Jurisdictional Immunities of States and their Property, according to customary international law:conditions under which execution measures can be authorised on property

03/11/2021

Ruling n°656 (FS-B) of 3 November 2021, appeal no. F 19-25.404 - First civil chamber

Dismissal

Appellant(s): Rasheed Bank

Respondent(s): Citibank

Rasheed Bank, whose registered office is at [Address 4] (Iraq), lodged an appeal no.*F 19-25.404* against the ruling delivered on 17 October 2019 by the *cour d'appel* (Court of Appeal) of Paris (Division 4, Chamber 8), in the dispute between it and Citibank, whose registered office is at [Address 1] (United States of America), respondent to the appeal.

In support of its appeal, the appellant invokes two pleas for quashing as appended to this ruling.

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

In the report of Ms Guihal, Judge, the observations of SCP Fabiani, Luc-Thaler et Pinatel, lawyer for Rasheed Bank, SCP Claire Leduc et Solange Vigand, lawyer for Citibank, and the opinion of Ms Caron-Déglise, Advocate-General, following arguments at the public hearing held on 14 September 2021, during which were present Mr Chauvin, President, Ms Guihal, Reporting Judge, Ms Auroy, Elder Judge, Mr Hascher, Ms Antoine, Mr Vigneau, Ms Poinseaux, Ms Guihal, Mr Fulchiron, Ms Dard, Judges, Ms Gargoullaud, Ms Azar, Mr Buat-Ménard, Ms Feydeau-Thieffry, Judge Referees, Ms Caron-Déglise, Advocate-General, and Ms Berthomier, Chamber Registrar,

the First Civil Chamber of the *Cour de cassation* (Court of cassation), composed of the above-mentioned President and Judges, pursuant to Article R. 431-5 of the Judicial Code, after having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Paris, 17 October 2019) - on the basis of a 27 September 2000 judgement of the Amsterdam District Court, ordering Rasheed Bank, an emanation of the Iraqi State, to pay Citibank various sums – Citibank enforced on 28 July 2011, a precautionary seizure of claims held by Natixis, which was converted into a garnishee order dated 26 June 2014, following the exequatur of the Dutch ruling. 2. Rasheed Bank brought a challenge to this seizure before the execution judge [*juge de l'exécution*].

Reviewing pleas

On the first three parts of the first plea, and the second part of the second plea, appended hereafter

3. Pursuant to Article 1014, paragraph 2 of the Civil Procedure Code, it is not necessary to have a specially reasoned decision on the first three parts of the first plea which are clearly not of such a nature as to entail quashing, nor on the fourth plea, which is inadmissible.

On the fourth through seventh parts of the first plea

Statement of plea

4. Rasheed Bank objects to the ruling that validates the 26 June 2014 conversion order, whereas:

"4°/ An additional condition for the implementation of a coercive measure targeting property of a foreign State - not provided for under the international law covering immunity from enforcement as derived from the 2 December 2004 Convention, but not explicitly prohibited by it - does not constitute an infringement of this law, which even though it sets a lower limit, it does not set a ceiling to the protection granted to States. In order to validate the contested seizure, the ruling under appeal, after recalling that Article *19* of the 2 December 2004 Convention "stipulates that allocating seized property to an operation falling under private law constitutes a sufficient condition to allow the exercise of an execution procedure, without it being necessary for the property to have a link with the claim" ; determines that it is necessary

"therefore to verify whether the seized property is connected to an economic, commercial or civil operation under private law, as this property must have a link to the entity targeted by the proceedings". Even though requiring a link between the seized property and the claim is not necessary to comply with Article *19* of the United Nations Convention of 2 December 2004, it is not contrary to it. In so ruling, the *cour d'appel* (Court of Appeal), which relied on a radically inoperative ground, infringes Article 455 of the Civil Procedure Code.

5°/ The right of access to a court guaranteed by Article 6, § 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms - and of which the enforcement of a court decision is a necessary extension - does not preclude a limitation to this right of access, arising from the immunity of foreign States, as long as this limitation is enshrined in international law and does not go beyond the rules of international law recognised in the matter of State immunities. These rules are those of customary international law, where applicable reflected in the United Nations Convention of 2 December 2004. By stating peremptorily that "the requirement of a link between the seized property and the claim is contrary to Article 6, § 1 of the ECHR, by the disproportionate infringement it causes without a legitimate aim to the creditor's right to the forced execution of legal decisions", without first establishing that this requirement was contrary to customary international law, as reflected in the Convention of 2 December 2004, the *cour d'appel (*Court of Appeal*)* did not provide a legal basis for its decision under Article 6, § 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

6°/ Limitation to the right of access to a court is compatible with Article 6, § 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms insofar as it has a legitimate aim and there is fair proportionality between the measures employed and the aim pursued. By merely holding that "the requirement of a link between the seized property and the legal claim is contrary to Article 6, § 1 of the ECHR, by the disproportionate infringement it causes without a legitimate aim to the creditor's right to the forced execution of legal decisions", without establishing in what way, with regard to its consequences on the evidentiary field in particular, this requirement limited the right of Citibank to the enforcement of the court decision in such a way that its very substance was affected, the *cour d'appel* (Court of Appeal) did not legally justify its decision in the light of Article 6, § 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms. 7°/ Article L. 111-1-2 of the Civil Execution Proceedings Code, which provides that execution measures may be authorised in the event of a judgement against a foreign State on property specifically used - or intended to be used - for purposes other than non-commercial public service that has a "link with the entity against which the proceedings have been brought", concerns only enforcement measures implemented after 10 December 2016, the date on which the 9 December 2016 law came into force. Nevertheless, the *cour d'appel* (Court of Appeal) infringed Article 2 of the Civil Code in holding that this provision, "although subsequent to the preventive seizure and its conversion order", must "be applied to the present dispute, due to a need for consistent application of the rules in this area and for the sake of legal certainty", which amounted to applying it retroactively."

Court's response

5. According to customary international law - as reflected in Article 19 of the United Nations Convention of 2 December 2004 on Jurisdictional Immunities of States and their Property - in the absence of a waiver of immunity from enforcement, or an appropriation of the seized property in satisfaction of the claim, the property of a foreign State or its emanations may not be the subject of a measure of execution by virtue of a ruling or arbitral award, unless it is established that the property is specifically in use or intended for use by the State for other than non-commercial public service purposes and is in the territory of the State of the forum, and has a connection with the entity against which the proceeding was directed.

6. The *cour d'appel* (Court of Appeal) rightly stated that it follows from customary international law, as reflected in the above-mentioned Convention, that it is not necessary for the property of a State's emanation to have a connection with the claim, but that it must have a connection with the entity against which the proceedings are brought, in order to be seizable. 7. On these grounds alone, leaving aside the superfluous grounds criticised by the fifth to seventh parts of the plea, the *cour d'appel* (Court of Appeal) lawfully justified its decision on this count.

On the first part of the second plea,

Statement of plea

8. Rasheed Bank made the same criticism to the ruling, when "execution measures can only be implemented against a foreign State or its emanation on property specifically used or intended to be used other than for non-commercial public service purposes, it is incumbent on the seizing creditor to establish the intention of the State or its emanations to use the seized property for a commercial operation. By affirming the contrary, on the hypothetical grounds that such proof would have been impossible", the *cour d'appel* (Court of Appeal) infringed customary international law, as expressed on this point by the United Nations Convention of 2 December 2004, together with Article 9 of the Civil Procedure Code."

Court's response

9. According to customary international law, as reflected in the above-mentioned United Nations Convention, in the absence of a waiver of immunity from enforcement, or an appropriation of the seized property in satisfaction of the claim which is the subject of these proceedings, the property of a foreign State or its emanations may not be the subject of a measure of execution by virtue of a ruling or arbitral award, unless it is established that the property is specifically in use or intended for use by the State for other than non-commercial public service purposes.

10. After recalling that the non-seizability of property of a State or its emanations was a matter of principle and that it was therefore incumbent on the pursuing creditor to prove the contrary, the *cour d'appel* (Court of Appeal) held that the seized funds had been deposited by Rasheed Bank in an account opened for the purpose of constituting cash collateral. A financial expert's report made clear that this account had been set up in the mid-1990s, at a time when it was common for Rasheed Bank to present itself as a bank independent of the Iraqi State, carrying out day-to-day commercial operations, which still constituted part of its activity. Finally, the measures for freezing Iraqi assets resulting from the sanctions imposed by the United Nations after 6 August 1990 ruled out the possibility that the funds deposited as cash collateral could have changed use and that movements could subsequently have affected the account at issue.

11. From these findings and assessments, the *cour d'appel* (Court of Appeal) was able to deduce, without reversing the burden of proof, that the seized assets, which were an instrument of bank guarantee set up in connection with commercial transactions, were by their very nature intended to be used for purposes other than non-commercial public service.

12. The plea, which goes further than the law by requiring the demonstration of an intentional element, is therefore unfounded.

ON THESE GROUNDS, the Court :

Dismisses the *appeal*; Orders Rasheed Bank to pay the costs; Pursuant to Article 700 of the Civil Procedure Code, dismisses Rasheed Bank's claim and orders it to pay Citibank the sum of EUR 3,000; Thus decided by the *Cour de cassation* (Court of cassation), First Civil Chamber, and pronounced by the President at the public hearing of the third of November, two thousand and twenty-one.

President : Mr Chauvin
Reporting Judge : Ms Guihal
Advocate-General : Ms Caron-Déglise
Lawyers : SCP Fabiani, Luc-Thaler et Pinatel - SCP Leduc et Vigand

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