



PERSPECTIVES

THE ENFORCEABILITY OF SOVEREIGN AWARDS FROM THE PERSPECTIVE OF AN ASSET TRACER



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Introduction

When award creditors for [investor-state arbitrations](#) think of an asset tracer's arsenal of tools for enforcement of their awards, they may immediately think of chasing assets held by the state such as high-value properties, a fleet of state aircraft, or even bank accounts held in enforcement-friendly jurisdictions. However, one less-thought-of asset relates to the coupon payments made on a state's international debt securities and the different enforcement strategies available to creditors targeting this asset class.

Whilst the idea of fixed income may not inspire an image as sexy as the seizure of an aircraft, there are four principal factors which make debt securities an attractive enforcement measure for creditors:

1. They frequently carry large principal amounts of up to USD 1 billion and more;
2. They are denominated in currencies such as US dollars, Euros, and British pounds;
3. They maintain paying agents for coupon payment distribution to bondholders in enforcement-friendly jurisdictions such as New York, London, and Luxembourg; and
4. They can put significant pressure on the state and its ability to attract future investments into the country.

This article discusses the mechanics of taking enforcement action against a state's coupon payments in the course of an asset tracer's investigation, providing the case of *Perenco Ecuador Limited v Republic of Ecuador* as a practical example. This will provide insight into more creative enforcement strategies available to investors and lawyers in the course of any post-award enforcement proceedings.

The Mechanics of Enforcement Action on Coupon Payments

Depending on whether an asset tracer is providing a pre-award assessment or a full report of a state's asset profile and the relevant jurisdictions / strategy for enforcement, the asset tracer will ultimately have the fun task of reading through all of the debt securities' prospectuses to answer four fundamental questions:

1. How is the debt security structured (i.e. is there a fiscal agent or are the securities subject to a trust deed);
2. Which bank or professional trust company is acting as the trustee / fiscal agent for the securities;
3. How frequent are the coupon payments and how much is being paid; and
4. What can trigger an event of default?

The first question is particularly important since it may affect the strategy which a creditor uses in any enforcement action.

There are two options for structuring international sovereign debt securities: a fiscal agency structure or a trustee structure.

In the case of a fiscal agency structure, the issuer of the security (i.e. the state) will appoint a fiscal agent (i.e. a bank or trust company) who is responsible *inter alia* for facilitating the coupon payments due on these securities to bondholders. The most important aspect of this relationship between the state and fiscal agent is the fact that the fiscal agent is not acting on behalf of the bondholders but rather the state.

In contrast, with a trustee structure the state will choose a professional trust company to act as the trustee for the debt securities. As a result, the trustee has a fiduciary duty to act on behalf of these bondholders. This difference in the role of an agent / trustee may affect legal arguments surrounding the ownership of the coupon payments once they reach the agent / trustee. Indeed, in the case of *Commisimpex v Republic of Congo*,¹ Commisimpex served two restraining notices on the Delaware Trust Company (DTC), which was acting as a trustee for one of Congo's Eurobonds, initially freezing the coupon payments due to bondholders. However, when DTC sought to annul these restraining notices acting in its capacity as trustee, it made the argument that the funds transferred by Congo were no longer under state ownership – they had passed to the bondholders as beneficiaries under the trust structure.

If a creditor is therefore seeking to freeze specific coupon payments, a fiscal agency structure is much more favourable than a trustee structure in the eyes of an asset tracer. Whilst the fiscal agency structure is more frequently used in older bond issuances, many states have turned to using the trustee structure for any new bond issuances since it *inter alia* insulates them from these enforcement actions.

However, even if you are faced with a trustee structure between the bank and the state, all hope is not lost. The case of *Perenco Ecuador Limited v Republic of Ecuador* shows that even where a trustee structure exists it is possible for a creditor to obtain a successful outcome.

Perenco Ecuador Limited v Republic of Ecuador

As part of Perenco Ecuador Limited's (Perenco) efforts to enforce their International Centre for Settlement of Investment Disputes (ICSID) award of approximately USD 412 million against Ecuador, they sought to freeze one of the semi-annual coupon payments due on three of Ecuador's debt securities with maturities in 2030, 2035, and 2040. In this case, the Bank of New York Mellon (BNYM) was acting as the trustee and maintained paying agents through its London and Luxembourg branches. This information guided the enforcement strategy and provided Perenco with jurisdictions where enforcement action would be possible.

Ultimately Luxembourg was selected as the most favourable jurisdiction for enforcement action for two principal reasons. Firstly, following the Luxembourg Court of Appeal's judgment from 11 February 2021 confirming the recognition and enforcement of arbitral awards issued by an ICSID arbitration panel, the process for recognising an ICSID award is more streamlined and faster than recognition in the UK, which aids a creditor's need for speed. Secondly, a creditor can serve a *saisie-arrêt*² on many different banks at the same time, providing an invaluable tool for freezing funds, especially if there is uncertainty surrounding the precise location of the funds.

Following extensive international news coverage of Luxembourg banks being ordered to freeze any assets held by Ecuador in early August 2022,³ Ecuador responded publicly to these reports by announcing that the freeze had not affected coupon payments to bondholders.⁴ However, crucially, because

¹ <https://www.reuters.com/article/ozabs-uk-congo-eurobonds-default-idAFKBN1AD2B6-OZABS>

² A *Saisie-Arrêt* is the equivalent of an Attachment Order.

³ See for example <https://www.reuters.com/markets/europe/exclusive-luxembourg-banks-told-freeze-ecuador-assets-amid-perenco-dispute-2022-08-01/> <https://globalarbitrationreview.com/article/perenco-secures-freeze-ecuador-accounts-in-luxembourg>

⁴ <https://www.reuters.com/world/americas/ecuadors-debt-payments-not-affected-by-luxembourg-asset-freeze-government-says-2022-08-09/>

of this press coverage, Ecuador's Ministry of Economy and Finance released a statement on the 30 August 2022 which emphasised Ecuador's capacity and willingness to comply with Perenco's arbitral award.⁵ In this statement, the Ministry of Economy and Finance stated that *"at no time has there been any intention by the country not to comply with this award which is the result of decisions adopted by Rafael Correa's government."*

The political landscape of Ecuador here played a key role in the enforcement strategy pursued by Perenco since Guillermo Lasso's centre-right government had promised to incentivise international investment into the country and eliminate Ecuador's fiscal deficit during the 2021 presidential elections. An asset tracer's knowledge of the political landscape and the thought process of key decision makers is therefore equally important to any enforcement action since certain measures can have an amplified effect when deployed at the suitable time. In any case, as a result of Perenco's action in Luxembourg, Perenco reached a successful settlement with Ecuador with a payment schedule agreed extending to the end of 2023.⁶

The success of Perenco in this case demonstrates that understanding the political landscape, using available enforcement avenues, and amplifying certain measures with extensive press coverage can be a powerful tool for creditors.

Conclusion

Governments generally want to be viewed as investor-friendly and capable of fulfilling their debt obligations internationally – if they don't, they will struggle to attract future investments into their countries.

Enforcement against a sovereign's international debt securities can offer effective solutions for creditors looking to enforce their awards – be it to actually attach coupon payments through enforcement measures or to exert pressure on the state. There is significant value derived from the multifaceted strategy of sovereign debt disruption. It can expose governments both publicly and internationally for not fulfilling debt obligations; it can lead to successful settlement agreements through negotiation; it can also affect a sovereign's long term credit rating. Equally, it can also offer the creditor the opportunity to recover physical assets through seizure of coupon payments in enforcement-friendly jurisdictions. It is this duality / multiplicity of purpose which makes international debt securities such a powerful tool for creditors in [investor-state arbitrations](#) – they are not limited to physical seizure and their value in enforcement actions should not be underestimated.

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⁵ <https://www.finanzas.gob.ec/wp-content/uploads/downloads/2022/08/BP-Perenco.-30.08.2022.-M.pdf>

⁶ <https://globalarbitrationreview.com/article/ecuador-pay-perenco-icsid-award-0>

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