

BANKRUPTCY :

THIRD-PARTY OPPOSITION TO OFFICIAL RECEIVER'S AUTHORIZATIONS IS NOW POSSIBLE

In a ruling dated March 30, 2024¹, the Luxembourg Court of Appeal, sitting in commercial matters, has just declared admissible the third-party objection lodged against the court's decision, based on the official receiver's report, to authorize the receiver to sell securities found in the assets of the bankrupt company, but which the third-party objectors consider themselves to own.

To the best of our knowledge, this is the first decision of its kind handed down by the Luxembourg courts, which have (finally) followed in the footsteps of, and confirmed, the jurisprudence of the Belgian Court of Cassation in this area.

In this case, the receiver of a bankrupt Luxembourg company had requested and obtained, in accordance with the provisions of article 477 of the Commercial Code (making the sale of the bankrupt's assets, other than assets subject to imminent deterioration or depreciation, subject to the authorization of the court, on the basis of a report by the official receiver), authorization to sell securities found in the bankrupt's assets, but the ownership of which had been transferred to third parties by an agreement signed prior to the bankruptcy:

The said securities would therefore not be free of rights, and would not form part of the bankrupt's assets, but would belong to the third-party objectors.

The third parties complained that the curator had not duly informed the juge-commissaire of the existence of this agreement, nor of the pending proceedings concerning its validity, and had thus irregularly "wrested" or "surprised" authorization from the juge-commissaire.

In this respect, it should be noted that the procedure for obtaining the official receiver's authorization to sell is a unilateral procedure - *ex parte* - attended only by the curator and the official receiver, in the absence of the creditors. It is therefore of major interest to the latter to know that, thanks to the lessons of aforementioned April 30, 2024 ruling, they can now validly lodge third-party objections against the official receiver's decisions.

¹ Ruling no. 76/24 IV .COM of April 30, 2024

In order to appreciate the practical importance of this decision by the Court of Appeal, it is worth recalling that under the terms of article 465 of the French Commercial Code :

"No opposition, appeal or civil claim may be lodged:

(...);

3° judgments authorizing the sale of effects or goods belonging to the bankrupt, or, in accordance with article 453, paragraph 3, the remission of the sale of seized objects;".

The judge of first instance declared the third-party objections (= an avenue of appeal open, under certain conditions, to any interested party, even if not a party to the contested judgment) inadmissible, considering that the action at the heart of the dispute was an action arising from bankruptcy and therefore subject to article 465 of the Commercial Code

However, according to the first judges, the wording of article 465 of the French Commercial Code prohibits any "**opposition**" against the judgments listed therein, and implicitly but necessarily includes **third-party opposition**.

The court of first instance proceeded by analogy with article 473 of the same code, which stipulates that the judgment declaring bankruptcy may be opposed both by the bankrupt and by "*any interested person*", a reference which in this case is lacking in article 465 of the Commercial Code, and deduced - wrongly - that the third-party opposition was inadmissible against the decisions of the official receiver (more precisely, the court's decisions on the official receiver's report).

Thus, until now, any authorization to sell granted by the Luxembourg official receiver to the curator was - wrongly - considered to be set in stone.

Now the Court of Appeal has opened a breach in the supposedly immutable nature of the juge-commissaire's authorizations to sell, impacting the centuries-old practice of bankruptcy law in Luxembourg.

The Court of Appeal, having reversed the judgment of the court of first instance, and after holding that "the Court of First Instance rightly held that the action at the basis of the present dispute should be classified as an action in bankruptcy", declares, referring in turn to Belgian doctrine and case law, that :

*"Article 465 paragraph 2 of the French Commercial Code is **interpreted restrictively**.*

*By reversal of the judgment, it is therefore necessary to state that **article 465, paragraph 2, does not provide for a prohibition on appealing against one of the judgments set out therein by way of third-party opposition.***"

The Court of Appeal developed its arguments to perfection, adopting the doctrine and reasoning of Belgian case law, holding that :

*"Moreover, Belgian legal writers are unanimous in stating that article 465 of the Belgian Commercial Code (similar in wording to article 465 of the Luxembourg Commercial Code), formulates an **exception to ordinary law**, and that the exceptional nature of the provision of article 465, paragraph 2, gives it an essentially **restrictive** character, both in terms of the judgments it lists, and in terms of **the remedies available against these judgments**. The judgments listed in this article may therefore be challenged, where appropriate, by way of third-party proceedings.*

*In a ruling dated May 16, 1991, the Belgian Court of Cassation also held that article 465, paragraph 2, of the Commercial Code is to be interpreted strictly, and stated that "**although they are not subject to opposition, appeal or recourse to the Supreme Court, the judgments referred to in article 465, paragraph 2, of the Commercial Code, in particular those authorizing the sale of effects or goods belonging to the bankrupt, may be challenged by third-party proceedings**"² .*

As a result, the Court of Appeal has just confirmed the right of any interested party who considers that he or she has been adversely affected by an authorization from the official receiver to lodge a third-party objection.

In Luxembourg, it was all the more necessary for any interested party to be able to lodge a third-party objection to the official receiver's authorization to sell, as the procedure for obtaining such authorization is unilateral and does not allow creditors to control and/or contest the conditions under which such authorization is obtained.

In short, it's simply a matter of restoring to litigants their primordial constitutional right to an effective defense and/or trial, a right that any rule of law is keen to protect.

Lastly, the considerable contribution of this ruling certainly also lies in the setting of the time limit for the third-party objection procedure:

Does it fall within the short, restrictive time limits applicable to bankruptcy appeals, i.e. opposition to the bankruptcy decree, which must be lodged within 15 days?

² Not. Belge 1991, n°478, p.810

Contrary to the claims of the curator, the Court of Appeal answered in the negative, holding that :

"In accordance with the foregoing, article 473 of the French Commercial Code, which sets out time limits for lodging objections to declarations of bankruptcy, cannot be transposed to the present case. The curator's argument concerning the lateness of the appeal must be rejected".

As a result, third-party objections to the official receiver's authorizations are subject to the 30-year time limit applicable under ordinary law. In commercial matters, this period would be reduced to 10 years.

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Biography:

Shiva MIR MOTAHARI has been a member of the Luxembourg Bar since 1998. She specializes in international business litigation and appeals on points of law.

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