

ENFORCEMENT IN SPAIN OF JUDGMENTS HANDED DOWN BY COURTS OF OTHER MEMBER STATES PURSUANT TO THE BRUSSELS I REGULATION: THE IMMUNITY FROM ENFORCEMENT HURDLE

On 3 October 2019, the Civil Chamber of the Spanish Supreme Court rendered a judgment in cassational appeal proceedings no. 3684/2016, ruling on the enforcement of a judgment handed down by a German court in relation to Argentine public debt bonds.

The Court rules on the scope of the States' immunity from enforcement, setting out its position as regards which assets of other States can be seized and realised in order to enforce a judgment.

Enforcement in Spain against foreign States

The Spanish Supreme Court's decision reiterates that the enforcement of court decisions is embedded in the right to due process, although it simultaneously acknowledges that such enforcement may not be possible when the party ordered to pay is a foreign State.

One of the circumstances that can effectively prevent the enforcement of a judgment is the impossibility of finding seizable assets in Spain of the State ordered to pay, due to the existing assets having the so-called "immunity from enforcement". The Supreme Court analyses the legal regime applicable to this immunity. In addition to the applicable laws and conventions, it states that the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (which is not yet in force due to lack of sufficient ratifications) is "*generally accepted as a principle of customary international law*" and that "*due to its contribution to the codification of international law, the Convention, although it has not entered into force, can serve as an important reference when interpreting the legislation in force*".

When analysing the scope of the immunity from enforcement, the Supreme Court's judgment distinguishes between those assets that are protected and those that can be seized and realised so as to pay the amounts set out in the enforced foreign judgment.

In light of the diverse terminology used by the above-mentioned UN Convention of 2004 and Spanish Organic Act 16/2015¹, the Supreme Court, without undertaking a specific analysis as the matter was not the subject of the

Key issues

- All assets of a foreign State attributed to a public purpose (official non-commercial purposes) enjoy immunity from enforcement in Spain, regardless of their nature. Whereas, on the contrary, coercive measures may be taken against assets used for a commercial purpose.
- Potential immunities from enforcement must be taken into account by the court, not when the enforcement is "dispatched" or ordered, but when specific enforcement measures are granted.
- Although orders cannot, in principle, be appealed to the Supreme Court, those issued pursuant to the recognition of foreign judgments can, when the ability to appeal is acknowledged in the international instrument of ratification or in the Regulations.

¹ Organic Act 16/2015 on privileges and immunities of foreign States, international organisations based or with an office in Spain and international conferences and meetings held in Spain

procedural debate, concludes that "*all assets attributed to a public purpose (official non-commercial purposes) enjoy immunity from enforcement, regardless of their nature. Whereas, on the contrary, coercive measures may be taken against assets used for a commercial purpose.*"

Lastly, the Supreme Court's judgment points out that the obligation to order the enforcement of a foreign court's decision pursuant to the mutual recognition of judgments issued in the European Union must not take into account potential immunities from enforcement during the stage when the enforcement is "dispatched" or ordered (Article 551.1 of the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*, "LEC")), but rather when specific enforcement measures are granted (Art. 551.3 LEC).

Although the case decided by the Supreme Court involved the enforcement of a court judgment, it could be understood that legal opinion on the immunity from enforcement of sovereign States may also apply to the enforcement of arbitration awards.

Admission of a cassational appeal against Orders rendered in relation to the recognition and enforcement of judgments from courts of EU Member States and other foreign courts

From another perspective, the Supreme Court's judgment dispels the doubts regarding the possibility of lodging a cassational appeal before the Supreme Court against orders related to the enforcement in Spain of a judgment handed down by another EU Member State. The Court confirms that although in principle only judgments, but not orders, can be appealed in cassation, the special regulation deriving from the primacy of European Union law governs this aspect. This position also extends to judicial decisions enforceable in Spain by virtue of other instruments of EU law or protected by "*any other rules of a similar nature, when the ability to appeal is acknowledged in the international instrument of ratification or in the Regulations*".

Conclusions

In short, the effects of this Supreme Court decision may be far-reaching in the future, because:

- The judgment applies restrictive criteria as to which assets of foreign States are subject to measures of constraint in Spain, concluding that assets attributed to a public purpose cannot be seized or realised, and identifying any of these that are "official non-commercial purposes" as such.
- Although it was not the aim of these proceedings, it is possible that this position could be taken by Spanish courts as well when enforcing arbitration awards in Spain against foreign States.
- The Supreme Court's position could determine, by virtue of the principle of reciprocity, the immunity from enforcement that could apply to Spain in other jurisdictions when the enforcement of court judgments or arbitration awards is sought against it.

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