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Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities

Three Incompatible Principles

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The decision rendered by the French *Cour de cassation* on July 6, 2000 in *Creighton v. Qatar* has had the merit of renewing the thinking on the relationship between arbitration law and the law of State immunities. In overruling the Paris Court of Appeals decision ordering the reinstatement of the State of Qatar's assets seized in France as a result of two ICC awards, the *Cour de cassation* held that:

[T]he obligation entered into by the State by signing the arbitration agreement to carry out the award according to Article 24 of the International Chamber of Commerce Arbitration Rules [now Article 28(6) of the Rules in force as of January 1, 1998] implies a waiver of the State's immunity from execution.¹

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¹ Cass. 1e civ., July 6, 2000, *Creighton v. Ministère des Finances de l'Etat du Qatar*, 127 J.D.I. 1054, 1055 (2000) (note by I. Pingel-Lenuzza); JCP, Ed. G., Pt. II, No. 10512, at 764 (2001) (note by C. Kaplan and G. Cuniberti); 2001 REV. ARB. 114 (note by P. Leboulanger); 2001 RTD COM. 410 (observations by E. Loquin); 2000 BULL. ASA 605, 609 (commentary by Emmanuel Gaillard, *Convention d'arbitrage et immunités de juridiction et d'exécution des Etats et organisations internationales*, at 471); 15(9) INT'L ARB.

In this decision, the *Cour de cassation* very clearly demonstrated its commitment to the principle that an arbitral award against a State that has given its consent to submit certain disputes to arbitration should not be rendered ineffective simply because the State benefits from immunity from execution. Admittedly, the Rouen Court of Appeals, in its June 20, 1996 decision in *Bec Frères v. Office des céréales de Tunisie*, had paved the way by holding that:

By entering into an arbitration agreement, in the absence of which the deal would clearly not have been concluded, the Tunisian State has thus accepted the ordinary legal rules of international trade; by doing so, it has waived its immunity from jurisdiction and, as agreements must be performed in good faith, its immunity from execution.²

The *Cour de cassation*'s decision in *Creighton* nevertheless constitutes a radical departure from the prior dominant case law.³

REP. A-1 (2000) (commentary by Nathalie Meyer-Fabre, *Enforcement Of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver Of Immunity From Execution Held French Court Of Cassation In Creighton v. Qatar, July 6, 2000*, at 48).

² CA Rouen, June 20, 1996, *Bec Frères v. Office des céréales de Tunisie*, 1997 REV. ARB. 263, 267 (note by E. Gaillard). Compare CA Paris, July 9, 1992, *Norbert Beyrard France v. République de Côte d'Ivoire*, 1994 REV. ARB. 133 (note by P. Théry).

³ The Paris Court of Appeals had previously held that "it cannot . . . be accepted that an arbitration agreement is an implied waiver of State immunity from execution, as such a waiver can only be inferred from acts that unequivocally manifest an intent to waive such rights." CA Paris, Apr. 21, 1982, *République islamique d'Iran v. Eurodif*, 110 J.D.I. 145 (1983) (note by B. Oppetit); 1983 REV. CRIT. DIP 101 (note by P. Mayer); 1982 REV. ARB. 204 (commentary by Pierre Bourel, *Arbitrage international et immunités des Etats étrangers – A propos d'une jurisprudence récente*, at 119). See also TGI Paris, July 8, 1970, *Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. République socialiste fédérale de Yougoslavie*, 98 J.D.I. 131 (1971) (note by P. Kahn); 1975 REV. ARB. 328 (note by J.-L. Delvolvé); JCP, Ed. G., Pt. II, No. 16810 (1971) (observations by D. Ruzié). On the topic as a whole, see

It stands alone in comparative law and is in total contradiction with prevailing ICSID arbitration practice, as Article 55 of the Washington Convention expressly preserves State immunity from execution. Consequently, *Creighton* prompted a mixed response from commentators.⁴

The existence of a contradiction between the principle of effectiveness of arbitral awards and the principle of State immunity from execution, suggested by the *Cour de Cassation* in the *Creighton* decision, can only be understood by also taking into consideration the principle of autonomy of State legal entities (*i.e.*, legal persons affiliated with the State). Indeed, these first two principles are not mutually exclusive. However, there does exist an incompatibility between the principles of effectiveness of arbitral awards, State immunity from execution, and autonomy of State entities. All combinations being possible, when any two of these principles are respected the third is necessarily sacrificed. We propose to illustrate this by considering each of these principles in turn, in light of its relationship to the other two.

I. THE EFFECTIVENESS OF ARBITRAL AWARDS

The principle of the effectiveness of arbitral awards arises from the legitimate expectations of the parties that have agreed to resolve certain of their disputes through arbitration. When an arbitration agreement is entered into by a State and a private party, the agreement to submit to arbitration would not have much value if the State could, at its own discretion, decide whether or not an award rendered against it could be enforced by exercising its immunity. As early as 1983, Bruno Oppetit stigmatized such a

ISABELLE PINGEL-LENUZZA, *LES IMMUNITÉS DES ETATS EN DROIT INTERNATIONAL* (Bruylant, 1998).

⁴ See PINGEL-LENUZZA, *supra* note 3; Loquin, *supra* note 1, at 411; for a less openly critical treatment, see Kaplan and Cuniberti, *supra* note 1.

situation, observing that recognizing State immunity from execution in this context would lead to conferring on the State “an exorbitant prerogative . . . to hold itself to its obligations only when it is inclined to do so.”⁵

This statement is appropriate regardless of whether the arbitration rules provide that the parties shall carry out the award “without delay.”⁶ Even in the absence of such a provision, the parties still expect their dispute to be resolved, *i.e.*, still expect the award to be rendered against one of them to be enforced. This was the position of the Rouen Court of Appeals when it grounded its June 20, 1996 decision on the principle that “agreements must be performed in good faith.”⁷ This observation is of interest in cases in which the applicable arbitration rules—unlike those of the ICC, the London Court of International Arbitration (“LCIA”), the American Arbitration Association (“AAA”), or the United Nations Commission on International Trade Law (“UNCITRAL”)—do not provide that the parties agree to satisfy the award under terms similar to those found in Article 24 of the former ICC arbitration rules, on which the *Cour de cassation* relied.

However, the argument that the principles of effectiveness of arbitral awards and State immunity from execution are incompatible is convincing only if one takes into account, in a very concrete manner, the organization of State activities into separate legal entities. Absent that perspective, however, the distinction between the acts *jure gestionis* and the acts *jure imperii* of a State is sufficient to resolve the apparent incompatibility between the two principles in question. By entering into an arbitration agreement, a State may, in good faith, be intending to voluntarily

⁵ In French: “*condition potestative*.” See note following CA Paris, Apr. 21, 1982, *Eurodif*, *supra* note 3, at 152.

⁶ See also Loquin, *supra* note 1, at 411.

⁷ CA Rouen, June 20, 1996, *Bec Frères*, *supra* note 2, at 267.

carry out the award or, if not, to accept the creditors' seizure of its assets designated for commercial activities, leaving those designated for State activities out of reach. The arbitral award will not be rendered ineffective. It will be possible to enforce it against certain assets of the State. No implicit waiver of State immunity from execution with respect to its other assets is necessary, while the principle of the effectiveness of arbitral awards is respected. Such is the meaning of Article 55 of the Washington Convention. Things are different in practice, however, as another principle exists: the independence of State-owned entities. Quite often, States organize their *jure gestionis* activities by creating as many distinct legal entities as they have activities. The intent in so doing is not necessarily malicious. Such organization usually corresponds to the requirements of effective management, enabling the profitability of each commercial activity to be valued individually. Yet the end result is that the State is effectively shielded from its creditors: when creditors try to enforce a decision against a State through assets allocated to *jure imperii* activities, the State will raise its immunity from execution; when creditors try to seize assets allocated to *jure gestionis* activities, they will be told that they are not pursuing the right debtor. As a result, the State is effectively in a position where it has the power to enforce, at its own discretion, only those awards it chooses to enforce. The incompatibility between the principles of effectiveness of arbitral awards and State immunity from execution is therefore very clear if one takes into account the principle of autonomy of State legal entities. What is yet to be determined is which of these two principles should be tempered in order to ensure the effectiveness of arbitral awards.

II. RECOGNITION OF STATE IMMUNITY FROM EXECUTION

The principle of State immunity from execution is not a mandatory rule. The State is free to waive it. Courts have therefore been tempted to find that an arbitration agreement implicitly contains a waiver of such immunity so that a State cannot refuse to enforce an award rendered against it on such grounds.⁸ Unfortunately this approach, which assumes that the division by the State of activities under its control into separate legal entities is intangible,⁹ does not always have the desired effect. In practice we see that State courts are extremely reluctant to enforce an award, and more generally any judicial decision, against assets designated for activities that only a State can pursue. A clear illustration of this reluctance on the part of courts is found in the *Noga* and *Republic of Cameroon v. Winslow Bank & Trust* cases, in which the waiver of immunity was not merely implicit but, on the contrary, agreed to in particularly forceful terms.

In the *Noga* decision, rendered by the Paris Court of Appeals on August 10, 2000, the Soviet Union (subsequently succeeded by the Russian Federation) and Noga had entered into an arbitration agreement with respect to two loans which provided for disputes to be settled through arbitration under the aegis of the Arbitration Institute of the Stockholm Chamber of Commerce. The Russian Federation had also waived “all right to immunity relative to the execution of the arbitral award rendered against it in connection with the present contract” and agreed not to rely “on any immunity from suit, from enforcement, from seizure or from any other judicial proceedings in connection with its duties arising from the present contract.” Following this agreement, an arbitral tribunal ordered, in two separate awards, the Russian Federation to

⁸ See *supra* notes 1 and 2.

⁹ See *infra* Section III.

pay Noga an amount in excess of 27 million US dollars. On the basis of these two awards, granted exequatur in France,¹⁰ Noga proceeded to seize several bank accounts held by the Embassy of the Russian Federation in France, the Permanent Delegation of the Russian Federation at UNESCO, and the Commercial Bureau of the Russian Federation in France. Contrary to the Paris Court of First Instance, the Court of Appeals held that the terms 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 favor 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.¹¹

The specificity of the assets seized here may explain the need for an express exclusion in order to find that the immunity no longer applies. Here again, from a strict legal perspective, the reasoning is far from convincing. Just as it can waive other immunities, a State has the right to waive its diplomatic immunity. Furthermore, the terms used in Russia's waiver at issue in the *Noga* case appear to be sufficiently broad to include this type of immunity. Therefore, in this case, there was no need to construe the State's intent in order to find such a waiver to exist.

¹⁰ TGI Paris, Mar. 15, 2000, confirmed by CA Paris, Mar. 22, 2001, *Gouvernement de la Fédération de Russie v. Compagnie Noga d'importation et d'exportation*, 2002 REV. ARB. 723 (3rd case).

¹¹ CA Paris, Aug. 10, 2000, *Ambassade de la Fédération de Russie en France v. Compagnie Noga d'importation et d'exportation*, 128 J.D.I. 116, 121–22 (2001) (note by I. Pingel-Lenuzza); JCP, Ed. G., Pt. II, No. 10512, at 765 (2001) (note by C. Kaplan and G. Cuniberti); 2001 RTD COM. 410, 412 (note by E. Loquin); 2001 Dalloz, Jur. 2157, 2158 (note by E. Fongaro); 2000 BULL. ASA 610, 620 (commentary by Emmanuel Gaillard, *Convention d'arbitrage et immunités de juridiction et d'exécution des Etats et organisations internationales*, at 471).

The waiver of immunities at issue in the *Republic of Cameroon v. Winslow Bank & Trust* case, decided by the Paris Court of Appeals on September 26, 2001, was no less broad. As is often the case in loan agreements, the waiver included all immunities that “the borrower [in this case, the Republic of Cameroon] would be entitled . . . to invoke for itself or for its assets . . . or any other immunity it may have.” The clause specified that “the borrower consents . . . to . . . the execution against any assets (no matter what they are used for or designated to be used for).” Nevertheless, the Court decided that even though the State had, in the agreement at issue, consented to the execution of any award against it, “this consent is presumed not to apply to assets and holdings of the State’s diplomatic missions, or to those designated for the use of its missions.” It added that “the ordinary clause in international loan agreements, according to which a State agrees to waive its immunity from execution on all its assets, whatever they might be designated for, does not constitute a waiver of its immunity from execution” and the fact that the clause quoted above “does not expressly mention the assets used by the Republic of Cameroon’s diplomatic missions, does not imply that the State consents to waive its immunity from execution on such assets.” The decision, which explicitly refers to the Vienna Convention on Diplomatic Relations of April 18, 1961, is even more restrictive as it seems to place the burden on the creditor to prove that the assets are not meant to be used for the activity of the diplomatic mission.¹² It remains no less true, however, that it is legally possible for a State to waive its immunity from execution with respect to assets designated for the operation of diplomatic missions. Furthermore, the terms of the disputed agreements seemed, in general, to include such immunity, even if, in this instance, the agreements were manifestly model clauses.

¹² CA Paris, Sept. 26, 2001, *République du Cameroun v. Winslow Bank & Trust*, Dalloz, I.R. 3017 (2001).

These decisions are not so much the result of a precise technical analysis but rather of a general reluctance of courts to allow the enforcement of outstanding private debts on assets designated for diplomatic activities, which are the core of the *jure imperii* activity of States.¹³ The position of the courts would be *a fortiori* justified if the waiver resulted not from a provision expressly consenting to such waiver but from the existence of an arbitration agreement, regardless of whether it referred to arbitration rules requiring that the parties carry out the award without delay. Therefore, the French *Cour de cassation's* approach of recognizing an implicit waiver of State immunity from execution in order to ensure the effectiveness of arbitral awards will not suffice in practice to bring an end to the situation in which an enforceable award remains ineffective until the State elects to honor it. This observation leads us to consider whether the solution to the contradiction between the principles of effectiveness of arbitral awards, immunity from execution, and autonomy of State legal entities is to be found in the tempering of the latter principle in favor of the two former principles.

¹³ On the legal policy reasons justifying this approach, however, see the approving comments of C. Kaplan and G. Cuniberti, and of E. Loquin in their respective commentaries, *supra* note 11. The courts' reluctance is not specific to France, as is seen in the outcome in the U.S. courts of the Noga seizures in that country. *See*, for example, the opinion of the U.S. District Court for the Southern District of New York dated September 19, 2002, which refused to validate Noga's seizure by distinguishing, manifestly erroneously, the Russian Federation, the asset's holder, from its Government, the party to the arbitration (*Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*, Case No. 00 Civ. 0632, 2002 U.S. Dist. LEXIS 17749; 17(10) INT'L ARB. REP. C-1 (2002)). For a commentary, *see* Emmanuel Gaillard, *L'affaire Noga*, DÉC. JUR. FIN. No. 44, at 52 (Apr. 2003). This decision was later overruled by the U.S. Court of Appeals for the Second Circuit: *Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*, 361 F.3d 676 (2d Cir. 2004)).

III. AUTONOMY OF STATE LEGAL ENTITIES

States are free to constitute as many legal entities as they see fit to handle the management of their commercial activities. Most commercial activities of States are, in practice, run through entities whose legal nature varies but which, according to the laws that govern them, have their own financial assets and autonomy in their management. The natural tendency of courts, when asked to rule on the seizure of an entity's assets to satisfy the debts of a State, is to find that such assets are out of reach of that State's creditors because they belong to an entity distinct from the debtor State.¹⁴ Although this is a classic response, this reasoning is not satisfactory. The division of a State's commercial activities among as many different legal entities as it sees fit is a unilateral decision of that State. Whether intentional or not, the result of the multiplication of distinct legal entities is that the State's creditors are effectively deprived of their ability to recover their debts, as assets otherwise susceptible to being seized are thus either protected by State immunity from execution or considered to be owned by a legal entity distinct from the debtor.¹⁵

¹⁴ The question is often outlined as being one of "State instrumentalities" ("*émanations de l'Etat*"), and leading French case law refuses to consider such instrumentalities as State entities that are required to answer for the State's debts. *See, e.g.*, Cass. 1e civ., July 21, 1987, *Benvenuti et Bonfant v. Banque commerciale congolaise*, 115 J.D.I. 108 (1988) (note by P. Kahn); Cass. 1e civ., July 6, 1988, *Navrom Romanian Maritime Navigation v. Buenamar Compania Naviera*, 116 J.D.I. 376 (1989) (note by P. Kahn); Cass. 1e civ., Jan. 4, 1995, *Office des céréales de Tunisie v. Bec frères*, 122 J.D.I. 649 (1995) (note by A. Mahiou); Cass. com., Oct. 1, 1997, *Secil Maritima v. Recofi*, 1997 REV. CRIT. DIP 751 (report by J.-P. Rémy); Cass. 1e civ., July 15, 1999, *Dumez GTM v. Etat Irakien*, 127 J.D.I. 45 (2000) (note by M. Cosnard); Cass. 1e civ., May 12, 2004, *Compagnie Noga d'importation et d'exportation v. EADS France*, 2004 Bull. Civ. I, No. 135; *Gaz. Pal.*, *Somm.* 3405 (2004).

¹⁵ *See supra* Section I.

In order to satisfactorily resolve the conflict of these contradictory interests—none of which being *a priori* illegitimate—one must engage in a policy analysis. Experience shows that effectiveness of arbitral awards, State immunity from execution and autonomy of State legal entities are not susceptible to being reconciled. The question, therefore, is which of these three principles should be sacrificed, wholly or in part, in order to satisfy the other two. Under the current state of the law, it is in many cases the effectiveness of arbitral awards—and thus the commitment of a State to resolve certain disputes through arbitration—that will give way before State immunity from execution and respect for the division of the State’s commercial activities into separate legal entities. What we must take away from the French *Cour de cassation*’s decision in the *Creighton* case, however, is that such a situation should not be allowed to continue.¹⁶ The Paris Court of Appeals, for its part, has noted the importance of respecting the principle of State immunity from execution on certain State assets for the sake of diplomatic relations.¹⁷ These two considerations necessarily lead to an examination of the value of the policy underpinning the rule allowing States to organize their commercial activities into as many separate legal entities as they wish. Does this principle correspond to so strong an imperative of justice, or to such pressing pragmatic considerations of international relations, that it should be considered to be a principle having a value equal or superior to that of the two preceding principles, with which it conflicts? More concretely, if we are not ready to allow the beneficiary of an enforceable award against a State to seize an embassy or the funds intended to remunerate diplomats, shouldn’t we allow such a beneficiary to enforce its rights against the assets of the airline company or the national bank when such entities are entirely controlled by the debtor State? Is the social cost of such

¹⁶ See *supra* note 1.

¹⁷ See *supra* note 11.

an exception to the principle of the autonomy of State legal entities greater or lesser than that of leaving the enforcement of an award to the unilateral will of the debtor, or of setting aside State immunity even more drastically in the name of performing agreements in good faith? We have already had the opportunity to observe that the solution of allowing the execution of an award against assets that the State has designated for commercial activities, whether administered through a separate legal entity or not, is likely preferable to one which considers an arbitration agreement to be a waiver of State immunity from execution.¹⁸ The interests served by protecting the autonomy of legal entities seem weaker than those supporting State immunities, and it is not inappropriate that respect for agreements entered into by a State (*e.g.*, the arbitration agreement from which the enforceability of the award arises) should prevail over the expression of its unilateral will (the divisions of its commercial activities into separate legal entities). Thus, we cannot help but rejoice that the Paris Court of Appeals, in four decisions dated January 23, 2003 (two cases), July 3, 2003, and January 22, 2004, has tempered its traditional position on “State instrumentalities” in order to allow the enforcement of awards or judicial decisions against a State through assets belonging to a national company tightly controlled by that State. The first three of these cases concerned the Republic of Congo, and the fourth concerned the Republic of Cameroon. The awards were enforced against the assets of Société nationale des pétroles du Congo (“SNPC”) and Société nationale des hydrocarbures (“SNH”) in Cameroon, respectively.¹⁹

¹⁸ See note following CA Rouen, June 20, 1996, *Bec Frères*, *supra* note 2, at 273–74.

¹⁹ CA Paris, Jan. 23, 2003, *Société nationale des pétroles du Congo v. Connecticut Bank of Commerce and République du Congo*, Case No. 2002/03187, unpublished; CA Paris, Jan. 23, 2003, *Société nationale des pétroles du Congo v. Walker International Holdings Ltd. and République du Congo*, Case No. 2002/03185, unpublished; CA Paris, July 3, 2003, *Société*

In the *SNPC* cases, the Paris Court of Appeals held that:

[I]f supervision or even control by a State over a legal person exercised through its directors, and the public interest function assigned to it, are not usually sufficient to consider that a company is a State instrumentality entailing its merger with the State . . . [the entity at issue here was] in reality a fictional legal person and, therefore, an instrumentality of the Republic of Congo.²⁰

This conclusion was justified by the fact that: (i) the members of its Board of Directors were primarily representatives of State bodies appointed by decree; (ii) the company was placed under the “strict control” of the Minister of Hydrocarbons, who exercised permanent power of direction and control over the company (“especially to ensure the application of the government’s policies, laws, and regulations, to approve investment programs and supervise their execution, to supervise the allocation of profits and personnel policy governed by the collective bargaining agreement on hydrocarbons, and even the acquisition of participating interests and the creation of subsidiaries, agencies, or branch offices”); and (iii) “the company [was] under the economic and financial control of the State and of the *Cour des comptes*.”²¹ The Court thus inferred that the Congolese State had reserved for itself, with regard to the company, “a real power of direction and approval constituting true interference which deprives of all substance the autonomy of [the

nationale des pétroles du Congo v. Walker International Holdings Ltd., Case No. 2002/03185, unpublished, reproduced in this volume as Annex 5; CA Paris, Jan. 22, 2004, *Winslow Bank & Trust Company Limited v. Société nationale des hydrocarbures*, Case No. 2002/20287, unpublished, reproduced in this volume as Annex 6. *See also* Cass. 1e civ., Feb. 6, 2007, *Société nationale des pétroles du Congo v. Walker International Holdings Ltd.*, 2007 REV. ARB. 483, 487 (note by L. Franc-Menget).

²⁰ CA Paris, July 3, 2003, *SNPC*, *supra* note 19, at 8.

²¹ *Id.* at 7.

company] which would normally result from its legal status as a company registered with the *Registre des opérateurs économiques*.”²²

In the *SNH* case, the Paris Court of Appeals held, in its decision dated January 22, 2004, that:

[E]ven though it is certainly established that SNH has its own separate assets comprised of real estate and securities, it results from [various factors] that SNH only appears legally and financially autonomous through the ownership of its own assets, with no real substance and without sufficient independence to take its own decisions, in its own interest, and cannot be considered to enjoy a legal or de facto autonomy from the State of Cameroon such that it could effectively be called a separate legal entity.²³

This reasoning is on all points analogous to that in the *SNPC* cases.

The fact that the Paris Court of Appeals chose to temper the principle of autonomy of State legal entities through recourse to the notions of “State instrumentality” and “fictitious legal entity” renders the exception relatively limited. Indeed, it is only when a State-controlled company exhibits a near total lack of autonomy that the seizure of its assets by the State’s creditors will be possible. The fact that a State owns virtually all of a company’s shares, or that it controls the company, is not sufficient, under current French case law, to allow the State’s creditor to overcome the obstacle created unilaterally by a State that organizes its *jure gestionis* activities among separate legal entities. It is nevertheless undoubtedly a step in the right direction if we desire, as the *Cour de cassation* expressed in the *Creighton* case, that arbitral awards

²² *Id.* at 8.

²³ CA Paris, Jan. 22, 2004, *SNH*, *supra* note 19, at 7.

not be rendered ineffective, while still giving the principle of immunity from execution for *jure imperii* activities of a State the respect it deserves.