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The Belvedere case: vodka, angry creditors and news judicial precedent

By judgment dated December 1, 2011, the Court of Appeals of Nîmes authored a new chapter of the "procedural" saga of BELVEDERE, a worldwide leader in wine and spirits. As counsel of one of the largest creditors of BELVEDERE, this is a case that we carefully monitor. The judgment of December 1 did not settle all pending issues. The Court will re-open the trial on January 5, 2012. Yet, the handed down judgment does clarify a procedural issue that had never been dealt with in the past concerning the suspensive effect of the Public Prosecutor's appeal against a judgment ordering the conversion of safeguard proceedings into receivership proceedings.

Reminder of the exceptional procedural context

BELVEDERE, leading producer, marketer and supplier of Marie Brizard, Sobieski and William Peel – just to name a few of its most famous brands – has been since 2008 the leading character of a judicial story with many twists and turns, with the substantial advantage of being sheltered from its creditors whose **payable receivables amount to nearly 600 million Euros!**

BELVEDERE was firstly subject to safeguard proceedings initiated on **July 16, 2008** by the Commercial Court of Beaune, the court having jurisdiction over the territory where BELVEDERE's registered office was located. Since BELVEDERE was unable to fulfill any of the commitments made in the framework of the safeguard plan, the Commercial Court of Dijon (that replaced the Commercial Court of Beaune following the reform of the judiciary map, i.e. the redrawing of the boundaries of judicial districts) had no other choice but to order the **nullification of the safeguard plan** on April 4, 2011. This decision was subsequently confirmed by the Court of Appeals of Dijon.

BELVEDERE then filed a motion with the Commercial Court of Dijon and **requested the opening of a conciliation procedure**. The Court granted this request on June 17, 2011.

Simultaneously, while the conciliation procedure was underway, BELVEDERE amazingly succeeded in being subject to **other safeguard proceedings** – an unprecedented fact in judicial history, these proceedings being this time **initiated by the Commercial Court of Nimes!**

Such a judicial maneuver was made possible because on June 16, 2011, the company MONCIGALE, one of BELVEDERE's second-tier subsidiaries having its registered office in Beaucaire, obtained from the Commercial Court of Nîmes the initiation of safeguard proceedings.

Then, based on an alleged commingling of estates between BELVEDERE and MONCIGALE "admitted" by the Chairman and CEO of the Group, the safeguard proceedings were extended to BELVEDERE pursuant to a judgment rendered by the Commercial Court of Nîmes on July 1, 2011. At no point did the managers of BELVEDERE inform the Commercial Court of Nîmes of the existence of the conciliation procedure, opened at BELVEDERE's request, pending before the Commercial Court of Dijon!

In September 2011, BELVEDERE transferred its registered office from Beaune to Beaucaire, probably to substantiate the alleged commingling of estates.

The Public Prosecutor lodged an appeal against the judgment ordering the extension of the safeguard proceedings to BELVEDERE. He considered, pursuant to applicable case-law and notably the decision rendered in the Metaleurop case, that the commingling of estates was in no way established.

This is on this appeal lodged by the Public Prosecutor that the Court of Appeals of Nîmes was supposed to rule on December 1, 2011. Yet, another unexpected procedural development occurred in the meantime.

Indeed, while the Court of Appeals of Nîmes had been notified of the appeal of the Public Prosecutor against the judgment that had extended the MONCIGALE safeguard proceedings to BELVEDERE as early as on July 8, 2011, the Commercial Court of Nîmes, acknowledging that both BELVEDERE and MONCIGALE were in a state of cessation of payment (i.e. unable to pay their debts as they became due), ordered the conversion of the safeguard proceedings into receivership proceedings pursuant to a judgment dated September 20, 2011.

The Commercial Court of Nîmes thus converted safeguard proceedings into receivership proceedings whereas an appeal had been lodged against the judgment which had extended the MONCIGALE safeguard proceedings to BELVEDERE…

The Public Prosecutor therefore lodged an appeal against this conversion judgment, but **only for the part of the judgment concerning BELVEDERE**, which means that MONCIGALE was indisputably placed in receivership on September 20, 2011.

This is in this complex procedural context that, in its judgment of December 1, 2011, the Court of Appeals of Nîmes raised, on its own motion, a legal argument that no party had put forth and according to which, pursuant to Article 369 of the French Code of Civil Procedure[1], the opening of receivership proceedings against MONCIGALE ordered on September 20, 2011 interrupted the pending appeal proceedings. The Court ruled that such proceedings should remain interrupted so long as the regularization measures to be taken by the Public Prosecutor have not be completed (i.e. until the court-appointed agents involved in the receivership proceedings initiated against MONCIGALE are called into the dispute).

To adopt this stand, the Court of Appeals of Nîmes had priorily confirmed that the appeal lodged by the Public Prosecutor against the judgment ordering the conversion of the safeguard proceedings into receivership proceedings had a suspensive effect, **thereby establishing an unprecedented case-law development**.

In the commented decision, as the appeal lodged by the Public Prosecutor did not concern the conversion of the safeguard proceedings into receivership proceedings with respect to MONCIGALE but only with respect to BELVEDERE, the Court of Appeals of Nîmes held that such appeal had not any suspensive effect on MONCIGALE, which resulted in the interruption of the appeal that had been lodged before it in relation to the extension of the safeguard proceedings to BELVEDERE.

The suspensive effect of the appeal lodged by the Public Prosecutor against a judgment ordering the conversion of safeguard proceedings into receivership proceedings

Prior to the 2005 Law on safeguard proceedings, the appeal lodged by the Public Prosecutor against a judgment rendered in relation to receivership or liquidation matters automatically had a suspensive effect.

In practice, this supensive effect acted as a deterrent to the exercise of the right of appeal because an appeal would automatically entail the freezing of the proceedings[2].

For this reason, the Law on safeguard proceedings repealed the supensive effect of the appeal lodged by the Public Prosecutor against judgments concerning the opening of safeguard or receivership proceedings.

Article L. 661-1 II of the French Commercial Code stipulates that *"the appeal of the Public Prosecutor has a suspensive effect, except if such appeal is lodged against a decision concerning the opening of safeguard or receivership proceedings"*.

To the best of our knowledge, since the entry into force of the 2005 Law on safeguard proceedings, French courts have not had the opportunity to specify whether a judgment ordering the conversion of safeguard proceedings into receivership proceedings was to be considered as a judgment ordering the opening of receivership proceedings within the meaning of Article L. 661-1 II of the French Commercial Code.

Therefore, the question raised was whether the appeal lodged by the Public Prosecutor against a judgment ordering the conversion of safeguard proceedings into receivership proceedings had a suspensive effect.

In the judgment it rendered on December 1, 2011, the Court of Appeals of Nîmes gave a positive answer to this question and specified that, in the circumstances of the case, the Public Prosecutor's appeal did have a suspensive effect.

Indeed, when drafting Article L. 661-1 II of the French Commercial Code the legislator made a clear distinction between:

On the one hand:

"1°) decisions concerning the opening of (…) receivership proceedings";

On the other hand:

"4°) Decisions concerning the conversion of safeguard proceedings into receivership proceedings (…)".

Each of these decisions is therefore regulated by a specific set of rules and the exception provided for under Article L. 661-1 II of the French Commercial Code only applies to decisions referred to in Article L. 661-1 I 1°) of said Code, i.e. decisions concerning **the opening of** receivership proceedings.

As such, for all other court decisions likely to be subject to an appeal from the Public Prosecutor, notably the decisions concerning the conversion of safeguard proceedings into receivership proceedings, the provisional enforcement is automatically stayed as from the date on which the appeal is lodged, as per Article R. 661-1 §4 of the French Commercial Code[3].

The Court of Appeals of Nîmes therefore rightfully inferred that the suspensive effect of the Public Prosecutor's appeal deprived the conversion judgment from its interrupting effect within the meaning of Article 369 of the French Code of Civil Procedure, only however with respect to BELVEDERE, the only company subject to the appeal lodged by the Public Prosecutor.

It is true that the judgment of the Court of Appeals of Nîmes has, for the time being, only a limited impact on case-law insofar as it is not currently subject to appeal since the Court will resume the trial on January 5, 202 to settle a last pending issue.

This judgment of December 1 may not yet be appealed before the *Cour de Cassation* (French Supreme Court) but once the Court of Appeals of Nîmes settles all pending issues raised in these quite unusual proceedings, its judgment, that will incorporate its ruling on the appeal lodged by the Public Prosecutor against the judgment converting the safeguard proceedings into receivership proceedings, may be subject to the review of the *Cour de Cassation* and, if such ruling becomes final, trigger an intense debate among French legal writers.

This judgment deserves credit for enlightening law practitioners on a thorny procedural issue that had never been addressed by the courts so far.

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[1] Pursuant to Article 369 of the French Code of Civil Procedure:
"Pending proceedings are interrupted by:
(…)
the effect of an order opening insolvency proceedings when there is a dispossession of the debtor or when

assistance to the debtor is needed."

[2] Extract of the Circular of April 18, 2006 on the actions taken by the public prosecutor in procedures regulated by Book VI of the French Commercial Code: *"Lastly the suspensive effect of the Public Prosecutor's appeal against a judgment concerning the opening of safeguard or receivership proceedings has been repealed in order to enable the Public Prosecutor to exercise its right of appeal to ensure compliance with territorial jurisdiction rules. Under the previously applicable rules, the freezing of the proceedings that resulted from the Public Prosecutor's appeal acted as a deterrent to the exercise of such right."*

[3] *Pursuant to Article R. 661-1 § 4 of the French Commercial code "If the Public Prosecutor lodges an appeal against a judgment referred to as under Articles L. 661-1, to the exception of a judgment concerning the opening of safeguard or receivership proceedings, L. 661-6 and L. 661-11, the provisional enforcement is automatically stayed as from the date of such appeal. The First President of the Court of Appeals may, on request of the Public Prosecutor, take any protective measures for the whole duration of the appellate proceedings."*