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mosaic moment

EPISODE_08

FROM JUDGMENT TO JUSTICE: HOW DEFAULT INSURANCE CLOSES THE GAP



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INTRO

0:01 Fast-changing risks affect people, businesses, and economies in today's turbulent world. Perils like cyberattacks, political violence, or threats to financial institutions. Listen in as Mosaic Insurance specialists quiz fellow experts on the most significant industry topics of our time. Welcome to this Mosaic Moment.



0:20 I'm Tamar Katamadze, political risk underwriter for Mosaic insurance. Today, we are diving into the world of legal risk enforcement battles and financial tools that power them. We are tackling a fascinating and increasingly relevant topic in the political risk sphere, enforcing arbitration awards against sovereigns and sovereign entities. My guest is Viren Mascarenhas, a partner in the litigation and arbitration department at Milbank in New York. Viren brings a wealth of experience in international arbitration award enforcement and cross-border disputes. Thanks for joining me today, Viren, we are going to unpack some recent cases, and talk about the broader enforcement campaign that award creditors are waging across jurisdictions. And, of course, we will discuss the financial side of this—long fights, litigation funding, secondary market insurance products and strategies that make the difference.

If you follow this space, you will know investors have won a number of arbitration cases against the EU member states under the Energy Charter Treaty and other investment agreements. But winning an award is only half the battle. The real challenge is getting it paid, and that's where things get interesting. Viren, I would love to get your take on this. What has been your experience with intra-EU disputes and the challenges around enforcement of awards?



2:10 Well, thank you, Tamar, for having me on this podcast. I'm excited to be here with you. You know, it was interesting to hear you say just now that winning the battle is only half of it, and then the other part is actually getting paid. When I started practising 20 years ago, a lot of people who focused on international law and international arbitration, including against sovereigns, actually used to think that all of the battle, or most of the battle, was about winning that paper award. And in the two decades that I've been practising, you've seen this sprawling ecosystem now of insurance brokers, litigation funders, asset recovery specialists and US litigators work together in this ecosystem to figure out, how do you take that paper award and translate it into money in your bank account if the award debtor, the sovereign debtor, is not paying up? So, it's been an interesting development here to see the players in the field develop and broaden, but also to look at the jurisprudence that's coming out of this.

Now you asked me very specifically about the intra-EU objection and the enforcement of those awards in various courts around the world. Just for those who are listening, who may not be familiar, you know, there is a whole sprawling system of bilateral and multilateral investment treaties that have been executed between countries that



were designed to encourage the flow of capital from one country to another. Several member states of the European Union signed these bilateral investment treaties amongst themselves. They also are, in many instances, members of the Energy Charter Treaty, which is a multilateral investment treaty governing energy investments. In the earlier part of the century, Spain and Italy, among other countries in the European Union, and admittedly, around the world, frankly, have enacted measures that were designed to encourage investment in their countries in the renewable energy sector, in particular, in solar energy in the case of Spain and Italy. Subsequently, the governments in those two countries changed some of the tariffs and economic terms applicable to those investments, and this gave rise to a number of challenges under the bilateral investment treaties between nationals of certain member states of the European Union and those two governments, in particular, Spain and Italy, that have resulted in dozens and dozens of awards, arbitral awards, rendered against them, and there's been this, it has become now, not just a legal issue, but also a political issue, with the European Union weighing in on whether those awards are valid under the theory that intra-EU disputes involving these issues should not be arbitral, but rather must go to a forum in which the European judicial authorities, for example, the European Court of Justice, would be able to weigh in.

Equally, there's also a battle as to where those awards may be enforced, and so a number of those EU award creditor holders, those investors that won these awards, are coming to jurisdictions outside of the European Union, seeking to enforce those awards under the ICSID Convention, under the New York Convention, for example. And here's the question of where sovereign immunity comes in, right? This is where now governments, the courts of jurisdictions such as the United States, such as Australia, such as the United Kingdom, and that's just picking three, you know, in different jurisdictions, where it may be the case that those sovereigns hold commercial assets that can be used to satisfy those awards, that's where these investors are coming now to enforce the awards. And so, it's an exciting time, although, admittedly, this is a time in which, you know, that question of, "when do we get paid?" really is playing out.



6:00 Right, I agree with you. And then that's where the, kind of like, insurance and litigation funders and hedge funds come in to the game where they think that there is, when an award-holder thinks that there is, uncertainty related to enforcement, not only intra-EU, but there are a lot of different awards in place where we see, and we have seen in our practice, that client has uncertainty related to the payment of the award or enforcement of the award, or they might expect enforcement or settlement within certain amount of time, but they don't know when it will happen. So that's what we thought, that there is kind of like, the gap where you can fill, you can come in and fill in, and we have come up with something really new in the insurance space. We call it "arbitration award protracted default insurance." So, in a nutshell, this product is designed for those moments when you cannot recover funds through enforcement or settle with a respondent, sovereign or state entity during the policy period, and it's the perfect tool if you are dealing with the uncertainty of enforcing complex arbitral awards. And here is the cool part, so if things go south and we had to pay out, we effectively step into the shoes of the insured through subrogation or assignment of rights. That means we take over the claim, helping ourselves, and the award holder recover the money. It's all about managing that enforcement risk in a smart, streamlined way, but here is something that is really stirring the pot: there has been a lot of debate about whether third parties like interveners should be able to exercise



those rights without the original parties' consent, and it is not a one-size-fits-all issue. Different jurisdictions have their own unique approaches, as you mentioned, which can have a big impact, for example, for insurers or for any third party who has some rights on the award. What do you think about this debate?



8:38 Well, Tamar, first, let me tell you how excited my clients are to learn about the product that you're describing. That Mosaic is leading the charge on. The reality is, when something has gone wrong and a relationship has broken down between two parties, perhaps one commercial entity, the investor, and on the other hand, the sovereign player. There is an element of figuring out, you know, what went wrong. And there's the principle behind that sense of justice or injustice that's been perpetrated, right? But there's also the realities of, if you're not going to be able to settle this issue amicably and both move on, then you have this, arbitration slog where you spend a lot of money and time to get an arbitration award, and if there isn't, then, voluntary compliance with that award... you've got this additional judicial slog, right, where you either have to fight over the annulment of the award, and if it's upheld, then you've got to fight over enforcement of that award and overcome defenses, for example, of sovereign immunity, both on jurisdiction, but then also on execution against assets of those sovereigns. And yes, you know, we can talk about this from a legal perspective, but let's not forget that ultimately, we're talking about businesses that want to do business. Their business is not in, you know, is not fighting, it's actually to do what they're good at and go about their commercial objectives. So clients are really interested and excited in the types of products that you're describing, in which there may be some coverage that protects them and allows them to see some monetary return arising out of that paper award that they may be holding. So, I just want to, I do want to stress that, you know, this was not something I talked about with my clients 10 or 15 years ago. But increasingly, this isn't just, you know, Fortune 10, Fortune 50, Fortune 100 companies that are familiar with these products; it's also small businesses, individual shareholders and companies, family offices, that are looking towards these insurance products to protect themselves in, you know, long fights against governments. How does timing matter here?



10:39 When it comes to timing, there is no magic moment, so we can step in almost any time. But here is the nuance, the ideal time is generally right after the award is rendered, especially when you see signs that a default might be on the horizon or if the award has already defaulted. So, for us, the decision really hinges on a few key factors, such as respondent sovereigns' asset allocation is very important for us. So, understanding how the sovereign manages its assets can tell you a lot about the likelihood of recovery. Size of the award—the larger the award, might bring additional complexities or risks that need to be carefully managed, and third-party interest and creditor subordination, so, level of involvement or ranking of other creditors, can significantly influence the strategy and timing. For listeners, the takeaway is this, while our product is flexible enough to be applied at various stages, assessing these factors early on can really help in determining the optimal moment to act. So, it's all about balancing the risk and ensuring that when we do step in, we are positioned for the best possible outcome where everyone will benefit, including award holders and any third party involved in a case.



12:19 Well, and Tamar, you were explaining earlier about, you know, intervenors and third parties that are stepping into the shoes of the original, you know, party that is the award creditor, and how that might play out. It's a fascinating question, because to some extent you're talking now about arbitration awards under what instrument did they come about, right? I think to some extent this will depend, really, on the applicable law. And so you have to think here about, you know, issues of where you're pursuing this enforcement action and whether there's anything in the procedural laws of that particular jurisdiction that may call into question the timing and the nature in which some of this stuff is done. My takeaway really is you need to be talking to the experts, like you, to make sure that when you're entering into these insurance products, you're accounting for those issues. I know it's very much on your brain, I'm sure.



13:11 I agree with you, but I would also recommend, first, the client needs to have a very strong lawyer who understands and who will take a lead in terms of enforcement, because with respect and help with drafting the contract with the third party. So, it is essentially a safety net. So, this coverage gives lenders peace of mind, because if the award defaults, there is insurance in place to cover the cost of capital, and it's all about adding that extra layer of certainty to what can be a pretty complex transaction.



13:53 Well, that makes complete sense to me, Tamar. I mean, the reality is that, you know, all parties to a dispute will deploy the arsenal, the full range of tools that they have available to them. And it's unsurprising, and to be expected, that states will assert their defenses of immunity that they have historically enjoyed, you know, absolute immunity back in the day, more restrictive immunity that we're seeing codified in laws such as the Foreign Sovereign Immunities Act here in the United States. So, you know, I understand that that's an element of representing a sovereign and the defense side of things. Equally, it's very good to know that the commercial market has stepped up to offer investors and award creditors options to help protect their awards against sovereigns and to ensure that they remain valuable, that they're worth more than the piece of paper, right, rendered by that tribunal. All of this requires logical but also creative thinking, because we're talking here about protracted legal battles that are playing out in different forums over a period of time in which things are not static, right? There are moving parts here. So, it's important to bear all of these moving parts in mind as we figure out the strategy.



15:07 Yes, I would say at the end of the day, enforcing an arbitration award against a sovereign is a marathon, not a sprint, and having the right lawyer and financial tool in place can make all the difference.

This has been such a great conversation we have covered a lot—enforcement challenges, litigation funding, secondary market dynamics, and, of course, how insurance plays a role in all of it. Thank you so much for joining me today and sharing your thoughts.



15:39 Thanks for listening. Feel free to download, follow, and share on social and recommend us to colleagues and clients. See you here next time for another Mosaic Moment.

