Argentina's Diplomatic Immunity in Belgium and France

Should waivers of diplomatic immunity in financial contracts be taken seriously? Should they be interpreted as narrowly as possible? Should it be specifically the case for states close to bankruptcy? For the same reasons, should the scope of diplomatic immunity be interpreted broadly?

These questions arise after two judgments delivered in the same case by the French supreme court and the Court of appeal of Brussels last summer interpreted differently the same contractual clause whereby the Republic of Argentina had waived its sovereign immunity in a financial contract.

Background

On Christmas 2001, the gift of Argentina to its creditors was to declare a moratorium on payments of its external debt. One such creditor was NML Capital Ltd, which was the beneficial owner of bonds issued by Argentina in year 2000. As the relevant financial contracts contained a clause granting jurisdiction to New York courts, the creditor sued Argentina before a U.S. federal court, and obtained in 2006 a judgment for USD 284 million.

In the summer 2009, NML Capital initiated enforcement proceedings in Europe. It had enforcement authorities carry out provisional attachements over banks accounts of the Argentine embassies (and of various other Argentine public bodies or missions to international institutions such as UNESCO) both in France and in Belgium.

Argentina challenged the validity of these provisional attachements on the ground that they violated its diplomatic immunity.

Argentina's Waivers of Sovereign Immunities

The relevant financial contracts contained clauses whereby the Republic waived all immunities for the purpose of enforcing a judgment ruling against it in the context of the relevant contracts. Each of the clauses in the different financial contracts then provided for exceptions, i.e. assets over which enforcement of the

judgment could not be sought. The first exception was the reserves held by the central bank of Argentina. The second and third exception were two categories of public assets on Argentina's territory. The fourth were certain assets related to the budget of Argentina as defined by a particular Argentine statute.

This looked like carefully drafted clauses. None of them mentioned diplomatic immunity, or diplomatic assets. At the same time, the only assets which the clauses excluded from the waiver were located in Argentina, which suggested that diplomatic assets were covered by the waiver clause.

Belgium

In a judgment of 21 June 2011, the Brussels Court of Appeal dismissed Argentina's challenge and held that the bank accounts could be attached by the plaintiff.

With respect to the scope of the waiver clause, the court found that the 1961 Vienna Convention on diplomatic relations only provides for one requirement for waiver of the diplomatic immunity: it should be express. The court ruled that the waiver in the financial contract was express. It rejected the argument that the diplomatic immunity could only have been waived by a clause providing specifically that diplomatic immunities were also waived, as there is no such requirement in the 1961 Vienna Convention.

France

In a judgment of 28 September 2011, the French supreme court for private and criminal matters (*Cour de cassation*) held that Argentina still benefited from its diplomatic immunity, and that the provisional attachements carried out in France were thus void.

With respect to the scope of the waiver clause, the court held that waivers of diplomatic immunities must not only be express, but also special, i.e. provide specifically that they cover diplomatic assets. As it was perfectly aware that the second requirement is absent from the Vienna Convention, the court relied on customary international law. The judgment, however, is as cryptic as all judgments of the court, and thus does not explain how the court comes to this conclusion about the content of customary international law, and whether particular sources were considered.

With respect to the scope of the diplomatic immunity, the Vienna Convention also raised an issue, as it does not mention bank accounts among the assets covered by the diplomatic immunity. Again, the court held that, under customary international law, the diplomatic immunity extended to the accounts of embassies. On this point, the Brussels Court of appeal had reached, reluctantly it seems, the same conclusion.

Further readings

The enforcement of the judgment was also sought, and challenged, in the United Kingdom. The UK Supreme Court ruled on the case in a judgment of July 2011.