Late twist to the Commisimpex saga as French Supreme Court reverses its position on state immunity from execution

On 10 January 2018, the French Supreme Court issued a second decision in the Commisimpex v Democratic Republic of Congo case, shifting its position on state immunity from execution. In the light of the new Sapin II law, the court held that a waiver of immunity from execution has to be both specific and express when it comes to seizing diplomatic assets. This decision is inconsistent with the approach taken in the French Supreme Court's previous decision on 13 May 2015 in the same case.

Introduction

State immunity from execution is a principle of international law which prevents a state’s assets held in another jurisdiction from being seized without its consent by a party seeking to execute a judgment or an arbitral award rendered against that state.

As states are becoming increasingly involved in both commercial and investment arbitration, state immunity and its influence on the practical enforcement and execution of awards has become a major concern. Winning an arbitration remains theoretical if the winning party cannot execute an award. Consequently, several legal systems have acknowledged that immunity from execution may be waived upon certain conditions, although the rules regarding the scope, validity and the efficiency of such a waiver may differ between different states. In particular, a significant issue to be determined is whether or not a simple express waiver of immunity may cover not only state assets used for commercial purposes but also any asset intended to be used for public purposes, and in particular diplomatic assets.

The concept of state immunity from execution in France was historically founded in case law. This legal landscape is changing, however, with the adoption on 9 December 2016 of a new bill...
on transparency, anti-corruption and modernisation (the Sapin II law), which introduced new provisions governing measures of execution against other states’ assets in France. In particular, the Sapin II law created a new article L.111-1-3 in the Civil Enforcement Procedure Code, providing that execution measures cannot be taken on property or assets used or intended to be used in the exercise of diplomatic missions, “unless there is an express and specific waiver of immunity by the states concerned.”

Relevant facts

The decision rendered by the Supreme Court on 10 January 2018 is the last one of a series of decisions concerning state immunity from execution in the case of Commisimpex v Democratic Republic of Congo.

In December 2000 and January 2013, the Société Commissions import export (Commisimpex) obtained two awards against the Democratic Republic of Congo (the Congo) following International Chamber of Commerce (ICC) proceedings seated in Paris. The two awards settled disputes relating to the Congo’s outstanding debts under a number of contracts for public works performed by Commisimpex throughout the 1980s.

In 2011, in an effort to execute the first of these awards, which amounted to EUR 167,652,461, Commisimpex attempted to seize the diplomatic bank accounts held by the Congolese embassy and its delegation to the UNESCO in Paris.

Relying on the decision of the French Supreme Court in the case of NML Capital v Republique Argentine No.09-72.057 from September 2011, the Versailles Court of Appeal found in favour of the Congo, that a waiver of a state’s immunity to execution must be both express and specific if it is to be in respect of diplomatic funds (Versailles C.A, 15 November 2012, n° 11-09073). Accordingly, since the Congo had not specifically mentioned diplomatic assets in its waiver, Commisimpex could not seize the funds in the diplomatic bank accounts.

However, the Versailles Court of Appeal decision was overturned by the French Supreme Court on 13 May 2015 on the basis that “international customary law only requires an express waiver of immunity from enforcement” (Cass, civ. 1ère, 13 May 2015, n°13-17751). Accordingly, the French Supreme Court referred the case back down to the Paris Court of Appeal to rule on the merits of the legality of the seizure.

The Paris Court of Appeal followed the reasoning of the Supreme Court and held on 30 June 2016 that a waiver need only be express and not specific. It therefore deemed lawful the seizure of the Congolese embassy and UNESCO delegation bank accounts by Commisimpex.

However, only six months after the decision of the Paris Court of Appeal, on 9 December 2016, the French government adopted the Sapin II law. As described above, this law introduced Article L.111-1-3 to the French Civil Enforcement Procedure Code, requiring a waiver of immunity from execution to be both express and specific if it is to apply to diplomatic assets.

In this context, on 30 June 2016, the Congo filed an appeal to the French Supreme Court to reverse the decision made by the Paris Court of Appeal on that same date. The Congo argued that by deciding that a waiver need only be express to apply to diplomatic assets, the Paris Court of Appeal had violated the Vienna Convention on Diplomatic Relations of 18 April 1961 and customary international law.

Decision

The French Supreme Court held in favour of the Congo, reversing the decision of the Paris Court of Appeal and its own decision in the same case.

In finding that an express waiver of immunity was not sufficient without specificity for the purpose of seizing diplomatic assets, the French Supreme Court took the position set out in the Sapin II legislation, despite that legislation having not yet come into force. Interestingly though, the Supreme Court acknowledged that this new legislation “cannot apply to the present dispute” but noted that its decision was based on a reversion to “its older case law” (likely referring to the NML decision of 2011 and a second decision involving the same parties from 2013) as “enhanced by the new law”. As well as explicitly mentioning the Article L.111-1-3 of the Civil Enforcement Procedure Code in the decision, the court also referred to the Vienna Convention on Diplomatic Relations and to international customary law.

To justify further its alignment with the new law, the French Supreme Court emphasised that there was an imperious need for consistency, considering that state immunity from execution is “a subject matter affecting states’ sovereignty and the preservation of their diplomatic representations.” With this in mind, the court therefore insisted on achieving the “objective of legal coherence and certainty.” By abandoning its interpretation set out on 13 May 2015, one of the court’s main aims seems thus to put an end to the discrepancy between codified law and case law on the subject of state immunity from execution, and to restore legal predictability.

In its decision of 10 January 2018, the French Supreme Court did not refer the case back to another Court of Appeal, but confirmed on the merits that the seizure of the Congolese bank accounts should be lifted, thus bringing to an end the Commisimpex saga before the French courts.

**Comment**

Given the change of direction by the French Supreme Court, there is likely to be widespread discussion between commentators, academics and practitioners over the next months on this decision. In particular, concerns have already been raised in relation to the Sapin II law as to whether the specificity requirement for waivers of immunity from execution unduly restricts a state creditor’s right of access to justice, as recognised under Article 6.1 of the European Convention of Human Rights. In addition, whilst the Supreme Court justified its decision on the basis of creating legal predictability, some may find this paradoxical, since the decision may be seen as indirectly giving retroactive effect to the new Article L.111-1-3 (although it took care to refer to previous case law as the basis for the decision). It is clear, however, that parties entering into contracts with state entities will need to be extra careful when drafting and negotiating waivers of immunity from execution.