

## Paris

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### **French Cour de Cassation clarifies the regime of enforcement of arbitral awards against a State's tax claims**

In France, State immunity from execution is governed by Articles L.111-1-1 to L.111-1-3 of the Code des procédures civiles d'exécution. According to these articles, enforcement measures against property belonging to a foreign State may be authorised if said property is specifically used or intended to be used by the State other than for non-commercial public service purposes – so long as the State has provided an express waiver (without adding the requirement of a specific waiver).

However, enforcement measures against property of diplomatic missions or consular posts belonging to a foreign State may be authorised so long as both an express and specific waiver have been provided by the foreign State.

In an ICC arbitration, a Congolese company, Commisimpex, had secured an award against the Republic of Congo. The latter had expressly waived its immunity from execution.

In enforcing the award against the Republic of Congo's assets in France, Commisimpex attempted to seize all monetary obligations owed by French Company EDF Africa Services to the Republic of Congo. Particularly, Commisimpex discovered that EDF Africa Services' Congolese branch, Hema Congo, owed the Republic of Congo a considerable amount of money corresponding to various taxes. Consequently, Commisimpex requested that a corresponding amount be seized from EDF Africa Services.

After the seizure was undertaken by the French enforcement authorities, the Republic of Congo requested French courts to declare the enforcement measures null and void and order their release. To support its request, the Republic of Congo relied on three main arguments:

- First, it argued that a State's tax claims are assets which, by their very nature, relate to the State's exercise of its official powers as a public authority, and that consequently, a third party may only enforce against these tax claims if the State's waiver of immunity from execution is both express and specific (i.e., that the waiver expressly and specifically covers tax claims).
- Second, it argued that French courts could not validly collect taxes owed to the Republic of Congo as tax collection is a sovereign prerogative that belongs only to the State to which taxes are owed.
- Third, it argued that French courts could not implement enforcement measures against French company EDF Africa Services for the recovery of tax claims owed by its

Congolese branch Hema Congo - irrespective of the fact that Hema Congo is a branch with no legal personality and with accounts centralized within EDF Africa Services.

In a [decision](#) dated 13 April 2023, the French *Cour de Cassation* rejected each of the Republic of Congo's claims.

With respect to the first argument, the *Cour de Cassation* stated that, regardless of whether the assets that are subject to enforcement measures consist of tax claims, insofar as they are not specifically used or intended to be used by the State in the exercise of its diplomatic or consular missions, the latter's express waiver of immunity from execution is sufficient for these claims to be subject to an execution measure - without the need for a special waiver.

With respect to the second argument, the *Cour de Cassation* emphasized that the dispute did not concern the exercise, in France, of tax collection measures per se. Insofar as a State has expressly waived its immunity from execution, enforcement measures against a State's tax claims, implemented against taxpayers domiciled in France, is nothing but an ordinary enforcement measure which can be undertaken under French enforcement law.

With respect to the third argument, the *Cour de Cassation* decided that the principle of unicity of assets implies that debts arising in the course of a branch's business (carried out in a foreign country), may be pursued in the State where the company has its registered office. As such, Commisimpex's recovery of the amount corresponding to Hema Congo's tax debts can be pursued through enforcement measures applied against EDF Africa Services' assets.

Consequently, in both investment or commercial arbitrations involving a foreign State which has expressly waived immunity from execution, award creditors can, in principle, enforce against that State's tax claims in France. This is especially true if enforcement measures are implemented against a company incorporated in France, where enforcement is sought, for the recovery of taxes owed by its branch which operates on the territory of the foreign State against which the arbitral award was rendered.

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