Strategies For Enforcing Arbitral Awards Against Sovereigns

By **Gabe Bluestone and Jeff Newton** (August 28, 2023)

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Imagine you or your client has invested tens or hundreds of millions of dollars in a project, or purchased shares in a company in an emerging foreign market. Buoyed by a supportive host government, the prospects for a successful outcome seem inevitable.

But then the political winds shift, and your investment is not only unwelcome, but expropriated entirely by a new government. Believing in a multilateral, rules-based order, you threaten arbitration against the sovereign under a bilateral investment treaty meant to protect foreign investors' rights.

What happens, however, when, after you prevail in a multiyear arbitration, the sovereign does not pay, and instead says, "Come and get it"? You're about to become an unwilling participant in a sovereign enforcement proceeding.

The ongoing cases between former shareholders of Argentinian oil and gas company YPF SA and the government of Argentina — Petersen Energia Inversora SAU v. Argentine Republic and Eton Park Capital Management LP v. Argentine Republic, both hurtling toward a final judgment in the U.S. District Court for the Southern District of New York — have reinvigorated discussion about the intermittently fashionable, yet always critical legal topic of collecting monetary awards against sovereign states.

While cases against sovereigns do not often make the news, they have been a key part of the framework of international trade for decades. A study of more than 150 investor-state arbitrations found that about 40% of the time, prevailing investors were compelled to, at a minimum, initiate some type of enforcement action.[1]

And this typically comes after bitterly fought arbitration proceedings. Fortunately, award creditors have meaningful cross-border enforcement options beyond conventional litigation tactics.

Diplomatic channels, multilateral organizations like the World Bank, and ratings agencies, among other resources, can be used to exert maximum pressure on the sovereign. Nonetheless, sovereigns' willingness to roll the dice on enforcement proceedings seems to be growing.

Indeed, the perception that sovereigns will comply with their award obligations to retain their reputations as investor-friendly jurisdictions may now be a relic of the past. So it is timely to ask how claimants can overcome stiffer and more frequent resistance to payment from sovereign debtors.

Collecting from sovereigns is fundamentally no different from securing payment from any other recalcitrant award debtor. As a creditor you must either (1) seize your way to satisfaction, by attaching and liquidating assets, or (2) compel a satisfactory settlement by lowering the perceived cost of the settlement or raising the perceived cost of nonsettlement.

Seizing your way to satisfaction may sound preferable, yet in practice it is often a challenge in sovereign cases. Sovereign immunity doctrine in the U.S. limits attachment of a sovereign's property strictly to commercial assets, and sovereign-owned assets are entirely immune from attachment in many jurisdictions.

Shrewd sovereign debtors, knowing they are likely to face adverse arbitration awards, may put assets into state-owned entities that are remote from the award debt, or otherwise create complex ownership structures intended to firewall assets. Piercing the corporate veil between the states and such entities — a topic that could be the subject of dozens of articles on its own — can be a time-consuming, fact-intensive and expensive venture for creditors.

And the commercial assets that are held directly by a sovereign may be subject to claims by multiple, competing creditors. Indeed, sovereign debtors who fail to pay arbitration awards are likely to have additional award holders pursuing them.

Or they may have defaulted on other debts as well — such as sovereign bonds. Simply put, it is not every case where a holder of a significant arbitration award is able to satisfy the debt without some participation of the sovereign debtor.

So how can a creditor chart a course to payment by a sovereign? Likely by executing a well-thought-out strategy designed to make settlement more attractive. But to arrive at that strategy, a preliminary question must be answered: Who is making the decision to pay or not?

In some cases, it may be a president or prime minister. In others, it may be a finance minister. In still others, it could require a legislative act to appropriate the necessary funds. Or approval could require multiple stakeholders.

Constructing an enforcement plan must account for the bureaucratic fiscal reality of sovereign debtors. A well-devised plan will focus on influencing those who can, in turn, influence payment of the debt.

The ultimate strategy to shepherd this decision maker to a resolution often requires a mix of hard and soft steps. For the former, an award holder will want an asset tracing and post-judgment discovery plan, a broad understanding of the sovereign immunity laws in jurisdictions where the sovereign's assets may be located, and the financial wherewithal to seek attachment and freezing orders, when and where appropriate.

Post-judgment discovery rules can be leveraged to create uncomfortable situations for government officials who may not want external eyes reviewing where the sovereign's money is being transferred. In some situations — including where state funds have been siphoned off in a money-laundering or theft context to benefit a government minister — the potential exposure can lead decision makers to settle.

Creditors should also be mindful that enforcement targets need not have a high economic value. Psychologically valuable pressure points can also create settlement leverage.

For example, some years ago, creditors of Argentina seized one of its naval warships in an African port. While this step was not itself a payday for creditors, the spectacle of a ship being seized because the country did not pay its debts brought attention to the case.

Pressure can also come from outside the courtroom through soft avenues, including via diplomatic channels, private lobbying, multilateral organizations and the international community. However, experience shows that soft approaches only pay out when backed up by the perspective of real consequences — the hard steps.

The soft steps can also involve lowering the sovereign's perceived cost of settlement. Examples include accepting payment in marketable commodities or exchange bonds with a value on the secondary market, or structuring a resolution that minimizes political backlash or public outcry.

While none of these steps alone may be a silver bullet, together they can establish multiple settlement pressure points that may increase the odds of a favorable resolution.

Those who have obtained an award or judgment in reliance on a rules-based order are, unfortunately, increasingly learning that these systems do not always deliver timely payment. Large-scale faceoffs against recalcitrant sovereigns will invariably require time, resources and proceedings in different jurisdictions for which a claimant had neither prepared nor budgeted.

Wise claimants and counsel should, at minimum, assess collection risk before embarking on a case against a sovereign. Without question, they should manage expectations about timely payment in the wake of a favorable award. Regrettably, in some cases that award or judgment is just the end of the beginning, rather than the beginning of the end.

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[1] Emmanuel Gaillard, Ilija Mitrev Penushliski, "State Compliance with Investment Awards" (2021), ICSID Review – Foreign Investment Law Journal. A survey on compliance with investment awards involving the 32 most sued states shows that states paid damages in 85 of the 170 cases (no details were available for 31% of cases).