Pursuing Protected Assets of Sovereign Award Debtors

22 January 2016

Michael S. Kim
KOBRE & KIM LLP
michael.kim@kobrekim.com

By definition, whenever a claimant finds itself having to enforce an arbitration Award, the Award debtor has been preparing to avoid paying. Especially where the debtor is a sovereign nation, various jurisdictions' approaches to sovereign immunity, transparency and comity give the debtor an inherent advantage: there are numerous ways to structure asset protection schemes, and to hide assets. In addition, even where the claimant ferrets out a vulnerability in the asset protection structure of the sovereign debtor, the claimant gets only one big chance at a significant asset seizure. Of course, the Awards in this area are typically very large (exceeding several hundred million USD and sometimes in the billions USD) and very difficult to monetize through a single asset seizure.

Thus, enforcement campaigns against sovereign nations require a multi-pronged approach designed to force a settlement. The following common questions are examined here:

(1) What should you do in the six months leading up to the Award and immediately thereafter?
(2) How do you find seizable assets?
(3) Do you really want to try to seize assets?
(4) Do you have to find assets to monetize the Award?

I. <u>What Should You Do in the Six Months Leading up to the Award and Immediately Thereafter?</u>

Very often, a claimant who receives a large arbitration Award but who is inexperienced in international enforcement will engage in the following course of conduct:

- "Wait and see" if the Award debtor will pay after the relevant period (e.g., 30 days after the Award, exhaustion of court proceedings to invalidate the Award, etc.) while making threats regarding enforcement;

- Commission an "asset search" typically from an investigative firm, hoping that an actionable list of a sovereign debtor's assets can be acquired via investigation without judicial proceedings; or
- Engage counsel in several jurisdictions, each with a narrow mandate to prepare papers for recognition of the Award and seizure of some asset within their jurisdiction that appears to have some connection to the sovereign debtor.

What are the problems with each of these common approaches?

Wait and See if the Debtor Pays, While Making Threats. If the sovereign debtor voluntarily and promptly pays the Award, this approach will have saved the claimant the expense and hassle of designing an enforcement campaign. However, the typical recalcitrant sovereign debtor has already been the subject of numerous creditor attacks and is quite savvy regarding asset protection structures. Thus, a successful enforcement campaign depends on finding the handful of overlooked vulnerabilities within such structures to seize assets that other creditors have not been able to obtain. Typically, while an arbitration is ongoing, the sovereign debtor has not focused on asset protection vis-à-visthe particular claimant involved and only begins such planning in the weeks following the Award. Most of the corrections to a sovereign debtor's flaws in asset protection structures are implemented in the first 30 days after the issuance of a large Award. Consequently, the first ~30 days following the issuance of the Award is a critical period for the claimant to be actually executing an enforcement campaign that has already been designed. This is not the period to be speculating whether the debtor will pay soon.

Even worse is where the claimant, while not having an enforcement campaign underway, merely makes threats to the sovereign debtor with specifics of how the claimant might enforce. This usually serves only to educate the debtor as to where to concentrate further asset protection structuring efforts. It seems obvious that a sovereign nation which was determined to avoid paying a significant arbitration Award is not going to transfer US $500 million just because someone yelled at them in a meeting. However, many (irrationally hopeful) claimants behave as if they believe such a scenario can occur.

In order to be in a position to execute an enforcement plan upon the issuance of an Award, typically the claimant will need to have begun enforcement planning approximately six

months earlier. This allows sufficient time for collection of intelligence, consideration of options by senior management, and preparation of the necessary legal papers.

Commission an "Asset Search". Too many first-time players in the game of hunting hidden assets base their understanding of how to proceed on spy movies, in which a *Mission Impossible* type team of investigators acquire incredible secrets about governments by dropping into air vents of buildings, wearing disguises, and accepting confidential documents in furtive meetings in back alleys. Often a claimant will commission an "asset search" believing that they will receive an actionable list of assets to pursue.

There are a number of high-quality investigative firms operating in this space that can collect information from a wide range of publicly available sources and can also acquire very useful private leads for further investigation and judicial discovery. There are also many questionable investigative firms that market themselves as having special sources of information via former intelligence service or law enforcement officers, but who in fact are just providing very expensive public records searches of limited usefulness. Regardless, no investigative firm can deliver a list of "hidden" assets that can be used as evidence in Court to seize them.

The useful investigative report is a detailed list of leads based on an aggregation of public records (sometimes public records which are difficult to obtain, such as customs records of a sovereign nation's exports coming into different ports of call) and informal human intelligence. Once in a while, but very rarely, an investigative firm will unearth a valuable piece of intelligence about the nature of a hidden asset. In any of these scenarios, however, it is extremely rare for judicial seizure action to be possible based on the investigative results alone. There are two common problems. Often the report does not contain a sufficient level of detail, which could only be obtained via judicial discovery (for example, whether a specific state-owned enterprise directly holds the asset in question or whether it is held via a subsidiary, in which case the asset cannot be seized to satisfy an Award against the parent). Sometimes, the basis of the intelligence is opaque and cannot be advanced to a Court as the basis for a freezing injunction; so the claimant is left with hunches and sometimes knowledge, but no practical way to seize anything.

Engage Counsel in Several Jurisdictions, Each with a Narrow Mandate. Another common step that claimants take is to hire a law firm in each of the countries listed in the

investigative report. The claimant will then typically instruct the law firm to prepare to have the Award recognized, and, after, to proceed to freeze the asset in question.

The problem with this approach is that, in the case of sovereign debtors, most attempted recognition and seizure applications are mistakes that decrease, rather than increase, chances at monetizing the Award.

Recalcitrant sovereign debtors have typically been under attack from numerous creditors, such that their asset protection structures might contain only a handful of mistakes that can be exploited. In this context, a claimant usually gets only one or two good opportunities for asset seizure. Once Award recognition and seizure litigation has begun, the sovereign debtor will gain significant insight through the resulting judicial process into what information this particular claimant possesses and restructure its assets accordingly. Thus, it is important for the claimant to mount one, well-planned significant assault at the right time, rather than engaging in a series of minor skirmishes that serve only to educate the debtor as to where its vulnerabilities lie.

Another problem that arises is that when the claimant proceeds robotically in multiple jurisdictions simultaneously, the proceedings never move at the same pace. Some lag significantly behind others. A bad ruling in a recognition proceeding in one jurisdiction can lead to substantial complications in similar proceedings in other countries. In addition, some countries will require a substantial bond to be installed at the outset of an asset freeze application. Such a ruling can confuse courts in other countries, where bonding is more discretionary, to also impose onerous security requirements on the claimant. Pretty quickly, the claimant can find that – even though it is trying to collect a debt – the claimant is the one doing most of the paying!

II. How Do You Find Seizable Assets?

There are two directions to move in searching for hidden assets – forward and backward.

In sovereign enforcement, it is rare to find a commercial asset (exempt from sovereign immunity protections) owned directly in the name of the sovereign nation. Even where the Award debtor is a state-owned enterprise, assets may be owned by a subsidiary that is a different legal entity than the parent company that is the Award debtor. In most countries, an Award

against a parent company does not entitle the claimant to seize assets belonging to a subsidiary, even a subsidiary wholly owned by the Award debtor.

Thus, it becomes necessary to hunt for assets that are structured in a vulnerable manner (i.e., either owned by the Award debtor and overlooked in asset protection structuring, or susceptible to arguments that the assets are beneficially owned by the Award debtor even though the nominal ownership may be under a different entity). The most common method that claimants focus on exclusively is forward tracing – in other words, looking at where assets belonging to the sovereign debtor *used to be* historically, and then trying to trace where the assets were moved.

This forward-tracing methodology usually does not yield helpful results and takes an enormous amount of time and money. This is because the historical information on the asset when it used to be directly owned by the sovereign is dated, and in the case of liquid assets, even a few days' transactions can alter the legal characteristic of the asset such that it is resistant to seizure. In addition, the process of tracing money passing through multiple jurisdictions requires several successive court applications that take many months and many dollars. By the time the creditor closes in on the "resting place" of the assets, the sovereign debtor has received notice of the forward-tracing efforts and can easily move or re-characterize the assets.

Forward tracing is a necessary evil, in that ultimately, the creditor needs to demonstrate that particular assets to be seized belong to the specific debtor liable for the Award, and linking assets to the sovereign debtor by their origin is a common method for doing so. However, relying primarily on forward tracing is usually destructive of the value of the Award because even a few months of clumsy asset seizure litigation can rapidly educate the debtor as to how to structure its assets, which can further devalue the Award.

Backward tracing refers to identifying how the debtor uses assets *today* and tracing back from the instances of asset consumption to find the sources. For example, a sovereign debtor might use certain bank accounts to service interest payments on bonds it has issued. By tracing back from the receipt of funds by a bondholder, one can find the account which holds the funds used to make payments. Or a state-owned enterprise that is an Award debtor would have paid legal fees to its counsel in the arbitration. The source of such funds can be traced backward from the accounts of opposing counsel from the arbitration.

Tracing backward from points of present consumption carries several advantages.

First, there is strong evidence that the source of funds is beneficially owned by the debtor, regardless of in whose name such funds are held. After all, the funds are being used clearly to service an obligation of the Award debtor, and Courts will be inclined to conclude that the assets are in fact beneficially owned by the debtor regardless of the legal labels put on its ownership as an asset-protection measure.

Second, the creditor will have discovered assets that are owned by the debtor *now*, as opposed to collecting historical information and attempting to trace forward through a maze of subsequent transactions and transfers. There is an elegance to skipping the numerous intermediate shell companies and bogus transactions that a debtor has interposed at great expense and attacking the assets as presently held by the debtor. As noted above, even if such assets cannot be traced back to funds originally owned by the debtor, its present use for the debtor's benefit will provide a strong presumption in many jurisdictions that such assets are vulnerable to seizure to satisfy an Award against the debtor.

There are essentially two types of asset identification available to the judgment creditor: independent asset discovery and asset discovery requiring judicial intervention.

Independent asset discovery takes place through the searching of public databases and records. Some countries (e.g., the UAE, Qatar, and others in the Middle East) have only very limited public records. However, this is the exception, not the rule. For example, most countries have public land registries that disclose the titleholder to a given piece of real estate.[1] The same is true for registries of ships and aircraft. It would be prudent for the creditor to start with searches of these registries in the debtor state itself, where such assets are most likely to be registered. Company registries are less helpful, because in most jurisdictions, such registries provide little or no public information as to ownership or control of the company. This may not matter where state-owned enterprises with high value assets are well-known already, but where

[1] It is rare to be able to search such databases by titleholder, and in many countries, such as Switzerland and Belgium, there are multiple provincial registries rather than a unified national one. The practical effect is that 'leads' are essential.

the state has established offshore companies to hold or distribute its assets, as recalcitrant states often do,[2] such opaqueness is plainly unhelpful.

Other public records can be usefully scrutinized. Copies of court judgments – and to varying degrees, underlying court filings – are freely available in most jurisdictions. This can be useful for three reasons. First, an unsatisfied judgment debt in favor of the sovereign state is itself a receivable that be collected upon in many jurisdictions to satisfy a separate Award or judgment. Ongoing litigation and arbitrations should be tracked with this in mind as well. Second, where the state has been a defendant (and lost), the experiences of enforcing prior Awards or judgments, so far as they are public, may offer the creditor insight into the state's assets and asset protection structures. Third, in all cases, lawyers representing the state can often be identified from court records. In some jurisdictions, lawyers can be required to produce information on the source of funds used to settle their bills in the backward-tracing process described above.

Information regarding bankruptcies is typically obtainable from public court records (e.g., in the United States) or other municipal sources (e.g., the debt enforcement and bankruptcy register in Switzerland). There may be scope to obtain details on credit liabilities (e.g., from the Bank of Portugal) or calls to creditors (e.g., from the Swiss Official Gazette of Commerce). In some civil law countries (such as Italy and some cantons in Switzerland), limited information from a taxpayer's tax returns may be publically accessed.

Meanwhile, shipping records such as bills of lading can provide actionable clues as to the nature and owner of valuable cargo. (These are often available through internet databases[3].) The location of specific ships, and often aircraft, can also be tracked via web services.[4] Such data can be useful not only to show the origin of specific cargo but also to know when that cargo, and indeed the vessel itself (if it can be seized), arrives in a creditor-friendly jurisdiction.

---

[2] The D.R. Congo, for example, appears to have made much use of offshore companies (in Bermuda, the BVI, and Jersery) as reported in two enforcement decisions from Jersey and England. *See La Geìneìrale des Carrières et des Mines v. FG Hemisphere Associates LLC (Hemisphere)* [2012] UKPC 27 and *Kensington Int'l v. Congo* [2005] EWHC 2684 (Comm), respectively.

[3] For example, the 'Cargos' database from Datamyne, available at http://www.datamyne.com/datamyne-cargos/.

[4] For example, https://www.vesselfinder.com or http://www.marinetraffic.com.

It is typically difficult to obtain bank account information of a sovereign state without court-ordered discovery. While it may be possible for private investigators to approach commercial counterparties to obtain details of payment instructions provided during a particular transaction, there is an obvious risk that the commercial counterparty may tip off the debtor state as to the creditor's enforcement campaign. Court-ordered discovery under seal and combined with a gag order (discussed below) is a safer, albeit more cumbersome, route.

Discovery with the aid of the Court or other judicial authorities provides a more direct route to asset identification and is especially useful in obtaining bank account information. It is often possible for the creditor to apply for discovery at the same time as applying for recognition of the Award. This is especially useful when court-ordered discovery is needed urgently in the ~30 day window after the Award is made – for example, for information on bank accounts currently used by the debtor state.

The precise methods and amounts of information available will vary from jurisdiction to jurisdiction. In France, for example, having obtained an exequatur order, the creditor can apply to the Bailiff to search for bank accounts in the name of the debtor. Other civil law jurisdictions (e.g., Switzerland, Italy, and Portugal) are much more restrictive and take a more robust approach to bank secrecy. In the U.S., the creditor can issue subpoenas to third party banks, and in the U.K. and commonwealth jurisdictions, third party disclosure orders and *Bankers Trust* orders are available to reveal assets or trace particular funds. Additionally, the creditor can apply for *Norwich Pharmacal* orders ("NPOs") against third parties.[5]Although NPOs are primarily aimed at identifying or completing a cause of action, they can yield information as to assets, for example, in respect of share ownership. That is one way to 'bust' an asset protection structure built on opaque offshore vehicles. In fact, it is now quite common in the offshore jurisdictions for such orders to be made against registered agents, requiring them to reveal registers of shares and directors, and beneficial owners of companies where, for example, the shares are held by nominees. Pressure brought to bear by the Financial Advisory Task Force (FATF) has resulted in offshore jurisdictions legislating in recent years to increase transparency regarding beneficial ownership of companies.

[5] *See*, *e.g.*, *Kensington Int'l Ltd. v. Congo* [2007] EWHC 1632 (Comm).

Even if enforcement of the Award is not likely to take place in the United States, there are good reasons for creditors enforcing an Award globally to pursue discovery in the U.S. courts, specifically in respect of bank accounts maintained or utilized by the debtor state or its alter egos. That is because (a) most states will conduct at least some transactions in U.S. dollars and (b) most USD wire transfers are processed through correspondent banks in the United States. Subpoenas can be served in the U.S. on those correspondent banks for wire messages without infringing sovereign immunity. Wire messages will typically disclose which bank the debtor uses and often the account number as well. Somewhat uniquely, this discovery can extend to information regarding bank accounts *outside* the U.S. Such subpoenas were upheld in *Republic of Argentina v. NML Capital, Ltd.*[6] Obtaining this information in the U.S. is especially invaluable where the bank holding the debtor state's account is located in a bank secrecy or debtor-friendly jurisdiction, and such discovery would simply be impossible in that jurisdiction itself. Note that discovery in the U.S. can be ordered in aid of foreign proceedings under 28 USC § 1782, so even if the underlying Award and litigation has no overt connection to the U.S., it is still open to the creditor there[7].

To ensure that the debtor does not get wind of the discovery, it would be prudent to conduct it under seal and, at the same time, obtain gagging orders against third parties providing information to the debtor state. In the United States, gagging orders can be made under the Federal Rules of Civil Procedure 45 and 65(a)(2). In England and many common law countries, gag orders can be made as part of the discovery order itself. For example, several gag orders were made against third parties by the English High Court in the *Kensington v. Congo* enforcement proceedings.[8] A search for bank accounts in France by the French bailiff is usually conducted without notice.

Finally, there is the 'nuclear' option of insolvency. Either the claimant or a defendant company that held debtor assets could be placed into insolvency: the claimant, where it is a special purpose vehicle with limited assets or obligations (and so can be liquidated relatively

[6] *See Republic of Arg. v. NML Capital, Ltd.,* 200 U.S. 321 (2014).

[7] Note however that it is not clear that extra-territorial discovery can be granted under 28 USC § 1782: *e.g.*, *In re Certain Funds, Accounts, &/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC,* No. 14 CIV. 1801 NRB, 2014 WL 3404955, at *8 (S.D.N.Y. July 9, 2014).

[8] This is reported in *Kensington Int'l Ltd. v. Congo* [2007] EWHC 1632 (Comm).

easily); or the defendant, where it is a separate legal entity from a sovereign. The claimant may place itself into insolvency with a view to taking advantage – through a liquidator – of cross-border asset discovery and recovery mechanisms that otherwise might not be available to it. Alternatively, the creditor may rely on the unpaid Award to place the debtor company into insolvency and obtain the appointment of a liquidator. That liquidator could then obtain information about the debtor's collectible assets that would otherwise be unavailable through regular post-judgment discovery. Further, the liquidator could initiate asset recovery claims that are only triggered upon insolvency (discussed below).

III. Do You Really Want To Seize Assets?

The above question might strike creditors as an odd one. After all, isn't the very purpose of an enforcement campaign to seize assets? Actually, no. The purpose of an enforcement campaign is to maximize the monetization of the Award. Sometimes seizing isolated assets helps that endeavor, and sometimes it hinders it.

Where the creditor has designed and executed a careful discovery and enforcement plan, the creditor may be in the enviable position of surreptitiously sneaking up on a major asset and freezing and seizing it. Such a lucky and sophisticated creditor might receive such a payoff from a single or handful of seizures that the substantial bonds and undertakings required will have been worthwhile.

However, such scenarios are difficult to achieve. The methods for freezing and seizing sovereign assets differ from normal commercial debt collection. Special obstacles include the immunity of sovereign debtors from *in personam* debt collection devices such as Mareva injunctions (absent written consent to enforcement against state assets[9]) and disclosure orders (a contempt for non-compliance leading only to another difficult-to-collect judgment), and complex sovereign immunity laws that protect assets owned by sovereigns and state-owned enterprises. The precise scope of sovereign immunity laws obviously differ from jurisdiction to jurisdiction, but, broadly speaking, most jurisdictions grant two types of immunity:

---

[9] Normally, sovereigns are not susceptible to Mareva injunctions. However, where the state has waived sovereign immunity and consented to the jurisdiction of the English High Court, limited Mareva injunctions can be issued in respect purely of commercial property. *See A Company Ltd. v. Republic of X* [1990] 2 Lloyd's Rep. 520 (Comm.), and *Pearl Petroleum Co. v. Kurdistan Reg'l Gov't of Iraq* [2015] EWHC 3361 (Comm) at 44.

(1) Immunity from adjudication or jurisdiction.[10] This means, subject to exceptions canvassed below, that a sovereign state cannot be sued. This immunity from suit typically bites when the creditor seeks to register the Award or when seeking to name the state as a defendant or respondent in an interim asset freeze.[11]

(2) Immunity from execution.[12] That is, state-owned assets cannot be executed against to satisfy an Award or judgment (unless an exception to the rule can be established).

The precise contours of the exceptions to sovereign immunity vary from state to state, but broadly speaking there are two:

(1) Both forms of immunity may be defeated by express waiver given by the state: i.e., consent to being sued and consent to execution of sovereign assets. Such a waiver is typically contained in the contract or investment treaty said to be breached. In most jurisdictions, the waiver must apply specifically to execution in order to seize sovereign assets (see, for example, the *Walter Bau* ruling in Germany, requiring a clear and unequivocal waiver from executory immunity.)[13]. In France, it cannot be a general waiver but must particularize the exact assets or class of assets over which immunity from execution has been waived.[14]Switzerland, however, takes a more unified view of

---

[10] In the UK, the State Immunity Act 1978 ("SIA 1978") s.1(1); in the U.S., the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1604.

[11] Courts around the world have held that registration invokes adjudicatory not executory immunity: e.g., the French Tribunal de Grande Instance in *Yugoslavia v. SEEE* [1970] 65 ILR 47; the German Supreme Court in *Walter Bau AG v. Kingdom of Thailand* [2013] Case No. III ZB 40/12; and the English Court of Appeal in *Svenska Petroleum Expl. AB v. Gov't of Lithuania (No. 2)* [2006] EWCA Civ 1529.

[12] See, for example, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C.A. §§ 1609, 1610 in the U.S., and s.13(2) of the SIA 1978 in the UK.

[13] As reported in *Sovereign Immunity in Enforcement Proceedings – The decision of the German Supreme Court in Walter Bau vs. Government of Thailand* (Stefan Kröll), available at: http://blogs.law.nyu.edu/transnational/2013/04/sovereign-immunity-in-enforcement-proceedings-%E2%80%93-the-decision-of-the-german-supreme-court-in-walter-bau-vs-government-of-thailand/. *See Walter Bau AG v The Kingdom of Thailand , Award, UNCITRAL, 1 July 2009, IIC 429 (2009) , at [10.10].* In the UK, this is governed by s.13(3) of the SIA 1978.

[14] *NML Capital Ltd. v. Republic of Arg.,* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 28, 2013 (Fr.), noted in *Enforcement against State assets: France's latest contribution to the Argentinean saga* (Clifford Chance Briefing Note) available at http://www.cliffordchance.com/briefings/2013/04/enforcement_againststateassetsfranceslates.html.

sovereign immunity so a waiver to jurisdiction may be taken to also be a waiver against execution.[15]

(2) Alternatively, if the subject matter of the dispute relates not to an act of state (sometimes called a public act) but rather a commercial (private) act, then immunity can be overcome. This so-called "restrictive theory" of immunity is followed throughout most of the world, in respect of both adjudicatory immunity[16] and executory immunity.[17] In practice it can be difficult for the creditor to defeat executory immunity when the state can make robust representations to the court that a given asset is public in its origin or use.[18]

The creditor faces a further burden where the assets to be seized are owned not by the state in its own name, but by a separate legal entity, such as state-owned enterprise. Seizure is not impossible, but there are additional difficulties. The first question is: can the separate entity claim the benefit of sovereign immunity (from suit)? The precise rules differ by jurisdiction on this and the answer largely turns on the definition of "state" and whether the entity is "agency", "instrumentality", "organ", "subdivision" (or similar semantics) of the state.[19] If yes, it will be

[15] See, e.g., *Kingdom of Greece v. Julius Bar & Co.*, Swiss Federal Tribunal [1956] 23 ILR 195. Note, however, that to execute against state assets in Switzerland, the Swiss courts do impose more rigorous jurisdictional requirements than simply to initiate proceedings, which may be seen as a *de facto* separate executory regime: *State Immunity from Execution*, 2nd Ed. (Hazel Fox), OUP, 2008, at 603.

[16] In several European countries the distinction is identified as between *acta jure imperii* (acts of state) and *acta jure getionis* (private acts). *See, e.g.*, *Campione v. Peti-Nitrogenmuvek NV & Hungarian Republic*, Italian Court of Cassation (Joint Session) [1972] 65 ILR 287; *Empire of Iran* , German Federal Constitutional Court [1963] 45 ILR 57; and *Libyan Arab Jamahiriya v. Actimon SA* [1985] 82 ILR 30. The public-commercial distinction has been incorporated into statute in other countries, e.g., in the UK, SIA 1978 s.3; and 28 U.S.C.A. § 1605(a)(2) in the U.S.

[17] *See, e.g.*, *Central Bank of Nigeria*, Landsgericht Frankfurt [1975] 65 ILR 131; *Abbott v. S. Afr*ica, Spain Constitutional Court [1992] 113 ILR 413; *Condor v Minister of Justice*, Italian Constitutional Court [1992] 101 ILR 394. In the UK, *see* SIA 1978 s.13(4).

[18] For example, the Krygyz government's *note verbale* to the Swiss Debt Collection Office that funds held by IATA were for a public use was held sufficient to establish immunity over the funds sought to be seized in Decision 5A_681/2011 dated 23 November 2011, ASA Bull 4/2012, p. 816. In the UK, a certificate from the relevant state's head of mission stating that the property in question is not in commercial use is a sufficient basis to found immunity from execution: UK SIA 1978 s.13(5). Such a certificate can be produced by the debtor state with very little effort.

[19] In the United States, "agency or instrumentality of a foreign state" means an entity which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and which is neither a citizen of a stat e of the United States as defined by statute, nor created under the laws of any third country. 28 USC § 1603(b). Meanwhile, the Privy Council for Jersey has held the test to determine whether an entity is an organ of the state in a jurisdiction to which the SIA 1978 applies (such as the UK, Jersey, or BVI), and hence able to

necessary to ask: has there been an effective waiver of that sovereign immunity? It might well be that a clear waiver is needed by that separate entity itself, or that a waiver made by the state would need to be imputed to the separate entity in order for it to be sued. Thirdly, is the entity sufficiently intertwined with the state that its assets can be seized in order to satisfy a judgment against the state? The question is similar to but distinct from the first. Finally, are the assets immune from execution? For example, central bank assets are presumptively immune from execution in some jurisdictions (e.g., the US and UK[20]), and, even so, it is always challenging to argue that central bank funds are used for commercial purposes.

One case illustrates the issues involved handily. NML brought proceedings in New York to garnish the accounts of the Argentinian central bank (BCRA) at the Federal Reserve. However, central bank funds cannot be executed on in the United States itself because such funds, held for the central bank's own account, are immune from execution under the Foreign Sovereign Immunities Act (FSIA).[21] The same is not true, however, in other jurisdictions such as Switzerland or Germany.[22] NML sought to leverage this different playing field by suing the central bank in New York, not in order to garnish its accounts at the New York Fed but simply for a declaration that it was an alter ego of the Argentine state. The immunity enjoyed by central banks under FSIA 1611(b) was only executory, so there was no automatic bar to suing the BCRA for a declaration. That declaration could then be deployed in Europe to execute on central bank assets in jurisdictions where such execution was allowed.

The argument for alter-ego status prevailed at first instance but was appealed. The Second Circuit accepted that the BCRA was an "instrumentality" of the Argentine state, and so

---

claim sovereign immunity, is whether the entity and the state are "so closely intertwined and confused that the entity could not be regarded as distinct for any significant purpose." *See La Geineìrale des Carrières et des Mines v. FG Hemisphere Associates LLC (Hemisphere)* [2012] UKPC 27.

[20] *See, e.g.* 28 U.S.C.A. § 1611(b)(1), and UK SIA 1978 s. 14(4).

[21] *See, e.g.* 28 U.S.C.A. § 1611(b)(1). Note the opposite in Germany, where courts have held that central banks, as separate legal entities, are not entitled to claim sovereign immunity – see, e.g., *Central Bank of Nigeria*, Landsgericht Frankfurt [1975] 65 ILR 131.

[22] *See Libyan Arab Jamahiriya v. Actimon SA* [1985] 82 ILR 30 and *Central Bank of Nigeria*, Landsgericht Frankfurt [1975] 65 ILR 131 respectively. In the UK, central bank funds are immune from execution under s.14(4) of the SIA 1978.

entitled to claim the benefit of sovereign immunity under the FSIA.[23] However, it found that sovereign immunity (from suit) had *not* been waived. NML argued that the waiver by the state could be imputed to the central bank as its alter ego, but the appeals court found that the BCRA was not so "extensively controlled" as to transform it into Argentina's alter ego.[24] The court also found that the central bank was not undertaking commercial activity in the United States so as to defeat sovereign immunity.

Where the asset is valuable but located in a country with stringent bonding requirements for an asset freeze (such as Turkey[25]), attempted asset seizure might be counterproductive to maximizing the monetization of the Award. If unsuccessful, the creditor could be stuck with a significant undertaking and associated liability, and a sense among potential buyers of the Award that the situation is fraught with more peril than opportunity.

Of course, where a creditor has located a significantly valued vulnerable asset, there is scope for a productive and rapid freeze and eventual seizure.

Freeze orders – that is interim orders freezing but not actually executing on assets – can be obtained relatively quickly in many civil law jurisdictions. In the *Yukos* case, for example, bank accounts were frozen in Belgium shortly after the Award was made[26] and there are reported examples of the same in Luxemboug in a recent case involving Slovakia.[27]

---

[23] The FSIA's definition of state includes any "agency or instrumentality", i.e., a separate legal person that is an organ or political subdivision of the state. 28 U.S. Code § 1603(b).

[24] The test is derived from *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

[25] In the case of Turkey, Article 259(1) of the Execution and Bankruptcy Law requires a security to be posted to apply for interim attachment, and Article 48 of the Turkish Private International Law No.5718 requires that a foreign claimant provide security before initiating proceedings in general. The exact security is discretionary but is commonly 15-20 percent of the total claim. UK and commonwealth courts often require the creditor to pose an undertaking in damages (i.e. a security) in order obtain an interim injunction, as well.

[26] See *Russia Set for Global Asset Fight Over Yukos After Seizures* (Bloomberg), available at http://www.bloomberg.com/news/articles/2015-06-18/russia-braces-for-global-asset-fight-over-yukos-after-seizures-ib2boyg9.

[27] *Achmea B.V. v. Slovk.*, PCA Case No. 2013-12 (UNCITRAL 2012). See *Slovakia Round-Up: Tribunals In Place For Steel Plant And (New) Health Insurance Disputes; Assets Frozen In Luxembourg In Bid To Collect On 2012 Award* (IAReport), available at http://www.iareporter.com/articles/slovakia-round-up-tribunals-in-place-for-steel-plant-and-new-health-insurance-disputes-assets-frozen-in-luxembourg-in-bid-to-collect-on-2012-award/.

Mareva injunctions and asset preservation orders (their *in rem* equivalent) are also a well-known feature of English law jurisdictions. While such injunctions and interim orders generally cannot be obtained against sovereigns[28], if the sovereign has specifically consented to enforcement against its assets, the immunity can be overcome at least with respect to freezing of assets in commercial use.[29] Note that even though a Mareva injunction is an *in personam* order operating on the debtor, it can indirectly 'bite' on identified accounts at financial institutions within the jurisdiction of the court issuing the order, because a financial institution assisting in breach of the order would be in contempt of court. Freezing orders can also be made against third parties holding assets for the defendant in English law (*Chabra injunctions*).

Once assets have been identified, and potentially frozen, there is a wide arsenal of tools by which the creditor can execute on them. The precise recovery strategy will have to be crafted to the case at hand, taking into account, for example, whether third parties hold legal title to the assets, the jurisdiction in which they are held, and the solvency or otherwise of the debtor.

Where the debtor maintains legal title, straightforward mechanisms such as garnishment proceedings in civil law jurisdictions,[30] turnover proceedings in New York,[31] or writs of control and execution in the UK,[32] can be deployed. The creditor can also apply for the appointment of a receiver to collect the debtor's assets.

Where the judgment debtor has dissipated his assets or placed them in the hands of third parties, the position is more complex. Further clawback proceedings, such as fraudulent conveyance claims or other proprietary claims, may be necessary to unwind those transactions. If the debtor has transferred assets to a company that it owns, the judgment creditor may seek to 'pierce the corporate veil', or argue alter ego status instead of unwinding the transaction.

---

[28] SIA 1978 s. 13(2).

[29] *See* footnote 9 *supra* for discussion of this exception and the SIA 1978 s. 13(3).

[30] For example, under the Debt Enforcement and Bankruptcy Act in Switzerland, or the respective Codes of Civil Procedure in Italy, Portugal, or the Netherlands.

[31] Turnover orders can be made under NY CPLR 5225(b).

[32] UK Civil Procedure Rules, Part 83.

As noted above, a nuclear tactic is to initiate involuntary insolvency proceedings against the debtor (where it is a separate legal entity from the state). The bankruptcy trustee or liquidator can then pursue clawback claims against third parties to whom the judgment debtor has transferred his assets, such as fraudulent preferences and transactions at undervalue. This has the added the value of placing the judgment debtor under intense personal or corporate pressure.

IV. Do You Have to Find Assets To Monetize the Award?

Maximizing the monetization of the Award can be accomplished by various means, only one of which is direct seizure of debtor assets. Some other key methods with respect to sovereign debtors include:

- Initiating lower-risk proceedings against the debtor's commercial counterparties that encourage the debtor to settle;
- Discovering embezzled proceeds to attach the same as debtor property, that can encourage the debtor to settle; and
- Selling the Award to an institutional investor in distressed debt.

Each of these is discussed in turn.

Proceedings Against Commercial Counterparties. Sovereign nations have many commercial counterparties. These can range from bondholders to distributors of product for state-owned enterprises to direct or indirect purchasers of commodities from the state. These counterparties, unlike the sovereign nation, enjoy fewer sovereign immunity protections and can be based in countries with creditor-friendly judicial systems.

This creates clear advantages. First, adjudicatory immunity usually has no application in relation to commercial counterparties. Second, the receivables are typically commercial in nature and so executory immunity usually, but not inevitably, does not attach either. It is not inevitable because even where the receivables (or other assets) are commercial in *origin*, if they have, or might come to have, a public/state *use*, that can be a valid basis to invoke executory immunity. The rules differ from jurisdiction to jurisdiction. In Germany for example, the potential use of assets (in the future) found to be commercial in origin has not rendered them

immune from execution.[33] But in France, recent decisions involving NML Capital and Argentina have held assets to be public in nature where they are "used or intended to be used" for public purposes.[34]

The *Kensington Int'l Ltd. v Congo* case is instructive. The creditor was successful in attaching receivables owed to the state from commercial counterparties. Specifically, it was able to attach debts owed to the Congo by Vitol S.A. in Switzerland.[35] At the same time, the creditor obtained injunctions preventing the UK affiliate of Vitol making payments to the Congo on behalf of the Swiss entity (which would have had the effect of discharging the very obligations subject to attachment in Switzerland). That case is doubly interesting because the English injunctions were made in support of Swiss proceedings which themselves were for the enforcement of an English judgment. One reason for this unusual approach appears to have been that the creditor was leveraging the wider scope of attachment relief on third parties 'debts' that is available in Switzerland versus the UK: specifically, *pre-payments* for future purchases could be attached in Switzerland, or at least arguably could be attached, whereas prepayments definitely could not be attached in the UK under a third party debt order.[36]

Even so, in the UK itself, the creditor did successfully obtain third-party debtor orders in respect of outstanding payments for of oil owed to the Congo by Glencore. It is notable that the oil in question was bought from the Congo through various intermediaries that were held to be, in effect, the state (a decision that required the court to 'pierce the veil').[37]

Attachment of third-party debts was also attempted by NML Capital in France in respect of "*créances fiscales and sociales*" (fiscal and social security debts) owed to the Republic of Argentina by local branches of certain French companies. This was ultimately unsuccessful as the Court did not accept the assets to be commercial in nature.

---

[33] *Central Bank of Nigeria* [1975] 65 ILR 131, 135.

[34] As noted in *Enforcement against State assets: France's latest contribution to the Argentinean saga* (Clifford Chance Briefing Note) available at http://www.cliffordchance.com/briefings/2013/04/enforcement_against stateassetsfranceslates.html.

[35] *Kensington Int'l Ltd. v Congo* [2006] EWHC 1712 (Comm).

[36] *Id.*

[37] *Kensington Int'l Ltd. v Congo* [2005] EWHC 2684 (Comm).

While enforcement against the receivables owed to a sovereign debtor from a counterparty might not yield sufficient value to satisfy a large Award, the commercial disruption caused thereby actually can cost the sovereign debtor far in excess of the amount seized by the creditor. In addition, in some industries (such as the energy industry), some sovereign debtors place a high premium on secrecy in dealings with agents that place its product (such as oil) with buyers. Judicial discovery that shine a light on the identity of agents and their commercial terms can be regarded as disastrous to its affairs by a sovereign debtor.

Discovering Embezzled Proceeds. Some sovereign debtors have significant public corruptions issues, such that it is almost a foregone conclusion that family members of certain key officials are engaged in business transactions with sovereign-owned enterprises that illegally siphon off national treasury funds. A determined creditor, using judicial discovery methods and selective reporting to key law enforcement authorities that are active in international forfeiture of corruption proceeds such as the U.S. Department of Justice, can close in on the hidden diverted assets of official corruption. Some courts have held that such assets, having been stolen from the sovereign, are in fact still property of the sovereign held in trust by the wrongdoers**.**

Where the amounts are relatively small, the embarrassment of exposure can motivate a sovereign debtor to settle with a determined creditor. And in some cases where the amounts are large (in some cases, in the billions of USD), the seizure itself could provide the Award creditor with substantial monetization of the Award.

Alternatively, funds may have been frozen abroad pursuant to sanctions following human rights abuses or violations of the rule of law. This occurred in the case of Zimbabwe, where the Office of Foreign Assets Control ("OFAC") in the U.S. – together with other authorities in Europe, Australia, and elsewhere – froze assets belonging to a wide range of Zimbabwean ministers, state-owned entities, and individuals and companies closely connected to the abuses at issue. A group of dispossessed farmers obtained and registered an ICSID arbitral Award against the state for the uncompensated seizure of their land. They recently were granted a declaration by the New York court stating that (a) four particular respondent companies that had been named on the sanctions list were alter egos of the state, and (b) that they (the creditors) were entitled to

seize the frozen assets of those alter egos, which the court further declared to be in commercial use.[38]

Selling the Award. Some assets can increase in value simply by changing owners. For example, a rare painting in need of professional restoration can be enhanced in value by transferring ownership from an amateur collector to a professional gallery, restored, and resold for a substantial profit over and above the cost of restoration. A large arbitration Award against a difficult debtor enjoys many of the same features as a neglected piece of fine art.

An arbitration Award is not a simple asset; it is more akin to a swap – money has to be invested in exchange for a potential return on that investment if certain events occur. Often, the claimant in an arbitration is not best positioned to maximize the monetary value of an Award that requires a complex and protracted enforcement campaign. Due to other business needs for cash or internal dynamics within the organization or inexperience, a claimant might be irrationally conservative in not expending legal fees despite a positive risk-adjusted return on investment profile. Or a claimant might inappropriately focus on enforcement steps that yield poor monetization prospects but take on a popular focus within the team of executives that harbor resentment against the debtor from past indignities in the arbitration itself and the underlying business relationship that went awry. In such cases, transferring the Award to an institutional investor experienced in buying and monetizing distressed debt instruments can effectuate a "Pareto-superior" reallocation of the asset. The transfer can be structured as an up-front payment and a participation in the recovered assets from the enforcement campaign, with the new owner making decisions and investing the funds necessary to monetize the Award.

As with all assets, it is important to market an Award when the value is at maximum. This usually means a careful marketing campaign conducted after some initial legal victories and a detailed enforcement plan being underway, but before any significant adverse court decisions or undertaking orders being issued against the creditor.

---

[38] *See Funnekotter v. Republic of Zim.,* No. 13 CIV. 01917 CM THK, 2013 WL 5517860, at *4 (S.D.N.Y. June 3, 2015).

V. Conclusion

As explained above, a substantial Award against a recalcitrant sovereign debtor requires a much more sophisticated approach than ordinary commercial debt collection. Employing normal creditor thinking to such an unusual situation can severely damage the value of a fragile asset. On the other hand, an Award creditor who is open to creative approaches can sometimes monetize the Award without years of litigation and expense.

KOBRE & KIM LLP