

Provisional measures and freezing of Iraqi assets (Ruling n° 831 - 19-14.929)

29/06/2023



Ruling No. 831

Partial quashing without referral

FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

RULING OF THE SECOND CIVIL CHAMBER OF THE *COUR DE CASSATION* (COURT OF CASSATION) OF 29 JUNE 2023

Montana Management Inc., a company operating under foreign law, with registered office at [Address 2] (Panama), lodged Appeal No. V 19-14.929 against the ruling delivered on 28 February 2019 by the *cour d'appel* (Court of Appeal) of Paris (Division 4, Chamber 8) in the dispute between:

(1) Heerema Zwijndrecht BV, a company operating under foreign law, with registered office at [Address 3] (Netherlands),

(2) BNP Paribas securities services, a limited partnership with share capital, with registered office at [Address 1],

respondents at the quashing. The company Heerema Zwijndrecht BV lodged a cross-appeal against the same ruling.

The appellant bases its action on one single ground of quashing.

The appellant in the cross-appeal bases its action on one single ground of quashing.

The case file has been sent to the Prosecutor-General.

On the report of Mr Cardini, judge referee, the observations of SCP Célice, Texidor, Périer, lawyers of Montana Management Inc., SCP Rocheteau and Uzan-Sarano, lawyers of BNP Paribas securities services, SCP Thouin-Palat and Boucard, lawyers of Heerema Zwijndrecht BV, and the advisory opinion of Mr Gaillardot, first advocate-general, following debate in the public hearing of 13 June 2023 in the presence of Ms Martinel, elder judge acting as President, Mr Cardini, judge referee-rapporteur, Ms Durin-Karsenty, Ms Vendryes, Ms Caillard, Mr Waguette, judges, Ms Bohnert, Ms Latreille, Ms Bonnet, judge referees, Mr Gaillardot, first advocate-general, and Ms Thomas, Chamber Registrar,

the Second Civil Chamber of the *Cour de cassation* (Court of Cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the abovementioned president and judges, after having deliberated in accordance with the law, has delivered the present judgment.

Account of the dispute

Facts and procedure

1. According to the ruling under appeal (Paris, 28 February 2019), delivered on referral after quashing (Second Civil Chamber, 28 June 2018, appeal No. 17-12.063), a ruling of the *cour d'appel* (Court of Appeal) of The Hague (Netherlands) dated 31 October 2000, declared enforceable in France by order of the President of *atribunal de grande instance* (Tribunal of First Instance) of 31 August 2011, ordered the State of Iraq and the Central Bank of Iraq to pay Heerema Zwijndrecht BV (Heerema) a certain sum.

2. In compliance with this decision, on 28 July 2011, Heerema carried out a precautionary seizure of receivables and a precautionary seizure of shareholder rights and securities, at the hands of the company BNP Paribas securities services (the bank), against the "Iraqi State and its entities whose funds belong to Iraq by virtue of UN resolutions, namely Montana Management Inc."

3. The precautionary seizures were converted into garnishment and sale on 24 June 2014 and 24 September 2014, respectively.

4. On 12 December 2014, Montana Management Inc. (Montana) brought an action against Heerema before an execution judge [*juge de l'exécution*] in order to oppose these measures. The bank intervened voluntarily in the proceedings.

5. By ruling of 28 February 2019, the *cour d'appel* (Court of Appeal) of referral set aside the judgment under appeal, except where it received the voluntary intervention of the bank, noted Heerema's withdrawal from its claim for payment against the bank and ordered Montana to pay the sum of 2,000 euros under Article 700 of the Code of Civil Procedure and to pay costs, and, also in a ruling, declared Montana's dispute admissible and validated the conversion measures for a certain sum.

6. The company Montana filed a main appeal against this ruling, and Heerema filed a cross-appeal.

7. By ruling of 21 December 2021 (Second Civil Chamber, 2 December 2021, appeal No. 19-14.929), the *Cour de cassation* (Court of cassation) referred requests for preliminary ruling to the Court of Justice of the European Union (CJEU) concerning the interpretation of Articles 4 and 6 of Regulation (EC) No. 1210/2003 of 7 July 2003.

8. By ruling of 15 December 2022 (CJEU, 15 December 2022, Nos. C-753/21 and C-754/21), the CJEU responded to the requests for preliminary ruling.

Reviewing pleas

Examination of the pleas Concerning the plea of the cross-appeal

Statement of reasons

9. In application of Article 1014(2) of the Code of Civil Procedure, it is not necessary to have a specially reasoned decision on this plea, the first part of which is clearly not of a nature to lead to quashing, and the second part is inadmissible. Concerning the first part of the plea of the main appeal

10. Montana objects to the ruling that validates the acts of conversion for the amount of (6,067,478.19 - 4,391,351.69 =) EUR 1,676,351.69 and orders it to pay Heerema the sum of EUR 10,000 under Article 700 of the Code of Civil Procedure and the corresponding costs, whereas "in accordance with Regulation (EC) No. 1210/2003, the freezing of funds or assets is understood as 'any action to prevent the movement, transfer, alteration, use or handling of funds in any way that would result in any change in their volume, amount, location, ownership, possession, nature or purpose or any other change that would enable the funds to be used, including portfolio management'; according to Article 6.2 of the same text, 'frozen funds will only be lifted for transfers to the successor mechanisms of the Development Fund for Iraq set up by the Iraqi government'; it follows that the freezing measure has no bearing on the ownership of the funds in question, since it specifically and expressly precludes any modification of the right of ownership of such funds pending transfer to the successor mechanisms, such that only this transfer involves an assignment of the right of ownership to the Iraqi State; by consequently holding that the frozen funds were owned by the Iraqi State solely on the basis of the freezing measure, the *cour d'appel* (Court of Appeal) infringed Article 6 of Regulation (EC) No. 1210/2003."

Court's response

Having examined Articles L. 111-2, L. 211-1 and L. 221-1 of the Civil Execution Proceedings Code, Articles 4(1) and (2), and 6 of Regulation (EC) No. 1210/2003 of 7 July 2003:

11. It follows from the first of these texts that a creditor in possession of a writ of execution that records a liquid and payable claim may only pursue enforcement of that claim on the assets of his debtor.

12. According to the second and third of these texts, relating to garnishment and sale, respectively, any creditor in possession of a writ of execution that records a liquid and payable claim may garnish those of his debtor's receivables concerning a sum of money held by a third party or have the tangible property belonging to the debtor confiscated and sold, regardless of whether or not it is held by the debtor.

13. Under the fourth of these texts, all funds and assets belonging to the previous Government of Iraq, or to any body, company (including companies governed by private law in which the public authorities have a majority or controlling interest) or institution of that Government designated by the Sanctions Committee and listed in Annex III, were frozen if they were outside Iraq as of 22 May 2003.

All funds and assets belonging to, owned or held by the following persons, as designated by the Sanctions Committee and listed in Annex IV, were frozen:

(a) former president [D] [Z];

(b) senior members in positions of responsibility in his regime;

(c) members of their immediate families; or

(d) legal persons, bodies, offices or entities directly or indirectly owned or controlled by the persons referred to in (a), (b) and (c) or by legal or natural persons acting on their behalf or according to their instructions.

14. It follows from the fifth of these texts that, apart from the waivers provided for, funds, assets and proceeds from assets frozen in accordance with Article 4 will be exempted from the freeze only for the purpose of their transfer to the successor mechanisms of the Development Fund for Iraq established by the Government of Iraq, under the conditions set out in United Nations Security Council Resolutions Nos. 1483 (2003) and 1956 (2010).

15. In response to the requests for preliminary ruling made by the ruling of 2 December 2021, in this dispute the Court of Justice ruled:

Article 4(2) to (4) and Article 6 of Council Regulation (EC) No 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96, as last amended by Council Regulation (EU) No 85/2013 of 31 January 2013,

must be interpreted as meaning that the frozen funds and economic resources remain, pending the decision to transfer them to the successor arrangements to the Development Fund for Iraq, the property of the natural and legal persons, bodies and entities associated with the regime of former President Saddam Hussein covered by the freezing.

16. In the grounds for its ruling, the Court of Justice stated that a combined reading of Articles 4(2) and 6 of the same regulation reveals two distinct stages consisting of, on the one hand, an asset freeze and, on the other, a transfer of such assets to the Development Fund (§ 44).

17. It also stated that the transfer takes place as an active measure on the part of the Member States after—and only after—the freeze has been lifted in accordance with the rules given in the regulation (§ 48).

18. It infers from this that the freezing measure does not, in itself, have an impact on the ownership of the assets that are the subject of this measure (§ 51).

19. Therefore, in accordance with the provisions of the above-mentioned regulation, the question arises as to whether the transfer of the funds was made by virtue of national law.

20. According to Article 104 of Law No. 2009-1674 of 30 December 2009, funds and assets, as defined in Articles 1 and 4 of Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, and repealing Council Regulation (EC) No. 2465/1996, owned by natural or legal persons appearing on the list attached to said regulation, located in French territory or owned by entities incorporated under French law will, in accordance with said Regulation and Resolution 1483 (2003) adopted by the United Nations Security Council at its 4761st meeting on 22 May 2003, concerning international assistance for the reconstruction and development of Iraq, be transferred to the Development Fund for Iraq under the conditions laid down in this article.

By executive order published in the Official Journal, the administrative authority will draw up a list of funds and assets held by natural or legal persons included on the list referred to in paragraph one. Any natural or legal person other than those appearing on the list attached to Regulation (EC) No. 1210/2003 of 7 July 2003, who can prove they had a right established before 22 May 2003 by an authentic instrument or by a judicial, administrative or arbitral measure or decision in respect of the funds and assets of the persons listed, or who have brought an action before that date to obtain a judicial, administrative or arbitral measure or decision in respect of those funds and assets, will have a deadline of two months from the publication of this ruling to establish the rights invoked by any means.

By executive order in the Official Journal, the administrative authority will, for each person concerned, publish a list of the funds and assets transferred, taking into account the rights acquired in respect of those funds and assets or the procedures for the recognition of title in progress at the time of the publication as provided for in paragraph two, as notified. The funds and assets listed in the executive order referred to in the preceding paragraph will have immunity as awarded to State assets.

An executive order handed down by the Council of State will specify the particular procedures for the transfer of each category of property.

21. Following the decision of the United Nations Security Council, by Resolution No. 1956 (2010), in order to have all the proceeds of the Development Fund for Iraq transferred to the account or accounts of the successor mechanisms of the Government of Iraq and to close the Development Fund for Iraq by 30 June 2011, Article 104 of Law No. 2009-1674 of 30 December 2009 was repealed by Law No. 2013-672 of 26 July 2013.

22. According to Article 85 of this latter law, funds and assets, as defined in Articles 1 and 4 of Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, and repealing Council Regulation (EC) No. 2465/1996, belonging to natural or legal persons appearing on the list given in Annexes III and IV to the aforementioned Council Regulation (EC) No. 1210/2003 of 7 July 2003, which are located in French territory or are held by entities incorporated under French law will, in accordance with said Regulation and United Nations Security Council Resolutions 1483 (2003) of 22 May 2003 and 1956 (2010) of the United Nations Security Council of 15 December 2010 on international assistance for the reconstruction and development of Iraq, be transferred to the successor mechanisms of the Development Fund for Iraq under the conditions given in this article.

By executive order published in the Official Journal, the administrative authority will draw up a list of funds and assets held by natural or legal persons included on the list referred to in paragraph one. Any natural or legal person other than those appearing on the list given in annexes III and IV to Regulation (EC) No. 1210/2003 of 7 July 2003, who can prove they had a right established before 22 May 2003 by an authentic instrument or by a judicial, administrative or arbitral measure or decision in respect of the funds and assets of the persons listed, or who have brought an action before that date to obtain a judicial, administrative or arbitral measure or decision in respect of those funds and assets, will have a deadline of two months from the publication of this ruling to establish the rights invoked by any means.

By executive order in the Official Journal, the administrative authority will, for each person on the list referred to in paragraphs one and two, publish a list of the funds and assets transferred, taking into account the rights acquired in respect of those funds and assets or the procedures for the recognition of title in progress at the time of the publication as provided for in paragraph two, as notified.

The funds and assets listed in the executive order referred to in paragraph three will have immunity as awarded to State assets.

An executive order handed down by the Council of State will specify the particular procedures for the transfer of each category of property.

23. It follows from the aforementioned provisions of Articles 104 and 85 that the assets frozen for the benefit of the Development Fund for Iraq and then of its successor mechanisms are transferred in accordance with a two-stage procedure, designed to allow for appeals by the persons concerned through the successive publication of two executive orders: the first listing the funds and assets held by the persons covered by the freeze; and the second listing the funds and assets transferred for each person concerned.

24. An executive order of 25 May 2011 "in application of paragraph two of Article 104 of Law No. 2009-1674 of 30 December 2009" and an executive order of 31 July 2017 "in application of paragraph two of Article 85 of Law No. 2013-672 of 26 July 2013" were published in the Official Journal on 2 June 2011 and 4 August 2017, respectively.

25. These executive orders, which are there to make it possible for interested parties to lodge appeals, are intended to cover the first stage of the transfer procedure laid down in the abovementioned Articles 104 and 85.

26. In validating the acts of conversion, the ruling first noted that, according to paragraph 23 of Resolution 1483 (2003), the funds frozen in accordance with Article 4(2) of Regulation No. 1210/2003 of 7 July 2003 were in accounts of which the Iraqi State bodies were no longer direct or indirect beneficiaries, but which were constituted by assets which, as a result of the confusion between the assets of the Iraqi State and those of its most senior executives, were the result of the fraudulent appropriation and misappropriation of its assets for the benefit of certain persons or entities or for the benefit of persons and/or entities other than the Iraqi State, but under the effective control of its former leaders, in order to serve as a cover for the unofficial activities of the Iraqi State, such that the funds are presumed to belong to the Iraqi State.

27. The ruling then observes that, on 26 April 2004, the United Nations Security Council Committee listed Montana as a company close to the Iraqi regime whose assets should be frozen and that said company does not maintain that it filed an application for cancellation of its inclusion on the list with the Secretariat of the Subsidiary Bodies of the United Nations Security Council.

28. Moreover, it holds that Article 4 of Regulation No. 1210/2003, which implements Resolution No. 1483 (2003) required the freezing of the funds of persons and entities listed in Annexes III and IV thereto, including Montana, and that the latter does not further maintain that it filed an application or an administrative appeal with the Council of the European Union for cancellation of its inclusion on the list or a judicial appeal with the Court of Justice of the European Communities to challenge a European decision on the freezing of assets, regardless of the appeal lodged before the European Court of Human Rights against a decision in a contentious matter with the Swiss Federal Government.

29. The ruling therefore concludes that the funds of the company Montana, which does not claim to have appealed against this decision within the deadline of two months from the publication of this executive order, belong to the Iraqi State.

30. In so ruling, in the absence of publication, on the date of conversion of the precautionary seizures, of an executive order implementing Article 104(3) of the aforementioned Law of 30 December 2009 or Article 85 of the aforementioned Law of 26 July 2013, that the frozen funds and resources remained the property of the company Montana, the *cour d'appel* (Court of Appeal) infringed the aforementioned texts.

Scope and consequences of the quashing

31. After notice served to the parties in accordance with Article 1015 of the Civil Procedure Code, Articles L. 411-3, paragraph 2, of the Judicial Code and 627 of the Civil Procedure Code are applied.

32. The interest to ensure the correct administration of justice justifies the decision on the merits delivered by the *Cour de cassation* (Court of Cassation).

33. It follows from paragraphs 11 and 30 of Article 104 of Law No. 2009-1674 of 30 December 2009 and Article 85 of Law No. 2013-672 of 26 July 2013, respectively, that, in the absence of publication of executive orders implementing paragraph three, the precautionary seizure of claims and the precautionary seizure of shareholder rights and securities practised on assets not belonging to the debtor, as referred to in the writ of enforcement, together with their conversion into garnishment and sale, may be declared void.

34. Accordingly, the acts of conversion of 24 June and 24 September 2014 must be declared void, as must the precautionary seizure of claims and the precautionary seizure of shareholder rights and securities of 28 July 2011, which renders the abovementioned seizures null and void and renders the request for release devoid of purpose.

Operative part of the ruling

ON THESE GROUNDS, and without having to rule on the other objections of the appeal, the Court:

DISMISSES the cross-appeal;

QUASHES AND SETS ASIDE the ruling delivered on 28 February 2019 by the *cour d'appel* (Court of Appeal) of Paris), except, on the one hand, where it partially confirms the judgment insofar as it allowed the voluntary intervention of BNP Paribas securities services to proceed, noted the withdrawal of Heerema Zwijndrecht BV from its claim for payment against BNP Paribas securities services and ordered Montana Management Inc. to pay the sum of EUR 2,000 under Article 700 of the Code of Civil Procedure and to pay costs, and, on the other hand, where it declares the reply filed by Montana Management Inc. admissible; DECLARES that there is no need to refer back the case

Confirms the judgment which rejects the plea of inadmissibility filed by Heerema Zwijndrecht BV against Montana Management Inc.;

Sets aside the judgment insofar as it rejects the application for nullity of the precautionary seizure carried out on 28 July 2011 by Heerema Zwijndrecht BV at the hands of BNP Paribas securities services and rejects any application further or contrary thereto;

Ruling on the same matter:

Declares null and void the precautionary seizure of claims and the precautionary seizure of shareholder rights and securities of 28 July 2011 and the acts of conversion of 24 June 2014 and 24 September 2014;

Finds that the request for release is devoid of purpose;

Orders Heerema Zwijndrecht BV to pay the costs, including those incurred before the *cour d'appel* (Court of Appeal) of Paris;

Pursuant to Article 700 of the Code of Civil Procedure, dismisses the claims brought by Heerema Zwijndrecht BV and BNP Paribas securities services both before the *cour d'appel* (Court of Appeal) of Paris and the *Cour de cassation* (Court of Cassation), and orders Heerema Zwijndrecht BV to pay Montana Management Inc. the sum of EUR 5,000 in respect of the

proceedings before the *cour d'appel* (Court of Appeal) of Paris and the *Cour de cassation* (Court of Cassation);

Finds that, at the behest of the Prosecutor-General at the *Cour de cassation* (Court of cassation), the present judgment will be forwarded for transcription in the margin or at the bottom of the partially overturned judgment;

Thus decided by the second civil chamber of the *Cour de cassation* (Court of Cassation) and pronounced by the president at the public hearing of the twenty-ninth day of the month of June of the year two thousand and twenty-three.

President : Ms MARTINEL, elder judge acting as President

First advocate-general : Mr Gaillardot

Judge referee : Mr Cardini

Lawyer(s) : SCP Célice, Texidor, Périer – SCP Rocheteau and Uzan-Sarano – SCP Thouin-Palat and Boucard

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Institution judiciaire

Translated rulings