

# Seizure of foreign state-owned assets: waiver of immunity from jurisdiction must be both express and specific

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In the framework of the world-famous case between the Republic of Congo and the Commissions Import Export SA (Commisimpex), the Supreme Court recently established a new rule to be followed in order to proceed to a seizure when an immunity from jurisdiction applies.<sup>(1)</sup>

## Facts

In 2000 the International Chamber of Commerce issued an arbitral award in favour of Commisimpex, settling the dispute between the latter and the Republic of Congo with regard to the execution of a memorandum of understanding. When attempting to execute the award, Commisimpex filed a claim in France in order to be authorised to seize several bank accounts held for the benefit of diplomatic missions and delegations to the United Nations Educational, Scientific and Cultural Organisation in Paris on behalf of the Republic of Congo.

When challenged by the Republic of Congo, which argued that the targeted assets were covered by an immunity from jurisdiction and execution, Commisimpex relied on a 1993 letter signed by the Republic of Congo which waived the right to invoke such immunities.

Following this, litigation before the French courts revolved around the following question: under which conditions can a public entity or a foreign state waive its right to immunity from jurisdiction – in particular, whether the waiver must be both specific and express to be valid.

## Proceedings

In 2012 the Versailles Court of Appeal decided that Commisimpex was not entitled to seize the bank accounts because of the lack of specificity in the 1993 waiver. However, this judgment was annulled by the Supreme Court in 2015, which held that, on the contrary, the waiver could be considered in full force and that the seizures could take place.

Thus, in June 2016 the Paris Court of Appeal, appointed by the Supreme Court to settle the dispute, confirmed the previous Supreme Court decision by considering that Commisimpex was ultimately entitled to seize the bank accounts under the general provisions set out in the waiver.

The Republic of Congo once again challenged this unfavourable decision before the Supreme Court.

## 2018 Supreme Court decision

Following this long and complex proceeding, the Supreme Court recently issued an inedited decision upsetting its own 2015 doctrine.

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According to the Supreme Court, the Paris Court of Appeal's 2016 decision – which found that the waiver was in full force even if it was not specific (according to what the Supreme Court had held in 2015) – may interfere with the entry into force of a new December 9 2016 regulation (Sapin II Law). The Sapin II Law provides that no attachment or seizure can be authorised over assets and bank accounts which are the property of or used by a diplomatic mission, unless the foreign state has issued a waiver that is both express and specific.

Thus, the Supreme Court held that despite the fact that the new legal provisions do not apply to prior facts in dispute (such as those concerning *Commisimpex*), the compelling need to preserve the equality of the situation between states should require the waiver's validity requirements to be modified in order to ensure that it complies with the new law.

## Comment

With this decision, the Supreme Court returned to its previous doctrine.

In fact, according to the traditional international customary law, the French courts have previously held that a foreign state's waiver of immunity from execution must be both express and specific in order to give validity to any seizure of foreign state property allocated to public services.<sup>(2)</sup>

However, in 2015<sup>(3)</sup> the Supreme Court simplified the requirements needed to seize a foreign state-owned asset in light of the principle of international customary law. Since most states recognise immunity from execution waivers as valid, France aligned itself with this approach.

Thus, the Supreme Court's 2018 decision can be explained by factoring in the considerations taken to maintain international relationships and diplomacy between states.

Over the past few years, many states have expressed concerns over judicial actions initiated by private corporations (eg, *NML v Republic of Argentina*), which has caused regulators to focus on protecting state assets. In this framework, the Sapin II Law reintroduced the requirement that a waiver be specific in order to assure foreign states that their assets will not be easily distrainable.

However, such provisions should never have been applied to *Commisimpex* since they entered into force after the facts in dispute. By holding the reverse, the Supreme Court has demonstrated the importance of applying the same rules of law in relation to immunity from jurisdiction or execution – to such an extent that the court justified the retroactive application of the Sapin II Law, as well as the modification of earlier Supreme Court jurisprudence.

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## Endnotes

(1) Supreme Court, 1st Civil Section, *Commisinpex v Republic of Congo*, January 10 2018, 16-22.494.

(2) Supreme Court, 1st Civil Section, September 28 2011, 09-72.057; Supreme Court, 1st Civil Section, March 28 2013, 10-25.93 and 11-10.450.

(3) Supreme Court, 1st Civil Section, *NML v Republic of Argentina*, May 13 2015, 13-17751.