

ARTICLE

SOVEREIGN IMMUNITY: A CONVENIENT AMENDMENT TO THE SAPIN II LAW?

| 04/01/17 | Marie Danis



Law no. 2016-1691 dated 9 December 2016 on transparency, anti-corruption measures and modernisation of the economy, called the Sapin II law, was published in the *Official Journal* on 10 December 2016. The draft law was amended to extend sovereign immunity of States facing provisional attachments or enforcement measures.

New Articles L. 111-1-1 to L. 111-1-3 of the Code of Civil Enforcement Procedures more strictly frame the implementation of enforcement measures and thus further protect the property of States ruled against by State courts or arbitral tribunals.

The requirement of a prior authorisation from a judge

Article L. 111-1-1 of the Code of Civil Enforcement Procedures states that: *"Provisional or enforcement measures cannot be applied to the property of a foreign State unless there is prior authorisation from a judge in an ex parte order."* The party with an enforceable award against a State used to be able to directly proceed with an enforcement measure on the assets of a State located in French territory, but those days are over. Now, any attachment must be authorised in advance by a judge.

This prior request may be sought *ex parte* and thus avoid the adversarial principle (but only for this first step). Indeed, in case of appeal of the order denying the request for attachment, the element of surprise no longer exists as the process then becomes adversarial.

Authorisation subject to conditions

Article L. 111-1-2 of the Code of Civil Enforcement Procedures adds conditions for the prior authorisation of the judge. In fact, enforcement measures may be granted only if *"the State concerned has expressly consented to the application of such a measure"*, *"[...] reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings"* or if *"the property in question is specifically in use or intended to be used by the State concerned for purposes unrelated to non-commercial public service and is linked to the entity against which the proceedings are initiated"*.

It is therefore obvious that an enforcement measure will take time, specifically when it is necessary to prove the commercial nature of the property, not to mention the difficulty in providing such evidence. In fact, in practice it is often difficult or even impossible to distinguish between state property falling under public service and property used for commercial activities.

Special and express waiver for diplomatic property

The last Article (Article L. 111-1-3 of the Code of Civil Enforcement Procedures) reinforces the immunity of diplomatic property by requiring a special and express waiver to implement an enforcement measure.

This Article is a step back from recent case law from the Court of Cassation^[1] that did away with the requirement of a *"special waiver"* in favour of an *"express waiver"*.

The reasons behind this reform

The new wording is no doubt intended to clarify the legislation against the changes in case law concerning immunity from execution that were analysed as likely to result in diplomatic disputes.

It has been highlighted that this reform would take place after (i) the *loukos* ruling, rendered in July 2014 by the international arbitration court of The Hague, ordering Russia to pay 50 billion dollars to the former shareholders of the company *loukos* and (ii) the diplomatic note from Russia sent to the embassy of France.

Whatever the reasons for this amendment, it will complicate requests for provisional and enforcement measures from creditors while extending the time frames.

[1] 1st Civil chamber, 13 May 2015, no. 13-17751

