Arendt Case Review

Arendt Case Review is a newsletter designed and produced by Arendt Litigation Group

February 2020

Summary

COMPANY LAW
Application for provision of security rights

Luxembourg Court of Appeal
Decision No. 142/19 - VII - CIV of 13 November 2019,
Docket No. CAL-2018-00485

This decision recalls the conditions for the application of Article 1865bis of the Civil Code, which provides that *"the event of dissolution results in the universal transmission of the company's assets to the sole shareholder, without the need for liquidation. The creditors may, within 30 days from the publication of the dissolution, apply to the President of the District Court, ruling as in summary proceedings, for provision of security rights."*

The Court recalls that *"the protection provided by law to the company's creditors pursuant to Article 1865bis-4 of the Civil Code has no impact on the act of dissolution of the company."* Concerning the application for provision of security rights, the court may dismiss the application *"only if the creditor has adequate safeguards or if these are not necessary in light of the shareholder's assets."* Under the law, assets are considered to be *"all external property, movable or immovable, which belongs to a natural or legal person."*

Moreover, *"it follows from Article 1865bis-4 of the Civil Code that both the ability to make provision of security rights and the state of the assets are to be assessed in relation to the shareholder to whom the assets of the dissolved company have been transferred."*

COMPANY LAW
Standing to bring an action for annulment of the decision to dissolve a company

Luxembourg Court of Appeal
Decision No. 150/19 - VII - REF of 27 November 2019,
Docket No. CAL-2018-00489

This decision recalls that *"the creditor of a company that is subject to dissolution in the context of Article 1865bis of the Civil Code may not oppose the dissolution of that company, but may only demand safeguards from the sole shareholder."*

The Court turned to the parliamentary proceedings relating to the law of 10 August 2016, which introduced Article 1865bis of the Civil Code, to explain that the text of this Article is inspired by Article 1844-5, paragraph 3, of the French Civil Code, but that it did not include the last sentence of the French article *"because this rule seems to derive directly from the ability of creditors in France to oppose the operation. However, while French law retains, where applicable, opposition as one of the possible creditor protection techniques, this is not the case under Luxembourg law. Consequently, the creditor protection mechanism retained here is inspired by those implemented in the context of merger-demerger operations"* (cf. parliamentary proceedings, Draft Law no. 5730, comments on the articles).

For this reason, the Court noted that the appellant, who opposed the dissolution of a company in the context of Article 1865bis of the Civil Code on the grounds that the appellant was a creditor of the dissolved company, did not have standing to bring an action for annulment of the decision to dissolve.

CIVIL LAW
Release of an attachment

District Court of Luxembourg
Civil Judgment No. 2019TALCH01/00402 of 18 December 2019,
Docket No. 187187

This judgment states that an attachment that has been released by order of a judge, sitting as in summary proceedings, has no legal existence and no basis, with the result that the application for validation of the attachment, now non-existent, before the Tribunal sitting in civil matters has become devoid of purpose.

The Tribunal also found that there was no need to rule either on the validation of the attachment or on the plea put forward by the applicant that there may have been a breach of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, explaining that *"a possible finding of a breach of that provision of the Convention will not have the effect of reviving the attachment, the release of which was ordered by a provisionally enforceable decision confirmed on appeal."*

CIVIL LAW
Res judicata, suspension of an insurance contract

District Court of Luxembourg
Civil Judgment No. 2019TALCH17/00285 of 27 November 2019,
Docket No. TAL-2018-00048

This judgment recalls that *"the civil court judge is not permitted to disregard what has necessarily and certainly been adjudicated by the criminal court judge."*

In the present case, the plaintiff had been convicted by the criminal courts for having put into circulation a vehicle not covered by valid insurance. The criminal court judge ruled on the issue of the suspension of the insurance contract and the lack of insurance coverage of the vehicle at the time of the accident, but not on the issue of the insurer's coverage of the victims' damages after the accident. Consequently, the Tribunal considered that the plaintiff's claim *"does not conflict with the res judicata authority of the criminal decision over the civil case."*

On the question of the reinstatement of the coverage by the insurer, the Court stated that *"in accordance with Article 23 on the contract of insurance, the suspended but not cancelled contract resumes its effects for the future* [underlined by the Tribunal]*, the day after midnight of the day on which the premium due to the insurer was paid, or, in the case of a split of the annual premium, the fractions of the premium that were the subject of the formal notice and those that became due during the period of suspension, as well as, where applicable, the costs of proceedings and recovery."*

In the present case, the Tribunal found that the insurance premiums were paid by the policyholder only after the accident occurred and thus decided that *"in light of the suspension of the contract on the day of the accident, the claim* [of the plaintiff] *to be indemnified by the insurer for past or future rulings against him is without merit."*

District Court of Luxembourg
Civil Judgment No. 2019TALCH20/00022 of 7 November 2019,
Docket No. 177901 and No. 181100

This judgment recalls certain principles applicable to real estate litigation.

The unilateral expert report

The Tribunal recalls that *"an expert report cannot be used against any person who was not called upon or represented while the expert conducted the assessment. The reason for this rule is to safeguard the rights of defence of the party against whom one wishes to invoke an expert report during the preparation of which the party was unable to present its observations"* (cf. TAL, 18 December 2000, No. 50320). For this reason, the terms "opposability" and "validity" are reserved for court-ordered expert reports.

On the other hand, a unilateral or unofficial expert report *"constitutes evidence within the meaning of Article 64 of the New Code of Civil Procedure and if it is regularly communicated and submitted to free discussion by the parties, it is to be taken into consideration as evidence and cannot be set aside solely on account of its unilateral nature"* (cf. CA, 3 May 2007, 9th Chamber, no. 31186; Cass., 7 November 2002, Pas. 32, p. 363; MOUSSA (T.), Expertise en matière civile et commerciale, 2nd ed. p. 166; CA, 13 October 2005, no. 26892; TAD, 14 July 2009, no. 104/2009). "*A unilateral expert report can thus be considered to be simple information but cannot in itself be the basis for a conviction and constitutes only one element of assessment among others*" (cf. CA, 13 October 2005, BIJ 8/2005, p. 158; Cass. 8 December 2005, no. 63/05, Pas. 33, p. 143).

The distinction between apparent and hidden defects in the sale of buildings to be constructed

The Tribunal highlighted that, with respect to the sale of buildings to be constructed, Articles 1642-1 and 1646-1 of the Civil Code establish a regime derogating from the ordinary law as regards the guarantee against defects.

According to Article 1646-1 of the Civil Code *"the seller of a building to be constructed is liable for ten years, as from the acceptance of the work by the purchaser, for hidden defects for which architects, contractors and other persons connected to the project supervisor by a works contract are themselves liable pursuant to Articles 1792 and 2270 of this Code. The seller is obliged to guarantee the minor works for two years from the acceptance of the work by the purchaser."* Article 1642-1 of the Civil Code specifies that *"the seller of a building to be constructed may not be discharged, either before the purchaser has taken possession of the work, or before the expiry of a period of one month after the purchaser has taken possession, of the construction defects apparent at that time."*

Consequently, *"it is on the date of the latest event that one must place oneself in order to determine whether or not the defect observed is subject to the regime of Article 1642-1 of the Civil Code. If the defect occurs after this period, it loses the qualification of apparent defect and becomes a hidden defect falling under Article 1646-1 of the Civil Code"* (cf. Jurisclasseur Civil, Vente d'immeubles à construire, Fasc. no. 20, no. 93).

CIVIL LAW
Neighbourhood disturbance

Court of Appeal of Luxembourg
Decision No. 128/19 - VII - CIV of 23 October 2019,
Docket No. CAL-2018-00738

This decision affirms the assertion of the court of first instance that *"the victim of a neighbourhood disturbance does not need to prove fault on the part of the perpetrator of the disturbance. The abnormality of the disturbance is sufficient to bring about a remedy"* (Cass. 29 June 2000, p. 31, 438).

The Court stated that *"Article 544 of the Civil Code clearly links neighbourhood disturbances to property by stating that property is the right to enjoy and dispose of things, as long as one does not exercise it in a manner prohibited by laws or regulations or that one does not cause a disturbance that exceeds the normal inconveniences of the neighbourhood, upsetting the balance between equivalent rights"* (G. Ravarani, La responsabilité civile des personnes privées et publiques, 3 édition, n° 350).

In this case, the owner of a building had filed a complaint against the owner of the neighbouring land, their insurer and construction companies following a court-ordered expert report which had noted the appearance of damage to his building, which appeared to have been caused by work done on the neighbouring land. On the basis of the court-ordered expert report, the Court held that the owner of the building provided evidence of a causal link between the work and the alleged disturbances, such that the disruptions to the building constituted disturbances that went beyond normal neighbourhood annoyances and led to an imbalance between the equivalent rights of neighbouring owners. The owner of the neighbouring land was therefore liable on the basis of Article 544 of the Civil Code.

CIVIL PROCEDURE
Withdrawal of action

District Court of Luxembourg
Civil Judgment No. 2019TALCH01/00331of 23 October 2019,
Docket No. 186926

This judgment recalls that *"withdrawal of an action and withdrawal of proceedings are two fundamentally different legal mechanisms, both in their conditions of implementation and in their effects. The withdrawal of an action, however, necessarily includes the withdrawal of proceedings."* Moreover, *"the withdrawal of an action, in order to be effective, does not require the agreement of the defendants."*

CIVIL PROCEDURE
Validity of attachment

District Court of Luxembourg,
Civil Judgment No. 2019TALCH11/00191 of 8 November 2019,
Docket No. TAL-2019-05796

This judgment recalls that the Luxembourg courts recognise themselves as having jurisdiction *"to determine the validity of the attachment made on sums deposited in Luxembourg. The principle is in fact that it is at the place of domicile of the third party seised that the territorial jurisdiction in matters of validation of attachment is connected."*

In the present case, the plaintiff company, established under German law, had served a Luxembourg company with an attachment of assets, which had been duly notified to the debtor party with a summons to appear before the Tribunal in order to have the blocking of assets in the hands of the Luxembourg company declared good and valid.

Article 35 of Regulation (EU) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters *"provides in particular that application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that Member State, even if the courts of another Member State have jurisdiction as to the substance of the matter."*

Given that the attachment procedure provided for in Articles 693 et seq. of the New Code of Civil Procedure constitutes a protective measure, including the proceedings for validation, *"the Luxembourg courts have jurisdiction to hear both the authorisation and the validation aspects of an attachment which has been initiated in Luxembourg because of the domicile of the third party seised, even if the main dispute is between foreigners who have neither domicile nor residence in the country."*

ARBITRATION
The public policy exception

Court of Appeal of Luxembourg
Decision No. 133/19 - VIII - Exequatur of 19 December 2019,
Docket No. CAL-2018-00013

This decision recalls the principles applicable to an appeal against an order declaring a foreign arbitral award enforceable in the Grand Duchy of Luxembourg. In the present case, the appellant had raised the violation of Luxembourg public policy as grounds for refusal of exequatur.

The legal framework

The Court recalled that the grounds for refusal of exequatur set out in Article 1251 of the New Code of Civil Procedure are indicated with the specification that the court shall refuse exequatur *"subject to the provisions of international conventions."* Article 1251 *"is to be interpreted as meaning that where the New York Convention is applied (...) the provisions of Article 1251 do not apply and the judge shall take into account only the provisions of the Convention."* Indeed, *"as soon as the exequatur of a foreign arbitral award is governed by the New York Convention, the specific rules of Luxembourg law do not apply"* (see: Court 26 July 2005, Docket No. 27789; Court 25 June 2015, Docket No. 42067; Court 27 April 2017, Docket No. 40105; Court 6 December 2018, Docket No. 44507).

The violation of public policy

The Court recalled that Article V(2)(b) of the New York Convention allows the court from which recognition or enforcement of an award is sought to refuse it if it is contrary to the public policy of that country, and also recalls that the Convention does not define the concept of public policy.

Concerning the practice of the Luxembourg courts, *"Luxembourg case law has for some years proposed a positive definition of public policy with regard to which it intends to review arbitral awards."* There would be a violation of Luxembourg public policy *"where the award or its enforcement would unacceptably offend the legal order of the requested State in that it would infringe upon a fundamental principle*" (Court, 17 October 2013, Docket No. 37973; Court, 15 July 2015, Docket No. 40127). It could consist of a "*manifest infringement of a rule of law regarded as essential in the Luxembourg legal order"* or *"an infringement of a fundamental right of that legal order"* (Court, 15 July 2015, Docket No. 40127).

The Court pointed out that even if the national courts seised of an action for annulment of the award have already examined the validity of the award in relation to the public policy of the country of those courts, the Court of Appeal of Luxembourg, when seised of an application for exequatur, may still assess whether the award is contrary to international public policy. Furthermore, the Court held that *"[t]he control exercised by the judge of exequatur, which is exclusive of any power of review on the merits of the arbitral award, is however limited and has the sole purpose of verifying whether the recognition or enforcement of the Award effectively and concretely violates international public policy."*

In the case where a party opposes the enforcement of an arbitral award on the grounds of fraud, the Court held that *"for there to be an infringement of public policy, the Award must have been obtained by manifest and decisive fraud. The burden of proof lies on the party opposing the exequatur on the grounds of fraud...The party opposing the exequatur on the grounds that the arbitral award is contrary to public policy must not only establish the alleged fraud by clear and convincing evidence and show that the fraud in question could not have been discovered during the arbitration, but also that the fraudulent manoeuvres had an influence on the arbitrators' decision."*

In the present case, the Court rejected the argument based on the violation of

public policy because the alleged fraud would have concerned only part of the damages in question, and not the appellant's liability, and the allegedly false information would not have been determinative in the decision of the arbitral tribunal concerning the calculation of the damages. Furthermore, the Court found that *"the appellant also failed to show evidence that the Award was made on the basis of false statements and documents, or of a manifestly fraudulent scheme."* Consequently, *"it is not established that the Arbitral Award and the Corrected Award or their enforcement constitute a manifest violation of a rule of law considered essential in the legal order of Luxembourg and infringe upon a fundamental right of that legal order."*

This decision is not yet final and can be subject to cassation proceedings.

COMMERCIAL LAW
Financial collateral arrangements

Court of Appeal of Luxembourg
Decision No. 6/20 IV-COM of 22 January 2020, Docket No. CAL-2017-00004

The admissibility of the application for annulment of the enforcement of pledges

In the present case, the defendants reiterated the plea that the application for annulment of the appropriation of the pledge was inadmissible, arguing that, in accordance with the intention of the drafters of the amended Law of 5 August 2005 on financial collateral arrangements, financial collateral arrangements are unassailable and cannot be annulled.

The Court agreed with the reasoning of the court of first instance to recall that *"the annulment of a financial collateral arrangement for manifest fraud or abuse constitutes an exceptional breach of the principle that financial collateral arrangements cannot be called into question with respect to their validity or their agreed valuation or performance."*

A decision of the Court of Cassation confirmed this principle by specifying that *"the right conferred on the secured creditor by Article 11, paragraph 1, of the Law of 2005 to appropriate, by virtue of the agreement between the parties, the pledged assets in the event of a circumstance giving rise to the enforcement of the guarantee does not preclude the court, in the event that this fact proceeds, as in this case, from an abuse of right or fraud, from putting an end to the appropriation by ordering the restitution of the appropriated assets*" (Court of Cassation, 14 February 2019, n°27/2019, n° 4022 of the register).

Consequently, *"in cases of fraud or manifest abuse, the appropriation of the pledged assets by the secured creditor may be called into question"* and the plea of inadmissibility is to be rejected.

The accessory nature of the pledge

In the present case, the pledge had been appropriated following the breach of a financial ratio by the debtor company, in accordance with the provisions of two pledge agreements subject to Luxembourg law, according to which the breach of that financial ratio constituted an enforcement event of the pledge.

The Court noted that enforcement events of pledges are subject to the free will of the parties, who determine them contractually, and may be subject to *a posteriori* review by the courts. In this case, the breach of the financial ratio contractually defined as an enforcement event may therefore result in the enforcement of the

collateral under the Law of 2005, which provides that "*a default or any other event agreed upon between the parties, the occurrence of which, under the financial collateral arrangement or the contract containing the relevant financial obligation or by application of the law, enables the collateral taker to realise or appropriate the financial collateral or triggers a close-out netting*."

The Court specified that, contrary to the appellant's reasoning, Luxembourg law and Directive 2002/47/EC on financial collateral arrangements allow the enforcement of a pledge in the absence of the debtor's default or the due date of the secured debt. This conclusion is confirmed by doctrine, which accepts that the parties may depart from the traditional requirement of the principal debt becoming due, as well as by the reasoning of the Court of Justice which emphasises the contractual freedom of the parties.

NEWS

The third edition of the **Arendt Arbitration and Litigation Seminar** dedicated to some specific and practical aspects of arbitration will take place on **Thursday, 13 February 2020** at Arendt House. **Guy Harles**, **Marianne Rau**, **Séverine Brasseur**, **Estelle Brisson** and **Maria Grosbusch** will speak on the topics of "**Arbitration: how does it work**", "**What are the advantages of resorting to arbitration from a business perspective?**" and "**Latest developments for swifter resolution of disputes**".

Find the blog on the case law of the Court of Justice of the European Union by **Philippe-Emmanuel Partsch** by clicking on the following link: http://eucaselaw.com/