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Clashing With Titans: Strategies For Enforcing Judgments Against Sovereign Nations And State-Owned Enterprises

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Commentary

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Over the past century, governments have increasingly moved beyond their traditional regulatory function to become commercial actors in their own right, transforming the international business and investment landscape in the process. Like other commercial actors, nations (and the business entities they own and operate) may or may not honor their commitments; like other commercial actors, their failure to honor those commitments often leads to litigation. Meanwhile, the global spread of the so-called "restrictive" theory of sovereign immunity (which holds that nations cannot escape liability for their commercial conduct simply because of their sovereign status) has made it possible for aggrieved investors or commercial partners to obtain judgments against these once-untouchable targets, just as they would if a private debtor failed to pay up.

Unfortunately for creditors, the similarities end there. Many who hold defaulted sovereign debt or have launched ill-fated business ventures with foreign states have learned a painful lesson: a favorable judgment or arbitration award is rarely the end of the fight. The process of securing judgments against foreign governments or state-owned entities is now routine, but enforcing those judgments remains uniquely difficult. There are, of course, many reasons for this. The assets held by foreign states and their instrumentalities are protected by a mosaic of immunity doctrines that vary between jurisdictions; pursuing foreign governments through court systems they control is often a futile exercise; and the political consequences for recalcitrance in the face of legal obligations are typically minimal. And as the size of a judgment or award increases, so does the likelihood that a foreign government or state-owned entity will refuse to acknowledge it.

But there is good news: with the right combination of high-pressure tactics, an aggressive, creative, multijurisdictional approach makes it possible to efficiently monetize judgments or arbitration awards against sovereign debtors. Drawing from our recent experiences in a pair of enforcement campaigns—one involving the government of a prominent African nation; the other, one of the world's largest state-owned oil companies—we describe below a few strategies that

have proven essential to turning the tables on foreign governments and state-owned entities who refuse to pay their debts.

* * *

Investigate enforcement opportunities early and aggressively.

The business maxim that instructs to "begin with the end in mind" applies with special force to enforcement efforts against sovereign entities. Even foreign governments with stated commitments to transparency do not readily publicize detailed information about executable assets. Finding enforcement opportunities that are legally and practically realistic takes time, and collecting the evidence necessary to seize on those opportunities requires a deep familiarity with the different discovery tools available in jurisdictions across the globe. Experienced enforcement counsel should be engaged as early in the process as is economically practical, and the initial stages of the enforcement strategy should focus on making the debtor feel the economic and political consequences of its intransigence as soon as possible after judgment. In cases involving governments who guard information about their overseas holdings especially closely, the filing of discovery and disclosure applications can itself meaningfully amplify the pressure with which a sovereign debtor is faced.

Look outside the debtor's borders.

Nations that flout international economic commitments, court judgments, and arbitral awards rarely boast strong rule of law within their own borders. This should come as no surprise, yet it has repeatedly proven a serious obstacle to creditors who, by taking a narrow, conventional view of their enforcement options, feel compelled to challenge sovereign debtors on their home turf. This is almost invariably a mistake, and its consequences can range from wasted time and resources to adverse rulings that later complicate proceedings in other jurisdictions. The savvy judgment creditor will be prepared to follow the debtor's assets wherever they lead, which requires enforcement counsel with the ability to coordinate efforts in a variety of jurisdictions.

Consider exotic asset classes (especially the movable kinds).

Not all assets are created equal. Creditors and counsel who pay equal attention to the strategic and symbolic importance of executable assets as to their pure monetary value. Overseas investments through sovereign wealth funds, shipping vessels and cargo, receivables owed by foreign business counterparties, and pending legal claims are examples of assets to which sovereign debtors regularly attach a value that exceeds the financial return those assets promise to a seizing creditor. When these assets are at stake, even a temporary seizure or credible threat of execution can drive an otherwise hardheaded debtor to the bargaining table.

In the Netherlands and Dutch Caribbean, for example, creditors can obtain 'conservatory arrests' of a sovereign debtor's commercial assets, oftentimes within twenty-four hours of filing an application and before the judgment is recognized by the local courts. This is an effective way to apply immediate pressure on the debtor, even if the assets are only briefly passing through these jurisdictions (such as oil tankers and cargoes). The only caveat is that conservatory arrests can also be easily challenged in court, so it is important to be prepared to defend them on short notice.

Go in through the "side door" by targeting SOE's.

One challenge to overcoming sovereign immunity is the burden of proving that the sovereign's assets are being used for commercial purposes. In contrast, it is much easier to do so for assets held by one or more of the sovereign's wholly or majority-owned companies. One approach is to 'pierce the corporate veil' and show that the state-owned enterprise (SOE) is an 'alter-ego' of the state, thereby making their assets fair game for enforcement (but this can be a difficult argument to make). Another approach is to prove the SOE is holding the assets as an agent or bailee of the state of itself – in which case, they actually are assets of the state and it is no longer necessary to put together the challenging 'alter-ego' argument.

Evidence that can be helpful for the above strategies may include: Contracts that show the SOE is acting on behalf of the state; affidavits filed by the SOE where it seeks to disprove ownership of assets in its possession; and wire transfer evidence showing the state as beneficiary of the SOE's accounts.

Use the media and prospective investors to your advantage.

As the strategies discussed above suggest, the key to a successfully enforcing against a foreign government—particularly with awards or judgments that approach or

exceed US $1 billion—is to strategize with an eye toward settlement. Judicial steps, including asset seizures, can be an important ingredient in building settlement leverage, but it is rarely sufficient without an all-out pressure campaign that more broadly buts things the debtor cares about at risk. To that end, public relations campaigns can be particularly effective when geared toward creating political discomfort for government decision-makers or informing other prospective investors or business partners of the perils of doing business with a judgment or award debtor.

* * *

To be sure, intransigent sovereign debtors can be frustrating and intimidating foes, and those who have successfully obtained judgments or arbitration awards against foreign governments can be forgiven for fearing that those victories may be worth little more than the paper on which they are recorded. But those who think their enforcement is a lost cause—or who have eschewed doing business with sovereign counterparties for the same reasons—should think again.

Creditors who work strategically and collaboratively with experienced counsel will discover that monetizing sovereign obligations is hardly the wishful fantasy that the conventional, courtroom-focused approach makes it seem. By applying pressure globally through a combination of judicial proceedings and unexpected non-judicial channels, judgments and awards against foreign governments can be realized efficiently and profitably. ■

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