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Commercial transactions: Advance or Retreat?
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I have been asked to give the French point of view on the commercial transaction exception. By way of introduction I shall start with some information on the legal sources of the law of state immunity in France. One should remember that in the field of state immunity, rules are not codified yet in France and this notwithstanding the well-known French tradition of codification. Such *vacuum legis* usually means that the lawyer looking for information will have to quench his thirst from other sources and particularly from case law on the one hand and from international treaties on the other. As far as French law is concerned, case law is so far more important than treaties as sources of law in our field. As you may know, France is party to the 1961 Vienna Convention on Diplomatic Relations but of course this Convention does not deal with the law of state immunity. Apart from this France has entered into a number of bilateral agreements dealing with the immunity of states, but France never became party to the 1972 Basel Convention on State Immunity. As you can see the field remains relatively untouched, either by treaty or by statute in France. Hence it fell to the court to rule by themselves on these issues. They did a good job in this respect, but case law remains case law and for a French lawyer nothing is better than a good set of hard and fast rules written in black letters, in a legal and binding instrument. It clearly means, and this is the first point of interest to us, that without a doubt in France, the new UN Convention appears as a good challenger against the current judge-made law. At least this is true with respect to the sources of law issue. But of course everyone knows that an improvement of the legal instrument from the sources point of view, is not necessarily worth it if the improvement of the same legal instrument from a contents point of view, does not follow. The question is whether the change brought about by the UN Convention and its possible ratification by France, would be a change for the better. I shall address this issue through the prism of the commercial transactions exception. Three articles of the Convention are concerned with the commercial transaction exception.

On the one hand we have Article 5 and Article 10. The first text sets out the principle of state immunity from jurisdiction of foreign courts. The second complements the principle by an exception: no immunity for the State involved in a commercial transaction at least with respect to that transaction.

On the other hand we have Article 2.1(c) which completes the picture by explaining the meaning of the words 'commercial transaction'. I must confess that combined, Article 5 and 10 will fit

more easily with the current French law on State immunity than the single provision laid down by Article 2. As far as Articles 5 and 10 are concerned, one can say that the gist lying behind the scheme is rather in line with French law. Like the UN Convention in these provisions, French law recognises as a matter of principle in favour of foreign states, immunity from jurisdiction of the French court but provides for an exception in the cases of commercial transactions. So like the UN Convention, France has received a principle of restrictive immunity and one can specify that this principle has been in force as early as the inter-war period. Being restrictive the immunity is not automatically granted to the defending foreign state. It is enjoyed by the state only under certain circumstances which have been clarified by French case law and on which we will focus now.

Restrictive immunity (Convention, Articles 5 and 10)

As far as state immunity from jurisdiction of the French courts is concerned, the principle gradually emerged that the foreign state is not accountable before the court for the acts it performs *jure imperii*; that is to say in its capacity as foreign state. But the foreign state is accountable in the French courts for acts it performs *jure gestionis*, in other words for commercial activities similar to the usual activities of private operators on the market. As soon as the distinction has been made between these, the difficulty is then drawing a precise line between the two categories.

After some hesitation the French *cour de cassation* came up with a major ruling in one of the leading cases on this issue, *Soc. Levant Express Transport c/ Chemin de fer du gouvernement iranien*. It involved a claimant, a French company, suing the Iranian government railways for breach of contract after goods which had been sent by the claimant in Iran were found damaged due to shortcomings of the carrier and ultimately by Iranian railways itself. As a public company the Iranian railways invoked its immunity from jurisdiction before the French court. The claim was dismissed on the ground that : ‘*Foreign States [...] enjoy immunity from jurisdiction of French Courts provided that the act giving rise to the dispute is an act of public power [“acte de puissance publique”] or this act has been performed in the interest of public service.*’ In other words when the relationship between the foreign state and the claimant would be by French standards governed by public law, the principle of immunity operates and the foreign state is protected. When on the other hand the relationship between the foreign state and the claimant would be by French standards governed by private law, an exception to immunity operates which could be called a commercial transaction exception (even though that would not be common parlance in France) and the foreign state loses its immunity. This case law has been confirmed time and again; most recently in 2003 by an interesting judgment by the *cour de cassation*, where a case summed up the current French scheme in a more modern language, in fact close to the UN Convention. In *X. c/Royaume d’Arabie Saoudite* the court states: “*Foreign States [...] enjoy immunity from jurisdiction of French Courts provided that the act giving rise to the dispute relates, by its nature or by its purpose, to the sovereign activities of these States and therefore, is not a commercial transaction [“un acte de gestion”]*”.

One could not dream of a better statement of the principle of state immunity from jurisdiction and of the exception brought to this principle of immunity in the case of a commercial transaction. So far as we can see, the similarity between the UN Convention and French law is quite close. However this is not the same for Article 2.

The scope of the restriction to immunity in the case of a commercial transaction (Article 2.1, c)

As far as Article 2 is concerned, the matching of French law with UN convention is not obvious. This article determines the meaning of the terms “commercial transaction”. One first problem one could say is repellent for France when considering the issue of ratification of the Convention, comes from the list method used by Article 2 to determine what is meant by the wording ‘commercial transaction’. Instead of giving a definition of the terms, Article 2 starts by enumerating categories of contracts deemed to be commercial transactions; contracts for the sale of goods, contracts for the supply of services, contracts for loans and so on. This list method has been used in the 1972 Basel Convention and it was one of the reasons for France deciding not to ratify this instrument.

One could wonder here what is wrong for France with the list method. The problem with a list replacing a definition is if the list is meant to be exhaustive, it is likely to leave out of its range a number of unlisted contracts although there are substantive reasons why these contracts should be covered. To be honest I do not think that this should be a major concern with the list established by Article 2 of the Convention. The reason for this is that the problem has been correctly addressed in the Convention. The list enumerated in Article 2 is not exhaustive, thanks to the provision of Article 2.1(c)(iii). Under this provision every contract not appearing in the list is nevertheless a commercial transaction provided it has a commercial, industrial, trading or professional nature. The risk of an incomplete list is therefore avoided thus facilitating French agreement with the Convention.

More difficult for France might be the problems arising from the restrictive role left by Article 2 to the purpose element in the operation of characterisation of the transaction with respect to the notion of commercial transaction. It clearly stems from Article 2 that the characterisation of the transaction depends primarily on the nature of the contract or transaction at issue. For example, if the contract has the nature of a sale of goods it should be in principle a commercial transaction under Article 2. We remember however that French law as it results from the case law mentioned earlier, requires that either the nature or the purpose of the act be taken into account to characterise it as done *jure imperii*. Hence in France a contract for sale of goods can be a contract done *jure imperii* if it is concluded in the interests of public service. The purpose of the contract obviously being taken into account for the characterisation of the contract. The discrepancy is not totally ignored by the Convention. Indeed Article 2 does not rule out any role for the purpose element in the characterisation of the transaction. Thanks to an express provision in Article 2 the purpose of the act can be taken into account under certain circumstances. Under Article 2 the purpose of the act should be considered ‘...if in the practice of the State of the forum that purpose is relevant to determining the non-commercial character of the contract...’. At first sight this provision allows France to stick to its current solution and to use the purpose element in the operation of characterisation. Nevertheless an in-depth analysis of the scheme laid down by Article 2 shows that the compromise lying in this text may be some kind of *trompe l’oeil*. Indeed one should keep in mind that the French solution has been admitted in the hope that reciprocity would come from foreign countries in similar cases involving France. One of the goals of the French case law as it has been described, is to permit France by way of reciprocity, to keep

within its jurisdiction cases involving acts performed by French administration and characterised as done *iure imperii* due to the nature or to their purposes.

Now this reciprocity will be ruled out once the Convention comes into force, at least with respect to countries whose practice is not yet settled in favour of taking into account the purpose element. For these countries, Article 2 will prohibit such a taking into account of the purpose element excluding reciprocation toward France. This is why if, by and large, the UN Convention is inspired by a spirit of compromise, the solution it enshrines does not fully fit with French law.

Let me finish with an optimistic view. Every internationalist in this room knows that small inconsistencies between domestic law and uniform law should not be a bar to the support of uniform law by States. For this reason one can hope that the uniformity will prevail over local specificities in France as elsewhere and the UN Convention will have the success it deserves.