

## State immunity and arbitration in France

Produced in partnership with [Xavier Nyssen, partner, and Emile Hu, associate, international arbitration, Dechert LLP](#)

This Practice Note considers the role of state immunity in relation to arbitration proceedings in France. For a general introduction to state immunity and arbitration, see Practice Note: [State immunity and arbitration—general considerations](#). In addition, for Practice Notes on state immunity in a number of jurisdictions around the world (including England and Wales), see our State immunity subtopic: [State immunity—overview](#).

State immunity is based on the principle of equality between states and mutual recognition of their sovereignty. Originally based in international custom and courtesy, state immunity now reflects more than simple courtesy and constitutes a principle of international law. In France, sovereign states benefit from immunity of jurisdiction and from immunity against enforcement of judicial decisions and arbitral awards (immunity from execution). State immunity, however, is not absolute, and can thus be waived under specific circumstances.

The 'Sapin 2' law dated 9 December 2016 sets out the conditions for state immunity from execution, and makes significant changes to the conduct of enforcement proceedings resulting from an award or a judicial decision against a foreign state. Prior to 2016, France had not enacted legislation to govern issues related to state immunity. Consequently, case law was the main source of such rules and it remains the main source of the rules concerning state immunity of jurisdiction, which is not dealt with by the 'Sapin 2' law. In 2007, however, France signed the United Nations Convention on Jurisdictional Immunities of States and Their Property (the Convention), which was ratified in 2011. Even though it is not yet in force, the Convention serves as a source of important guiding principles for French judges.

In order to understand the interplay between arbitration and state immunity principles in France, it is necessary to understand the French courts' approach to state immunity, and to analyse the new features of the regime of state immunity from execution under French law.

All references to French case law in this Practice Note are not reported by LexisNexis® UK.

### The notion of state immunity in France: general principles

French courts make a distinction between two types of state immunity, immunity from jurisdiction on the one hand, and immunity from execution on the other. Immunity from jurisdiction implies that a court will be prevented from considering claims against a particular state. Immunity from execution prevents courts of the forum state from imposing measures of constraint or seizing the property of another state.

Immunity from jurisdiction and immunity from execution are subject to the principle of separability meaning that a waiver of jurisdictional immunity may not necessarily imply a waiver of immunity from execution. While a state may have lost its entitlement to claim immunity from jurisdiction, unless it is entitled to claim immunity from execution, judgments and awards may be enforced against it.

State immunity in France is relative, and not absolute. This means that it can be waived. Immunity is only granted to a state's acts when such acts are made in its sovereign capacity (*jure imperii*) and not when such acts are of a private or commercial nature (*jure gestionis*). State immunity cannot therefore be raised where a state has acted for a commercial purpose or intended to allocate certain assets for the performance of a purely commercial operation. State immunity will only apply to assets that are held by a state to perform its sovereign or public services.

The criteria applied by French courts to determine whether an act is commercial have evolved over time. Since 2003, however, the *Cour de Cassation* (France's highest court) has chosen an approach which it summarised as follows: *'foreign states and their organisations that constitute their "emanations" benefit from jurisdictional immunity only if the act in issue involves, by its nature or its goal, the exercise of*

*sovereignty'* (Cass. ch. mixte, 20 June 2003, Dame Soliman c. Ecole Saoudienne de Paris et Royaume d'Arabie saoudite).

## **Waivers of state immunity: the evolving case law of the Cour de Cassation and its impact on arbitration**

While state immunity is the rule, very often, states waive their immunity from jurisdiction and execution.

### **Immunity from jurisdiction**

With respect to immunity from jurisdiction, French case law recognises that, if a state enters into an arbitration agreement in writing, and agrees to submit to arbitration differences related to a commercial transaction, it cannot claim immunity from jurisdiction thereafter. One example of this is the 1986 *SEEE v. République de Yougoslavie* case (Cass. 1re civ. 13 octobre 1986, Société européenne d'Etudes et d'Entreprise (S.E.E.E.) c. République de Yougoslavie), in which the *Cour de Cassation* held that Yugoslavia's agreement to arbitration meant that it 'has submitted itself to the jurisdictional power of the arbitrators, has thereby accepted that their award be recognised as enforceable'.

### **Immunity from execution**

The issue of immunity from execution is more complex and had evolved greatly in recent years, until the 'Sapin 2' law settled the conditions governing a state's waiver of its immunity from execution. Entry into an arbitration agreement on the part of a state does not necessarily mean that the state intends to waive its immunity from execution with respect to all of its assets. At present, in order for a waiver of state immunity from execution to be effective, it must be express, special and target purely commercial assets (see articles L 111-1-1 to L 111-1-3 of the Code of Civil Procedures for Enforcement (CCP Enforcement), as introduced by the 'Sapin 2' law). In order to understand the new regime governing state immunity from execution under French law and its impact on arbitration, it is important to understand the evolution of French case law in this domain.

### **The evolution of French case law with respect to state immunity from execution**

In 2000, the *Cour de Cassation* rendered the famous *Creighton v Qatar* decision (Cass. 1re civ. 6 juillet 2000, Société Creighton Ltd c. Qatar), in which it held that the state of Qatar, by agreeing to an arbitration clause and to executing the award in accordance with the International Chamber of Commerce (ICC) Rules of Arbitration (ICC Rules), had waived its immunity from execution. The *Cour de Cassation* stated that 'the commitment made by the state in the arbitration clause to carry out the award within the terms of article 24 of the ICC Rules implied the state's waiver of immunity from execution'. In coming to this conclusion, the *Cour de Cassation* implied a waiver of Qatar's immunity from execution in its agreement to ICC Rules arbitration.

#### *References:*

[ICC Rules](#)

One month later, however, in *Russian Embassy v Noga*, the Paris Court of Appeal limited the scope of the *Creighton* decision by requiring an express and specific waiver regarding property used for diplomatic functions. The Paris Court of Appeal held that the wording used by the parties did not show 'the unequivocal intention of the borrowing state to waive its right to raise diplomatic immunity from execution in favour of the other contracting party, a private law entity, and to accept that this commercial company could, should the case arise, impede the functioning and activity of the state's embassies and missions abroad'.

In 2013, the *Cour de Cassation* rendered the *Société NML Capital v République Argentine* decisions (Cass. 1re civ. 28 mars 2013, Société NML Capital Ltd c. République argentine et Société Total Austral/Société NML Capital Ltd c. République Argentine et Société Air France) whereby it further limited

the effect of the *Creighton* decision. The *Cour de Cassation* held that a waiver of state immunity from execution would only be deemed effective in France if the assets or categories of assets for which the waiver was given were expressly set out in the contract. The *Cour de Cassation* stated that the waiver of immunity from execution not only had to be express, it also needed to be special. The court so held, notwithstanding the fact that there was an arbitration agreement between the parties. The *NML* decision has been strongly criticised by commentators underlining the significant practical difficulties that practitioners would face in attempting to anticipate which categories of assets might later be available for enforcement of ongoing and future contracts.

The *Cour de Cassation* again changed its position in a decision rendered on 13 May 2015, *Commissions Import Export SA v the Republic of Congo* (Cass. Civ.1, 13 May 2015, *Commisimpex c. Congo*) (*Commisimpex*). In *Commisimpex*, the *Republic of Congo* and the Congolese company, *Commisimpex*, had entered into a series of contracts for public works to be performed in the 1980s. In 1993, the parties entered into a repayment agreement whereby the *Republic of Congo* agreed to pay its outstanding debts. The agreement contained an arbitration clause, and, in a letter of undertaking, the *Republic of Congo* agreed not to 'invoke, in the context of the settlement of a dispute related to the undertakings, any immunity from jurisdiction as well as any immunity from execution'. A dispute later arose and in 2000, an award ordering Congo to pay its arrears was rendered by an ICC tribunal. The parties entered into a further repayment agreement which was subject to a second arbitration commenced by *Commisimpex* in 2009. In 2013, the second arbitral tribunal issued an award in *Commisimpex's* favor.

*Commisimpex* began enforcement proceedings of the 2000 award in its favour in October 2011. The Versailles Court of Appeal decided that the *Republic of Congo's* waiver did not satisfy the test requiring that it be express and special. *Commisimpex* accordingly appealed to the *Cour de Cassation*.

In a significant change in its approach to waivers of immunity from execution, and a departure from the *NML* solution, the *Cour de Cassation* abandoned the requirement that a waiver of enforcement immunity must be special (in addition to express). It stated: 'customary international law does not require a waiver of the execution immunity to be anything else than express'.

It is noteworthy that the enforcement proceedings in France related to the Yukos award rendered in July 2014 against Russia caused some diplomatic and commercial tension between France and Russia. In these proceedings, former shareholders of Yukos attempted to seize assets from Russia's debtors in France (with such debtors including major French companies such as Arianespace, Air France and Total). It is against this backdrop that the French Parliament introduced the provisions in the 'Sapin 2' law discussed below, which aim to grant more protection to foreign States' assets located in France.

### **The new regime of state immunity from execution**

Under CCP Enforcement, art L 111-1-1, as introduced by the 'Sapin 2' law, a claimant seeking to seize a foreign state's assets located in France must seek an *ex partes* order (*ordonnance sur requête*) authorising the seizure from a *juge d'exécution*. Under the previous regime, provided that the creditor had title pursuant to *inter alia* a final award, the foreign state's assets could be seized directly through recourse to a bailiff, without recourse to a judge.

#### *References:*

[CCP Enforcement, art L 111-1-1](#)

CCP Enforcement, art L 111-1-2 provides that a judge may only authorise enforcement measures where the three following cumulative conditions are satisfied:

#### *References:*

[CCP Enforcement, art L 111-1-2](#)

- the waiver is express (ie written and devoid of any ambiguity)
- the waiver is special (ie the assets or categories of assets for which the waiver is given are expressly set out in the contract), and

- when an award or a judicial decision has been rendered against a state, (i) the assets at stake must be specifically used or intended to be used by said state for purposes other than non-commercial public service (thereby excluding *inter alia* military assets, cultural assets, tax or social debts), and (ii) those assets must be related to the entity against which the enforcement proceedings have been instituted. This implies that a creditor under an award or judicial decision must prove that the assets it seeks to seize are of a purely commercial nature, which might prove to be difficult in practice. (CCP Enforcement, art L 111-1-2 provides a definition of what constitutes 'assets used or intended to be used for non-commercial public service')

Unlike other non-commercial public service assets, diplomatic assets may be seized under CCP Enforcement, art L 111-1-3 provided that the waiver is express and special.

*References:*

[CCP Enforcement, art L 111-1-3](#)

In conclusion, the 'Sapin 2' law has undoubtedly clarified the regime of state immunity from execution, which we welcome given the changing attitudes that judges have displayed in this regard, but the various conditions it has imposed will likely complicate and delay enforcement proceedings, to the detriment of creditors.