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# Assignment of arbitral claims and arbitral awards: uncertain legal landscape in France

Eversheds Sutherland (International) LLP | Litigation - France



SARAH  
MONNERVILLE  
SMITH



VALENTIN  
LEVEQUE

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### Introduction

The assignment of arbitral claims and arbitral awards is a fast-growing market practice. When entering into agreements for such assignments, it is crucial to ensure that they comply with all the applicable legal requirements. In this context, the assignee should carefully assess the risks that may arise out of the award debtor's rights pursuant to the provisions of the law applicable at the seat of arbitration and/or at the place(s) of enforcement of the award.

Under French law there is a specific mechanism called the right of "*retrait litigieux*" ("disputed withdrawal"). In accordance with this singular legal mechanism, which is designed as a tool to fight against speculation, when a disputed claim is assigned to a third party in the course of any judicial or arbitral proceedings, the debtor is entitled to discharge its debt by paying the assignee the actual price of the assignment, plus interest and costs, instead of the full amount of the original debt (article 1699 of the French Civil Code ).<sup>(1)</sup>

As has been seen in the *FG Hemisphere v Democratic Republic of the Congo* saga, the conditions and requirements for exercising the right of *retrait litigieux* in the context of assignment of arbitral claims or arbitral awards are uncertain under French law.

### Facts

In this case, the company Energoinvest initiated two arbitration proceedings against the Democratic Republic of Congo (DRC) and the Société Nationale d'Electricité for the recovery of outstanding payments under two credit agreements. During these arbitration proceedings, Energoinvest assigned its receivables against the DRC to FG Hemisphere, a US-based investment management fund.

On 30 April 2003, two arbitral awards were issued in Paris and Zurich, respectively, ordering the DRC to pay damages. It was only after these awards were rendered that FG Hemisphere notified the DRC of the assignment of receivables that had taken place during the arbitration proceedings.

The DRC started two challenge proceedings against the awards before the International Division of the Paris Court of Appeal:

- an action to set aside the award issued in France; and
- an appeal against the enforcement order of the award rendered in Switzerland.

In both these proceedings, the DRC applied to exercise its right of *retrait litigieux* pursuant to article 1699 of the French Civil Code (ie, to extinguish its debt by paying FG Hemisphere the actual price of assignment plus interest and costs).

### Decision

#### *Paris Court of Appeal*

In two decisions handed down on 12 April 2016, the Paris Court of Appeal dismissed the DRC's application as inadmissible. The Court held that it could not rule on the DRC's claim seeking its right of *retrait litigieux* because its powers were limited to reviewing the awards' compliance with the five exclusive grounds laid down by French law for setting aside or refusing enforcement of the award – namely, that:

- the arbitral tribunal has wrongly retained or denied jurisdiction;
- the arbitral tribunal was improperly constituted;
- the arbitral tribunal ruled without complying with the mandate conferred upon it;
- the principle of due process was not complied with; or
- recognition or enforcement of the award is contrary to international public policy.

#### *French Supreme Court*

The French Supreme Court quashed these decisions on 28 February 2018.<sup>(2)</sup>

According to the Supreme Court, an award debtor's application to exercise its right of *retrait litigieux* is admissible in the context of such challenge proceedings, since this mechanism "affects the enforcement of the award".

Interestingly, the Court relied on article 1699 of the French Civil Code without providing any explanation as to why French law should be applicable to the issue and while the assignment of the disputed receivables was governed by Swiss law.

#### *Second Court of Appeal*

In accordance with French rules of procedure, when a decision is quashed by the Supreme Court, the case is referred to a second court of appeal composed of different judges to the ones who issued the quashed decision. Usually, the second court of appeal will follow the solution dictated by the Supreme Court.

In this case, however, the Paris Court of Appeal ruled against the position of the Supreme Court. By two decisions dated 7 December

2021,<sup>(3)</sup> the Court of Appeal held that even if "exercise of the right of *retrait litigieux* is likely to indirectly affect the enforcement of the award in that it directly affects the amount of the claim fixed by the award", it cannot have "the effect of modifying and extending the powers [of the court in charge of reviewing the arbitral award] beyond the cases provided for by law".

Therefore, despite the decision issued by the Supreme Court in 2018, the Paris Court of Appeal held that it does not fall within the powers of the court in charge of reviewing an arbitral award to rule on an award debtor's application to exercise its right of *retrait litigieux*.

Thus the Court once again dismissed the DRC's application to exercise its right of *retrait litigieux*, ruling that such an application "cannot lead to annulment of an award" or "prevent the enforcement of the award in France".

The Paris Court of Appeal specified that the *retrait litigieux* may nevertheless be invoked before the judge in charge of enforcement matters, after the award has been recognised as valid or granted exequatur in France, provided that French law is applicable to the assignment of the disputed receivables.

In this respect, the Court dismissed the DRC's argument that the right of *retrait litigieux* is akin to a French mandatory rule that should apply whenever the enforcement of an award is sought in France, notwithstanding the law applicable to the assignment of the receivables.

The Court also rejected the DRC's argument that the assignment of the arbitral claims had been fraudulently concealed in order to deprive it of its right of *retrait litigieux*, noting that:

*it has not been shown that the exercise of this withdrawal right was applicable, in circumstances where the original contract was governed by Swiss law, which does not recognize this mechanism, and therefore, it cannot be found that there was an attempt to evade the application of French law, which was not applicable to the assignment of the claim.*

On this point, the Paris Court of Appeal's reasoning could be construed as being a departure from that of the Supreme Court in the decisions issued on 28 February 2018. Indeed, since the Supreme Court provided no justification or reasoning for the applicability of French law, some commentators had opined that, in view of the express reference to article 1699 of the French Civil Code, the right of *retrait litigieux* might be applicable as a mandatory rule whenever the enforcement of an arbitral award is sought in France.<sup>(4)</sup>

#### Comment

It is now up to the Supreme Court, before which two appeals have been lodged against these two decisions, to clarify the conditions and requirements for this right of *retrait litigieux* in the specific context of international arbitration.

The Supreme Court should issue its judgment in 2023. In any event, third-party funders would be well advised to avoid specifying French law as the applicable law when they enter into assignment agreements for disputed claims, such as arbitral awards and arbitral claims.

*For further information on this topic please contact Sarah Monnerville Smith and Valentin Lévêque at Eversheds Sutherland LLP by telephone (+33 1 55 73 40 00) or email (sarahmonnervillesmith@eversheds-sutherland.com and valentinleveque@eversheds-sutherland.com). The Eversheds Sutherland LLP website can be accessed at [www.eversheds-sutherland.com](http://www.eversheds-sutherland.com).*

#### Endnotes

(1) Article 1699 of the French Civil Code:

*A person against whom a disputed right exists may, when that right has been assigned, discharge himself from any liability to the assignee by reimbursing to the assignee the actual price of the assignment together with costs and interest running as from the day on which the assignee paid the price of the assignment.*

(2) Civ 1st, 28 February 2018, No. 6-22 112 and Civ 1st, 28 February 2018, No. 16-126, Dalloz actualité, 20 March 2018, obs J-D Pellier; D 2018, page 1934, obs S Bollée; D2018, page 2448, obs T Clay; AJ Contrat 2018, page 187, obs J Jourdan-Marques; RTD civ 2018, p 411, obs H Barbier; RTD civ 2018, page 431, obs P-Y Gautier; Rev arb 2018, page 389, note M Laazouzi; Procédures 2018, No. 5, obs L Weiller; JCP G 2018, 1111, note P Casson; RDC September 2018, No. RDC115k7, note R Libchaber; JDI 2018, page 1202, note P Pinsolle.

(3) Paris, Pôle 5, Chapter 16, 7 December 2021 No. 18/10217 and No. 18/10220, Dalloz actualité, 21 January 2022, obs J Jourdan-Marques and Gaz Pal, No. 15 - page 4, 3 May 2022, obs L Larrivière.

(4) On this issue, see M Laazouzi, "Pour un cantonnement plus strict de la recevabilité du retrait litigieux lors du contrôle de la sentence internationale, note sous Cass civ 1re, 28 février", Rev arb 2018, pages 390-400.