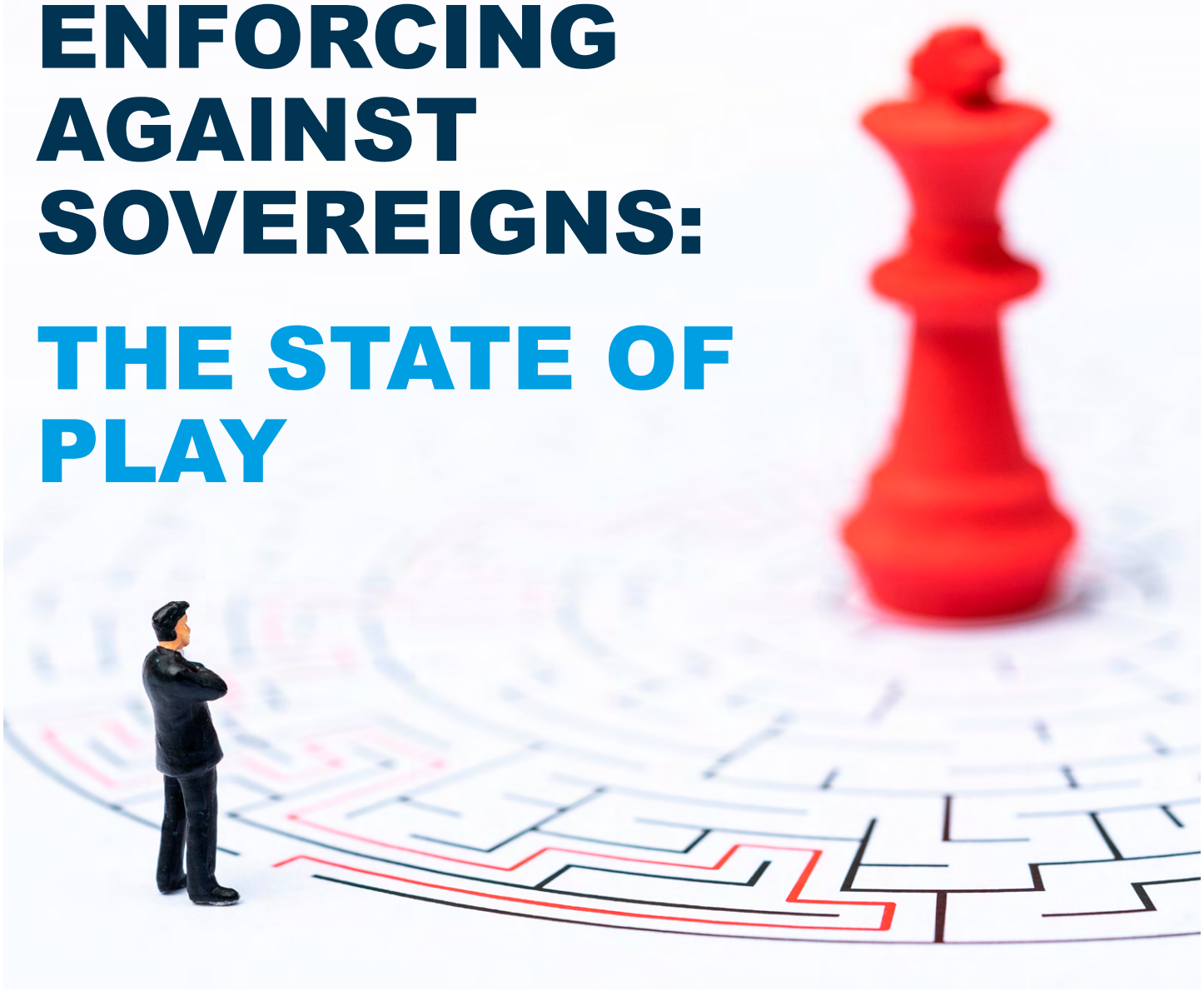
ENFORCING AGAINST SOVEREIGNS:

THE STATE OF PLAY



Authored by: Jon Felce - PCB Byrne LLP

Looking back at my recent TL4 article on Hot Topics in Enforcement in England and Wales[1], it is apparent that a number of the topics discussed arise in the context of enforcement against sovereigns. This is perhaps a reflection that (i) (some) sovereigns appear to be more resistant to meeting judgments and awards than perhaps before, and (ii) enforcing against a State has its own unique issues with which to grapple and which are ripe for testing before the courts. This article provides an overview of the State of play in relation to some recent interesting recent developments in the area.

1. Sovereign immunity – adjucative and enforcement immunity

When one first thinks about litigating against a State, the words "sovereign immunity" immediately spring to mind. However, not only are there exceptions to sovereign immunity, but there are subtle differences between the types of immunity available. Different rules apply to adjudicative immunity – whether a state can be sued at all – and whether any resulting judgment or award can be enforced (i.e. enforcement immunity). This distinction is sometimes overlooked. Just because one of the exceptions to adjudicative immunity applies, it does not mean that an exception to enforcement immunity arises (and vice-versa). This was recently highlighted in the BVI decision of *Tethyan Copper v Pakistan*[2], where at the ex parte stage Tethyan's focus had been on enforcement immunity rather than adjudicative immunity, and at the interpartes hearing the Court addressed whether it had jurisdiction at all.

1 See https://thoughtleaders4.com/images/uploads/news/TL4_FIRE_-_Issue_4_-_Q1_2021.pdf
2 BVI case number: BVIHC (Com) 2020/0196

2. Adjudicative immunity - validity of arbitration agreement

One of the exceptions to adjudicative immunity is found in section 9 of the State Immunity Act 1978 (SIA), where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, providing that the ensuing proceedings relate to the arbitration. One hot topic that has arisen in the context of arbitrations against EU member states is the impact of the CJEU's decision in the Achmea case[3]. Following that decision, EU member states are arguing that arbitral tribunals do not have jurisdiction to hear claims against them, including claims under bilateral investment treaties and the Energy Charter Treaty.

Notwithstanding that many tribunals have rejected that argument, it means that enforcement within the EU is likely to be a tall order, and arguments that paying creditors constitutes illegal state aid can make that a taller order still. All of this means that creditors holding judgments and awards against EU sovereigns are increasingly looking outside the EU to jurisdictions such as England and Wales when it comes to enforcement. This is particular the case in ICSID disputes, following the Supreme Court's decision in Micula[4] which prescribed limited circumstances in which the Court will stay enforcement of an ICSID award.

3. Can a third party (and therefore its assets) be assimilated with the sovereign?

Of course, the end goal is actually enforcing against an asset. Given enforcement immunity rules, parties are increasingly creative when it comes to targeting assets. One particular aspect of this involves identifying third party assets that can be said to be the assets of the sovereign. This strategy has been making headlines recently in relation to attempts to enforce against national airlines, with both Air India and Pakistan International Airlines (PIA) the subject of attempts to seize assets to satisfy billion dollar awards against India and Pakistan respectively.

In particular, in the aforementioned Tethyan case, Tethyan asserted that PIA and its subsidiaries should be treated as assets of the state amenable to enforcement, for example because PIA was referred to and sometimes treated as and like a government department. However, this was successfully challenged at the inter partes hearing, when the Court spent some time considering the Privy Council's decision in Gecamines[5].

In Tethyan, the simple answer was that PIA was a publicly listed company with private shareholders and therefore could hardly be assimilated with the state. The lesson from the case is that the true position of an entity in relation to the State requires close and detailed scrutiny of a considerable number of factors, going beyond merely superficial indicators. The decision sets out a number of the potential factors to which practitioners should pay close attention[6].

4. Procedural issues

Questions of procedure in sovereign cases have also been at the forefront of recent decisions. I deal with two procedural points now.

The first of those is service. Until now, there have been a number of cases grappling with what – if anything - needs to be served on a State and, if so, how. We now have the answer. In General *Dynamics United Kingdom Limited v Libya*[7], in the context of a New York Convention arbitration award, it has been held that: (i) a document does need to be served on the sovereign, such as the arbitration claim form or the order permitting enforcement, (ii) the document needs to be served through the Foreign, Commonwealth and Development Office, and (iii) service in this manner is mandatory and cannot be dispensed with.

The second procedural issue is whether sovereigns should be treated any differently from other litigants, not least given that it can sometimes take time to get instructions from sovereigns against a backdrop of bureaucracy and political changes. For example, in one recent case (concerning a challenge to an arbitration award itself), a State sought an extension of time and relief for sanctions having failed to meet the relevant deadline for its application, including by reference to a change of government[8]. However, the Court made clear that the fact that a party is a foreign state is of little significance, relying upon dicta from another sovereign case[9] that a foreign state is 'a litigant like any other litigant and … is expected to comply with the rules and provisions of the CPR and with any directions given by this court'. Further, the Court stated that the fact that an entity – whether a government or otherwise – may have a bureaucratic decision-making processes does not justify delay. It is important that this is conveyed to a State client at the outset so that attempts can be made to ameliorate the position before any deadlines expire.

5. Conclusion

Obtaining your judgment or award against a sovereign is often not the end of the matter. In that regard, as this tour through some recent developments illustrates, the State of play in sovereign enforcement cases is ever-changing.

3 *Slovak Republic v Achmea BV (Case C-284/16)*
4 *Micula v Romania [2020]* UKSC 5
5 *La Générale des Carrières et des Mines v FG Hemisphere Associates LLC* [2012] UKPC 27.
6 See paragraph 81.
7 [2021] UKSC 22
8 *STA v OFY* [2021] EWHC 1574 (Comm).
9 *Process and Industrial Developments v Federal Republic of Nigeria* [2018] EWHC 3714 (Comm).