7 July 2017
Civil Decision
17/02165
RM/EE

IN THE NAME OF THE KING

Supreme Court of the Netherlands

Ruling

in the case of:

PORTUGAL TELECOM INTERNATIONAL FINANCE B.V., with its official seat in Amsterdam,

APPLICANT in the cassation appeal,

counsel: R.M. Hermans,

versus

CITICORP TRUSTEE COMPANY LTD., with its official seat in London, United Kingdom,

RESPONDENT in the cassation appeal,

counsel: J.W.H. van Wijk

and

J.L.M. GROENEWEGEN in his capacity as trustee in the bankruptcy of Portugal Telecom International Finance B.V., with his principal place of business in Amsterdam,

INTERESTED PARTY in the cassation appeal,

counsel: T.T. van Zanten,

OI BRASIL HOLDINGS COÖPERATIEF U.A., with its official seat in Amsterdam,

INTERESTED PARTY in the cassation appeal,

Counsel: B.I. Kraaipoel,

J.R. BERKENBOSCH in his capacity as trustee in the bankruptcy of Oi Brasil Holdings Coöperatief U.A., with his principal place of business in Amsterdam,

INTERESTED PARTY in the cassation appeal,

Counsel: J.P. Heering,

CITADEL EQUITY FUND LTD.,
with its official seat in Grand Cayman (Cayman Islands),

CAPRICORN CAPITAL LTD.,
with its official seat in Grand Cayman (Cayman Islands),

TRINITY INVESTMENTS DESIGNATED ACTIVITY COMPANY,
with its official seat in Dublin, Ireland,

YORK GLOBAL FINANCE FUND,
with its official seat in London, United Kingdom

MONARCH MASTER FUNDING 2 (LUXEMBOURG) S.A.R.L.,

INTERESTED PARTIES in the cassation appeal,

counsel: B.T.M. van der Wiel,

GOLDEN TREE ASSET MANAGEMENT LLP.,
with its official seat in New York, United States of America,

INTERESTED PARTY in the cassation appeal,

counsel: Chr. F. Kroes,

PEDRA DA GAVEA CO LTD.,
with its official seat in Toronto,
Canada,

INTERESTED PARTY in the cassation appeal,

counsel: C.J.A. Seinen,

CITCO NEDERLAND B.V.,
with its official seat in Amsterdam,

INTERESTED PARTY in the cassation appeal,

not having appeared.

The parties will hereinafter also be referred to as PTIF and Citicorp, and the interested parties as the bankruptcy trustee of PTIF, Oi Coop, the bankruptcy trustee of Oi Coop, Citadel et al., Golden Tree, Pedra da Gavea and Citco.

1. The proceedings in the fact-finding instances

For the course of the proceedings in the fact-finding instances, the Supreme Court refers to the following documents:

a. the decision in case C/13/16/43 S by the Amsterdam District Court, dated 2 February 2017;

b. the decision in case 200.209.138/01 by the Amsterdam Court of Appeal, dated 19 April 2017.

The decision of the Court of Appeal has been attached to this ruling.

2 The proceedings in cassation

PTIF has filed an appeal in cassation against the decision of the Court of Appeal. The cassation application has been attached to this ruling and forms part of it.

Advocate-General L. Timmerman concluded that the following parties be called to appear at the oral hearing of the cassation appeal: Citicorp, the bankruptcy trustee of PTIF, (the bankruptcy trustee of) Oi Coop, Citadel et al., Golden Tree, Pedra da Gavea and Citco.

The Supreme Court called Citicorp, the bankruptcy

trustee of PTIF, (the bankruptcy trustee of) Oi Coop, Citadel et al., Golden Tree, Pedra da Gavea and Citco to appear at the oral hearing of the cassation appeal, on the ground that these parties can be considered interested parties that appeared in the previous instance.

Citicorp and the bankruptcy trustee of PTIF have submitted a statement of defence.

The appeal was heard together with the cassation appeal in case 17/02153, whereby the summoned parties and interested parties, insofar as they made an appearance, have been heard. The hearing took place behind closed doors. In connection with the nature of this bankruptcy case, the Supreme Court informed the parties at the outset of the hearing that Article 9(1) (opening lines) and (a) of the Dutch Code of Civil Procedure (DCCP) prohibits the parties from making any statements regarding the matters discussed during the hearing to third parties and also determined, on the basis of Article 29(1) (opening lines) and (b) DCCP, that the parties are also prohibited from making statements regarding the contents of the procedural documents to third parties.

The opinion of the Advocate General L. Timmerman is to deny the appeal in cassation.

PTIF's counsel responded to this opinion by letter of 27 June 2017 on the basis of Article 44(3) DCCP.

Pedra da Gavea's counsel did so by letter of 27 June 2017. Golden Tree's counsel did so by letter of 28 June 2017.

3. Assessment of the ground for cassation

3.1 The following can be assumed in cassation.

(i) By decision of 3 October 2016, the District Court granted PTIF a provisional suspension of payments.

(ii) PTIF has been part of a group of companies (the Oi Group) since mid-2014. The shares in PTIF are held by Oi S.A., the Brazilian parent company of the Oi Group.

(iii) The Oi Group is one of the world's largest integrated service providers in the telecommunications industry. The activities of the Oi Group take place primarily in Brazil, but the Oi Group is – or has been – active in Portugal and various African countries as well.

(iv) The shares in Oi S.A. are traded on the São Paulo stock exchange and on the New York Stock Exchange. A large portion of the financing of the Oi Group runs via its two Dutch financing companies: Oi Coop and PTIF. A provisional suspension of payments was granted to Oi Coop on 09 August 2016.

(v) PTIF's activities consist, more specifically, of (i) the issue and repayment of debts in the international capital markets, primarily in the form of listed notes (hereinafter also "notes") and (ii) the relending of funds

received via the notes to the Oi Group, in particular via a credit agreement concluded between PTIF and Oi Coop.

(vi) The notes are not covered by a right of security. The notes are guaranteed by Oi S.A. PTIF itself does not have any operational activities and the noteholders can be paid exclusively out of the income and proceeds generated by the operational companies of the Oi Group. By virtue of the guarantee from Oi S.A., the noteholders have a direct claim against Oi S.A.

(vii) On 20 June 2016 PTIF had issued notes for a total of approximately €3.9 billion. Mid-2015 PTIF relent an amount of approximately €3.8 billion to Oi Coop. Oi Coop had issued notes on 20 June 2016 for a total of approximately €1.9 billion. Oi Coop, in turn, had relent an amount of approximately €4 billion to Oi S.A. and had relent an amount of approximately €1.6 billion to group company Oi Móvel S.A.

(viii) On 20 June 2016, PTIF and Oi S.A., together with five other group companies, including Oi Coop and Oi Móvel, submitted an application to open consolidated judicial restructuring proceedings in Brazil (*recuperação judicial*, hereinafter the "RJ Proceedings"). The Brazilian court granted this request on 29 June 2016. The aim of the RJ proceedings is to restructure the Oi Group as a going concern by means of a composition negotiated with the

creditors and approved by the creditors and the Brazilian court (RJ Plan) and to thereby avoid liquidation. On 5 September 2016, a consolidated draft RJ Plan was filed with the District Court in Rio de Janeiro, Brazil. In a press release dated 22 March 2017, Oi S.A. announced that the draft RJ Plan would be revised. The revised text was added as an annex to that press release.

(ix) Citicorp is a member of the Citibank Group and serves as trustee in a variety of international financing structures, including a €4.4 billion Note Program of PTIF.

3.2 In these proceedings, Citicorp requests, on the basis of Section 242 DBA and on various grounds, the withdrawal of the provisional suspension of payments granted to PTIF, as well as the bankruptcy of PTIF. The administrator in that suspension of payments, now the bankruptcy trustee of PTIF, submitted the same request in the first instance.

3.3 The District Court dismissed the requests, against which only Citicorp lodged an appeal. The Court of Appeal set aside the decision by the District Court, withdrew the provisional suspension of payments, and declared PTIF bankrupt. Succinctly put, the Court of Appeal considered the following in this respect.

There are three grounds that justify the withdrawal of the suspension of payments within the meaning of Section 242(1) DBA (ground 5.12).

The proposal for the RJ Plan mentioned in 3.1 under (viii) above, which PTIF approved, entails that Oi S.A. And Oi Móvel no longer have to pay Oi Coop and that Oi Coop no longer has to pay to PTIF the amount of €3.8 billion that PTIF lent on to it, as referred to under 3.1 under (vii). This constitutes an act of management or disposition on the part of PTIF, relating to an asset in the estate, to wit PTIF's proposal to waive its €3.8 billion claim against Oi Coop, which pursuant to Section 228(1) DBA, required the permission of the administrator. This meets the ground for withdrawal of Section 242(1)(opening lines) and (3°)DBA. (ground 5.6-5.7)

In November 2016, PTIF requested the Brazilian court to, among other things, declare that the Administrator cannot interfere in the RJ Proceedings without the permission of the Brazilian Superior Court of Justice and also that the Administrator must refrain from any act aimed at obstructing actions by the PTIF board with regard to the RJ Proceedings, subject to a penalty. This request is not compatible with PTIF's obligation to openly consult with the administrator to arrive at an adequate management of the estate. After all, PTIF intends with this request, without striving to reach

agreement with the administrator, to restrict the authorities of the administrator in respect of the management of the estate. PTIF is thereby guilty of acting in bad faith in the management of the estate within the meaning of Section 242(1) (opening lines) and (1) DBA. (ground 5.8-5.9)

Lastly, the ground for withdrawal of the suspension of payments as referred to in Section 242(1) (opening lines) and (4) DBA is present as (the board of) PTIF provides no, or at least not enough, information to the administrator, as a result of which the administrator does not gain sufficient insight into the Brazilian composition negotiations and is therefore unable to assess whether the acceptance of a consolidated restructuring of the debts in the context of the RJ Proceedings is in the best interest of the estate (ground 5.10-5.11).

The result of the Court of Appeal's weighting of the interests involved is that the suspension of payments must be withdrawn and bankruptcy must be pronounced.
The Court of Appeal found the arguments that PTIF advanced to arrive at a different outcome to be either insufficient or unfounded.
(ground 5.12)

3.4 The complaints of subground 1 cannot lead to cassation. With regard to Section 81(1) Judiciary

Organisation Act, this does not require any further substantiation since said complaints do not require answers to legal questions in the interest of unity of law or legal development.

3.5.1 Subground 3 is directed against the Court of Appeal's decision to also hear parties and interested parties other than those referred to in Section 243(3) DBA, whereby the Court of Appeal referred to an analogous application of Section 220 DBA (ground 2.1). According to the subground, only the applicant, debtor and administrator referred to in Section 243(3) DBA may be heard on the application for withdrawal. Argued in subground 3b is that the Court of Appeal was in any event not allowed to hear noteholders, as these are not creditors of PTIF. This subground furthermore argues that, by hearing other parties besides the applicant, debtor and administrator referred to in Section 243(3) DBA, the Court of Appeal obstructed PTIF in its defence, because, as a result therefore, despite the application of Article 29 of the Dutch Code of Civil Procedure, it has not been able to freely present confidential information at the hearing.

3.5.2 The subground is unfounded. Section 242(3) DBA and the corresponding Section 243(3) DBA, as invoked in the

subground, merely contain an obligation to summon – in any event – the applicant, the debtor and the administrator. These provisions do not prevent the court, should it have reason thereto, from summoning and hearing other interested parties, such as (other) creditors or companies affiliated with the debtor, as well. In principle, the court has discretion to do so. The argument in subground 3b that the Court of Appeal, by hearing other parties than the applicant, debtor and administrator referred to in Section 243(3) DBA, already fails because it has not been demonstrated that PTIF advanced this as a ground for appeal against the Court of Appeal's decision to hear the case this way.

3.6.1 The complaint in subground 4 is that the Court of Appeal exceeded the boundaries of the grounds for appeal and the legal dispute by basing its opinion in part on arguments and assertions that have not been advanced by appellant Citicorp – but by the administrator or Citadel et al. – or that were not advanced by Citicorp until the pleadings.

3.6.2 This subground is also unfounded. Section 242(1) DBA confers upon the District Court the competence to withdraw the suspension of payments *ex officio* as well. Both the

principle of (full) adjudication in two fact-finding instances and the raison d'être of this competence– that the court needs to take the interests of the creditors into account, if need be ex officio – entail that this competence accrues to the Court of Appeal as well if, on the basis of Section 242 DBA, it has to pass judgment on appeal (the same applies to the authority in Section 242(4) DBA, to connect the bankruptcy of the debtor to the withdrawal of the suspension of payments). It follows from this that the Court of Appeal is not bound to the grounds for appeal in assessing whether there is reason to withdraw the suspension of payments.

The Court of Appeal did not exceed the boundaries of the legal dispute with its opinion, because, on the basis of Citicorp's appeal application, a decision was to be rendered on the withdrawal of the suspension of payments on appeal (as well) (cf. Supreme Court 26 February 2016, ECLI:NL:HR:2016:340, NJ 2017/214).

3.7.1 Subgrounds 2 and 5 address the relationship between the Dutch suspension of payments of PTIF (and Oi Coop) and the restructuring proceedings in Brazil (the RJ Proceedings). The Oi Group is an international group of affiliated companies, of which some have been incorporated under Dutch law and have their official seat in the

Netherlands (Oi Coop and PTIF), and others, including parent company Oi S.A., in other countries – chiefly Brazil. In the RJ Proceedings pending in Brazil, the Group strives to accomplish a consolidated restructuring of the group in connection with the financial difficulties it is in (see 3.1 under (viii) above). The essence of what PTIF and Oi Coop argue in these proceedings is that the suspension of payments granted to them in the Netherlands should be subordinate to the restructuring proceedings in Brazil – in the interest of the success of said proceedings, and thereby in the interest of the group as a whole – and that, partly because of that, PTIF and Oi Coop need not, or only to a limited extent, involve the administrators in what they submit to the discussion in the RJ Proceedings.

3.7.2 That opinion cannot be followed. It has been established in these proceedings that Dutch bankruptcy law applies to PTIF and Oi Coop, as these are companies with their official seat in the Netherlands. This means that, in principle, the rules of the Dutch Bankruptcy Act apply to them in full. This includes the rules of Section 228 DBA in case of a suspension of payments, which entails that the debtor only maintains the management and disposition of its estate together with the administrator, meaning the debtor is not allowed to act without the administrator’s

cooperation, authorisation or assistance. In the absence of an applicable international or a special domestic rule to the contrary, there are no grounds that merit an exception to this because PTIF and Oi Coop belong to an international group of affiliated companies that have the centre of their main interests in a foreign country and in respect to which restructuring proceedings are pending in said foreign country, such as the RJ Proceedings.

3.7.3 Insofar as subgrounds 2 and 5 are based on the interpretation dismissed in 3.7.2 above, they are unfounded.

3.7.4 The fact referred to at the end of 3.7.2 can be considered wherever the law allows room for such, as with the weighting of interests that, on the basis of Section 242(1) DBA, ought to take place in the context of the withdrawal of the suspension of payments. In cases such as the one at hand, the administrator and the bankruptcy trustee can furthermore consider the interests of the group as a whole and those of the creditors of the group as a whole. However, the individual legal personality of the members of a group must be taken as the starting point in insolvency proceedings as well.

The Court of Appeal has not failed to recognise the

foregoing, as evidenced by its considerations in ground 5.12.

3.8.1 Among other things, subground 2 contains complaints against the Court of Appeal's opinion in ground 5.8-5.9, which has been presented in the fourth paragraph of 3.3., to wit that PTIF, by submitting a request to the Brazilian court directed against its administrator, is guilty of acting in bad faith in the management of the estate within the meaning of Section 242(1) (opening lines) and (1°) DBA. According to the subground, this opinion is incorrect partly because the debtor is exclusively authorised to offer a composition during the suspension of payments without involving the administrator (Section 252 DBA). The subground furthermore invokes Section 231(3) DBA, from which it follows, according to the subground, that PTIF does not require the cooperation of the administrator for its participation in the RJ Proceedings in Brazil.

3.8.2 These complaints are unfounded. The RJ Proceedings and the composition offered therein relate in part to PTIF's assets, and thereby to the management and disposition of the estate as referred to in Section 228(1) DBA and to the rights and obligations of the estate as referred to in Section 231(3) DBA. Both because this concerns a

composition that is offered by the group, or by the group companies involved therein, and because it also relates to the mutual relationships within the group, this does not concern an offer for a composition as referred to in Section 252 DBA, whereby the debtor only commits itself and not the estate. For these reasons, the consolidated restructuring at stake in the RJ Proceedings does not relate to such an offer either, or at least not exclusively.

The cooperation of the administrator, as prescribed in Section 228(1) DBA, that the debtor requires during the suspension of payments for the management and disposition of the estate entails that the debtor must inform the administrator adequately in regard to all things relevant in that respect. The Court of Appeal rightly considered that PTIF's request to the Brazilian court is not compatible with this. Its opinion that PTIF is guilty of acting in bad faith within the meaning of Section 242(1) (opening lines) and (1°) therefore does not display an incorrect legal interpretation and is not incomprehensible.

3.9.1 Subground 2 furthermore contains complaints against the Court of Appeal's opinion in grounds 5.10-5.11 that the ground for withdrawal of the suspension of payments as referred to in Section 242(1) (opening lines) and (4°) DBA is present as (the board of) PTIF provides no, or at least

insufficient, information to the administrator, as a result of which the administrator does not gain sufficient insight into the Brazilian composition negotiations and is therefore unable to assess whether the acceptance of a consolidated restructuring of the debts in the context of the RJ Proceedings is in the best interest of the estate.

3.9.2 These complaints are also unfounded. It follows from the considerations in 3.8.2 above that the Court of Appeal rightly ruled that PTIF should have offered the administrator sufficient insight into the Brazilian composition negotiations and the consolidated restructuring of the debts in the context of the RJ Proceedings. The Court of Appeal's opinion that PTIF failed to inform the administrator adequately on both matters is of a factual nature and is not incomprehensible.

It also bears noting that, unlike the presumption in the subground, the Court of Appeal's opinion that this latter element satisfies the ground for withdrawal of Section 242(1) (opening lines) and (4°)is not based on the circumstance that PTIF failed to heed the District Court's recommendation to enable the administrator to properly perform his duties (ground 8.21 of its decision in the first instance), but on the failure to do what, according the administrator, had to be done in the best interest of the

estate within the meaning of Section 242(1) (opening lines) and (4') DBA. In grounds 5.11 and 5.12, the Court of Appeal merely refers to the District Court's recommendation to further substantiate the culpability of PTIF's actions.

3.10.1 Subground 5, with its various complaints, is directed against the Court of Appeal's opinion in grounds 5.6-5.7 that PTIF's approval of the proposal for the RJ Plan constitutes an act of management or disposition related to an asset of the estate within the meaning of Section 242(1) (opening lines) and (3°) DBA.

3.10.2 These complaints fail as well. The Court of Appeal's opinion apparently also pertains to the revised RJ Plan, of which the Court of Appeal established in 5.10 that it was submitted during the suspension of payments on behalf of PTIF as well and that this happened with the approval of PTIF too. The Court of Appeal's opinion entails that, with the aforementioned approval, PTIF committed itself to this offer. This opinion is of a factual nature and is not incomprehensible. As demonstrated by the considerations in 3.8.2 above, the Court of Appeal rightly assumed that the offer thereby constitutes an act of management or disposition within the meaning of Section 242(1) (opening lines) and (3°) DBA.

3.11 Subgrounds 6 and 7 lack any independent significance and need not be addressed.

4. Decision

The Supreme Court dismisses the appeal.

This decision was rendered by vice president E.J. Numann as president and justices G. Snijders, G. de Groot, C.E. du Perron and M.J. Kroeze, and pronounced in open court by justice G. de Groet on 7 July 2017.