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In France, the notion of immunity from execution has been treated as distinct from that of immunity from jurisdiction; this has been true at least since February 10, 1965, when the Court of Appeals of Rouen annulled a conservatory attachment of funds in France owned by the State of Turkey.[1] The basis of that attachment was a claim against the state arising out of its guaranty of a loan to the city of Istanbul. There was no immunity from jurisdiction, since the guaranty of a loan was a commercial act and since French courts have for several decades limited sovereign immunity from jurisdiction to claims relating to acts *jure imperii;* however, the court affirmed that immunity from execution was a separate issue, and held that a state was entitled to immunity from execution upon its goods.

This decision has been approved by commentary and jurisprudence. That immunity from execution be considered as a separate issue from that of immunity from jurisdiction has been supported on two grounds, one of which has come to be discredited.

First, it has been said that as a matter of international courtesy French courts should not treat foreign states in any way less favorably than they treat the French State.[2] Since there can be no *exécution forcée* pronounced by French courts against the French State, the argument goes, there should be none against foreign states. On examination, the parallel is not persuasive, for the foreign state involved cannot be counted on to follow the same norms as the French State. There is no *exécution forcée* against the latter because the French State *does* indeed execute decisions against it on a voluntary basis. A judgment against a French governmental instrumentality is carried as a debit in its budget, and consequently paid by the public treasury. Failure to make such a payment can be appealed on the grounds that the instrumentality in such a case would have made a decision beyond its powers—*excès de pouvoir.*

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[1]Société Bauer-Marchal v. Ministre des Finances de Turquie, 1965 REV. CRIT DE DR. INT. PRIVE (hereinafter REV. CRIT.) 565.

[2]*See, e.g.,* H. BATTIFOL, I DROIT INTERNATIONAL PRIVE N° 225, 226 (1970).

As there is no assurance that foreign states assume the same responsibilities as judgment debtors, there is no basis on which to conclude that their immunity from execution flows inexorably from the French State's immunity from execution.

The second argument is based on the diplomatic problems that might arise from execution against a foreign state. This argument has prevailed; it is recognized that the diplomatic concerns that might arise from actual execution against a foreign state's property are of a different, graver order than those created by the mere assertion of jurisdiction to hear a claim against a foreign state.

However, sovereign immunity from execution is not absolute in France. Three types of limitations have been advocated, two of which have been accepted by the courts.

A. *No immunity from attachments.* Conceptually, this viewpoint was that attachments, especially those of a conservatory nature, did not truly have the character of execution, because they were not final. They should be thought of as concomitant with the assertion of jurisdiction, and therefore rise or fall depending on the presence of *immunity from jurisdiction.* Only the finalization of the attachment (i.e., the definitive divestment of title) should be covered by the notion of *execution* for the purposes of this special area of sovereign immunity.

This notice might be defended, but has simply not been accepted.

B. *No immunity from registration of* exéquatur. As the recognition of a judgment against a state does not constitute in itself any interference with the property of a state, it is not, according to French jurisprudential thinking, covered by the notion of immunity from execution. It is not an act of execution; it is mere preliminary foreplay.

This position was embraced by the Tribunal de grande instance de Paris in the 1970 case of *Yugoslavia v. SEEE,*[3] where SEEE, having rendered services relating to a railroad in Yugoslavia and having obtained an arbitration award in Switzerland (rendered 1956 by Messrs. Panchaud and Ripert),[4] had obtained an *ordonnance d' exéquatur* and had seized Yugoslavian assets in the hands of the World Bank in Paris. The Yugoslav Solicitor General argued to M. Bellet, the President of the Tribunal sitting in *référé* (hearings for provisional remedies), that:

i. The *ordonnance d' exéquatur* violated French public order because it failed to respect the defendant's sovereign immunity from execution. Judge Bellet refused this argument, stating that:

[3]1971 J. DU DR. INT. 131.
[4]1959 J. DU DR. INT. 1074.

> in accepting an arbitration clause, the Yugoslav State accepted to waive its immunity from jurisdiction with respect to the arbitrators and their award up to and including the procedure of *exéquatur* necessary to give the award full force . . . waiver of jurisdictional immunity in no way results in waiver of immunity from execution . . . the *ordonnance d' exéquatur* . . . is not an action of execution but merely an act preceding execution measures; it is merely . . . the necessary consequence of this award; it affirms its validity for whatever useful purpose this might serve; it does not encroach upon the immunity from execution benefitting the Yugoslav State.[5]

ii. The conservatory attachment should be annulled on the grounds of the state's immunity from execution. This argument was not disposed of as the result was reached by reference to the third argument.

iii. The conservatory attachment should be annulled on the grounds that SEEE had at least tacitly accepted a settlement of its accounts as a result of an inter-governmental (France and Yugoslavia) agreement in 1950. The judge agreed that this 1950 agreement should be considered *res judicata* and therefore this further action was contrary to French public order; the attachment was lifted.

(This case is currently on appeal to the supreme civil court of France (Cour de Cassation); to the extent that the grounds of appeal lead the court to consider the immunity point as well as the *res judicata* point, it may contribute to the French jurisprudence on immunity from execution.)

C. *No immunity with respect to commercial property.* This is the key to immunity from execution. There are four important cases, and they must be looked at together.

In the 1946 case of *Procureur Général v. Vestig,*[6] an attachment of money standing to the credit of the Norwegian Government in a French Bank was allowed.

However, the funds in fact belonged to a Norwegian national whose assets were being protected from the occupation forces, so the court can really be seen as holding that no immunity applied because the property was not in fact that of the Norwegian State, which had acted as agent for its citizen.

In 1969, the Cour de Cassation decided *Englander v. Banque d'Etat tchécoslovaque,*[7] where plaintiff, a resident of France, was entitled to a sum of 100,000 Czech crowns held by the Czech Tatra Bank. The rights and obligations of the latter were subrogated to the Czech State Bank in 1950. In 1964, Englander obtained a judgment by a French court against

[5] 1971 J. DU DR. INT. at 132-3.
[6] 1947 SIREY (I) 137.
[7] 1970 REV. CRIT. 101.

the State Bank. Subsequently, not having been paid, he proceeded to attach the amount of the debt in the hands of the Banque commercial pour l'Europe du Nord, which specializes in capital movements between the member states of COMECON and other states.

Englander appealed from a 1966 decision[8] of the Court of Appeals of Aix-en-Provence, which had revoked the attachment on the grounds of sovereign immunity, stating that attachments against a state could not be upheld, even if the funds are held and administered by a bank with independent legal personality. The court of appeals held that "the accounts of the State Bank had served indifferently to satisfy debts of commercial enterprises belonging to the Czech State and to defray maintenance costs of the state's dues to various international organizations," concluding that:

> as the distinction between private and public funds was impossible to make, the attachment might deprive the foreign state of resources which it needs in order to assure the well-functioning of its services or to fulfill obligations accepted by virtue of its attributes of sovereign power.[9]

The Cour de Cassation reversed, holding that immunity from execution cannot be founded on the *"simple éventualité"* of the risk of not being able to separate public from private funds, where it had been determined that only a part of the funds belonged to the Czech State. (It might be noted in passing that the court appeared to assume that assets of state enterprises are not assets of the state.)

In the 1971 case of *Dame Clerget v. Représentation commerciale de la République démocratique du Viêt-Nam et autres,*[10] plaintiff obtained a default judgment in 1965 before the labor tribunal of Paris of 74,123 francs for salary and various indemnities based on services performed in a mining operation in Vietnam up until 1955. To satisfy the award, Clerget attached funds held by the Banque commerciale pour les Pays de l'Europe du Nord and owing to either the People's Republic of Vietnam or its commercial representation. The attachment was struck down by the Court of Appeals of Paris. Clerget, formulating his petition on the language of *Englander,* appealed.

Somewhat surprisingly, the Cour de Cassation confirmed, without any mention of *Englander.* The court of appeals, it stated, could well have concluded that the People's Republic of Vietnam—albeit unrecognized by France—constituted a sovereign state whose funds, their origin and their intended use not having been determined, could not consistently with international courtesy be attached. The key to the case seems to be

[8] 1966 J. DU DR. INT. 846.
[9] *Id.* at 849.
[10] 1972 REV. CRIT. 312.

this proviso; so long as its origin and intended use had not been determined, sovereign property was immune from execution, but the plaintiff is invited to prove that its origin and intended use is such that immunity should not be accorded! The crucial distinction seems to be that between state property applied to sovereign activities and such property serving commercial enterprises. In this respect, the decision is consistent with *Englander.*

However, in *Englander* there was a presumption in favor of the plaintiff (so long as it was not shown that *all* the attached property was property subject to immunity, attachment was upheld), while in *Clerget* a presumption is articulated in favor of the state (unless its origin and intended use are demonstrated to be outside the ambit of the protection by immunity, property of a state cannot be attached).

Is the Cour de Cassation inconsistent? One should always be wary of such a conclusion. Professor Paul Lagarde, of the University of Paris and presently co-author with Professor Battifol of the influential two-volume treatise, *Le Droit International Privé,* has proposed the following rationale,[11] which was not stated by the court but would explain its results. When the property is owned by an entity nominally independent from the state (e.g., the bank in *Englander*), the presumption is that its property is not of the kind entitled to sovereign-immunity protection. But when it is owned directly by the state, the opposite presumption operates. To Professor Lagarde, this rationale is entirely coherent and should be preferred as compared to a conclusion that the Cour de Cassation was remiss.

This brings us to the latest major case in the area of sovereign immunity from execution, *Braden Copper Company v. Groupement d'Importation des Métaux,*[12] a decision in which an order authorizing garnishment was obtained with regard to an amount of 6,804,300 francs owed to the Copper Corporation, a state-owned Chilean entity, on account of a shipment of identifiable copper from plaintiff's expropriated mines. (There was a parallel attachment granted on the same grounds for the sum of 2,721,720 francs owed to the Copper Corporation by the Société Tréfimétaux G.P.)

The garnishment was granted by an *ordonnance* of September 30, 1972, the court apparently accepting plaintiff's argument that the nationalization "ordered by the Chilean State under the conditions set forth above (no indemnification) is contrary to French public policy, as appears from the well-established line of decisions by the Cour de Cassa-

[11]Lecture series at the University of Paris I (Pantheon), May 1977.
[12]1973 J. DU DR. INT. 227; translated into English in 12 INT. L. MAT. 182 (1973).

tion, and that the rights acquired by virtue of such nationalization are without any legal validity in French territory" and that

> French courts, under these conditions, cannot recognize the validity of the alleged transfer of title effected by the Chilean State; . . . this is in accord with the French decisions handed down ever since the Soviet nationalizations as well as upon the Spanish expropriations and the . . . Algerian nationalizations.[13]

The doctrine that French courts do not give legal effect to foreign nationalizations failing to meet the imperative standards of French public policy was reaffirmed by the Court.[14] But what is particularly interesting for present purposes is the manner in which the Tribunal de grande instance of Paris affirmed its continuing jurisdiction despite the plea by the Copper Corporation of sovereign immunity, by the decision of November 29, 1972, which dissolved the garnishment but ordered the Copper Corporation to keep the funds in hand to be produced in the event Braden should win.

The Copper Corporation first argued for sovereign immunity from jurisdiction. This defense was dismissed, the court noting that the Copper Corporation was engaged in the international commercialization of copper structured within private law norms. No exercise of sovereignty was involved. In the very case of its sales agreements with the Groupement d'Importation des Métaux et Tréfimétaux, there was an ICC arbitration clause. The court concluded

> that if in these circumstances the Chilean Copper Corporation must be considered as acting in the name and on behalf of the Chilean State for the management and development of the nationalized domain, it cannot, however, on the occasion of the present litigation oppose itself to the examination, by this Court, in a conservatory and provisional manner, of a plea which relates to an act of its own management and which is necessarily linked to its commercial mission, . . .[15]

However, the court reserved its holding as to immunity from execution, pending the outcome of a factual investigation, for which purposes an expert was named.

The expert was to determine three things.

One, had there been equitable compensation? (If the expert determined that the Chilean State had given sufficient compensation to satisfy the norms of French *ordre public,* then of course the Copper Corporation could pass title.)

Two, how might a global settlement be achieved? (The French court was concerned to make French proceedings consistent with a global disposition of Braden's claim.)

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[13] 12 INT. L. MAT. at 184-5, citing three Cour de Cassation decisions.
[14] 1973 J. DU DR. INT. at 229, 12 INT. L. MAT. at 189.
[15] 1973 J. DU DR. INT. at 228-9, 12 INT. L. MAT.

Three, to what purpose were the funds collected by the Copper Corporation within the scope of its commercial activities allocated, destined, and used?

This third point to be determined would be (following the *Englander* and *Clerget* learning) dispositive of the claim of sovereign immunity from execution. Presumably, if these funds went directly into a mass of governmental receipts out of which, for example, government employees were paid, the immunity would apply; while if they remained "allocated to, destined for and used in" the commercial branch of activity which engendered the funds, there would be no immunity from execution.

One might imagine many difficulties of proof in this area; it would not seem difficult for the state (owning the commercial enterprise) to argue that the earnings of the commercial activity more or less directly flow into public service. The *Braden* case never clarified this point, as the change of regime in Chile led to a settlement between the parties.

However, it should be noted that the court, faced with a state-owned commercial enterprise, was willing to accept prima facie that its competence to force execution would not be hindered by a plea for sovereign immunity. Until the expert might inform it otherwise, it ordered the Copper Corporation to keep the garnished sums ready to be produced in the event it should be adjudged to owe them to Braden, and then it retained jurisdiction over the execution procedure.

The conclusion to be drawn from this study of recent French jurisprudence is that sovereign immunity bars execution against the property of a foreign state in France unless it can be shown that the use of that property is commercial. In the case of accounts receivable, it must be shown that they are allocated to commercial activity.