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Protection of States' Diplomatic Assets in France

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In France, until recently, rules governing the issue of sovereign immunity from enforcement, and in particular those setting out the scope and conditions under which such immunities apply, derived from case law. Although relevant international instruments (e.g. the 1961 Vienna Convention on Diplomatic Relations and the 2004 Convention on Jurisdictional Immunities of States and their Property) occasionally served as the basis for court decisions, the legal regime governing sovereign immunity from enforcement remained uncodified. It was hence subject to significant fluctuations.

On 9 December 2016, a statute known as "Sapin II" was promulgated. It has been enshrined through Articles L. 111-1-1, L. 111-1-2 and L. 111-1-3 of the Code of Civil Enforcement Proceedings, which currently regulate most of the issues pertaining to sovereign immunity from enforcement in France.

In a notable decision dated 10 January 2018 rendered in the landmark *Commisimpex v République du Congo* case (No 16-22.494), the Supreme Court has made clear that, although they do not apply to enforcement measures performed prior to their entry into force, the abovementioned provisions should nonetheless be considered when ruling on such measures. Making an explicit reference to new articles L. 111-1-1, L. 111-1-2 and L. 111-1-3 of the Code of Civil Enforcement Proceedings, the Supreme Court decided that a State's waiver of its immunity from enforcement in relation to its diplomatic assets had to be specific and express so as to be valid. By so ruling, the Supreme Court overturned its own precedent rendered in the same case on 13 May 2015, which held that "customary international law only requires that such waiver be made expressly to be effective" (No 13-17.751).

In the *Commisimpex v République du Congo* case, Commisimpex, a Congolese company, was seeking the enforcement of an ICC award against the Republic of the Congo in France. Commisimpex was relying on the Republic of the Congo's written promise that it would finally and irrevocably waive any immunity from jurisdiction and from enforcement in the context of the settlement of the dispute. On this basis, in October 2011, Commisimpex attached bank accounts held at Société Générale under the name of the Congolese diplomatic mission and the country's delegation to UNESCO in Paris.

On 15 December 2011, the first instance court of Nanterre lifted the attachments. The Versailles

Court of Appeal upheld the first instance court's decision on 12 April 2012 (No 11/09073). The Court held that, under customary international law, foreign States' diplomatic missions enjoy an autonomous immunity from enforcement, which can only be waived by expressly and specifically providing that the waiver shall be effective against assets protected by diplomatic immunity. The court thus considered that the Republic of Congo's general waiver did not specifically relate to diplomatic assets.

The Versailles Court of Appeal's decision was in line with consistent case law coined by the Paris Court of Appeal on 10 August 2000 in the *Commpagnie Noga d'importation et d'exportation v Embassade de la Fédération de Russie* case (No 2000/14157). The mentioned case law considered that a general waiver of immunity from enforcement was not sufficient for a State to waive its immunity vis-à-vis the assets of its embassies and diplomatic missions abroad. Diplomatic immunity from enforcement was thus consistently held to be independent from general State immunity from enforcement. Accordingly, even where a State had waived its immunity from enforcement, diplomatic immunity still applied, unless the State had expressly provided otherwise (the "*Noga* test"). This doctrine was based in turn on the principle of State sovereignty, on a particular reading of the 1961 Vienna Convention on Diplomatic Relations (CA Paris, 10 August 2000, No 2000/14157), and on customary international law (Cass civ 1, 28 September 2011, No 09-72.057).

Commisimpex filed a recourse against the Versailles Court of Appeal decision before the French Supreme Court, contending that there was no legal basis for the Court of Appeal's finding. In a decision dated 13 May 2015, the Supreme Court quashed the Versailles Court of Appeal's ruling and remanded the case to the Paris Court of Appeal. The Supreme Court held that customary international law only requires an express waiver of immunity (as opposed to an express and specific waiver). This finding applied even in relation to diplomatic assets. While the 13 May 2015 *Commisimpex* decision was also based on customary international law, it nevertheless arrived at an opposite conclusion to the Versailles Court of Appeal decision and traditional case law, which applied the Noga test and hence considered that diplomatic assets should be afforded a specific protection.

On 30 June 2016, the Paris Court of Appeal, to which the *Commisimpex* case was remanded, accordingly held that customary international law only requires that a waiver of immunity from enforcement be made expressly to be effective. The Paris Court of Appeal thus considered that the attachments performed by Commisimpex on the bank accounts of the Congolese diplomatic mission and the country's delegation to UNESCO in Paris were valid. To reach this decision, the Paris Court of Appeal strictly followed the Supreme Court's instructions by adopting the exact same rationale.

One would thus have expected that the Republic of the Congo's challenge against the 30 June 2016 ruling of the Paris Court of Appeal be dismissed by the Supreme Court. However, in a last unanticipated turn-about, the Republic of Congo's petition was upheld by the Supreme Court.
In its 10 January 2018 decision, after having summarised the procedure set out above, the Supreme Court observed that the Paris Court of Appeal had complied with its 13 May 2015 ruling. The Supreme Court then made lengthy reference to new Articles L. 111-1-1, L. 111-1-2 and L. 111-1-3 of the Code of Civil Enforcement Proceedings, emphasizing that these statutory provisions require that a State's waiver of its immunity from enforcement in relation to its diplomatic assets has to be specific and express in order to be valid. Interestingly, along with this new statute, the Supreme Court also referred to the 1961 Vienna Convention on Diplomatic Relations (reference that it had

abandoned in its 13 May 2015 decision).

The Supreme Court then ruled that "these statutory provisions, which subject the waiver of its immunity from enforcement by a foreign State to the double condition that such waiver be express and specific, contradict the isolated doctrine resulting from the 13 May 2015 ruling, but enshrine prior case law [i.e. case law promoting the *Noga* test] […]; yet, these provisions apply only to enforcement measures performed after their entry into force and hence do not apply to the present dispute; nonetheless, as regards State sovereignty and the preservation of States' diplomatic representations, given the compelling necessity to deal with identical situations in an identical manner, the purpose of consistency and legal certainty demands to apply prior case law as comforted by the new legislation".

On this basis, the Supreme Court quashed the Paris Court of Appeal's 30 June 2016 ruling and confirmed the 15 December 2011 judgment of the Nanterre first-instance court that had lifted Commisimpex's attachments (not remanding the case to any further court).

The 10 January 2018 decision is worth reporting in two respects.

First, taking a conservative view on procedural points, one could have expected that the Supreme Court would dismiss the Republic of the Congo's challenge, given that the Paris Court of Appeal had followed the French Supreme Court's ruling in the 13 May 2015 decision. In order to depart from its 13 May 2015 precedent and apply its previous and established case law that promoted the *Noga* test to this issue, the Supreme Court not only overturned its own recent ruling in this case, but it also referred to such ruling as having generated an "isolated approach", which strongly contrasted with prior established case law.

Second, in light of the extensive reference made to the new statute and the substance of the decision, one may argue that the Supreme Court retroactively applied new Articles L. 111-1-1, L. 111-1-2 and L. 111-1-3 of the Code of Civil Enforcement Proceedings to the *Commisimpex* case, despite these statutory provisions not providing for their retroactive application. However, on a formal level at least, the Supreme Court was mindful to base its decision on the application of prior case law, rather than on the new legislation (although the court underlines that its prior case law that championed the Noga test was indeed comforted by the new legislation). The Supreme Court proffered a policy argument, emphasizing that in a matter of public interest, the consistency of solutions should prevail, although, in the present case, this led to overriding a private party's enforcement rights (in the absence of any vested right of the parties to the stability of court decisions).

Finding comfort in the inapplicable provisions of the "Sapin II" statute to operate a turn-about and apply a judicial doctrine previously relinquished, the Supreme Court has sought to reassemble the diplomatic shield it had shattered in 2015.

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