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Commentary

Enforcement Of US Punitive Damages Award In France: First Ruling Of The French Court Of Cassation In X. v. Fountaine Pajot, December 1, 2010

By
Nathalie Meyer Fabre

[Editor's Note: Nathalie Meyer Fabre is a member of the Paris Bar, founding partner of a boutique law firm located in Paris specialized in international arbitration and litigation. Mrs. Meyer Fabre has over twenty years experience in the resolution of international disputes for foreign companies, sovereign states and public entities. *Replies to this commentary are welcome.]*

The general perception in the US is that the chances of getting a European court to recognize and enforce punitive damages awarded by a US Court are virtually nil.

This view should be tempered in view of an important decision issued on December 1st, 2010 by the French Court of Cassation in *Fountaine Pajot*[1], which is the first decision of this Court on the recognition and enforcement in France of a foreign punitive damages award.

The Court of Cassation held that "an award of punitive damages is not, per se, contrary to public policy", adding however that this principle does not apply "when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligations."

The delimitation of what should be regarded as "disproportionate" is likely to give rise to heated debates in future cases. In *Fountaine Pajot*, the Court of Cassation noted that the US judgment awarded an additional amount ($1.46 million) which, in its view, "largely exceeds" the full compensation of the damage ($1.39 million) and decided that the lower court could thus validly hold that the damages awarded were "manifestly disproportionate with regard to the loss suffered and the breach of contractual obligations" and were therefore not enforceable in France.

This decision of the Court of Cassation is one of a series of French decisions which – following the recent elimination of traditional, nationalistic obstacles to the recognition and enforcement of foreign judgments have had to directly tackle the more weighty issue of the reception that can be given in France to foreign (particularly Anglo-Saxon) institutions which are sometimes regarded as alien to, and incompatible with, the French system.

The dispute in this case involved an American couple residing in the US who had purchased for their personal use a catamaran manufactured by the French shipping company called Fountaine Pajot. The buyers filed suit in the Superior Court of California (County of Alameda), claiming that the boat presented defects which made it unsailable. During the proceedings, it appeared that the defects resulted from serious structural damage caused to the boat by a storm whilst the boat was still in the French shipyard, and from the hasty overhaul works conducted by Fountaine Pajot before delivery. Fountaine Pajot raised jurisdictional objections, which were dismissed, and then chose not to participate in the procedure. On February 2003, the Superior Court of California (County of Alameda) ordered Fountaine Pajot to pay to the plaintiffs a total amount of $3,253,734.45, comprised of $1,391,650.12 for the refurbishment of the boat, $402,084.33 for their attorney's fees and $1,460,000 by way of punitive damages.

The US plaintiffs then started a long battle to try and enforce the US judgment against Fountaine Pajot in France.

At this stage, a few words should be said about the French rules regarding recognition and enforcement of foreign judgments.

In the absence of any applicable multi-lateral or bi-lateral treaty, the recognition and enforcement in France of a US judgment is governed by the French common regime on the recognition and enforcement of foreign judgments which, unlike the vast majority of French law, is not codified. The regime is one of decisional law, constructed year after year by the rulings of the French courts and in particular the Court of Cassation.

In 1964, in *Munzer*[2], the Court of Cassation defined five cumulative conditions for recognition: (1) the foreign court must properly have jurisdiction under French law; (2) the foreign court must have complied with its own procedural rules; (3) the foreign court must have applied the appropriate law under French conflict-of-law principles; (4) the decision must not contravene French concepts of international public policy; (5) the decision must not be a result of *fraude à la loi* (evasion of the law) or fraudulent forum shopping.

Three years after its decision in *Munzer*, the Court of Cassation abandoned the second condition, and instead included a procedural dimension in the public policy condition.[3] Accordingly, the procedural regularity of a foreign decision is now limited to a review as to whether fundamental principles of procedure have objectively been respected.

In 1985 the jurisdictional test was softened. Under *Munzer*, the French courts verified a foreign court's jurisdiction on the basis of the French law criteria for the jurisdiction of the French courts in international cases. In *Simitch*[4], the Court of Cassation changed this rule. To satisfy the jurisdictional test, it is now required that (1) the case does not fall within the "exclusive jurisdiction" of the French courts[5], (2) there is a "characterized link" between the case and the foreign country, and (3) the plaintiff's choice of the foreign forum was not fraudulent.[6]

The *Simitch* jurisdictional test left one major obstacle to the recognition and enforcement of US judgments in France. This obstacle was Article 15 of the French Civil Code. This provision reads: "A French person may be called before a court of France for obligations contracted by him in a foreign country, even with a foreigner". This Article had been interpreted against its words by the French courts as creating a rule of exclusive jurisdiction. French nationals and French corporations could therefore always resist recognition and enforcement of a foreign judgment in France provided that such exclusive jurisdiction rule had not been waived by, for example, a choice of court clause in a contract or appearance by the French defendant before the foreign court without challenging its jurisdiction.

In its landmark *Prieur* decision, on May 26, 2006, the Court of Cassation abandoned its almost 80-year old exorbitant and much criticized interpretation of Article 15 restoring a non-exclusive jurisdictional rule.[7]

French defendants in foreign proceedings thus lost a reinforced-metal shield that was readily available and easy to use in enforcement proceedings.

Initially, this shield was successfully used by the French defendant in this case, Fountaine Pajot. The *exequatur* of the Californian judgment was refused, on 12 November 2004, by the French first instance court in Rochefort and, on 28 June 2005, by the Court of Appeal of Poitiers, on the ground that, based on Article 15, the US Court did not properly have jurisdiction, since Fountaine Pajot was a French corporation, which had objected to the jurisdiction of the US Court and had thus not waived the jurisdictional privilege based on its French nationality.

The US plaintiffs brought the matter before the Court of Cassation. Confirming the interpretation of Article 15 it had given in *Prieur* one year before, the Court of Cassation quashed the Court of Appeal decision and held, in a judgment issued on May 22, 2007[8], that Article 15 only creates an optional jurisdictional ground in favor of the French courts, which does not exclude the jurisdiction of a foreign court, provided there is a "characterized link" between the dispute and the foreign court and provided the choice of the foreign court was not fraudulent.

The matter was remanded before the Court of Appeal of Poitiers for it to rule again on the recognition and enforcement of the US judgment.

In the meantime, on February 20, 2007, the Court of Cassation had abandoned the *Munzer* condition relating to the law applied by the foreign court, ruling that henceforth only three conditions for recognition and enforcement applied[9]: (1) jurisdiction of the foreign court, (2) conformity with international (procedural and substantive) public policy, and (3) absence of fraud.

In its judgment of February 26, 2009[10], the Court of Appeal of Poitiers found that there were sufficiently "characterized" connecting factors between the dispute and the US to satisfy the jurisdictional test and that there was no proof of any fraudulent forum shopping. The Court then verified the conformity of the US judgment to international public policy, from both the procedural and substantive standpoints.

Fountaine Pajot argued that the US judgment violated a fundamental principle of procedure because it was not motivated. The Court of Appeal rejected this argument, noting that the US plaintiffs had produced the transcript of the hearing which made it possible to know the US judge's reasoning. The Court noted in particular, regarding the award of punitive damages, that the transcript made it clear that it was motivated by the need to dissuade Fountaine Pajot to act as it did in the future and that the amount corresponded to 20% of Fountaine Pajot's net worth.

The Court of Appeal did however consider that the award of punitive damages in addition to compensatory damages was contrary to the French notion of substantive international public policy. Moreover, the Court noted that the amount of the punitive damages was clearly disproportionate as it exceeded the damages awarded as full compensation for the loss suffered.

To justify the exclusion of punitive damages the Court of Appeal relied on the "principle of full compensation" (*principe de la réparation intégrale*) as it is traditionally professed under French liability law, according to which damages must fully repair the harm caused but which excludes any consideration of the seriousness of the tortfeasor's actions. The Court of Appeal also argued that enforcing the US judgment would result in an unjust enrichment of the plaintiffs and would violate the proportionality principle.

The US plaintiffs brought the matter for the second time before the Court of Cassation.

By holding in its decision of December 1st, 2010, that foreign punitive damages awards do not per se violate public policy, the Court of Cassation departed from the appellate decision.

This important holding should however not come as a complete surprise. The French system is indeed not entirely impermeable to the idea that liability for tort or contractual liability has a punitive or deterrent function in addition to its compensatory function. For example, under French law, the parties to a contract can provide for contractual penalties in case of non-performance or late performance.[11] Mention should also be made of the French courts' practice to award "moral" damages for which no substantive proof is required, and of the French courts' power to order a party to pay a penalty ("*astreinte*", to be paid to the other party) for non-compliance with a court order. There are even proposals to introduce punitive damages in French domestic law.[12]

Moreover, in another recent case, the Court of Cassation accepted the enforcement in France of a pecuniary sanction of more than US$13 million ordered by the US District Court of the Southern District of New York against Mr. Blech, Credit Bancorp's CEO, for failure to cooperate in the liquidation process of Credit Bancorp and the tracing of diverted assets as he had been enjoined to do by a previous court order.[13] The Court of Cassation held that the financial penalty sanctioning the non-compliance with a foreign court's injunction was civil rather than criminal in nature, and thus capable of enforcement before the civil courts. Taking into account the magnitude of the fraud (US$200 million) for which Mr. Blech was being sued it further held that the principle of proportionality had not been violated.

Relying again on the proportionality principle, the Court of Cassation held in *Fountaine Pajot* that foreign punitive damages awards may however be considered as contrary to public policy if they are excessive, "disproportionate" to use the expression of the Court of Cassation.

Against what should the "proportionality" be measured? The Court of Cassation refers to both the damage actually suffered and "the breach of the debtor's contractual obligations". No mention is made of the wealth of the debtor.

The reference to "the breach of the debtor's contractual obligations" is somewhat surprising, as under US law, punitive damages are not normally awarded for breach of contract unless the conduct constituting the breach is also a tort. A more appropriate reference would have been to "the seriousness of the debtor's wrongful behavior." However, the Court of Cassation makes no reference to the fraudulent behavior of Fountaine Pajot. This may be due to the fact that the Court of Appeal itself reasoned as if the case only involved a purely contractual breach, the Court of Cassation's review being in principle bound by the factual circumstances stated by the Court of Appeal.

In *Fountaine Pajot*, it seems that the main reason why the punitive damages award was found "disproportionate" is because it "largely exceeds", in the Court's view, the amount awarded as compensatory damages ($1.46 million as opposed to $1.39 million).

After a battle of more than six years to obtain the recognition and enforcement in France of the US judgment they obtained against Fountaine Pajot, the US plaintiffs have failed. For them, the principle affirmed by the Court of Cassation that punitive damages are not per se contrary to the French notion of international public policy is probably of little relief. They should however be able to obtain a partial exequatur of the non-punitive elements of the damages awarded by the US judgment, which are clearly identified. Such a partial exequatur is indeed possible in France when the foreign judgment details the various heads of damages awarded, singling out at least the punitive damages. Otherwise, the French court is not authorized to reduce the amount of the damages awarded by the foreign court, as this would amount to a review on the merits of the foreign judgment.

It will be interesting to see how, in future cases, the Court of Cassation will elaborate the proportionality criteria set in *Fountaine Pajot*.

For the moment, in view of the recognition of a US judgment including an award of punitive damages in France, it seems important that the punitive elements do not exceed the compensatory damages, and that the punishment be expressly motivated by serious breaches/torts committed by the debtor. In any event, it is essential to separate the various heads of damages so as to permit a partial enforcement of those which will pass the French recognition test.

Endnotes

1. Cass. civ. 1st, December 1, 2010, *Fountaine Pajot*, appeal N°09-13303. This decision is labeled "P+B+R+I" by the Court of Cassation, which means that it will be in all the Court's official publications and is thus considered as a decision of particular importance and doctrinal value.

2. Cass. civ. 1st, January 7, 1964, *Munzer*, Bull. *1964*, I, N°15.

3. Cass. civ. 1st, October 4, 1967, *Bachir*, Bull. *1967*, I, N°277.

4. Cass. civ. 1st, February 6, 1985, *Simitch*, Bull. *1985*, I, N°55, appeal N°83-11241.

5. Exclusive jurisdiction of the French courts is limited. It exists in cases such as disputes over rights *in rem* in immovable property located in France or concerning the validity of a French patent (comp. Article 22 of EC Regulation N°44/2001 ("Brussels 1 Regulation).

6. The latter condition means that the plaintiff must not have manufactured or "engineered" jurisdiction in order to evade a judgment under French law and effectively corresponds to the fifth condition of the *Munzer* test.

7. Cass. civ. 1st, May 23, 2006, *Prieur*, Bull. 2006, I, N°254, appeal N°04-12777. One year later, in *Fercometal* (Cass. civ. 1st, May 22, 2007, *Fercometal*, Bull. 2007, I, N°195, appeal N°04-147162), the Court of Cassation ruled that Article 14 of the French Civil Code (that allows French citizens and legal persons to seize the French courts) does also not operate as a rule of exclusive jurisdiction of the French courts. As a consequence, a French defendant in foreign proceedings can no longer hinder those proceedings by seizing a French court on the basis of

his or her nationality, and claim that the French court's exclusive jurisdiction should prevail.

8. Cass. civ. 1st, May 22, 2007, *X. v. Fountaine Pajot*, Bull. 2007, I, N°196, appeal N°05-20473.

9. Cass. civ. 1st, February 20, 2007, *Cornelissen*, Bull. 2007, I, n°68, appeal N°05-14.082.

10. CA Poitiers, February 26, 2009, case N°07/02404, Journal du Droit International 2010.1230, commentary by François-Xavier Licari.

11. It should be noted that French courts have the power to moderate or increase the penalty if it is manifestly excessive or derisory as compared to the actual damage (Article 1152 of the Civil Code).

12. Geneviève Viney, "*Quelques propositions de réforme du droit de la responsabilité civile*", D. 2009. Chron. 2944.

13. Cass. civ. 1st, January 28, 2009, *Blech*, Bull. 2009, I, N°15, appeal N°07-11729. ■

Court of Cassation
First Civil Chamber
Public hearing on December 1, 2010
Appeal N° 09-13303
Published in the Bulletin
Dismissal

Mr. Charruault, Presiding Judge
SCP Barthélemy, Matuchansky & Vexliard, SCP Boré & Salve de Bruneton, SCP Delaporte, Briard & Trichets, Attorney(s)

FRENCH REPUBLIC
IN THE NAME OF THE FRENCH PEOPLE

THE COURT OF CASSATION, FIRST CIVIL CHAMBER, has handed down the following judgment:

On the sole argument of the principal appeal, taken in its five branches:

Whereas Mr. and Mrs. X. . . , American citizens living in the United States, have applied for the enforcement in France of a decision handed down on February 26, 2003 by the Superior Court of California (County of Alameda), which ordered the French company Fountaine Pajot to pay them the sum of USD 3,253,734.45, composed of USD 1,391,650.12 for the reconditioning of the ship made by the French company which they had bought for USD 826,009, USD 402,084.33 for attorney fees and USD 1,460,000 by way of punitive damages;

Whereas Mr. and Mrs. X. . . criticize the appellate decision in dispute (Court of Appeal of Poitiers, February 26, 2009), handed down upon referral after cassation (1st Civil Chamber, May 22, 2007, N° 05-20473), for having said that the decision was contrary to substantive international public policy and for having dismissed their enforcement application, whereas, according to the argument:

1°/ a foreign decision ordering a party to pay punitive damages is not, in principle, contrary to substantive international public policy; by taking the opposite view, the Court of Appeal violated Articles 3 and 15 of the Civil Code, Article 509 of the Code of Civil Procedure and the principles governing the enforcement procedure;

2°/ the Court of appeal has expressly noted that the contractual choice of California law is not fraudulent and binds Mr. and Mrs. X. . . as well as Fountaine Pajot; by basing its decision, in order to hold that the judgment of the Superior Court of California (County of Alameda) dated February 26, 2003 is contrary to substantive international public policy, on the terms of Article 74 of the Vienna Convention dated April 11, 1980 on the International Sale of Goods, the Court of Appeal, which has not drawn the legal consequences of its own findings, has violated, by refusing to apply them, Articles 3 and 15 of the Civil Code, Article 509 of the Code of Civil Procedure and the principles governing the enforcement procedure, and, by wrong application, Article 74 of the Vienna Convention;

3°/ in any event, the Vienna Convention dated April 11, 1980 on the International Sale of Goods is not applicable to sales of goods bought for personal or family use, nor to sales of ships; it is not disputed in the present case that Mr. and Mrs. X. . . bought a catamaran for private and family use; by basing its decision on the Vienna Convention in order to hold that the judgment of the Superior Court of California (County of Alameda) dated February 26, 2003 is contrary to substantive international public policy, the Court of Appeal violated by wrong application Articles 25 and 74 of the Vienna Convention dated April 11, 1980 on the International Sale of Goods;

4°/ the control of conformity of a foreign decision with international public policy excludes any review of the decision on the merits; by basing its decision on French tort and contract law in order to hold that the judgment of the Superior

Court of California (County of Alameda) dated February 26, 2003 is contrary to substantive international public policy, the Court of Appeal violated Articles 3 and 15 of the Civil Code, Article 509 of the Code of Civil Procedure and the principles governing the enforcement procedure;

5°/ by affirming that an indemnity granted by a foreign decision to the buyer of a ship, largely exceeding its sale price, is disproportionate insofar as it gives him an unjust enrichment, without trying to establish, as it was asked to do (appeal recapitulative brief notified on December 16, 2008, p. 18ff), if, given the absolute impossibility for Mr. and Mrs. X. . . to use a ship purchased ten years before for a price of USD 690,000 paid in full, the deceitful behavior of Fountaine Pajot, seller and manufacturer of the ship, which concealed the defects affecting it, thereby risking to endanger the life of the buyers and of their children, was finally sentenced therefor and refrained from performing the repairs, the order for the seller to pay an indemnity exceeding the ship's price was not, in fact, justified and therefore proportionate, the Court of Appeal has deprived its decision of any legal basis regarding Articles 3 and 15 of the Civil Code, Article 509 of the Code of Civil Procedure and the principle governing the enforcement procedure;

But whereas if the principle of an award of punitive damages is not, per se, contrary to public policy, it is otherwise when the amount awarded is disproportionate with regard to the damage sustained and the debtor's breach of his contractual obligation; in the present case, the appellate decision notes that the foreign decision awarded to the purchaser, in addition to the reimbursement of the ship's price and of the repair costs, an indemnity which largely exceeds this sum; the Court of Appeal could conclude from that that the amount of damages was manifestly disproportionate with regard to the damage sustained and the breach of the contractual obligations, so that the foreign judgment could not be recognized in France; the argument cannot be upheld.

FOR THESE REASONS, and without having to rule on the possible appeal:
DISMISSES the principal appeal;

Orders Mr. and Mrs. X to pay the Court costs;

Dismisses the claims made pursuant to Article 700 of the Code of Civil Procedure;

So done and judged by the Court of Cassation, First Civil Chamber, and pronounced by the Presiding Judge at its public hearing on December first, two thousand and ten.

The original French version of the decision can be found on the Court of Cassation's website: http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/1090_1_18234.html ■

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