CENTRE DE DROIT
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Enforcement

An unlimited personal guarantee is not contrary to Swiss public policy

Par Romain Dupuis le 30 July 2024

In a recent ruling on enforcement, the Federal Supreme Court ruled on the question of whether a personal guarantee for an unlimited amount, subject to foreign law, is compatible with Swiss public policy (ruling 4A_650/2023 of 13 May 2024).

On 8 December 2010, A, domiciled in the United Arab Emirates, signed a personal guarantee contract in favour of an Emirati bank by which he guaranteed a loan granted by the bank to a company.

The contract – subject to UAE law – is in writing, but does not specify the maximum amount for which A is liable.

In 2019, following a dispute over the repayment of the loan, the Dubai Court of Cassation ordered A to pay the bank jointly and severally more than MAD 200 million (over CHF 50 million) under the guarantee agreement.

In 2021, on the basis of its claim arising from the Dubai ruling, the Emirati bank lodged an initial application in Geneva for the sequestration of A's assets with a number of Swiss banks. Having discovered new assets, the bank subsequently filed a second application.

The two receiverships were granted by the Court of First Instance, which dismissed A's objections. The bank then validated the receiverships by filing two writs of execution, followed by two applications for final release, together with an application for exequatur of the Dubai judgment.

By judgment of 5 June 2023, the Court of First Instance recognised and declared enforceable in Switzerland the Dubai judgment and consequently ordered the final release of the objections lodged by A. This judgment was confirmed by the Court of Justice.

A appealed to the Swiss Federal Supreme Court, alleging a violation of Swiss public policy insofar as the undertaking given in the guarantee contract did not include any limit on the amount.

After reviewing the theory behind the enforcement of foreign judgments not subject to the Lugano Convention (three possibilities : (i) independent recognition and enforcement

proceedings ; (ii) enforcement proceedings without a prior application for a sequestration order ; (iii) enforcement proceedings with validation of a sequestration order), the Federal Court examined the ground of conflict with Swiss public policy.

The LDIP reserves Swiss public policy (i) when a Swiss court is seised of an action based on foreign law (art. 17 LDIP) and (ii) when a foreign judgment is to be recognised and declared enforceable in Switzerland (art. 27 para. 1 LDIP).

In the first situation, the reservation of Swiss public policy exceptionally allows the court not to apply a foreign substantive law that would result in an intolerable conflict with the perception of the law in Switzerland.

In the second situation, recognition and enforcement of a foreign decision must be refused in Switzerland if it is manifestly incompatible with Swiss public policy.

In all cases, and *a fortiori* in matters of recognition, the reservation of Swiss public policy must be interpreted restrictively and applies only to situations that shockingly offend the most essential principles of the Swiss legal system. It is therefore not sufficient for a mechanism provided for in foreign law to be unknown to Swiss law or to appear original to a Swiss lawyer.

In this case, the Geneva Court of Justice analysed the personal guarantee at issue as a joint and several guarantee within the meaning of art. 493 CO. The Federal Court is examining whether the mandatory rules set out in art. 493 para. 1 and 2 of the Swiss Code of Obligations (CO) – according to which the deed of guarantee must be in the form of an authentic instrument and state the total amount for which the guarantor is liable – are a matter of Swiss public policy.

In a decision handed down in the 1960s (in the context of a direct application of foreign law), the Federal Court held that these two requirements – which are intended to draw the guarantor's attention to the scope of his commitment – did not in principle fall within the scope of Swiss public policy (BGE 93 II 379).

In a slightly more recent ruling, this time on the recognition of a foreign judgment, the Federal Supreme Court held that the requirement of authentication provided for in art. 493 para. 2 CO could not be invoked by a debtor to oppose recognition in Switzerland when the parties had submitted to a foreign law – and to the resulting formal requirements – by choice of law (BGE 111 II 175).

On this basis, the Federal Court considers that the requirements of art. 493 paras. 1 and 2 CO do not engage the reservation of Swiss public policy. In the present case, A cannot therefore oppose the recognition and enforcement of the Dubai judgment by invoking the unlimited nature of the guarantee at issue.

In other words, where parties, both domiciled in the United Arab Emirates, have agreed a choice of law in favour of the law of that State, there is no reason why that law should not be binding on them.

This ruling confirms that simple formal requirements in contractual matters, even if mandatory under Swiss law, do not in principle fall within the scope of public policy, insofar as an extensive interpretation of this reservation would constitute an obstacle to the conduct of business in

international relations.
