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State 1 - Investor 0: Recent French Decisions regarding Sovereign Immunity from Execution

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Contracting with States or State-controlled/assimilated entities is, and has always been, tricky, especially when a dispute arises between the (private) party or investor and the State or State-controlled/assimilated entity. An increasingly common problem is the attempt by the State to raise sovereign immunity from execution/enforcement to avoid enforcement of an arbitral award (and or judgment) rendered against that State or its instrumentalities. This has become a major concern, in light of with the growing number of both commercial and investment arbitrations involving States resulting in (i) defaulting States and (ii) the ones on the verge of bankruptcy (i.e., Argentina, Greece, Ireland, Slovenia, Portugal, etc.).

As regards Argentina, it suffered from an unprecedented economic crisis from 1999 to 2002. This major downturn in its economy caused the fall of the government and default on the country's foreign debt. NML Ltd, one of Argentina's creditors, initiated proceedings to recuperate the funds it had invested in Argentina. Despite winning its case, NML Ltd has been trying to enforce the decision against the Republic of Argentina. The *NML Ltd et al. v. the Republic of Argentina* saga was born. The latest decisions in that regard were rendered recently by the French Cour de Cassation, which elaborated on the French conception of sovereign immunity from execution, in particular, on interpretation of waivers of immunity from execution clauses.

This brief article provides a short overview of this series of related judgments.

You lose, you pay!

As a general rule, international arbitral awards are final, binding and enforceable, regardless of who the parties are.

Arbitration awards against a State entity are commonly enforced either under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID Convention') or the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention').

Both conventions contain commanding language obliging state parties to enforce the

awards rendered even against them:

Article 54 of the ICSID Convention states:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

Article III of the New York Convention states:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Yet, none of them provide for concrete rules for execution once an award is recognized in the State in which execution is sought.

Execution of arbitral awards will be governed by the law of the execution of judgments in force in the country where execution is sought. National courts will thus have the last word regarding the execution of awards.

But I'm not like everyone else...

States are not companies nor people but sovereign bodies composed of groups of people that are united together for the purpose of promoting their mutual safety and advantage under the authority of their representatives. As such, States have the power to do all that is necessary to govern themselves. To do so, States need certain types of assets, including diplomatic properties and infrastructures.

It is then commonly accepted that States can benefit from immunity from execution of arbitral awards and judgments to cover States' property located on another States' territories that relate to the performance of a mission of public service.¹⁾ This immunity to the execution of arbitral awards derives from public international law and more specifically from customary law and treaty law such as the 1972 European Convention on State Immunity²⁾ and the 2004 UN Convention on Jurisdictional Immunities of States.³⁾

Enforcement of arbitral awards by national courts against a State entity can thus be put in jeopardy if a State claims sovereign immunity from execution. However, taking advantage of this immunity would give States an unfair advantage to be committed

only under a potestative condition.⁴⁾

Going All-In?

Under most legal systems, most assets belonging to the State cannot be disposed of for the execution of an arbitral award or judgment (for example, the country's foreign embassies, or consular possessions, military property, cultural heritage, exhibitions of scientific and historical objects, etc.) unless these assets are used or intended for use by the State for other than governmental non-commercial purposes.⁵⁾ It is generally recognized that immunity from execution will only apply to assets that are held by a State to perform its sovereign or public services.⁶⁾

However, sovereign immunity from execution may be lifted by the State itself in order to attract foreign investors.

To execute an award against a State, the challenge for the investor is thus:

1. to determine which assets are held for sovereign or public purposes and which are held for commercial or economic activities; and
2. if the assets are held for sovereign or public purposes, to determine whether the State waived its sovereign immunity from execution.

In doing so, the investor will have to take into consideration the law of the execution of judgments in force in the country where execution is sought.

France, as other countries in Europe, found that immunity from execution measures cannot be raised where the State intended to allocate certain assets for the performance of a purely commercial operation.⁷⁾ Further, French Courts gradually adopted a more lenient approach towards waivers, even recognizing implicit waivers.⁸⁾ Still, there had to be a limit and the Paris Court of Appeal held, in a case where the contracts at issue stated 'the decision rendered in the arbitration shall be final and binding on the parties. The parties shall not appeal against the arbitral award and the [State] waives its right to immunity as concerns the enforcement (application) of an arbitral award rendered against it with respect to the present contract' that it was not sufficient to prove the unambiguous intention of the State to waive its right to rely on diplomatic immunity from enforcement measures.⁹⁾ In a judgment of 28 September 2011, the Supreme Court added that failing an express and specific waiver, a State could rely on its diplomatic immunity to resist enforcement measures against diplomatic assets.¹⁰⁾ Therefore, diplomatic immunity was the limit.¹¹⁾

Even if you win, you still lose...

It seems however that the French Supreme Court has recently gone a step further towards a greater protection of sovereign immunity by upholding, in the *NML Ltd et al. v the Republic Argentina* saga, Argentina's immunity despite a waiver.¹²⁾

Readers will recall that NML Capital Ltd (a creditor) sued Argentina before a U.S.

federal court, obtained in 2006 a judgment for USD 284 million, and initiated enforcement proceedings in Europe, in particular against funds deposited on bank accounts used by Argentinian embassies. This time, NML Capital rather focused on non-diplomatic assets, i.e., monies related to tax, social security and oil royalty claims owed by French companies to Argentina through their local branches.

The French Supreme Court first held that those assets were held for public purposes and would thus be immune from execution provided that Argentina had not waived its sovereign immunity.

Turning to the waiver issue, the Supreme Court held that a waiver of immunity from execution had to be express and specific by mentioning the assets or the category of assets over which the waiver is granted. As it was not the case, Argentina's immunity from execution was upheld.

It is noteworthy that, already in 1991, International Law Commission had indicated:

A general waiver or a waiver in respect of all property in the territory of the State of the forum, without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1".¹³⁾

However, making a distinction between assets for public purposes is confusing. Why should certain assets or categories of assets prevail over others if they have the same purpose? In light of the bargaining power of the State, why should an express general waiver not bound the State if it chose to insert one?

These recent state-friendly decisions highlight the need to grant special attention to risk management for a party contemplating to invest in a foreign State, particularly regarding the drafting of waivers of sovereign immunity from execution.

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