that matters.

We are perhaps best known for our news. But we also have a growing range of in-depth content, including books such as this one; retrospective regional reviews; conferences with a bit of flair; and time-saving workflow tools. Do visit www.globalarbitrationreview.com to find out more.

As the unofficial 'official journal' of international arbitration, we sometimes spot gaps in the literature before others. Recently it dawned on us that, despite the number of books on investment law, there was nothing focused resolutely on the practical side of those disputes. So we decided to make one.

The book you are reading – *The Guide to Investment Treaty Protection and Enforcement* – is the result. It follows the concept of investment protection through its whole life cycle – from treaty negotiation to conclusion of a dispute. It aims to tell the reader what to do, or think about, at every stage along the way, with an emphasis, for readers who counsel or clients in investment matters, on what 'works'.

We trust you will find it useful. If you do, you may be interested in the other books in the GAR Guides series. They cover energy, construction, IP disputes, mining, M&A, challenging and enforcing awards, and evidence in the same practical way. We also have a book on the advocacy in arbitration and how to become better at thinking about damages – as well as a handy citation manual (*Universal Citation in International Arbitration*).

We are delighted to have worked with so many leading firms and individuals in creating this book. Thank you, all – especially the various arbitrators who supplied boxes for us at short notice. We are in your debt.

And last, special thanks to our two editors – Mark Mangan and Noah Rubins – who went above and beyond, somehow finding time in their busy lives not only to devise the original concept with us but also to shape it with detailed chapter outlines and personal review of chapters as they were submitted, and to my Law Business Research colleagues in production for creating such a polished work.

David Samuels
Publisher, GAR
December 2021

Contents

CHAPTER 22

Enforcement and Recovery: Practical Steps

Mark Bravin, Tiana A Bey, Theresa B Bowman and Albina Gasanbekova[1]

Introduction

As documented in a recent study of compliance by states with adverse awards in investor–state arbitration, a lot has changed since the architects of the International Centre for Settlement of Investment Disputes (ICSID) system of investor–state treaty arbitration opined in the mid-1960s that 'as long as States would remain under an international obligation to comply with awards, they would generally do so'.[2] Out of the 170 cases surveyed in a recent scholarly assessment in which damages were awarded against the state, the investor commenced enforcement proceedings in domestic courts about 40 per cent of the time, generally because the state refused to pay voluntarily.[3] Those enforcement proceedings typically lasted several years, in addition to an average of four years spent in arbitration, and often cost the investor millions of dollars in legal expenses on top of an average US$6.4 million spent arbitrating the investment dispute.[4]

---

1 Mark Bravin is a partner, and Tiana A Bey, Theresa B Bowman and Albina Gasanbekova are associates, at Mitchell Silberberg & Knupp LLP.

2 See Emmanuel Gaillard and Ilija Mitrev Penusliski, 'State Compliance with Investment Awards', *ICSID Review – Foreign Investment Law Journal*, Section 2 (February 2021). The authors assessed the compliance record of the 32 most sued states in 776 investment treaty arbitrations, comprising roughly 70 per cent of all such disputes commenced before 2020.

3 ibid.

4 A recent study of over 400 investor–state arbitrations found that, for investors, the mean cost of an arbitration at ICSID exceeds US$6.4 million and the mean length of proceedings where the investor prevails is about 4.6 years. See Yarik Kryvoi, Matthew Hodgson and

In this chapter, we provide an inside view on how to collect on an investor–state arbitral award without going to court, through negotiations, diplomatic channels and government relations; how to monetise awards in the secondary (litigation funder) market; and provide a practical roadmap for asset tracing and seizure of sovereign assets. These strategies are meant to broaden the reader's understanding of the practical steps available to investors to recover a substantial portion, if not all, of the money awarded to them in a hard-fought investor–state arbitration.

How to collect without going to court: negotiations, diplomacy and government relations

One reason to consider non-litigation strategies for collecting on an investor–state arbitration award is that resort to domestic court litigation to enforce an investor–state arbitral award against a foreign state that refuses to pay voluntarily can be surprisingly complicated, expensive and protracted. This is because states enjoy privileges and immunities under domestic law that are predicated on principles of sovereignty.

The first sovereign-related hurdle faced by an award creditor is compliance with the special rules for effecting service of process on a foreign state. In the United States, those rules are in the Foreign Sovereign Immunities Act (FSIA), which stipulates a hierarchy of methods of service that a litigant must follow scrupulously and in a specified order.[5] Taking a step out of order, or failing to adhere to a step precisely, can result in a lengthy delay in the enforcement proceeding until the error is corrected or dismissal of the case if no correction is made.[6] The

---

Daniel Hrcka, '2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration', British Institute of International and Comparative Law, Allen & Overy, available at https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf.

5 Under FSIA Section 1608(a), the hierarchy of steps are: (1) service in accordance with any special arrangement for service between the foreign state and the plaintiff; (2) if there is no special arrangement, then delivery in accordance with an applicable international convention on service of judicial documents; (3) if the foreign state is not a party to any such convention, then by a form of mail requiring a signed receipt, addressed and dispatched by the clerk of the court to the head of the foreign state's ministry of foreign affairs; and (4) if service under (3) cannot be made within 30 days, then by transmittal through diplomatic channels.

6 In *Hardy Exploration v. India*, an action to enforce an international arbitral award based on a concession agreement was delayed by more than one year because the investor/award creditor misread a contractual provision for service of required notices that did not pertain to service of judicial documents. *Hardy Exploration & Prod. Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas*, 219 F. Supp. 3d 50 (D.D.C. 2016); 314 F. Supp. 3d 95 (D.D.C. 2018); see also Alexander A Yanos and Kristen K Bromberek, 'Enforcement Strategies where the

second and much more difficult hurdle is addressed in Chapter 21, 'Enforcement and Recovery: Theory'. It requires overcoming the immunity of sovereign-owned assets from attachment and execution under the laws of the forum where the assets are located.[7]

However, as the above-cited studies indicate, award creditors avoid the burdens of enforcement litigation in a majority of investor–state arbitrations because states in those cases voluntarily pay some or all of the amounts awarded to the investor. These cases often present unique opportunities that investors can leverage to facilitate a settlement without going through the judicial enforcement process.

There are several driving motivations for sovereign states to pay adverse damages awards in these cases. Foreign direct investment (FDI) is an integral part of economic development and modernisation.[8] While measuring the impact of FDI on economies is not an exact science, studies have shown that FDI contributes to productivity and income growth in host countries beyond what domestic investment normally would trigger.[9] States keen to strengthen their investment competitiveness understand that their national policies and investment laws play a role in attracting FDI and realising its benefits.[10]

Lack of transparency in FDI policies and investment protection practices often will harm the sovereign's reputation for investment competitiveness.[11] As found in a recent World Bank study, foreign investors assessing the regulatory risk of investing in a particular country weigh carefully factors such as transparency in the process of making investment-related laws and regulations; the extent

---

Opponent is a Sovereign' in Alan Redfern (ed.), *The Guide To Challenging and Enforcing Arbitration Awards*, pp. 172–173 (Global Arbitration Review, 2021).

7 See also Yanos and Bromberek, footnote 6, pp. 174–175.

8 'Foreign Direct Investment for Development', OECD (2002), available at www.oecd.org/investment/investmentfordevelopment/1959815.pdf; see also World Bank Group, 'Global Investment Competitiveness Report 2019/2020: Rebuilding Investor Confidence in Times of Uncertainty' (World Bank, 2020), 8-18, available at https://openknowledge.worldbank.org/bitstream/handle 10986/33808/9781464815362.pdf?sequence=4&isAllowed=y/.

9 'Foreign Direct Investment for Development', footnote 8, p. 9.

10 World Bank, 2020, footnote 8, pp. 135–136, 148. When in 2017, the government of Kazakhstan adopted its 2018–22 National Investment Strategy laws, it did so to increase FDI inflow by 25 per cent by 2022.

11 Weigel Dale, 'Lessons of Experience No. 5: Foreign Direct Investment', IFC, available at https://www.ifc.org/wps/wcm/connect/publications_ext_content/ifc_external_publication_site/publications_listing_page/lessonsofexperienceno5; 'World Investment Report 2020' (UNCTAD, 2020) available at https://unctad.org/system/files/official-document/wir2020_en.pdf.

of legal protection provided to investors against arbitrary, unpredictable or non-transparent government actions; and access to effective mechanisms for recourse in case of grievances or disputes.[12] Relatedly, host states are mindful that inconsistencies in their international investment regime and practices in enforcement and recognition of arbitral awards – including their failure to honour adverse investment arbitration awards – can substantially undermine the state's desired investor-friendly image, creating an impression of high-risk conditions for foreign investment.[13] Examples of states settling investment disputes with foreign investors out of concern that a failure to do so would discourage future investment are not uncommon.

For example, the Czech Republic – as examined by one study – honoured at least three investment treaty awards against it 'reportedly in order to maintain a reputation of an attractive investment destination'.[14] Similarly, Argentina reportedly settled several awards with foreign energy companies to contribute to 'the restoration of direct investment' as part of Argentine President Mauricio Macri's goal to rehabilitate and strengthen Argentina's reputation with foreign investors.[15]

These examples show that sovereign states – particularly those with poor track records of investment protection that are eager to bolster their competitiveness for investment and improve their foreign relations – might be more inclined to settle and satisfy damages awards. Although the public does not always know the true motivations behind each instance of voluntary compliance, the statistical

12 World Bank, 2020, footnote 8, p. 133. See also *Chevron and TexPet v. Ecuador*, PCA Case No. 2009-23, Final Award, 2011 (holding Ecuador liable in an investor–state treaty arbitration for failing to provide 'effective means' of asserting claims and enforcing rights under the US-Ecuador Bilateral Investment Treaty, available at https://jusmundi.com/en/document/decision/en-chevron-corporation-and-texaco-petroleum-company-v-the-republic-of-ecuador-i-final-award-wednesday-31st-august-2011.

13 A state's obligation to respect investor–state arbitral awards comes from multilateral international treaties, such as the ICSID Convention and the New York Convention, as well bilateral investment treaties and arbitration rules and awards. International treaties and arbitration rules oblige states to respect and carry out awards. See Gaillard and Penusliski, footnote 2, p. 55.

14 id. at pp. 24–25.

15 'Argentina enters into an agreement with TOTAL Oil Company within the context of the ICSID', 18 July 2017, available at https://www.economia.gob.ar/en/argentina-enters-into-an-agreement-with-total-oil-company-within-the-context-of-the-icsid/; see also Gaillard and Penusliski, footnote 2, pp. 14–15, Nos. 63, 66; see also *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15 and *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Arbitration, December 2007.

data on arbitration awards also corroborate this notion. Studies and surveys have generally shown that a sizeable majority of sovereign states elected to honour their obligations and pay adverse awards voluntarily.[16]

Nonetheless, cases of non-compliance are not infrequent. Foreign investors have several strategies at their disposal to try to compel payment, including leveraging their home state to espouse the claim on their behalf. These forms of diplomatic and political pressure are known as 'diplomatic protection'. Article 27 of the ICSID Convention explicitly allows for 'diplomatic protection'.[17] Some bilateral treaties also enable a party to exercise diplomatic protection in instances of non-compliance with adverse awards.[18]

There have been a number of examples in investment arbitration where a state's compliance with an adverse award was accomplished by various forms of diplomatic pressure and lobbying. In 2015, after Russia – a host state notorious for its non-compliance with adverse arbitral awards – failed to pay a €10 million award, the Italian investor Valle Esina reportedly 'sought the support' of the Italian government to secure payment.[19] In 2011, after Argentina refused to

16 UNCTAD Publication (2014), p. 156, available at https://unctad.org/system/files/official-document/diaeia2013d2_en.pdf; Gerry Lagerberg and Professor Loukas Mistelis, 'International Arbitration: Corporate Attitudes and Practices' (Queen Mary University of London, 2008), 2, available at www.arbitration.qmul.ac.uk/media/arbitration/docs/IAstudy_2008.pdf (reporting that 'in more than 76% of [corporate counsel's] arbitration proceedings, the non-prevailing party voluntarily complies with the arbitral award; in most cases, according to the interviews, compliance reaches 90%').

17 'No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.' Article 27(1); see also UNCTAD Publication (2014), footnote 16, pp. 156–157.

18 For example, US bilateral treaties based on the 2004 US Model BIT and 2012 US Model BIT provide for the application of other measures if a state party fails to pay an award: 'If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings: (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and (b) a recommendation that the respondent abide by or comply with the final award.' 2004 US Model BIT; see Article 34, Uruguay–US BIT (2005); Rwanda–US BIT (2008); United States–Mexico–Canada Agreement (2018).

19 *Valle Esina S.p.A. v. The Russian Federation*, UNCITRAL Arbitration, June 2014 (not public); Gaillard and Penusliski, footnote 2, p. 33. The authors have been unable to identify the details of the 'support' efforts that the investors sought.

honour investment awards totalling about US$300 million, several US investors lobbied the US government to take action against Argentina for not complying with its international obligations.[20] The United States suspended trade benefits to Argentina under the US Generalized System of Preferences regime and voted against proposed loans of over US$230 million for Argentina at the World Bank and Inter-American Development Bank.[21] The tariff suspension measures alone exposed Argentina to approximately US$477 million in new tariffs, 'which was nearly eleven percent of total imports from Argentina'.[22] Ultimately, these measures proved effective, prompting Argentina to settle with US investors that had spent years trying to enforce the awards.[23] Similarly, in 2008, after more than five years of unsuccessful enforcement efforts by investor AIG, Kazakhstan settled and paid an adverse award reportedly only after pressure was applied by the US government on Kazakhstan.[24] In 2005, when a tribunal ordered Kyrgyzstan to pay more than US$1.1 million in damages, Swedish investor Petrobart spent years attempting to enforce the award in courts, to no avail. It was not until 2011 that the parties settled the award, and only after 'Swedish diplomats reportedly raised this matter with the Kyrgyz Government'.[25]

---

20 'U.S. Trade Representative Ron Kirk Comments on Presidential Actions Related to the Generalized System of Preferences', Office of United States Trade Representative, 26 March 2012, available at https://ustr.gov/about-us/policy-offices/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti; 'Obama says to suspend trade benefits for Argentina', Reuters, 26 March 2012, available at https://www.reuters.com/article/usa-argentinatrade- idAFW1E8DD01J20120326; Gaillard and Penusliski, footnote 2, p. 13.

21 Gaillard and Penusliski, footnote 2, p. 14; see also Sandrine Rastell and Eric Martin, 'U.S. Opposes Loans to Argentina in Bid to Step Up Pressure for Debt Accord', Bloomberg, 28 September 2011, available at https://www.bloomberg.com/news/articles/2011-09-28/u-s-opposes-loans-toargentina-in-bid-to-boost-pressure-for-debt-accord; 'U.S. Suspends Argentina trade benefits over unpaid arbitral awards', *International Comparative Legal Guides*, 28 March 2012, available at https://iclg.com/cdr/usa/ussuspends-argentina-trade-benefits-over-unpaid-arbitral-awards; Gaillard and Penusliski, footnote 2, pp. 13–14.

22 Office of United States Trade Representative, footnote 20.

23 Gaillard and Penusliski, footnote 2, pp. 13–14.

24 *Caratube International Oil Company LLP and Devincci Salah Hourani v. The Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on Stay and Enforcement of the Award, ¶ 21, available at http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C2923/DS13372_En.pdf; see also Gaillard and Penusliski, footnote 2, pp. 6, 35.

25 *Petrobart Limited v. The Kyrgyz Republic*, SCC Case No 126/2003; see also Gaillard and Penusliski, footnote 2, p. 7.

Changes in the regime of a sovereign state – that could lead to the reversal of its policies or economic or diplomatic priorities[26] – can also open the door for settlement of adverse awards. In 2016, Argentina's settlement of a decade-long dispute with a hedge fund, Elliott Management, is one famously reported example of how a change in a host state's administration resulted in a change of policy and settlement of investment awards.[27] The parties settled just months after the election of President Mauricio Macri, who had promised to revitalise Argentina's economy.[28] Similarly, in 2004, Libya's swift settlement of, and agreement to comply with, several arbitral awards and court judgments was reportedly credited to a dramatic shift of Libyan policies that entirely transformed US–Libya foreign relations and ended Libya's long-lasting designation as a state sponsor of terrorism under US law.[29]

While engaging their own state and seeking diplomatic pressure can be an effective tool for investors to incentivise a host state to pay an adverse award, it is important to note that forms of diplomatic support are not equally available to all investors. Investors from home states that are less 'powerful' may have less (if any) leverage against the host state.[30] Political tensions between host and home states can also create significant hurdles in enforcing or settling investment awards, even by means of diplomatic pressure.[31] Yet, at the right time and with the right strategy, sovereign states often can be persuaded to pay adverse arbitral awards.

---

26 Yanos and Bromberek, footnote 6, p. 173.

27 Alexandra Stevenson, 'How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds', *New York Times*, 25 April 2016, available at https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html; see also Yanos and Bromberek, footnote 6, Chapter 14, p. 173.

28 ibid.

29 Jonathan B Schwartz, 'Dealing with a "Rogue State": The Libya Precedent', 101 *Am. J. Int'l L.*, 553, 554–555, 575–576, 580 (2007); 'Statement by the White House Press Secretary', 20 September 2004, available at https://georgewbush-whitehouse.archives.gov/news/releases/2004/09/20040920-8.html; see also Yanos and Bromberek, footnote 6, p. 173. The authors have not identified a source confirming which awards Libya made the payment in relation to.

30 UNCTAD Publication (2014), footnote 16, p. 54.

31 One study observing compliance of investment awards against Russia and Ukraine in relation to the 2014 annexation of Crimea suggest that neither state has any interest in honouring the awards, regardless of any pressure. See Gaillard and Penusliski, footnote 2, pp. 30–33.

Monetising awards in the secondary market

If diplomatic efforts are unavailing, there are additional market-based options for an award creditor to hedge the risk of the host state's non-compliance with an adverse arbitral award.

There are plenty of reasons why an award creditor may wish to liquidate the value of an award before (or in lieu of) investing in enforcement. Sometimes it is to fund the enforcement process itself, sometimes it is because an investment-savvy award creditor believes it can better leverage an early partial payment in the marketplace as compared to later full recovery of the award. Perhaps most commonly, the award creditor, having just invested in the long life of an arbitration to procure an award, is now especially eager to inject new working capital into their business.

Meeting these needs has proven a very attractive investment opportunity for third-party funders in the post-award context. The economics of pre-award funding are such that in most cases a claim must be in the tens of millions of dollars (at the very least) for funding to be financially feasible.[32] Post-award funding provides some additional flexibility given that the arbitration award has already been issued, and there is no uncertainty about the amount of the award.

Funders evaluating the attractiveness of investment in an already-issued award will thus consider, inter alia: the amount of the award (the larger the award, the greater margin for recovery over the costs of any enforcement proceedings); whether post-award interest and enforcement costs are included in the award; the expertise and billing rates of enforcement counsel; the identity of the respondent state; the availability and location of the respondent state's assets; any special legal or practical hurdles to enforcement based on where those assets are located; and the prospects for post-award settlement.[33]

If a third-party funder concludes that it wants to invest in a particular arbitral award, the funding arrangement typically will entail several key investment provisions – and important corresponding decision points for the parties.

---

32 International Council for Commercial Arbitration (ICCA), 'Report of the ICCA–Queen Mary task force on third- party funding in international arbitration' (ICCA Reports, 2018), 244 (Annex C).

33 Brooke Guven and Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', Columbia Center on Sustainable Investment, A Joint Center of Columbia Law School and the Earth Institute (May 2019), 5.

Basic mechanics of the investment

The funder and award creditor will negotiate an investment contract (i.e., a funding agreement) that lays out the rights and obligations of each party. These will include specific rights the funder may have to receive confidential or proprietary information, as well as rights of involvement in, or decision-making with regard to, any enforcement proceedings or post-award settlement negotiations.[34] The funding agreement typically will also include some form of security interest of the funder in any monies recovered in satisfaction of the award.[35]

Important decision points for both the funder and award creditor will include whether, and how much, the funder will be responsible for bearing the costs of enforcement, as well as whether or not the security interest in the award will be on a 'non-recourse' basis. That is, whether the funder will have a right of action against the award creditor if the amount of eventual recovery does not cover a specified or agreed-upon portion of the funder's investment.[36]

Full versus partial monetisation

Another important decision point is what proportion of the award the award creditor seeks to monetise. A funding agreement may be for partial monetisation, in which the funder advances a discrete payment immediately upon closing in exchange for a percentage of any subsequent recovery on the award or, alternatively, a multiple of the funded amount. Or, it may cover full monetisation, which is the advancement of a payment upon closing in exchange for full economic rights to any monies recovered to satisfy the award.

Funder involvement in decision-making

Especially where full economic rights are transferred, a funder that has agreed to bear the full risks associated with the cost of enforcement will want to negotiate for as much involvement in enforcement or settlement decisions as possible.

In the event that either the funder or award creditor seeks an arrangement that includes funder-side decision-making responsibility for enforcement proceedings, parties should first evaluate whether such an arrangement will cause enforcement problems in any of the jurisdictions where the state's assets are expected to reside. To begin, while the grounds for refusing recognition and enforcement of an arbitration award (under an applicable treaty or convention) are limited,

34 ibid.
35 ibid.
36 id. at 3.

they include a 'public policy' challenge.[37] For example, the New York Convention, Article V(2)(b), provides that enforcement of an award may be refused when it 'would be contrary to the public policy of the forum country'. The funder, and in many instances the award creditor, will hire due diligence counsel to evaluate the enforcement risks, including whether third-party funding is considered to be contrary to public policy in the target domestic enforcement jurisdiction. Notably, however, global efforts to define and categorise 'public policy' violations thus far have conspicuously omitted third-party funding.[38]

Even if funding is found not to pose an enforcement risk on public policy grounds, any ensuing domestic litigation efforts to utilise specific local enforcement mechanisms – such as asset attachment – will be subject to the typical constraints of domestic litigation in the forum where the assets are located. In that context, both parties to a funding agreement will need to evaluate the risk that relevant domestic courts might take issue with funders being involved in litigation or settlement decisions. There is a broad diversity of approach in domestic civil and common law jurisdictions towards whether, and how, to regulate the extent to which a third-party funder may take responsibility for management of an enforcement action. Common law jurisdictions typically feature doctrines against 'champerty' and 'maintenance' while in 'civil law jurisdictions professional attorney ethics rules and ownership of claim constraints take center role in providing any limitations on third-party funding arrangements'.[39] Singapore and Hong Kong have opted to regulate third-party funding in the context of arbitrations through legislation.[40] On balance, both the funder and the award creditor have strong incentives to pursue an arrangement by which the funder is, at least partially, insulated from decision-making by the award creditor and their attorneys.

Award creditors should approach third-party funding opportunities with the aid of counsel experienced in negotiating litigation funding agreements. Assuming both the award creditor and the funder are ably advised by experienced counsel of the risks of third-party funding and can negotiate on the basis of an alignment of interests, the arrangement can provide an attractive win-win. It is an appealing

37 Similarly, if the underlying arbitration was funded by third parties, this could impact recognition of the award in jurisdictions that do not favour third-party funding.

38 International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards, 'Report on the Public Policy Exception in the New York Convention', October 2015.

39 ICCA Reports (2018), footnote 32, p. 43 (Annex C).

40 ibid.

option for award creditors that seek to obtain the certainty of litigation funding as soon as possible and for funders looking to secure what might be viewed as (potentially) outsized investment returns.[41]

Asset tracing and seizure: a practical roadmap

Winning a monetary award in an investor–state arbitration is but the first proverbial step on the road to recovering damages from a losing sovereign. Whether that road is long or short – or leads to collection – will depend, in some part, on the dispute mechanism authorised by the relevant bilateral or multilateral investment treaties and on which the investor bases its arbitration claims.[42] In large part, however, the investor's success in recovering any pecuniary award obtained in an investor–state arbitration will depend on award collection plans the investor had in place prior to initiating the arbitration against a host state. Below is a discussion of factors an investor should consider when devising an asset tracing and seizure plan, the timing to implement such a plan, and the tools potentially available to attach and execute against assets to satisfy an arbitral award or subsequent court judgment.

---

41 *Tienver S.A., Transportes de Cercanias S. A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, Award, ICSID Case No. ARB/09/1, 29 July 2017 (third-party funder enjoyed a 700 per cent return on investment).

42 For example, Article 53(1) of the ICSID Convention requires a sovereign party (as well as the claimant) to 'abide by and comply with the terms of the award'. And '[t]he 2010 UNCITRAL Arbitration Rules, the 2017 ICC Rules and the 2017 SCC Rules all require the parties to 'carry out' arbitration awards 'without delay'. Gaillard and Penusliski, footnote 2, p. 5 (citing Arbitration Rules of the United Nations Commission on International Trade Law (2010), Article 34(2); International Chamber of Commerce Court of Arbitration Rules of Arbitration (2017), Article 35(6); Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2017), Article 46). And some countries' BITs require sovereigns to carry out an award without delay. Gaillard and Penusliski, footnote 2, p. 5, n. 26. Although the 'must comply' rules established by these arbitration mechanisms do not guarantee timely compliance, a recent study has shown that 50 per cent of the examined sovereign losers of arbitrations under these rules eventually complied with the awards. id. at 48 ('The States reviewed in this survey have paid damages in 85 of the 170 cases that they lost'). Additionally, the principal advantage of enforcement of an ICSID award against a contracting state is that under Article 54(1) of the ICSID Convention, if the state fails to comply with the award, the claimant can seek to have the pecuniary obligations recognised and enforced in the courts of any ICSID Member State as though it were a final judgment of the Member State's highest court. If the award is won at ICSID against a non-contracting state, or outside of ICSID under the UNCITRAL or other rules, for example, then recognition and enforcement of the award is governed by the law of the place of arbitration, including any applicable treaties. In most cases, that means resort to the New York Convention, which has defences to enforcement not found in the ICSID Convention.

Tracing a sovereign's assets

Given the increased regularity with which sovereign countries are involved with investor–state disputes brought under investment treaty regimes, some states have found creative ways to hide their commercial assets[43] or to disguise them among their diplomatic endeavours to avoid paying arbitral award or court judgment debts.[44] Thus, a particularly prudent investor will have conducted a preliminary investigation of the host state's commercial assets by the time it contemplates an investment relationship with that state and, more importantly, before the

43 Depending on whether the domestic laws of the country in which a sovereign's assets are located adheres to a restrictive immunity theory of sovereign immunity; a sovereign debtor's commercial assets may be subject to seizure to pay a pecuniary arbitral award or court judgment. 'Commercial assets' are defined by the particular jurisdiction in which the assets are located, but the rule common among countries with a restrictive view of immunity is '[w]hen a State is engaged in a commercial transaction, it acts as a trader, not as an independent sovereign state. Because it has ceased to act in a public capacity, it has no immunity for the commercial transactions'. D Gaukrodger (2010), 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, at 18, 2010/02, OECD Publishing. Even when the assets are determined by a court to be 'commercial', however, a country's laws may further limit seizure to situations where: (1) the sovereign debtor waived its immunity from judgment execution; (2) the property sought to be seized by a judgment creditor has a direct link to the underlying adjudicated claim; or (3) the property was 'used for a commercial activity' in the territory of the country where the enforcement action is brought. id. at 20–21; see also *TIG Ins. Co. v. Republic of Argentina*, 967 F.3d 778, 786 (D.C. Cir. 2020) (holding that whether a property is 'used for a commercial activity' depends on the totality of the circumstances existing when the motion for a writ of attachment is filed). The investor should also be aware of countries that do not limit seizure of sovereign assets to those used solely for commercial purposes, but allow seizure of assets even if those assets are used for non-commercial purposes. For example, according to an expert on Turkey's sovereign immunity law on attachment and execution: 'Turkey does not differentiate between enforcement immunity [for] commercial and non-commercial actions of a foreign state. According to the precedents of the Court of Cassation, all property and assets of a foreign state would be subject to enforcement or execution except for properties that are used for diplomatic, military and consular purposes.' Orcun Cetinkaya, 'Turkey' in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 71 (citing Decision of the 12th Civil Chamber of the Court Cassation No. 2004/6469 E 2004/13007 K).

44 e.g., Charlotte Cans, 'Congo (Brazzaville) economy: Court in Paris rules against Brazzaville' (*EIU Views Wire*, 20 April 2006) (describing Congo's prime minister admitting 'that the country had been "hiding" oil revenues to escape from "vulture creditors" and that the government had been forced to use "sometimes rather unorthodox mechanisms"').

time an investment-treaty dispute has arisen.[45] It might also identify assets of state officials that could potentially be the result of corruption, embezzlement or misappropriation of state assets for personal use.

An investigation of the host state's assets would necessarily include a process called 'asset tracing'. Two types of asset tracing are important to finding attachable assets: forward tracing and backwards tracing.[46] Forward tracing starts with assets a sovereign debtor owned in the past and tracks the subsequent ownership of the assets to the present owners. Forward tracing may help an investor or award creditor determine whether a non-commercial asset was turned into a commercial asset or if a commercial asset was fraudulently transferred to a third party or to an alter ego (wholly controlled) entity to avoid satisfying the sovereign's debt obligations.[47] The challenge, however, is if the sovereign debtor becomes aware that the investor or award creditor is tracing assets, it may fraudulently transfer the assets to third parties or legally transfer them to entities that are more difficult to trace. Or worse yet, the sovereign, unbeknown to an award creditor, may sell the asset to a bona fide purchaser and, thus, the asset may no longer be subject to attachment

45 The universe of assets available for enforcement of an arbitral award may include commercial-use real property or tangible and intangible personal property, such as overseas investments held through sovereign wealth funds; aircraft, vehicle, ship and tanker fleets; production equipment; gold reserves; investment funds; bank accounts; trust accounts, shareholdings in foreign companies; accounts payable on goods and services; oil, gas and mining concessions and/or royalty fees; bond interest payments; intellectual property royalties; and unsatisfied judgment debts owed to the sovereign.

46 Michael S Kim and Timothy deSwardt, 'Asset Recovery: Investigation and Foreign Recognition, in Committee Educational Session: Commercial Fraud/International: People and Assets on the Move Overseas: What You Need to Know to Hold Everything Still and Seize the Assets' (ABI Conference, February 2016).

47 e.g., EIU, 'Country Report Congo (Brazzaville): Foreign trade and payments: Agreement w/comm'l creditors outstanding' (1 April 2006) (describing the Congolese government's admission of resorting 'to elaborate and expensive financing deals for its international oil sales, which aim to prevent creditor seizures', including deals that 'involved the establishment of shell companies, some of them personally owned by members of the regime, and the use of multiple and complex transactions or the sale of oil at substantial discounts to market prices').

and execution to satisfy a debt.[48] Nevertheless, forward tracing is a necessary part of investigating a sovereign debtor's assets.

Backwards tracing is not only necessary, it also provides a unique advantage over forward tracing.[49] Backwards tracing requires the investor to analyse the 'debtor's patterns of consumption today and then trace backward to find the source of assets used to fund that consumption'.[50] For example, if a sovereign debtor is found to consume certain commercial goods or services frequently or periodically (e.g., weekly delivery of bottled water for personnel or utilisation of electricity for property), payments for these goods or services might be traced back to a previously unknown bank account that may in turn be traced to the sovereign debtor. Backwards tracing can lead to a strong presumption or direct evidence that the sovereign debtor presently beneficially owns an asset to which a third party holds title. By contrast, forward tracing starts from the past and seeks to catch up to present assets 'through a maze of subsequent transactions and transfers'.[51]

Investigation of assets through public sources and private investigators

Tracing of assets can begin with an investigation using public resources, including the following:

- public records databases, including real estate records, to identify buyer or seller information, attorneys and title companies involved, property tax information, building permit requests and lien information;
- civil court records to identify assets targeted by other creditors, unsatisfied judgments or arbitral awards in favour of a sovereign where the sovereign is owed money, or the attorneys representing the sovereign, which can potentially lead to finding out the monetary source used to pay the sovereign debtor's legal bills;[52]

48 e.g., Donald Manasse, 'Monaco' in Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam (eds), *Lexology Getting The Deal Through: Asset Recovery* 2021 (Law Business Research, 2020), at 77 (explaining when property acquired by a third party or close relatives in Monaco): 'It is possible to confiscate property acquired by a third party (whether or not related), but the confiscation must not affect the rights of third parties who legitimately acquired [the property], and the third party . . . must be given the right to oppose the confiscation.'

49 Kim and deSwardt, footnote 46.

50 ibid.

51 ibid.

52 ibid.

- websites of the sovereign debtor's agencies and ministries to identify state-owned enterprises and their assets,[53] and banks with which the sovereign processes commercial transactions;[54] and
- databases or companies that track sovereign tanker and shipping vessels, aircraft and cargo.[55]

In addition, in recent years, some countries have adopted disclosure rules that require public disclosure of asset ownership, making it easier to find a sovereign's assets. For example, in the United Kingdom, the Administrative Division of the English High Court issued an order requiring the UK government to disclose to US judgment creditors details of assets of the Syrian government that

---

53 State-owned enterprises (SOEs) may have assets, including subsidiaries, that can be used to pay an arbitration award that has been converted to a domestic judgment. For example, a US Court of Appeals for the Third Circuit concluded that the FSIA's commercial exception provided US courts with authority to attach shares of a US subsidiary of a Venezuelan SOE oil company, Petróleos de Venezuela SA, as a means to pay an arbitration award won by Crystallex, a Canadian company that invested in Venezuela. *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). The Court reached this conclusion based on the alter ego doctrine as articulated by the United States Supreme Court in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611 (1983) and *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018). Identifying a sovereign's SOEs is not an easy process and can require substantial digging, however. Not all sovereigns publish a list of their SOEs or statistics regarding their SOEs, but some have published this information. For example, the Morocco Ministry of Finance reported that, as at 2019, it owned 225 SOEs in addition to 43 companies in which its treasury had a direct interest, and those companies have 479 subsidiaries, of which Morocco has majority ownership in 54 per cent. Projet de loi de Finances Pour L'Annee 2020, '1ere Partie: Composition et Performances du Portefeuille Public', available at https://www.finances.gov.ma/Publication/depp/2019/depp-plf2020-fr-30-34.pdf. As at 2021, the Ministry of Investment in Egypt held a portfolio of approximately 226 SOEs and over 660 joint ventures between public and private firms as well as an undisclosed number of strategic firms held by sectoral ministries or the military. The Ministry publishes a list of its SOEs on its websites: http://www.mpbs.gov.eg/Arabic/Affiliates/HoldingCcompanies/Pages/default.aspx and http://www.mpbs.gov.eg/Arabic/Affiliates/AffiliateCompanies/Pages/default.aspx. See also Jennifer Bremer, 'Transparency of Egypt's Public-Private Joint Ventures', in *Towards New Arrangements For State Ownership in the Middle East and North Africa* (OECD, 2012), 119.

54 For an example of how a sovereign's published government financial information (including wire payment instructions) can be used to track attachable commercial assets in the United States, including through interbank settlement systems such as the Federal Reserve's Fedwire Funds Service and the Clearing House Interbank Payments System, see Brian Asher, 'Finding Sovereign Assets Through US Banks' (*Law360*, 25 February 2019).

55 Kim and deSwardt, footnote 46.

were frozen by the United Kingdom pursuant to Article 18(1) of EU and UK Sanctions Regulation No. 36/2012 (the EU/UK Regulation).[56] Article 29(1) of the EU/UK Regulation requires that third parties that are in possession of sovereign assets frozen pursuant to applicable sanctions laws and regulations submit to the Treasury reports of location and other details to facilitate compliance with the Regulation.[57] Article 18(1)(a) and (b) of the Regulation provides that holders of judgments and arbitral awards against the sanctioned sovereigns may be entitled to collect from frozen property or funds to satisfy those judgments or awards.[58] Thus, looking to a country's sanctions regime to identify already-seized assets set aside to pay arbitral awards, before getting involved in an arduous, lengthy and costly judicial enforcement proceeding, is a progressive step towards satisfying the award.

Moreover, the World Bank recently reported that over 160 countries have adopted disclosure regimes, such as asset and interest declaration requirements (AID systems), to alert the public as to who beneficially owns or controls particular assets.[59] Robust AID systems require governmental officials, as well as their family members, to disclose assets owned directly or by proxy, and they include a sanctions element attached to non-compliance that is designed to curb corruption among governments and their officials.[60] Depending on the forcefulness and openness of the AID system in place in a particular jurisdiction, public reporting based on the use of that system could be a useful tool for investigating assets.

Award creditors that can afford the additional expense should consider hiring a private investigator or company specialising in asset-tracing services to handle or supplement the public records search. Such investigators may already have used, or can identify, less visible databases (e.g., where access is limited to those with a required subscription or membership). Their expertise may be especially useful in backwards tracing, and, more generally, in applying their specialised knowledge, investigatory skills and relationships to ferret out the location of

56 *Certain Underwriters at Lloyds London, et. al. v. HM Treasure, et al.* [2020] EWHC 2189 (Admin), available at http://www.bailii.org/ew/cases/EWHC/Admin/2020/2189.html.

57 id. at ¶ 4.

58 ibid.

59 World Bank Group, 'Enhancing Government Effectiveness and Transparency: The Fight Against Corruption' (2020), 225–226, available at https://documents1.worldbank.org/curated/en/235541600116631094/pdf/Enhancing-Government-Effectiveness-and-Transparency-The-Fight-Against-Corruption.pdf.

60 id. at 229.

assets owned indirectly or beneficially by the sovereign debtor.[61] However, award creditors should be aware that asset-tracing firms can be enormously expensive and seldom (if ever) guarantee they will find evidence that can be used effectively in an enforcement proceeding. Further, award creditors need to be mindful of the risk that an investigations firm may obtain pertinent, even conclusive evidence by means that are illegal under the laws of the country where the evidence resides. In evaluating that risk, creditors should determine, under the laws of relevant jurisdictions, how illegally obtained evidence is treated in civil litigation.[62]

Timing considerations for investigation of assets through public sources and private investigators

To allow the best chance for asset seizure, efforts to find appropriate assets – including asset tracing – should begin as soon as practically possible. As mentioned above, an informal investigation into a host state's assets could begin as part of the investor's due diligence conducted when contemplating investing abroad or before commencing negotiations over the arbitration clause.[63] Many investors, however,

---

61 In proceedings to enforce a final arbitral award against an Indonesian state-owned oil company, the award creditor sought to attach funds derived from oil sales and held in New York trust accounts. A global investigations firm obtained key evidence used by Indonesia to support the district court's determination (affirmed on appeal) that 95 per cent of the funds actually belonged to Indonesia and were immune from attachment and execution under the FSIA. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*, 313 F.3d 70, 88–93 (2d Cir. 2002).

62 See, e.g., Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals', Section 4, 'Deriving a General Principle from National Laws? – A Comparative Study of National Civil Procedure', in *The Law & Practice of International Courts and Tribunals* (2020) 19(2) at 147–176 (surveying the laws of 27 national jurisdictions bearing on the treatment of illegally obtained evidence in civil litigation), available at https://doi.org/10.1163/15718034-12341420.

63 For example, investors may want to have sovereign asset information in hand when negotiating an arbitration agreement as part of the parties' contract. It could be relevant to an investor's position on the seat of arbitration or procedures for arbitration, or both, and whether to argue during contract negotiations that the sovereign must expressly waive execution immunity should the investor prevail in an arbitration dispute. Sally-Ann Underhill and M Cristina Cardenas, 'Awards: Early Stage Considerations of Enforcement Issues', in J William Rowley QC, Emmanuel Gaillard and Gordon E Kaiser (eds), *The Guide to Challenging and Enforcing Arbitration Awards* (Global Arbitration Review, 2020), 5–6 ('The arbitration Clause should ideally include a broad waiver of immunity, including both pre- and post-judgment attachment of assets'). An investor should keep in mind, however, that an immunity waiver from the contracting sovereign does not guarantee that a sovereign's assets can be attached or seized as a means to pay an award. For example, in *Thai-Lao Lignite v. Government of the Lao People's Democratic Republic* [2013] EWHC 2466

begin the search for the sovereign's assets only after an investment dispute has surfaced, or after receiving a final award in the arbitration. An additional reason an investor should conduct host-state asset tracing before initiating an arbitration is that once the sovereign learns it may be liable for damages to an investor, the sovereign will have an incentive to restructure ownership of commercial assets in a way that blocks or impedes their seizure. Identifying those assets and determining their location before the host state moves them could be helpful for tracking them later or for requesting a court or emergency arbitrator to grant emergency interim measures to bar the state from dissipating the assets. Nonetheless, if an investor waits until an award is imminent, or after the arbitral tribunal issues the award, an investor can still successfully pursue seizure of the sovereign's commercial assets. The chances for success are increasingly diminished, however, the longer the investor waits to implement its plan.

Investigation of assets through judicial proceedings

Not infrequently, award creditors will initiate judicial proceedings to engage the help of courts to secure payment of the award. In some jurisdictions, investors can initiate these proceedings while the arbitration is pending, or only when the award is imminent or issued by an arbitration tribunal. Discovery through judicial channels may present the most successful opportunities to ascertain the nature and location of a sovereign's assets.[64] This may include discovery directed to the sovereign[65] or discovery directed to third parties that are presumed to be in possession

(Comm), the Lao government expressly waived immunity to attachment and execution in its agreement to arbitrate disputes arising out of its Production Sharing Contract. However, specific assets were not designated as attachable to satisfy an arbitral award. Thus, when Thai-Lao Lignite sought to attach nearly US$74.5 million of Laos' assets located in England, it was confronted with the Lao Central Bank's unwaived claim to immunity for Central Bank assets. The England and Wales High Court held that, because the Lao Central Bank – a separate Laos state entity – had a beneficial interest in the Lao government's funds held in England and had not waived its immunity from attachment and execution of assets, the Court had no authority to freeze Laos' assets held in the Central Bank because it would affect the Central Bank's assets and harm the functions of the Central Bank.

64 Ascertaining the nature of the sovereign's assets, however, necessarily includes both commercial and non-commercial assets. As explained in footnote 43, some countries (e.g., Turkey) do not make the distinction and allow a debtor to collect from a sovereign's non-commercial assets to satisfy an award or judgment.

65 e.g., *Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of the Lao People's Democratic Republic*, No. 10-CV-5256, 2011 WL 4111504, at *7, 10 (S.D.N.Y. 13 September 2011) (awarding nearly US$20,000 in sanctions against Laos for failure to comply with a discovery order).

of a sovereign's assets or information about those assets.[66] The particular discovery practices and remedies available will depend on where the assets are located (or where the sovereign has legal ownership of the asset). Enforcement of an award against a sovereign debtor in that sovereign's courts will likely be difficult due to the state's interest in protecting its assets. Thus, an investment creditor will usually seek enforcement in the courts at the seat of arbitration or in the courts of a third country where attachable assets are located. The available legal tools to find and force a turnover of assets, either pre-award or post-award, will depend on the domestic laws of those third-country courts.

Judicial discovery and attachment of sovereign assets

The availability of judicial assistance with asset discovery and seizure will depend largely on the forum's law on sovereign immunity.[67] An enforcement court whose laws adhere to the principle of restrictive immunity of a sovereign will usually apply its laws on asset discovery and seizure in the same manner as it would apply to a private citizen,[68] although the application of particular procedures might differ depending on whether the procedures themselves would encroach on a sovereign's immunity.[69]

---

66 For example, in 2014, the US Supreme Court held that sovereign immunity is not a defence to preclude imposition of post-judgment discovery of a sovereign's commercial assets, even if the assets are located in other countries and for that reason are immune from attachment and execution in United States. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

67 For example, a foreign sovereign's assets located in Hong Kong cannot be discovered, attached or turned over with judicial assistance by Hong Kong's courts because Hong Kong is subject to China's absolute immunity law, which does not allow exceptions to jurisdictional or enforcement immunity. So, an award creditor may be out of options if all of the sovereign debtor's commercial assets are held in China or its Special Administrative Regions (Hong Kong and Macau).

68 e.g., Unites States law: Section 1606 of the FSIA, codified at 28 U.S.C. 1606 ('As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . .').

69 For example, *Bankers Trust*, *Anton Piller* and *Mareva* injunction orders available to assist with tracing and seizing assets of private citizens may not be available or effective to compel disclosure or seizure of a sovereign's assets.

Pre-award legal tools

Some jurisdictions have procedures in place that allow courts to order both discovery of the location of attachable assets and seizure of those assets even before an arbitral tribunal issues an award. Pre-award tools that may be available through judicial assistance include *Norwich Pharmacal*[70] orders, interim measures granted by the arbitral tribunal, third-party disclosures based on civil procedure or debt collection rules, and writs of attachment.

Norwich Pharmacal orders

Norwich Pharmacal orders are available in some common law jurisdictions and are useful to assist an investor with gathering information from third parties to which the state fraudulently transferred its assets or that were involved with fraudulently transferring the sovereign's assets.[71] These third parties, however, must not be a party to enforcement of the arbitral award. The beauty of *Norwich Pharmacal* orders is that the 'discovery' of information about the assets can be done without notice to the sovereign. That can avoid the risk of the sovereign dissipating those assets to avoid payment.

Pre-award discovery and seizure granted by arbitration tribunals

Some jurisdictions' domestic laws provide an arbitral tribunal with the authority to issue an order (or request one from an appropriate judicial authority) for a sovereign respondent or a third party to disclose information that would assist the investor in identifying and seizing assets subject to attachment in those jurisdictions.[72]

---

70 *Norwich Pharmacal Company v. Commissioner of Custom and Excise*, 3 W.L.R. 164 (H.R. 1973), 2 All E.R. 943 (H.L. 1973).

71 e.g., The Queen's Bench Guide ¶ 4.7 (2021). To the extent exceptions to jurisdictional and enforcement immunity apply, exemplar countries that allow *Norwich Pharmacal* orders to aid in the discovery and seizure of sovereign assets located in their jurisdictions or possessed by citizens of their jurisdictions are: Canada and the United Kingdom. Alison G FitzGerald and Azim Hussain, 'Canada', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity 2020* (Law Business Research, 2020), at 12 (explaining Canadian courts' competency 'to assist with or otherwise intervene to help identify assets held by states in the territory'); Stephen Jagusch QC and Odysseas Repousis, 'United Kingdom', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity 2020* (Law Business Research, 2020), at 77 (explaining English courts' competency 'to assist with or otherwise intervene to help identify assets held by states in the territory') .

72 For example, if the seat of arbitration is Malaysia, under the Malaysia Arbitration Act of 2005, the arbitration panel adjudicating the investor–state arbitration claims has the authority

Civil procedure and debt collection rules

Some jurisdictions have rules governing civil procedure and debt enforcement that allow pre-award *ex parte* requests to take evidence from third parties if it can be shown that the assets are at risk of dissipation.[73] Once that risk is established, the investor can seek a remedy to freeze the assets temporarily to secure payment of an imminent award.[74]

Pre-award attachment

Other jurisdictions allow an investor to request attachment of assets already known to the investor, but do not have mechanisms in place to assist the investor to discover assets that may be subject to attachment and execution. This is the case in Denmark and Egypt, for example.[75]

---

to compel a sovereign respondent to disclose or turn over assets during the course of the arbitration. Malaysia Arbitration Act of 2005, Article 11 (allowing the arbitration panel to issue interim awards for discovery, security for the amount in dispute 'by way of arrest of property', 'the preservation, interim custody, or sale of any property which is the subject matter of the dispute', 'ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party', and 'an interim injunction or any other interim measure'). Switzerland grants similar authority: 'In arbitration proceedings, by entering into an arbitration agreement, a foreign state waives its right to assert a plea of immunity. Consequently, interim or injunctive relief could be issued by an arbitral tribunal pursuant to the rules applicable to the arbitration proceedings.' Sandrine Giroud, Veijo Heiskanen and Anton Vallélian, 'Switzerland', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 63 (explaining available interim measures).

73 Switzerland, for example, has such a rule. See Switzerland Civil Procedure Code, Articles 158, 256. See also Marc Henzelin, Sandrine Giroud and Deborah Hondius, 'Switzerland', in Daniel Kadar, Laetitia Gaillard and Stéphanie Abdesselam (eds), *Lexology Getting The Deal Through: Asset Recovery* 2021 (Law Business Research, 2020), at 106 (explaining available interim measures).

74 Switzerland Debt Enforcement and Bankruptcy Act, Article 272 et. seq. See also Giroud, Heiskanen and Vallélian, footnote 72.

75 In Denmark, investors can request a court's interim assistance with attachment of assets to secure payment of an arbitral award, including attachment of a sovereign's ships or the ships' cargo if certain conditions are met. Danish Administration of Justice Act, Chapter 56; Danish Merchant Act, Chapter 4; Danish Act on Foreign State-owned Vessels; Jacob Skude Rasmussen and Niels Anker Rostock-Jensen, 'Denmark', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 16 (explaining available Interim or injunctive relief); id. at 18 (explaining '[t]here is no general access for the Danish courts to help identify assets held by states or other parties'). Similarly, Egypt can provide 'urgent production' by issuing 'orders to secure rights that could be lost by a loss of evidence, to prove a fact that could cease to exist by lapse of time, or to avoid imminent harm' prior to the '[f]inal

Still, some jurisdictions, such as France, have neither pre-award discovery nor seizure available as interim relief unless a sovereign party to the dispute consents to such discovery and seizure.[76]

Post-award legal tools

Jurisdictions that provide pre-award relief tools to investors typically will make those same tools available for post-award/post-judgment relief. Jurisdictions that provide no pre-award relief at all may have more weapons in their arsenal to discover and seize assets once a tribunal issues an award and the award is converted to a domestic judgment. That is because the exceptions to immunity in those jurisdictions are geared particularly towards either enforcing an agreement to arbitrate or recognising already-existing awards (i.e., converting the award to a domestic judgment) and attaching and executing against commercial assets to satisfy those domesticated awards.[77]

When choosing an enforcement court, an essential factor to consider is which jurisdictions are the most pro-enforcement and frequently enjoy deferential treatment by other enforcement courts concerning award confirmation or

---

settlement of the dispute (such as an interim award of damages, judicial guardianship, depositing goods in a secure place protective seizure or sale of goods susceptible to damage)'; Mohamed S Abdel Wahab and Omar Abdel Aziz, 'Egypt', in Stephen Jagusch QC and Odysseas G Repousis (eds), *Lexology Getting The Deal Through: Sovereign Immunity* 2020 (Law Business Research, 2020), at 22–23 (explaining available interim or injunctive relief); id. at 25 (explaining Egyptian courts are not 'competent to assist with or otherwise intervene to help identify assets held' in Egypt).

76 Article L111-1-2 of the French Code of Civil Enforcement Proceedings requires that pre-award '[c]onservatory . . . measures over an asset owned by a foreign state can only be authorised by a judge if the state has expressly consented to the performance of such measure [or] the state has allocated or earmarked the asset at stake to satisfy the claim that is the subject-matter of the legal proceedings'.

77 For example, the United States' restrictions on attachment immunity under the FSIA are far more robust post-judgment than prejudgment. Sections 1609 and 1610(d) of the FSIA preclude any prejudgment attachment to secure satisfaction of an ultimate judgment, except where the sovereign party 'explicitly waived its immunity from attachment prior to judgment'. Courts in the United States, however, rarely find that a sovereign has explicitly waived immunity from attachment where the parties' governing arbitration agreement or the governing treaties do not clearly and unambiguously express a waiver, whereas Section 1610(a) of the FSIA – the law governing attachment immunity post-judgment – allows attachment of commercial assets if a sovereign party explicitly or implicitly waived its immunity from attachment.

recognition decisions.[78] Pro-enforcement jurisdictions usually have various judicially compelled disclosure tools[79] and robust authority to enforce the use of those tools should recipients of asset discovery fail to comply.[80]

Post-judgment discovery

Depending on the jurisdiction in which an investor chooses to initiate enforcement proceedings, formal investigation to identify the judgment debtor's assets can occur through judicial discovery proceedings. This type of investigation usually enhances an investor's chances of discovering attachable assets, even if those assets are outside the geographical boundaries of the court's enforcement jurisdiction and spread all over the world. For example, in *NML Capital*, Argentina had no attachable assets in New York or elsewhere in the United States. Yet, the Supreme Court held that the FSIA did not preclude a judgment creditor from using the US court's authority to compel discovery to peer into the sovereign's assets located all over the world – to the extent third parties under the court's jurisdiction had access to that information.[81]

---

78 For example, in ongoing cross-border disputes between Thai-Lao Lignite (TLL) and the Laos government in connection with TLL's attempts to enforce a valid Malaysian arbitration award, the English High Court confirmed the award with deference to the US court's judgment confirming the award on res judicata grounds. See *Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao PDR) Co Ltd v. The Government of the Lao People's Democratic Republic* [2012] EWHC 3381 (Comm) ('[T]his award is manifestly valid and given what was decided by the U.S. courts any possible objections that might be raised with regard to the enforceability of this award have been determined in the United States . . . and are matters of issue estoppel.'). After the award was set aside in Malaysia, however, the US court vacated its own judgment confirming the award.

79 For example, in the United States, US judgment creditors can subpoena third parties to disclose details about a sovereign's assets that will help them pinpoint which assets are subject to seizure and turnover under any jurisdiction's laws. That disclosure could be in the form of written answers to interrogatories, production of documents in response to a formal document request, or oral or written deposition testimony, under penalty of perjury. See Rules 30, 31, 33 and 34 of the United States Federal Rules of Civil Procedure (FRCP). Court permission is not required to seek such disclosures through subpoenas. If a third party fails to comply with the subpoena, a US court can compel disclosure through additional orders or monetary sanctions, or both. FRCP 37.

80 If a third party refuses to comply with a court order compelling disclosure or sanctions, the court has the power to hold the third party in contempt, subjecting the third party to a fine or jail time, or both, until it complies. See 18 U.S.C. § 401(3).

81 *NML Capital*, footnote 66, at 142.

Post-judgment attachment or seizure

In many jurisdictions, such as the United States,[82] Canada,[83] Egypt,[84] Turkey[85] and the United Kingdom,[86] a court has authority to 'attach', 'arrest' or 'seize'[87] a sovereign debtor's assets, under certain conditions to safeguard them from dissipation and to secure a means of paying the sovereign's obligations under an arbitral award/domestic court judgment. An award creditor looking to initiate such an attachment proceeding must be aware of the threshold requirements for obtaining the relief. In some countries, the federal law provides the jurisdiction for these attachments, but state or provincial law provides the procedures for attachment and execution. For example, in the United States, the FSIA provides both federal and state courts with jurisdiction to attach (prejudgment and post-judgment) before a final ruling on whether those assets can be turned over to the judgment creditor.[88] Rule 69 of the Federal Rules of Civil Procedure, however, requires that the procedural laws of the state forum (where the action will be adjudicated) govern the 'procedure on execution . . . and . . . proceedings supplementary to and in aid of judgment or execution', which includes a request to seize a sovereign's assets.[89] Thus, once an investor is able to meet the thresholds of the FSIA and applicable state law for attachment, a US court can order a sovereign debtor's assets be restrained.

---

82 Section 1610(a) of the FSIA.

83 *Canadian Planning and Design Consultants Inc. v. Libya,* 2015 ONCA 661, ¶ 74 (affirming a lower Canadian court's issuance of garnishment notices to Libya's banks by allowing continuance of enforce of those notices while immunity issues were being adjudicated in Libya's Canadian set-aside action).

84 'Private domain assets . . . According to Egyptian jurisprudence, sovereign immunity is limited to the sort of acts and transactions performed by a state in its sovereign capacity. Any other civil or commercial acts are not covered by sovereign immunity', Wahab and Aziz, footnote 75.

85 'There are examples where assets of foreign sovereigns were seized by Turkish Enforcement Offices in connection with the enforcement of the International Centre for Settlement of Investment Disputes (ICSID) awards.' Orcun Cetinkaya, footnote 43, at 72.

86 *Orascom Telecom v. Chad* [2008] EWHC 1841, ¶¶ 1, 3, 51 (Comm) (issuing a third-party freeze order to the sovereign's bank in London to restrain proceeds of oil sales that were reserved to repay oil pipeline project finance loans to the World Bank).

87 The terminology depends on the jurisdiction, but 'attachment' and 'seizure' have the same effect – sequestering a debtor's assets to secure payment of a judgment.

88 See Section 1610(a) and 1610(d) of the FSIA.

89 e.g., *Crystallex*, footnote 53, at 134 (applying FSIA and Delaware law on obtaining a writ of attachment).

Restraining assets, in any jurisdiction, may include, for example, ordering a sovereign or third party in possession of sovereign property to place funds into a court registry, freezing sovereign bank accounts at third-party banks, taking physical custody of a sovereign's real property located within the forum, and restricting transfers of property from a third party to a sovereign or from a sovereign to a third party. A court's restraining of property through applicable attachment procedures, however, does not guarantee that a judgment creditor is entitled to possess such property. A court will still need to decide whether the property seized is subject to execution immunity.[90] Nonetheless, an award creditor's victory in an attachment or seizure proceeding provides a hefty benefit that could lead to settlement on terms favourable to the award creditor,[91] even if the assets ultimately cannot be turned over to the investor to satisfy the judgment.

Conclusion

An investor's plan of asset identification, seizure and ultimate enforcement is completed once payment of the arbitral award is satisfied. As noted above, devising a successful strategy for enforcement of the award starts with understanding the sovereign immunity laws of the jurisdiction where a sovereign's assets are potentially located. Other considerations, such as a court's statutory time limitations on judgment enforcement, or whether there is a notice requirement to be met before initiating adversary proceedings, may be just as important to the success of award enforcement and should be analysed carefully by an investor when investigating a sovereign's assets before a dispute arises and again when seeking seizure and ultimate execution on those assets to pay an award. To understand fully all options available to an investor armed with a favourable arbitration award, the authors recommend to investors wishing to be best prepared to collect on an award within a reasonable period to engage reputable legal counsel in the relevant jurisdictions who are familiar with the specific tools necessary for successful collection of sovereign assets.

---

90 *Preble-Rish Haiti, S.A. v. Republic of Haiti*, No. 21-CV-4960 (PKC), 2021 WL 4037860, at *3 (S.D.N.Y. Sept. 3, 2021) (vacating attachment of accounts of the Central Bank of Haiti upon further showing that the initial attachment was improper because the Central Bank was immune).

91 See Julian Schumacher, Christoph Trebesch and Henrik Enderlein, 'Sovereign Defaults in Court, ECB Working Paper Series No. 2135', Appendix 1 (February 2018): 69–70, available at https://www.ecb.europa.eu/pub/pdf/scpwps/ecb.wp2135.en.pdf.

APPENDIX 1

About the Authors

Mark Bravin
Mitchell Silberberg & Knupp LLP

Mark Bravin heads MSK's international dispute resolution practice. He and his team specialise in handling disputes between private parties and sovereign governments in US court litigation and international arbitration. He has a distinctive record of finding effective solutions to intricate, and often cutting-edge, legal problems involving international investments and contracts.

Mark has extensive experience with the Foreign Sovereign Immunities Act, which governs all lawsuits against foreign states and state agencies in US federal and state courts. He has also handled a variety of arbitration-related matters under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, including motions to compel arbitration and petitions to enforce arbitral awards.

He is lead counsel for the award creditor in *TIG Insurance Co v. Republic of Argentina*, which established the test that federal courts in the DC Circuit must follow to determine when sovereign-owned property 'is used for commercial purposes' and may be subject to seizure and sale to enforce a foreign arbitral award.

Tiana A Bey
Mitchell Silberberg & Knupp LLP

Tiana A Bey's practice includes international arbitration related to bilateral investment treaties, arbitration award enforcement proceedings, international contract disputes and family law implicating international issues. With over 20 years of legal experience, her positions as a paralegal and now attorney have given Tiana a unique and advanced perspective on any case that comes her way.

Tiana has performed all aspects of litigation from case intake to final disposition at trial. She has briefed issues relating to the United States Foreign Sovereign Immunities Act, the Indian Arbitration Act, the Malaysian Arbitration Act, the

Singapore International Arbitration Act, the Singapore Sovereign Immunities Act and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards before the United States Court of Appeals for the Second Circuit and the United States District Courts for the Southern District of New York and the District of Columbia, as well as in arbitration and ad hoc proceedings before ICSID arbitration panels under ICSID and UNCITRAL arbitration rules.

Theresa B Bowman
Mitchell Silberberg & Knupp LLP

Theresa B Bowman has developed her international arbitration and litigation practices in the areas of commercial disputes and obtaining jurisdiction over, and discovery from, foreign sovereigns and transnational corporate entities. A significant portion of Theresa's practice includes representation of clients in their efforts to enforce intellectual property rights worldwide. Theresa has represented several global media companies in connection with multi-jurisdictional content protection disputes that require coordination of a cross-border team and navigation of difficult jurisdictional issues.

Theresa has successfully briefed and argued issues of foreign sovereign immunity as well as contract and intellectual property rights before multiple trial and appellate courts. She has navigated all aspects of complex litigation and arbitration against many foreign sovereign and multi-national entities in a wide variety of subject areas, from the pre-filing investigation stage to enforcement and asset recovery.

Theresa has been published in *Global Arbitration Review*, the *National Law Review*, the International Society of Law's *International Legal Materials* and the *World Financial Review*.

Albina Gasanbekova
Mitchell Silberberg & Knupp LLP

Albina Gasanbekova's practice focuses on international arbitration and federal litigation matters involving contract disputes, enforcement of arbitral awards, public international law and jurisdictional issues, including the application of the Foreign Sovereign Immunity Act. Albina also represents clients across various industries in connection with intellectual property involving copyright and trademark infringement.

In addition to her work, Albina serves on the editorial board for *ITA in Review*, an e-journal devoted to international arbitration. She was also recognised as a 'Rising Star' in the field of international law by *New York Super Lawyers*.

Albina is a native Russian speaker, dual-qualified in both common law and civil law, and can help clients orient and navigate in a wide variety of legal systems and jurisdictions.

Mitchell Silberberg & Knupp LLP
1818 N Street NW
7th Floor
Washington, DC 20036
United States
Tel: +1 202 355 7900
mnb@msk.com
tab@msk.com
tbb@msk.com
a1g@msk.com
www.msk.com

The *GAR Guide to Investment Treaty Protection and Enforcement* is a new guide on the practical side of investor–state disputes. It tracks the concept of investment protection throughout its life cycle – from negotiation of the treaty to enforcement of an award and everything in-between. In doing so, it seeks to guide the reader in what to do and think – how to strategise – at every stage of a dispute, focusing on what works. The content is further enriched with a series of contributions from arbitrators, on topics du jour.

ISBN 978-1-83862-856-7