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Preventing the enforcement of a first demand guarantee within a few weeks' time: Story of a successful case

To prevent the abusive and imminent enforcement of a first demand guarantee, Soulier AARPI, represented by Mrs. Catherine Nommick, Ms. Flore Foyatier and Ms. Isabelle Cottin, obtained in less than a week an injunction from the President of the Commercial Court of Paris who ordered the bank to suspend the payment of the funds under the guarantee pending a decision of the summary judge, and then, in less than a month, a decision of the summary judge who acknowledged that the request for enforcement of the guarantee was obviously abusive, and enjoined the bank not to grant such a request.

This lawsuit – managed in a situation of urgency with a successful outcome – provides the opportunity to recall the circumstances and procedural means in/by which the request for enforcement of a first demand guarantee can be successfully challenged.

Many lawsuits drag on. Procedural issues, recourses, expert investigations and other delaying tactics are primarily the main cause for delay. The lack of human resources in courts and understaffed police forces also contribute to the slowness that litigants have to deal with.

Fortunately, in some cases where matters are skillfully brought to court, judges can, within a few days, prevent the irremediable.

We have benefited from this exceptional court reactiveness in a case where we defended an international

construction group and its Tunisian subsidiary.

- **A first demand guarantee issued by a French bank and a construction project in Tunisia**

Our clients, the parent company, as guarantor, and its Tunisian subsidiary, as contractor, had entered into a contract for the refurbishment of a luxury hotel in Tunisia with another Tunisian company, as project owner.

Following instructions from our client (the "Principal"), a first demand guarantee had been issued by a French bank (the "Guarantor") to the benefit of the project owner (the "Beneficiary").

Under this guarantee, the bank committed to "*immediately pay to the Project Owner, in the event the latter considers that the works have not been performed as per the clauses of the works contract, any sum up to the amount set forth above, on first written demand*".

As such, our client granted to the project owner a so-called "independent guarantee" within the meaning of Article 2321 of the French Civil Code.

Facing serious financial difficulties, the project owner stopped paying the provisional invoices issued by our client.

After several months of negotiation and suspension of the works, our client referred the matter to an arbitral tribunal in Tunis, as per the arbitration clause set forth in the works contract.

On May 11, 2018, the arbitral tribunal handed down its award and ordered the project owner to pay a substantial amount of money to our client for the loss suffered as a result of the suspension of the works.

The arbitral tribunal also ordered "*the release of the bank guarantees issued in relation to this works contract*", including the aforementioned guarantee.

By letter dated May 11, 2018, i.e. on the same day as the award that ordered the release of the guarantee, the project owner requested the enforcement of said guarantee.

On Wednesday May 23, 2018, the bank received the written request for enforcement of the guarantee and immediately informed our client, as Principal, thereof.

Our client asked the bank not to grant the request for enforcement as it was obviously ungrounded and abusive. For this purpose, it forwarded to the bank the arbitral award that ordered the release of the guarantee, ordered the project owner to pay a substantial amount of money and dismissed all claims brought by the project owner in relation to the works performed under the works contract.

Notwithstanding the unambiguous terms of the award, the bank responded on May 25, 2018 that in the absence of a decision providing for the recognition and enforcement of the award in France, such award was

no enforceable against it, and added that "*we will have to perform payment by June 1, 2018 at the latest*".

Asked by our client to manage the case as a matter of urgency following the bank's refusal to withhold payment, we filed on May 30, 2018 an *ex parte* motion with the President of the Commercial Court of Paris seeking the authorization to summon the bank before the summary judge.

This first *ex parte* procedure was necessary to avoid the standard summary proceedings and to enable us to summon the bank using the so-called "*d'heure à heure*" interlocutory procedure as per Article 485 of the French Code of Civil Procedure that reads as follows "*If, nevertheless, the case requires celerity, the summary judge may allow summoning on a specified time, even on holidays or non-working days*".

By doing so, we by-passed the 15-day legal period that must habitually lapse between the summons and the date of the hearing, as per Article 838 of the French Code of Civil Procedure. As the bank had announced that it would perform payment on June 1, we had no other choice but to opt for this derogation procedure.

In an order issued on May 30, 2018, i.e. the same day as we filed and defended our ex parte motion, the President of the Commercial Court of Paris granted our motion and:

- authorized us to summon, on the following day up to noon maximum, the bank to appear at a hearing before the summary judge on June 4, 2018;
- enjoined the bank not to perform any payment under the guarantee, pending the decision of the summary judge at the above-mentioned hearing.

Thanks to this first victory, we prevented the payment of the funds that had been scheduled by the bank on June 1, 2018.

By writ delivered by a bailiff on May 31, 2018 at 11:45 am, the bank was summoned to appear on a summary hearing on June 4, 2018. The project manager, who had been informed of what was going on, voluntarily joined the proceedings but requested that the case be postponed at a later date.

Following the filing of several sets of submissions and a publicly held hearing on June 29, 2018 where lively discussions took place, the summary judge, in an order dated June 29, 2018, enjoined the bank not to perform the payment asked for by the project owner "*in his request for enforcement dated May 11, 2018 or in any other request that it could file in his respect*".

To support his decision, the summary judge noted *inter alia* that:

- all of the claims brought by the project owner against the arbitral award were ineffective;
- the arbitral award had the force of res judicata, was not subject to appeal and was enforceable as its enforcement had been ordered by the First Instance Court of Paris on June 13, 2018;
- the arbitral award had been issued on May 11, 2018 and the request for enforcement of the guarantee dated May 11, 2018 had in fact been actually been posted on May 14, 2018, i.e. after the issuance of the award.

The summary judge rightfully inferred therefrom that the request for enforcement was manifestly abusive and that this constituted a manifestly unlawful nuisance which ought to be ended by suspending the guarantee until a potential decision on the merits, should the project manager decide to initiate proceedings on the merits.

- **Powers of the summary judge**

The matter was appropriately referred to the summary judge, as per Article 873 of the French Code of Civil Procedure that stipulates as follows:

"The president may, within the same confines and even where confronted with a serious objection, order by way of a summary procedure such interim measures or remediation measures as may be necessary, either to avoid an ***imminent damage*** *or to abate a manifestly unlawful nuisance.*

In the cases where the existence of an ***obligation is not seriously challenged****, he may award an interim payment to the creditor or order the* ***mandatory performance of the obligation*** *even where it is an obligation to do."*

Indeed, according to an established case-law, the summary judge to whom a case is referred on the basis of Article 873 of the French Code of Civil Procedure, has jurisdiction to assess the existence of a manifest abuse or manifest fraud that can lead to the suspension of a first demand guarantee[1].

- **The manifest abuse by the beneficiary of a first demand guarantee**

Pursuant to Article 2321 of the French Civil Code:

"An independent guarantee is a commitment by which the guarantor binds himself, in consideration of a debt subscribed by a third party, to pay a sum either on first demand or subject to terms agreed upon.

The guarantor is not bound in case of manifest abuse or fraud by the beneficiary or in case of collusion of the latter with the principal*.*

The guarantor may not set up any defense in relation to the guaranteed obligation.

Unless otherwise agreed upon, that security does not follow the guaranteed obligation."

As such, it is necessary to establish the existence of a manifest abuse or manifest fraud to prevent the enforcement of a first demand guarantee. No other circumstance may suffice.

According to legal writer Loïc Cadiet (rep. Droit civil, Dalloz): *"Here, the fraud or the abuse merges with the*

bad faith of the creditor who seeks to enforce his/her guarantee while he/she/it is fully aware that the enforcement requirements are not met".

According to legal writer François Jacob (Lamy, droit des sûretés): "*While one must admit that the beneficiary of a first demand guarantee has the right to enforce such guarantee without having to worry immediately of what the debtor owes or does not owe,* ***the beneficiary may not, on the other hand, knowingly exercise his/her/its right to enforce the guarantor's commitment with a view to receiving funds that are not due to him/her/it.***"

As such, a request for enforcement of a guarantee must be held manifestly abusive wherever "*the awareness of the lack of right by the beneficiary and the knowledge of such abuse by the guarantor are both established*"[2].

In this case, the beneficiary of a first demand guarantee has no right whatsoever and its request must be considered manifestly abusive insofar as the risk for which the guarantee had been subscribed has not materialized due to circumstances exclusively attributable to the beneficiary[3].

It is on the basis of this case-law, related academic writings and the aforementioned facts of the case that the President of the Commercial Court of Paris enjoined the bank not to pay the amount claimed by the project owner as the request for enforcement of the guarantee made by the latter was manifestly abusive.

If the summary judge had dismissed our claim, the bank would have immediately wire-transferred the funds to the beneficiary.

In that case, we could have initiated proceedings on the merits to seek the recovery of sums unduly received, the only type of action that would have remained available. However, even if this action turned successful, the chances to recover the money would have been null given that the Project Owner was insolvent.

[1] Commercial Chamber of the *Cour de Cassation*, November 6, 1990, n° 88-19.449; Commercial Chamber of the *Cour de Cassation*, May 31, 2011, n° 10-14.974

[2] Commercial Chamber of the *Cour de Cassation*, June 4, 2002, n° 99-21.47

[3] Commercial Chamber of the *Cour de Cassation*, December 11, 1985, n° 83-14.457

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