Commentary

French Supreme Court Refuses The Enforcement Of An Arbitral Award In France For Failure To Comply With Mandatory Insolvency Provisions

By
Pierre Heitzmann
and
Corinne Nguyen

[Editor’s Note: Pierre Heitzmann is a member of the Paris Bar and Partner at Jones Day. Corinne Nguyen is a member of the Paris Bar and Associate at Jones Day. Based in Paris, they concentrate in the field of international commercial arbitration. The views expressed in this commentary are those of the authors and should not be considered the views of Jones Day or of its clients. Copyright 2009 by Pierre Heitzmann and Corinne Nguyen. Replies to this commentary are welcome.]


The dispute relates to the alleged breach of several contracts for the sale of crystallized sugar concluded in March–April 2001 between a French company, Jean Lion S.A. (“JL” or the Respondent), and an Egyptian company, the International Company for Commercial Exchanges Income (“Income” or the Claimant). The contracts provide that all disputes are submitted to arbitration, in London, under the auspices of the Refined Sugar Association.

On October 5, 2001, Income filed a request for arbitration claiming breach of contract against JL.

On May 20, 2003, while the arbitral proceedings were pending, the Respondent entered into bankruptcy proceedings and became subject to a compulsory liquidation order on July 1, 2003, under the authority of a court-appointed liquidator.

On February 9, 2004, the arbitral tribunal, composed of Messrs. G. H. Toffer (Chair), S. O’Mahony and M. Duncan rendered an award in favour of the Claimant by ordering the Respondent to make a payment of USD 5.2 million to Income.

On February 20, 2006, the Claimant successfully obtained an order for the enforcement of the award in France (executatur).

On April 21, 2006, the liquidator filed an appeal against the executatur order on the basis of two grounds. First, the liquidator alleged that the award had been rendered after a violation of the principle...
of due process by the arbitral tribunal (article 1502 (4) CCP). He further argued that recognition of the award would violate a rule of international public policy (article 1502 (5) CCP).

On November 8, 2007, the Paris Court of Appeal upheld the *exequatur* order, thus prompting the liquidator to file a challenge before the French Supreme Court.

On May 6, 2009, the French Supreme Court vacated the decision of the Paris Court of Appeal.

First, the Supreme Court rejected the liquidator’s due process claims, which were based on the fact that he was not validly and personally informed of the different steps of the proceedings. The Supreme Court noted that the liquidator was duly informed — through his office — of the different steps of the arbitration proceedings. He was given an opportunity by the Refined Sugar Association to participate and to comment upon the proceedings, including the possibility for the arbitral tribunal to issue an award based on the written submissions of the parties without the need of a hearing, to reduce the costs of the arbitration. Having decided voluntarily to refrain from participating in the proceedings, the liquidator was deemed to have waived his rights to object and was estopped from challenging the validity of the procedure in subsequent proceedings once the award had been rendered.

Second, however, the Supreme Court overturned the decision of the Paris Court of Appeal for violation of the provisions of article L.621-41 CC. This article provides that following the commencement of insolvency proceedings in France, all proceedings, including arbitrations, between the insolvent party and any creditor must be suspended until the submission of the creditor’s claims to the court-appointed representative of creditors. After this submission is made, the relevant parallel proceedings between the insolvent company and the creditor can be resumed, but only for the purpose of fixing the amount of the debt. It is for the commercial court in charge of the insolvency proceedings to make an order that the claims are admitted as part of the debtor’s liabilities. The rationale behind this mandatory rule is to preserve the principle of equal treatment among creditors of the insolvent company.

The request for arbitration had been filed before the insolvency proceedings were started, and JL filed for insolvency proceedings before the issuance of the award. The Claimant should therefore have requested the suspension of the arbitral proceedings to declare its claim with the court-appointed representative and then requested the arbitral tribunal to resume the arbitration proceedings for the sole purpose of fixing the amount of debt, if any, due by the Respondent.

A failure to comply with this mandatory rule of French insolvency law may lead to the annulment of the award if it is rendered in France. In the present matter, the decision of the Paris Court of Appeal to uphold the *exequatur* order of a “London” award, made abroad, was vacated because the arbitral tribunal ordered the Respondent to pay a certain amount to Claimant, instead of issuing an award fixing the amount without ordering a payment.

This decision is a reminder for international practitioners that the principle of equal treatment of the creditors in case of insolvency proceedings taking place in France is considered to be part of the French international public policy and is strictly applied by the French Supreme court. While France (unlike other jurisdictions such as Italy, Poland or Lithuania) allows arbitration proceedings to be resumed after a creditor declares its claim with the court-appointed representative, a failure by the arbitrators to draft an award limited to the determination of the amount due by the insolvent party may lead to an annulment of the entire arbitration proceedings.

The approach of the Supreme Court may be viewed as too rigid, leading to a formalistic application of the French Commercial Code. An alternative solution would be to recognize the award only as fixing the amount due by the insolvent party. 

The French Court also reaffirms the limited scope of the judicial review of arbitral awards in the context of annulment proceedings. The grounds for annulment of an award are limited, and the Court can either dismiss the application or declare the award null and void on the limited grounds provided for by law. In the present matter, the breach of the mandatory provisions of article L.621-41 CC by the arbitral tribunal is considered by the Supreme Court to be so
manifest or so blatant that it justifies entirely its decision without no further justifications.11

Finally, international practitioners will note the application, once again by the French Supreme Court,12 of the principle of prohibition for a party to behave in a contradictory manner vis-à-vis third parties, also known as estoppel. Such a concept was used by the court to protect the Claimant’s legitimate reliance of the Respondent’s conduct during the proceedings. The fact that the liquidator had decided to ignore the arbitral proceedings by not participating in the procedure although he was fully aware and informed of it, justified the application of the principle of estoppel.13

The Supreme Court also imposes a duty of loyalty and consistency on the parties throughout the conduct of arbitration proceedings, and may ultimately sanction a party who has acted inconsistently.14

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Endnotes

1. Article L.621-41 CC has been replaced by article L.622-22 CC pursuant to the Law of July 26, 2005.

2. French Supreme Court, First Civil Section, May 6, 2009, no. 08-10.281, Dalloz 2009 no. 21 p. 1422, note X. Delpech; Paris Court of Appeal, November 8, 2007, no. 06/7417, Rev. arb. 2007 no. 4 p.929.


9. See for instance the more flexible approach adopted in *Fotochrome Inc. v. Copal Co*., 517 F.2d 512 (2d Cir. 1975) and the commentary by J. Rosell and H. Prager, supra, note 5.


