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"Force Majeure" and Interim Preservation Measures as a Litmus Test of EU Asset-Freezing Measures

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This article is the second of a two-part series focusing on the scope of EU economic sanctions regulations against Iran and focuses on a recent decision by the French Cour de cassation on the impact of EU sanctions in domestic French law.

After analyzing the referral to the European Court of Justice ("**ECJ**") in March 2020 by a German court for a ruling on the scope of Article 5 (1) of Regulation (EC) No. 2271/96[1] in our first article of this series, this alert focuses on a recent ruling by the highest judicial court in France (the "*Cour de Cassation*") on the impact of EU economic sanctions in domestic law. In this case, the *Cour de Cassation* referred to the ECJ to determine whether an interim preservation or enforcement measure could be taken against assets frozen under Regulation (EC) No. 441/2007 concerning restrictive measures against Iran.

In the context of this ruling issued on July 10, 2020, the *Cour de Cassation*, meeting in plenary session, considered, for the first time, the nature of an asset freezing measure, and its scope in domestic law notably when faced with enforcement measures taken against these assets.

1. Brief reminder of the facts and procedure

In a ruling dated April 26, 2007, the Paris Court of Appeals overturned the judgment of the Paris District Court of May 16, 2006, and held the Iranian bank Sepah liable for the actions of its officials (scams in the context of a vast fraud involving financial instruments), and ordered it to pay Overseas Financial Ltd ("**Overseas**") and Oak Tree Finance Ltd ("**Oak Tree**") respectively, the sums of 2.5 million and 1.5 million US Dollars with interest at the legal rate as of the date of the ruling.

After jointly obtaining payment of 264,581.69 Euros from one of the convicted individuals, Overseas and Oak Tree then asked Bank Sepah to pay the outstanding balance. However, the latter were confronted with an asset freeze on the funds and economic resources of Bank Sepah made by the United Nations Security Council[2] and enacted into EU law by Council Regulation (EC) No. 423/2007 of April 19, 2007.

On January 17, 2016, the UN Security Council removed Bank Sepah from the list of persons subject to restrictive measures against Iran. This decision was given effect in the European Union by the implementing regulation (EU) No. 2016/74 of January 22, 2016.

A few weeks after the delisting, Overseas and Oak Tree naturally proceeded with enforcement of the April 26, 2007 ruling and served two orders to pay against Bank Sepah. In compliance with these orders, Bank Sepah paid the corresponding principal sums but refused to be held liable for the interest provided in the April 26, 2007 judgment.

In response to this refusal, Overseas and Oak Tree brought proceedings for seizure and attachment of shareholder rights and securities held by the bank Société Générale on behalf of Bank Sepah. Ten days later, the latter summoned Overseas and Oak Tree before the enforcement division of the Paris District Court in order to contest these enforcement measures. The enforcement division joined both challenges and validated, in a judgment of January 9, 2017, all the seizures and attachments carried out. This judgment was upheld on March 8, 2018 by the Paris Court of Appeals, which added that interest prior to May 17, 2011 was time-barred and was therefore not owed to Overseas and Oak Tree.

These were the circumstances in which both Bank Sepah (regarding the payment of interest), and, Overseas and Oak Tree (regarding the statute of limitation for the interest) appealed to the *Cour de Cassation*. Both appeals were ultimately referred to the plenary session by two judgments of February 27, 2020.

The *Cour de Cassation* was thus asked to consider the issue of whether the fact of being targeted by an asset-freezing measure amounts to *force majeure*, and **(3)** whether urgent preservation or enforcement measures could be taken against frozen assets **(4)**. For clarity's sake and in order to shed some light on the *Cour de Cassation* responses to these two questions, we have recapped the nature and scope of these asset-freezing measures **(2)**.

2. Bank Sepah targeted by several asset-freezing measures

Bank Sepah has been subject to a multitude of asset freezing measures, illustrating both multilateral approaches (through the 2007 UN resolution and its enactment into EU law) and conflicting positions.

2.1. UN asset-freezing measures

Bank Sepah's funds and economic resources were initially frozen under United Nations Security Council Resolution No. 1747 (2007) of March 24, 2007[3]against the Islamic Republic of Iran.

Bank Sepah has been identified among the entities contributing to Iran's nuclear or ballistic missile program[4] and Member States are enjoined to "*freeze the funds, financial assets and economic resources on their territory.*" This obligation to freeze the bank's assets is incumbent on the Member States, which must enact these measures within their domestic legal systems.

2.2. EU asset-freezing measures

This resolution was therefore enacted into EU law by Council Regulation (EC) No. 423/2007 of April 19, 2007, supplemented by Commission Regulation (EC) No. 441/2007 of April 20, 2007, the provisions of which were incorporated into Council Regulation (EU) No. 961/2010 of October 25, 2010. It should be recalled here that European asset-freezing measures provided for in EU regulations are directly applicable in French law.

Under these regulations, all Bank Sepah's financial assets and economic resources fall within the scope of the freezing measures,[5] although it should be recalled that this restrictive measure constitutes a temporary restriction on the right of ownership and not an expropriation.[6]

2.3. U.S. asset-freezing measures

Bank Sepah is also subject to U.S. asset-freezing measures adopted in 2007[7] and still in force today. This fact is far from incidental in this case, as both the *Cour de Cassation Rapporteur* and the *Procureur Général* pointed out that Société Générale asked Overseas and Oak Tree to prove the existence of a specific license issued by the Office of Foreign Assets Control ("**OFAC**"), the authority in charge of the administration and enforcement of U.S. sanctions, to be able to release the funds seized from its accounts.

Indeed, Overseas and Oak Tree, as U.S. companies, cannot receive payment from an entity designated as Specified Designated Nationals ("**SDN**") by OFAC, such as Bank Sepah, without first obtaining a specific license.

Bank Sepah also filed an application for a stay of proceedings before the Paris Court of Appeals, citing OFAC's delay in issuing the license (still not issued as of March 8, 2018), which was dismissed for procedural reasons (not presented before any defense on the merits and no case to answer).

The parties appealed to the *Cour de Cassation*, invoking arguments based on the very nature of the asset-freezing measures against Bank Sepah in this complex factual and procedural context. Effectively, the latter argued that these measures constituted a case of *force majeure* that prevented it from honoring its debt and more specifically, paying the interest. Overseas and Oak Tree, on their side, maintained that freezing Bank Sepah's assets prohibited them from implementing any interim preservation or enforcement measure that would have allowed them to suspend the statute of limitation for the interest imposed by the Paris Court of Appeals in its ruling of March 8, 2018.

3. Analysis of Bank Sepah's appeal: *force majeure* as a litmus test of asset-freezing measures

Bank Sepah challenged the fact that it was required to pay the interest pursuant to the decision of April 26, 2007, arguing that it was unable to pay its debt due to the asset-freezing order ordered against, and this amounted to a *force majeure*.

3.1. Recap of the notion of *force majeure*

Prior to the 2016 reform of French contract law,[8] which occurred after the removal of Bank Sepah from the list of persons subject to asset-freezing measures, and was therefore not applicable to this case, the French Civil Code did not supply a verbatim definition of *force majeure* in contractual matters. However, it was traditionally defined by commentators as "*an unforeseeable and irresistible event which, arising out of a cause external to the debtor of an obligation or the perpetrator of harm, releases him from his obligation or exonerates him from his liability.*"[9]

As the *Cour de Cassation Rapporteur* stated in his opinion of June 26, 2020, *force majeure* was defined and qualified in the light of the *Cour de Cassation* case law.[10] Following the rulings of the plenary session of April 14, 2006,[11] however, some commentators had come to the conclusion that the *Cour de Cassation* had abandoned

the externality criterion.[12] This abandonment was subsequently formalized by the 2016 contract law reform, which removed any reference to externality in the new definition of *force majeure* in contractual matters contained in Article 1218 of the French Civil Code.

This departure from the externality test is, however, limited to contractual matters. In tort matters, such as the case here,[13] the *Cour de Cassation* still relies on unforeseeability, unpredictability and externality in the absence of a legal definition.[14]

3.2. The failure of *Force Majeure* in the face of asset-freezing measures

Bank Sepah criticized the Court of Appeals for finding it "*was ill-founded in invoking the existence of a foreign cause [force majeur] that would exonerate it from its obligation to comply with the decision of April 26, 2007*" since freezing its assets at the time of the events constituted "*a sanction ordered against it.*"[15]

The *Cour de Cassation* reached the same conclusion by substituting the purely legal grounds of the trial judges (relying on the notion of "*sanctions*") with a lack of an external cause. Freezing Bank Sepah's assets was is in fact attributable to its own activity that contributed to the proliferation of Iran's nuclear weapons . The absence of externality therefore exists as a result of the operative event, which stems from Bank Sepah's conduct, which the latter has never contested.[16] Here, the *Cour de Cassation* recalled the importance of the criterion of externality when establishing *force majeure*[17] in tort cases.

This approach is to be favored because the opposite approach would have considerably weakened the scope of asset-freezing measures[18] by offering persons subject to such measures the possibility of relying on them to justify non-compliance with their obligations as debtors (in this case, the payment of interest).

4. Analysis of the appeal by Overseas and Oak Tree: interim preservation or enforcement measures as a litmus test of asset-freezing measures

Overseas and Oak Tree's sole argument raised the issue of whether interim preservation measures or enforcement measures can be taken against frozen assets and economic resources.[19]

4.1. Recap of French civil enforcement proceedings

A distinction is made among civil enforcement proceedings between interim preservation measures, which aim to prevent a debtor from squandering his assets to avoid his creditor by having the debtor's assets placed under the jurisdiction of the court, and enforcement measures, which aim to use the appropriate means to obtain from the liable party the relief ordered by a judgment that has become enforceable.

The Court of Appeals ruled that the interest due under the April 26, 2007 judgment was subject to a five-year statute of limitation under Article 2224 of the French Civil Code, such that only interest accruing after May 17, 2011 (*i.e.*, five years before service of the orders to pay against Bank Sepah by its creditors), is payable by Overseas and Oak Tree.

Overseas and Oak Tree appealed to the *Cour de Cassation* on this basis, considering that they were unable to act using interim preservation or enforcement measures before the delisting of Bank Sepah assets due to their freezing. Such interim preservation or enforcement measures would indeed have made it possible to suspend the statute of limitation on the interest.

In other words, did the freezing of Bank Sepah's assets prevent Overseas and Oak Tree from requesting the implementation of interim preservation or enforcement measures in order to suspend the statute of limitation on the action for payment of accrued interest?

4.2. Civil enforcement procedures in the face of asset-freezing measures

The plenary session was therefore asked to determine whether interim preservation or enforcement measures could be taken against frozen assets.

The issue is interesting insofar as the freezing of assets as defined in the European regulations applicable to the case[20] aims to "*prevent any movement, transfer, alteration, use of or dealing with*" funds and economic resources. The objective of asset-freezing measures is therefore to prevent certain persons from having access to economic or financial resources that they could use to support unlawful activities. [21]

These asset-freezing measures therefore have a temporary impact on the availability of Bank Sepah's funds and economic. However, the Court of Appeals considered that this temporary unavailability had no impact on the accrual of interest. The asset-freezing measure did not therefore suspend the statute of limitation attached to the interest according to the judges ruling on the merits of the case. The latter relied on a ruling of the *Cour de Cassation*, which held that a debt unavailable in the debtor's assets does not cease to belong to him.[22]

The Court of Appeals therefore followed existing case law which has adopted a very rigorous conception of the impossibility of acting within the meaning of Article 2234 of the French Civil Code.[23] The *Cour deCassation* seeks evidence of absolute impossibility. The judges concluded that it was not absolutely impossible for Overseas and Oak Tree to act and they could have stopped the running of the statute of limitation by taking interim preservation or enforcement measures.

This ruling is hard to justify from the point of view of the creditors, who were not inactive during the period that Bank Sepah's assets were frozen. They asked, in a letter dated December 2, 2011, the French Minister for the Economy, on the basis of the provisions of Article 17 of Regulation (EU) No. 961/2010, to authorize the release of Bank Sepah's assets to the extent of the compensation due to them under the Paris Court of Appeals ruling of April 26, 2007. This appeal was rightly dismissed.[24] Nevertheless, it is nonetheless evidence of the creditors' willingness to recover their receivables from Bank Sepah, which was subject to asset-freezing measures at the time.

The French Treasury and the Minister for Europe and Foreign Affairs also confirmed that a prior release of funds by the competent authorities was necessary to implement interim preservation or enforcement measures,[25] and the link between asset freezing and the interim preservation or enforcement measures is not addressed by EU regulations.[26]

Finally, it should be emphasized that the provisions of EU regulations upon which are grounded the asset-freezing measures imposed on Bank Sepah, only prohibit transfers of assets that have the effect of making funds available. However, the purpose of an interim preservation or enforcement measure is not the transfer of funds and they shall have no attributive effect.

The *Cour de Cassation* is, in this context, confronted with a novel issue which calls for the interpretation of Regulation (EC) No. 423/2007 and the regulations that supplemented it.[27] It therefore stayed proceedings and referred two questions to the ECJ for a preliminary ruling.

The ECJ's response to this question will have a real impact for creditors with debtors that are subject to an asset-freezing measure. This is not insignificant when to date, 2,356 asset-freezing measures are in force in

France.[28] For example, the Iranian assets frozen in France before the entry into force of the Vienna Agreement of July 14, 2015 (JCPOA), which lifted most of the economic sanctions against Iran, amounted to approximately 200 million Euros.[29] In addition, to date, 296 persons (individuals and legal entities) are still subject to asset-freezing measures in France pursuant to economic sanctions adopted against Iran.

Accordingly, in the context of the EU's declared willingness to preserve the Vienna Agreement and maintain trade relations with Iran,[30] the ECJ's response is undoubtedly eagerly awaited by French and European economic stakeholders. Such decision could even provide an additional guarantee to them by granting them the power to seek interim preservation or enforcement measures against frozen assets in order to "*safeguard stability of the assets*" of their Iranian debtors.[31]

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[1] Referrals to the ECJ in 2020 to clarify the scope of several EU Regulations on economic sanctions - September 30, 2020.

[2] Resolution 1747 (2007) of March 24, 2007, the Security Council identified Bank Sepah as one of the "*Entities involved in nuclear or ballistic missile activities*" of Iran and consequently placed it on the list of persons or entities to which these measures were to be applied.

[3] https://www.undocs.org/fr/S/RES/1747%20 (2007).

[4] Annex I to United Nations Security Council Resolution No. 1747 (2007) of March 24, 2007.

[5] Article 1 of Council Regulation (EU) No. 961/2010 of 25 October 2010 defines the concept of economic resources as "*assets of every kind, whether tangible or intangible, movable or immovable, which are not funds, but which may be used to obtain funds, goods or services*".

[6] §5 - Joint Guidelines of the General Directorate of the Treasury and the Insurance Control and Resolution Authority on the Implementation of Asset Freezing Measures (Version updated at 17/06/2019).

[7] https://www.treasury.gov/press-center/press-releases/Pages/hp219.aspx.

[8] Order no. 2016-131 of February 10, 2016.

[9] G. Cornu, Association Henri Capitant, 12th edition, PUF.

[10] François Molins, *Avis de Monsieur le procureur général* (Attorney General opinion), June 26, 2020 (p.31).

[11] Cass., ass. Plén., April 14, 2006, nos. 04-18.902 and 02-11.168.

[12] See in particular V.F. Terré, P. Simler, Y. Lequette et F. Chénédé, *Droit civil. Les obligations*, 12th edition, Dalloz, 2018, no. 748 s.

[13] The interest involved in this litigation was produced by a court order and not contractual interest.

[14] François Molins, *Avis de Monsieur le procureur general* (Attorney General opinion), June 26, 2020 (p.31) citing in particular the following rulings: 3e Civ., March 23, 2017, appeal no. 16-12.870; 3e Civ., July 9, 2013, appeal no. 12-17.012; 2e Civ., April 2, 2009, appeal no. 08-11.191 and Com., October 9, 2007, appeal no. 06-16.744.

[15] Cass., plenary session., July 10, 2020, nos. 18-18.542 and 18-21.814 (pt.8).

[16] François Molins, *Avis de Monsieur le procureur général* (Attorney General opinion), June 26, 2020 (p.35).

[17] For a critique of this return of the criterion of externality as a requirement of *force majeure*, see J.-D. Pellier, *Le gel des avoirs bancaires ne constitue pas un cas de force majeure*, Dalloz actualité, July 20, 2020.

[18] Pascal Oudot, *Force majeure : l'opportune extériorité !, Note sous arrêt,* La semaine Juridique Edition Générale no. 39, September 21, 2020, 1032.

[19] Explanatory note plenary session, Ruling of July 10 2020 (p.3).

[20] Articles 1 and 7 of Council Regulation (EC) No 423/2007 of 19 April 2007, reproduced by Articles 1 and 16 of Council Regulation (EU) No 961/2010 of 25 October 2010.

[21] Point 54, Ruling of April 29, 2010, M e.a. C-340/08, Rec.p. I-3913.

[22] 2e Civ., February 28, 2006, appeal no. 04-16.396, Bull. 2006, II, no. 59; 2e Civ., March 16, 2000, appeal no. 98-14.725, Bulletin civil 2000, II, no. 49; 2e Civ., July 6, 2000, appeal no. 98-20.286, Bull. 2000, II, no. 119; Com., June 11, 2014, appeal no. 13-13.643, Bull 2014, IV, no. 106.

[23] 1er Civ., 13 February 1979, appeal no. 77-14.945, Bulletin des arrêts Cour de Cassation Chambre civile 1ère no. 53 p44, 1er Civ., October 7, 1992, appeal no. 89-13.461, 1er Civ., November 14, 2012, appeal no. 11-22.853, 2e Civ., February 14, 2013, appeal no. 12-13.339, Bull. 2013, II, no. 28.

[24] Article 17 of Regulation (EU) No. 961/2010 provides, *inter alia*, that the competent authorities of Member States shall have the power to unfreeze frozen assets where those assets are subject to a court decision taken prior to the date on which the person was designated by the Sanctions Committee, the Security Council or the Council. The appeal by Overseas and Oak Tree was therefore obviously dismissed on the grounds that the enforceable title they invoked was the decision of April 26, 2007, which preceded the asset-freezing measure against Bank Sepah.

[25] Note dated May 20, 2020 from the French Treasury (points 15, 18 and 32) and note dated May 15, 2020 from the Ministry of European and Foreign Affairs.

[26] François Molins, *Avis de Monsieur le procureur général* (Attorney General opinion), June 26, 2020 (p.54).

[27] The ECJ recalled in its ruling Commission v. France, issued on October 4, 2018 (C-416/17) that, in principle, the domestic court is required to refer to the Court of Justice of the European Union whenever a question relating to the interpretation of EU law is raised before it.

[28] According to the national register of persons and entities subject to an asset-freezing order, pursuant to Article R.562-2 of the French Monetary and Financial Code updated by the DGT (November 11, 2020).

[29] https://www.lemonde.fr/economie/article/2015/07/16/seulement-200-millions-d-euros-d-avoirs-iraniens-geles-en-france_4686108_3234.html

[30] See in this respect: JCPOA - State of play of EU-Iran relations and the future of the JCPOA (October 2020); Launch of two platforms by the European Commission for SMEs so that they can maintain commercial relations with Iran while ensuring compliance with European regulations: https://ec.europa.eu/commissio...

[31] R. Perrot et P. Théry, *Procédure civiles d'exécution*, 3rd ed., Dalloz 2013, no. 1119.

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