

New decision against France due to the excessive length of judicial liquidation proceedings

The right to have one's case tried within a reasonable period of time is one of the fundamental guarantees of a fair trial. As a consequence, the violation of Article 6, §1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") probably represents the ground having justified most of the sentences in criminal matters, but also in civil and commercial matters. A new example is provided by the decision of the European Court of Human Rights ("ECHR") of 22 September 2011 in *re Tetu v. France* (no. 60983/09).

In this case, the claimant had initiated an action in 2009 before the ECHR to complain about the excessive length of the judicial liquidation of his farm, which had started in 1990 to end in 2011, i.e. 21 years later. According to him, the proceedings had not complied with the requirement of a reasonable time period and had deprived him of the availability of his goods, without ensuring an effective remedy. These three grounds have been retained by the ECHR in its decision against France.

Reasonable time period

To challenge the theory of the claimant, the French Government asserted that the latter's behaviour had contributed to the length of the judicial proceedings as the debtor had lost interest in the proceedings and had refrained from acting during the observation period.

The ECHR recalled the long line of case law concerning the elements to be taken into account to determine the reasonableness of the duration of proceedings, i.e. the facts of the case, its complexity, the claimant's behaviour and that of the relevant authorities as well as the stakes of the dispute for the parties. In the case at hand, the case was particularly complex from a legal standpoint due to the situation of joint ownership of the claimant with the other members of his family in the scope of a succession. Yet, after having acknowledged that the debtor had not been cooperative and that the liquidation operations and the distribution of the succession may have delayed the proceedings, the ECHR considered that the French Government had not proven how the debtor's behaviour would have delayed the proceedings between the opening of the liquidation and the moment when the ECHR handed down its decision. Moreover, as the debtor is not a party to the liquidation proceedings, the liquidator, who exercises the rights and actions of the debtor during such proceedings, had to inform the Bankruptcy Judge of the encountered difficulties. Lastly, the Government had not provided explanations regarding several periods of judicial inactivity.

In light of these elements, the ECHR considered that the length of the proceedings was excessive and did not meet the requirement of a reasonable period of time pursuant to Article 6, §1, of the Convention. This decision is not the first decision handed down against France due to the excessive

length of insolvency proceedings. A decision had notably already been handed down in 2002 (ECHR, 17 January 2002, no. 41476/98, *Laine v. France*).

Deprivation of property

The claimant also asserted that the liquidation proceedings had deprived him of the administration and availability of his property for more than twenty years. According to the French Government, this deprivation was justified by the legitimate objective pursued by the liquidation proceedings consisting in guaranteeing, to the benefit of the creditors of the debtor, the recovery of their claims.

The ECHR recalled that this measure of interference in the availability of the property of the debtor must ensure a fair balance between the requirements of general interest and the requirements relating to the protection of the fundamental rights of the individual. Yet, according to the ECHR, this balance is not ensured when the prohibition imposed on the debtor may give rise for the latter to an excessive burden with respect to the possibility to use his property, especially when the proceedings last for a very long time, as in the case at hand.

The duration of the proceedings being manifestly excessive, the ECHR, in this case, considered that the interference in the debtor's right to peacefully enjoy his property was not justified during the entire proceedings and was disproportionate compared to the pursued objective. The violation of Article 1 of Protocol 1 relating to the protection of property of natural persons has thus been established.

Absence of any effective remedy

The claimant lastly considered having been deprived of the possibility to bring an action before the French courts to have the excessive length of the proceedings acknowledged, the rights and obligations of the debtor being exercised during the entire duration of the liquidation proceedings by the liquidator. According to the French Government, to the contrary, this right of action of the debtor would solely have been suspended and not cancelled during the liquidation proceedings.

The ECHR recalled, in this respect, that Article 13 of the Convention guarantees the existence in domestic laws of an effective remedy before a national court to complain about any breach of the obligation, imposed by Article 6, §1, to hear cases within a reasonable period of time. In light of the absence of such a remedy, the ECHR noted that said Article 13 had been violated.

The claimant will thus receive compensation for his material and moral losses from the French State, it being recalled that the ECHR does not have the power to annul the decisions handed down in violation of the right granted by Article 6, §1,

of the Convention. However, he will not receive any compensation for the loss of chance, as he did not request the authorisation to continue his activity before the Court or Bankruptcy Judge.

This new decision against France handed down by the ECHR, on the triple ground of Articles 6, §1, and 13 of the Convention and Article 1 of Protocol 1, recalls the importance granted by the European Court to the measures that must be implemented by the bodies of the liquidation. The multiple constraints in terms of delays imposed by the French legislator, since the Company Safeguard Law no. 2005-845 of 26 July 2005, had already acted in favour of a restriction of the duration of insolvency proceedings. This decision will undoubtedly have a real impact on the future acts of the various parties involved.



Virginie Adam
virginie.adam@hoganlovells.com
