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Canadian Planes, French Orders and Greek Courts: Lessons on Enforcing Interim Measures from Eurobank Ergasias v. Bombardier Inc.

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The Supreme Court of Canada ("**SCC**") recently delivered a judgment which, while dealing primarily with the issue of bank guarantees, serves as a window into a Paris-seated ICC arbitration between a Canadian aircraft manufacturer Bombardier inc. and the Hellenic Ministry of Defense ("**HMOD**"). The case of *Eurobank Ergasias v. Bombardier inc.* brings to the forefront the enforceability of tribunal-ordered interim measures and the importance of educating national courts about arbitrations.

Setting the Stage

At the close of the last century, the parties entered into two agreements: the Procurement Contract for ten amphibious Bombardier aircraft, and the Offsets Contract, the purpose of which was to provide offsetting benefits to HMOD, the Greek defense industry and the Greek economy in general, in proportion to HMOD's purchase from Bombardier. The latter provided for the payment of liquidated damages of up to a maximum of nearly USD 28 million upon the expiry of the Offsets Contract for any obligations which then remained unfulfilled by Bombardier. The amount of liquidated damages was secured by a letter of guarantee ("**LC**") in favour of HMOD issued by a Greek bank ("**Eurobank**"), which in turn was secured by a letter of counter-guarantee issued by the National Bank of Canada ("**NBC**").

In 2008, after Bombardier indicated it was unable to fulfill some of its subcontracting obligations under the Offsets Contract, HMOD demanded payment of the liquidated damages and sought to draw on the LC, which prompted Bombardier to initiate arbitration. In April 2012, before the tribunal, HMOD undertook not to demand payment under the LC "for as long as the [arbitration] procedure is going." Notwithstanding this undertaking, on 5 August 2013, HMOD demanded payment from Eurobank. Upon Bombardier's urgent application for interim relief, on 13 August 2013, the tribunal ordered HMOD to abstain from demanding payment under the LC until a final award was issued in the arbitration process ("**PO No. 11**" or "**Interim Order**"). In December 2013, the tribunal ruled in Bombardier's favour, finding that no payment was owed under the liquidated damages clause.

By that point, however, Eurobank had already succumbed to HMOD's multiple demands for

payment (the last of which came on 23 December 2013) and was in a situation where it had paid an amount Bombardier did not owe, and was seeking repayment under the letter of counter guarantee from NBC.

The Spaghetti Bowl of Court Proceedings

The present post does not deal with French set aside proceedings (in which the Court of Appeal of Paris dismissed HOMD's request to annul the award in April 2015). Nor does it deal with proceedings aimed at recognizing and enforcing the tribunal's Interim Order because no such proceedings took place. Rather, this section briefly describes the parallel battles for or against interim relief unravelling in Quebec and Greek courts.

In August 2013, having little faith in HMOD's compliance with the Interim Order, Bombardier obtained a provisional injunction from the Superior Court of Quebec ("**Superior Court**"), which enjoined Eurobank and NBC from honouring the letters of credit, which injunction was thereafter renewed several times. In early January 2014, the Superior Court issued a safeguard order which, *inter alia,* enjoined NBC from paying out any monies pursuant to the letter of counter-guarantee. In June 2014, this safeguard order was renewed until judgment on the merits of Bombardier's application by which it sought: the homologation of the arbitral award, and a permanent injunction enjoining NBC from paying Eurobank under the letter of counter-guarantee. The hearing on the merits of Bombardier's application took place in October 2017, and a judgment was rendered in June 2018. The Superior Court homologated the arbitral award, declared the counter-guarantee issued by the NBC null and void and enjoined NBC from paying any amount under it, declared that any payment by Eurobank to HMOD was not due and cannot form the basis of a demand for payment under the counter-guarantee or produce any legal consequences against Bombardier or NBC. Eurobank appealed. The majority of the Court of Appeal of Quebec ("**Court of Appeal**") allowed the appeal only in part so as to strike one paragraph, while confirming the Superior Court's judgment in all other aspects. Though Eurobank was granted leave to appeal to the SCC in March 2023, the majority of the SCC dismissed the appeal in April 2024.

Meanwhile, across the pond, in 2013, Eurobank petitioned a Greek court to order HMOD to withdraw the request for payment of the LC and to refrain from proceeding with a new request for payment until the issuance of a final award or, alternatively, order HMOD not to receive payment from Eurobank and Eurobank not to pay the amount of the LC until such time. Though initially the Greek court allowed Eurobank not to liquidate the LC until the hearing of the petition for the interim measure, on 16 December 2013, it dismissed Eurobank's injunctive application on the merits (which ruling apparently could not be appealed; the "**Kostis Decision**"). This enabled HMOD to present its demand for payment to Eurobank. After Eurobank paid HMOD and faced the difficulty of recovering said amounts from NBC, it applied to a Greek court seeking reimbursement from the HMOD. Though in November 2019 the first instance court concluded that HMOD had to reimburse Eurobank the amount it had paid under the LC, plus interest, on December 8, 2020, this judgment was overruled. According to the Court of Appeal of Athens, "*the Greek State was not bound (a) by its prior written commitment not to seek the performance of the LC as long as the arbitration proceedings before the ICC Arbitral Tribunal were pending; (b) by the Interim Order of the ICC Arbitral Tribunal not to seek payment under the LC until a final arbitral ruling, or (c) by the Final Award of the ICC Arbitral Tribunal*" (the "**Athens Court of Appeal Decision**;" see 2022 QCCA 802, para. 63). The Hellenic Supreme Court ostensibly

confirmed the same conclusion, noting that "*interim decisions of the International Court of Arbitration […] were not binding on the Greek State*" (see 2024 SCC 11, para. 108).

A Closer Look at the Judgments of Canadian Courts

The Superior Court characterized HMOD's conduct as "*nothing short than legal blackmail and extortion in order to force Eurobank to pay just a few days before it would be officially announced that it did not have the right to that payment*" (para. 182)

Similarly, according to the majority of the Court of Appeal, HMOD's actions "*clearly amount to a bad faith and fraudulent attempt to circumvent the Interim Order and the Final Award of the Arbitral Tribunal by any and all means, no matter how repugnant they may be*" (para. 60). While no application to recognize Greek judgments in Quebec had been made (and as such they were not necessarily binding on Quebec courts), the majority of the Court of Appeal emphasized that "*Quebec courts are not bound to recognize and enforce such foreign laws and decisions within Quebec with respect to Quebec when the result of doing so is manifestly inconsistent with public order as understood in international relations*" (para. 66). In the Court's view, the Athens Court of Appeal Decision is one such example because it "*stands for the proposition that the Greek State may ignore with impunity both the Interim Order and the Final Award of the ICC Arbitral Tribunal even if it formally undertook to abide by the arbitration process, and even if the Final Award was confirmed in all its aspects by the Court of Appeal for Paris*" (para. 69).

The majority of the SCC agreed with the trial judge and the majority of the Quebec Court of Appeal, who both expressly opted out to give no weight to the decisions of the Greek courts (see paras. 102, 104). The decisive factor for SCC's majority "*was the conclusion of the foreign courts that a party can disregard an order of an arbitral tribunal to which it has agreed to be subject*" (para. 107).

How Enforceable Are Tribunal-Ordered Interim Measures Today?

While it is reassuring that Canadian courts negatively view foreign judgments that disregard rulings of arbitral tribunals, one can hardly stay indifferent when reading the panoply of actions that the parties here had to take because the tribunal's Interim Order was not enforceable.

Much ink has been spilled on the issue of enforceability of interim or provisional measures. Authors have considered whether framing them as an "award," "decision" or "procedural order" matters, as well as whether, despite the title of the ruling, interim measures could be considered as "awards" enforceable under the New York Convention (which omits to define this term). [1)]

The 2006 UNCITRAL Model Law ("**ML**") contains one solution to the problem of enforceability of interim measures. Article 17H clarifies that "an interim measure issued by an arbitral tribunal shall be recognized as binding and […] enforced upon application to the competent court, irrespective of the country in which it was issued." Article 17I provides that recognition or enforcement of an interim measure may be refused only in specific situations (most of which mirror those in which awards may be refused recognition and enforcement).

In 2016, when adopting the new *Code of Civil Procedure* (“**CCP**”), inspired by the 2006 changes to the ML, the Quebec legislator created Article 638 which provides as follows:

> The arbitrator may, on a party’s request, take any provisional measure or any measure to safeguard the parties’ rights for the time and subject to the conditions the arbitrator determines and, if necessary, require that a suretyship be provided to cover costs and the reparation of any prejudice that may result from such a measure. **Such a decision is binding on the parties but one of them may, if necessary, ask the court to homologate the decision to give it the same force and effect as a judgment of the court.**

Furthermore, provisional measures may be homologated (if domestic) or recognized and enforced (if international) in the same circumstances as arbitral awards, as per Articles 646 and 653 of the CCP.

The legislation in force at the time of the events in *Eurobank Ergasias v. Bombardier inc.*, however, was silent on the matter. Had it already had provisions similar to Articles 638, 646 and 653, Bombardier would have been able to enforce the tribunal’s procedural order as opposed to seeking an injunction from a court. It is reasonable to assume that with the updated legislative framework, the frustrating situation in which tribunal-ordered interim measures are unenforceable is unlikely to reoccur in Québec.

The 2006 version of Article 17 of the ML, however, has not been transposed into the laws of many jurisdictions. Even within Canada the regime is not uniform.

For example, while the Ontario *International Commercial Arbitration Act* follows the 2006 ML, the *Arbitration Act* which governs domestic arbitrations, appears to only grant the tribunal the power to “*make an order for the detention, preservation or inspection of property and documents*” which the “*court may enforce […] as if it were a similar direction made by the court in an action*” (see section 18). It also provides, at section 8(1), that “*court’s powers with respect to detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions*.”

The Alberta *International Commercial Arbitration Act* reflects the 1985 version of the ML, which grants tribunals the power to order interim measures but does not address their enforcement. In domestic matters, section 8(1) of the *Arbitration Act* largely resembles that of Ontario.

In British Columbia, Articles 17H and 17I of the 2006 ML appear to be reflected in both domestic (sections 43 and 44 of the *Arbitration Act*) and international (sections 17.08 and 17.09 of the *International Commercial Arbitration Act*) arbitration statutes.

Conclusion

Apart from undermining the utopian ideals of uniformity and predictability, the different treatment of interim measures undercuts the efficiency of arbitration and its status as the *alternative* dispute resolution method. The latter concern is amplified by the dissenting Justice Côté’s comment that

though the parties "*were contractually bound to comply with any conservatory and interim measures ordered by the Tribunal*," their breach "*is not equivalent to a breach of a court order*" (because such orders could not have been enforced in courts) rather constitute a mere "*contractual breach*" (see para. 266).

Not only do applications for interim relief from courts increase costs and delays, they also remove one of arbitration's most attractive features: confidentiality. Parties may already expect their dispute to become somewhat public in post-award proceedings (though, the Quebec Superior Court recently restated the importance of preserving confidentiality even at that stage). However, seeking court assistance mid-way through the arbitration forces the parties to publicize their dispute much sooner (which may change the dynamic between the disputing parties, potentially giving leverage to the party that is less concerned with preserving secrecy).

It has been said in the past that, parties typically comply with tribunal-ordered interim measures.[2)] However, exceptions to voluntary compliance exist, and the *Eurobank* case perfectly exemplifies just how many complications the absence of a clear regime for the enforcement of interim measures can cause. Legislators considering arbitration reforms in the future would be wise to address this issue before history repeats itself.

** The views expressed herein are those of the author and do not necessarily reflect the views of Woods LLP or its partners.*

*** Woods LLP represented NBC in the above-described judicial proceedings.*

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?1 See, *e.g.*, ICC, "Final Report on Interim and Partial Awards," in ICC Bulletin (1990), Vol. 1, No. 2; Pierre A. Karrer, "Interim Measures Issued by Arbitral Tribunals and the Courts: Less Theory, Please" in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 10 (New Delhi 2000): International Arbitration and National Courts: The Never Ending Story, ICCA Congress Series*, Vol. 10 (2001), p. 108; Rolf Trittmann, "When Should Arbitrators Issue Interim or Partial Awards and or Procedural Orders?", in JOIA (2003), Vol. 20, No. 3; V. V. Veeder, "The Need for Cross-border Enforcement of Interim Measures Ordered by a State Court in Support of the International Arbitral Process," in Albert Jan Van den Berg (ed.), *New Horizons in International Commercial Arbitration and Beyond*, ICCA Congress Series, Vol. 12 (2005); Ali Yesilirmak, *Provisional Measures in International Commercial Arbitration* (2005), Chapter 6; Benoit Le Bars and Tejas Shiroor, "Provisional Measures in Investment Arbitration: Wading through the Murky Waters of Enforcement" in Indian Journal of International Arbitration Law (2017), Vol. VI, No. 1; Jonathon Hill, "Is an Interim Measure of Protection Ordered by an Arbitral Tribunal an Arbitral Award?," in Thomas Schultz (ed)., Journal of International Dispute Settlement (2018), Vol. 9, No. 4; Gary B. Born, *International Commercial Arbitration*, Chapter 17 (2023).

?2 See, e.g., Kaj Hobér, "Interim Measures by Arbitrators," in Albert Jan van den Berg (ed.), *ICCA Congress Series No. 13 (Montreal 2006): International Arbitration 2006: Back to Basics?*, ICCA Congress Series, Vol. 13 (2007), pp. 739-740; Maxi Scherer, "Chapter 19: Interim and Conservatory Measures", in Maxi Scherer, Lisa Richman et al., *Arbitrating under the 2020 LCIA Rules: A User's Guide* (2021), pp. 334- 335.

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