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The Belvedere case: Belvedere's forum shopping strategy dismissed by the court of appeals of Nimes!

The decision rendered on March 8, 2012 by the Court of Appeals of Nîmes that we, as counsel of one of the largest creditors of BELVEDERE, eagerly awaited, put an end to the "procedural" saga of this worldwide leader in wine and spirits. The Court of Appeals of Nîmes reversed the judgment handed down on July 1, 2011 by the Commercial Court of Nîmes that had extended to BELVEDERE the safeguard proceedings initiated in respect of its second-tier subsidiary MONCIGALE and nullified – on the ground of abuse of authority – the judgment dated September 20, 2011 that had converted the safeguard proceedings extended to BELVEDERE into receivership proceedings. The decision of March 8, 2012 thus opened the way for the initiation of receivership proceedings against BELVEDERE in Dijon, which was done on March 20.

Reminder of the exceptional procedural context

BELVEDERE, leading producer, marketer and supplier of Marie Brizard, Sobieski and William Peel – just to name a few of its most famous brands – has been since 2008 the leading character of a judicial story with many twists and turns, with the substantial advantage of being sheltered from its creditors whose **payable receivables, in principal and interests, now exceeds 600 million Euros!**

BELVEDERE was firstly subject to safeguard proceedings initiated on **July 16, 2008** by the Commercial Court of Beaune, the court having jurisdiction over the territory where BELVEDERE's registered office was located. Since BELVEDERE was unable to fulfill any of the commitments made in the framework of the safeguard plan, the Commercial Court of Dijon (that replaced the Commercial Court of Beaune following the reform of the judiciary map, i.e. the redrawing of the boundaries of judicial districts) had no other choice but to order the **nullification of the safeguard plan** on April 4, 2011. This decision was subsequently confirmed by the Court of Appeals of Dijon on June 7, 2011.

BELVEDERE then filed a motion with the Commercial Court of Dijon and **requested the opening of a conciliation procedure**. The Court granted this request on June 17, 2011.

Simultaneously, while the conciliation procedure was underway, BELVEDERE amazingly succeeded in being subject to **other safeguard proceedings** – an unprecedented fact in judicial history, these proceedings being this time **initiated by the Commercial Court of Nimes!**

Such a judicial maneuver was made possible because on June 16, 2011, the company MONCIGALE, one of BELVEDERE's second-tier subsidiaries having its registered office in Beaucaire, obtained from the Commercial Court of Nîmes the initiation of safeguard proceedings.

Then, based on an alleged commingling of estates between BELVEDERE and MONCIGALE "admitted" by the Chairman and CEO of the Group, the safeguard proceedings were extended to BELVEDERE pursuant to a judgment rendered by the Commercial Court of Nîmes on July 1, 2011.

At no point did the managers of BELVEDERE inform the Commercial Court of Nîmes of the existence of the conciliation procedure, opened at BELVEDERE's request, pending before the Commercial Court of Dijon!

In September 2011, BELVEDERE transferred its registered office from Beaune to Beaucaire, probably to substantiate the alleged commingling of estates (it being specified, however, that the transfer of the registered office has no consequence on the determination of the territorially competent commercial court during a period of six months as from the publication of a notice of transfer by the Register of Trade and Companies where the company was originally incorporated).

The Public Prosecutor had ten days to lodge an appeal against the judgment ordering the extension of the safeguard proceedings to BELVEDERE. He did so, considering, according to applicable case-law, that the commingling of estates was in no way established. As counsel of one of the largest creditors of BELVEDERE, we unreservedly supported this appeal and voluntarily joined the appellate proceedings.

While the Court of Appeals of Nîmes had been notified of the appeal of the Public Prosecutor against the judgment that had extended the MONCIGALE safeguard proceedings to BELVEDERE as early as on July 8, 2011, the Commercial Court of Nîmes, acknowledging that both BELVEDERE and MONCIGALE were in a state of cessation of payment (i.e. unable to pay their debts as they became due), ordered the conversion of the safeguard proceedings into receivership proceedings pursuant to a judgment dated September 20, 2011.

The Commercial Court of Nîmes thus converted safeguard proceedings into receivership proceedings whereas an appeal had been lodged against the judgment which had extended the MONCIGALE safeguard proceedings to BELVEDERE…

The Public Prosecutor therefore lodged an appeal against this conversion judgment, but **only for the part of the judgment concerning BELVEDERE**, which means that MONCIGALE was indisputably placed in receivership on September 20, 2011.

The Court of Appeals of Nîmes ordered the joinder of these appellate proceedings and issued on March 8, 2012 a single judgment in which it overturned the judgment ordering the extension of the safeguard proceedings and nullified the judgment converting the safeguard proceedings into receivership proceedings

rendered by the Commercial of Nîmes, on the ground that there had not been any commingling of estates between BELVEDERE and MONCIGALE.

In its lengthy judgment, the Court of Appeals of Nîmes rejected each plea and claim put forth by BELVEDERE and concluded that BELVEDERE "*through the defense strategy it had adopted, participated in the procedural missteps*"!

BELVEDERE was thus ordered to appear before the Commercial Court having jurisdiction over the territory where its registered office was originally located, i.e. the Commercial Court of Dijon, to be placed into receivership.

Highlights and case-law developments brought about by the March 8, 2012 decision

The suspensive effect of the appeal lodged by the Public Prosecutor against a judgment extending safeguard proceedings on the basis of an alleged commingling of estates

To the best of our knowledge, since the entry into force of the Law on safeguard proceedings French courts had not had the opportunity to rule whether a decision ordering the opening of safeguard proceedings by way of extension of existing safeguard proceedings should be assimilated to a decision ordering the opening of safeguard proceedings within the meaning of Article L. 661-1 II of the French Commercial Code.

The Court of Appeals of Nîmes answered to this question in the negative.

As foreshadowed in its judgment of December 1, 2011[1], the Court of Appeals of Nîmes specified that the appeal of the Public Prosecutor has a suspensive effect *"when it is lodged against decisions concerning the extension of safeguard, receivership or liquidation proceedings"* referred to in Article L.661-1§3 of the French Commercial code.

As such, Article L. 661-1 II of the French Commercial Code – stipulating that the appeal of the Public Prosecutor has no suspensive effect when it is lodged *"against decision concerning the opening of safeguard or receivership proceeding"* – does not apply to appeals lodged by the Public Prosecutor against decisions concerning the extension of safeguard, receivership or liquidation proceedings.

The Court of Appeals of Nîmes drew two conclusions from this analysis.

First, it inferred from the suspensive effect of the Public Prosecutor's appeal that the appointment of the court agents in the BELVEDERE safeguard proceedings had not become effective, meaning that the Public Prosecutor could not possibly call into the appellate proceedings the receiver and creditors' representative of BELVEDERE. The Court of Appeals of Nîmes thereby rejected the plea of inadmissibility raised by

BELVEDERE.

Secondly, it inferred from the suspensive effect of the Public Prosecutor's appeal against the judgment extending the safeguard proceedings to BELVEDERE that *"the Commercial Court of Nîmes could not, without committing an abuse of authority, order the conversion of S.A. BELVEDERE safeguard proceedings into receivership proceedings"*.

The appeal judges therefore rightfully considered that safeguards proceedings subject to a suspensive appeal – and therefore that do not exist! – could not possibly be converted into receivership proceedings.

Absence of abnormal financial relations establishing the commingling of estates

In its judgment rendered on July 1, 2011, the Commercial Court of Nîmes considered that the commingling of estates between MONCIGALE and BELVEDERE had been duly established and that the safeguard proceedings initiated for MONCIGALE was thus to be extended to BELVEDERE.

By reversing this judgment, the Court of Appeals of Nîmes recalled that the commingling of estates must be evidenced *"by transfers of assets or the provision of services without any valuable consideration"* (criterion used to establish the existence of abnormal financial relations), *"thereby entailing a change in the respective estates of S.A. BELVEDERE and SAS MONCIGALE"* (criterion on the indeterminability of the composition of estates). The Court held that the following facts were not sufficient to establish the commingling of estates:

- The fact that the Chairman and CEO of BELVEDERE had admitted such commingling of estates, being specified by the Court that a judicial admission/confession can only serve to prove facts, not to determine the legal classification of facts;
- The redistribution of markets within the BELVEDERE Group, thereby forcing MONGIGALE to abandon certain markets to the benefit of other group entities;
- The grant of payment periods by MONCIGALE to BELVEDERE's Polish subsidiaries;
- The fact that MONCIGALE assumed the costs associated with the development and building of certain brands owned by BELVEDERE;
- The shareholding relationships between BELVEDERE and MONCIGALE and the community of managers.

By reversing the first instance judgment, the Court of Appeals of Nîmes strictly followed the case-law of the *Cour de Cassation* (French Supreme Court) and considered that none of the criteria put forth by the plaintiffs was likely to establish the commingling of estates allegedly based on abnormal financial relations[2].

The principle of Estoppel cannot be relied upon against the Public Prosecutor

By decision rendered on September 20, 2011, the Commercial Chamber of the *Cour de Cassation* recognized the rule according to which a person may not contradict himself/herself/itself to the detriment of another person as a general principle of French law and consequently sanctioned contradictory procedural behaviors[3].

BELVEDERE raised this principle, known as Estoppel in common law countries, before the Court of Appeals of Nîme, arguing that the Public Prosecutor had adopted a contradictory procedural behavior by:

- **Supporting in the first instance proceedings** the conversion of the safeguard proceedings into receivership proceedings because he considered that the appeal lodged against the judgment that had extended the safeguard proceedings to BELVERDERE had no suspensive effect ;
- **Requesting in the appellate proceedings** the nullification – for abuse of authority – of the judgment converting the safeguard proceedings into receivership proceedings because he considered that the appeal lodged against the judgment that had extended the safeguard proceedings to BELVERDERE had a suspensive effect.

The Court of Appeals of Nîmes held that the pointed out contradictions could not justify declaring the Public Prosecutor's appeal inadmissible insofar as *"The Public Prosecutor, whose mission includes to ensure accurate application of the law, remains entitled, in the interest of the law, to lodge an appeal against a judgment that infringes a* ***public policy rule****, even if the rendered judgment is in line with the conclusions put forth by the Public Prosecutor's representative at the pleading hearing".*

Thus, the Public Prosecutor cannot be blamed for contradicting himself to the detriment of another party when such contradiction concerns the application of a public policy rule.

The judgment of the Court of Appeals of Nîmes adds a new dimension to the Estoppel-related case-law and vigorously reaffirms that in insolvency/bankruptcy matters, the – public policy – territorial jurisdiction rules cannot be circumvented without any consequences by unscrupulous corporate officers.

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[1] See our December 2011 e-newsletter

[2] Metaleurop Case, *Cour de cassation*, April 19, 2005 : *"By basing its decision on such reasons that are irrelevant to establish why, in a group of companies, the cash pooling management agreement and foreign exchange agreement, staff exchanges and cash advances by the mother company – elements that it had identified – revealed abnormal financial relations constitutive of a comingling of estates between the parent company and its subsidiary, the Court of Appeals, that did not rule on the basis of Article L. 624-3 of the French Commercial Code, failed to provide a legal basis for its decision".*

[3] See our January 2012 e-newsletter

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