Expanding Immunity from Execution Through the Backdoor: The French Example



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Abstract In December 2016, France enacted a new Statute—the 'Sapin 2 Law'—containing certain provisions governing State immunity from execution. This initiative, which gave rise to a vigorous debate in which diplomatic concerns as well as economic interests were prevalent, has resulted in a new legal framework significantly reinforcing the protection enjoyed by State property. Measures of constraint targeting State property are now subject to a new procedure of prior judicial authorization which, in practice, may complicate the enforcement of creditors' rights. The new statute also clarifies the rules governing the seizability of assets, which depends on their use or intended use by the State as well as on whether the State has waived its immunity from execution. Within this framework, the statute grants a specific protection to diplomatic property. While the original declared intent was to devise a new framework based on customary international law, as reflected by the 2004 United Nations Convention on Jurisdictional Immunities of State and their Property (UNCSI), it turns out that it significantly and purposefully deviates from it in many ways. In this light, doubts might be raised as to whether the new statute is in line with the requirements of the European Convention on Human Rights.

1 Introduction

In light of its title, the French Statute No. 2016-1691 of 9 December 2016 on 'Transparency, the Fight against Corruption and the Modernization of Economic Life'[1] has *prima facie* nothing to do with the issue of immunity from execution. It is clearly not in its Title IV 'On the Strengthening of Financial Regulation' that we would have imagined finding provisions on that matter, just after new rules relating to market abuse and the powers of the French financial regulatory authorities. It is

[1] JORF (10 December 2016), No. 287.

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also surprising that such a sensitive subject has been addressed in a text discussed before the Parliament in the framework of an accelerated legislative procedure,[2] without dealing with issues that could have been included in a broader statute on sovereign immunities, for instance a statute that would have dealt with immunity from jurisdiction of States and/or immunity from execution of international organisations.

A close examination of the legislative *travaux préparatoires* holds a few surprises and denotes that the issue of immunity from execution is placed at the intersection of multiple interests, public and private, often intertwined and sometimes contradictory. The record of the Senate debates of 7 July 2016 is particularly instructive in this regard.[3] Between 10:25 pm and 00:30 am,[4] when more than twenty million viewers were vibrating in front of France-Germany for the semi-final of the UEFA European Championship and fans were pouring into the streets of the capital noisily celebrating the qualification, a few blocks away, a handful of senators and members of the government were discussing several amendments concerning the provisions relating to immunity from execution. Three topics were at the centre of discussions.

The first issue concerned what is now Article 59 of the Sapin 2 Law, which has amended the *Code des procedures civiles d'exécution* (CPCE—Code of Civil Enforcement Procedures) with regard to interim and enforcement measures targeting foreign State property. Minister Michel Sapin, the initiator of the bill, said that the proposed rules (need for prior judicial authorization, conditions relating to waiver of immunity from execution, categories of seizable State property and reinforced protection of diplomatic property) intend to protect the property of foreign States 'within the framework of the UNCSI'[5] (the United Nations Convention on Jurisdictional Immunities of States and Their Property—UNCSI), and added that certain initiatives undertaken by creditors were 'very damaging, notably for our diplomatic relations,' mentioning, in passing, the cases of 'Russia today' and 'Argentina yesterday.'[6]

The second issue concerned what is now Article 60 of the Sapin 2 Law, which has established a more restrictive immunity regime with regard to interim and enforcement measures targeting foreign State property when the underlying claim is related to a sovereign default. According to Michel Sapin, this measure aims at 'fighting against what is sometimes called "vulture funds"' and 'against the abnormal behaviour of a certain number of speculative funds.'[7]

[2] However, it should be noted that 'no constitutional provision requires the Government to justify the use of the accelerated procedure' and that, consequently, recourse to this procedure does not require the characterization of an emergency situation (Conseil constitutionnel, Decision No. 2012-649 DC (15 Marchs 2012), Loi relative à la simplification du droit et à l'allègement des démarches administratives, para. 4).

[3] JO Sénat (2016), No. 76 S. (C.R.), p. 12422.

[4] JO Sénat (2016), No. 76 S. (C.R.), p. 12523 and p. 12566.

[5] JO Sénat (2016), No. 76 S. (C.R.), p. 12540.

[6] JO Sénat (2016), No. 76 S. (C.R.), p. 12540.

[7] JO Sénat (2016), No. 76 S. (C.R.), p. 12544.

The third issue was related to a Senator's amendment proposal (eventually not included in the final text) that would have prohibited a garnishment when the payment of the claim in the hands of the garnishee was unenforceable against the debtor in a foreign court.[8] This seemed a rather surprising proposal in that context since it does not concern the issue of immunity from execution. Actually, it was much less surprising when one considers that several French companies owing social charges, taxes or royalties to a foreign State have been targeted by its creditors as third-party debtors. This was the case, for example, of Total or Air France in the context of garnishments filed in France against Argentina.[9] If such measures do not fully discharge these companies from their monetary obligations, they are put at risk of paying twice. As the senator noted, 'the current situation is very costly to our companies based abroad, especially those that export and thus contribute to our balance of trade.'[10]

The issues discussed during these few hours of parliamentary work raise several questions. Why do States legislate on immunity from execution? Is it to preserve their diplomatic relations and/or to avoid offending certain powerful States? Is it to find a palliative remedy to sovereign debt problems?[11] Is it to preserve the competitiveness of domestic companies and their activities abroad? And this also leads to other questions. Could we consider that a more restrictive framework on immunity from execution also affects the possibility of domestic companies to secure the payment of their claims against foreign States? Does it also affect the attractiveness of Paris as an arbitration centre since the enforcement of awards will become more complex? Could it also affect in turn the 'small creditors' of States, such as employees of diplomatic missions, who find themselves unable to enforce a judgment in their favour, and who are likely to be the first victims of this new system, much more than investment funds and other types of sophisticated creditors having other means of exerting pressure on their debtors? And, more generally, although the law of sovereign immunities is obviously affected by political as well as economic considerations and constraints, to what extent is it possible to modify and even manipulate these rules at the national level—rules which are supposed to be at the heart of delicate balances resulting from a long process of formation of customary international law?

It should be borne in mind that these provisions of the Sapin 2 Law have been enacted with the specific purpose of making more restrictive in France measures of

[8] JO Sénat (2016), No. 76 S. (C.R.), p. 12546 (the text of the proposal provided: '*Lorsque, sans faute du tiers saisi, le paiement de la créance saisie entre les mains du même tiers est, devant un tribunal étranger, inopposable au débiteur saisi, et sauf renonciation expresse et irrévocable du débiteur à poursuivre le tiers, la saisie-attribution est privée d'effet*') (Author's translation).

[9] Bismuth (2015), p. 633

[10] JO Sénat (2016), No. 76 S. (C.R.), p. 12547 ('*la situation actuelle coûte très cher à nos sociétés installées à l'étranger, en particulier celles qui exportent et contribuent ainsi à notre balance commerciale*') (Author's translation).

[11] On the link between sovereign insolvency and immunity from execution, see Fox and Webb (2013), p. 480.

constraint against foreign State property, in particular diplomatic property. The provisions on immunity from execution, also labelled in the general press as 'the Putin Amendment,'[12] have been included in response to enforcement proceedings targeting Russian assets located in France in the wake of the Yukos arbitration,[13] while also having in mind enforcement measures stemming from Argentina's sovereign default. The impact assessment of the bill noted that 'these measures will have a positive impact on France's diplomatic relations.'[14]

It is also important to note that, from a legal perspective, French authorities intended to place these new rules in the orbit of the UNCSI. This treaty, ratified by France in 2011[15] but not yet in force, reflects, to a large extent, customary international law, as pointed out by the International Court of Justice (ICJ).[16] The underlying objective was to ensure the legitimacy of the Sapin 2 Law initiative by 'docking' the statute with the UNCSI. It should also be remembered that the case law on immunity from execution was characterized by high degree of instability.[17] Notably, in three decisions of 2013 (*NML v. Argentina*)[18] and of 2015 (*Commisimpex v. The Republic of Congo*),[19] the French *Cour de cassation* adopted two divergent solutions on the issue of the waiver or immunity from execution but,

[12] For instance, see in 'L'amendement Poutine adopté dans la loi Sapin 2' (10 juin 2016) Le Figaro.

[13] Tranchant (2017), p. 838 et s.

[14] Étude d'impact – Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, NOR: FCPM1605542L/Bleue-1 (30 March 2016), p. 95 ('*ces mesures auront un impact positif sur les relations diplomatiques de la France*') (Author's translation).

[15] Loi No. 2011-734 autorisant la ratification de la convention des Nations unies sur les immunités juridictionnelles des États et de leurs biens, JORF (29 June 2011), p. 10953.

[16] The ICJ mentioned that the UNCSI sheds 'light on the content of customary international law' on the basis of a 'State practice of particular significance [which] is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention' (Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, [2012] ICJ Rep. 99, p. 123, para. 55; p. 128, para. 66). On the specific issue of immunity from execution, the Court stated that 'it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 [of the UNCSI] reflect current customary international law' but that it suffices 'to find that there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State : that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim' (at p. 148, paras. 117–118).

[17] Étude d'impact – Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, NOR: FCPM1605542L/Bleue-1 (30 March 2016), p. 91.

[18] Cass. Civ. 1ère (28 March 2013), Nos. 10-25.938, 11-10.450 and 11-13.323, NML v Argentine, Total Austral et Air France. See, Muir Watt (2013) and Bismuth (2015).

[19] Cass. 1ère civ. (13 May 2015), No. 13-17.751, Commissimpex v Republique du Congo. See Muir Watt (2015) and Glucksmann (2017).

nonetheless, considered that both decisions were based on rules of 'customary international law.'

Surprisingly, the government and the parliamentarians both claimed that their proposals were in line with the convention, even though they were diverging one from another.[20] The *travaux préparatoires* show above all that the UNCSI was an element of legitimation of the various proposals and that, although the final text relies on some portions of the UNCSI, the Sapin 2 Law is not in conformity with the convention. In fact, it differs from it in many respects. The same is true for the 1961 Vienna Convention on Diplomatic Relations, which has been mentioned during the *travaux préparatoires*,[21] but has proven not to be relevant in all respects, for example, with regard to the immunity of the bank accounts of diplomatic missions.

An analysis of the provisions of the Sapin 2 Law relating to immunity from execution therefore requires particular attention not only to identify the various obstacles that creditors will encounter in practice even though they do not appear explicitly in the statute, but also to question their conformity with customary international law, as well as with certain constitutional requirements and with the European Convention on Human Rights (ECHR). Our analysis will focus on article 59 of the Sapin 2 Law, which inserts the new articles L.111-1-1 to L.111-1-3 into the CPCE.

Two issues deserve to be discussed in this context. First, the Sapin 2 Law modifies the procedure applicable to coercive measures concerning the property of foreign States by making them subject to a new procedure of prior judicial authorization (Sect. 2). Second, the new Statute clarifies the applicable rules determining the seizability of State property, which depends essentially on its actual or potential use and on whether the State has waived its immunity from execution (Sect. 3).

2 The Questionable Addition of a Procedural Hurdle: The Prior Judicial Authorization

The new CPCE article L.111-1-1 provides that 'interim or enforcement measures may only be implemented on foreign State property with the prior authorization of the judge by an order on motion.'[22] This new procedure of prior judicial

[20] For instance, in the same senatorial session, Minister Sapin underlined that the government's amendment proposal was 'within the framework of the UNCSI' (JO Sénat (2016) No. 76 S. (C.R.), p. 12540) whereas the commission's amendment proposal had, according to the rapporteur, 'accurately transposed the UNCSI) (at p. 12541).

[21] See for instance the advisory opinion of the French Council of State (No. 391.262 (24 March 2016), para. 27) pointing out that the provisions of the bill 'also respect the rules of international custom . . . which is consistent with the Vienna Convention on Diplomatic Relations.'

[22] '*Des mesures conservatoires ou des mesures d'exécution forcée ne peuvent être mises en œuvre sur un bien appartenant à un État étranger que sur autorisation préalable du juge par ordonnance rendue sur requête*' (Author's translation).

authorization is mainly intended to filter out abusive requests from creditors, but it has the effect of creating obstacles that are difficult to overcome for certain creditors acting in good faith (Sect. 2.1). Moreover, an analysis of the mechanism shows that its legality is questionable, in particular with regard to the case law of the European Court of Human Rights (Sect. 2.2).

2.1 A Procedural Hurdle Aimed at Filtering Abusive Requests but with Excessively Restrictive Effects

By introducing a new requirement of prior judicial authorization, CPCE article L.111-1-1 constitutes an exception to the ordinary law in matters of enforcement measures according to which 'a creditor in possession of an enforceable title establishing a due monetary debt may pursue its forced execution on the debtor's property'[23]—given that it is the judge's responsibility to intervene *ex post* to control whether such measures had been carried out in an irregular manner if a dispute arises.[24] The same principles apply as regards interim measures since the CPCE provides that 'a prior authorization of the judge is not necessary when the creditor avails himself of an enforceable title or a court decision which is not yet enforceable.'[25] But in the context of the Sapin 2 Law applicable to coercive measures targeting State property, the ordinary chronological sequence (measure of constraint)/(judicial control) is reversed.

2.1.1 A New Procedure Paved with Good Intentions

The new CPCE article 111-1-1 has experienced many vicissitudes since both parliamentary assemblies opposed its inclusion in the final text[26] and it was systematically reinstated at the initiative of the Government until its final adoption. At first sight, the objective of this new procedural requirement is commendable: allowing the judge to review the coercive measure requested to ensure compliance with the substantive provisions of the Sapin 2 Law, supposedly based on the UNCSI, and thus preventing the State on whose territory the property is located from violating its international obligations.[27]

According to the French Government, this *ex ante* control is necessary to neutralize abusive procedures carried out by certain creditors initiating enforcement

[23] CPCE, article L.111-2 ('*le créancier muni d'un titre exécutoire constatant une créance liquide et exigible peut en poursuivre l'exécution forcée sur les biens de son débiteur*') (Author's translation).

[24] Mouralis (2017), para. 15.

[25] CPCE, article L.511-2.

[26] Heymann (2017), p. 176.

[27] See more generally about preventive measures of that nature, Audit et al. (2019), p. 380.

measures of dubious legality within the framework of a strategy of procedural harassment. As Minister Sapin noted:

> certain creditors knowing that their request is not necessarily completely legitimate or sound nevertheless process it by means of bailiffs who are not necessarily familiar with all the subtleties of international law. At the end of the day, several months later, they are rejected. But, between the [measure] and the moment when justice puts things in order, the creditor is in a position of strength to discuss with the State concerned. This does not seem to us to be a good thing.[28]

Similarly, the impact study emphasized that this procedure is justified 'due to the complexity of the verifications to be carried out to ensure the seizability of State property.'[29]

The bailiffs are regarded as insufficiently reliable, but actually the same distrust applies to all French courts given that, under the new framework, only the 'enforcement judge' (*juge de l'exécution*) of the Paris *Tribunal de Grande Instance* has authority to decide on measures of constraint targeting State property.[30] This rule of special competence, which exists for matters relating to national security such as terrorism,[31] is surprising and barely justifiable in light of the low technicality of the legal issues at stake. The possibility that French authorities had in mind favouring the emergence of a more controlled judicial policy with regard to immunity from execution through the centralization of the decision-making process cannot be excluded.

The procedure of prior judicial authorization is not a complete novelty in French law. Indeed, this procedure has already been implemented since 2005 for measures of constraints specifically targeting the assets of foreign central banks.[32] Under article L.153-1 of the *Code monétaire et financier* such measures are in principle prohibited, but can be authorized by a court only to the extent it is proven that these assets 'are part of resources allocated to an activity governed by private law.'[33]

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[28] JO Sénat (2016) No. 76 S. (C.R.), p. 12540 ('*certains créanciers qui savent que leur demande n'est pas forcement tout à fait légitime ou solide la mettent néanmoins en œuvre par le biais d'huissiers ne connaissant pas forcément l'ensemble des subtilités du droit international. Au bout du compte, plusieurs mois après, ils sont déboutés. Mais, entre le moment où ils font fermer tel ou tel consulat ou saisir tel ou tel bien et celui où la justice remet les choses en ordre, le créancier s'est trouvé en situation de force pour discuter avec l'État concerné. Cela ne nous paraît pas être une bonne chose*') (Author's translation).

[29] Étude d'impact – Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, NOR: FCPM1605542L/Bleue-1 (30 March 2016), p. 94.

[30] CPCE, article R. 111-1.

[31] Code de procédure pénale, articles 706-17 and 706-25-2; Code de la sécurité intérieure, articles L.229-1, L.229-4 and L.229-5.

[32] Enacted through Law N° 2005-842 of 26 July 2005 (Loi pour la confiance et la modernisation de l'économie).

[33] Article 153-1§2 of the *Code monétaire et financier* provides that '*par exception aux dispositions du premier alinéa, le créancier muni d'un titre exécutoire constatant une créance liquide et exigible peut solliciter du juge de l'exécution l'autorisation de poursuivre l'exécution forcée dans les conditions prévues par la partie législative du code des procédures civiles d'exécution s'il établit*

Parliamentary debates show that this specific provision was devised—in the words of a senator—to improve the 'competitiveness of the Paris financial centre . . . for the asset management of foreign central banks,'[34] which implies to 'provide sufficient security.'[35] How much clearer can it be?

The requirements of article L.153-1 of the *Code monétaire et financier* have made more difficult attachment of foreign central banks' assets, given that the creditor has the obligation of proving that the assets at stake 'are part of resources allocated to an activity governed by private law.'—which is all the more difficult to reach, given bank secrecy. This led creditors to challenge the constitutionality of article L.153-1 but, surprisingly, the French *Cour de Cassation* considered that the issue was not 'of a serious nature'[36] and decided not to refer the matter to the *Conseil Constitutionnel*. This is also why doubts have been raised as to whether that provision is in conformity with the European Convention on Human Rights (ECHR).[37] The government was perfectly aware of the obstacles stemming from article L.153-1 and, through the Sapin 2 Law, it knowingly decided to extend its application to all foreign States' property.

The procedure of prior judicial authorization has also been implemented in Belgium. The Belgian statute of 23 August 2015 amended the *Code judiciaire* and inserted a new article 1412*quinquies* 'governing the seizure of assets belonging to a foreign power or to a supranational or international organization of public law' and requiring a prior judicial authorization as well. It is worth noting that, instead of 'States' this new statute uses the expression 'foreign power' which is quite unusual in the twenty-first century and was more common in the nineteenth century when the doctrine of absolute immunity prevailed. The *travaux préparatoires* of the Belgian Statute have been a valuable source of inspiration for the French legislator to the extent that similar arguments have been raised in the Belgium context. Indeed, the Belgian minister supporting the bill pointed out, just like Michel Sapin a year later, that measures of constraint can 'be made in such a short period of time and sometimes without the intervention of a judge that one cannot presume a perfect knowledge of international law on the part of those involved.'[38] The Belgian constitutional court, which upheld the constitutionality of the procedure of prior judicial authorization,[39] also confirmed that the legislator relied on a similar procedure recognizing 'the principle of unseizability of assets held or managed by foreign

que les biens détenus ou gérés pour son propre compte par la banque centrale ou l'autorité monétaire étrangère font partie d'un patrimoine qu'elle affecte à une activité principale relevant du droit privé.'

[34] JO Sénat (2005), pp. 5133–5134.

[35] JO Sénat (2005), pp. 5133–5134.

[36] Cass. 2ème civ. (11 July 2013), No. 13-40.036, QPC, Novoparc Healthcare International v Central Bank of Iraq.

[37] Bismuth (2015), p. 639 et s.

[38] Doc. parl., Chambre (2014–2015), DOC 54-1241/005, p. 9.

[39] Cour constitutionnelle (27 April 2017), No. 48/2017.

central banks and international monetary authorities in Belgium as well as the exception to this principle when the creditor can demonstrate that the assets he intends to seize are exclusively allocated to an economic or commercial activity governed by private law.'[40]

2.1.2 A New Procedure Neutralizing Creditors' Requests in Practice

According to the French government, the procedure of prior judicial authorization by order on motion has a protective dimension for creditors to the extent that the decision is made *ex parte* without an adversarial procedure, thus neutralizing the risk that the debtor State would be informed of this initiative and would have an opportunity to relocate its assets abroad. This is, moreover, the position of the *Conseil constitutionnel* when the issue of the potential infringement of creditors' rights was raised. In this respect, the Constitutional Council limited itself to indicating that the absence of an adversarial debate 'protects the creditor from the relocation of the assets covered by the protective or enforcement measure.'[41]

However, the reality of enforcement proceedings against foreign States is quite different and the litigation relating to the implementation of article L.153-1 of the *Code monétaire et financier* has already given a glimpse of the almost insurmountable obstacles that creditors will face. In the context of a seizure or attachment of bank accounts, how can creditors prove, in the context of an *ex parte* procedure, the commercial or non-commercial, diplomatic or other destination of the funds targeted when the court considers that banking secrecy is applicable?[42] The question was raised before the Belgian Constitutional Court, which simply indicated that the burden of proof weighing on the creditor as regards the use of the assets 'does not appear to be impossible to provide in all cases.'[43] This is a far cry from discovery procedures ordered by US courts in the context of the dispute between the Argentine Republic and its creditors![44] The Belgian court's expeditious argument is unconvincing and it is very difficult to assess the viability of the procedure of prior judicial authorization without taking into account rules on bank secrecy and those concerning the different types of seizable assets (diplomatic assets, assets allocated to an economic activity governed by private law, etc.). Moreover, the Belgian

[40] Cour constitutionnelle (27 April 2017), No. 48/2017, para. B.23.3 ('*Le législateur s'est par ailleurs inspiré de la procédure similaire prévue par l'article 1412quater du Code judiciaire, qui établit l'insaisissabilité de principe des avoirs détenus ou gérés par les banques centrales étrangères et les autorités monétaires internationales en Belgique ainsi que l'exception à ce principe lorsque le créancier peut démontrer que les avoirs qu'il entend saisir sont exclusivement affectés à une activité économique ou commerciale de droit privé.*') (Author's translation).

[41] Conseil constitutionnel, Decision No. 2016-741 DC (8 December 2016), Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, para. 72.

[42] Audit et al. (2019), p. 383.

[43] Cour constitutionnelle (27 April 2017), No. 48/2017, para. B.25.2.

[44] Kleiner (2015), p. 771; Glucksmann (2018), p. 311; Audit et al. (2019), p. 386.

Constitutional Court noted in the same decision that, given the inviolability of 'bank account statements and records [which] constitute archives and documents protected by Article 24 of the Vienna Convention on Diplomatic Relations of 18 April 1961,' the foreign State 'cannot be compelled to produce them in court, so that the judge could not compel the debtor, a foreign power, to prove that these funds have been used for government non-commercial purposes.'[45]

Due consideration shall also be given to what is likely to happen in practice. Given that States could be informed of seizure initiatives at a preliminary stage, it is not excluded, as pointed out by the Senate's Commission on Legislation, which disapproved the principle of prior authorization, that this procedure 'would allow the foreign State to relocate the most mobile assets like a bank account'[46] and that finally 'the proposed reform would be likely to deprive the creditors of any capacity to obtain the enforcement of a final court decision.'[47]

The procedure of prior judicial authorization was based on the government's desire to limit the risk of violation of the rules on immunity from execution. It would be no exaggeration to say that the underlying ambition of the current framework is to eliminate every risk of enforcement. It is in this light that the legality of the prior authorization procedure ought to be examined.

2.2 *Assessing the Legality of the Procedure of Prior Judicial Authorization*

The rapporteur of the bill in the Senate considered the procedure of prior judicial authorization to be 'a manifestly excessive infringement of the right of creditors and the right to obtain the enforcement of court decisions, both guaranteed by the Constitution.'[48] But the *Conseil constitutionnel* did not carry out an in-depth review

[45] Cour constitutionnelle (27 April 2017), No. 48/2017, para. B.26.2. ('*Il découle de cette inviolabilité que l'Etat étranger ne saurait être contraint de les produire en justice, de sorte que le juge ne pourrait contraindre le débiteur, puissance étrangère, à prouver l'utilisation de ces fonds à des fins de service public non commerciales*') (Author's translation).

[46] Sénat, Rapport fait au nom de la Commission des lois sur le projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, No. 712 (vol. 1) (22 June 2016), p. 144.

[47] Sénat, Rapport fait au nom de la Commission des lois sur le projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, No. 712 (vol. 1) (22 June 2016), p. 144.

[48] Sénat, Rapport fait au nom de la Commission des lois sur le projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique (Nouvelle lecture), No. 79 (vol. 1) (26 October 2016), p. 74. The rapporteur mentions the two following decisions of the French Constitutional Council: Conseil constitutionnel, Decision No. 2010-607 DC (10 June 2010), Loi relative à l'entrepreneur individuel à responsabilité limitée (concerning creditors' rights); Conseil constitutionnel, Décision No. 2014-455 QPC (6 March 2015), M. Jean de M. (concerning the right to obtain the enforcement of court decisions).

of the Sapin 2 Law, and just noted 'laconically'[49] the protection of foreign states' property[50] and the protection against the risk of dissipation of assets were general interest objectives.[51] The reluctance to scrutinize the constitutionality of the statute echoes what the *Cour de cassation* did when it refused to refer a case to the *Conseil constitutionnel* concerning the constitutionality of the same procedure for central bank assets.[52] Moreover, the same can be said for the analysis made by the *Conseil d'Etat* in its advisory opinion on the bill, which considered that all the provisions, and in particular the procedure of prior judicial authorization, 'were strictly in conformity with international law,'[53] 'did not raise any constitutional difficulty, nor did they run counter to the provisions of the European Convention on Human Rights and Fundamental Freedoms.'[54] However, a more detailed and nuanced analysis indicates that doubts could be raised as to the conformity of the procedure of prior judicial authorization with the ECHR to the extent that this additional protective procedure is not required by the UNCSI.

2.2.1 A Procedure Not Required by the UNCSI

First, it is necessary to examine the conformity of the procedure of prior judicial authorization with the UNCSI. The UNCSI does not require such an authorization in the context of pre- and post-judgment measures of constraint under its articles 18 and 19. This was not denied either by the impact study (this authorization is 'not required by the international treaties to which France is a signatory')[55] or by the Minister during the parliamentary debates, Michel Sapin noting: 'I will say straight away that this provision is not necessary in order to comply with the United Nations Convention', but then adding that 'It is not contrary to it either.'[56]

The question then arises as to whether an additional condition for the implementation of a measure of constraint targeting the property of foreign States, not provided for by the UNCSI but not explicitly prohibited by it, constitutes a violation of international law. This question leads us to examine the status of the international law of sovereign immunity and, in particular, the issue of whether it consists only of interstate obligations or whether some of its rules are likely to generate symmetrical

[49] Tranchant (2017), p. 843.

[50] Conseil constitutionnel, Decision No. 2016-741 DC (8 December 2016), Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, para. 69.

[51] Conseil constitutionnel, Decision No. 2016-741 DC (8 December 2016), Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, para. 72.

[52] Cass. 2ème civ. (11 July 2013), No. 13-40.036, QPC, Novoparc Healthcare International v Central Bank of Iraq.

[53] Conseil d'Etat, avis No. 391.262 (24 March 2016), para. 27.

[54] Conseil d'Etat, avis No. 391.262 (24 March 2016), para. 27.

[55] Étude d'impact – Projet de loi relatif à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, NOR: FCPM1605542L/Bleue-1 (30 March 2016), p. 94.

[56] JO Sénat (2016), No. 76 S. (C.R.), p. 12541.

rights for the benefit of private persons. As we previously noted, the choice made by a State to offer other States a more extensive protection with regard to sovereign immunity than the one prescribed by custom does not in itself constitute a violation of the international law of sovereign immunity *stricto sensu* because sovereign immunity is conceived as a floor and not as a ceiling of protection.[57] This idea is supported by the ICJ's position in *Jurisdictional Immunities of the State*. While the Court considered that 'it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 [*of the UNCSI*] reflect current customary international law,'[58] it nonetheless pointed out that:

> it suffices . . . to find *that there is at least one condition that has to be satisfied* before any measure of constraint may be taken against property belonging to a foreign State : that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim[59]

The State therefore complies with the international law of sovereign immunity if at least one of these conditions is met when exercising a coercive measure against the property of a foreign State. It may therefore grant additional protections to the benefit of States, such as the procedure of prior judicial authorization not provided for by the UN Convention. But any additional protection not required by international customary law is a relevant element to take into account when it comes to assessing its compatibility with the ECHR.

2.2.2 The Doubtful Legality of the Procedure with the ECHR

The Strasbourg Court has long held that ECHR Article 6 on the right to a fair trial does not only imply the right to be heard or the right to obtain a court decision, but also includes the enforcement of decisions, because the right to a court 'would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.'[60] The creditor's property rights may also be affected under Article 1 of Protocol No. 1 to the Convention.[61] This right to the enforcement of judicial decisions is not absolute, however, and may be subject to limitations if such limitations 'pursue a legitimate

[57] Bismuth (2015), p. 646.

[58] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, [2012] ICJ Rep. 99, p. 148, para. 117.

[59] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment of 3 February 2012, [2012] ICJ Rep. 99, p. 148, para. 118 (Emphasis added).

[60] ECtHR, No. 18357/91, Hornsby v Greece, Judgment of 19 March 1997, para. 40.

[61] ECtHR, No. 43892/04, Pennino v Italy, Judgment of 24 September 2013, para. 53; ECtHR, No. 43870/04, De Luca v Italy, Judgment of 24 September 2013, para. 39.

aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.'[62]

State compliance with the international law of sovereign immunity is one of the legitimate aims that the Court takes into account. As it pointed out, 'the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity."[63] Consequently, 'measures taken by a High Contracting Party *which reflect generally recognised rules of public international law on State immunity* cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6§1.'[64]

The margin of appreciation of States is therefore limited, and the question that must guide the national court to ensure compliance with the requirements of ECHR Article 6 is the following: in allowing the exception based on sovereign immunity, do the limitations imposed on the applicant go beyond what is prescribed by international law when they confer additional protection on the foreign State? In other words, does the protection go beyond what is required by the UNCSI? This was the approach of the Strasbourg Court in *Cudak v. Lithuania* in which it recognized that 'the application of absolute State immunity has, for many years, clearly been eroded'[65] and that it was necessary to consider the exceptions to immunity existing in customary international law as reflected in the UNCSI, in this case the exception of Article 11 relating to contracts of employment. By granting the foreign State additional protection beyond the floor of international law, the High Contracting Party has failed 'to preserve a reasonable relationship of proportionality',[66] overstepped its margin of appreciation and consequently violated ECHR Article 6.

It is in this light that the conformity with the ECHR of the new CPCE article L.111-1-1 needs to be examined. As pointed out above, the procedure of prior judicial authorization implies in certain situations (in particular with regard to bank accounts) a *de facto* quasi-impossibility of taking a measure of constraint if one also takes into account the allocation of the burden of proof, bank secrecy and the risk of dissipation of funds.[67]

A similar question has already been put to the French courts when the legality of article L.153-1 of the *Code monétaire et financier* was assessed in a case involving an attachment of funds belonging to the Central Bank of Iraq. In 2015, the *Cour d'appel de Versailles* dismissed the argument of non-compliance with the ECHR by simply recalling the 'legitimate aim' pursued by 'the respect of generally recognized

[62] ECtHR, No. 26083/94, Waite and Kennedy v Germany, Judgment of 18 February 1999, para. 59.

[63] ECtHR, No. 35763/97, Al-Adsani v United Kingdom, Judgment of 21 November 2001, para. 55.

[64] ECtHR, No. 35763/97, Al-Adsani v United Kingdom, Judgment of 21 November 2001, para 56 (Emphasis added).

[65] ECtHR, No. 15869/02, Cudak v. Lithuania, Judgment of 23 March 2010, para. 64.

[66] ECtHR, No. 15869/02, Cudak v. Lithuania, Judgment of 23 March 2010, para. 74.

[67] See also, Audit et al. (2019), p. 385.

international rules on State immunity' and that if 'article L.153-1 places a difficult burden of proof on the creditor as to the nature of the funds and their allocation, it does not establish an impossible proof,' thus concluding that there is no 'disproportionate restriction' to ECHR Article 6.[68] The case was brought before the *Cour de cassation*, which, identically concluded that this provision 'does not place a disproportionate restriction on the right to enforcement in relation to the legitimate aim pursued and does not disregard the requirements of a fair trial,' and added that the burden of proof arising from these provisions 'does not have the effect of violating the principle of equality of arms resulting from the right to a fair trial.'[69]

The position of the *Cour d'appel de Versailles* and of the *Cour de cassation*—which, it may be recalled, considered that the question of the constitutionality of Article L.153-1 was 'not of a serious nature'[70]—was insufficiently argued in comparison with the meticulous examination carried out by the European Court of Human Rights in *Cudak v. Lithuania*. It would therefore be premature to say that the debate on the conformity of CPCE Article L.111-1-1 with the ECHR is closed in the absence of a clear position of the Strasbourg Court on that matter.[71] Given that the procedure of prior judicial authorization is not required under international customary law, this additional protection is likely to be considered by the Court as a disproportionate restriction.

These questions are also difficult to dissociate from the issues relating to the applicable legal standards to determine the seizability of State property, for which the Sapin 2 Law has also deviated from international customary law.

3 The Questionable Standards Governing the Seizability of State Property

Once an application has been made to the *juge de l'exécution* (the 'enforcement judge'), he or she has to determine whether a measure of constraint may be taken against the targeted State property. On that matter, the Sapin 2 Law clarifies the regime of immunity from execution which had been defined by an unstable case law in the wake of the Argentine sovereign debt litigation. Two main situations need to be considered to determine the seizability of assets, depending on the absence (Sect. 3.1) or presence (Sect. 3.2) of a waiver of immunity from execution. The new mechanism is *prima facie* inspired by the UNCSI, in particular its articles 18, 19

[68] CA Versailles, 16ème ch. (1 October 2015), No. 14/05200. See Bismuth (2016).

[69] Cass. 2ème civ. (11 January 2018), No. 16-10.661. See, Haftel (2018); Bazille and Bismuth (2018).

[70] Cass. 2ème civ. (11 July 2013), No. 13-40.036, QPC, Novoparc Healthcare International v Central Bank of Iraq.

[71] See also Grandaubert (2021), pp. 541–544.

and 21, but some questionable deviations from the convention have also been incorporated in the final text.

It is useful to briefly mention beforehand Article 60 of the Sapin 2 Law, which is not codified in the CPCE, and which establishes a specific discipline intended to counter the usual procedural strategy of so-called 'vulture funds.'[72] Under article 60, a measure of constraint against a foreign State and requested on the basis of a sovereign debt instrument cannot be authorized when the following three conditions are met: (1) the State was on the list of recipients of official development assistance established by the OECD Development Assistance Committee when it issued the debt instrument in question, (2) the debt instrument was acquired by the creditor when the State was in default or had proposed a modification of the issuance agreement, (3) the situation of default must have existed for less than 48 months at the time when the creditor seeks the prior judicial authorization. In substance, article 60 of Sapin 2 Law does not concern the general regime of immunity from execution, but pursues an objective similar to that of certain 'anti-holdout' legislations which have been adopted in the United Kingdom or in Belgium.[73] The underlying objective is to incentivize recalcitrant creditors to participate in collective action mechanisms instead of pursuing the enforcement of their claim.

However, it may be noted that Article 60(V) provides that 'for the purposes of this article, the central State, the federated States and their public institutions shall be treated as foreign States.' This definition of a 'State' has not been extended to the provisions of Article 59, which does not incorporate the definition of a 'State' contained in the UNCSI. In any case, Article 60(V) restricts the eligibility of the anti-holdouts mechanisms to the financial instruments of the central state, federated states and their public institutions. Other types of territorial subdivisions (municipalities, regions, etc.) are not mentioned and cannot benefit from this protective regime.

3.1 The Scope of Seizable Property in the Absence of Waiver of Immunity from Execution

Before the Sapin 2 Law, the position of French courts was guided by the 1984 *Cour de cassation*'s ruling in *Eurodif* which held that the immunity from execution enjoyed by foreign States 'may nevertheless be waived in exceptional cases; this is the case when the seized property has been allocated to the economic or commercial activity governed by private law which gives rise to the action.'[74] The conditions for lifting the immunity were restrictive since it was necessary to establish a link

[72] JO Sénat (2016), No. 76 S. (C.R.), pp. 12542–12546.

[73] Bismuth (2012), pp. 499–503.

[74] Cass. Civ. 1ère (14 March 1984), No. 82-12462, SA Eurodif et Sofidif v République islamique d'Iran.

between the seized property and the activity at the origin of the action, which had to be governed by private law, something difficult to prove in practice. The *Eurodif* ruling has given rise to difficulties of interpretation and has also generated an overlapping between issues of immunity from jurisdiction and from execution by linking the question of enforcement to the nature of the activity giving rise to the action.[75]

The Sapin 2 Law breaks with the *Eurodif* approach and implements a framework that, at least apparently, is closer to that of the UNCSI. To better understand the evolutions the new statute introduces, the relevant provisions of the English translation of the law[76] and of the English version of the UNCSI are mirrored in the following table:

Sapin 2 Law (Article 59)	UNCSI
CPCE Article L.111-1-2 Provisional or enforcement measures in respect of property belonging to a foreign State may be authorized by the judge only if one of the following conditions is met: . . . 3° Where a judgment or award has been rendered against the State concerned and the property in question is specifically used or intended to be used by that State other than for non-commercial public service purposes and has a connection with the entity against which the proceedings was directed.	**Article 19 – State immunity from post-judgment measures of constraint** No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that: . . . . . . c) 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 is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.
For the purposes of 3°, the following assets, in particular, are considered to be specifically used or intended to be used by the State for non-commercial public service purposes: (a) Property, including bank accounts, used or intended for use in the performance of the functions of the State's diplomatic mission or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; (b) Property of a military character or property used or intended use in the performance of military functions;	**Article 21 – Specific categories of property** 1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c): (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(continued)

[75] Giansetto (2017), p. 377 et s.

[76] Author's translation.

Sapin 2 Law (Article 59)	UNCSI
(c) Property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (d) Property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale; (e) Tax or social security receivables.	(b) property of a military character or used or intended for use in the performance of military functions; (c) property of the central bank or other monetary authority of the State; (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

It may be noted that, in the absence of a waiver of immunity from execution, measures of constraint may be requested only on the basis of an existing judgment or an arbitral award. On that matter, there is a convergence between the rules of the Sapin 2 Law and of the UNCSI. But two other issues need to be addressed: the question of the identification of the seizable entity and the identification of the seizable assets belonging to that the entity.

3.1.1 Identification of the Seizable Entity

It is possible to note a break with the *Eurodif* precedent on an important aspect that opens new perspectives for creditors.[77] Whereas *Eurodif* was based on an approach that could be described as 'substantive' (the existence of a substantive link between the seized property and the activity at the origin of the claim), the Sapin 2 Law as well as the UNCSI adopt a 'personalist' approach (the property 'has a connection with the entity against which the proceedings was directed').[78] This means that, *prima facie,* the scope of the debtor's assets likely to be targeted is much wider since the whole of his patrimony is potentially concerned—with some limits that will be detailed below. Relying on international customary law, the *juge de l'exécution* had the occasion to abandon the *Eurodif* precedent for seizures carried out prior to the entry into force of the Sapin 2 Law but challenged afterwards, by holding, for example, that 'according to customary international law, the allocation of the seized assets to an operation falling under private law constitutes a sufficient condition, without it being necessary for the seized assets to be linked to the claim that was the subject of the procedure.'[79]

[77] Tranchant (2017), p. 850; Glucksmann (2018), p. 294.

[78] The ILC Draft Articles adopted in 1991 retained both substantive and personalist approaches. Its article 18(c) referred to the property having 'a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed' (ILC, Draft Articles on Jurisdictional Immunities of States and their Property (1991) YILC vol. II (Part 2), p. 56.

[79] TGI Paris (9 mai 2017), No. 18/83221, États-Unis v Bellelis.

One can also wonder about the meaning of the expression 'property that has a connection with the entity against which the proceeding was directed' that appears in both the Sapin 2 Law and the UNCSI. In this regard, it is necessary to turn to the Annex of the UNSCI which provides that 'the words "property that has a connection with the entity" . . . are to be understood as broader than ownership or possession.' It is therefore conceivable to target assets that have been fraudulently transferred by this entity to third parties in order to avoid measures of constraint.

The personalist approach also implies that the distinctions between legal persons under the domestic law of the foreign State must in principle be respected. In the absence of a waiver of immunity from execution, it is only possible to target the property of one of the components of the State (the State as a legal person under domestic law, or an organic or territorial dismemberment of the State) if the judicial decision on which the measure is based has been obtained against that component of the State—of course leaving aside the possibility of seizing the assets of its emanations.[80] In other words, it would not be possible to target in France the assets of the province of Quebec if the debtor is the Province of Ontario or Canada.

This solution resulting from the personalist approach could be different if the debtor is the foreign State (e.g. Canada) and accepts a waiver to its immunity from execution which would constitute an international commitment from a public international law standpoint (e.g. the waiver is included in a treaty or was made by an *ex officio* representative of the State). In that case, the international obligation would arguably be binding on the foreign State as an international legal subject and, given that a State cannot rely on its own domestic law to limit the scope of its international obligations,[81] such waiver would therefore cover all its organs, including its organic or territorial subdivisions.

3.1.2 Identification of the Seizable Property

Once the entity (or its emanations) on which seizures can be made have been identified, the scope of the seizable property must be delimited more precisely, since certain types of assets are subject to specific protection and can be seized only when there is a waiver of immunity from execution. In the absence of such a

[80] This is indeed permitted under the Annex to the UNCSI which states that 'article 19 does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.' The same solution has been followed by the *Cour d'appel de Paris* which considered that 'it is accepted that the creditor's right to sue is extended in the event of confusion of assets, in particular to public bodies which are so dependent on a foreign State that they are merely an emanation of it. The qualification as an emanation of the State, a question of fact, must be assessed according to the functional independence and the autonomy of the assets of the entity concerned, which are the attributes of legal personality' (CA Paris (27 June 2017), No. 16/08522, Veteran Petroleum v Arianespace et Roscosmos).

[81] Free Zones of Upper Savoy and the District of Gex (Second Phase) (France v Switzerland) (Order) [1930] PCIJ Rep Series A No. 24, p. 12.

waiver, only property 'specifically used or intended to be used by that State other than for non-commercial public service purposes' is seizable.

On this point, there is no significant difference between the Sapin 2 Law and the UNCSI, both using a double negative which does not serve the clarity of the text. However, differences are to be noted in the lists of types of assets that the statute and the convention consider to be 'specifically used or intended to be used by that State other than for non-commercial public service purposes.' Both texts mention diplomatic and military property, property forming part of the cultural heritage, archives and property forming part of an exhibition of objects of scientific, cultural or historical interest—types of assets that cannot be seized in the absence of renunciation. The Sapin 2 Law does not mention the property of central banks, contrary to the convention, but a reference to them is already made in article L.153-1 of the *Code monétaire et financier*.[82]

The main difference lies in paragraph (e) of the text of the Sapin 2 Law, which includes in this list 'tax or social security receivables' whereas there is no reference to those in the UNCSI. The words 'in particular' suggests that the list article 21 draws is not exhaustive, but this addition in the French statute raises several questions. First, it is inspired more by the litigation before French courts on immunity from execution than by a general practice. Indeed, the Argentine sovereign debt litigation in France that gave rise to the judgments of the *Cour de cassation* of 28 March 2013 mainly concerned enforcement measures relating to tax and social security receivables owed by French companies to Argentina.[83] The *travaux préparatoires* of the Sapin 2 Law shows that this provision reflects more a desire to protect the overseas activities of French companies than a careful reflection of what could be in international customary law the meaning of a property 'specifically used or intended to be used by that State other than for non-commercial public service purposes.' What constitutes a 'tax or social security receivables' is also a tricky question. For instance, in *NML v Argentina* the French *Cour de cassation* considered that oil royalties fall into that category even though royalties could be contractually negotiated between the State and the foreign company. Also, should we consider as a 'tax or social security receivables' what is considered as such under the law of the foreign State or under the law of the State where enforcement measures are sought? Just another question that has remained unanswered in the statute and that may be a harbinger of future difficulties for the *juge de l'exécution*.

Lastly, the Sapin 2 Law leaves open the question of what constitutes property 'specifically used or intended to be used by that State other than for non-commercial public service purposes.' The notion of 'allocation' ('*affectation*') of the property in the *Eurodif* ruling has raised certain questions of interpretation,[84] but the picture is less clear when it comes to determining the possible or potential use of the property.

[82] On the relationship between the Sapin 2 Law and article L.153-1 of the *Code monétaire et financier*, see Wuerth (2019), p. 275.

[83] Bismuth (2015), p. 637; Glucksmann (2018), p. 295.

[84] El Sawah (2012), p. 268.

Some assets are indeed objectively assigned to a sovereign function (the premises of an embassy, a military ship, etc.) unless proven otherwise. This is less obvious for claims, bank accounts and financial assets. For instance, tax and social security receivables can be linked to the exercise of sovereign prerogatives, but how can one determine their use? How can one prove the possible non-diplomatic use of an embassy bank account if bank secrecy is an obstacle?

Thus, despite a legal framework that seems *prima facie* more predictable and favourable to creditors than the one resulting from the *Eurodif* ruling, enforcement measures in the absence of a waiver of immunity from execution should be limited in practice.

3.2 The Scope of Seizable Assets in Presence of a Waiver of Immunity from Execution

Before exploring the legal regime of waivers, it may be noted that CPCE article 111-1-2(2) provides that enforcement measures against foreign State property may be authorized if the State 'has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.' This provision is directly inspired by article 18(b) and 19(b) of the UNCSI and concerns cases where, for example, the foreign State has granted security interests.[85] This hypothesis can also be understood as a case where the foreign State has expressly waived its immunity from execution for an identified asset in the context of a specific dispute.

The situation is not so clear with respect to the provisions of the Sapin 2 Law applicable to the waiver of immunity from execution, which allow—at least in theory—broadening the scope of seizable assets for creditors by including those that are not deemed to be used or intended to be used by the State 'other than for non-commercial public service purposes.' The CPCE deviates from the UNCSI on some important aspects. Just like the specific provision on 'tax and social security receivables' mentioned above, the statute is more the result of national considerations than of an intent to follow the path of the UNCSI.

3.2.1 In General

The first point of divergence between the law and the Convention concerns the modalities of waiver. Leaving aside the question of the special waiver for diplomatic property, which will be discussed below, both the law and the Convention indicate that the State must have 'expressly consented' to the application of measures of constraint, which may include both post- and pre-judgment measures. It can be noted that the statute uses the singular ('the State has expressly consented to . . . such a

[85] Herman and Hanotin (2017).

measure') and the convention the plural ('the State has expressly consented to ... measures'). The latter expression leaves more latitude to the court in the sense that the waiver clause formulated in a general way (for example, an undertaking to enforce an award) refers to all possible enforcement measures subsequent to the judgment.

The text of the statute, which uses the singular, could require a specific mention of the enforcement measure envisaged, thus giving the court the possibility of controlling waiver clauses in a more restrictive manner. Moreover, the UNCSI refers in particular to a waiver made 'by international agreement' or 'by an arbitration agreement or a written contract.' There is no such reference in the new CPCE article L.111-1-2. This has led some authors[86] to consider that the *Creighton* precedent, which recognized that the commitment made by the State to enforce the award pursuant to the ICC Arbitration Rules 'implies a waiver by that State of its immunity from enforcement,'[87] could be called into question.

3.2.2 For Diplomatic Property

While the UNCSI envisages only a single waiver regime regardless of the nature of State property,[88] the new CPCE article L.111-1-3 imposes specific waiver procedures when the targeted property relates to the exercise of diplomatic functions. More specifically, this article provides that 'interim and enforcement measures may not be implemented on property, including bank accounts, used or intended to be used in the performance of the functions of the States' diplomatic mission or its consular posts, special missions, missions to international organizations, only in presence of an express and special waiver [accepted by] the States concerned.'

Such a deviation from the UNCSI cannot be understood without a quick look at the fluctuating case law of the *Cour de cassation* on the matter. In 2011, the court, basing its decision on 'customary international law,' held that diplomatic missions enjoy 'autonomous immunity from execution which can only be waived in an express and special manner.'[89] In three rulings in 2013, the same court, this time basing its decision on 'customary international law, as reflected in the United Nations Convention,' stated that 'while States may waive ... their immunity from execution in respect of property or categories of property used or intended to be used for public purposes, this may only be waived in an express and special manner, by mentioning the property or category of property in respect of which the waiver is granted.'[90] The condition of special waiver is thus extended to all property used or

[86] Mouralis (2017), para. 86.

[87] Cass. 1ère civ. (6 July 2000), No. 98-19.068, Creighton v Qatar.

[88] Brown and O'Keefe (2013), p. 346; Dopagne (2019), p. 400.

[89] Cass. Civ. 1ère (28 September 2011), No. 09-72.057, NML v Argentine.

[90] Cass. Civ. 1ère (28 March 2013), Nos. 10-25.938, 11-10.450 and 11-13.323, NML v Argentine, Total Austral et Air France.

intended to be used for public purposes, whereas in 2011 the Court justified the requirement of special waiver for diplomatic property in view of the autonomous character of diplomatic immunities. This is one of the reasons why these decisions, which seem to be part of a movement to extend immunity, are in disharmony one with another as to their legal justification.[91] Perhaps aware of the fragility of its case law, the same court held in 2015 that even for the property of diplomatic missions, 'customary international law does not require anything other than an express waiver of immunity from execution.'[92] Ironically, it is in this decision, which does not mention the UNCSI, that the Court of Cassation adopts the position that best complies with it.

To the extent that the Sapin 2 Law deviates on this matter from the UNCSI, the issue of the conformity of the requirement for a special waiver in the case of diplomatic property with the ECHR deserves to be raised. The Belgian Constitutional Court is of the opinion that this requirement finds its source in the 1961 Vienna Convention on Diplomatic Relations, which makes it in line with the case law of the ECHR.[93] It thus decided to censor the condition of special waiver included in the Belgian law, but only to the extent that it applies 'to property which is not assigned to the exercise of the functions of the diplomatic mission of the foreign power or of its consular posts, its special missions, its missions to international organizations or its delegations to the organs of international organizations or to international conferences.'[94] Would the position of the European Court of Human Rights be the same? If so, CPCE article L.111-1-3 would be preserved. The argument based on the specific nature of diplomatic immunity is, however, questionable since the 1961 Vienna Convention does not include any specific provision relating to the modalities of waiver of immunity from execution concerning the diplomatic mission's property.[95] It is more likely in an evolution of State practice and an emerging customary norm than in a debatable interpretation of the 1961 Vienna Convention that a requirement

[91] For a critical assessment, see Bismuth (2015), p. 638 et s.

[92] Cass. 1ère civ. (13 May 2015), No. 13-17.751, Commissimpex v Republique du Congo.

[93] Cour constitutionnelle (27 April 2017), No. 48/2017, para. B20.1.

[94] Cour constitutionnelle (27 April 2017), No. 48/2017, para. B21.

[95] On this aspect, see Bismuth (2015), p. 640. See also Dopagne (2019), p. 402; Fox and Webb (2013), p. 518.

for a special waiver is to be found.[96] So far, this requirement exists not only in France and Belgium, but also in Germany[97] and Australia.[98]

However, the key concern for creditors is not the possibility of seizing property actually used strictly in the context of a diplomatic mission such as an embassy, but the availability of adequate procedures to obtain evidence as to the actual or potential use of property formally designated as 'diplomatic.' Without such evidentiary safeguards, the special waiver clause—which could not have been fully contemplated by creditors before these recent developments in France or Belgium—could eventually encourage States to designate as 'diplomatic' certain assets (such as bank accounts) that are not used for their alleged purposes.

4 Conclusion

The provisions of the French Sapin 2 Law on immunity from execution offer an interesting illustration of how international customary law can be used and manipulated at the domestic level for purely political motives. While the stated intention was to ensure compliance with international customary law as reflected by the UNCSI, it turns out that the French statute significantly and purposefully deviates from it in many ways for some different reasons: preserve peaceful diplomatic relations, avoid offending certain powerful States, avoid interference with sovereign debt restructurings, but also preserve the competitiveness of domestic companies and their activities abroad.

But when rules on immunity from execution are modified for whatever reason, they are applicable to all types of enforcement measures and not only for those for which they have been designed. They may affect enforcement measures sought by so-called vulture funds, but also those requested in the context of the payment of arbitral awards, damages for torts or compensation to be paid to embassy employees.

States' creditors in the weakest position to obtain enforcement measures are those who cannot usually rely on a waiver by the State of its immunity from enforcement.

Some precedents have shown that claimants such as former embassy employees who cannot generally rely on such a waiver are in the most precarious situation. Faced with the obstacle of immunity from execution, they will have no choice but to

[96] On the evolution of State practice, see Grandaubert (2021), pp. 506–511. See also Dopagne (2019), p. 402.

[97] BVerfG (6 December 2006), No. 2 BvM 9/03, S v. Ministro de Economía Hipolito Yrigoyen, para. 59 (according to which it cannot be inferred from the VCDR, the work of the International Law Commission and the international law literature 'that a general rule of international law exists according to which a blanket waiver of immunity would be suitable for waiving the diplomatic immunity of embassy accounts'). (Translation from the author).

[98] Australia Foreign States Immunities Act 1985, sec. 31(4) ('a waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property as property to which the waiver applies').

bring in France a 'strict liability claim' before administrative courts to engage the State's responsibility on the basis of a personal damage caused by the implementation of a treaty or a rule of customary international law.[99] It will therefore be up to the French taxpayer to bear the financial consequences of the successful invocation by the foreign State of its immunity from execution—and leaving it freed from its monetary obligations.

More sophisticated creditors, such as corporations, whether or not they benefit from a waiver of immunity from execution, could be tempted, faced with difficulties in executing their claims, to sell them at a lower price to financial funds specialized in the recovery of sovereign debts. Some precedents show that this secondary market can be particularly unscrupulous. For example, Vivendi had been waiting since 1997 for the settlement of a claim on Argentina and, given the difficulties with regard to enforcement, decided to sell its claim to the financial fund Gramercy for 25% of its value and by being paid in Argentine bonds—while the fund was already secretly negotiating with Argentina to whom it sold the claim for more than 60% of its value. The obstacles that creditors face as a result of the more restrictive rules on immunity from execution could therefore encourage the development of a secondary market for sovereign debt dominated by opaque actors, likely to encourage embezzlement and dishonorable collection practices. This would be another unfortunate side effect of a law on 'Transparency, the Fight against Corruption and the Modernization of Economic Life.'

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[99] CE (14 October 2011), No. 329788, Om Hashem Saleh et autres.

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