

# ENFORCEMENT AGAINST FOREIGN STATES – NEW RULES ON IMMUNITY FOLLOWING THE LOI SAPIN 2



**The Loi Sapin 2 has amended the rules on the immunity of foreign States by creating new conditions for the obtaining of preliminary measures and the recovery of debts.**

## **The position before Loi Sapin 2**

Under its Code of Civil Procedure of Enforcement (the Code) France complies with public international law in recognising the principle of foreign State immunity in connection with the seizure of property following a court order (immunity from enforcement).

This was however revised on 9 November 2016 following the introduction of the *Law on Transparency, Anti-Corruption and Modernization of Economic Life* (known as the Loi Sapin 2<sup>1</sup>), which incorporates new rules on the enforcement of decisions against a foreign States.

Previously, the rules on States' immunity were prescribed by the judgments given by the *Cour de Cassation* (French Supreme Court) and were considered to be more liberal than those of many

other European countries which, meant, that under French law, it was relatively easy to enforce decisions against foreign States.

1. France is a signatory to the United Nations Convention on Jurisdictional Immunities of States and their Property 2004 (the 2004 Convention). However, this Convention is not yet in force as the minimum number of signatories has yet to be reached.
2. Nevertheless, by reference to the 2004 Convention, the Cour de Cassation<sup>2</sup> required any lifting of the immunity from enforcement is conditional on the existence of a waiver by the foreign State which must be both:
  - Express (written without ambiguity).
  - Special (contractually determined by the foreign State).
3. However, the Cour de Cassation reversed this position in 2015<sup>3</sup> by no longer requiring a special waiver by the foreign State, thus enabling enforcement by seizure of all

1 Law dated 9 November 2016 on *Transparency, Anti-Corruption and Modernization of Economic Life* n°2016-1691

2 Cass. Civ 1ère, 28 September 2011, n° 09-72.057; Cass. 1ère civ., 28 March 2013, n° 11-10.450 et 11-13.323

3 Cass, Civ 1ère, 13 May 2015, n° 13-17.751



property, including those belonging to diplomatic missions, where there was an express waiver of immunity only.

The change brought the Convention in line with the provisions of Article 6(1) of the European Convention on Human Rights 1950, guaranteeing the right to a fair trial.

In drafting the Loi Sapin 2, the legislature defined precisely the situations in which the holder of a debt recognised by a final judgment can enforce it on property belonging to a State.

### Conditions for enforcement following Loi Sapin 2

#### General conditions

The new Article L.111-1-1 of the Code provides that preliminary or enforcement measures relating to property belonging to a foreign State may be authorised only if the following cumulative conditions are met:

1. The State concerned has expressly consented to the application of such a measure.
2. The State concerned has reserved or assigned the property in accordance with the request.
3. Where a judgment or arbitral award has been made against the State concerned and the property in question is specifically used or intended for use by that State otherwise than for the purposes of public service.
4. There is a relationship with the State entity against which the proceedings were instituted.

The same article defines which goods are to be considered as “property specifically used” or “intended for use” by the State for public service purposes to be:

- Property, including bank accounts, used or intended for use in the performance of the functions of the diplomatic mission of the State, or its consular posts, special missions, or missions to international organisations, or its delegations to the organs of international organisations or international conferences (Diplomatic property).
- Property belonging to the military, or property used or intended for use by the military.
- Property forming part of the cultural heritage of the State, or its archives, which is not intended to be offered for sale.
- Property forming part of an exhibition that is of scientific, cultural or historical interest which is not intended to be offered for sale.
- The tax or social revenues of the State.

#### Autonomous immunity of diplomatic missions

The Loi Sapin 2 provides for special rules regarding the seizure of Diplomatic property.

The amended Code clarifies a debate between international law and the diplomatic immunity in particular on the basis of the International Convention of 1861.

Article L111-1-3 of the Code now provides that preliminary measures or enforcement measures may not be applied to diplomatic property.

This category of property must now be the subject of an express and special waiver which is granted by the State concerned.

#### Debts held by hedge funds

The Loi Sapin 2 also introduced new provisions relating to the enforcement of a claim against a foreign State on the initiative of the holder of a debt obligation (referred to in Article L. 213-1 A of the Monetary and Financial Code) or any instrument or right with characteristics similar to a debt instrument (mentioned in Article L. 211-41 of the same Code).

These provisions are based on the legislation adopted in the United Kingdom<sup>4</sup> and Belgium<sup>5</sup> to prevent hedge funds from profiting by acquiring claims against States in financial difficulty.

Following the introduction of the Loi Sapin 2 no interim measures and no enforcement action against property belonging to a foreign State can be authorised by a French judge if:

1. The foreign State was receiving aid from the Development Assistance Committee of the Organisations for Economic Co-operation and Development (OECD) when it issued the debt document.
2. The holder of the debt obligation acquired that security when the foreign State was in default on that debt obligation or proposed a change in the terms of the debt obligation.

4 Debt Relief (Developing Countries) Act 2010

5 Law dated 6 April 2008 aiming to prevent seizing or transfer of public funds intended for international cooperation, in particular through the vulture funds technique M.B. 16 May 2008 / Law dated 12 July 2015 against the activities of vulture funds, M.B., 11 September 2015



3. The default status on the debt obligation is less than 48 months at the time the holder of the debt obligation seeks a court order authorising him to enforcement.

The Loi Sapin 2 proposed certain adjustments to the conditions listed above, especially in the case of “manifestly abusive behaviour” on the part of the creditor, including the option of extending the period referred to in 3 above to 72 months.

In addition, the creditor must communicate, on penalty of inadmissibility, the document by which he acquired the debt in question in support of his application for enforcement. The full financial terms of the acquisition must be certified by an auditor.

There are however two important limitations to these rules:

- They only apply to debt securities acquired after the coming into force of the Loi Sapin 2, on 9 November 2016.
- Some States are clearly excluded from their scope, such as Greece, which is not included in the OECD list of countries receiving State aid.<sup>6</sup>

### Prior authorisation of the court

Finally, Loi Sapin 2 goes further than the 2004 Convention by introducing a new authorisation procedure, which is necessary for any interim or compulsory enforcement action against property of a foreign State. This new procedure is intended to provide a filter for abusive creditor claims.

The procedure requires the creditor to seek an order for an interim or

enforcement measure against the foreign State. The court deals with the matter ex-parte (that is without notice to the debtor), so as to avoid concealment of the property. The burden is on the creditor to demonstrate that the property concerned is suitable for seizure.

The introduction of this new step in the enforcement proceedings will no doubt lengthen the time involved and introduce additional uncertainty in the recovery of claims against a foreign State.

### Conclusion

The provisions of the Loi Sapin 2 should be taken into account when drawing up State immunity waiver clauses in contracts between private operators and host States, which are particularly common in the infrastructure and energy sectors.

The new law significantly alters the procedure required to recover debts owed by those States, requiring prior auditing of claims and an analysis of the geopolitical situation of the concerned State.

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<sup>6</sup> For the list of contributions in 2014, 2015 and 2016 (French)  
<https://www.oecd.org/fr/cad/stats/documentupload/DAC%20List%20of%20ODA%20Recipients%202014%20final%20FR.pdf>



For more information, please contact the authors of this briefing:

**Robert Follie**

Partner, Paris  
T: +33 1 44 94 40 50  
E: robert.follie@hfw.com

**Guillaume Mezache**

Associate, Paris  
T: +33 1 44 94 40 50  
E: guillaume.mezache@hfw.com

HFW has over 450 lawyers working in offices across Australia, Asia, the Middle East, Europe and the Americas. For further information about international commerce issues in other jurisdictions, please contact:

**Paul Dean**

Partner, London  
T: +44 (0)20 7264 8363  
E: paul.dean@hfw.com

**Pierre Frühling**

Partner, Brussels  
T: +32 (0) 2643 3406  
E: pierre.fruhling@hfw.com

**Georges Racine**

Partner, Geneva  
T: +41 (0)22 322 4812  
E: georges.racine@hfw.com

**Dimitri Vassos**

Partner, Piraeus  
T: +30 210 429 3978  
E: dimitri.vassos@hfw.com

**Ziad El-Khoury**

Partner, Beirut  
T: +961 3 030 390  
E: ziad.elkhoury@hfw.com

**Hadi Melki**

Partner, Riyadh  
T: +961 3 258 800  
E: hadi.melki@hfw.com

**Rula Dajani Abuljebain**

Partner, Kuwait  
T: +971 4 423 0534  
E: rula.dajaniabuljebain@hfw.com

**Yaman Al Hawamdeh**

Partner, Dubai  
T: +971 4 423 0531  
E: yaman.alhawamdeh@hfw.com

**Henry Fung**

Partner, Hong Kong/Shanghai  
T: +852 3983 7777/  
+86 21 2080 1000  
E: henry.fung@hfw.com

**Mert Hifzi**

Partner, Singapore  
T: +65 6411 5303  
E: mert.hifzi@hfw.com

**Gavin Valley**

Partner, Melbourne  
T: +61 (0)3 8601 4523  
E: gavin.valley@hfw.com

**Stephen Thompson**

Partner, Sydney  
T: +61 (0)2 9320 4646  
E: stephen.thompson@hfw.com

**Hazel Brewer**

Partner, Perth  
T: +61 (0)8 9422 4702  
E: hazel.brewer@hfw.com

**Gerard Kimmitt**

Partner, Houston  
T: +1 (713) 706-1943  
E: gerard.kimmitt@hfw.com

**Jeremy Shebson**

Partner, São Paulo  
T: +55 11 3179 2900  
E: jeremy.shebson@hfw.com

Lawyers for international commerce

hfw.com

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