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Are State Creditors Defeated by State Immunity from Enforcement in France?

Saria María Moreno Sanchez (MIDS Geneva) · Friday, December 30th, 2016

The fact that foreign States are normally entitled to immunity from enforcement before national jurisdictions pursuant to customary international law, has always been the stumbling block in the enforcement of arbitral awards against them.

In France to the date State immunity from enforcement has been regulated by case law, but a new Bill on transparency, anti-corruption and modernisation (Sapin II) has been adopted to insert provisions aimed at implementing customary international law on sovereign immunity from enforcement into the French Civil Enforcement Procedure Code.

The National Assembly has recently decided to intervene by codifying these provisions after the Cour de Cassation Decision of 13 May 2015, relied on the U.N. Convention on Jurisdictional Immunities of States and their Property (U.N. Convention), which is not yet in force, to determine when State property may be subject to post-judgement measures. The Court reached its decision on the basis that the U.N. Convention reflects the current criteria for State immunity.

The draft article reads as follows:

Article 59

Following article L. 111-1 of the Civil Enforcement Procedure Code the subsequent articles are added:

Article L. 111-1-1. Provisional and enforcement measures shall only seize Foreign States property if a preliminary judicial authorization has been issued.

Article L. 111-1-2. Provisional or enforcement measures against property of a foreign State cannot be authorized by a judge unless one of these conditions is satisfied:

1° The State has expressly consented to the taking of such measures;

2° The State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding;

3° A decision or an arbitral award has been rendered against a State and it has been established that the property is specifically in use or intended for use by the State for other than government

non-commercial purposes and has a connection with the entity against which the proceeding was directed...

On 15 November 2016, the Senate objected to the adoption of Sapin II before the Constitutional Council, stating that article 59 was incompatible with the rights guaranteed by the French Constitution as it impairs creditors' rights in a manifestly excessive manner.

The requirement for preliminary judicial authorisation for the enforcement of awards, provided in Sapin II, was one of the significant points considered by the Senate to be irreconcilable with urgent enforcement measures. The Senate argued that under the Sapin II provisions, State creditors aiming to enforce an award in France would be obliged to obtain a judicial authorization from local courts, thereby hampering the enforcement of any measure targeting the property of foreign States in France.

In the Senate's view, this would inevitably lead to the relocation of movable assets by foreign States and will put the burden of proof on States' creditors as they will be bound to demonstrate before a local court that the property at stake is solely for commercial purposes.

Although Sapin II was intended to implement the U.N. Convention, the Senate highlighted that integrating a preliminary judicial authorisation for enforcement measures was not envisaged by the U.N. Convention and is therefore contrary to the right to enforce judicial decisions guaranteed by the Constitution and by the European Court of Human Rights.

On 8 December 2016, the Constitutional Council decided that article 59 is consistent with French Constitution provisions and therefore rejected the Senate's objection. The Constitutional Council stated that the judicial authorization ensures compliance of the legal conditions required for the enforcement measures and thereby protects public interest.

After the Bill is enacted, the perception of Paris as one of the top arbitration jurisdictions in the world may be affected due to provisions hindering the enforcement of awards against property covered by State immunity protection. It has already been acknowledged that France may try to follow the path of the 'Yukos Law' passed in Belgium, which also requires foreign States' creditors to obtain a judicial authorization for the attachment of foreign States' assets.

To require States' creditors to preliminarily prove that foreign States' property is not sovereign could imply imposing a high threshold for foreign States' creditors. It will likely be difficult for creditors to discharge that burden of proving that the property they seek to attach is undeniably used for commercial purposes. This may mean that the pendulum is swinging back slightly towards absolute immunity from enforcement.

Overall, the amendment to the French Civil Enforcement Procedure Code reflects France's intention to embrace the undertakings provided by the UN Convention, in situations where grating attachment against foreign States' assets will be inappropriate. Likewise, it will enable national courts to ensure enforcement measures against State property in appropriate cases. Nevertheless, if the Senate is correct, Sapin II may be going too far in requiring a preliminary judicial authorization for enforcement of measures against property subject to State immunity.

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This entry was posted on Friday, December 30th, 2016 at 12:26 am and is filed under [France](#), [State Immunity](#)

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