Enforcement Of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver Of Immunity From Execution Held French Court Of Cassation In Creighton v. Qatar, July 6, 2000

By Nathalie Meyer-Fabre

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On July 6, 2000, in Creighton Limited v. Ministry of Finance and Ministry of Municipal Affairs and Agriculture of the State of Qatar ("Creighton v. Qatar"), the French Court of Cassation (Supreme Court) held that when a sovereign State signs an ICC arbitration clause it thereby waives its immunity from execution.

(Text of Decision in Section A. Document #05-000925-101).

The dispute submitted to ICC arbitration arose in connection with the performance of a contract entered into in 1982 by the Government of Qatar (Ministry of Municipal Affairs and Agriculture) and Creighton, a US private company, for the construction of a hospital in Doha, the capital of Qatar. Under two final arbitration awards rendered in Paris on October 18, 1993, the Government of Qatar was ordered to pay to Creighton a total amount of around 12 million QAR, plus interest. In January 1996, the Paris Court of Appeal dismissed an application to set aside the awards, which thus became enforceable in France. In February 1996, Creighton seized monies and attached stockholder rights and securities held by Qatar National Bank and Banque de France in the name of the Qatar Ministry of Municipal Affairs and Agriculture.

The Qatar authorities succeeded in lifting these enforcement measures at first instance on appeal,1 on the grounds that they violated the immunity from execution recognized in favor of foreign States. The reasoning adopted by the courts at first instance and on appeal was consistent with previous French case law.

Both decisions referred to a rule established by the Court of Cassation in 1984,2 providing that "immunity from execution, which, as a matter of principle, benefits foreign States, may only be set aside if the property seized was used or intended for the economic or commercial private law activity which gave rise to the claim." At first instance, the construction of a hospital was characterized as an activity of a public nature. As for the Court of Appeal, it merely held that Creighton had not produced sufficient
evidence to show that the seized assets had been used by the Qatar Emirate for a commercial activity related to Creighton's claim. Under none of these analysis was there room for the application of the aforementioned exception to the rule of immunity from execution.

Furthermore, both courts held that there was no evidence to show that the State of Qatar had waived its immunity from execution. Submission to arbitration was not deemed to be sufficient proof of such a waiver.

Creighton made a further appeal before the Court of Cassation.

The Court of Cassation quashed the appeal judgment in respect of the waiver issue, on the grounds that the commitment made by a State, when signing an ICC arbitration clause, to carry out the award in accordance with the terms of Article 24 of the ICC Rules of Arbitration, implies that the State waives its immunity from execution. Under the heading "Finality and enforceability of award," Article 24 of the (then in force) ICC Rules of Arbitration provides in its second paragraph that "by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made."³

The Creighton v. Qatar decision is in line with the general trend towards reducing or even eliminating the impact of sovereign immunities on the arbitration process, from the beginning of the proceedings until the enforcement of the award. However, the method used by the French Court of Cassation, based on an interpretation of the State's intention and the detection of an implicit waiver, may not be the most appropriate approach to obtain a balanced and stable result.

It is well established under French case law that when a foreign sovereign State has signed an arbitration clause, it has "thereby accepted that the award may be declared enforceable" ("revêtue de l'exequatur") by the courts of another State.⁴ Most commentators agree that the State party to an arbitration should not be immune from the jurisdiction of foreign courts exercising their "ancillary" role in the arbitration process, and that this "ancillary" role includes the declaration of enforceability of the award. However, many think that this solution should preferably be based on an objective exception to the jurisdictional immunity, such as 28 U.S.C.A. § 1605 (a) (6),⁵ rather than on an implicit waiver. Should one seek implied intentions behind an arbitration clause, the first one would indeed clearly be the intention not to submit to the courts of any country.

A further step has however been made in the Creighton v. Qatar decision, in which immunity from execution, rather than from jurisdiction, was at stake. Whereas, as a matter of general principle, a waiver of the immunity from execution may only result from unequivocal demonstrations of the State's intention and cannot be inferred, for example, from a waiver of the immunity from jurisdiction, the Court of Cassation held that signing an ICC clause of arbitration is sufficient evidence of such a waiver.

Before the decision of the Court of Cassation in Creighton v. Qatar, the Paris Court of Appeal held in 1982 that a waiver of the immunity from execution can only result from unequivocal demonstrations of the State's intention to waive its immunity, and does not
result from the sole execution of an arbitration clause, nor from a reference to the ICC Rules of Arbitration. The Paris Court of Appeal noted that Article 24 of the said Rules merely contains an undertaking to voluntarily enforce the award and to recognize its binding nature, but does not include any reference to the issue of immunity. However, the opposite view was adopted in 1996 by the Court of Appeal of Rouen, which held that by submitting to arbitration (an ad hoc arbitration in that case), a State accepts the common rules of international trade and, thereby, waives its immunity from jurisdiction and - as required by good faith - from execution.

For private parties, being confronted with the last but often insurmountable obstacle of the State's immunity from execution is obviously intolerable, and the scope of the State's privilege may indeed be considered as excessive when the State has agreed to submit to arbitration and thereby to recognize the binding nature of the award. However, once again, the method used by the French Court de Cassation in Creighton v. Qatar to circumvent the State's immunity by means of an implied waiver is unconvincing and may have undesirable consequences.

Although submission to arbitration implies that the parties recognize the binding nature of the award and that they undertake to carry out their obligations thereunder, it is a matter of a different order for a sovereign State to waive its immunity from execution, thereby submitting to enforcement measures on any of its assets by the authorities of any State where enforcement may be sought.

The clause in Article 24-2 (now Article 28-6) of the ICC Rules, emphasizing that the award is binding on the parties and that the parties undertake to carry it out without delay, is a rather stereotyped and, one may even say, superfluous provision, but for its psychological effect. It does not include any reference to the immunity from execution that a party may be entitled to invoke. To read a waiver of such immunity between the lines of this clause is a far-fetched interpretation.

What may have been decisive in Creighton v. Qatar is the fact, relied upon in Creighton's briefs, that Article 24 refers to the "enforceability" (caractère "exécutoire") of the award. This is indeed the case, but it is only referred to in the title of Article 24 ("Finality and enforceability of award"). One may have some doubts about the use of the word "enforceability" in this context: an award is never "enforceable" without some kind of State court's intervention, and it is neither for the parties, nor for the ICC, to decide upon the "enforceability" of an award. Moreover, the enforceable nature of a decision does not prevent foreign States from invoking their immunity from execution. In fact, the issue of whether immunity from execution can be asserted only then arises, when an enforceable decision exists. In any event, were it meant, in Article 24, that parties protected by an immunity from execution waive such privilege by submitting to an ICC arbitration, this would undoubtedly have been more clearly stated in the Rules.

Enforcement of arbitration awards against sovereign States should preferably be based on an objective rule providing for a well defined exception to the immunity from execution (see 28 U.S.C.A. § 1610 (a) (6)), rather than on questionable implicit waivers. However, introducing such an exception in French law should be a task for the legislator rather than for the judiciary, which may explain why the French Court of Cassation, in the absence of statutory or treaty provisions governing sovereign immunity under French law, chose a subjective approach based on the interpretation of
the foreign State's intention.

As it is, the Creighton v. Qatar decision leaves many questions unanswered, which will undoubtedly give rise to substantial commentary and analysis, as well as further court decisions.

For example, does the waiver resulting from a reference to the ICC Rules mean that enforcement measures can be implemented on any and all assets belonging to the foreign State, including those which are used for the State's public functions?

In principle, a positive answer should be given to this question under French law. However, in a very recent decision of 10 August 2000 (in, Embassy of the Russian Federation et al. v. Compagnie Noga d'importation et d'exportation), the Paris Court of Appeal made an interesting distinction. In that case, the State had signed not only an arbitration clause (Stockholm Chamber of Commerce), but also an express waiver "of any right of immunity." Nevertheless, the Court of Appeal held that such waiver did not extend to the diplomatic immunities from execution guaranteed by the 1961 Vienna Convention and by customary international law, which are governed by specific rules distinct from those applicable to foreign States' sovereign immunities. Accordingly, the Court ordered the lifting of seizures Noga had obtained on bank accounts opened in the name of the Russian Embassy and other Russian diplomatic entities. It remains to be seen whether the Court of Cassation will endorse the same view.

Another issue will be to determine whether by signing an ICC arbitration clause a sovereign State waives its immunity from pre-judgment attachments as well as its immunity from execution of the final award.

Article 8-5 of the (then in force) ICC Rules provides that "before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures...." Clearly, the purpose of this provision is to avoid the existence of an ICC arbitration agreement being considered as prohibiting applications for interim relief before judicial authorities, and not to derogate from any rule of immunity. However, after its decision in Creighton v. Qatar, the possibility should not be entirely dismissed that the Court of Cassation might interpret such a clause as an implicit waiver of the State's immunity from prejudgment attachments.

Unless its scope is limited in future decisions, in particular in respect of the two above mentioned issues, the implicit waiver resulting, according to the French Court of Cassation, from the execution by a sovereign State of an ICC arbitration clause (and possibly from the execution of any arbitration clause), is likely to have a significant practical impact on sovereign States' willingness to submit to (ICC) arbitration. When negotiating with sovereign States, private parties should in any event expect that the State will fight hard to obtain the inclusion of a provision expressly reserving its immunity from execution.

Another practical consequence of the Creighton v. Qatar decision could be an increase in the number of enforcement measures sought by private parties against sovereign States' property in France, with ensuing diplomatic difficulties for the French government.
ENDNOTES

1. Judgments from the Judge of Execution of the Tribunal de Grande Instance of Paris dated January 31, 1997 (Case No. 96/84282) and from the Paris Court of Appeal (Case No. 97/07089) dated June 11, 1998, both unpublished. The above description of the dispute is based on the text of these judgments.


3. A similar provision is included in Article 28 of the revised ICC Rules, in force as from January 1, 1998.


7. Court of Appeal of Rouen, Société Bec Frères v. Office des Céréales de Tunisie, June 20, 1996, Rev. Arb. 1997.263, note Gaillard. However, the Court refused the requested enforcement against the defendant, on the grounds that it was not an emanation of the Tunisian State and was therefore not liable for the debt of the State.

8. The distinction is clearly made in the ICSID Convention between, on the one hand, the State's commitment to recognize the binding nature of the award and to carry it out (Art. 54) and, on the other hand, the issue of the State's immunity from execution (Art. 55). See also the 1972 European Convention on State Immunity (Articles 20 and 23).

9. The ICC Rules of Arbitration are not the only arbitration rules to make an express reference to such an obligation (see, for example, Article 32.2 of the UNCITRAL Rules, Article 26.9 of the LCIA Rules). One may even think that the obligation to recognize the binding nature of the award is in fact implied in any arbitration agreement.

10. If a foreign State has waived its immunity from execution, French courts do not require that the State's assets be used for a commercial activity to allow enforcement measures against such assets. In contrast, under 28 U.S.C.A. § 1610 (a), the property of a foreign State "used for a commercial activity in the United States" shall not be immune from execution if the foreign State has waived its immunity from execution.

12. A similar provision is included in Article 23-2 of the revised ICC Rules.


14. By way of comparison, under US law, such a waiver of the immunity from pre-judgment attachments must be explicit (see 28 U.S.C.A. § 1610 (d)).
CREIGHTON

The plaintiff invokes, in support of its appeal, the two grounds for appeal appended to this judgment:

At the public hearing on June 6, 2000, where the following people were present: Mr. Lemontey, Presiding Judge, Mr. Bargue, Counselor; Rapporteur, Mssrs. Renard-Payen, Ancel, Durieux, Mrs. Bens, Mssrs. Guerin, Sampere, Counselors, Mmes. Cassuto, Teytaud, Barberot, Catry, Commissioners of Audit, Mr. Roehrich, general Attorney, Mrs. Audolet, Court Clerk:

After having deliberated on the report by Mr. Bargue, Counselor, the comments by Mr. Foussard, the Attorney for Creighton Limited, from the firm of Bouzidi, the attorney of the Minister of Finance of the State of Qatar and the Minister of Municipal Affairs and Agriculture of the Government of the State of Qatar and the brief by Mr. Roehrich, general attorney, in accordance with the law:

On the first grounds:

In view of the principles of international law governing the immunity of foreign states, together with Article 24 of the arbitration rules of the International Chamber of Commerce,

Whereas in enforcement of arbitration awards that have become final, the American company Creighton Limited, recognized as a creditor of the Ministry of Municipal Affairs and Agriculture of the Government of the State of Qatar, proceeded, on one hand, with two seizures on sums held in the name of that Ministry by Qatar National Bank and by the Bank of France and, on the other hand, two conservatory attachments of stockholder rights and securities held by those same two banks;

Whereas to order all those attachments lifted, the judgment in dispute state that Creighton Limited has not established that the State of Qatar waived immunity from execution and that the fact of having accepted an arbitration clause cannot assume waiver of said immunity, which is separate from immunity from jurisdiction;

Whereas in so ruling, when the commitment made by de State that signed the arbitration clause to carry out the award in accordance with the terms of Article 24 of the arbitration rules of the International Chamber of Commerce implied that the State waived immunity from execution, the Court of Appeals violated the above-mentioned principles and text;

For these reasons and without ruling on the second grounds:

THE COURT

SETS ASIDE AND ANNULS all provisions of the judgment handed down on June 11, 1998, between the parties, by the Paris Appeals Court; consequently reminds the case and returns the parties to the state in which they were before said judgment and sends them back before the Paris Appeals Court, composed of different people, for legal act;

Leaves the court costs to the Public Treasury;

Rules that, at the diligence of the General Prosecutor to the Court of Cassation, this judgment will be sent to be transcribed in the margin or at the end of the judgment that has been set aside;

So done and judged by the Court of Cassation, First Civil Chamber, and pronounced by the Presiding Judge at its public hearing on July sixteenth, two thousand.
CIV I

N. R.

2. 1278

La demanderesse invoque, à l’appui de son pourvoi, les deux moyens de cassation annexés au présent arrêt ;

La COUR, en l’audience publique du 6 juin 2000, où étaient présents : M. Lémontey, président, M. Bargue, conseiller rapporteur, MM. Renard-Poyen, Ancel Darieux, Mme Hénas, MM. Guérin, Sampère, conseillers, Mmes Cassuto-Toyaud, Barberot, Caby, conseillers référendaires, M. Roehrich, avocat général, Mme Ayalot, greffier de chambre ;

Sur le rapport de M. Bargue, conseiller, les observations de Me Fournier, avocat de la société Creighton limited, de la SCP Bouzidi, avocat du ministre des finances de l’État du Qatar et du ministre des Affaires municipales et de l’agriculture du Gouvernement de l’État du Qatar, les conclusions de M. Roehrich, avocat général, et après en avoir délibéré conformément à la loi ;

Sur le premier moyen :

Vu les principes du droit international régnant les immunités des États étrangers, ensemble l’article 24 du règlement d’arbitrage de la Chambre de commerce internationale ;

Attendu qu’en exécution de sentences arbitrales devenues définitives, la société américaine Creighton limited, reconnue créancière du ministère des Affaires municipales et de l’agriculture du Gouvernement de l’État du Qatar, a fait procéder, d’une part, à deux saisies-attribution sur des sommes détenues au nom de ce ministère par la Qatar National Bank et par la Banque de France et, d’autre part, à deux saisies conservatoires des droits d’associés et de valeurs mobilières détenues par deux mêmes banques ;

Attendu que pour ordonner la mainlevée de l’ensemble de ces saisies, l’arrêt attaqué refusa qu’il n’est pas Creighton limited que l’État du Qatar ait renoncé à l’immunité d’exécution et que le fait d’avoir accepté une clause d’arbitrage ne peut faire présumer la renonciation à cette immunité, qui est distincte de l’immunité de juridiction ;

Qu’en statuant ainsi, alors que l’engagement pris par l’État signataire de la clause d’arbitrage d’exécuter la sentence dans les termes de l’article 24 du règlement d’arbitrage de La Chambre de commerce internationale impliquait renonciation de cet État à l’immunité d’exécution, la cour d’appel a violé les principes et texte susvisés ;

PAR CES MOTIFS et sans qu’il y ait à statuer sur le second moyen :

CASSE ET ANNULE, dans toutes ses dispositions, l’arrêt rendu le 11 juin 1998, entre les parties, par la cour d’appel de Paris ; remet, en conséquence, la cause et les parties dans l’état où elles se trouvaient avant ludit arrêt et, pour être fait droit, les renvoie devant la cour d’appel de Paris, autrement composée ;

Laisse les dépens à la charge du Trésor public ;

Dit que sur les diligences du procureur général près la Cour de Cassation, le présent arrêt sera transmis pour être transcrit en marge ou à la suite de l’arrêt cassé ;

Ainsi fait et jugé par la Cour de Cassation, Première chambre civile, et prononcé par le président en son audience publique du six juillet deux mille.

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, PREMIERE CHAMBRE CIVILE, a rendu l’arrêt suivant :

Sur le pourvoi formulé par la société Creighton limited, société de droit américain, dont le siège est PO Box 2247, Brentwood TN 37024 - 2247 (États-Unis),

en cassation d’un arrêt rendu le 11 juin 1998 par la cour d’appel de Paris (8ème chambre, section B), au profit :

1/® du ministre des Finances de l’État du Qatar, domicilié en ses bureaux PO Box, Doha (Qatar),

2/® du ministre des Affaires municipales et de l’agriculture du Gouvernement de l’État du Qatar, domicilié en ses bureaux PO Box, Doha (Qatar),

défendeurs à la cassation ;

V. Fournier
TRANSLATED FROM THE FRENCH

Grounds produced by Mr. Fouard, Attorney ("Avocat aux Conseils") for Creighton Limited.

GROUNDS APPENDED to Judgment No. 1278 CIV.1

FIRST GROUND FOR "CASSATION"

The challenged decision of the Paris Court of Appeal should be quashed.

INSOFA RD AS, in confirming the first instance judgment appealed against, it ordered the lifting of the conservatory attachments carried out in respect of partnership rights and securities belonging to the Ministry of Municipal Affairs and Agriculture of the Government of Qatar, held by the Bank of France.

ON THE GROUNDS that immunities from execution that foreign States enjoy in principle can be set aside if the property seized was allocated for the economic or commercial activity that comes under private law which gives rise to the claim; that Creighton Limited has not established that the attached partnership rights and securities were allocated for an economic or commercial activity related to its claim; that the nature of the attached rights and securities is not specified in the document; that under Article 178 of the Decree of July 31, 1992, rights and securities that a debtor holds are attached in the hands of the company or legal entity that issued them; that to the conservatory attachment was to cover the stock of the of Qatar in the Qatar National Bank. Since it was not established that [the Bank's] activity, albeit of a commercial nature under the by-laws of the said bank, was related to the contract concluded by Creighton Limited;

WHEREAS

- the State's immunities come into play only insofar as they have not been waived by the State;
- immunity from execution, like immunity from jurisdiction, can be the subject of a waiver on the part of its beneficiary;
- a waiver of immunity from execution can be inferred, in particular, from the State's acceptance, when signing an arbitration agreement, of the enforceable nature of the arbitration award;
- At the time when the contract was concluded between the State of Qatar and Creighton Limited, the rules of arbitration of the International Chamber of Commerce expressly specified that by submitting its dispute to the International Chamber of Commerce for arbitration the parties undertook to carry out the award without delay, and that the arbitration award was "enforceable" (Art. 24):
- By deciding that the State of Qatar had not waived its immunity from execution when it was clear from the documents in the file that the State had agreed to submit to arbitration in accordance with the rules of the International Chamber of Commerce, the judges on the merits deprived the decision of any legal basis under Articles 1492, 1497 and 1498 of the New Code of Civil Procedure in conjunction with the principles of private international law governing State immunity.

SECOND GROUND FOR "CASSATION"

The challenged decision of the Paris Court of Appeal should be quashed.

INSOFA RD AS, in complying with the first instance judgment appealed against, it ordered the lifting of the conservatory attachments carried out in respect of partnership rights and securities belonging to the Ministry of Municipal Affairs and Agriculture of the Government of Qatar, held by the Bank of France.

ON THE GROUNDS that immunities from execution that foreign States enjoy in principle can be set aside if the property seized was allocated for the economic or commercial activity that comes under private law which gives rise to the claim; that Creighton Limited has not established that the attached partnership rights and securities were allocated for an economic or commercial activity related to its claim; that the nature of the attached rights and securities is not specified in the document; that under Article 178 of the Decree of July 31, 1992, rights and securities that a debtor holds are attached in the hands of the company or legal entity that issued them; that to the conservatory attachment was to cover the stock of the of Qatar in the Qatar National Bank. Since it was not established that [the Bank's] activity, albeit of a commercial nature under the by-laws of the said bank, was related to the contract concluded by Creighton Limited;

WHEREAS

- If State immunity from execution exists in principle when it is not waived, it does not cover property allocated for an economic or commercial activity under private law;
- Where the allocation of property to an activity under private law can be presumed, particularly when it is allocated for the activity that is the subject of the claim, it can also be inferred from other circumstances;
- For example, allocation to an activity under private law can result solely from the nature of the property seized;
- Partnership rights or securities held by a State in a company having commercial activity must be presumed allocated for an economic activity under private law;
- In deciding that Creighton Limited cannot attach the partnership rights and securities held by the State of Qatar in the Qatar National Bank, whose activity is commercial, because it did not establish that the bank's activity was related to the contract concluded, when the allocation of said property to a private activity is sufficiently evident from the commercial nature of the bank's activity, the judges on the merits violated the principles of private international law governing State immunity.

[Editor's Note: Creighton LTD. arguments translated by Nathalie Meyer-Fabre of the Paris office of Salans Hertzfield & Heilbronn]