

Ruling n°639 of 12 November 2020 (19-18.849) – Cour de cassation (*Court of cassation*) - Commercial Chamber - ECLI:EN:CCASS:2020:CO00639

Stay of individual proceedings and exequatur of an international arbitration award: the exequatur of an arbitration award can be granted for the sole purpose of enabling the creditor to have his contested obligation debt recognized before the bankruptcy judge.

Only the french version is authentic

Company in difficulty (Law of 26 July 2005)

Dismissal

Summary

The exequatur of an international arbitration award condemning a debtor to pay a sum of money cannot, without failing to comply with the principle of the stay of individual enforcement proceedings against debtors placed in safeguard proceedings, result in giving such award the force and effect of a decision condemning the debtor. The exequatur of the award may nevertheless be granted, at the request of the creditor, for the sole purposes of allowing him to have his right of claim recognized when it is contested before the supervisory judge.

Appellant: IPSA Holding, a simplified joint stock company & Ors

Respondent: Alpha Petrovision Holding AG

Facts and Procedure

1. According to the ruling under appeal (Paris, 14 May 2019), pursuant to an agreement dated 9 September 2011, Alpha Petrovision Holding (APV), a company incorporated under the laws of Switzerland, sold all of the shares of IPSA, a mutual fund manager incorporated under French law, to ACG Private Equity (ACG), for the purchase price of 1 euro pending the liquidation of the funds, in addition to two deferred purchase-price instalments, one representing 50% of IPSA's earnings, known as an Earn Out, and the other based on the performance of the funds. In March 2012, ACG sold the shares to the French-based company IPSA Holding, the latter being thereby substituted in all the rights and obligations of ACG.

2. On 12 November 2014, APV initiated arbitration proceedings to settle a dispute arising from the payment of the deferred purchase-price instalments. On 23 December 2016, an arbitral tribunal issued an award in Zurich ordering IPSA Holding to pay APV an amount of

EUR 3,310,399.16 in principal and interest, together with any subsequent interest, costs and expenses.

3. On 9 January 2017, a court started safeguard proceedings against IPSA Holding. CBF Associés, represented by Mr B... was appointed administrator and I... O..., represented by Mrs. O... was appointed as the creditors' representative. APV filed proof of claim, which was contested.

4. On 8 March 2017, APV, in voluntary liquidation, filed a petition for the enforcement of the arbitral award, requesting the issuance of an enforcement notice. This was granted by an order of the President of the tribunal de grande instance of Paris (*Paris Tribunal of First Instance*) on 10 March 2017, ruling the award enforceable. IPSA Holding appealed the order.

5. By order of 22 May 2018, the supervisory judge, to whom a request for the admission of APV's claim had been submitted, stayed the proceedings pending the decision of the cour d'appel (*Court of Appeal*) ruling in the appeal against the exequatur order.

Reviewing pleas

Reviewing the plea of the cross-appeal

Statement of plea

6. APV takes issue with the cour d'appel (*Court of Appeal*) for overturning the exequatur order to the extent that it makes enforceable the order for payment of sums of money, whereas:

"as an exequatur is not an enforcement order, the opening in France of collective insolvency proceedings against a debtor sentenced by an arbitral tribunal abroad has no bearing on the exequatur of the arbitral award".

He claims that in overturning the exequatur order of 10 March 2017 in that it renders enforceable an order for payment of sums of money, in holding that the only purpose of the exequatur was the recognition and enforceability in France of the award, and in considering that making such a payment order enforceable would violate the principle of a stay of individual proceedings, the cour d'appel (Court of Appeal) wrongly considered that the exequatur constituted an enforcement order and violated Article 1516 of the Civil Procedure Code."

Court's response

7. The ruling under appeal states that the principle of a stay of proceedings against individual creditors is both a domestic and international public policy principle. Having noted that the disputed judgment of 23 December 2016, which had the force of res judicata when handed down, ordered IPSA Holding to pay various sums to APV, and that the court opened the safeguard proceedings against IPSA Holding on 9 January 2017, the judgment correctly held that exequatur cannot, without disregarding the above-mentioned principle, make an order against the debtor for the payment of sums of money enforceable.

8. The plea is therefore unfounded.

Reviewing the first plea of the main appeal

Statement of plea

9. IPSA Holding, CBF associés, represented by Mr B... and the I...-O..., represented by Mrs O...., acting in their respective capacity, submit that the ruling upholds the enforcement order to the extent that it implies recognition of the award, whereas:

"1°/ pursuant to Articles L. 622-21, L. 622-22 and L. 624-2 of the Commercial Code, in the absence of proceedings pending at the date of the judgment opening the proceedings to safeguard the debtor, the creditor, upon declaration of his claim, can only confirm the principle and fix the amount pursuant to the procedure for verifying claims; only a decision of supervisory judge declaring or acknowledging its own lack of jurisdiction to rule in a dispute relating to a declared claim and which consequently stays the proceedings with regard to its admission, may enable the parties to refer the matter to the competent court; consequently, following the declaration of its claim, a creditor cannot directly submit a request for exequatur or recognition of an arbitral award to the court and must await the decision of the supervisory judge inviting him to submit the matter to the competent court, even if the dispute or claim is not obviously within the supervisory judge's jurisdiction; that in ruling as it did, after acknowledging that IPSA Holding had been placed in safeguard proceedings by a judgment of the tribunal de commerce de Paris (Paris Commercial Court) of 9 January 2017, that APV had declared its claim as a liability of IPSA Holding on 16 February 2017 and had then filed a petition for enforcement of the award on 8 March 2017, without awaiting the decision of the supervisory judge who has sole competence to decide on the regularity of the declaration of claim, and who only ruled a stay of proceedings by order of 22nd May 2018, the cour d'appel (Court of Appeal) violated the provisions of articles L. 622-21, L. 622-22, L. 624-2 and R. 624-5 of the Commercial Code, together with Article 1520.5° of the Civil Procedure Code;

2°/ the subject matter of the dispute is determined by the respective claims of the parties and the court must rule on all the claims and only on the claims; in confirming the order of 10 March 2017 granted by the President of the tribunal de grande instance de Paris (Paris Tribunal of First Instance), in that it recognised the award issued on 23 December 2016, despite the fact that AP, in its final appeal submissions only requested confirmation that the order had conferred exequatur on the arbitral award and did not request its recognition, the cour d'appel (Court of Appeal) violated Articles 4 and 5 of the Civil Procedure Code;

3°/ the court must respect and guarantee the adversarial principle; that by raising its own ground such that, in view of the circumstances in the case, the only purpose of the exequatur was the recognition and enforceability in France of the sentence and without first inviting the parties to discuss these grounds, the cour d'appel (Court of Appeal) violated Article 16 of the Code of Civil Procedure."

Court's response

10. The ruling contested decided that, given that, pursuant to the provisions of Article 1525 of the Civil Procedure Code, the award can only be contested by way of appeal against the exequatur order and for the limited reasons set forth in this text, the creditor must apply for

exequatur when the verification of the claims give rise to a dispute over which the supervisory judge has no jurisdiction. It held that the purpose of an exequatur pronounced in such circumstances could only be the recognition and enforceability in France of the award. It decided that the exequatur order issued on 10 March 2017, following the declaration of the claim arising from the award, did not fall within the scope of the violation of the principle of international public policy concerning the stay of individual proceedings against the debtor by the creditors on this sole aspect regarding the recognition. On the basis of these findings and assessments, the cour d'appel (*Court of Appeal*), requested by APV to grant the exequatur of the award in order to incorporate its provisions into the internal legal order, has accurately deduced, without failing to take into account the purpose of the dispute or the adversarial principle, that the exequatur could, in this situation, be granted for the purpose of allowing APV to have its right of claim recognised and not for the purpose of giving such award the force and effect of a decision condemning the debtor.

This plea is therefore unfounded.

Reviewing the second plea of main appeal

Statement of plea

12. IPSA Holding, CBF associés, represented by Mr B... and I...-O..., represented by Mrs O... acting in their respective capacity, submit that the judgment upholds the enforcement order to the extent that it implies recognition of the award, whereas:

“In its final appeal submissions, filed and served on 3 December 2018, IPSA Holding expressly argued that the arbitral tribunal's disregard of the adversarial principle was evidenced by the fact that its decision on items of expenditure, in the second part of its arbitral award, were based on criteria that they had defined in the first part of that award although this did not correspond to APV's position, as claimant in the arbitration, for whom all expenses were to be treated uniformly and without distinction, nor that of IPSA Holding, as defendant in the arbitration, in whose opinion all exceptional expenses relating to the management of the company prior to the closing were to be excluded from the calculation of the expenses cap. The arbitral tribunal indeed ruled that such expenses should only be excluded from the calculation of the expenses cap if they resulted from a breach of the representations and warranties provided in the contract. IPSA Holding further argued that it disputed the arbitral tribunal failure to allow it submit its item-by-item arguments concerning said expenses in response to the criteria adopted in the award which differed with those proposed by the parties. In ruling as it did on the grounds that the item-by-item discussion of expenses was introduced into the debate by way of the calculation formula filed by IPSA Holding and contested by APV, and that it had been the subject of a hearing by the arbitrators of the IPSA Holding's witness, as recognized by the Swiss Federal Court, without responding to these submissions, the cour d'appel (*Court of Appeal*) violated Article 455 of the Civil Procedure Code.”

Court's response

13. The discussion on the interpretation of the Earn Out clause in the agreement for the sale of shares and how the expenses to be included in this calculation would be determined was referred to the arbitral tribunal. IPSA Holding provided the arbitral tribunal with documents outlining the different elements, item-by-item, that it believed should be taken into account in

the calculation of the Earn Out, all of which were contested by APV. The item-by-item discussion of expenses was introduced by way of the calculation formula submitted by IPSA Holding and contested by APV and was the subject of hearings of the arbitrators and of the IPSA Holding Witness. Accordingly, the cour d'appel (*Court of Appeal*) responded by dismissing these submissions.²²

14. This plea is therefore unfounded.

ON THESE GROUNDS, the Court:

DISMISSES the main appeal and the cross-appeal

President: Mr Rémercy, Senior Judge acting as President

Reporting judge: Ms Bélaval

Advocate-General: Ms Guinamant, Advocate-General Referee

Lawyer(s): SCP Ortscheidt - SCP Thouin-Palat et Boucard