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Collecting on foreign sovereign debts in France: politics and courts at a crossroads

In a recent report published in *International Litigation News*,[1] the author described garnishees' rights and duties when confronted with attachments sought in France on assets of a sovereign foreign state. This discussion was made in anticipation of 'continuous waves of seizures' expected in France for the collection of the more than $50bn damages awarded against the Russian Federation in the arbitration proceedings brought by the former shareholders of the Yukos oil company.

These waves of seizures have indeed been carried out, starting in June 2015, generating complex litigation to unlock the attached assets, with several instructive preliminary judgments handed down in France in January, April and May 2016. French courts have also been affected by the recently concluded judicial saga that opposed Argentina and certain United States hedge funds, including, noticeably, NML Capital Ltd ('the Elliott fund'). The series of enforcement proceedings in the *Yukos* case, together with the attempts at collecting claims against Argentina in the French courts, recently prompted the French Government into promoting controversial legislative changes aimed at restricting access to the French-located assets of foreign sovereign debtors.

The latest French court developments for the enforcement of the Yukos awards

The *Yukos* awards, dated 18 July 2014, and rendered in The Hague, were granted '*exequatur*' (recognition and enforcement) status by the French courts on 1 December 2014.[2] The Russian Federation appealed against these *exequatur* orders, with a final hearing in the Paris Court of Appeal scheduled for 15 November 2016, and also moved before the Court of Appeal for an order suspending the enforcement of the awards, pending the outcome of the appeal. However, in line with current French arbitration law,[3] the Paris Court of Appeal on 17 December 2015 denied suspension of the enforcement of the awards.[4] The Russian Federation also challenged the awards in the Dutch courts, as the place of arbitration was The Hague. The Hague District Court found on 20 April 2016[5] that the arbitrators lacked proper jurisdiction and quashed all six arbitration awards. The *Yukos* former shareholders appealed against that judgment before the Court of Appeal in The Hague, and pledged to continue enforcing the awards in the meantime. It would seem that under French arbitration law, enforcement action may continue in the French courts unabated notwithstanding the annulment proceedings in The Hague.[6]

Enforcement is currently sought in a number of jurisdictions, including Belgium, France, Germany, the United States and the United Kingdom. Enforcement began in France in June 2015, with more than 200 attachment orders and related enforcement proceedings. A wide spectrum of assets were targeted, including, noticeably, real estate (including the land on which the new orthodox church commissioned by the Russian Government in Paris is being built), bank accounts, debts owed by French companies to the Russian Government (such as tax or flight control duties owed by Air France), and property (whether bank accounts, debts owed by French companies, or French company shares) held in France by Russian government-controlled entities known in Russia as 'unitary enterprises'.

The attachments were, in many cases, waived where no monies or debts were found (or debts were disclosed but only in small amounts), or debts appeared to have been already settled in advance of the enforcement proceedings. Others were vacated by French courts either by reason of sovereign immunity defences, or because the targeted assets were found to belong to Russian unitary enterprises but not to the Russian Federation.

Sovereign immunity defenses in the Yukos matter

The sovereign immunity from enforcement defence should apply to attachments sought on assets required for diplomatic service, including embassy bank accounts, or real property belonging to the embassy, which creates the presumption that they are used for diplomatic service.[7] Sovereign immunity had also been successfully invoked in another recent protracted judicial fight involving the Russian Government and another of its creditors in the French courts (the Swiss company, Noga). In that case, Russia was able to remove all the attachments previously secured in France by Noga, who had extended loans to Russian for the purchase of oil supplies and related services and had also carried out large-scale efforts to enforce its claims for repayment against Russia by garnishing, inter alia, accounts of the Russian Central Bank and the Russian Foreign Trade Bank (VTB Bank) [8] and other assets including two military air force jets on display at the Paris Air Show.[9]

In the *Yukos* case, the awards derived from an arbitration clause in the Energy Charter Treaty (the 'ECT') which provided in general terms for an undertaking to enforce the award.[10] A 2000 ruling by the *Cour de cassation* (*Creighton Ltd v Qatar Ministry of Finance*) held that consent by a state to an institutional arbitration clause such as the International Criminal Court (ICC), which has very similar language to the clause in the ECT,[11] implied a waiver of sovereign immunity.[12] However, for two reasons it is doubtful that in *Yukos* the Russian Federation should be held to have waived its sovereign immunity defences on the basis of the arbitration clause in the ECT. First, throughout the arbitration, the Russian Federation contended that it was not bound by the ECT,[13] a position vindicated by the District Court in The Hague in its judgment on 20 April 2016 that set aside the awards.[14] Secondly, there still seems to be some confusion in French case law as to whether a general undertaking to comply with the terms of an award is sufficient to create a waiver of sovereign immunity from enforcement.

Indeed, the 2000 ruling in *Creighton* was reiterated twice by the Paris Court of Appeal in 2013, in another matter involving the Russian Federation (*Orion Satellite*), as the Court found that by undertaking through its consent to the arbitration clause to spontaneously comply with the terms of the award, the respondent had waived its sovereign immunity rights from enforcement.[15] However, in contrast, the same Paris Court of Appeal had also held in 2000, in the *Noga* matter,[16] just a month after the *Creighton* decision, that 'the mere references, in the contracts at stake, to the borrower waiving any and all rights of immunity relating to the performance of an adverse arbitration award, does not establish an unequivocal consent by the borrowing State to waive its rights of diplomatic immunity', meaning that, at least for diplomatic immunities, waivers had to be explicit, and not just implied. Moreover, in more recent decisions the *Cour de cassation* insisted that waivers of the immunity from enforcement need be both explicit and specific (meaning that they should identify the assets covered by the waiver)[17]. But in its latest decision reported on the subject, in *Commisimpex v the Republic of the Congo*, the *Cour de cassation* now only requires such waivers to be explicit, and not both explicit and specific.[18]

As we read that last 2015 decision, the *Cour de cassation* has switched to a more flexible approach by admitting waivers that do not specifically identify assets. However, as waivers are still required to be explicit, this could indicate that waivers incorporated in institutional arbitration rules, such as the ICC or in an investment treaty such as the ECT, might be treated as implicit only and would not qualify as a valid argument in support of enforcement actions.[19]

Should Russian unitary enterprises be held liable for obligations of the Russian Federation?

Many attachments in the *Yukos* matter have also been defeated by reason of the concurring analysis by the French courts of the status of unitary enterprises under Russian law.

These were attachments targeted at bank accounts or other properties held by Russian government-controlled entities known under Russian law as 'unitary enterprises.' The most significant proceedings which the *Yukos* claimants had been able to secure in France, nearing approximately €1bn in attached worth, were debts owed to such entities by French industrial partners, such as debts owed by Arianespace to Roscosmos in connection with the space industry. The *Yukos* claimants had also managed to freeze stock of the French media company Euronews,

in which the Russian national television and radio organisation, VGTRK, had been investing, and interfere with bank accounts and equipment held by Russian news agencies that are operating in France.

Each of these entities had already been impacted by earlier proceedings in France involving other creditors seeking to enforce their claims against Russia, such as Noga, with claimants contending that these were mere emanations or instrumentalities of the Russian Government, which accordingly should be held liable for debts incurred by the Russian Federation. However, the attachments had all been defeated as French courts all concurred, after examining related Russian statutes and the by-laws of these entities, that these should be treated as independent structures and not emanations of the Russian Government.[20]

Therefore, the claimants in *Yukos* switched strategies. The *Yukos* claimants do not contend that these unitary enterprises are instrumentalities of the Russian Federation, but now assert that these entities are running their business with assets that are ultimately owned by the Russian Government and merely ascribed to the unitary enterprises for operational purposes. However, the French tribunals that first reviewed the attachments carried out by the *Yukos* claimants on properties of Russian unitary enterprises examined the same documents (Russian statutes and by-laws) and all concurred in finding that unitary enterprises owned their own properties, even though with restricted rights concerning those assets that had been ascribed to them by the Russian State for operational purposes,[21] and that their assets were not the assets of the Russian Federation and therefore could not be held to secure the debts of the Russian Federation.[22]

Accordingly, the attachments sought by the *Yukos* claimants on properties held in France by Russian unitary enterprises have all been ordered to be vacated. Although appeals may still be pending, we would not expect these judgments to be reversed given that, in an earlier matter that opposed RSCC and Orion Satellite Communications, the same finding (concerning RSCC) has been upheld by the French *Cour de cassation*.[23]

US hedge funds (NML Capital) enforcing claims against Argentina in the French courts

The French judiciary has also been under pressure from US hedge funds, particularly the Elliott Fund, as they launched a large-scale judicial campaign for the enforcement of their claims against Argentina.

The Elliott Fund had purchased bonds at low cost on which Argentina had defaulted, and secured judgment in December 2006 from a District Court in New York ordering Argentina to pay the Elliott Fund near to US$285m in damages. The Elliott Fund then moved to collect on this debt. It first secured the garnishment of the Argentine embassy and diplomatic funds held in a French bank account, but this garnishment was lifted as the *Cour de cassation*, in a 2011 decision,[24] ruled first, that embassy funds are covered by sovereign immunity from enforcement, and secondly, that Argentina had not waived its rights of immunity in respect of such funds. Specifically, the court set a rule of presumption whereby such funds are first deemed to be for the performance of diplomatic duties and are therefore immune from enforcement, unless the claimant is able to prove that they are dedicated to private or commercial functions. Further, the court stated that such sovereign immunity rights may only be waived by an explicit and specific waiver. In contrast, the waiver clause in the financial documents relating to the Argentinian bonds did not mention embassy or diplomatic funds abroad and only referred to enforcement in Argentine courts.

Next, the Elliott Fund reached provisional garnishment in France of debts due to Argentina by three French companies (BNP Paribas, Total Austral and Air France) in relation to the operations of their respective branches in Argentina. Debts were in respect of labour and corporate taxes (for BNP Paribas), fees and taxes relating to transportation, the issuance of airline tickets, the regulation of air traffic movements and flight safety control services, and customs duties (for Air France) and oil royalty taxes (for Total Austral). However, these garnishments were lifted as well, as the *Cour de cassation* ruled, in the three 2013 decisions reported above,[25] first, that these debts being all equated to debts of a tax or quasi-tax nature, they were 'necessarily connected to the exercise by the Argentine State of powers linked to its sovereignty', and therefore covered by immunity from enforcement, and secondly, that such immunity rights had not been adequately waived, since 'if states may waive, in a written contract, their immunity from enforcement on property or categories of property used or intended to be used for

governmental purposes, such a waiver must be explicit and specific, mentioning the property or category of property for which the waiver is granted'.

As also reported above, the *Cour de cassation* eased its requirements for waivers of immunity from enforcement in 2015 by ruling that such waivers need no longer be both explicit and specific, but only explicit.[26] Accordingly, following this new more flexible ruling by the *Cour de cassation* in its *Commisimpex* decision in May 2015, the Elliott Fund promptly resumed action in the French courts in May and June 2015, targeting the same assets as before. In the meantime, the Elliott Fund had secured a final recognition and enforcement ('*exequatur*') judgment in France for the December 2006 judgment by the New York District Court.

The Elliott Fund first reinstated garnishment actions on all Argentine embassy and diplomatic funds held in French bank accounts. However, the Paris Tribunal ordered the attachment to be vacated, by finding that the waiver clause was explicit but not unequivocal, since it mentioned assets located in Argentina dedicated to an 'essential public service' and the Tribunal found that it made no sense that the clause may have protected Argentine 'essential public services' but not its diplomatic services.[27]

The Elliott Fund then carried out 29 attachments with BNP Paribas, aimed at the same fiscal and social tax debts incurred to Argentina through the bank's branch in Buenos Aires. The Paris Tribunal first cleared an objection based on territoriality by finding that they had jurisdiction over the issue notwithstanding that these were foreign tax debts and tax debts incurred abroad. However, the Tribunal confirmed that these debts were covered by sovereign immunity rights, that the waiver had to be explicit and unequivocal, and found that the waiver was not unequivocal because on its face it only applied to debts generated in Argentina or to attachments sought before the Argentine courts.[28] Therefore the Tribunal ordered the attachment to be removed.

Finally, the Elliott Fund reiterated its action against Air France, but aiming only at tax and social tax claims due to Argentina through the airline's operations in Argentina. The Tribunal also vacated the attachment, but did so by upholding the territoriality argument, as it found that Argentine tax claims could not be attached in France as this would interfere with Argentina's exclusive authority to collect its own taxes.[29]

As a result, all of the Elliott Fund's attempts at collecting funds in France on its New York judgment against Argentina failed, and the Fund withdrew from any appeal or further action having struck a deal with Argentina in February 2016. The Elliott Fund was paid a reportedly very significant amount[30] in April 2016.

Prospective legislative changes concerning collecting on foreign sovereign debts in France

As described above, although appeals are on their way, French courts have to date denied those more significant attempts by the *Yukos* claimants to collect money on the July 2014 arbitration awards rendered against the Russian Federation, and, likewise, enforcement action by the Elliott Fund against Argentina has failed. Nevertheless, the aggressive attitude displayed by the Elliott Fund, as well as by each of the other creditors of the Russian Federation (whether *Noga*[31] or the *Yukos* claimants), combined with the coverage in the press of each of those matters, and strong political pressure by Russia,[32] prompted the French Government into promoting two significant changes to French law on this subject.

These changes are being brought by way of proposed amendments to a draft law currently being discussed in Parliament, named '*Loi Sapin II*'.[33]

Changes aimed at restricting enforcement actions against foreign sovereign States generally

This amendment was prompted by the *Yukos* matter. Article 24 of the current draft of *Loi Sapin II* provides, in summary, that enforcement actions may be taken on property belonging to a sovereign foreign state provided that one of the three following conditions are complied with:

- the foreign state explicitly consented to such enforcement action;
- the foreign state explicitly allocated or earmarked that property for the satisfaction of the claim at issue;
- the property is specifically in use or intended for use other than for government non-commercial purposes, and has a connection with the entity against which the proceeding that led to the underlying judgment or the arbitration award was directed.

The draft law further provides an indicative list of assets used other than for government non-commercial purposes. The assets include diplomatic property (including bank accounts), military equipment, cultural assets not open for sale, goods lent for temporary cultural exhibits, and tax or social tax debts owed to the foreign state.

In addition, the draft law requires waivers of sovereign immunity covering diplomatic property to be both explicit and specific, and further requires prior judicial consent for any enforcement action against a foreign sovereign state.

Salient and controversial aspects of this amendment are, first, failing a waiver, the required connection between the property sought for attachment and the defending entity in the main underlying proceedings: this is aimed at avoiding fishing expeditions targeting an unlimited list of foreign government-controlled entities or alleged instrumentalities of the foreign government. Secondly, the requirement that waivers must be both explicit and specific (meaning identifying assets left open for enforcement actions). This is a retreat (although limited to diplomatic assets) from the aforementioned 2015 ruling by the *Cour de cassation* in *Commisimpex*.

The third and most difficult issue is the requirement for a prior judicial consent for any enforcement action against a foreign sovereign. Currently there is no need for prior judicial consent when enforcing a judgment or an award, as judges would only review the situation ex post if challenged by the foreign state. Although prior judicial consent would be solicited in non-adversarial proceedings, that requirement would nevertheless create a significant constraint, since the applicant would have to produce evidence to the judge as to the existence and nature of the assets targeted for enforcement, whereas in many cases such evidence is unavailable to the claimant in advance of enforcement, as it often derives from the disclosure made by the attached third-party debtor to the attaching bailiff.

In closing, we would observe that while most of the above language is comparable to the terms of the 2004 UN Convention,[34] which is often referred to by French courts, together with customary international law, as the governing source of law on this subject,[35] the requirement for prior judicial consent is a supplemental condition, much appreciated in comments from Russian officials, but it is unclear whether this addition will survive the upcoming parliamentary discussion.

Changes aimed at restricting enforcement actions against impoverished nations

This is the amendment prompted by the judicial battle between the Elliott Fund and Argentina, and is aimed at restricting the activities of the so-called 'vulture funds', which buy developing countries' sovereign debt at discounted prices and seek to recover its value in full through the courts.

Article 24-*bis* of the current version of *Loi Sapin II* provides, in summary, that enforcement actions may be taken on property belonging to a sovereign foreign state subject to prior judicial consent, but that no such consent is allowed when the foreign state: (i) is listed by the Organisation for Economic Cooperation and Development (OECD) Development Assistance Committee as a beneficiary of the Official Development Assistance; (ii) had already defaulted when the claimant acquired title to his claim; and (iii) defaulted or entered into a refinancing agreement with creditors representing 66 per cent of its debts less than four years ago. Enforcement action is allowed after the state entered into a refinancing agreement with creditors representing 66 per cent of its debts, only if the claimant restricts his claims to the same level as creditors who accepted the refinancing arrangement. In applying for judicial consent, a claimant must produce full documentation for its acquisition of title to the claim and disclose all financial terms.

This draft law is inspired by the Debt Relief (Developing Countries) Act 2010 in England which covers the 40 states that are part of the International Monetary Fund/World Bank Highly Impoverished Poor Countries, or the 2015 Belgian law which caps investors' recovery at the price they paid to acquire title to their claim. Unlike article 24 of *Loi Sapin II* which first met with some resistance from the lawmakers, we would expect article 24-*bis* to sail through the parliamentary discussion without too much trouble.

Notes

1 International Litigation News, April 2016, p23: '*Seizures against a state: what should garnishees in France do?*' by S Berland-Basnier.

2 There were in fact six awards: three partial awards on jurisdiction and the admissibility of certain claims, dated 30 November 2009, and three final awards on the merits on liability, damages and quantum, dated 18 July 2014, in each case one for each of three claimants, respectively, namely Hulley Enterprises Limited, Yukos Universal Limited and Veteran Petroleum Limited.

3 Section 1526 of the French Civil Procedure Code.

4 The Court of Appeal denied suspension of the enforcement of the awards but ordered that amounts recovered be set up in escrow with *Caisse des dépôts et consignations*, the French government-controlled financial institution ordinarily designated to such effect, until the outcome of the appeal from the 1 December 2014 exequatur orders.

5 Case C/09/477160, C/09/477162 and C/09/481619.

6 Specifically, the decision by the Dutch courts has no binding effect on the Paris Court of appeals in its expected adjudication of the appeal taken from the December 2014 French court exequatur orders, because under French arbitration law (sections 1525 and 1520 of the French Civil Procedure Code), the setting aside of the award in the country of the seat of the arbitration does not appear as being one of the grounds required for denying recognition or enforcement of an arbitral award. This is in contrast to Article VI(e) of the 1958 New York Convention. As French arbitration law is more favourable than the New York Convention, French law prevails: this is the rationale repeatedly used by French courts to deny any legal impact on the French courts of the setting aside of the award in the country of the seat of the arbitration.

7 *Cour de cassation*, 1 ch civ, 28 September 2011, *NML Capital Ltd v Argentina*, n°09-72.057.

8 These attachments were vacated by the Paris Tribunal, in a judgment upheld by the Court of appeals: see Paris Court of Appeal, *Russian Federation v Noga*, 21 June 2011, n°09/19983.

9 Attachment was released by the Tribunal in Bobigny on 2 July 2003, n°01/06987.

10 Art 26(8) of the Energy Charter Treaty which provides that 'each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards'.

11 Art 28.6 of the ICC Rules of Arbitration: 'by submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay…'.

12 *Cour de cassation*, 1 ch civ, 6 July 2000, n°98-19.068, *Creighton Ltd v Qatar Ministry of Finance*.

13 See para 37 of the 30 November 2009 Interim Award on Jurisdiction and Admissibility.

14 See para 5.95 of the judgment of the District Court in The Hague of 20 April 2016.

15 Paris Court of Appeal, *Orion Satellite Communications Inc v RSCC and Russian Federation*, 31 January 2013 (n°12/10267) and 31 October 2013 (n°12/16888).

16 Paris Court of Appeal, *Russian Federation v Noga*, 10 August 2000 (n°2000/14157)

17 In two series of decisions rendered in the *NML Capital Ltd v Argentina* matter, first for waivers applying to diplomatic immunities only (*Cour de cassation*, 1 ch civ, 28 September 2011, n°09-72.057), and second for all waivers of immunity from enforcement (three decisions by the *Cour de cassation*, 1 ch civ, 28 March 2013, n°10-25.938, 11-10.450 and 11-13.323).

18 *Cour de cassation*, 1 ch civ, 18 May 2015, n°13-17.751, *Commisimpex v the Republic of the Congo*.

19 In *Commisimpex v the Republic of the Congo*, the contract with The Congo contained an explicit waiver from any and all immunities from jurisdiction and enforcement; in addition, the claims derived from an ICC arbitration award, but the waiver built into the ICC Rules was not discussed in court, by reason of the requirement for an explicit waiver of immunities.

20 The Paris 'JEX' – judge in charge of disputes relating to the enforcement of claims – vacated on 16 May 2008 (n°08:80915) an attachment made on the bank account of the Russian news agency RIA Novosti, meant to secure claims by Noga against the Russian Federation; the judge denied that RIA Novosti was an emanation of the Russian government by finding that it had its own independent assets although these derived, but in part only, from contributions by the State, management was independent and only ten per cent of its profits reverted to the government. The same finding concerning Russian 'unitary enterprises' in the space industry was upheld by the *Cour de cassation* (1st ch civ, 12 May 2004, n°02-12920) R.

21 Judgments by the Paris JEX of 15 April 2016 concerning RSCC (n°15/82803), and Rossiya Segodnya and RIA Novosti (n°15/82058).

22 Judgments by the JEX in Evry of 19 January 2016 (n°15/05296) and 12 April 2016 (n°16/01068) concerning Roscosmos; same findings by the tribunal in Lyon on 10 May 2016 (n°2015/13501) concerning VGTRK and its shareholding in Euronews which could not serve for the benefit of creditors of the Russian Federation.

23 *Cour de cassation*, 1st ch civ, 14 March 2012, *RSCC v Orion Satellite Communications*, n°10-25560.

24 *Cour de cassation*, 1 ch civ, 28 September 2011, *NML Capital Ltd v Argentina*, n°09-72.057.

25 *Cour de cassation*, 1 ch civ, 28 March 2013, *NML Capital Ltd v Argentina*, n°10-25.938, 11-10.450 and 11-13.323, see the comments on these decisions by A. Blumrosen and F. Malet-Deraedt, 107 A.J.I.L. 638 [2013].

26 *Cour de cassation*, 1 ch civ, 13 May 2015, n°13-17.751, *Commisimpex v the Republic of the Congo*.

27 TGI Paris, *Argentina v NML Capital Ltd*, 27 November 2015, n°15/83274.

28 TGI Paris, *Argentina, BNP Paribas v NML Capital Ltd*, 27 November 2015, n°15/82120.

29 TGI Bobigny, *Argentina, Air France v NML Capital Ltd*, 31 December 2015, n°15/08371.

30 $2.4bn, representing a 392 per cent return on the original value of the bonds, as reported in *The New York Times* on 25 April 2016.

31 The Russian Federation successfully retaliated against Noga by claiming for, and being awarded, damages on account of Noga's multiple and repetitious actions, undeterred by its repeated court failures: Paris Court of Appeal, 21 June 2011, *Russian Federation v Noga*, n°09/19983.

32 Counsel for the *Yukos* claimants, E Gaillard, reported in the press (*Les Echos*, 10 June 2016) that the Russian Ministry of Foreign Affairs had sent a 'verbal note' to the French embassy on 6 March 2016, advising that attachments carried out in France were violating the spirit and the letter of international law and threatening retaliation against France, French citizens and French companies.

33 So called by the name of the Finance Minister, Mr Michel Sapin.

34 United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, signed by France on 17 January 2007, ratified on 28 June 2011, but not yet in force.

35 See *Cour de cassation*, 1 ch civ, 28 March 2013, *NML Capital Ltd v Argentina*, n°10-25.938, 11-10.450 and 11-13.323.