

Freezing of Iraqi assets: the freezing of the assets makes the funds unavailable as a precautionary measure without, by itself, entailing neither recognition of the property of the Iraqi State nor transfer of property to its benefit.

12/01/2022



Ruling of 12 January 2022, appeal no. 20-17.116 *(no summary in the versions published on Judilibre or Jurinet)*

Quashing

RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), FIRST CIVIL CHAMBER, OF 12 JANUARY 2022

1°/ Al Arabi Trading Company, whose registered office is at [Address 3]),

2°/ Iraqi Airways, whose registered office is at [Address 2]), 3°/ the Republic of Iraq, whose registered office is at [Address 1],

have lodged appeal no. T 20-17.116 against the ruling delivered by the *cour d'appel* (Court of Appeal, 16th Chamber) of Versailles on 20 February 2020 in the dispute between them and Instrubel NV, whose registered office is at [Address 4]), respondent in the quashing.

In support of their appeal, the appellants rely on the two pleas for quashing appended to this ruling.

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

On the report of Ms Guihal, Judge, the observations of SCP Fabiani, Luc-Thaler and Pinatel, lawyer for Al Arabi Trading Company and Iraqi Airways and the Republic of Iraq, SCP Claire Leduc and Solange Vigand, lawyer for Instrubel NV, and the opinion of Ms Caron-Déglise, Advocate-General, after the arguments at the public hearing of 16 November 2021, in which Mr Chauvin, President; Ms Guihal, Reporting Judge; Ms Auroy, Elder Judge; Mr Hascher, Mr Vigneau, Ms Poinseaux, Mr Fulchiron, Ms Dard, Ms Beauvois, Judges; Ms Gargoullaud, Mr Duval, Ms Azar, Mr Buat-Ménard, Ms Feydeau-Thieffry, Judge Referees; Ms Caron-Déglise, Advocate-General; and Ms Berthomier, Chamber Registrar;

the First Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the above-mentioned President and Judges, having deliberated in accordance with the law, has delivered the present ruling.

Facts and procedure

1. According to the ruling under appeal (Versailles, 20 February 2020) and the documents submitted, on the basis of two arbitration awards made on 9 February 1996 and 22 March 2003, which were granted exequatur by an order of 20 March 2013 and ordered the Iraqi State to pay various sums to it, on 20 January 2014, the Dutch company Instrubel ordered a precautionary seizure of assets held by the Union of Arab and French Banks (UBAF) in accounts opened in the names of the Iraqi companies Iraqi Airways and Al Arabi Trading Company (Al Arabi Trading).
2. Both of these companies, and the Republic of Iraq, brought a challenge to this seizure before the enforcement judge [*juge de l'exécution*].

Forfeiture of the appeal insofar as it is lodged by the company Iraqi Airways, examined ex officio

3. After notice given to the parties in accordance with Article 1015 of the Civil Procedure Code, Article 978 of the same code shall be applied.

In view of Article 978, section 1 of the Civil Procedure Code:

4. According to this text, subject to forfeiture of the appeal, the statement of claim must be served on the respondent who has not obtained legal counsel before the month following the expiry of the four-month time limit from the date of appeal.
5. After filing an appeal against the ruling of 20 February 2020, Iraqi Airways did not file or serve on Instrubel a statement of claim containing the legal arguments it had raised against the contested decision.
6. It is therefore necessary to declare that the appeal has been forfeited insofar as it was lodged by Iraqi Airways.

Reviewing pleas

On the second part of the first plea, which is preliminary

Statement of plea

7. The Republic of Iraq and Al Arabi Trading objects to the ruling dismissing their requests for the annulment of the precautionary seizures of shareholders' rights, securities and receivables carried out by Instrubel by writ on 20 January 2014 by UBAF, whereas "the precautionary seizure can only relate to assets belonging to the debtor as at the date of the writ of seizure. In order to consider that the assets seized as a precautionary measure by Instrubel in UBAF's ledgers on accounts opened in the name of the Al Arabi Trading Company were the property of the State of Iraq, the ruling under appeal held that "by maintaining that the assets" of the Al Arabi Trading Company "will revert to it, the State of Iraq itself recognises that the Committee, having identified the entities in Appendix IV" of Regulation 1210/2003, "did not target the wrong entity by including the Al Arabi Trading Company, whose assets are intended to be used to fund the State Reconstruction Fund", that the "common defence of the appellants in the present case only reinforces the confusion of interests between them" and that "through the screen constituted" by the Al Arabi Trading Company, "the frozen economic wealth remained that of the State of Iraq". In so ruling, neither the freezing of the assets of the Al Arabi Trading Company pursuant to Security Council Resolution 1483 (2003) and Article 4 of Regulation 1210/2003, nor the State of Iraq's impending ownership thereof, nor the joint defence of the State of Iraq and Al Arabi Trading Company was capable of establishing that the disputed assets had been transferred to the State of Iraq or that the latter should be presumed to be the owner as at the date of the seizure, the *cour d'appel* (Court of Appeal) did not legally justify its decision in light of Articles L. 511-1 and L. 511-2 of the Civil Execution Proceedings Code."

Court's response

In view of Articles L. 511-1 and L. 511-2 of the Civil Execution Proceedings Code and Articles 4, §2, 6 and 1, §4 of Council Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq:

8. According to the first two of these texts, a creditor who relies on an enforceable title may take a precautionary measure against his debtor's assets.
9. The third text, adopted to ensure the implementation within the European Community, of paragraph 23 of United Nations Security Council (UNSC) Resolution 1483 (2003) of 22 May 2003 relating to the reconstruction of Iraq and sanctions against the previous Iraqi government, provides that:

"All funds and economic resources belonging to, or owned or held by the following persons, identified by the Sanctions Committee and listed in Annex IV, shall be frozen: (a) former President [T] [Y];

(b) senior officials of his regime;

(c) immediate members of their families, or

(d) legal persons, bodies or entities owned or controlled directly or indirectly by the persons referred to in subparagraphs (a), (b) and (c) or by any natural or legal person acting on their behalf or at their direction. "

10. The fourth of these texts, as originally drafted, states:

"Funds, economic resources and proceeds of economic resources frozen pursuant to Article 4 shall only be unfrozen for the purpose of their transfer to the Development Fund for Iraq held by the Central Bank of Iraq, under the conditions set out in UNSC Resolution 1483 (2003)."

11. According to the fifth text, the term "freezing of funds" means any act preventing any move, transfer, alteration, use of or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or other change that would enable the use of the funds, including portfolio management.
12. Annex IV, referred to in Article 4, §2 of Regulation (EC) No. 1210/2003, reproduces the list of persons and entities set out by the UNSC sanctions committee. Al Arabi Trading Company was included in this list by Regulation (EC) No. 785/2006 of 23 May 2006, published on 25 May.
13. Resulting from the definition of the freezing measure, the criteria for designating, in Article 4, §2 of the Regulation, the persons to whom the measure applies, and in Article 5, according to which they may be handed over frozen assets, either for humanitarian purposes or to pay for legal services, that this measure renders the funds unavailable as a precautionary measure, without in itself entailing either recognition of the ownership of the Iraqi State or a transfer of ownership to it, as long as the assets have not been handed over to the Development Fund for Iraq.

14. Upholding the precautionary seizures, the ruling held that Al Arabi Trading had not used the possibilities available under international law to challenge its inclusion on the list of persons affected by the sanctions, and that the Iraqi State, in arguing that the assets in question were destined to revert to it, had recognised that this inclusion was justified.
15. In so determining, the *cour d'appel* (Court of Appeal) did not provide a legal basis for its decision on grounds that did not characterise the Iraqi State's ownership of the disputed assets as at the date of their precautionary seizure.

On the first part of the first plea

Statement of plea

16. The Republic of Iraq and Al Arabi Trading raised the same objection against the ruling, whereas "the judge cannot alter the nature the terms of the dispute, as determined by the respective claims of the parties. In order to declare the contested precautionary seizures valid and to admit that the seized assets were the property of the State of Iraq, the ruling under appeal held that the Al Arabi Trading Company "did not use any of the procedures provided for by the international system to provide proof of the lawfulness of its activities and its independence from the Iraqi State" and "does not offer more to these proceedings to provide such proof". In so ruling, when it was neither alleged nor established that the Al Arabi Trading Company could have been an emanation of the Iraqi State, and that no evidence tendered during arguments showed that this private company participated in the exercise of public power or managed a public service under the control of the Iraqi State, so that its assets would have been confused with state assets, the *cour d'appel* (Court of Appeal) altered the nature of the terms of the dispute and violated Article 4 of the Civil Procedure Code."

Court's response

In view of Article 4 of the Civil Procedure Code:

17. According to this text, the subject matter of the dispute is determined by the respective claims of the parties, which are set out in the document initiating the proceedings and in the defence.
18. In order to uphold the precautionary seizures carried out, the ruling further held that the freezing measures were aimed, on the one hand, at the wealth of the Iraqi State that had been captured or misappropriated for the benefit of the regime of [T] [Y], under conditions that characterised a confusion of assets, and on the other hand, at assets that remained under the effective control of former dignitaries, but assigned to separate entities for the sole purpose of serving as a screen for the activities of the State and that, as Al Arabi Trading did not offer to prove its independence from the Iraqi State, it should be considered that, through the screen constituted by this company, the frozen economic wealth remained that of the State.

19. In so ruling, with regard to only part of the criteria for qualifying an entity as an emanation of a State, whereas, if the reasons by virtue of which the listing of Al Arabi Trading by the UNSC sanctions committee on the list of persons whose assets were to be frozen could be upheld, as a presumption of fact, in order to qualify the listed entity as an emanation of the Iraqi State, this was not supported by Instrubel in its conclusions, the *cour d'appel* (Court of Appeal), which changed the subject matter of the dispute, violated the above-mentioned text.

ON THESE GROUNDS, and without having to rule on the third part of the first plea and on the second plea, the Court:

QUASHES AND SETS ASIDE all provisions of the ruling handed down on 20 February 2020, between the parties, by the *cour d'appel* (Court of Appeal) of Versailles;

Returns 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 Versailles;

Orders Instrubel to pay costs;

Pursuant to Article 700, dismisses Instrubel's claim and orders it to pay the Republic of Iraq and Al Arabi Trading Company the total sum of EUR. 3,000;

Declares that according to the procedures of the Prosecutor-General at the *Cour de cassation* (Court of cassation), this ruling will be forwarded to be noted in the margin or at the end of the quashed ruling;

Thus decided by the *Cour de cassation* (Court of cassation), First Civil Chamber, and pronounced by the president at the public hearing of the twelfth of January, two thousand twenty-two.

PLEAS APPENDED to this ruling

Pleas submitted by SCP Fabiani, Luc-Thaler and Pinatel, Supreme Court Lawyer, for Al Arabi Trading Company, Iraqi Airways, and the Republic of Iraq

FIRST PLEA FOR QUASHING

Al Arabi Trading Company and the Republic of Iraq object to the ruling under appeal dismissing their application for the annulment of the precautionary seizures of shareholders' rights, securities and receivables carried out by Instrubel NV by writ on 20 January 2014 by the Union of Arab and French Banks;

Whereas, on the one hand, the judge cannot alter the nature of the terms of the dispute, as determined by the respective claims of the parties. In order to declare the contested precautionary seizures valid and to admit that the seized assets were the property of the State of Iraq, the ruling under appeal held that Al Arabi Trading, which "did not use any of the procedures provided for by the international system to prove the lawfulness of its activities and its independence from the Iraqi State (), does not offer more to these proceedings to provide such proof either (ruling, p. 7, §2). In so ruling, when it was neither alleged nor established that the Al Arabi Trading Company could have been an emanation of the Iraqi State, and that no evidence tendered during arguments showed that this private company participated in the exercise of public power or managed a public service under the control of the Iraqi State, so that its assets would have been confused with state assets, the *cour d'appel* (Court of Appeal) altered the nature of the terms of the dispute and infringed Article 4 of the Civil Procedure Code.

Whereas, on the other hand, the precautionary seizure can only relate to assets belonging to the debtor as at the date of the seizure. In order to consider that the assets seized as a precautionary measure by Instrubel in UBAF's ledgers on accounts opened in the name of the Al Arabi Trading Company were the property of the State of Iraq, the ruling under appeal held that "by maintaining that the assets" of the Al Arabi Trading Company "will revert to it, the State of Iraq itself recognises that the Committee, having identified the entities in Annex IV" of Regulation 1210/2003, "did not target the wrong entity by including the Al Arabi Trading Company, whose assets are intended to be used to fund the State Reconstruction Fund", that the "common defence of the appellants in the present case only reinforces the confusion of interests between them" and that "through the screen constituted" by the Al Arabi Trading Company, "the frozen economic wealth remained that of the State of Iraq" (ruling, p. 7, §2). In so ruling, neither the freezing of the assets of the Al Arabi Trading Company pursuant to Security Council Resolution 1483 (2003) and Article 4 of Regulation 1210/2003, nor the State of Iraq's impending ownership thereof, nor the joint defence of the State of Iraq and Al Arabi Trading Company was capable of establishing that the disputed assets had been transferred to the State of Iraq or that the latter should be presumed to be the owner as at the date of the seizure, the *cour d'appel* (Court of Appeal) did not legally justify its decision in light of Articles L. 511-1 and L. 511-2 of the Civil Execution Proceedings Code.

Whereas, in the alternative, in any event, a precautionary seizure can only be carried out against the debtor. In order to declare the contested precautionary seizure valid, the ruling under appeal, after holding that "through the screen constituted" by the Al Arabi Trading Company, "the frozen economic wealth remained that of the State of Iraq" (ruling, p. 7, §2); deduced "that in seeking to pay its claim against the State of Iraq on the funds placed in the ledgers of the UBAF on accounts opened in the name of the Al Arabi Trading Company, Instrubel NV did not target the wrong debtor" and that "the State of Iraq's plea that the Al Arabi Trading Company should have been treated simply as a seized third party is unfounded" (ruling, p. 7, §3). In so ruling, when the ownership of the seized funds and their belonging to the State of Iraq, even if they had been established, were nonetheless insufficient to establish the status of the Al Arabi Trading Company as a debtor, the *cour d'appel* (Court of Appeal) infringed Articles L. 111-1, L. 511-1 and L. 511-2 of the Civil Execution Proceedings Code.

SECOND PLEA FOR QUASHING (alternative)

Al Arabi Trading Company and the Republic of Iraq object to the ruling under appeal dismissing their application for the annulment of the precautionary seizures of shareholders' rights, securities and receivables carried out by Instrubel NV by writ on 20 January 2014 by the Union of Arab and French Banks.

Whereas, on the one hand, while Article 10 of Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq, which prohibited all judicial proceedings and all types of attachments, garnishments or other forms of enforcement in respect of funds and economic resources frozen in accordance with Article 4 of that Regulation, including those belonging to the Al Arabi Trading Company, is no longer applicable from 30 June 2011, pursuant to Regulation (EU) No. 131/2011 of 14 February 2011, so that civil enforcement proceedings against previously frozen funds are possible as of 1 July 2011, such measures may only be implemented subject to compliance with the provisions of Article 6 of Regulation (EC) No. 1210/2003, from which it follows that authorisation to release funds may be given, pursuant to its paragraph 1, only if all the conditions laid down therein are met. In order to dismiss the exhibitors' challenge to the seizability of the assets targeted by the freezing measure, the ruling under appeal held that "it follows from the intersection of Articles 4, 6 and 10 of Regulation 2010/2003 that the seizability or otherwise of the property and assets affected by the freezing measure did not result from either Article 4 or Article 6, but only from Article 10", which was applicable until 30 June 2011, and that "seizures carried out after that date are therefore not prohibited" (ruling, p. 7, §5). In so ruling, without ensuring that the contested seizures had been implemented by Instrubel NV in compliance with the provisions of Article 6 of Regulation (EC) No. 1210/2003, the *cour d'appel* (Court of Appeal) disregarded its provisions, by refusing to apply them.

Whereas, on the other hand, and in any event, Article 1 of Regulation (EC) No. 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq precludes precautionary measures from being taken against frozen assets without prior authorisation from the relevant national authority. In holding, however, that in the present case, "the fact that the seizure was carried out before the assets were unfrozen with a view to their transfer to the DFI's successor mechanisms" was "in no way an obstacle to the implementation of a precautionary measure, the interest of which for the creditor in possession of a writ of execution, is to rank ahead with a view to a priority payment once the funds have been made available" (ruling, p. 7, §6), the *cour d'appel* (Court of Appeal) infringed Article 1 of EC Regulation No. 1210/2003.

President : Mr Chauvin

Reporting Judge : Ms Guihal

Advocate-General : Ms Caron-Dégliise

Lawyers : SCP Fabiani, Luc-Thaler et Pinatel – SCP Leduc et Vigand

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