

In the case of an offer of arbitration in a treaty that does not contain a *ratione temporis* restriction, the annulment judge need only verify that the dispute arose after the treaty's entry into force (Ruling n° 877 – 21-15.390)

07/12/2022



Ruling No. 877

PARTIAL QUASHING

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), FIRST CIVIL CHAMBER, 7 DECEMBER 2022

The Joint Stock Company "State Savings Bank of Ukraine", also known as JSC Oschadbank, formerly known as Public Joint Stock Company (State Savings Bank of Ukraine), a joint-stock company with registered office at [Address 1] (Ukraine), brought appeal No. 21-15.390 against the ruling delivered on 30 March 2021 by the *cour d'appel* (Court of Appeal) of Paris (Division 5, Chamber 16, International Commercial Chamber) in the dispute between said company and the Russian Federation, with its address at [Address 1] (Russian Federation), acting through the Office of the Prosecutor-General of the Russian Federation, itself represented by the Prosecutor-General of the Russian Federation in office, having full powers to act on behalf of the Russian Federation, domiciled at [Address 4] (Russian Federation), respondent to the quashing.

In support of its appeal, the applicant relies on the two pleas for quashing appended to this ruling.

The case file was sent to the prosecutor-general.

On the report by Ms Guihal, elder judge, the observations and arguments of Ms Ortscheidt, lawyer of Joint Stock Company "State Savings Bank of Ukraine", and Ms Benabent, lawyer of the Russian Federation, and the advisory opinion of Mr Poirret, first advocate-general, following debate in the public hearing of 25 October 2022 in the presence of Mr Chauvin, President, Ms Guihal, reporting elder judge, Ms Duval-Arnould, Ms Auroy, elder judges, Ms Antoine, Mr Mornet, Ms Poinseaux, Mr Chevalier, Ms Kerner-Menay, Mr Fulchiron, Ms Dard, Ms Bacache-Gibeili, Ms Beauvois, Mr Bruyère, Ms Agostini, judges, Ms Le Gall, Ms Kloda, Mr Duval, Ms Azar, Ms de Cabarrus, Ms Dumas, Mr Buat-Ménard, Ms Feydeau-Thieffry, Mr Serrier, Ms Champ, Ms Robin-Raschel, judge referees, Mr Poirret, first advocate-general, and Ms Tinchon, Chamber Registrar,

following deliberation in accordance with law, the First Civil Chamber of the *Cour de cassation* (Court of Cassation), composed of the abovementioned president and judges in accordance with Article R. 421-4-1 of the Judicial Code, delivered this ruling.

Account of the dispute

Facts and Procedure

1. According to the ruling under appeal (Paris, 30 March 2021), on 27 November 1998 the Russian Federation and the Republic of Ukraine signed a bilateral investment protection treaty (BIT), which entered into force on 27 January 2000.
2. After defining the term 'investments' in Article 1.1, Article 9 of the BIT provides that "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with the investments, including disputes concerning the amount, terms or procedure for payment of compensation, as provided for in Article 5 of this Agreement, or the procedure for transfer of payments, as provided for in Article 7 of this Agreement" may be submitted to arbitration after an attempt at amicable settlement.
3. Article 12 states that, "This Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party as from 1 January 1992."

4. On 20 January 2016, the Ukrainian Joint Stock Company "State Savings Bank of Ukraine" (the bank) initiated a claim for compensation before an arbitration tribunal on the basis of that treaty, claiming that the Russian Federation had expropriated its assets located in Crimea in 2014.
5. The Russian Federation initiated an action for annulment of the ruling, which, upon finding that the BIT had been infringed, ordered it to pay the bank the sum of USD 1,111,300,729.

Pleas

Examination of the pleas

On the second part of the first plea

Statement of plea

6. The bank objects to the ruling for annulling the arbitration ruling and ordering it to pay EUR 150,000 to the Russian Federation pursuant to Article 700 of the Code of Civil Procedure, whereas, "going further than the denominations chosen by the arbitrators or proposed by the parties, the court hearing the annulment supervises the arbitration tribunal's decision on its jurisdiction, by investigating all the legal or factual elements that make it possible to assess the scope of the arbitration agreement; whereas such control is exclusive of any review of the merits of the ruling; whereas, according to Article 9 of the Bilateral Investment Treaty concluded on 27 November 1998 between the Russian Federation and Ukraine on the Promotion and Reciprocal Protection of Investments, "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with the investments, including disputes concerning the amount, terms or procedure for payment of compensation, as provided for in Article 5 of this Agreement, or the procedure for transfer of payments, as provided for in Article 7 of this Agreement", may be submitted to arbitration; whereas Article 12 of the Bilateral Investment Treaty, insofar as it provides that, "This Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party as from 1 January 1992", does not limit the procedural protection afforded by the arbitration agreement contained in Article 9 of said Treaty for investments made after that date, but only affects the entry-into-force of the substantial protection of investments by the Treaty; whereas, in ruling as it did, on the grounds that, "The arbitration offer resulting from Article 9 is not a general and unconditional offer for any investment dispute between the Russian Federation and Ukraine, but rather an offer within the limits set by the bilateral investment treaty, such that the procedural protection offered by the arbitration clause, where the arbitration tribunal's jurisdiction is subject to the applicability of the treaty to the investment under dispute and, more specifically, to the existence of a dispute concerning an investment necessarily carried out by the investor of one of the Contracting Parties in the territory of the other from 1 January 1992" and that, "The terms of the above-mentioned Article 12 are sufficiently clear to consider that it determines the temporal scope of the Treaty and entitles only investments carried out as from 1 January 1992 to substantial and procedural protection, such that those that were carried out previously are necessarily excluded", to imply that the banking activity of JSC Oschadbank in Crimea that began before 2 January 1992, "necessarily implied that the execution of the investment was also excluded" and that, "the temporal condition laid down by Article 12 of the Bilateral Investment Treaty, which contains the arbitration offer is not met, such that the arbitration tribunal was wrong to accept jurisdiction to hear the dispute", the cour d'appel (Court of Appeal) infringed Article 1520(1) of the Code of Civil Procedure."

Statement of reasons

Court's response

Admissibility of plea

7. The Russian Federation claims that the plea is inadmissible insofar as the bank contradicted itself to its detriment in the appeal for revision of the ruling.
8. However, the pleas put forward in another instance cannot be regarded as a contradiction to the detriment of others.
9. The plea is therefore admissible.

Merits of the plea

In view of Article 1520 paragraph 1 of the Code of Civil Procedure:

10. It follows from this provision that if the court hearing the annulment reviews the decision of the arbitration tribunal concerning its jurisdiction, whether it has accepted or declined jurisdiction, by investigating all the matters of law or fact that make it possible to assess the scope of the arbitration agreement, said supervision is exclusive of any review of the substance of the ruling.
11. With regard to the protection of transnational investments, the State's consent to arbitration results from the standing offer of arbitration formulated in a treaty, addressed to a category of investors defined by the treaty for the settlement of investment disputes.
12. To set aside the award, the ruling observes that Article 9 of the BIT does not establish a general and unconditional offer for all investment disputes between a Contracting Party and an investor of the other Contracting Party, but rather an offer within the limits set by the Treaty, such that the procedural protection afforded by the arbitration clause and thus the jurisdiction of the arbitration tribunal is subject to the applicability of the Treaty to the investment under dispute and, more specifically, to the existence of a dispute concerning an investment that has necessarily been carried out by an investor of one of the Contracting Parties in the territory of the other as from 1 January 1992.
13. In so ruling, the *cour d'appel* (Court of Appeal), which was required only to ascertain, under *ratione temporis* jurisdiction, that the dispute had arisen after the entry-into-force of the treaty, violated the aforementioned text, whereas neither the arbitration offer stipulated in article 9 nor the definition of investment provided for in article 1 contained any restriction *ratione temporis*, and article 12 did not state a condition of consent to arbitration on which the jurisdiction of the arbitration tribunal depended, but rather a substantive rule.

Operative part of the ruling

ON THESE GROUNDS, and without having to rule on the other pleas, the Court:

QUASHES AND SETS ASIDE, except insofar it rejects the dismissal raised by the Joint Stock Company "State Savings Bank of Ukraine" on the plea based on the temporal lack of jurisdiction of the arbitration tribunal, the ruling delivered on 30 March 2021 between the parties by the *cour d'appel* (Court of Appeal) of Paris;

Returns, except on this point, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Paris, otherwise composed;

Orders the Russian Federation to pay the costs;

pursuant to Article 700 of the Code of Civil Procedure, dismisses the claim made by the Russian Federation and orders it to pay the Joint Stock Company "State Savings Bank of Ukraine" the sum of EUR 3,000;

At the request of the Prosecutor-General of the *Cour de cassation* (Court of Cassation), this ruling shall be forwarded for transcription in the margin or at the bottom of the partially quashed ruling;

Thus decided by the First Civil Chamber of the *Cour de cassation* (Court of Cassation) and delivered by the president at the public hearing on the seventh day of the month of December of the year two thousand and twenty-two.

Pleas attached

PLEAS ATTACHED to this ruling

Pleas submitted by SARL Ortscheidt, Supreme Court Lawyer, for Joint Stock Company "State Savings Bank of Ukraine"

FIRST PLEA FOR QUASHING

The Joint Stock Company "State Savings Bank of Ukraine" (JSC Oschadbank) complains that the ruling under appeal annulled the arbitration award handed down in Paris on 26 November 2018 (PCA Case No. 2016-14) and ordered it to pay EUR 150,000 to the Russian Federation pursuant to Article 700 of the Code of Civil Procedure;

(1) WHEREAS, going further than the denominations chosen by the arbitrators or proposed by the parties, the court hearing the annulment reviews the decision of an arbitration tribunal on jurisdiction, seeking all the elements of law or fact that make it possible to assess the scope of the arbitration agreement; whereas such control is exclusive of any review of the merits of the ruling; whereas, by asserting that, "Only the common will of the parties has the power to vest in the arbitrator its judicial power, which can be confused in arbitration matters with its jurisdiction" and that, "Where the arbitration clause results from a bilateral investment treaty, it is therefore necessary to assess said common will in the light of all the provisions of the treaty so that the arbitration tribunal has jurisdiction to hear a dispute only if it falls within the scope of the treaty and if all the conditions of application of the treaty are met" (ruling under appeal, § 70 and 71), when the jurisdiction of the arbitration tribunal is assessed having regard not to all the conditions of application of the bilateral investment treaty, in particular those relating to the substantial protection offered by that treaty, but only to those affecting the arbitration agreement, the *cour d'appel* (Court of Appeal) infringed article 1520 paragraph 1 of the Code of Civil Procedure;

(2) WHEREAS, going further than the denominations chosen by the arbitrators or proposed by the parties, the court hearing the annulment reviews the decision of the arbitration tribunal concerning its jurisdiction, by seeking all the

matters of law or fact that make it possible to assess the scope of the arbitration agreement; whereas such control is exclusive of any review of the merits of the ruling; pursuant to Article 9 of the Bilateral Investment Treaty signed on 27 November

1998 between the Russian Federation and Ukraine on the encouragement and reciprocal protection of investments, "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with the investments, including disputes concerning the amount, terms or procedures for payment of compensation, as provided for in Article 5 of this Agreement, or the procedure for transfer of payments, as provided for in Article 7 of this Agreement" may be submitted to arbitration; whereas Article 12 of the Bilateral Investment Treaty, in that it provides that, "This Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party as from 1 January 1992", does not limit the procedural protection afforded by the arbitration agreement contained in Article 9 of this Treaty to investments made after that date, but only affects the entry-into-force of the substantial protection of investments by the Treaty; whereas, in ruling as it did, on the grounds that, "The arbitration offer resulting from Article 9 is not a general and unconditional offer for any investment dispute between the Russian Federation and Ukraine, but rather an offer inserted within the limits set by the bilateral investment treaty, such that the procedural protection offered by the arbitration clause, where jurisdiction of the arbitration tribunal is subject to the applicability of the treaty to the investment under dispute and, more specifically, to the existence of a dispute concerning an investment that has necessarily been carried out by the investor of one of the Contracting Parties in the territory of the other as from 1 January 1992" (ruling under appeal, § 75) and that "the terms of the above-mentioned Article 12 are sufficiently clear to consider that it determines the temporal scope of the Treaty and entitles only the investments that were carried out from 1 January 1992 to substantial and procedural protection, such that those that were carried out previously are necessarily excluded" (ruling under appeal, § 83), to imply that the banking activity of JSC Oschadbank in Crimea began before 2 January 1992, this implied "necessarily, that the realisation of the investment was also fulfilled" and that "the temporal condition laid down by Article 12 of the Bilateral Investment Treaty, which contains the arbitration offer is not met, such that the arbitration tribunal was wrong to accept jurisdiction to hear the dispute" (ruling under appeal, § 100-101), the *cour d'appel* (Court of Appeal) infringed Article 1520 paragraph 1 of the Code of Civil Procedure.

SECOND PLEA FOR QUASHING (subsidiary)

The Joint Stock Company "State Savings Bank of Ukraine" (JSC Oschadbank)

challenges the ruling under appeal for having annulled the arbitration ruling handed down in Paris on 26 November 2018 (PCA Case No. 2016-14) and for having ordered it to pay EUR 150,000 to the Russian Federation pursuant to Article 700 of the Code of Civil Procedure;

(1) WHEREAS, according to Article 9 of the bilateral Treaty between the Russian Federation and Ukraine on the Promotion and Reciprocal Protection of Investments of 27 November 1998, "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with the investments, including disputes concerning the amount, manner or procedure for payment of compensation, as provided for in Article 5 of this Agreement, or the procedure for transfer of payments, as provided for in Article 7, may be submitted to an *ad hoc* tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of this Agreement"; whereas, according to article 1.1 of this treaty, the term 'investment' means, specifically, all kinds of assets which are invested by an investor of a contracting party in the territory of the other contracting party and then lists, in a non-exhaustive manner, assets considered to be investments; whereas Article 12 of the Agreement provides that, "This Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party as from 1 January 1992". whereas, in ruling as it did on the grounds that the banking activity of JSC Oschadbank in Crimea had begun before 2 January 1992, "necessarily implying that the execution of the investments was also started", to deduce "that the temporal condition laid down by Article 12 of the Bilateral Investment Treaty, which contains the arbitration offer, was not met, such that the arbitration tribunal was wrong to accept jurisdiction to hear the dispute" (ruling under appeal, §100 and 101), after having nevertheless found that, "On 18 March 2014, the Republic of

Crimea was joined to the Russian Federation by virtue of the treaty concluded on the same date" (ruling under appeal, § 2), from which it resulted that the assets of JSC Oschadbank located in the Crimean Peninsula had only become protected investments, carried out by a Ukrainian company in the territory of the Russian Federation, as defined in the bilateral investment treaty, after that date, the *cour d'appel* (Court of Appeal) infringed Article 1520 paragraph 1 of the Code of Civil Procedure;

(2) WHEREAS, SUBSIDIARILY, according to Article 9 of the bilateral Treaty between the Russian Federation and Ukraine on the Promotion and Reciprocal Protection of Investments of 27 November 1998, "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with the investments, including disputes concerning the amount, manner or procedure for payment of compensation, as provided for in Article 5 of this Agreement, or the procedure for transfer of payments, as provided for in Article 7, may be submitted to an ad hoc tribunal in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) of this Agreement"; whereas, according to article 1.1 of this treaty, the term 'investment' means, specifically, all kinds of assets which are invested by an investor of a contracting party in the territory of the other contracting party and then lists, in a non-exhaustive manner, assets considered to be investments; whereas Article 12 of the Agreement provides that, "This Agreement shall apply to all investments made by investors of a Contracting Party in the territory of the other Contracting Party as from 1 January 1992". whereas, in ruling as it did, on the grounds that, "In order to assess the date on which this investment, which should have been taken as a whole as all the banking and finance services provided by JSC Oschadbank in all its branches in Crimea, it is therefore necessary to examine the date on which said banking and finance activity was set up" (ruling under appeal, § 96), that, "The banking activity of JSC Oschadbank in Crimea had begun prior to 2 January 1992," (ruling under appeal), "necessarily implying that the investment was also carried out" (§ 100), to deduce that, "The temporal condition laid down in article 12 of the bilateral investment treaty, which contains the arbitration offer, is not met, such that the arbitration tribunal was wrong to accept jurisdiction to hear the dispute" (ruling under appeal, § 101), the *cour d'appel* (Court of Appeal), which added a condition that the treaty does not provide, infringed article 1520 paragraph 1 of the Code of Civil Procedure;

3°) WHEREAS, SUBSIDIARILY, by inferring that the banking activity of JSC Oschadbank in Crimea had begun before 2 January 1992, which necessarily implied that the execution of the investment was also started (ruling under appeal, § 100), from the fact that said bank arose from the dismantling of the unified banking system of the Soviet Union in 1991, that the activity of the Ukrainian branch of the Sberbank of the Soviet Union was transferred to the Ukrainian State by order of 20 March 1991 and to a company governed by public law known, as from 3 September 1991, as the "Ukrainian Commercial Public Savings Bank (Oschadbank d'Ukraine)", registered with the National Bank of Ukraine on 31 December 1991 (ruling under appeal, § 97), that in the terms of said bank's articles of association of 3 September 1991, it is indicated that it was set up by a law of 20 March 1991, that it is a legal person and that, with all its branches, it constitutes a single banking system, that the branches or departments located in the Autonomous Soviet Socialist Republic of Crimea, in the regions at [Address 3] as well as at local level, are headed by the directors of branches or managers of the departments who are hierarchically appointed by the administrative bodies of the bank from among persons having at least three years' practical experience in the bank, and that said branches are subject to the legal regime governing legal persons, act on behalf of the bank, have their own balance sheets, which form part of the balance sheet of the bank, and carry out their activity under the Regulation on branches and departments of the Bank approved by the Board of the Bank (ruling under appeal, § 98), and that it is apparent from a report of the meeting of the Board of the Bank of 3 September 1991 that, "The director of the branch of the Bank in Crimea is a member of the board of the above-mentioned bank such that as of that date, the banking and financial activities of JSC Oschadbank were already in progress" (ruling under appeal, § 99), on the contrary Oschadbank maintaining that the investment was not prior to 1 January 1992, since its Crimean branch had only been registered on 2 January 1992 (concl., § 163, p. 53), the *cour d'appel* (Court of Appeal), which ruled by simple assertion, infringed article 455 of the Code of Civil Procedure;

(4) WHEREAS, SUBSIDIARILY, going further than the names chosen by the arbitrators or proposed by the parties, the court hearing the annulment reviews the decision of an arbitration tribunal on jurisdiction by examining all the matters of law or fact that make it possible to assess the scope of the arbitration agreement; whereas, in its arbitration award of 26 November 2018, the arbitration tribunal compensated JSC Oschadbank in the amount of USD 597,771,793 for the loss of its property, USD 484,616,757 for its loss of future profits and USD 28,912,179 for the loss of third-party assets,

consisting of gold, jewellery and unknown assets, and commissions (award, § 332, 341 and § 374-375); whereas, by ruling as it did, after establishing that, "In the context of the arbitration procedure, JSC Oschadbank thus sought the protection of its tangible assets (movable and immovable property), and immovable rights (including those arising from leases), of the claims, rights and economic interests arising from the relations between the Crimean branch and its customers [...]" (ruling under appeal, § 95), without finding that the arbitration tribunal, by compensating JSC Oschadbank, ruled on the investments it had carried out in Crimea before 1 January 1992, the *cour d'appel* (Court of Appeal) did not legally justify its decision under Article 1520 paragraph 1 of the Code of Civil Procedure.

President : Mr Chauvin
First advocate-general : Mr Poirret
Reporting Elder Judge : Ms Guihal
Lawyer(s) : Ms Ortscheidt – Ms Benabent

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Institution judiciaire

Translated rulings