

PARIS COURT OF APPEAL

Division 5 - 16

RG 19/04161 - No Portalis 35L7-V-B7D-B7MGP

Referral's nature: Other referrals to the court at the parties' initiative

Date of the notice of referral: 19 February 2019

Registration date of the referral: 28 February 2019

Nature of the case: Request for enforcement of a conciliation agreement, of an agreement on a recommendation of a mediator, an arbitral award, or seeking sanctions for their non-enforcement.

Decision challenged : No. PCA2016-14 issued by the Arbitral Tribunal of PARIS on 26 November 2018

Claimant to the motion and to the action :

THE RUSSIAN FEDERATION

(Represented by the Ministry of Justice of the Russian Federation itself represented by Mr Konovalov Alexander Vladimirovich, Minister of Justice)

Having its offices: 14 Gitnaya Street, Moscow, Russian Federation

Represented by [], lawyer at the PARIS Bar, toque :

Having as litigator [], lawyer at the PARIS Bar, toque...

Defendant to the motion and to the action::

JSC OSCHADBANK (formerly known as "PUBLIC JOINT STOCK COMP ANY " ST A TE SA VINGS BANK OF UKRAINE") taken in the person of its legal representatives

Represented by [], lawyer at the PARIS Bar

Having as litigating [], lawyer at the PARIS Bar, and [], lawyer at the PARIS Bar

PROCEDURAL ORDER BEFORE THE PRE-TRIAL JUDGE

(with no No, 6 pages)

At the hearing on procedural issues of 8 October 2019,

We, François ANCEL, Pre-trial Judge , assisted by Clémentine GLEMET, clerk of the court

I - FACTS AND PROCEDURE

Facts

1. Public Joint Stock "State Savings Bank of Ukraine", hereinafter referred to as JSC Oschadbank, is a Ukrainian state-owned joint-stock company with banking activities, operating in Crimea through a local branch.

2. On 18 March 2014, the Republic of Crimea was attached to the Russian Federation under a Treaty of Accession entered into on the same day.

3. On 6 May 2014, the National Bank of Ukraine issued Resolution No. 260 prohibiting all Ukrainian banks from conducting banking activities in the Crimean peninsula as of June 2014 "due

to the takeover of the legal and administrative apparatus and the physical closure of the border through the installation of armed checkpoints by the now Russian "Crimean" authorities.

Procedure

4. On 20 January 2016, JSC Oschadbank, considering that its assets in the Republic of Crimea had been expropriated, initiated arbitration proceedings before the Permanent Court of Arbitration sitting in Paris against the Russian Federation, alleging violation of the bilateral Treaty on the Promotion and Protection of Investments concluded between the Russian Federation and Ukraine on 27 November 1998 (hereinafter "the BIT"). The Russian Federation, challenging the application of the said Treaty and the jurisdiction of the arbitral tribunal, did not appear in the arbitration proceedings.

5. The Permanent Court of Arbitration in Paris, composed of Messrs. [], [], [], arbitrators and [] Chairman, issued an arbitral award on 26 November 2018:

- asserted its jurisdiction to resolve the dispute submitted to it;
- held that the Russian Federation had violated the Russia-Ukraine Treaty of 27 November 1998 by taking expropriation measures against the investments of the company JSC Oschadbank in the Crimean Peninsula;
- ordered the Russian Federation, inter alia, to pay JSC Oschadbank a total amount of US\$ 1,111,300,729 as compensation in addition to the costs of the arbitral proceedings and expenses (lawyers', experts', witnesses' and other costs);

6. By an act dated 19 February 2019, the Russian Federation filed an application with the Paris Court of Appeal to set aside the arbitral award handed down on 26 November 2018 in Paris.

7. By submissions on procedural issues notified by electronic means on 25 March 2019, the Russian Federation applied to the pre-trial judge under article 1526 of the Code of Civil Procedure for a stay of the enforcement of the arbitral award handed down in France on 26 November 2018.

8. The pleadings on the procedural issue were set at the hearing of the pre-trial judge of May 14, 2019.

9. On 18 April 2019, as the respondent had not instructed a lawyer, the Clerk notified the appellant that he had to serve its referral in accordance with Article 902 of the Code of Civil Procedure.

10. On 25 April 2019, the Russian Federation served the company JSC Oschadbank, in accordance with the Hague Convention of 15 November 1965, its application to set aside the arbitral award and its submissions on procedural issues, by bailiff's act issued on 25 April 2019.

11. At the hearing of 14 May 2019, since JSC Oschadbank did not appear, the pre-trial judge, noting that there was no evidence that JSC Oschadbank knew of the date of the hearing and that the time limit to attend the hearing was insufficient in the light of the Hague Convention of 15 November 1965, ordered that the case be postponed to the hearing of 2 July 2019.

12. By extrajudicial act of 21 May 2019, the Russian Federation served on JSC Oschadbank notice of postponement of the hearing of its application for a stay of execution to 2 July 2019, in accordance with the Hague Convention of 15 November 1965.

13. At the hearing on 2 July 2019, JSC Oschadbank did not instruct a lawyer. The matter was held and reserved until 13 August 2019.

14. On 7 August 2019, JSC Oschadbank was represented by a lawyer. By letter dated 8 August 2019, JSC Oschadbank explained that it had been served with the notice to appear at the 2 July 2019 hearing on 5 August 2019 and requested that the hearing be reopened for the purpose of defending itself.

15. By order of August 13, 2019, the pre-trial judge ordered the reopening of the hearing.

II- CLAIMS AND PLEAS OF THE PARTIES

16. **According to its latest submission notified electronically on 23 September 2019**, the Russian Federation requests from the pre-trial judge, inter alia, pursuant to Article 1526 of the Code of Civil Procedure, to primarily order the stay-of the execution of the arbitral award handed down in Paris on November 26, 2018 in PCA Case N°2016-14 and in any event to order JSC Oschadbank to pay to the Russian Federation the sum of EUR 40,000 pursuant to the provisions of Article 700 of the Code of Civil Procedure in addition to the entire costs of the procedural hearing to benefit to SELARL LEXAVOUE PARIS-VERSAILLES.

17. To support its application, the Russian Federation claims, in substance, that the conditions laid down by Article 1526 of the Code of Civil Procedure are satisfied in view of the risk that its rights may be prejudiced by attempts by JSC Oschadbank to enforce it in countries which do not guarantee adequate protection for the immunity from execution which it enjoys.

18. It points out that since it has assets throughout the world, the potential enforcement of the arbitral award is likely to seriously harm its rights in view of the massive campaign of enforcement attempts in several countries that it would have to face, but also of the risks of non-restitution of the sums in the event of the award being set aside and of the uncertain nature of the legal steps that would need to be taken to recover the unduly apprehended amounts and assets.

19. It recalls that the freezing of assets belonging to a State constitutes in itself a violation of its immunity from execution likely to seriously harm its rights, the French Government, the Parliamentarians and the *Conseil Constitutionnel* having held that the risk of violation of the rights of a State was sufficiently serious to modify the state of previous French law with the adoption of Act No. 2016-1691 of 9 December 2016 relating to transparency, the fight against corruption and the modernisation of economic life, which amended Article L. 111-1-1 of the Code of Civil Enforcement Procedures, which now provides that enforcement measures may only be implemented on property belonging to a foreign State with the prior authorisation of the judge by order issued on request.

20. It states that JSC Oschadbank applied for and obtained the exequatur of the award by the Kiev Court of Appeal on 17 July 2019 without the presence of the Russian Federation and that Ukraine will not provide adequate protection for the Russian Federation's immunity from execution since in another case involving Ukrainian beneficiaries of an arbitral award made against the Russian Federation, the Supreme Court of Ukraine held that the stipulation of an arbitration clause in the BIT meant that the Russian Federation waived its immunity from jurisdiction and execution.

21. The Russian Federation thus considers that the Ukrainian courts, by upholding a waiver of immunity from execution in a case not permitted under either international law or French law, do not provide adequate protection for the immunity from execution which it enjoys and that, in these circumstances, the execution initiated by JSC Oschadbank in Ukraine, if it is not stopped, is likely

to seriously harm its rights and in particular its right to benefit from immunity from execution.

22. In this respect, it asserts that, under Article V.1(e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the stay of provisional enforcement will prevent the enforcement of the award not only in France, but is likely to prevent it abroad where the application is made against an award made by an arbitral tribunal sitting in France.

23. The Russian Federation adds that the claim for compensation resulting from the award, which is the subject of the action for setting aside, arose from the exercise by the Russian Federation of its sovereign prerogatives and that this type of claim for compensation is therefore not susceptible, under French law, of being enforced against the Russian Federation because it does not relate to "an economic and commercial activity under private law". It recalls that immunity from execution may be set aside only if the property seized was used for economic or commercial activity falling within the scope of private law and that in the present case, in view of the nature of the claim arising from the exercise by the Russian Federation of its sovereign prerogatives, the Russian Federation's immunity from execution will apply to any execution attempt.

27. By submissions notified electronically on 3 October 2019, JSC Oschadbank requests the pre-trial judge to :

- reject the request for a stay of execution of the final arbitral award obtained by JSC Oschadbank and to deny Russia all its claims;

In the further alternative:

- To arrange for the immediate execution of the final arbitral award obtained by JSC Oschadbank on November 26, 2018 by authorizing Russia to deposit within a period of one month with the *Caisse des Dépôts et Consignations* a sum equivalent to the sums due under the final arbitral award obtained by JSC Oschadbank and to declare that in the absence of execution within this period, the execution will be fully effective;

In any event:

- Order Russia to pay to JSC Oschadbank the sum of EUR 35,000 under the provisions of Article 700 of the Code of Civil Procedure;
- Order Russia to pay all the costs of the procedural order proceedings.

28. To support its claims, JSC Oschadbank states in substance that the conditions laid down in Article 1526 of the Code of Civil Procedure allowing the stay of enforcement of an award on an exceptional basis are not met, it being recalled that the purpose of the stay of enforcement is solely to avoid causing irreversible damage to the debtor pending a decision on his application for setting aside the award.

29. It points out in this regard that the risk of enforcement against sovereign property is not such as to justify the stay of enforcement of the award, while this question is a matter for the judge of the place of enforcement of the award and, moreover, it does not apply to property not covered by immunity.

30. It recalls that the assessment in case-law of a risk of "serious harm" to the rights of the parties is based on a purely economic and accounting analysis of their situation and is assessed in concreto.

31. It argues in this respect that Russia neither mentions nor establishes the existence of a risk likely to jeopardise its financial sustainability, given that the amount of the award, i.e. US\$1.1 billion in principal, represents a derisory fraction of approximately 0.07% of Russia's GDP for 2018. It adds that since Russia does not identify the States in which sovereign assets are allegedly insufficiently protected or how such protection would be insufficient, its argument is general and hypothetical.

32. It points out that the Paris Court of Appeal's decision will not have the effect of stopping the enforcement of the award in all States since Article V.1(e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards leaves State courts full discretion to recognize and enforce an award and the courts of several countries have refused to stop the enforcement of an award when it was set aside or suspended by the courts of the place where the arbitration took place.

33. It believes that the Paris Court of Appeal cannot establish itself as the international authority for the control of the protection of sovereign immunities by reference to the rules of French law and that it is not required to be the judge of the degree of protection of property located abroad.

34. It adds that there is no risk of non-enforcement on its part and that the fact that it may attempt to enforce the award in several countries is not in itself sufficient to characterize a risk of non-enforcement. It points out that it is one of the largest Ukrainian banks which is owned by the Ukrainian State and has more than 29,000 employees.

35. JSC Oschadbank states that it is prepared not to enforce the award until the decision of the Paris Court of Appeal on the application for annulment if, in return, Russia deposits the amount due under the award in a deposit account with the French *Caisse des Dépôts et des Consignations*, or provides sufficient independent bank guarantees.

REASON FOR THE DECISION

On the request for a stay of enforcement :

36. Pursuant to Article 1526 of the Code of Civil Procedure: "An action to set aside the award and an appeal against the order granting exequatur shall not have suspensive effect. However, the first president ruling in summary proceedings or, as soon as the matter is referred to him, the pre-trial judge may stay or modify the enforcement of the award if such enforcement is likely to seriously harm the rights of one of the parties".

37. As indicated in the Report to the Prime Minister on Decree No. 2011-48 of 13 January 2011 reforming arbitration, "the new Article 1526 constitutes an innovation compared to the previous state of the law, since it provides for the absence of suspensive effect when an appeal or an action to set aside has been brought against an award. Such an amendment was intended to avoid dilatory actions by parties acting in bad faith. However, paragraph 2 reserves the application of the preceding paragraph when the enforcement of the award is likely to seriously harm the rights of one of the parties".

38. It follows from these considerations that the stay or adjustment of enforcement of the award, which cannot depend on the seriousness of the action for setting aside, must be assessed strictly, otherwise the lack of suspensive effect of the action for setting aside will be ineffective, despite the fact that the text of the above-mentioned Article 1526 does not expressly restrict its benefit to an assessment solely of the economic consequences of enforcement of the award for one of the parties.

39. This utilitarian interpretation of Article 1526(2) makes the benefit of the judgment or adjustment subject to an assessment in concreto of the serious harm to rights which the enforcement of the award is likely to generate, so that this risk must be sufficiently well established at the time the court rules and that Article 1526 of the Code of Civil Procedure does not give the court the power to grant a party the right to oppose enforcement of an award on general, abstract or hypothetical grounds.

40. In this case, the Russian Federation essentially considers that the serious harm to its rights is characterized by the risk of disregard for its immunity from enforcement in the event of attempts to enforce the award made by JSC Oschadbank in countries that do not guarantee adequate protection of that immunity, in particular Ukraine, contrary to the protection afforded by French law since Act No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernization of economic life, which amended article L. 111-1-1 of the Code of Civil Enforcement Procedures.

41. However, on the one hand, the mere fact that JSC Oschadbank may consider instituting enforcement proceedings in various countries because of the extent of the assets of the Russian Federation cannot be a relevant ground for deciding to stay enforcement of an award, when the principle of enforcement is precisely intended to allow payment of the award, notwithstanding an action for setting aside, it being observed that there is no justification in the case in point for any measure of compulsory execution which would have been taken and would have had the effect, by reason of the law applicable in that State, of actually infringing property protected by its immunity from execution.

42. On the other hand, the allegation that certain foreign laws do not sufficiently protect the immunity of States from execution does not in itself constitute a sufficient ground for a State to obtain a stay of execution in proceedings to set aside an award, where the merits of such a ground, and hence the alleged risk, depend on an assessment of the conditions under which the enforcement of that award is pursued under the law of the country of the place of enforcement, which falls within the jurisdiction of the court of the place of enforcement, which alone is able to assess, in the light of its law and in particular the degree of protection it affords to the respect of immunity from enforcement, the validity of the enforcement measure.

43. It should also be noted that it is neither established nor even maintained that enforcement of the award is likely to compromise the financial equilibrium of the Russian Federation in view sums it is ordered to pay, which must, moreover, be assessed at the level of a State.

44. Finally, the risk of non-restitution is not characterised, even though it is not disputed that JSC Oschadbank is a bank belonging to the Ukrainian State and employing more than 29,000 people, for which there is no evidence that it is in financial difficulty.

45. In the light of the foregoing, the request for a stay of execution must be rejected and there is no need, in view of the Russian Federation's opposition, to order an adjustment which is moreover unjustified.

On costs and expenses;

46. The Russian Federation, as losing party, should be ordered to pay the costs of the procedural order proceedings.

47. In addition, the Russian Federation should be ordered to pay to JSC Oschadbank, which had to incur irrecoverable costs in order to assert its rights, compensation under Article 700 of the Code of

Civil Procedure which it is equitable to fix at the sum of EUR 8,000.

III- ON THESE GROUNDS, WE HEREBY

1. Reject the request for a stay of execution of the arbitral award of November 26, 2018 handed down by the Permanent Court of Arbitration, sitting in Paris ;
2. Find that there is no need to adjust the enforcement of the award;
3. Order the Russian Federation to pay to JSC Oschadbank the sum of EUR 8,000 pursuant to Article 700 of the Code of Civil Procedure ;
4. Order the Russian Federation to pay the costs of the procedural order proceedings-

Order made by François ANCEL, Pre-trial judge assisted by Clémentine GLEMET, clerk present when the order was made available at the Registry of the Court, the parties having been given prior notice thereof in accordance with the conditions laid down in the second paragraph of Article 450 of the Code of Civil Procedure.

Paris, 22 October 2019

The Clerk

Pre-trial Judge