


Res Judicata for Foreign Freezing Orders?

Can foreign freezing orders prevent the forum from granting leave to attach provisionally local assets? The Rouen Court of appeal ruled so in a judgment of 24 March 2009.

The case was about the sale of a ship from a company incorporated in  Panama to a company incorporated in the Marshall Islands. The parties had concluded a memorandum of agreement whereby the buyer, which had paid a deposit upon the signature of the memorandum, would pay the price within three days of the notification of the delivery of the ship. The seller notified. The buyer did not pay. The seller terminated the contract, but kept the deposit. The buyer initiated arbitration proceedings in London (substantive claims are not known).

Parallel arrest proceedings

While the arbitration proceedings were pending, the buyer sought to arrest provisionally (*saisie conservatoire*) the ship in Greece. A Greek court granted leave to do so ex parte, but when the defendant challenged the order in inter partes proceedings, a Greek court set aside the order on the ground that two critical requirements of Greek law were not met: there was neither a good arguable case nor a real risk that the award would go unsatisfied.

When the ship showed up in France a year later, the buyer sought to arrest it provisionally again. The commercial court of Rouen (Normandy) granted leave to do so ex parte. The defendant challenged unsuccessfully the French order in inter partes proceedings. It then appealed.

Recognition of Foreign Order

The Court of appeal of Rouen allowed the appeal, and set aside the arrest. It did so on the ground that the dispute had been settled by the Greek court, not on the ground of French substantive law. Indeed, the Court ruled that French law had different requirements, but that this was irrelevant since the court was bound to recognize the foreign order. It underlined that the foreign order had been rendered between the same parties, had the same object and the same cause.

One would have expected the court to rule that the foreign order was *res judicata* and thus prevented any other European court from deciding the dispute again. The court referred to article 33 of the Brussels I Regulation and held that it was bound to recognize the foreign order. It also held that the two disputes were the same by the Brussels I Regulation standards (parties, cause, object).

However, the court got it all wrong when it offered its final legal analysis. It held that the French order was irreconcilable with the Greek order. It concluded that, in such circumstances, article 34 of the Brussels I Regulation demanded that the foreign order be recognized and the French court not issue a contradictory order. This was a rather innovative reading of article 34. Article 34 provides that, when one of the two irreconcilable judgments was rendered by the forum, it should always be preferred. Article 34 does not help recognition: it offers grounds for denying it.

Nevertheless, the decision is interesting. If the court had applied the *res judicata* doctrine instead of addressing the issue through the conflict of judgments doctrine, it would have reached the exact result that it wanted to reach.

It might then have wanted to discuss the issue of the applicable law to *res judicata*: *res judicata* of provisional orders is typically limited, as they often can be modified in case of new circumstances. This is what article 700 of the Greek Code of civil procedure provides. But did Greek law govern the issue?

I am grateful to Sebastien Lootgieter for drawing my attention to this case.