International Lawyer

Volume 19 | Number 1 Article 13

1985

Sovereign Immunity from Jurisdiction: French Caselaw Revisited

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In 1977, French caselaw on sovereign immunity from jurisdiction was described in this journal.[1] At that time the situation could be summarized by three propositions:

1. The registration *(exequatur)* of a judgment or an arbitral award against a State did not raise the issue of sovereign immunity from execution. Such recognition of a judicial or arbitral decision does not in itself constitute interference with the property of a State, and is therefore a corollary to the assertion of jurisdiction; if there was no *immunity from jurisdiction*, registration of the decision that resulted from the assertion of jurisdiction may not be resisted on the grounds of immunity.[2]
2. The absence of immunity from jurisdiction did not automatically remove immunity from execution.[3]
3. Immunity from execution does not apply to a State's commercial property.

The first two propositions remain valid today and do not appear to have been questioned since 1977. On the other hand, there have been significant developments with respect to the third proposition, and in the case of *Eurodif v. Iran*, decided on 14 March 1984,[4] the highest French court (the *Cour de cassation*) redefined the rules that limit sovereign immunity from execution. The following is intended to update the earlier article and clarify the meaning and potential impact of this decision.

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1. Paulsson, *Sovereign Immunity from Execution in France*, 11 INT'L LAW. 673 (1977).
2. Yugoslavia v. SEEE, decision of 6 July 1970, Tribunaux de grande instance of Paris, 1971 JOURNAL DU DROIT INTERNATIONAL 131; *affirmed* by the Court of Appeal of Paris, decision of 29 January, 1975 JOURNAL DU DROIT INTERNATIONAL 136; *reversed on other grounds* by the *Cour de cassation*, decision of 14 June, 1977 JOURNAL DU DROIT INTERNATIONAL 864.
3. Société Bauer-Marchal et Cie. v. Minister of Finance of Turkey, decision of 10 February 1965, Cours d'appel Rouen, 1965 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE (hereafter REV.CRIT.) 565.
4. Eurodif *et al.* v. Islamic Republic of Iran *et al.*, 1984 LA SEMAINE JURIDIQUE (23 May 1984) 20205.

I. Background

A. Early Cases

In the first case that appeared to limit sovereign immunity from execution,[5] involving an attachment of funds held by a French bank in the name of the Norwegian government, an analysis of the facts demonstrated that the funds belonged to a national whose assets were being protected from the World War II occupation forces, so the case may seem to have less to do with sovereign immunity than with the question whether the property was in fact that of the Norwegian state.

Some two decades later, in the leading *Englander* case,[6] it was held that a French plaintiff could execute a French money judgment against the State Bank of Czechoslovakia by seizing its account at the Banque commerciale pour l'Europe du Nord. The Court of Appeal had ruled that sovereign immunity was a bar to such execution, because the accounts of the State Bank had served variously to pay the debts of commercial entities belonging to the Czech state and the costs of the state's participation in various international organizations. The highest court reversed, holding that the "mere chance" that it might be impossible to separate private-use from public-use funds was not sufficient to sustain a finding of immunity, since it had been determined that only a part of the funds belonged to the Czech state. Somewhat like the case involving the Norwegian government, the *Englander* case was not fully satisfactory as a precedent: it did not face the issue of the limits of immunity if the property was clearly that of the state.

B. 1977–1984

Such a case, *Dame Clerget v. People's Republic of Vietnam Trade Mission, et al.*, was decided in 1977.[7] The defendant was the People's Republic of Vietnam, and the plaintiff a judgment creditor. The latter attempted to levy execution on funds held by the Banque commerciale pour les pays de l'Europe du Nord, but his action was denied by the courts. Confirming the Court of Appeal of Paris, the *Cour de cassation* approved the holding that the funds of a foreign sovereign were immune as long as their origin and intended use had not been determined. This would not preclude a plaintiff from arguing that their origin and intended use was such that immunity should be denied. One assumed that, consonant with developments in other

5. Procureur Général v. Vestig, decision of 5 February 1946, Cour de cassation, 1947 SIREY (I) 1937; 1946–1949 Journal Du Droit International 1.

6. Englander v. State Bank of Czechoslovakia, decision of 11 February, 1969, Cour de cassation, 1970 Rev.Crit. 101; 1969 Journal Du Droit International 923.

7. Decision of 2 November 1971, Cour de cassation, 1972 Rev.Crit. 312.

countries, the crucial distinction would be between property used for sovereign functions and property used in commerce. If this was the rule as of 1977, however, it had to be understood by inference, because there had been no case holding that property belonging to a state was in fact subject to execution.

The *Cour de cassation* had had only one occasion to pronounce itself in this area during the period between 1977 and 1984, and that was in the so-called *CAVNOS* case,[8] named for an Algerian pension fund which had taken over the assets of a private pension fund established prior to independence. The national fund of the French bar association, subrogated to the rights of French contributors to the pre-independence fund, sued CAVNOS and attached its assets in France. CAVNOS attempted to have the attachments set aside on the grounds that it was a public-service entity and therefore immune from execution. This argument was rejected by the French court, which held that since CAVNOS' funds were distinct from those of the State of Algeria, there was no immunity.

The CAVNOS decision is, therefore, reminiscent of the *Englander* case in which the *Cour de cassation* appeared to apply the presumption that assets of legal entities in the public sector but distinct from the State, and not exclusively engaged in public functions, are not immune from execution.[9] It

8. Caisse algérienne d'assurance vieillesse des non-salariés (CAVNOS) v. Caisse nationale des barreaux français, decision of 7 December 1977, Cour de cassation, 1978 REV.CRIT. 532.

9. Other French decisons have, like the *CAVNOS* case, dealt with the issue whether a formally independent public sector entity is entitled to sovereign immunity. In Zavicha Blagojevic v. Bank of Japan, decision of 19 May 1976, Cour de cassation, 1977 REV.CRIT. 359, a plaintiff failed to convince the courts that the Bank of Japan had acted outside the scope of its delegated powers in applying Japanese exchange controls. (The claim alleged that the Bank of Japan's actions did not have *bona fide* exchange control purposes, but were intended to help a private Japanese company escape contractual obligations.) Accordingly, immunity of *jurisdiction* barred the action. For a case where the public sector entity was not acting "in the name and on the account of the State," *see* Air Zaire v. Gauthier *et al.*, decision of 31 January 1984, Court of Appeal of Paris, 1984 RECUEIL DALLOZ SIREY (12 April) 160, in which a conservatory attachment of aircraft was upheld against a claim of sovereign immunity of execution. The court held that no immunity may be invoked with respect to "purely commercial operations." In this case, the underlying action was brought by a group of Belgian pilots who claimed to have been wrongfully dismissed from their employment by Air Zaire.

The issue of immunity of execution as invoked by public sector entities is an intriguing one; the question appears to be whether they have acted within the scope of delegation of sovereign powers. If they have not acted in the name of the *puissance publique*, there is no sovereign immunity. It is, however, for this very reason that such cases make but a limited contribution to our understanding of sovereign immunity. For if the burden on a formally independent parastatal entity is to prove that it is in fact acting for the state, and the private party therefore can content itself to contest the existence of such a delegation, the question remains very much open as to how one goes about determining that a state itself has acted outside the realm of its sovereign functions.

The fascinating and hugely important matter of determining whether, and if so to what

did not, however, answer the main issue: whether and, if so, in what circumstances the property of a state itself might be subject to forcible measures. Although this issue did arise in two subsequent highly visible litigations, the cases were settled before they reached the Court of Appeals, let alone the *Cour de Cassation*.

The first case, *Ipitrade*, involving attachments of bank accounts of the Federal Republic of Nigeria on the strength of an International Chamber of Commerce arbitral award rendered in Geneva, was decided by the Vice-President of the *Tribunal de grande instance* of Paris[10] in favor of the claimants on the grounds that a post-arbitral settlement agreement between the parties contained an unequivocal waiver of immunity from execution. Shortly thereafter, the dispute was definitively resolved by negotiation.[11]

The *Ipitrade* case thus stands for the proposition that an express waiver of sovereign immunity from execution is effective, and on the assumption that this view would not be disavowed by higher courts—and there is no suggestion to the contrary in scholarly commentary—one would conclude that French law on this point is consistent with international practice.[12] But it does not resolve the issue with respect to the more common situation where there is no such waiver. Although the nearly simultaneous *LIAMCO* case did not involve a waiver, it is unsatisfactory as a precedent for other reasons.

A subsidiary of Atlantic Richfield Company, LIAMCO had won an arbitral award (rendered in Geneva by a sole arbitrator appointed by the President of the International Court of Justice) in the amount of U.S. $80 million. To enforce the award, LIAMCO attached assets located in France held in the name of the Libyan Arab Republic and a number of Libyan state entities. These attachments were vacated by the *Tribunal de grande intance* of Paris, on the ground that immunity applied since

> no distinction can be made at this time between funds allocated to sovereign or public-service activity and those derived from economic or commercial activities governed by private law.[13]

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extent, execution may be sought against the assets of parastatal entities in order to satisfy claims against the state itself is beyond the scope of this article. *See generally* the casenote of Professor Pierre Mayer under Crédit populaire d'Algérie v. SAPVIN, decision of 14 February 1978, Cour de cassation, 1980 REV.CRIT. 707.

10. Procureur de la République v. S.A. Ipitrade International, decision of 12 September 1978, *Tribunal de grande instance* of Paris (référé), 1979 JOURNAL DU DROIT INTERNATIONAL 857.

11. The settlement also terminated litigation in the U.S.; *see* Ipitrade International v. Federal Republic of Nigeria, 465 F.Supp. 824 (D.D.C. 1978).

12. *See generally* G. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT. L. 784 (1981).

13. Procureur de la République v. LIAMCO, decision of 5 March 1979, Trib. gr. inst. of Paris (référé), 1979 JOURNAL DU DROIT INTERNATIONAL 859, at 861.

However, the court simultaneously ordered an investigation into the nature, destination, and use of the assets of the Libyan state entities.[14] This order implies that enforcement might have been available against such assets, provided they were "derived from economic or commercial activities governed by private law." It is unclear whether it was envisaged that enforcement against assets not owned directly by the state might be justified by disregarding the State emanation's corporate veil, or perhaps by considering that assets held in the name of such an entity was for the account of the state. A further element of ambiguity was the fact that no investigation was ordered with respect to assets directly owned by the state. Be that as it may, a negotiated settlement between the parties ended the litigation and made it unnecessary for the French courts to deal with such findings as the experts commissioned by the *Tribunal de grande instance* might have made.[15]

In the light of the *Englander-Clerget-CAVNOS* line of cases, as colored by the lower court's decision in *LIAMCO*,[16] a commentator concluded:

> French law allows the attachment of assets of separate state instrumentalities unless these assets are themselves set aside for immune purposes or can be shown to be inextricably mixed with assets that are. *In the case of state funds, it is still uncertain whether execution will ever be permitted: though the weight of doctrine favors the possibility, the jurisprudence is by no means so clear.* At any rate, attachment will only be possible against assets or a separate fund shown to be clearly devoted to non-immune purposes.[17]

This was an appropriate assessment of the state of French law prior to the landmark decision of *Eurodif v. Iran*; however, with that decision the entire landscape of this legal area has been altered.

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14. The terms of reference for this investigation, to be carried out by three court-appointed experts, were nearly identical to those designed for the earlier *Braden Copper Company* case described in Paulsson, *supra* Note 2, at 677–9.

15. As in the *Ipitrade* case, the litigation was not limited to France; LIAMCO had sought enforcement in the U.S., Sweden, and Switzerland as well. For a summary of these actions, *see* 20 I.L.M. 891 (1981).

16. There was yet a third post-*CAVNOS* case involving an attempt to enforce an arbitration award against a state itself. An Italian claimant, Benvenuti & Bonfant, had won an ICSID arbitration against the People's Republic of Congo and sought to have it enforced in France. While the President of the *Tribunal de grande instance* of Paris granted recognition of the award, he qualified his order by stating that the award creditor must come back to him for authorization prior to seeking any specific enforcement against Congolese assets. Benvenuti & Bonfant seized the Paris Court of Appeal, which struck down this qualification by noting that the Convention for the Settlement of Investment Disputes between States and Nationals of Other States, pursuant to which ICSID was created, requires France to recognize and enforce ICSID awards as if they were a final French court judgment, and that the qualification devised by the lower court magistrate was not one that would attach to an French court judgment; decision of 26 June 1981, 1981 JOURNAL DU DROIT INTERNATIONAL 843; English translation *in* 20 I.L.M. 878 (1981). This case thus does not reach our topic. Had Benvenuti & Bonfant been obliged to advance to the execution stage, this might have been the case, but once again the litigation ceased upon payment by Congo; *see* I NEWS FROM ICSID 2 (1984).

17. Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT. L. 820, at 843 (1981).

II. Eurodif v. Iran

The case arose out of the Iranian withdrawal from the Eurodif nuclear fuel enrichment project for the construction of a large plant at Tricastin in the south of France. Eurodif was created in 1973 as a joint venture with four European countries as participants. The lead participant was the French *Commissariat à l'Energie Atomique* (CEA). In late 1974, Iran negotiated a 10 percent participation in the project, thereby assuring itself access to a high-technology enrichment process, which the then Iranian government desired as an element of its ambitious nuclear-industry program.

Following the revolution that created the Islamic Republic of Iran, that country's nuclear program was abandoned by governmental decision; Iran ceased payments to Eurodif and repudiated its undertaking to take or pay for its share of Eurodif's output. A capital-intensive venture, Eurodif considered its shareholders' purchase agreements to be a cornerstone of its financial structure and essential to the servicing of its debt.[18]

Eurodif along with Sofidif, a French company established to channel the Iranian participation in Eurodif, as well as CEA, accordingly commenced International Chamber of Commerce arbitration proceedings against Iran as stipulated in the contract. Furthermore, pending the arbitration, Eurodif and Sofidif sought and obtained a conservatory attachment from the Tribunal of Commerce of Paris as security for its claim, which was provisionally evaluated in the amount of 9 billion French francs. The attachment order authorized Eurodif and Sofidif to seize a debt owed by CEA (and secondarily by the French state as guarantor) under a U.S. $1 billion loan granted by the State of Iran in 1975 as part of the overall accords of cooperation in the nuclear area.

Iran appealed, and obtained a favorable decision on 21 April 1982 from the Court of Appeal of Paris,[19] which held that Iran was entitled to sovereign immunity of execution. It noted that the attached debt was owed to the Iranian state whose future use of monies repaid as principal and interest was not subject to any restriction, and therefore the Iranian government would be in a position to exercise its sovereign discretion as to the allocation of these funds to whatever government activities it chose. Under these circumstances, the Court held, immunity applied.

The *Cour de cassation* reversed in a brief decision which begins by articulating the following basic proposition:

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18. A detailed description of the contractual framework of the dispute appears in the brief to the Cour de cassation of M. *l'Avocat Général* Gulphe, 1984 LA SEMAINE JURIDIQUE (23 May) 20205.

19. 1983 REV. CRIT. 101; 1983 JOURNAL DU DROIT INTERNATIONAL 145; 1982 LA REVUE D'ARBITRAGE 209.

> Whereas a foreign State in principle benefits from immunity of execution; but whereas this immunity may exceptionally be ruled out; whereas this is the case whenever the seized asset has been allocated to economic or commercial activity governed by private law and which gave rise to the legal action.[20]

Having announced this as being the general rule, and characteristically omitting any mention that it was in fact creating a *new* rule, the *Cour de cassation* reviewed the general framework of the litigation and the Court of Appeal's decision to accord immunity on the sole basis that the attached assets were "public funds." It noted that the Court of Appeal had deemed it irrelevant to determine "whether the activities of production and distribution of enriched uranium in which the Iranian State had undertaken to participate were of a commercial character that subject them purely to private law," and concluded, in light of the statement of principle quoted above, that:

> . . . in so holding, even though its decision makes clear that the attached claim was one held by the State of Iran against CEA and the French State under the loan agreement of 23 February 1975, and it thus followed that the origins of said claim were the same funds that had been allocated to the accomplishment of the Franco-Iranian program of production and distribution of nuclear energy, the rupture of which by the Iranian party had given rise to the action, the Court of Appeal, on which it was thus incumbent to determine the nature of this activity in order to decide the issue of immunity of execution, had not given a legal basis for its decision.[21]

The *Cour de cassation* thus overruled the Court of Appeal of Paris and, in conformity with French practice, referred the case to the Court of Appeal of Versailles, to which Iran would have to turn to pursue its challenge of the attachment. (The decision of the Paris Court of Appeal having been reversed, the original attachment order of the Tribunal of Commerce of Paris was reinstated.)

III. The Consequences

One now knows that if assets of a state have been used for or allocated to the same economic or commercial activities that gave rise to the claim, they are not immune from execution. The only restriction on this rule would seem to be that the transactions must be such that they are of a "private law" character. In practice, much depends on whether French courts in the future interpret the notion of "private law" activities broadly or restrictively. One might reasonably expect that with regard to activities carried out in pursuance of international contracts, French courts would tend to view them as having a private law character whether or not they would have been consid-

20. 1984 LA SEMAINE JURIDIQUE (23 May) 20205.
21. *Id.*

ered administrative contracts as a matter of French domestic law if they had been concluded between the French state and one of its nationals.[22] With one blow, French jurisprudence may thus be said to have unambiguously aligned itself with the generally restrictive approach to sovereign immunity of execution reflected in U.S. and U.K. legislation, as well as in the European Convention on State Immunity of 1972 (which France has not ratified).[23]

The *Eurodif v. Iran* case leaves open the question of the conditions, if any, under which a private claimant may obtain execution against a state's assets even though they were not used in connection with the transaction that gave rise to the claim, by showing that those assets have their origin in activities of a private law character. Would the claimant in this situation be required to make the difficult demonstration that the assets were also intended in the future to be used in activities of a private law character? To draw such a conclusion now would doubtless be hasty. One notes that the *Avocat Général*'s brief before the *Cour de cassation*—which to some extent may be considered to reflect an official view, if not directly that of the Ministry of Justice—had criticized the Court of Appeal for having based its decision only on the destination of the funds, without taking into account their origin.[24] The *Cour de cassation*, whose weighing of words is legendary, was careful not to say that cases where state assets are allocated to the activity underlying the claim constitute the *only* exceptions to sovereign immunity of execution.

One might, for example, consider that any state asset allocated to non-sovereign use may be subject to execution irrespective of its connection with the claim, and that with respect to sums of money, the fact that they originated in a commercial transaction would give rise to a presumption that their destination would also be non-sovereign.[25] It will surely be argued that there is no justification in principle for the result that a claimant who happens to find a state asset in France that is connected with the activities out of which the claim arose achieve complete success, while an equally deserving claimant fail completely because the assets, although used for

22. Professor Hervé Synvet, in the first French academic commentary on the *Eurodif c. Iran* case, expressed the view that in reproaching the Court of Appeal of Paris for not having determined whether the activity in the context of which the attached loan arose was of a commercial nature, the *Cour de cassation* "in truth implies a preference for a positive answer." M. Synvet lists the following elements as militating against the conclusion that a contract is concluded in the exercise of sovereign functions: contractual form modeled on typical instruments used in international trade, contractual stipulation of a national applicable law, absence of clauses that are *exorbitantes du droit commun* (i.e. containing provisions that two private parties could not legally agree), and reference to commercial arbitration in the event of dispute. *Id.*

23. Of May 16, 1972, EUROP. T. S. No. 74.

24. 1984 LA SEMAINE JURIDIQUE (23 May) 20205.

25. Prof. Synvet suggests this analysis, *supra* note 22.

non-sovereign activities, do not have such a connection. Of course, difficulties remain. For example, it remains to be confirmed that French courts would consider that funds have a commercial "origin" because their last *use* was in a commercial transaction, rather than allowing a defendant state to invoke immunity by pointing to an earlier public source (ultimately leading to the general revenues of the state, which might be expected to be dominated by income from taxes and other levies). Nevertheless, it will doubtless not be long before private claimants seek to avail themselves of the openings suggested by the *Eurodif v. Iran* holding.