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by
Nathalie Meyer Fabre

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Commentary

Waivers Of Immunity From Execution: A New Turn By The French Court Of Cassation

By
Nathalie Meyer Fabre

[Editor's Note: Nathalie Meyer Fabre is a member of the Paris Bar, founding partner of a boutique law firm located in Paris specialized in international arbitration and litigation. Mrs. Meyer Fabre has over twenty-five year of experience in the resolution of international disputes both as counsel for private parties and sovereign States, and as arbitrator. Any commentary or opinions do not reflect the opinions of LexisNexis, Mealey's. Copyright © 2015 by Nathalie Meyer Fabre. Responses are welcome.]

The decision issued by the French Court of Cassation on May 13, 2015 in *Commissions Import Export S.A. v. The Republic of the Congo* (“*Commisimpex v. Congo*”)¹ marks a new turn in the French courts’ perception of what customary international law may have to say about waivers of sovereign immunity from execution.

Commissions Import Export S.A. (“*Commisimpex*”), a Congolese company, prevailed in 2000 in an ICC arbitration seated in Paris against the Republic of the Congo (“*Congo*”). *Commisimpex* sought, for years, to collect on the arbitral award in a number of jurisdictions² with only limited success, despite the fact that it could rely on a broad waiver by the Republic of any immunity from jurisdiction as well as from execution.

In France, *Commisimpex* seized a number of bank accounts held in the name of the Congo’s Embassy in Paris and its permanent delegation to UNESCO. Confirming a lower court’s judgment, the Court of Appeal of Versailles, in a ruling of November 15, 2012, ordered the release of the seizures on the grounds that, under customary international law, foreign States’ diplomatic missions benefit, for the operation of the

representation of the sending State and the needs of its sovereign mission, from an “autonomous” immunity from execution, which can only be waived in an “express and specific” manner (“*de façon expresse et spéciale*”). The Court of Appeal thereby very accurately applied the solution previously adopted by the Court of Cassation in *NML Capital. v. Argentina*.³

Commisimpex nevertheless challenged the decision before the Court of Cassation. In its decision of May 13, 2015, the Court held that “customary international law does not require a waiver of the execution immunity to be anything else than express”. Consequently, it found that the Court of Appeal had misapplied the rules of customary international law, quashed its decision, and remanded the case before the Court of Appeal of Paris.

I. Background

Like most civil law jurisdictions, France has not enacted general legislation on State immunity. French law on the subject is judge-made law, with the additional difficulty that the French system does not recognize the principle of *stare decisis*. Regarding immunity from execution, the legal framework nevertheless remained quite stable for years after the adoption of the commercial exception by the Court of Cassation in 1984 in *Eurodif v. Iran*.⁴ sovereign immunity from execution is exceptionally set aside when coercive measures are implemented against State property used for a private activity which is at the origin of the underlying claim.⁵ Until 2000, it was also undisputed that a waiver of the immunity from execution required an unequivocal demonstration of the State’s intention to waive that

right of immunity. In particular, a waiver by the State of its immunity from jurisdiction or its submission to arbitration did not imply a waiver of the immunity from execution.

In 2000, a pebble was thrown in the pond when the Court of Cassation decided in *Creighton v. Qatar* that the signature of an ICC arbitration clause by a sovereign State implies a waiver of its immunity from execution.⁶ The Court of Cassation applied an extremely lenient test by finding that an implied waiver of immunity from execution resulted from the undertaking to carry out the award without delay accepted by any party to an ICC arbitration.⁷ Despite the prediction of some commentators, who thought that the way was now largely open for the enforcement of arbitral awards against sovereign assets in France, the pebble actually only caused small ripples in the water. Only very few decisions from lower courts seem to have applied *Creighton v. Qatar*'s very liberal approach towards implicit waivers.⁸

This may be partly due to the limits French courts started to impose on the scope of general waivers by sovereign States of their immunity from execution, which is an issue that raised much higher waves.

Just one month after the Court of Cassation's ruling in *Creighton v. Qatar*, the Court of Appeal of Paris inaugurated a more restrictive approach in *Russian Embassy v. Noga*,⁹ which was later confirmed by the Court of Cassation in 2011 in *NML Capital v. Argentina*.¹⁰ The defendant States in these two cases had expressly waived any right of immunity from execution in general terms. There was thus no need to "discover" an implied waiver. Nevertheless, the courts ordered a release of seizures that had been implemented on bank accounts held in France in the name of these States' diplomatic missions and delegations to international organizations, on the grounds that such assets are protected by an "autonomous immunity from execution, which can only be waived in an express and specific manner" by the foreign State.

Two years later, in 2013, the *NML Capital v. Argentina* saga came back before the Court of Cassation, which further limited the efficiency of waivers. This time, NML Capital had attached oil royalties, social security payments and tax payments owed to Argentina by French companies. In three decisions issued on the same day on March 28, 2013,¹¹ the Court of Cassation found that Argentina's express and broad waiver was once again not sufficiently "specific" to authorize

enforcement on such public assets, as it did not identify "the assets or categories of assets for which the waiver is consented". The source relied upon in these cases was "customary international law, as reflected by the UN Convention of December 2, 2004 on jurisdictional immunities of States and their property".¹²

These decisions have generally been criticized by commentators.¹³ From a theoretical point of view, the Court's reference to the UN Convention is indeed misguided. Whether or not the UN Convention reflects customary international law is in itself doubtful, particularly with respect to immunity from execution.¹⁴ In any event, the UN Convention does certainly not require that waivers specify to which property they apply. Critics further regretted that, as a result of the *NML Capital v. Argentina* decisions, unequivocal general waivers would become ineffective and drafters of waiver clauses would be facing inextricable practical problems to anticipate which assets might later be available for enforcement. Despite the general terms used by the Court of Cassation, some observers even suggested that the solution in *NML v. Argentina* might have been dictated by a desire to protect indebted sovereign States against speculative creditors, and considered that it should not be maintained with respect to other, more "legitimate", creditors. Such a distinction based on the perceived legitimacy of the creditor's claim would however be difficult to implement without legislative intervention.

It is in these troubled waters that the *Commisimpex v. Congo* ruling came out on May 13, 2015. The Court laconically stated that "customary international law does not require a waiver of the immunity from execution to be anything else than express". On this basis, the Court quashed the lower decision that had released seized funds used by diplomatic missions. The Court of Cassation thereby reversed not only its latest and most criticized decision requiring a specific waiver for any public asset, but also its earlier and less controversial solution to autonomously protect property used for the functions of diplomatic missions.

It remains to be seen whether this ruling will re-establish the calm after the storm.

II. Analysis

Sources And Methods

National courts have an important role to play in the application, and therefore also the development, of customary international law, especially regarding the law of

immunities, where the issues to be resolved arise precisely in the context of judicial or enforcement proceedings, and especially in countries like France which have not enacted legislation on the subject.

The French Court of Cassation recently acknowledged its own role in this respect. Whereas in the past, the Court viewed the law of sovereign immunities as belonging to *private* international law,¹⁵ i.e., to a branch of the law which essentially originates in each individual State, in 2000, the *Creighton v. Qatar* decision was issued under the umbrella of “the principles of international law” governing sovereign immunities. Thereafter, the *NML v. Argentina* decisions openly purported to apply “customary international law” and in *Commisimpex v. Congo*, the Court more precisely referred to “the rules of customary international law concerning sovereign immunity from execution”, thereby indicating that in this field, international law defines not only the *principles* but also the *rules*, and affirming its power to say what these rules are.

The Court’s endeavors to ground its decisions on public international law may partly be motivated by a desire to satisfy the test set by the European Court of Human Rights according to which “measures taken by a High Contracting Party which reflect generally recognized rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6 § 1” of the European Convention on Human Rights.¹⁶

The national courts’ ambition to translate customary international law on State immunities in their decisions is thus perfectly justified and legitimate. Whether the French Court of Cassation is appropriately equipped to do so is another question.

Doubts may arise when considering the lack of coherence among the above decisions on waivers: within a matter of 15 years (i.e., very little time on the scale relevant for the emergence of custom), the Court successively (i) found an implied waiver in standard ICC arbitration clauses, (ii) required an express and specific waiver for property used for diplomatic functions, (iii) extended this requirement to all public assets, and (iv) finally disavowed all its previous rulings and reactivated general waivers provided they are express, even when diplomatic assets are at stake. Admittedly, custom may

not be the best performing source of law from the point of view of legal certainty, but the Court of Cassation’s repeated variations on the theme of waivers of execution immunity introduce serious doubts as to the very existence of any established custom on the subject, even within the limited realm of the French jurisdiction.

To play a credible role in the development of customary international law and stabilize its own doctrine in this field, the French Court of Cassation may have to adapt its traditional *modus operandi*. The Court’s function is to ensure that the law is respected by the lower courts and to say what the law is (“*dire le droit*”). It generally makes a point to do so in an extremely concise form. In this respect, the *Commisimpex v. Congo* decision is a model of its kind: it simply affirms that “customary international law does not require a waiver of the immunity from execution to be anything else than express”, without any attempt to justify or explain this statement. Yet, unlike what happens with written sources of law, ascertaining the existence and contents of customary international law supposes to establish “evidence of a general practice accepted as law”.¹⁷ The Court of Cassation’s authority, as well as the coherence of its rulings could only be enhanced if it accepted to give some details as to how it performs this task. Having the benefit of a somewhat articulate reasoning supporting the Court’s *dicta* on customary law would also help better understand its decisions and anticipate their consequences.

Scope And Consequences

For now, despite its cryptic formulation, one may nevertheless try to draw a few lessons from the decision in *Commisimpex v. Congo* and suggest a few directions for the future.

First of all, according to the Court of Cassation, such a waiver need not be anything else than express, which logically means that it must be express, i.e. formally or explicitly stated. In other words, an implied waiver would not be sufficient. This should put an end to any attempt to revive the *Creighton v. Qatar* solution which saw a waiver of the immunity from execution in the State’s agreement to submit to ICC arbitration. The least one may say about the waiver invented in *Creighton v. Qatar* is that it was not express. An agreement to arbitrate, even if it contains an express commitment to carry out the award, cannot reasonably be equated with the State’s consent to submit to measures

of constraint by the authorities of any other State, on any of its private or public property.

The next lesson is that there is no additional condition for an express waiver to be effective. In particular, there is no need to specifically designate the property or the types of assets to which it applies. A general waiver, provided it is express, should allow measures of constraint on any and all property of the State which would otherwise be protected by the immunity from execution. Such a waiver therefore certainly allows coercive measures on State property used for commercial purposes even if this property is not connected to the underlying claim.¹⁸ It also allows enforcement on public property used for government purposes. NML Capital could thus try again to seize tax and social security payments owed by French companies to the Argentinian administration. Argentina should no longer be able to successfully argue that a specific waiver is needed to allow enforcement on this type of public receivables.

It will also be interesting to follow-up on the *Commisimpex v. Congo* case, now to be re-adjudicated before the Court of Appeal of Paris. The question will again be debated whether, having regard to the general waiver consented by Congo, measures of constraint can be carried out on bank accounts used for the needs of its diplomatic representation and its delegation at UNESCO. Given the censure by the Court of Cassation, arguing that a specific waiver is required is unlikely to be effective. But does it mean that such bank accounts do not benefit from any form of autonomous protection, which is not waived with State immunity? If the answer is yes, the concrete result in this case may well be that the Congolese diplomatic representations in Paris will be paralyzed. More generally, the consequences are likely to be devastating for France's international relations.¹⁹ Another route must be found.

The 1961 Vienna Convention on Diplomatic Relations has sometimes been relied upon as basis for an autonomous immunity protecting diplomatic property.²⁰ However, the immunity protecting "the premises of the mission, their furnishings and other property thereon and the means of transport of the mission", which derives from the inviolability of the premises of the mission under Article 22 of the Vienna Convention, does not apply to bank accounts. A more convincing legal foundation to prevent the seizure of the mission's bank accounts may perhaps be found in

Article 25 of the Vienna Convention, providing that "the receiving State shall accord full facilities for the performance of the functions of the mission" or, even better, directly in the customary rule *ne impediatur legatio*, obliging the receiving State to abstain from any interference with the functions of the mission.²¹

If customary international law does not require that waivers from the immunity from execution be anything else than express, as the French Court of Cassation said, but which remains to be established, bank accounts used by diplomatic missions should nevertheless be protected against measures of constraint, unless it is demonstrated that they are not used for the functions of the mission, because customary international law certainly obliges France to respect the rule *ne impediatur legatio*.

Endnotes

1. Cass. Civ.1, May 13, 2015, *Commisimpex v. Congo*, n°13-17751, commented by M. Laazouzi in JCP E 2015 II 759; L. Weiller in Procédures 2015, comm. 228; I. Gallmeister in D 2015.1108.
2. In the United States, see *Commissions Import Export S.A. v. The Republic of the Congo and Caisse Congolaise d'Amortissement*, District Court for the District of Columbia, January 8, 2013, Civ. No. 12-743 (RCL); on appeal, District of Columbia Circuit, July 11, 2014, No. 13-7004; and lately, District Court for the District of Columbia, July 30, 2015, Civ. No. 12-743 (RCL).
3. Cass. Civ.1, September 28, 2011, *NML Capital v. Argentina*, n°09-72057, commented by H. Gaudemet-Tallon in Rev. Crit. DIP 2012.124; P. Chevalier, R. Le Cotty in Procédures 2012, étude 2; Pierre Chevalier and Rachel Le Cotty.
4. Cass. Civ.1, March 14, 1984, *Eurodif v. Iran*, n°82-15619, in GAJFDIP n°65 with comments by B. Ancel and Y. Lequette.
5. Under French law, a connection is thus in principle required between the property against which enforcement is sought and the underlying claim, as under 28 U.S. Code § 1610 (a) (1).

6. Cass. Civ. 1, July 6, 2000, *Creighton v. Qatar*, commented by N. Meyer Fabre in Mealey's International Arbitration Report 2000, Vol.15 #9; Ph. Leboulanger in Rev. Arb. 2001.114; I. Pingel-Lenuzza in Clunet 2000.1046; E. Loquin in RTD Com. 2001.409; G. Cuniberti, Ch. Kaplan in JCP G 2001 II 10512.
7. See Article 34 (6) of the 2012 ICC Rules of arbitration. At the time of the *Creighton v. Qatar* case, the relevant provision was Article 24 of the 1988 ICC Rules of arbitration.
8. See C.A. Paris, January 31, 2013, *Orion v. Russian Satellite Company*, commented by N Meyer Fabre in Rev. Arb. 2013.460; See also C.A. Paris, January 8, 2015, *De Sutter v. Madagascar*, n° Juris-Data: 2015-003927.
9. C.A. Paris, August 10, 2000, *Russian Embassy v. Noga*, commented by I. Pingel-Lenuzza in Clunet 2011.116; E. Loquin in RTD Com. 2001.409; G. Cuniberti, Ch. Kaplan in JCP G 2001 II 10512.
10. Cass. Civ.1, September 28, 2011, *NML Capital v. Argentina*, n°09-72057, *op. cit.*
11. Cass. Civ.1, March 28, 2013, *NML Capital v. Argentina and Total*, n°10-25938; Cass. Civ.1, March 28, 2013, *NML Capital v. Argentina and Air France*, n°11-13323; Cass. Civ.1, March 28, 2013, *NML Capital v. Argentina and BNP Paribas*, commented by H. Muir-Watt in Rev. Crit. DIP 2013.671, G. Cuniberti in Clunet 2013.910, L. Franc-Menget in Rev. Arb. 2013.989, M. Laazouzi in RDC 2013.1485, S. Bollée in D. 2013.2293, L. Usunier in RTD Civ. 2014.319, D. Martel in D. 2013.1728.
12. France has signed and ratified the UN Convention, which is not yet in force however, failing the required number of ratifications.
13. See however H. Muir-Watt, *op.cit.*
14. See the doubts expressed in this regard in ICJ, February 3, 2012, *Germany v. Italy; Greece intervening*, ICJ Reports 2012, p. 99, § 117.
15. For example, the famous *Eurodif v. Iran* decision, *op. cit.*, started as follows: "Having regard to the principles of private international law governing the immunities of foreign States".
16. See ECHR, *Sabeh El Leil v. France*, June 29, 2011, Application No. 34869/05, esp. § 49.
17. See Article 38 § 1 of the Statute of the International Court of Justice.
18. Property belonging to a separate entity can only be used for enforcement of a debt against the State if the entity is an "emanation" of the State, i.e., that it has no functional, decisional or financial autonomy vis-à-vis the State. See Cass. Civ. 1, February 6, 2007, *Société Nationale des Pétroles du Congo*, n°04-13107 and 04-16888 and Cass. Civ.1, November 14, 2007, *Société Nationale des Hydrocarbures*, n°04-15388.
19. See comment by H. Gaudemet-Tallon on Cass. Civ.1, September 28, 2011, *NML Capital v. Argentina*, *op.cit.*
20. See C.A. Paris, August 10, 2000, *Russian Embassy v. Noga*, *op. cit.* and in Belgium: Cass. 1st Ch., November 22, 2012, *Argentina v. NML Capital*, commented by P. d'Argent in Journal des Tribunaux 2013.290.
21. See comment by P. d'Argent, *op. cit.* ■

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1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA

Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)

Email: mealeyinfo@lexisnexis.com

Web site: <http://www.lexisnexis.com/mealeys>

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