

Recognition and Enforcement of U.S. Judgments in France – Recent Developments

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In the absence of any applicable multi-lateral or bi-lateral treaty, the recognition and enforcement of U.S. court judgments in the French courts is subject to the ordinary French recognition regime. U.S. courts' judgments therefore receive, at least in theory, the same treatment as judgments from the courts of a state where there is no rule of law. Not unsurprisingly, therefore, the American perception often seems to be that judgments of U.S. courts are not welcome when it comes to recognition and enforcement in France.

This paper will try to show that this perception is not (or at least is no longer) true.

Part of the misconception may be due to the fact that the French recognition rules are not easily accessible. Unlike the vast majority of French law, the recognition regime is not codified. It is one of decisional law, constructed year after year by the rulings of the French courts and in particular the Court of Cassation. A study of the French recognition rules therefore requires delving into the somewhat impenetrable decisions of the French courts as well as the often disparate literature on the subject. It is not easy.

This paper will briefly describe how French courts have progressively, but much more rapidly in the last five years, eliminated the traditional nationalistic obstacles to the recognition and enforcement of foreign judgments. Now that these relatively unsophisticated barriers have gone, the French courts have to address the more weighty issue of the reception that can be given in France to Anglo-Saxon institutions such as punitive damages, anti-suit injunctions, or class actions, which were often regarded as alien to, and incompatible with, the French system. As will be shown, the French courts' approach has been far more liberal than generally presumed.

To put recent developments back in their historical context, it should be mentioned that, whilst in France there has never been a condition of "reciprocity" (whereby a foreign judgment would have effect in France only if the foreign jurisdiction gives effect to French decisions), originally, the French practice was for the courts to undertake a substantive review of the merits of the foreign decision (*révision au fond*) before granting it recognition and enforcement.

This practice was definitively abandoned by the Court of Cassation in *Munzer*, in 1964.¹ In this fundamental decision,

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; and (5) the decision must not be a result of *fraude à la loi* (evasion of the law) or fraudulent forum shopping.

Three years after *Munzer*, the Court of Cassation abandoned the second condition, and instead included a procedural dimension in the public policy condition.² The procedural regularity of a foreign decision is now limited to a review as to whether fundamental principles of procedure have objectively been respected.

It was only in 1985 that a further change was made to the *Munzer* conditions, softening the jurisdictional test. Under *Munzer*, the French courts verified whether the foreign court had jurisdiction on the basis of the French law criteria for the jurisdiction of a French court in an international case. In *Simitch*,³ 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, (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. 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.

The *Simitch* jurisdictional test left one major obstacle to be overcome. 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." Article 15 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 voluntary appearance by the French defendant before the foreign court without any challenge of its jurisdiction.

This exorbitant interpretation of Article 15 was much criticized by French legal scholars. Indeed, one suspicion was that it had been maintained purely as a lever to be used in treaty negotiations with the United States. By startling coincidence, just after the failure of the negotiations over the

¹ Cass. Civ. 1st, January 7, 1964, *Munzer*, Bull. 1964, I, n°15.

² Cass. Civ. 1st, October 4, 1967, *Bachir*, Bull. 1967, I, n°277.

³ Cass. Civ. 1st, February 6, 1985, *Simitch*, Bull. 1985, I, n°55, case n°83-11241.

initiative started by the United States of a Hague Convention on Recognition and Enforcement of Foreign Judgments and the adoption of the narrower 2005 Hague Convention on Choice of Court, the Court of Cassation abandoned in 2006 in *Prieur*, its almost 80-year old exorbitant interpretation of Article 15, restoring it as a non-exclusive jurisdictional rule.⁴

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

Less than a year later, in *Cornelissen*, the Court of Cassation abandoned the *Munzer* condition relating to the law applied by the foreign court, ruling that henceforth only three conditions for recognition and enforcement applied:⁵ (1) jurisdiction of the foreign court, (2) conformity with international (procedural and substantive) public policy, and (3) absence of fraud.

Just months after that, another weapon in the armory of French litigants was removed when the Court of Cassation ruled in *Fercometal* that Article 14 of the French Civil Code (that allows French citizens and legal persons to seize the French courts) also does not operate as a rule of exclusive jurisdiction of the French courts.⁶ As a consequence, a French defendant in foreign proceedings can no longer easily hinder the recognition and enforcement of the foreign judgment to be rendered by concurrently seizing a French court on the basis of his nationality.

Now that the easy way for the French courts of refusing recognition of a foreign judgment has been removed, more sophisticated questions will have to be addressed, arising under the jurisdictional test, and under both the procedural and the substantive dimensions of the international public policy prong.

Under the jurisdictional test, their exclusive jurisdiction being limited now that Articles 14 and 15 of the French Civil Code no longer operate as exclusive jurisdiction rules, the French courts will henceforth more frequently have to grapple with the question as to whether the link between the dispute and the foreign court is sufficient to warrant exercise of jurisdiction by the foreign court. Since the ruling in *Simitch* in 1995, this condition has been interpreted liberally, such that if there is no issue of the exclusive jurisdiction of the French courts in the balance, the link can result from one or a number of factual circumstances, considered casuistically. Although

the place of domicile of the respondent is normally considered as a primary ground for jurisdiction (the judge of the respondent's domicile being sometimes called the "natural judge"), other connecting factors (e.g. place of performance in a contractual dispute, place of the damage in a tort claim, habitual residence of either party in family matters, etc.) may warrant jurisdiction of other fora. Connecting factors may be deemed sufficient, even if they do not correspond to any criteria justifying the jurisdiction of the French courts in international cases.

For example, in a recent case in which a U.S. company incorporated in Alabama sought to enforce a judgment rendered by the U.S. District Court for the Northern District of Alabama against a French company, the Court of Appeal of Amiens⁸ considered the following factors as creating a sufficient link between the dispute and the Alabama court: (i) the claimant is incorporated in Alabama, where it also manufactures the products sold and where it received the orders from the French respondent, (ii) the respondent was not a "passive" customer and had entered into business relationship with the claimant, (iii) its representative went to visit the production plant in Alabama to analyze the production process, (iv) part of the deliveries were made ex works, and (v) the contracts in dispute were governed by Alabama law.

In these circumstances, the French court agreed with the Alabama court's "minimum contacts" analysis. However, long-arm claims to jurisdiction based solely on concepts such as "doing business", transitory physical presence or possession of assets on the territory, are unlikely to suffice.

Interestingly, in two recent cases, the Court of Cassation accepted to recognize and enforce U.S. court judgments issued in family matters at the request of one of the spouses, despite the fact that the other spouse had, *before* the start of the U.S. proceedings, initiated proceedings in a competent court in France.⁹ The Court of Cassation did not follow the traditional principle *prior tempore, potior jure*. It only checked that (i) there was a characterized link between the dispute and the U.S. forum (in this respect the fact that the child(ren)'s habitual residence was in the U.S. probably played a decisive role), and that (ii) there was no fraudulent forum shopping—it being clearly specified that the mere fact of bringing an action before the U.S. courts knowing that prior proceedings had been started in France was not considered as "fraudulent." The Court of Cassation's main concern in these two cases was

⁴ Cass. Civ. 1st, May 23, 2006, *Prieur*, Bull. 2006, I, n°254, case n°04-12777.

⁵ Cass. Civ. 1st, February 20, 2007, *Cornelissen*, Bull. 2007, I, n°68, case n°05-14082.

⁶ Cass. Civ. 1st, May 22, 2007, *Fercometal*, Bull. 2007, I, n°195, case n°04-147162.

⁷ Exclusive jurisdiction of the French courts 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 Council Regulation (EC) n°44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation)). It also exists if the parties have agreed to submit to the exclusive jurisdiction of the French courts.

⁸ Court of Appeal of Amiens, May 12, 2011, case n°09/05545.

⁹ Cass. Civ. 1st, September 30, 2009, Bull. 2009, I, n°192, case n°08-18769 and Cass. Civ. 1st, December 16, 2009, Bull. 2009, I, n°251, case n°08-20305.

certainly to avoid the risk of conflicting decisions, particularly unwanted in family matters. It may also have been influenced by the *forum conveniens* theory.

In its procedural dimension, the international public policy prong is likened to American due process. The European Court of Human Rights has confirmed that any court in a contracting state must, when seized with an enforcement action, verify that due process has been respected, even if the foreign court is in a non-contracting state.¹⁰ The verification must be made *in concreto*, such that defendants to the enforcement action must show that their interests have been “objectively compromised by a violation of fundamental principles of procedure.”¹¹ For example, a very short notice to appear does not in itself violate due process if, in fact, the defendant was relieved from default and was allowed to present its case.¹² Similarly, whereas it is a fundamental principle of procedure that judgments must be motivated, the lack of motivation of a foreign judgment itself can be remedied if “equivalent” documents can be produced, such as a hearing transcript, making it possible to know the foreign judge’s reasoning.¹³

U.S. default judgments may pose problems. If a defendant simply fails to appear, service of process having been proven to have been validly effected, a resulting foreign default judgment should be enforceable in France, no objective violation of the defendant’s procedural rights having occurred.¹⁴ Likewise, the French courts have enforced foreign default judgments rendered as a sanction to a procedural default by a defendant in the course of the foreign proceedings where there is no evidence of such default resulting from a deprivation of procedural rights.¹⁵ It may be that the French courts will place weight upon the nature of the procedural obligation sanctioned by default by the foreign court. Sanctions for failure to comply with an English *Mareva* injunction with its inherent safeguards has been recognized and enforced.¹⁶ Failure to comply in full with wide-ranging and intrusive U.S. discovery orders may on the other hand not be considered as justifying sanction by way of default, particularly if compliance with the discovery order implies violation of the French blocking statute.¹⁷

Anti-suit injunctions may also be problematic. This is not because of the “non-final” nature of the injunction (which is not a pre-condition to the recognition of judgments under

French law) but because of the risks of infringement on sovereignty, comity, etc. that are associated with this type of injunction. The French courts have, however, recently considered the question and did so in favor of recognition in a case where the anti-suit injunction had been ordered effectively to sanction a breach by the French party of a contractual choice of court clause in favor of the courts of the State of Georgia. The Court of Cassation ruled that an anti-suit injunction is not contrary to international public policy where its purpose is only to punish a breach of a pre-existing contractual obligation.¹⁸

Financial and other procedural penalties sanctioning contempt of court raise an issue as to their characterization under French law. The question is whether they should be regarded as criminal in nature and thus not enforceable as money judgments or as civil sanctions subject to the recognition regime applicable to civil and commercial matters. In *SEC v. Credit Bancorp Ltd* the receiver appointed by the U.S. District Court of the Southern District of New York, Mr. Loewenson, obtained an order for pecuniary sanctions against Credit Bancorp’s CEO, Mr. Blech, a U.S. citizen, for failure to cooperate in the liquidation process and the tracing of diverted assets as he had been enjoined to do by a previous court order. Mr. Blech was found to be in contempt of court. The liquidator sought to enforce the penalty of more than US\$13 million in France. The Court of Cassation ruled, without elaborating its reasons why, that the financial penalty sanctioning the non-compliance with a foreign court’s injunction was of a civil 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.¹⁹

The Court of Cassation’s reliance upon the proportionality principle announced the position it would take with respect to another demonized U.S. institution: punitive damages awards. The Court of Cassation issued its first decision on this subject on December 1, 2010 in *Fontaine Pajot*,²⁰ holding 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.”

¹⁰ ECHR, July 20, 2001, *Pelligrini v. Italy*, application n°30882/96.

¹¹ Cass. Civ. 1st, September 19, 2007, *Bureau Veritas*, Bull. 2007, I, n°297, case n°06-17096.

¹² Court of Appeal of Amiens, May 12, 2011, case n°09/05545.

¹³ Court of Appeal of Poitiers, February 26, 2009, case n°07/02404.

¹⁴ Cass. Civ. 1st, January 23, 2008, *Cunningham*, Bull. 2008, III, n°11, case n°07-11768.

¹⁵ Cass. Civ. 1st, June 30, 2004, *Stolzenberg*, Bull. 2004, I, n°191, case n°01-03248/01-15452.

¹⁶ *Ibid.*

¹⁷ Law n°80-538 of July 16, 1980 (J.O. July 17, 1980).

¹⁸ Cass. Civ. 1st, October 14, 2009, *In Zone Brands*, Bull. 2009, I, n°207, case n°08-16369/08-16549.

¹⁹ Cass. Civ. 1st, January 28, 2009, *Loewenson*, Bull. 2009, I, n°15, case n°07-11729.

²⁰ Cass. Civ. 1st, December 1, 2010, *Fontaine Pajot*, Bull. 2010, I, case n°09-13303.

The dispute in this case involved an American couple residing in the U.S. who had purchased for their personal use a catamaran manufactured by the French shipping company called Fountaine Pajot. The buyers filed suit in California, 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 U.S. plaintiffs then started a long battle to try and enforce the U.S. judgment against Fountaine Pajot in France.²¹ In 2009, the Court of Appeal of Poitiers considered that the award of punitive damages in addition to compensatory damages was contrary to the French notion of substantive international public policy.²²

The Court of Cassation departed from the appellate decision on this point and held, in its 2010 decision that a foreign punitive damages award is not *per se* contrary to the French notion of international public policy. This position is actually not really surprising, as the French legal system is not entirely impermeable to the idea that damages may have a deterrent function in addition to their 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.²³ 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 the other party for non-compliance with a court order. There are also proposals to introduce punitive damages in French domestic law.²⁴

For the U.S. plaintiffs in *Fountaine Pajot*, however, knowing that punitive damages are not *per se* contrary to the French notion of international public policy will be of little relief. The Court of Cassation indeed added that this principle does not apply when the punitive damages award is "disproportionate." To measure the "proportionality," the Court of Cassation referred to "the damage suffered" and "the breach of the debtor's contractual obligations,"²⁵ and it seemed convinced that the amount awarded as punitive damages (US\$1.46 million) "largely exceeded" the amount awarded as compensatory damages (US\$1.39 million) and was therefore "disproportionate."

The U.S. plaintiffs should, however, be able to obtain a partial enforcement, of only the non-punitive elements of the damages awarded by the U.S. judgment. Such a partial exequatur is indeed possible in France when the foreign judgment clearly separates 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.

The recognition and enforcement in France of U.S. class action judgments has given rise to interesting debates on both sides of the Atlantic. Judges of the U.S. District Court of the Southern District of New York recently tackled the subject in order to determine whether there was a probability that the judgment of a U.S. Court in class action proceedings would be recognized to have a preclusive effect by French courts. On March 22, 2007, Judge Holwell in *Vivendi*²⁶ ruled, on his assessment of the abundant and disparate expert evidence on French law that had been adduced before him, that there was a probability that this type of judgment would be recognized and enforced by a French court. He found in particular that an opt-out class judgment would not offend French concepts of international public policy. The opposite view was adopted by Judge Marrero in *Alstom*²⁷ and was also expressed in the *amicus curiae* brief filed on February 26, 2010 by the French government before the U.S. Supreme Court in *Morrison v. National Australia Bank*.

²¹ Initially, the Californian judgment was denied recognition by the French courts on the basis of the jurisdictional privilege founded on the French nationality of the defendant, which was then still derived from Article 15 of the French Civil Code. On May 22, 2007, the Court of Cassation overturned this solution (Cass. Civ. 1st, May 22, 2007, Bull. 2007, I, n°196, case n°05-20473), confirming the interpretation of Article 15 it had given in *Prieur* one year before (see above, foot note 4), when Article 15 was restored as an optional jurisdictional rule. The matter was then remanded before the Court of Appeal of Poitiers for it to rule again on the recognition and enforcement of the Californian judgment.

²² Court of Appeal of Poitiers, February 26, 2009, case n°07/12404. To justify the exclusion of punitive damages the Court of Appeal relied *inter alia* 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 wrongdoer's actions.

²³ 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).

²⁴ "Avant-projet de réforme du droit des obligations et du droit de la prescription," September 22, 2005, elaborated by a commission appointed by the French Ministry of Justice and presided by Professor Pierre Catala (see Article 1371).

²⁵ The reference to "the breach of the debtor's contractual obligations" does not seem entirely appropriate, as the punitive damages awarded by the U.S. court were probably linked to Fountaine Pajot's fraudulent conduct rather than to its breach of contract.

²⁶ *Vivendi Universal, S.A. Securities Litigation*, 242 F.R.D. 76 (S.D.N.Y., May 21, 2007).

²⁷ *Alstom SA Securities Litigation*, 253 F.R.D. 266 (S.D.N.Y., 26 August, 2008).

The French courts however, may not share the government's view, as shown by a judgment issued on April 28, 2010 by the Paris Court of Appeal in *Vivendi*.²⁸ Vivendi argued that there had been an abuse of forum shopping in that the French plaintiffs in the U.S. class action had been seeking relief that was not enforceable in France concerning a dispute for which the French courts were the natural forum. Vivendi sought an award of compensatory damages and an anti-suit injunction. The Court of Appeal dismissed Vivendi's action. It rejected Vivendi's claim that the action should have been brought before the French courts on the grounds that French courts, although a competent forum, enjoyed no superiority over any other such forum. The Court further noted that "characterized" links existed between the dispute and the U.S. forum, so that it could not be said that the plaintiff's choice of a U.S. forum was inappropriate or fraudulent. Regarding the alleged incompatibility of the U.S. opt-out class action mechanism with French public policy, the Court of Appeal held that the issue could only be assessed *in concreto*, if and when the U.S. class action judgment were brought before a French court for recognition and enforcement. This holding can be understood as an indication that, for the Court of Appeal of Paris, an opt-out class action judgment is not *per se* contrary to the French concept of international public policy.²⁹

Substantive international public policy comes more often into play in family matters than in commercial matters, but even there, a degree of liberalization can be noted.

An important decision regarding the adoption by a couple of homosexuals (which is not permitted under French domestic law) was issued by the Court of Cassation on July 8, 2010.³⁰ The case involved the recognition and enforcement in France of a judgment of a state court in Georgia pronouncing the adoption by the mother's "domestic partner," another woman, of a child conceived through anonymous sperm donation and ordering shared parental responsibilities of both women for the child. The Court of Cassation accepted to give effect to this judgment in France and took this opportunity to redefine the scope of the French concept of international public policy as being confined to "the essential principles of French law."

Based on such principles, the Court of Cassation refused on November 4, 2010, to recognize a divorce judgment issued by a state court in Texas giving to the mother alone the right to make decisions regarding the children and their enrollment with the U.S. Army and enjoining the father from spending time with the children in the presence of his "mistress" unless he married her. Not unsurprisingly, this judgment was deemed contrary to "essential principles of French law" regarding privacy and equality between parents in the exercise of parental responsibility.

Perhaps more controversial are three decisions issued on April 6, 2011, by which the Court of Cassation refused to recognize any effect in France to surrogate motherhood arrangements validly entered into in the U.S. and to U.S. court decisions legalizing such arrangements and their consequences.³¹ The Court of Cassation held that surrogacy arrangements are contrary to the essential principle of French law relating to the unavailability of personal status (*l'indisponibilité de l'état des personnes*).

If one excludes the last example which involves a highly debated social and ethical issue, the above overview of recent French decisional law shows that the conditions for the recognition and enforcement of foreign judgments in France have not only been reduced to the strict minimum (jurisdiction test, public policy test, absence of fraud test), but are also interpreted in a quite liberal way, allowing foreign institutions which have traditionally been seen as alien to the French system to develop their effects in France. In view of the most recent developments, it may be said that the French "common law" recognition regime, applicable in particular with respect to U.S. judgments, is not fundamentally different from that prevailing among the member states of the European Union, and is clearly more favorable than that established by many bilateral treaties in force between France and other countries. ■

²⁸ Court of Appeal of Paris, April 28, 2010, case n°10/01643 *Vivendi v. Gérard, Morel and ADAM*.

²⁹ The U.S. Supreme Court's decision in *Morrison v. National Australia Bank*, 130 S.Ct. 2869 (2010), has significantly reduced the scope of transnational securities class actions and the U.S. post-*Morrison* decision in *Vivendi*, 2011 WL 590915 (S.D.N.Y.) (Feb. 17, 2011) dismissed the claims brought by investors who purchased Vivendi's shares on foreign exchanges. As a result, the French courts may not have the occasion in the near future to confirm the Paris Court of Appeal's open-mindedness in actually grappling with the issue of whether a U.S. judgment in a U.S. opt-out class action can be given preclusive effect in France.

³⁰ Cass. Civ. 1st, July 8, 2010, Bull. 2010, I, n°162, case n°08-21740.

³¹ Cass. Civ. 1st, April 6, 2011, case n°09-17130 – Cass. Civ. 1st, April 6, 2011, case n°09-66486 – Cass. Civ. 1st, April 6, 2011, case n°10-19053.