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Enforcement Against State Assets: France's Latest Contribution to the Argentinean Saga

Three judgments handed down on 28 March 2013 by the French Cour de Cassation continue to restrict the ability of private creditors to enforce post-judgment measures against State assets

Three judgments handed down on 28 March 2013 by the Cour de cassation, France's highest court for private and criminal matters, set aside enforcement measures against assets owned by the Republic of Argentina in France. The court held that while Argentina had waived its immunity in general, it had not specifically waived its immunity from enforcement with respect to the categories of assets concerned.

The enforcement measures were sought by NML Capital Ltd ("**NML**"), a hedge fund that acquired Argentinean sovereign bonds in 2000 pursuant to contracts that were subject to New York law and granted jurisdiction to New York courts (the "**Contracts**").

In December 2001, at the height of the country's financial crisis, Argentina defaulted on its debt payments and NML filed a claim before a NY Federal Court to obtain payment of interest on the bonds it held.

In a judgment dated 18 December 2006, the US District Court of the Southern District of New York entered judgment against Argentina and awarded NML USD 284 million. NML has since sought to enforce this judgment in various countries where Argentina has assets, notably, France, the UK[1], the US, Belgium and Ghana.

In the most recent French episode of this saga, NML focused its claim on fiscal and social security debts ("*créances fiscales et sociales*") owed to Argentina by local branches of the French companies BNP Paribas, Total Austral and Air France.

NML argued that it was entitled to seek enforcement against these assets on the basis of a general waiver clause contained in the Contracts pursuant to which Argentina had expressly consented to such post-judgment enforcement measures.

The Cour de cassation rejected this argument on the basis of customary international law which it interpreted as requiring that a waiver of immunity of enforcement be both express and specific in order to be valid and enforceable against sovereign State assets in France. As such, because fiscal and social security debts were not categories of assets specifically mentioned in the waiver, they could not be the subject matter of a valid enforcement action.

Key issues

- The French Cour de cassation limits enforcement of post-judgment measures against state assets.
- It considers that immunity waivers must not only be express but also specific as to the state's assets and categories of assets.
- Contract drafters will have a significantly harder task in drafting immunity clauses in order to ensure their efficiency in France.

[1] See former briefing note of July 2011.

The Requirement of an "Asset Specific" Waiver Extended to all Categories of Public Assets

The requirement of an "asset specific" waiver is fairly new. The Cour de cassation applied this condition for the first time in this context in a decision of 28 September 2011 in which it held that a general waiver did not cover diplomatic assets and that in order to be effective a sovereign State's waiver had to mention expressly the specific category of diplomatic assets against which enforcement measures could be taken. Assets belonging to a diplomatic mission were covered by specific diplomatic immunity and thus subject to a specific regime in customary international law which required the waiver to be both express and specific.

But in the three judgments of 28 March 2013 the Cour de cassation expands the scope of the requirement of an "asset specific" waiver to include public assets of any nature; that is, not only assets protected by the specific regime of diplomatic immunity.

The assets sought by NML in these three cases were not diplomatic assets, but fiscal and social security debts owed to Argentina by local branches of French companies.

The Cour de cassation based the requirement of an "asset specific" waiver in customary international law on the 2004 UN Convention on Jurisdictional Immunities of States and Their Property ("**UN Convention**") which it considered codified the rule.

The Cour de cassation's succinct judgment does not offer any evidence in support of its finding that customary international law requires waivers to be "asset specific" in order to be valid. Moreover, there are serious reasons to doubt the customary nature of the UN Convention and, in particular, Article 19 which provides States with the possibility of waiving their immunity from enforcement. The nature of this provision has been and remains a hotly debated topic among public international lawyers.

While the International Court of Justice in a recent case on *Jurisdictional Immunities of the State* did not seize the opportunity to clarify the nature of Article 19, it noted that: "*When the United Nations Convention was being drafted, these provisions gave rise to long and difficult discussions*".

In any event, supposing that Article 19 of the UN Convention codifies customary international law, it is difficult to construe it in a way that requires waivers to be "asset specific". It merely requires a state's consent to enforcement measures to be "express":

> "*No post-judgment measures of constraint, such as attachment, arrest or execution, against State property may be taken in connection with proceedings before a court of another state unless and except to the extent that:*
>
> *(a)* ***the State has expressly consented to the taking of such measures as indicated****…"*

In the absence of a clear rule of international law limiting the validity of immunity waivers by imposing a condition of asset specificity, a question arises as to whether the three judgments of the Cour de cassation breach the right to a fair trial (Article 6 § 1of the European Convention on Human Rigths).

Indeed, the application of sovereign immunity by states is often challenged before the European Court of Human Rights ("**ECtHR**") on the basis that it violates the right to a fair trial and, more specifically, the right to access to a court which necessarily includes the right to have a judgment executed.[2]

In dismissing these claims, the ECtHR has consistently held that sovereign immunity does not violate the right to a fair trial insofar as the limitation on this right is proportionate to "*the legitimate aim of complying with international law to promote comity and good relations between States*".[3] In this respect, the ECtHR considers that compliance with a well-established rule of international law "*cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1*".[4]

It follows that the ECtHR's analysis would be different should a State restrict the right to a fair trial (and hence to have a judgement executed) by taking measures which are not based on international obligations.

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[2] ECHR, *Kalogeropoulou et al c. Greece and Germany*, no. 59021/00, p.7:"*The right of access to a tribunal would be illusory if a Contracting State's legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6*".
[3] *Ibid,* p.8.
[4] ECHR, *Al-Adsani v. the United Kingdom, no. 35763/97, §56*.

question arises as to whether the judgments of the Cour de cassation are in violation of the right to a fair trial.

The Cour de cassation's Definition of a Public Asset: an Additional Burden for Creditors?

The latest judgments of the Cour de cassation confirm its previous rulings regarding the definition of public assets protected by sovereign immunity.

In its judgments of 28 March 2013, the court held that a public asset is one that is used or intended to be used for public ends:

> *"According to customary law …, States can waive, by written contract, their immunity from enforcement in relation to assets or categories of assets used or intended to be used for public ends* (emphasis added).

The criterion for determining whether an asset is public is therefore the *use* made of it and not its *origin*. Assets which do not fall within this definition (e.g. assets used for commercial purposes) are not covered by immunity from enforcement.[5]

This definition of public assets is, to a large extent, impracticable when it comes to cash accounts, given that under French law money is a fungible good and as such cannot, at law, be exclusively allocated to a specific *use*. Consequently, in theory, all monies owed to a State may be regarded as earmarked to finance sovereign activities. This creates almost insurmountable difficulties for anyone seeking to enforce against cash accounts belonging to a foreign State, not to mention bank secrecy which prevents a creditor from obtaining information on a debtor's bank account (and in particular the recipients of bank transfers).

The burden of proof, which lies on the creditor, may thus often be impossible to discharge, which *de facto* grants foreign States almost absolute immunity from enforcement against assets held in bank accounts.

In one of the judgements of 28 March 2013, the Cour de cassation adds additional complexity to this already complex area. While confirming the definition of public assets based on their *use*, the court also refers to the *origin* of the debts sought to be attached as a criterion relevant to determining their public nature:

> *"*[The assets] *necessarily pertain to the exercise by Argentina of its sovereign prerogatives, these debts correspond to fiscal and parafiscal debts originating in the state's sovereign powers and intended to finance other sovereign prerogatives"* (emphasis added).

Although the Cour de cassation's reference to the origin of the assets should not be interpreted - at this stage - as introducing an additional criterion into the definition of public assets under French law (i.e. their public origin), this finding unnecessarily adds confusion to a field where clarification would be welcome.

The Repercussions of the Judgments of the Cour de cassation

Whether the judgments of the Cour de cassation are viewed as correctly interpreting customary international law or not, they now represent the current state of the law in France: in order to be valid, an immunity waiver must be "asset specific".

But how specific is specific? The Cour de cassation held that:

> "*According to customary law …, States can waive, by written contract, their immunity from enforcement in relation to assets or categories of assets used or intended to be used for public ends. They may, however, only do so expressly and specifically by mentioning the assets or category of assets for which they consent to such waiver*" (emphasis added).

Accordingly, there is a risk that general waiver clauses, although expressly provided for by contract, will no longer be considered valid waivers by the French courts. To enforce post-judgments measures of constraint against State property, waivers should:

- be expressly set out in a written contract; and
- specify the assets or category of assets potentially subject to enforcement measures.

This will inevitably lead to more complex drafting as contract drafters seek to cover the various categories of assets against which enforcement may be sought.

[5] Cour de cassation, Eurodif, 14 March 1984, n°82-12462

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