# Kluwer Arbitration Blog

## LIDW 2024: Arbitration and Enforcement Involving Sovereign States

Krystal Lee (Assistant Editor for Europe) (Lalive) · Saturday, June 8th, 2024

On the final day of London International Disputes Week 2024 ("LIDW"), LALIVE and Kobre & Kim hosted an event on arbitration and enforcement involving sovereign States. The panel of speakers comprised Andrew Stafford KC and Nicholas Surmacz of Kobre & Kim, as well as Sandrine Giroud and Marc Veit of LALIVE. They explored issues relating to the enforcement of arbitral awards against States and state-owned entities ("SOEs") in the UK, Switzerland, and the world. This post provides a recap of the salient points of discussion.

**Recognition and Enforcement Procedures in Switzerland and the UK**

The panel began with an overview of recognition and enforcement procedures in Switzerland and the UK, with Stafford explaining how enforcement procedures in England and Wales are, for the most part, fairly streamlined. Applications for enforcement of arbitral awards are usually made on an *ex parte* basis, which expedites the process. He highlighted the duty of full and frank disclosure in such applications as a feature that is often alien to lawyers from the US or civil law jurisdictions and will leave English lawyers anxious to ensure compliance, to avoid public criticism from the court.

Stafford highlighted the efficiency of such applications in England and Wales, where there is generally a strict timetable following service of the application on the respondent State. He mentioned *P&ID v Nigeria* as a rare example of the English court granting a generous extension of time to Nigeria, noting that it is an exception that rather proves the rule. He further expressed that some of the proposed amendments to the English Arbitration Act 1996 would further streamline the recognition and enforcement procedure, although these amendments would now be on hold until Parliament reconvenes after the general election.

Giroud gave the Swiss perspective, noting that while Switzerland is enforcement-friendly, it may be difficult to locate assets of asset debtors in the jurisdiction because there is no discovery process available. Principles of banking secrecy further complicate matters, making it difficult for assets to be attached. Moreover, the lifting of the corporate veil is difficult in Switzerland, such that assets become even harder to attach if the award debtor has a complex corporate structure in place.

Giroud advised that it is not necessary to proceed with recognition as a separate step in enforcing

arbitral awards in Switzerland, not least because this results in the award debtor being alerted to one's enforcement efforts. Instead, she advised that it is normally preferable to make an application for the attachment of assets and to ask for recognition of the award within the context of the attachment application. She also shared some particularities of the Swiss approach, such as the important distinction between monetary and non-monetary claims.

Stafford noted that such differences in approach between jurisdictions are critical to the outcome of enforcement efforts, justifying collaboration with local counsel. Giroud agreed, noting, for example, that counsel has an obligation not to mislead the court in Switzerland but that – unlike England and Wales – there is no duty of full and frank disclosure.

She also noted another particularity of the Swiss requirement in enforcement against sovereign States, which is that of a sufficiently close link to Switzerland (the so-called "Binnenbeziehung").

**Arbitrating Against States and SOEs**

Surmacz, who was moderating the discussion, then asked Veit about his views on arbitrating against States and SOEs.

Veit said it was important to consider the question of enforcement at the outset of a dispute, noting that investors typically have two options against States: either a contract claim or a claim based on an investment treaty (or both). If an investor elects to make a claim under a treaty, there is often a choice of forum, in particular, a choice between ICSID or UNCITRAL arbitration. He explained an important characteristic of choosing ICSID arbitration is that annulment applications are heard within the ICSID system instead of being handled by local courts. In the context of such applications, it is often possible for the winning investor to successfully apply for security for the claim to be provided by the State challenging the award. This puts the award creditor in a much less risky position.

Where an investor elects to arbitrate under the UNCITRAL Rules instead, Veit considered the choice of the seat to be critical. In his view, where the arbitration is against an EU Member State in particular, there are very few "safe" choices of seat – England and Switzerland being two such options. He cited the recent Swiss judgment in EDF v Spain, where Spain had applied to set aside the arbitral award. He explained that the Swiss Federal Supreme Court took an unusually robust position, holding that EU institutions have been on a crusade against investment arbitration for the past few years, and that they have not properly interpreted the Vienna Convention on the Law of Treaties nor the Energy Charter Treaty. Veit noted that the US' approach on this issue will shortly be clarified by the Court of Appeal in Washington D.C.

Stafford raised an important practical point of settlement negotiations with States, noting that, in practice, States are rarely prepared to settle a dispute, since government representatives often do not wish to be responsible for such a decision. Surmacz pointed out that the main difference between commercial and sovereign counterparties is that the latter is in the position of relying on criminal allegations, observing that States sometimes argue that an investor may have defrauded the State or committed other criminal offenses. He also noted that States have a wide range of powers that may complicate enforcement procedures for an award creditor, such as the issuance of Interpol red notices, demands for banking information, and in the United States, discovery applications in assistance of foreign criminal investigations that the debtor State may instigate

against the award creditor pursuant to section 1782 of Title 28 of the United States Code.

**Enforcement Against States and SOEs**

Stafford noted that there may sometimes be negotiations between the investor and State or SOE, especially if the investor continues to hold investments in that State. He commented that this may be of particular relevance to funders who have invested in the arbitral award, since any settlement negotiations may result in a divergence in interest between investor and funder.

Veit observed that clients and funders are often concerned when the State in question is a serial offender involved in multiple arbitrations. This is because they worry that States or SOEs may not have sufficient assets abroad against which multiple investors may enforce successful awards. However, he considered this position to be somewhat shortsighted. In his recent experience with Tanzania, it was in fact investors who commenced arbitration later that managed to obtain compensation sooner because, by then, Tanzania was sufficiently concerned about the numerous ongoing arbitrations and was more prepared to negotiate a settlement with the investor.

When dealing with the assets of entities claiming to be immune against enforcement, Giroud described possible serious practical challenges for award creditors. For example, States may issue diplomatic notes indicating that certain entities and/or assets may be immune or are separate from the State. Such documents are difficult, though not impossible, for award creditors to rebut.

Stafford said creativity is needed in such circumstances since it is not possible to obtain freezing injunctions or deploy insolvency strategies. He explained that, in England and Wales, the commercial use exception is the argument generally used when seeking to enforce against a sovereign's assets. However, in his view, the Supreme Court has interpreted the exception too narrowly, frustrating many award creditors' enforcement attempts.

Giroud explained that the exception is broader in Switzerland, but that it is still a challenge to distinguish between assets (or funds) used for sovereign activities from those used for commercial purposes. She illustrated the point with the example of air traffic control taxes, part of which may be used to fund air space control, a sovereign activity, and a part of which may be used to build restaurants or hotels at an airport, which would be considered a commercial purpose.

Both Stafford and Giroud explained that enforcement efforts must often be part of a broader strategy to exert pressure on States to settle the award debt at the best available price.

**Discussion and Final Thoughts**

The panel opened the floor up for questions, with audience members querying the extent to which it was possible for award creditors to gain access to information about a government's use of funds. Giroud commented that there is often more publicly available information than expected, such as financial and operational reports, and that it is also a good idea to consider retaining an investigator for asset tracing. Veit added that he would often consider local SOEs and focus on payments made from abroad to such entities.

Finally, Stafford noted, to the amusement of the room, that kleptocrats may well be a good target of investigations in such cases.

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