



Kobre & Kim's International Judgment Enforcement & Offshore Asset Recovery Contacts



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Clashing With Titans: Effective Judgment Enforcement Against Sovereign Entities

Enforcing a judgment against a sovereign entity — be it a foreign state or a state-owned entity — can seem like a near-impossible task. Below, our International Judgment Enforcement and Offshore Asset Recovery team show specific examples of techniques that can be employed to achieve successful judgment enforcement against these types of targets.

While foreign investors and companies alike frequently secure court judgments and arbitration awards against foreign governments or state-owned entities, enforcing those judgments and awards remains difficult.

There are many reasons why sovereign debtors can be challenging targets:

- The assets held by foreign states and state-owned entities are protected by immunity doctrines that vary between jurisdictions;
- Pursuing foreign governments through court systems they control is often a futile exercise;
- There are typically minimal political consequences for governments to resist legal debt obligations;
- 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.

The right combination of high-pressure tactics, coupled with aggressive, creative, multijurisdictional strategies, can force sovereign debtors to take a seat at the bargaining table and efficiently monetize judgments and arbitration awards.

Some specific examples of effective techniques from recent successful matters where legitimate claims were recovered against sovereign entities, include:

Look outside the debtor's borders. Keep a low profile.

While immunity doctrines can complicate the seizure of sovereign assets, the truth is that discovery from third parties outside the debtor's borders is generally fair game. Therefore, a critical first step would be looking at a wide range of targets, in multiple jurisdictions – one example is banks in the United States, through which U.S. dollar transactions may flow. Chances are, one of these money trails will lead the creditor to creditor-friendly jurisdictions and, subsequently, pressure points that can be leveraged against the sovereign.

And the best part? Obtaining this information in some cases can be done covertly through ex parte applications and under-seal discovery filings, without having to alert the debtor. In this instance, it's important to show that the sovereign debtor is likely to move their assets out of a given country if made aware of any asset tracing efforts.

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Consider exotic asset classes (especially movable kinds).

Exotic asset classes are often worth more to the sovereign debtor than the potential financial returns that they promise to a seizing creditor. Examples of this asset class include overseas investments through sovereign wealth funds, ships carrying valuable export products sold by state-owned companies, receivables owed by foreign business counterparties and pending legal claims. When these kinds of 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 24 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 the beneficiary of the SOE's accounts.

Use the media and prospective investors to your advantage.

As these tactics suggest, the key to successfully enforcing against a foreign government — particularly with awards or judgments approaching the US \$1 billion or more — may be to strategize with an eye towards settlement. Judicial steps, including asset seizures and fraudulent-transfer actions, can be an important driver of settlement leverage but are rarely sufficient without an all-out pressure campaign that more broadly puts things the debtor cares about at risk. To that end, public relations and public affairs campaigns can be particularly effective in creating political discomfort for government decision-makers or informing other prospective investors or business partners of the perils of doing business in the debtor nation.

Creditors who work strategically and collaboratively with experienced counsel will discover that, by applying pressure globally through a combination of judicial proceedings and unexpected non-judicial channels, they can realize judgments and awards against foreign governments efficiently and profitably.

About Kobre & Kim's International Judgment Enforcement & Offshore Asset Recovery Team

Kobre & Kim is a conflict-free Am Law 200 law firm focused on disputes and investigations, often involving fraud and misconduct.

The firm's international judgment enforcement & asset recovery team has significant experience acting on behalf of creditors to monetize high-value judgments and arbitration awards. We are also experienced representing debtors and guided by an in-depth understanding of the latest asset-structuring techniques and defensive litigation strategies that judgment/award debtors can deploy. We use this understanding to craft offensive strategies on behalf of creditors.

Many of our cases involve closely coordinated, cross-border proceedings, and we are able either to advocate directly, or to work cooperatively with local counsel, in jurisdictions across North and South America, EMEA, Asia, and key offshore financial centers.