Finally, Spaanderdam argued that Dutch courts must apply restraint when assessing setting aside applications.

The Supreme Court held that there is no place for a restrained application of article 1065 sub 1(e) of the Dutch Code of Civil Procedure if the parties' fundamental right to a full and fair opportunity to present their case is violated. The Supreme Court considered this right to be of no less significance in arbitral proceedings than in proceedings before state courts. With respect to the application of rules of evidence by arbitral tribunals, the Supreme Court held that the tribunal's discretionary power is irrelevant in this case because an arbitral tribunal must at all times ensure the parties' equal right to a full and fair opportunity to present their case.

In a number of prior landmark decisions, the Supreme Court has stressed the importance of an arbitration-friendly environment, in which setting aside applications are only granted in very limited circumstances. With this decision, the Supreme Court seems to have broadened the basis for annulment actions in cases where the fundamental rights of due process are at stake. The rationale for the decision of the Supreme Court seems to be that a positive arbitration climate is also enhanced by the protection of the parties' fundamental rights to fair trial and equal treatment in arbitration proceedings, even if that would lead to an increased number of successful setting aside actions.

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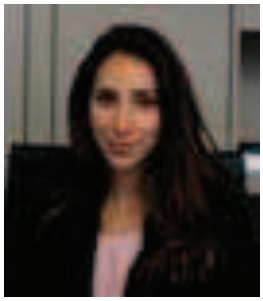
Switzerland



Noradèle Radjai, Lalive, Geneva

Moscow Center for Automated Air Traffic Control v Commission de surveillance des offices des poursuites et des faillites du canton de Genève (Swiss Supreme Court, 15 August 2007)

It is well-established in international arbitration precedents, scholarly writings and even certain statutory provisions, such as Art. 177(2) of the Swiss PIL Act, that state parties that enter into an arbitration agreement cannot escape arbitration in the event of a dispute falling within the ambit of the agreement.

That said, state parties are granted certain advantages when it comes to resisting the enforcement of arbitral awards. Assets which the State requires in order to perform its public duties benefit from immunity from execution. They cannot be seized.

The question was recently considered by the Swiss Supreme Court in the latest chapter of the ***Noga*** saga: Russia's resistance against international arbitral awards in favour of a Swiss corporation (*Noga*) is at the core of a series of court decisions in a number of countries including France, Switzerland, and the USA, which test the limit of State immunity. The Swiss Supreme

Court decision of 15 August 2007 was published in December 2007 (Decision 7B.2/2007, 15 August 2007, *Moscow Center for Automated Air Traffic Control v Commission de surveillance des offices des poursuites et des faillites du canton de Genève*, ASA Bull. 1/2008, 141-151).

Noga had obtained an arbitral award in its favour but was unable to get it enforced, in spite of some widely reported attempts to seize Russian assets. On 31 July 2002, the Russian Federation and Noga entered into a settlement agreement. However, the dispute continued.

In February 2003, Noga started enforcement proceedings in Geneva for an amount of CHF 1.185 billion, based on the settlement agreement. On September 2005, the Debt Collection and Insolvency Office of Geneva (the "Office") seized all assets held on behalf of the Russian Federation by the International Air Transport Association (IATA) in Geneva (in Germany, another party who had been unable to enforce an award against Russia had also tried to seize transit rights. Without success due to the absence of a waiver of immunity: *Sedelmayer v Russia*, *BGH*, 4 October 2005, VII ZB 9/05, ASA Bull. 1/2006, 175). The Moscow Center for Automated Air Traffic Control ("Center") claimed the assets as its own, and filed a complaint with the Office's supervisory board. The board upheld the decision; the Center appealed to the Swiss Supreme Court.

The Center argued that the attachment was not proper since, *inter alia*, the Center alleged that it was a legal entity distinct from the Russian Federation and the owner of the assets seized at IATA in its own right. In the event that the assets were considered to belong to the Russian Federation, the Center argued that they were protected by the State's immunity from execution and could not be seized.

The Supreme Court dismissed the appeal.

For procedural reasons, the Supreme Court was not authorized to review the determination of the Office's supervisory board that the Center's assets are state property. The Court noted, however, that this finding was supported by the bylaws of the Center according to which the latter was a "*corporate entity taking the legal form of a state company that is property of the Russian Federation*". It was, therefore, clear that the Center was part of the Russian State. Hence, the Center's assets with IATA could rightfully be seized as belonging to the Russian Federation.

The Supreme Court accepted that immunity could be a bar to attachment. The **scope of immunity** is governed by public international law as established by statutory law (treaties) as well as usages. The Court did not accept that the European Convention on State Immunity of 16 May 1972 (RS 0.273.1) should be applied as customary law, since it had been neither signed nor ratified by the Russian Federation. Therefore the Court examined the immunity defences in light of general principles of public international law. These principles were codified in the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the General Assembly on 2 December 2004. While not yet in force, the Convention was signed by both Switzerland and the Russian Federation in 2006. The Supreme Court recalled that Switzerland allowed the enforcement against assets belonging to foreign States only if **three prerequisites** were met:

First, the underlying claim must relate to the activity *iure gestionis* and *not iure imperii* of the State. This was not contested. Indeed, the settlement agreement explicitly stated that Russia recognized its "private and commercial nature". *Second*, the claim must have a sufficient link with Switzerland ("*Binnenbeziehung*"). Irrespective of the applicable substantive law (Luxembourg law), the settlement agreement had such a link, as it had been executed in Switzerland. *Third*, the assets must not be allotted to public functions of the State. The Center argued that the assets that had been seized at IATA were taxes which were levied by the Center based on the State's sovereign prerogative. The Office's supervisory board had left the nature of the assets open, considering that the Russian Federation had waived its immunity in the settlement agreement.

The Supreme Court followed the lower court's view that the **settlement agreement contained a waiver**: "*The Government recognizes expressly the private and commercial nature of the present settlement agreement and expressly and without reservation waives any immunity from jurisdiction and/or enforcement*".

The Center argued that this waiver should not be construed literally. Since the waiver mentioned the private and commercial nature of the settlement, the waiver could only concern assets used *iure gestionis*. The Center relied on the decision by the Cour d'appel of Paris of 10 August 2000 (Cour d'appel de Paris, Decision no. 287, 10 August 2000, *Société Noga v Fédération de Russie*, in ASA Bull. 2000, 610 ; E. Gaillard, *Convention d'arbitrage et immunités de juridiction et d'exécution des Etats et des organisations internationales*, ASA Bull. 2000, 471) that had annulled the attachment by Noga of accounts of the Russian embassy, of the commercial mission of the Russian Federation and of the permanent delegation Federation with the UNESCO. The Paris court had considered that the waiver in the underlying contract ("*waives any right to immunity regarding the application of the arbitral award*") did not prevent Russia from relying on diplomatic immunity.

The Supreme Court distinguished the Paris case. The Paris court did not rule that the general principles of public international law prohibited waivers of immunity for assets *iure imperii*. Rather, the reason why the Paris court did not allow the attachment was the particular nature of the assets at hand, namely that they belonged to diplomatic missions and were governed by the Vienna Convention on Diplomatic Relations. The Center had not argued before the Supreme Court that the assets frozen with IATA were of a similar nature.

The Supreme Court found that the waiver in the settlement agreement could not possibly be interpreted as covering only assets that belong to the activity *iure gestionis* of the Russian Federation for which in any event no immunity exists. Rather, the clear wording of the waiver made it clear that it aimed at assets that had been allotted by the State to the performance of public powers, *iure imperii*.

The Supreme Court also remarked in an *obiter dictum* that the Center's line of argument was inconsistent with the stance it took regarding the issue of ownership of the amounts held by IATA. The Center had claimed that the latter resulted from private law contracts with airway companies which the Center concluded independently of the Russian State.

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