

# Immunity from execution: collection of tax claims possible in the event of express waiver by the State (Ruling n° 259 – 18-20.915)

13/04/2023



Ruling No. 259

**Dismissal**

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

## **JUDGMENT OF THE *COUR DE CASSATION* (COURT OF CASSATION), FIRST CIVIL CHAMBER, 13 APRIL 2023**

The Republic of the Congo, with registered offices at [Address 4] (Republic of the Congo), brought appeal No. F 18-20.915 against the judgment delivered on 3 May 2018 by the *cour d'appel* (Court of Appeal) of Paris (Section 4, Chamber 8), in the dispute between:

(1) the company Commissions import export (Commisimpex), with registered offices at [Address 2] (Republic of the Congo),

(2) EDF Africa Services, a simplified joint stock company with registered offices at [Address 1],

(3) the Prosecutor-General to the *cour d'appel* (Court of Appeal) of Paris, domiciled at [Address 3], respondents in the quashing.

The plaintiff bases its appeal on the single plea for quashing appended to this judgment.

The case file has been sent to the Prosecutor-General.

On the report of Mr Hascher, judge, the observations of SARL Cabinet Rousseau and Tapie, lawyer of the Republic of the Congo, SARL Ortscheidt, lawyer of the company Commissions Import Export, and the advisory opinion of Mr Salomon, Advocate-General, after debate in the public hearing of 7 March 2023 attended by Mr Chauvin, president, Mr Hascher, judge-rapporteur, Ms Guihal, elder judge, Messrs Bruyère, Ancel, judges, Ms Kloda, Ms Dumas, Ms Champ, Ms Robin-Raschel, judge-referees, Mr Salomon, Advocate-General, and Ms Vignes, Chamber Registrar,

the First Civil Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after discussion in accordance with the law, has delivered the present judgment.

### **Account of the dispute**

### **Facts and procedure**

1. According to the ruling under appeal (Paris, 3 May 2018), in November 2016, the company Commisimpex, in performance of an arbitral award ordering the Republic of the Congo to pay it various sums, carried out a garnishment of receivables held by the company EDF Africa Services, which was liable to the Republic of the Congo for various taxes and duties.
2. The Republic of the Congo brought an action before an execution judge for nullity and for the release of the measure.

### **Pleas**

### **Review of the plea**

### **On the third part of the plea,**

### **Statement of plea**

3. The Republic of the Congo objects to the ruling that it rejected its application for nullity and for the withdrawal of the garnishment order, whereas "if States may waive, in writing, the immunity from execution they have in respect of assets or categories of assets used or intended to be used for public purposes, this waiver is valid only on condition that it is express and special, by mentioning the assets or categories of assets for which the waiver is granted; fiscal or social claims of a State are assets that are by nature attached to the exercise of public prerogatives, such that they can be the subject of execution activities carried out by a third party only on condition that the State in question has specifically renounced its immunity from execution on said claims; In order to validate the garnishment order at issue, the *cour d'appel* (Court of Appeal), on previously established grounds, held that, since it was not argued that the seized property would be used or intended to be used for the functions of the diplomatic mission or consular posts of the Republic of the Congo, its special missions or its missions to international organisations, it was inferred that, in accordance with the principles of customary international law, shown in the Law of 9 December 2016, if there were an express waiver by the Republic of the Congo of its immunity from execution, these claims could be the subject of an execution measure regardless of the fact that the seized property is specifically used or intended to be used for specific non-commercial purposes, or whether it is a tax claim and the claim giving rise to the seizure is not related to the subject of the seizure; in so judgment, when it resulted from its own findings that the garnishment of 15 November 2016 had only made it possible to determine the sums for which EDF Africa Services, through its branch in Hema Congo, was liable to the Republic of the Congo in respect of tax debts, such that execution measures could only be imposed on said sums provided that the Republic of the Congo had specifically renounced its immunity from execution on those claims, the *cour d'appel* (Court of Appeal) again violated Article L. 111-1 of the Civil Execution Proceedings Code."

## Statement of reasons

### Court's response

4. Having noted that it was not argued that the seized assets were specifically used or intended to be used in the exercise of the diplomatic or consular missions of the Republic of the Congo, the *cour d'appel* (Court of Appeal) rightly concluded that, in accordance with the principles of customary international law reflected in the United Nations Agreement of 2 December 2004 on the immunities of States and their property, the express waiver of immunity from execution, granted by that State in the dispute between itself and Commisimpex, was sufficient for the assets in question to be subject to an execution order, regardless of whether they constituted claims with no special waiver being required.
5. The plea is therefore unfounded.

## Pleas

### On the first and second parts of the plea

#### Statement of plea

6. The Republic of the Congo makes the same objection to the judgment, whereas:

"(1) the principles of territoriality of the means of execution and collection of tax exclude the fact that tax claims may be considered in the territory of a State other than the State of taxation; It follows that the person with a writ of execution against a State cannot proceed with the garnishment in the territory of a foreign State for sums held by a third party in respect of tax claims of the debtor State of the creditor; whereas by holding, in order to validate the garnishment at issue, that the dispute did not concern the exercise in France of constraint measures with a view to the Republic of the Congo recovering tax claims and that the sums seized do not concern the tax revenue or proceeds in themselves, but rather a tax debt of a third party, when it resulted from its own findings that the debt of EDF Africa Services, a third-party debtor, was exclusively of a tax-related nature, only the Republic of the Congo could carry out execution proceedings against the sums held by said company in order to recover the corresponding sums, the *cour d'appel* (Court of Appeal) violated Article L. 111 - 1 of the Civil Execution Proceedings Code;

(2) Tax and social claims are located in the territory of the State in which the economic activity that constitutes the corresponding operative event was carried out; the profits made by the permanent establishment of an undertaking are as a matter of principle taxed in the State in which the establishment in question carries on its business, regardless of whether it has no legal personality or whether its accounts are centralised in another State; by judgment that, in accordance with the principle of the unity of assets, the claims of the debtor, EDF Africa Services, had to be located "at the latter's registered office, as the latter correctly understood, since it declared the debts it had with regard to the Republic of the Congo, for which it is solely liable, its branch not having legal personality, regardless of the reservations issued regarding their being possibly subject to garnishment", the *cour d'appel* (Court of Appeal) violated Article L. 111-1 of the Civil Execution Proceedings Code."

## Statement of reasons

### Court's response

7. Firstly, the principle of the unity of assets and liabilities resulting from Article 2284 of the Civil Code implies that legal action may be taken against the company's registered offices to recover debts arising in the course of the activity of a branch office. The situation is no different in the case of a tax debt generated by the activity carried out in the territory of a foreign State by the branch office of a company with registered offices in France.
8. Secondly, while the assessment of tax and its collection in its own territory constitute the prerogatives of a sovereign State, and while the principle of territoriality of execution precludes a State from recovering its tax claims in the territory of another State by means other than those of inter-State cooperation, once a foreign State renounces its immunity from execution, no principle precludes the tax claims it holds on taxpayers domiciled in France from being the subject of ordinary law execution measures by the creditor benefiting from said waiver.
9. The *cour d'appel* (Court of Appeal) rightly held, on the one hand, that the principle of territoriality of tax recovery did not apply since the dispute did not concern the exercise of measures in France for the recovery of tax claims by the Republic of the Congo, and on the other hand, that by virtue of the principle of the unity of assets, the Republic of the Congo's claims on EDF Africa Services could be assessed at the latter's registered offices.
10. The plea is therefore unfounded.

### Operative part of the judgment

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

Orders the Republic of the Congo to pay the costs;

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the claims;

Thus decided by first civil chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president in public hearing on the thirteenth day of the month of April of the year two thousand and twenty-three.

President : Mr Chauvin  
Advocate-general : Mr Salomon  
Reporting Judge : Mr Hascher  
Lawyer(s) : SARL Cabinet Rousseau and Tapie – SARL Ortscheidt

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