

# Kluwer Arbitration Blog

## State 1 - Investor 1: Bring it on!

Gregory Travaini (Herbert Smith Freehills LLP) · Friday, April 1st, 2016 · Herbert Smith Freehills

No less than two years ago, in a series of related judgments (the *NML Ltd et al. v the Republic of Argentina* saga), the French Court of cassation gave greater protection to state immunity from execution.<sup>1)</sup> A new turning point in the French approach towards this matter has been reached with the decision of the French Court of Cassation dated 13 May 2015, in the long running dispute between the Republic of Congo (“Congo”) and the Congolese company Commissions Import Export SA (“Commisimpex”).<sup>2)</sup>

This article provides a brief overview of the issue of waivers of immunity from execution under French law.

### I. Previously on State v. Investor...

To enforce an award against a State, an investor has to determine (i) which assets are held for public purposes and which are held for commercial or economic activities and (ii) for the former, whether the State waived its sovereign immunity from execution.

France, like many other countries around the globe, found that States could not invoke immunity against enforcement measures when targeted assets are of a purely commercial nature.<sup>3)</sup> Failing a specific and express waiver, a State could rely on its sovereign immunity to resist enforcement measures against diplomatic assets.<sup>4)</sup>

Readers will recall that, in 2013, the French Court of Cassation went a step further by upholding Argentina’s immunity despite an express waiver.<sup>5)</sup> In short, it first held that non-diplomatic assets such as monies related to tax, social security and oil royalty claims owed by French companies to Argentina through their local branches were assets for public purposes and would thus be immune from execution provided that Argentina had not waived its sovereign immunity. Then, the French Supreme Court found 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, thereby limiting the efficiency of waivers.

Confusion with a tinge of criticism arose.<sup>6)</sup> Why shouldn’t an express general waiver bind a State if it chooses to insert one?

## II. An unexpected twist

Commisimpex, a Congolese company, prevailed in 2000 and in 2013 in two ICC arbitration proceedings seated in Paris against Congo. The awards settled disputes between the parties in relation to (i) several contracts for public works concluded in the 1980s and that Congo had failed to pay, and (ii) an agreement regarding payment of Congo's debts, which Congo also had failed to execute. The arbitral tribunals ruled in Commisimpex's favour.

Commisimpex sought to enforce the first award against Congo by seizing a number of accounts held in Paris in the name of the Congo's diplomatic mission and delegation to UNESCO.

In 2012, the Versailles Court of Appeal held that under customary international law, diplomatic missions benefit from an autonomous form of immunity from execution, which can only be waived in an express and specific manner. Although Congo had expressly indicated that it had waived its right to invoke "any immunity of jurisdiction as well as any immunity of execution", the Court found that this waiver could not be construed as "express and specific" and thus upheld Congo's immunity from execution measures.

Commisimpex brought the case before the French Court of Cassation, which had to decide whether, in order to be effective, Congo's waiver of immunity from execution should have specifically referred to the assets or the category of assets over which the waiver is granted.

The first Chamber of the Court of Cassation, the same chamber which had, in 2013, 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, reversed the Versailles Court of Appeal's decision and found that "international customary law does not require a waiver of the execution immunity to be anything else than express" and remanded the case before the Court of Appeal of Paris.<sup>7)</sup>

Given the broad terms of this decision, it appears that the French Court of Cassation has abandoned the requirement that a waiver be "specific" and simply requires that it be express, thereby reverting to a more flexible approach to questions of sovereign immunity.<sup>8)</sup>

The lack of consistency among French decisions on immunity waivers questions the very existence of any established practice on this issue.<sup>9)</sup> Therefore, reference made to "international customary law" or "principles of international private law"<sup>10)</sup> by the French Court of Cassation may be confusing. For the sake of clarity and predictability, it may be time for the French approach towards sovereign immunity from execution to be set in stone, or at the very least be consistent.

The United-Kingdom and the United States of America have already enacted Laws on State immunity, nearly 40 years ago. A presumption of immunity from execution exists save (i) any consent of the State concerned, or (ii) on property which is for the time

being in use or intended for use of commercial purposes.<sup>11)</sup> The US Foreign Sovereign Immunities Act even states that “the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication...”.<sup>12)</sup>

Is it time for France to take the lead in Europe and enact general legislation on State immunity? To be continued...

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### References

- <sup>1</sup> G. Travaini, *State 1 - Investor 0: Recent French Decisions regarding Sovereign Immunity from Execution*, Kluwer Arbitration Blog (27 August 2013).

- ↑2 Cass., Civ. 1ere, 13 May 2015 n°13-17751.  
Cass., Civ. 1ère, 14 mars 1984, *Société Eurodif c. République islamique d’Iran*,
- ↑3 n°82-12462; Cass., Civ. 1ère, 1er octobre 1985, *Société Sonatrach c. Migeon*, n° 84-13605.
- ↑4 Cass., Civ. 1ère, 28 septembre 2011, *NML Capital Ltd. c. République Argentine*, n° 09-72057.
- ↑5 Cass., Civ. 1ère, 28 mars 2013, *Société NML Capital (Iles Caïman) c. Etat d’Argentine*, n° 10-25.938, 11-10.450 and 11-13.323.  
See for instance, L. Franc-Menget, “Vers un durcissement des conditions de renonciation à l’immunité d’exécution de Etats étrangers en droit français ?”, note sous Cass. 1ere civ., 28 mars 2013”, *Rev. Arb.*, 2013, n°4 ; M. Audit, “La France au secours de l’Argentine”, *Les Echos*, 5 avril 2003 ; D. Martel, “Haro sur les clauses de renonciation à l’immunité d’exécution !”, *D.*, 2013.1728.
- ↑6 Cour de cassation, chambre civile 1, 13 May 2015 n°13-17751.  
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- ↑7 N. Meyer-Fabre, “Waivers of immunity from execution: A new turn by the French Court of Cassation”, *Mealey’s report*, 21 August 2015.
- ↑8 Cass., Civ. 1ère, 14 mars 1984, *Société Eurodif c. République islamique d’Iran*, n°82-12462; Cass., Civ. 1ère, 1er octobre 1985; Cass., Civ. 1ère, 28 septembre 2011, *NML Capital Ltd. c. République Argentine*, n° 09-72057; Cass., Civ. 1ere, 13 May 2015 n°13-17751.
- ↑9 Section 13 of the UK State Immunity Act of 1978; Sections 1609 and 1610 of the US Foreign Sovereign Immunities Act of 1976.
- ↑10 Section 1610(a)(1) of the US Foreign Sovereign Immunities Act of 1976.

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