Stay of Enforcement in France: How Restrictive is the Paris Court of Appeal?

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Under French law, the principle is that both a request to set aside an award and an appeal of a decision upholding enforcement (*ordonnance d'exequatur*) have no suspensive effect (Article 1526(1) of the Code of Civil Procedure, 'CCP'), so that an international arbitral award is immediately enforceable. However, as an exception, stay or adjustment of enforcement can be granted if such enforcement is "*susceptible to severely prejudice the rights of a party*" (Article 1526(2) of the CCP). Introduced by the 2011 French reform on arbitration, this provision is aimed at avoiding dilatory proceedings initiated by a party in bad faith to undermine the enforcement of an international arbitration award.

Since its entry into force, Article 1526(2) CCP has been subject to the interpretation of the Parisian judges. Although the provision has first been interpreted very restrictively, the Court has since softened its approach. The recent decision issued on 22 October 2019 (No. 19/04161) by the new international section of the Paris Court of Appeal (16th chamber, 5th section) is remarkable as it takes a halfway nuanced stand.

Underlying Arbitration Proceedings and the Request to Stay Enforcement

In the case at stake, the motion to stay enforcement of the award was filed by the Russian Federation on February 2019, following an unpublished Permanent Court of Arbitration (PCA) award rendered on November 2018, which granted US$ 1.1 billion to Oschadbank, a Ukrainian state-owned bank, for the expropriation of its assets in Crimea by the Russian Federation. The request was finally denied by the Court of Appeal.

In support of its application, the Russian Federation claimed that Article 1526(2) CCP's conditions were met in light of the risk that its rights (and in particular its right to immunity from execution) would be prejudiced by:

- Oschadbank's attempts to enforce the award in states that do not guarantee appropriate protection to its immunity from execution (in particular in Ukraine, where the Kiev Court of Appeal has considered in another case that a BIT arbitration clause was a waiver to the immunity from execution),
- the mass enforcement campaign that it would have to face in several states given that it possesses assets worldwide, as well as
- the risk of non-restitution of amounts already recovered by the bank.

Russia also sustained that enforcement would be in breach of its immunity from execution as enshrined in Article L.111-1-1 of the Code of Civil Enforcement Procedure (issued from the recent 2016 '*Loi Sapin II*').

Oschadbank opposed that:

- Article 1526(2) aims at preventing irreversible damage to the debtor pending a decision on the request to set-aside, and that
- the risk of enforcement on sovereign assets is not of a nature to justify a stay of enforcement and is rather a question to be addressed by the judge of the place of enforcement of the award.

Oschadbank finally claimed that a risk of "*severe prejudice*" on the parties' rights within the meaning of Article 1526(2) CCP is assessed *in concreto* by the jurisprudence, on the basis of a purely economic and accountable analysis of the situation.

The Court's *Oschadbank* Decision

In its writ, the pre-trial judge (*conseiller de la mise en état*) first considered that "*although the provision's wording does not require an assessment of the sole economic consequences of the enforcement*" (para. 38), a request to stay enforcement proceedings is to be "*restrictively*" assessed in order to give its full effect to Article 1526(1) of the CCP. In line with the Court's previous jurisprudence (8 mars 2012, No. 12/02299, *Pierre Cardin*; 29 January 2015, No. 14/21103, *Gold Reserve*), it recalled that stay or adjustment of enforcement does not depend on the serious character of the set-aside request.

Notably, the judge ruled as a general guideline that:

> *"This effective interpretation of Article 1526(2) leads to subordinate the benefit of the stay or the adjustment to an in concreto assessment of the severe prejudice on the rights that the enforcement of the award is likely to generate, so that this risk must be, at the date of the judge's ruling, sufficiently characterised and that it cannot derive from Article 1526 of the Code of Civil Procedure an option for the judge to grant a party the right to object to the enforcement of an award on a general, abstract or hypothetical ground" (para. 39, free translation from the author).*

This statement greatly clarifies the assessment to be conducted under Article 1526(2) of the CCP. Accordingly, the applicant to the motion must establish that:

- there is a risk related to the enforcement of the award;
- such risk is sufficiently characterised at the date of the ruling on the request;
- such risk is likely to generate a severe prejudice on the rights of one of the parties.

The Court examined Russia's allegations in light of these conditions. It first found that the fact that some foreign laws would not protect Russia's right to immunity from execution is not a "*sufficient*" ground for the purpose of characterising a risk of severe prejudice, adding that such a risk is to be assessed by the judge of the place of enforcement. It then turned on to the circumstance that Oschadbank

could envisage to initiate enforcement actions in several states and considered that this is not a "*relevant*" ground either. It specifically noted that in the present case no enforcement action had been engaged by the Ukrainian bank with the effect to severely prejudice Russia's right to immunity from execution.

Interestingly, the Court also noted that "*it is not established nor even sustained that enforcement of the award would be likely to compromise Russia's financial sustainability*" (para. 43, free translation from the author) thus highlighting the great relevance of this argument in order to characterize a risk of severe prejudice under Article 1526(2) of the CCP. The Court then observed that there was no risk of non-restitution since it had not been established that the Ukrainian bank was in financial difficulty. On this basis, the request was denied.

A Well-Balanced Decision

In light of the Court's previous case law, this decision appears particularly well-balanced.

On the one hand, it confirms the Court's departure from its previous highly-restrictive approach that prevailed until 2013, and that led the Court to rule for instance that the "*severe prejudice to the rights*" under Article 1526(2) of the CCP was to be assessed "*more restrictively*" than the sole economic risk or potential financial difficulties incurred by the debtor, *i.e*. that it was necessary to establish that immediate enforcement would jeopardise the cash flow and put the company in an extremely difficult situation (18 October 2011, No. 11/14286, *Mambo Commodities*), or that the risk of becoming insolvent and filing bankruptcy and to be deprived of the right to challenge effectively the award does not constitute a severe prejudice of rights since it would not prevent the debtor from pursuing the action to set aside the award through the receiver (13 July 2012, No. 12/11616, *CIEC Engineering*).

The conditions established by the Court offer more flexibility to the judge seized of a request to stay enforcement. In particular, the requirements that the risk be "*sufficiently characterised*" and "*likely to generate*" a severe prejudice of rights seem to cover a broader range of situations and are thus less far-reaching for the applicant. This is further confirmed by the Court's express statement that the scope of its assessment shall not be exclusively limited to the economic

consequences of the enforcement, although no particular guidance is provided in this regard.

The Court's choice of an *in concreto* assessment also guarantees that the judge focuses on concrete elements regarding both the situation of the parties and the consequences of the enforcement, which was not always the case with the previous jurisprudence (*see*, *e.g.*, 23 April 2013, No. 13/02612, *Spie Batignolles Nord* and 27 March 2014, No. 13/24165, *Fairtrade*, that granted adjustment of enforcement on the sole basis that restitution could be highly random given that it was a foreign-seated arbitration and that the enforcing party was located abroad).

On the other hand, the decision remains consistent with the spirit and rationale of Article 1526(2) of the CCP, as well as the recent case law of the Court, which only after 2013 started to grant stays or adjustments of enforcement on the basis *e.g.* that there is a risk of suspension of payments (27 March 2014, No. 13/24165, *Fairtrade*), that enforcement would constitute a threat on the award debtor's financial sustainability (3 April 2014, No. 13/22288, *Farmex*), or that there were allegations of fraud during the arbitration and the award creditor lacks guarantees of restitution (4 July 2014, No. 14/12102, *Assurance Pilliot*; 3 October 2013, No. 13/07263, *CMN*).

Indeed, it first confirms that the "*severe prejudice on rights*" is mainly to be construed from an economic perspective, paying particular attention to (i) the financial sustainability of the applicant, (ii) economic difficulties that the applicant could face in case of immediate enforcement as well as (iii) the risk of non-restitution. Further, in light of the Court's express prohibition of "*general, abstract or hypothetical grounds*", it is now clear that general legal considerations that, for instance, the law of the place of enforcement does not guarantee immunity from execution, or that the applicant is likely to face enforcement actions worldwide are of no relevance unless an economic risk is sufficiently characterised (*i.e.* it is established that enforcement actions having such effect have already been initiated).

In conclusion, this decision should be welcome as it is consistent with the Court's traditional restrictive approach, and at the same time provides for a clear framework that was lacking up to now. This framework ensures a more-flexible assessment meanwhile affording high protection to the award creditor and ensuring that enforcement-delaying tactics remain precluded. This approach

seems particularly suitable when the stay of enforcement has been initiated by an entity that is so financially powerful (*e.g.*, a State or a global company) that there is no chance that enforcement proceedings create an economic risk.

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