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# Enforcement of Judgments

France: Trends & Developments

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## Trends and Developments

*Contributed by:*

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The French enforcement system has its own dynamic and is constantly improving; it might also depend on external factors, including politically – the COVID-19 crisis and Brexit are perfect examples thereof.

Within Europe, Brexit highlights the importance of each country's system of enforcement of judgments. Following Brexit, UK judgments are no longer expected to benefit from automatic recognition within the European legal system. The possible fall-out has already been anticipated – for example, with respect to ISDA master agreements.

Until recently, the most widely used standard contract for derivatives and swaps by the ISDA association was subject to English law and the jurisdiction of the English courts. In July 2018, two new ISDA master agreement standards were set forth, subject to French and Irish law. The French legal standard, chosen as a practical solution for civil law countries, is subject to the jurisdiction of the newly established French international courts both at first instance and appeal levels to deal with international contracts, including contracts between non-French parties. This new development is directly related to Brexit and the French system of recognition and enforcement of judgments.

Given the stakes attached to enforcement, French law has created a stable system where creditors have the right to enforce a judgment recognised by law that is subject to constitutional protection. This right to enforceability echoes European jurisprudence and regulations which, in general, has a solid influence on the French legal system for recognition and enforceability of judgments.

The system of enforcement of judgments has recently been heavily affected by the consequences of COVID-19. This does not affect the main trends relating to the impact on foreign judgments.

### **French Law: Trend to Extend Recognition and Enforceability of Foreign Judgments**

Under Regulation 1215/2012 dated 12 December 2012, also known as the Brussels I bis regulation, judgments in civil and commercial matters rendered within an EU member state enjoy automatic recognition and enforceability in France. Furthermore, these judgments are directly enforceable on French territory without any specific formality. The same applies to the enforceability of French judgments within the EU. Rules similar

to the EU regulation have been applied, in part, to most EFTA member states by the Lugano Treaty dated 30 October 2007. However, under this convention enforceability is still subject to a declaration.

The UK has expressed the wish to accede, through bilateral convention, to the equivalent of the Lugano Convention after its effective withdrawal. This request is subject to negotiation.

In theory, there are a few available defences that can impede the enforcement of foreign judgments within the EU, but these are limited to issues including public policy, failure of service and situations where the judgment in question is irreconcilable with an earlier judgment. However, these defences are very limited and difficult to bring in the absence of exequatur orders prior to enforcement.

In contrast, and subject to a bilateral treaty with France, the enforcement of foreign judgments issued outside the scope of Brussels I bis or the Lugano Convention are subject to exequatur orders from the relevant French court. To obtain exequatur, a party must fulfil conditions set by the French courts to evaluate foreign judgments, which have become, over the years, more liberal and less restrictive.

The exequatur now must meet three conditions:

- the jurisdiction of a foreign court – a foreign court is deemed to have jurisdiction if it has tangible links with the dispute and if the matter does not fall under the exclusive jurisdiction of French courts;
- the absence of fraud related to the law or to the jurisdiction of the court; and
- compliance with international public policy.

Under French international public policy, the French courts exercise a more limited control than under domestic policy. Examples of international public policy requirements include: proper service to the defendants; a reasonable time afforded to the parties during the foreign proceeding; and the independence and impartiality of the foreign court.

Although limited, the additional steps related to exequatur involve additional time and risks which may be prejudicial to the creditor. Furthermore, a party objecting to recognition and/or enforceability has the right to bring a claim before the rel-

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evant French court if the foreign judgment does not meet the requirements for recognition or enforceability.

## **Recent Variations to the Scope of Immunities**

Foreign judgments rendered in tax, administrative and criminal matters cannot be subject to exequatur. Additionally, certain international or public bodies benefit from immunity. Foreign heads of states, as well as foreign diplomats/agents and international organisations, enjoy a certain measure of protection against enforcement measures.

A new law was enacted on 9 December 2016 to increase this level of protection. Conservatory or enforcement measures against a foreign state are now subject to specific authorisation from an enforcement judge in the Paris civil court and are limited to certain occurrences, one of which is the explicit consent of the foreign state.

Specific provisions were adapted for hedge funds, where measures relating to assets belonging to a foreign state may not be enforced by a French judge if one of the following conditions is fulfilled:

- the foreign state whose assets are subject to precautionary or enforcement measures is a beneficiary of OECD development aid; or
- the debtor acquired the title when the foreign state was in default of a debt security or proposed a change to the terms of the debt obligation within 48 months of the debtor seeking authorisation to carry out an enforcement measure.

Public bodies (the French state, public and local authorities as well as public establishments) also enjoy immunity. They can, however, be ordered to pay a pecuniary penalty if they do not execute a judgment.

In the event that a local authority fails to execute a judicial decision ordered by the French state, subject to the control of the competent judge and various other conditions, necessary measures may be taken, including the sale of the local authority's assets if the said assets are not deemed necessary to the operation of the local authority.

A recent judgment dated 5 September 2019 handed down by the Paris court of appeal on the basis of these new provisions has provided valuable information on the new regime of immunities from enforcement.

In simplified terms, the Paris court of appeal implemented a new balance between the state and the creditors that is:

- more favourable to the state with regard to the regime of waivers of immunity which requires an express consent from the state to allow the seizure;
- more favourable to creditors with regard to the ability to seize assets belonging to companies which are deemed to be the "emanation" of the state. The decision suggests in this respect a shift in the case law of the French jurisdictions with respect to the burden of proof which seems to be placed upon the state under certain circumstances.

This ruling is part of a movement to find the right balance between the respective interest of the states and those of the creditors.

## **Enforcement Measures: the Efficiency Objective of the Latest Reforms**

There are three main categories of enforcement measures: (i) to pay; (ii) to do something or refrain from doing something; and (iii) to give or to return something.

These enforcement measures may only be taken against the debtor's assets and not against the person themselves, except on strictly limited occasions. The creditor has the right to choose the type of enforcement measure depending on the nature of the assets to be attached.

The reforms of recent years have:

- adapted enforcement procedures so as to keep pace with the evolution of asset forms and values, particularly the evolution of assets in economies with an increasing share of intangible assets – eg, licences, patents, domain names and other types of IP assets;
- improved the efficiency of the procedure – enforcement measures, including attachments, are carried out through acts serviced by bailiffs, thereby eliminating the need to go back to the judge, except in cases related to either the attachment of real assets or the remuneration of employees; and
- centralised all challenges to enforcement measures and enforcement titles before the same court (the "enforcement judge"), as well as authorisation of conservatory measures prior to the delivery of a judgment to facilitate enforcement once the judgment has been rendered.

The most recent reform makes it a point to simplify the rules of court organisation by providing for an additional transfer of competence in favour of the enforcement judge who is now responsible for the specific procedure related to attachment of remunerations as introduced by decree dated 11 December 2019.

Nevertheless, this trend towards increasing the powers of the enforcement judge raises the question of the relationship with the substantive judgment. The power of the enforcement judge to examine enforceable titles cannot allow him or her to question titles which have the force of *res judicata*. However, the enforcement judge has powers of interpretation which in certain case may be extensive.

The most recent reforms, resulting from the law 2019–22 for the 2018–22 planning and reform of the justice system dated 23 March 2019, illustrate the approach of French legislators, which is to improve the efficiency of the system on an incremental basis based on the evolution of economic and technological trends and the experience of the practitioners.

As an example, the law has transferred, in part, the management of seizures of real assets and salaries from the courts in charge of salary seizures to the French state bank (*caisse des dépôts et consignations*) when seizure is sought by several creditors. This reflects a trend in French procedure – the transfer of certain duties of the court to third parties, thus allowing the court to focus on its essential duties. In the same vein, the secretary of the enforcement judge, will have the role of allocating, in lieu of the judge, the amount of remuneration seized.

### Impact of Digital Transformation

The French system continuously introduces laws that recognise the use of digital tools to implement enforcement measures. For example, the notification of a judgment by a bailiff, a prerequisite step before every enforcement action, may be executed electronically, but only with the debtor's express agreement. This specific requirement explains why electronic notification is rarely used.

The law of 23 March 2019 imposed the use of electronic acts in matters relating to the seizure of bank accounts. Electronic acts are also used to seize vehicles through notification to the public authority in charge of vehicle registry, thus preventing the sale of vehicles subject to judgments.

### Extension to the EU Territory

The efficiency objective of the French system extends to European territory. For example, the French courts have ruled that the seizure of an account held by a French bank also extends to accounts managed by its European branches.

### Complementary Ways to Enforce Judgments Available under French Law

The rights of creditors to obtain enforcement of a judgment have been strengthened through various additional measures:

- the possibility of obtaining an additional pecuniary penalty if a judgment is not executed – the sum fixed by the judge is calculated in proportion to the period of failure to perform;
- an automatic increase of late payment interest in the absence of a judgment extending the deadline;
- the inability of debtors to appeal or challenge a judgment that has not been executed, even provisionally; and
- the judgments of first instance are now, in principle, provisionally enforceable – exceptions exist if the law specifically provides otherwise, or if the judge at first instance considers that such provisional execution is incompatible with the nature of the case.

### The Balance Between Enforcement and Protection of Debtors

French law concurrently acts to protect the debtor against measures that do not respect the debtor's fundamental rights, such as dignity and the right to privacy, and the special status of bailiffs – professional officers appointed by the Minister of Justice, who enjoy public authority prerogatives to enforce judgments and are governed by mandatory rules and a code of ethics. These debtor rights have been applied in several ways, as listed below.

- Regarding the identification of debtor assets, France has developed various sources of information accessible to creditors whereas the law protects debtors from excessive intrusion. For example, unless through the initiation of civil enforcement proceedings judicially authorised, the law does not allow creditors access to bank account balances.
- The obligation of creditors to carry out enforcement measures in proportion to the amount of the claim and the amount of expenses involved by the said measures. In some cases, the creditor is required to exercise certain measures before implementing other measures (for example, a mortgage creditor is required to first seize the mortgaged real estate asset before seizing any other assets).
- A prohibition from implementing enforcement measures during certain dates or times.
- The right to proceed to the voluntary and amicable execution of a sale to avoid a forced sale.
- The possibility for the debtor to benefit from payment terms of up to 24 months.

### Enforcement of Judgments Suspended by Insolvency Proceedings

Under French law, judgment enforceability and enforcement measures are suspended and/or prevented by the automatic stay attached to the opening of an insolvency proceeding. This principle applies to all creditors, secured and unsecured. Except in a few limited cases, the suspension will continue to apply until the closure of the insolvency proceedings and thereafter.

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This (particularly strong) protection of the debtor is aimed at preserving the continuity of the debtor's business and to preserve equality as between the creditors. However, in practice there is a limit to the level of enforceability applicable to corporations and self-employed professionals. To some extent, individuals also have their own protections, which are comparable to insolvency proceedings through the French legislation on over-indebtedness.

## **Enforcement of Judgments Suspended by Criminal Seizures**

The law of 9 July 2010 provided a new powerful tool to prosecutors and investigating judges: the possibility to order seizures during criminal proceedings. Those seizures may apply to any asset that could be subject, in case of a trial, to a confiscation by the criminal court (bank accounts, moveable assets, property, shares, etc).

Assets may be seized not only if they have a link with the alleged offence – being the object or the product of this offence, or a mean used to commit the offence – but also if they are equivalent in value to the alleged offence. Those seizures may be ordered at any stage of the criminal proceedings and are possible whenever the magistrate considers that sufficient evidence has been collected to establish an offence, without any intervention of a criminal court.

Such criminal seizures, which have been increasingly used over the past ten years, suspend, or prevent any civil enforcement measure on the concerned asset until its withdrawal or the confiscation of this asset. According to recent case law dated 2017, this even applies to assets included within the scope of an insolvency proceeding.

The creditor who initiated an enforcement procedure before the criminal seizure enjoys the full right to own a collateral security on the seized asset, which seniority is set at the date of the opposability of this enforcement procedure.

In addition, if retaining the seized asset is no longer necessary under criminal legislation, a creditor with an enforceable title related to a due claim may be authorised by the criminal magistrate to initiate or resume a civil enforcement procedure on this asset.

## **Impact of the COVID-19 Crisis on French Procedures**

The current global health crisis has made it difficult to strike a balance between the public health imperative, the protection of the rights of litigants, and the predictability of the rules of procedure.

In an attempt to reconcile continuity of public service and the physical closure of the courts, the French government was

empowered to issue numerous legal reforms of a temporary and exceptional nature, particularly those of 27 March 2020 and 20 May 2020. Faced with a triple imperative of pragmatism, legal security and simplification, the rules have been adapted for the courts in non-criminal matters, particularly with regard to procedures. In this respect, the following are examples of measures.

### *COVID-19: the enforcement freeze*

In response to the crisis, a “legally protected” period was created with the consequence, among others, of adjusting the time limits for actions and appeals but also to automatically suspend the penalties attached to certain contractual obligations and judgments.

### *Limitation of forced executions carried out by bailiffs*

The national chamber of bailiffs has also provided numerous recommendations to bailiffs in the context of the health crisis. For example, enforcement measures would no longer be carried out at the debtor's domicile, nor those requiring a prior decision of the courts.

It has also been recommended that enforcement procedures be postponed if possible and that dematerialised channels of communication should be privileged.

### *Enforcement of judgments suspended by pre-insolvency proceedings enhanced by the COVID-19 effect*

Under French law, judgment enforceability and enforcement measures are suspended and/or prevented by the automatic stay attached to the opening of an insolvency proceeding. The same protection has been made available to debtors for a limited time period during the COVID-19 crisis under pre-insolvency proceedings called “conciliation” which allows the debtor to preserve its activities and assets without entering into a true insolvency proceeding.

### *The strict adaptation of the courts*

In practice, the courts have tried to maintain judicial efficiency while dealing with the issues related to the COVID-19 crisis by putting in place continuity plans, correlated with the government's measures.

Thus, simplification measures have been taken – for example, the possibility in the event of the inability of a court to function to transfer the matter to another court of the same nature, or the possibility for the interim relief judge to reject the application before the hearing if the application is inadmissible.

### *Trends towards dematerialisation reinforced by the COVID-19 effect*

The necessary adaptations in response to the COVID-19 crisis have made it possible to hold proceedings without a hearing,

with restricted publicity or in chambers. Moreover, audio-visual means of telecommunication, the possibility of resorting to video-conferencing, and the possibility of recourse to a unique judge have all been favoured.

## **Practical Lessons from the Recent Developments**

The enforcement of judgments in France offers various rights to creditors which are regularly enhanced by French legislators, albeit limited by the situation (financial and otherwise) and the protection of the debtor. This was the case before the COVID-19 crisis, and continues to be the case during and thereafter.

Creditors are encouraged to proactively define a strategy adapted to the French jurisdiction; this may be implemented in advance, even before an enforceable judgment is rendered (eg, choice of appropriate jurisdiction when possible, use of conservatory measures, use of securities, etc).

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and dispute resolution, the firm provides a comprehensive range of legal services. Altana's lawyers provide multifaceted insight encompassing both technical and cultural expertise in all major sectors, and have advised clients in common, civil and "hybrid" legal systems.

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