

## Conflict of Laws Analysis on the Scope of Immunity from Execution: Execution of Investment Arbitral Awards against Assets of State-Owned Enterprises (summary)

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This article analyzes from the perspective of conflict of laws whether the execution of investment arbitral awards against assets of state-owned enterprises (“SOEs”) is possible in Japan, especially under the Act on the Civil Jurisdiction of Japan with respect to Foreign States (hereinafter, Japanese Foreign State Immunity Act: “JFSIA”) implemented in 2010. Such execution is one of the appealing options for winning investors when host states fail to comply with awards.

For Japanese law analysis, this article introduces the U.S. and U.K. court practices: decisions of the United States Court of Appeals for the Third Circuit in *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (2019) and the Judicial Committee of the Privy Council in *La Générale des Carrières et des Mines (Gécamines) v. F.G. Hemisphere Associates LLC* (2012). These decisions provide two similar, but different approaches: 1) piercing the corporate veil of an SOE and 2) categorizing an SOE as an organ of (and thus part of) a foreign state to assimilate them for the purpose of execution.

Based on these two approaches, this article first considers categorizing an SOE as an organ of (and thus part of) a foreign state under JFSIA. While JFSIA provides that “foreign states” include “a state and the governmental institutions thereof” and “entities that are granted the authority to exercise sovereign power,” an SOE needs to be in the first category to be assimilated with its state. As JFSIA does not clearly distinguish between these two categories, with references to *Gécamines* as well as the “core functions test” adopted by the U.S. courts, this study proposes that categorizing an SOE as “a state and the governmental institutions thereof” under JFSIA requires the SOE to have the authority to exercise sovereign power. This requirement excludes the possibility of executing investment arbitral awards against assets of SOEs if they do not have the authority and only engage in commercial activities.

The second consideration is piercing the corporate veil of an SOE. Such a piercing claim in the Japanese execution procedure may be raised in two situations. First is in Ac-

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tion for Grant of a Certificate of Execution where a judgment creditor against a foreign state seeks to expand the effect of its judgment to an SOE by piercing the corporate veil. Although the Supreme Court of Japan has denied such expansion, several theories allowing such piercing have been developed, including piercing based on good faith. The second is in Third Party Action against Execution that must be raised by an SOE who claims ownership or other rights of the subject matter of execution. In contrast to the Action for Grant of a Certificate of Execution, claiming to pierce in the Third Party Action against Execution has been allowed by the Supreme Court because of its substantive character, not procedural.

From the perspective of conflict of laws, while piercing in Action for Grant of a Certificate of Execution (if allowed) would be decided by Japanese law as the law of the forum state, piercing in Third Party Action against Execution would be decided by the law of the state governing SOEs, thus, the law of its incorporation. Finally, the following aspects should be considered: whether foreign states control SOEs by their ownership and their sovereign power like taxation, whether foreign states use SOEs for policy purposes, and whether day-to-day business decisions need governmental approval.

When it comes to the execution of investment arbitral awards, winning investors tend to take proceedings in multiple jurisdictions that burdens not only those investors but also host states to respond to each execution proceeding. This study thus suggests that execution of investment arbitral awards against assets of SOEs under stringent conditions may assist to ensure the effectiveness and, by decreasing costs of enforcement procedure, sustainability of the investment arbitration system.