CENTRE DE DROIT
BANCAIRE ET FINANCIER

Enforcement of a foreign arbitral decision

An interest rate of 24 % is not contrary to Swiss public policy

Par Claire Tistounet le 3 October 2024

In ruling 4A_57/2024, the Swiss Federal Supreme Court held that an arbitration award ordering the debtor of an outstanding loan to pay interest at a rate of 24 % was not contrary to Swiss public policy within the meaning of Art. V ch. 2 let. b of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).

Two Chinese companies had entered into a loan agreement for a period of 2 months, with an interest rate of 8 % per annum. This interest rate was to increase to 15 % per annum in the event of subsequent failure to obtain financing (in Switzerland or abroad) in connection with the loan. In addition, the parties had agreed to pay a further 0.05 % interest per day on the amount not repaid on time. Albert, who lives in Switzerland, and David agreed to act as joint and several guarantors for the repayment of the loan. The *China International Economic and Trade Arbitration Commission* (CIETAC) was appointed as arbitral tribunal.

As the loan had not been repaid on time, the CIETAC ordered the debtor and Albert and David jointly and severally to repay the amount of the loan plus 24 % annual interest.

On this basis, the creditor company initiated enforcement proceedings at Albert's Swiss domicile for the amount awarded by the CIETAC plus interest at 24 % per annum. As an incidental claim, the company requested that the CIETAC's award be declared enforceable in accordance with the NYC. The first two instances ruled in favour of the company. Albert then appealed to the Swiss Federal Supreme Court on various grounds.

In particular, he argued that an interest rate of 24 % was contrary to Swiss public policy within the meaning of art. V ch. 2 let. b CNY.

The High Court points out that the concept of public policy in the context of enforcement proceedings is less broad than that of public policy under the provisions of private international law (art. 17 LDIP). It also points out that not all mandatory provisions of Swiss law are part of public policy ; only those that are of fundamental importance are taken into account.

The Federal Court also points out that the Swiss Code of Obligations does not expressly set a maximum interest rate. Similarly, while the adoption of provisions aimed at preventing interest rate abuses is left to federal and cantonal public law, none of them is applicable in this case.

With regard to the question of whether an interest rate is contrary to accepted principles of morality (art. 20 para. 1 CO), our High Court referred to its previous case law, according to which (i) an interest rate of 2 % per month in an international dispute and (ii) an interest rate of 18 % per annum were not contrary to accepted principles of morality.

The Federal Court thus concluded that

- the 24 % annual interest rate contested in this case was not based on a relationship under Swiss law of obligations but on a loan agreement under Chinese law ;
- Albert and David had guaranteed the loan by means of a surety bond ;
- although an annual interest rate of 24 % may seem unacceptable in a Swiss context, it is not necessarily contrary to the fundamental principles of the Swiss legal system and values ;
- all the more so as Albert did not put forward any argument to the effect that the loan contract was of a particular nature (*e.g.,* a particularly low-risk loan, which would require a low interest rate).

Finally, in addition to the question of the interest rate, Albert invoked the formal requirements for guarantees under Swiss law, according to which a guarantee must be notarised and the consent of the spouse is necessary for the valid conclusion of a guarantee (art. 493 para. 1 and 494 para. 1 CO). Insofar as his guarantee was not notarised and his spouse had not given her consent, Albert argued that failure to comply with these requirements was also contrary to Swiss public policy. The Federal Supreme Court rejected these arguments and confirmed its previous case law, according to which the formal requirements of a surety bond under Swiss law, although mandatory, do not form part of Swiss public policy (TF 4A_650/2023, commented *in* : Dupuis, cdbf.ch/1360/).

In conclusion, in this ruling the Federal Court once again reiterates that the concept of public policy must be interpreted restrictively, all the more so in the context of enforcing an arbitration award. Such an interpretation confirms the willingness of our High Court to favour a broad application of international treaties. Last year, for example, the Federal Supreme Court amended its case law to make more restrictive the interpretation of the grounds for refusing to execute a letter rogatory under art. 12 para. 1 let. b of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (CLaH70) (TF 4A_389/2022, commented *in* : Tistounet, cdbf.ch/1291/).
