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# Applicable requirements for the service of judicial documents within the European Union wherever the defendant does not appear at court

## Bringing a legal action against a person domiciled in another Member State of the European Union requires compliance with a whole series of European and national provisions relating to the international service of judicial documents.

## In a decision handed down on April 11, 2019[1], the *Cour de Cassation*(French Supreme Court) specified the requirements for the international service of a writ of summons when the defendant does not appear before the French court to which the case has been brought.

In order to bring a case before a French court against a person domiciled abroad, it is necessary to comply with specific procedural rules relating to the international transmission of judicial documents. These rules are intended to facilitate the service of documents between the parties across borders and the coordination of State authorities to this end.

One of the main objectives of these various rules is to ensure, despite international constraints, that a person sued before a foreign court can be duly informed of the action brought against him/her and that he/she be given a reasonable time to prepare his/her defense.

Compliance with these provisions is particularly important for the writ of summons. It is indeed through this document that the person is informed of the very existence of an action against him/her.

However, the geographical distance between the parties often implies a significant risk of not appearing at the trial. But what if the defendant does not appear? How can we ensure that the latter has been informed of the

proceedings? Can the trial continue despite his/her absence?

*Applicable provisions*

Wherever the person is domiciled in another Member State of the European Union, Regulation (EC) No 1393/2007 of the European Parliament and of the Council of November 13, 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (the "*Regulation*") applies.

This text sets out rules for the service of documents between the authorities of the country of dispatch (called "*transmitting agencies*") and the authorities of the recipient country (called "*receiving agencies*").

In France, the transmitting agencies are court clerks and bailiffs while the receiving agencies are only the bailiffs. In Spain, the transmitting agencies are also the bailiffs while the receiving agencies are courts called "*Juzgado*decano".[2]

Article 19 of the Regulation addresses the issue of defendants not entering an appearance. It stipulates as follows:

*"Where a writ of summons or an equivalent document has had to be transmitted to another Member State for the purpose of service under the provisions of this Regulation and the defendant has not appeared, judgment shall not be given until it is established that:*

*a) the document was served by a method prescribed by the internal law of the Member State addressed for the service of documents in domestic actions upon persons who are within its territory; or*

*b) the document was actually delivered to the defendant or to his residence by another method provided for by this Regulation*[3];

*and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend."*

Article 688 of the French Code of Civil Procedure on the service of documents in foreign countries also specifies that:

*"If it is not established that the addressee of a document has become aware of it in due time, the judge hearing the case may rule on the merits only if the following conditions are met:*

*1° The document has been transmitted in accordance with the methods provided for in the applicable Community regulations or international treaties, or in the absence thereof, in accordance with the requirements set forth in Articles 684 to 687;*

*2° A period of at least six months has elapsed since the document was sent;*

*3° No proof of service of the document could be obtained notwithstanding the steps taken with the competent authorities of the State where the document is to be served*".

Finally, Article 479 of the French Code of Civil Procedure reads as follows: "*The judgement by default or the judgement in absentia regarded as adversarial against a party residing abroad must expressly specify the efforts made to inform the defendant of the writ of summons*".

As such, according to the above-mentioned provisions, the defendant not entering an appearance benefits from a number of procedural safeguards. In order for the proceedings to continue in his/her absence, it is necessary to demonstrate, in absence of proof of delivery, that service of the document was actually effected in accordance with the procedures laid down in Regulation (EC) No 1393/2007 and the rules of the recipient country. All this must, of course, have been achieved within a sufficient period of time.

In the absence of these elements, the trial cannot continue as it stands and the court hearing the dispute must stay the proceedings.

*The decision of the Cour de Cassation*

In a decision handed down on April 11, 2019, the *Cour de Cassation*made a combined application of the provisions of the Regulation and the French Code of Civil Procedure. It thus clarified the requirements for serving a writ of summons within the European Union to be met in the event of the defendant's failure to appear at court.

In this specific case, a company had brought proceedings against another company in France to seek the rescission of sales contracts. A third company was called into the dispute as third-party defendant, and the defendant's insurer voluntarily joined the proceedings. A judgment had initially ruled that the plaintiff's claims were inadmissible. This judgment, reversed on appeal, was finally confirmed by the *Cour de Cassation*which remanded the case to another Court of Appeals.

The plaintiff then brought the case before the remanding Court of Appeals by way of a declaration to the clerk, in accordance with Article 1032 of the French Code of Civil Procedure[4].

At this stage of the proceedings, the third company initially called into the dispute had been replaced by an Italian company. It was therefore necessary to have this company notified in Italy of the declaration made to the clerk, a document which serves as a writ of summons to initiate proceedings before a Court of Appeals to which a case had been remanded.

The Court of Appeals, after clarifying that the declaration had been transmitted to the Italian company by the defendant's insurer, condemned the Italian company for failing to appear and to appoint a lawyer.

An appeal was then lodged before the *Cour de Cassation*to challenge the procedures for the international service of the declaration to the Italian company.

Could the Italian company be condemned despite its failure to appear in court?

In order to answer this question, the *Cour de Cassation*explained that:

*"Having regard to Articles 7 and 19 of Regulation (EC) No 1393/2007 of the European Parliament and of the Council of November 13, 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, together with Articles 479 and 688 of the French Code of Civil Procedure;*

*Whereas, according to the first of these texts, where a document is transmitted from a Member State for service to a person residing in another Member State of the European Union, the receiving agency of that Member State shall effect such service or have it effected; it results from the combination of the second and fourth of these texts that where the transmission concerns a writ of summons or an equivalent document and the defendant does not enter appearance, the French judicial judge may only adjudicate the case after having ascertained either that the document has been served in a manner prescribed by the law of the Member State where such document was supposed to be served, that the document has been transmitted according to one of the methods provided for in the Regulation, that a period of at least six months has elapsed since the date of dispatch of the document and that no certificate of transmission has been obtained notwithstanding all the steps taken with the competent authorities or entities of the Member State; pursuant to the third of these texts, the judgment must expressly acknowledge the steps taken to inform the defendant of the document."*

The *Cour de Cassation* thus makes a combined application of the provisions of the Regulation and the French Code of Civil Procedure in order to determine the requirements for the international service of documents in case a defendant domiciled in another Member State of the European Union fails to appear at court.

Continuing its reasoning, it reversed the judgment of the Court of Appeals, considering that it had not been established that the requirements for international service to the Italian company had been met.

It pointed out that the Court of Appeals should have ensured that the service of the declaration to the Italian company had been certified by the Italian authorities or, failing that, that it should have specified the procedures followed for transmitting the document and the steps taken by the Italian authorities to obtain that certificate.

The *Cour de Cassation* thus offers a solution that reconciles, in such a case, the interests of the plaintiff and those of the defendant. Indeed, the plaintiff who has carried out all the necessary steps to serve the defendant with a document may have his case heard and adjudicated by the court to which the matter had been brought despite the defendant's failure to appear. In parallel, minimum procedural requirements for international service of documents ensure that every effort has been made to inform the defendant in due time.

*Practical conclusions*

To ensure the continuation of a trial before French courts wherever a defendant domiciled in another Member State of the European Union does not enter an appearance, it is therefore necessary to make sure that the following requirements are met:

- the writ of summons has been served either in accordance with a method prescribed by the law of the recipient Member State or in accordance with another method provided for in the Regulation;
- a period of at least six months has elapsed since the writ of summons was sent;
- no certificate of transmission could be obtained despite the steps taken with the competent agencies.

Finally, the judge to whom the matter has been brought must expressly specify the steps which have been taken to inform the defendant.

In any event, the plaintiff wishing to bring an action against a defendant domiciled abroad must therefore allow a sufficient period of time between the sending of the writ of summons and the convening before the court to which the matter has been brought – a period which is necessarily longer than in a purely domestic procedure – allowing the defendant to be informed and granting him sufficient time to prepare his defense.

It should be recalled in this respect that Article 643 of the French Code of Civil Procedure increases the time limits for the appearance of persons domiciled abroad by an additional period of two months.

Once these requirements are met, the defendant may then be sentenced by the French court despite his/her failure to enter an appearance.

Such a possibility is not negligible insofar as the conditions for the recognition and enforcement of judgments in civil and commercial matters within the European Union are now greatly facilitated by Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (called Brussels I Regulation Recast).

A judgment issued by a French court against a defendant residing in another Member State of the European Union may therefore perfectly be enforced directly in the defendant's State, even if the defendant has not appeared at court proceedings in France.

*Additional recommendations*

Several additional factors must be taken into account when considering the service of a judicial document in another Member State of the European Union.

First, a translation of the document may be required. Indeed, Article 5 of the Regulation stipulates as follows:

*"The applicant shall be advised by the transmitting agency to which he forwards the document for transmission that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8".*

Pursuant to Article 8 of said Regulation:

*"The receiving agency shall inform the addressee, using the standard form set out in Annex II, that he may refuse to accept the document to be served at the time of service or by returning the document to the receiving agency within one week if it is not written in, or accompanied by a translation into, either of the*

*following languages:*

*a) a language which the addressee understands; or*

*b) the official language of the Member State addressed or, if there are several official languages in that Member State, the official language or one of the official languages of the place where service is to be effected.*

A translation of the transmitted documents into the target language is therefore necessary, unless the addressee understands French.

Lastly, a recent Decree dated May 3, 2019[5]has created a new Article 687-2 in the French Code of Civil Procedure. This new Article concerns the service of documents in foreign countries and specifies as follows:

*"The date of service of a judicial or extrajudicial document in a foreign country shall, without prejudice to the provisions of Article 687-1, in respect of the person to whom it is made, be the date on which the document is delivered to him/her or validly served.*

*Where the document could not be delivered or served to its addressee, the service shall be deemed to have been effected on the date on which the competent foreign authority or the French consular or diplomatic representative attempted to deliver or serve the document, or, where that date is not known, the date on which one of these authorities notified the French transmitting agency that it was impossible to serve the document.*

*Where no certificate describing the completion of the request has been obtained from the competent foreign authorities, notwithstanding the steps taken with them, the service shall be deemed to have been effected on the date on which the document was sent to them*".

It is therefore necessary to remain vigilant about the calculation of time limits, which may vary according to the circumstances of the service in the foreign country.

[1]2nd Civil Chamber of the *Cour de Cassation*, April 11, 2019, n°17-31497

[2]The complete list of transmitting agencies and receiving agencies in each Member state can be consulted on the European e-Justice Portal : https://e-justice.europa.eu/content_serving_documents-373-en.do.

[3]The other means of transmission and service of judicial documents are as follows: transmission by consular or diplomatic channels, service by postal services or direct service by the transmitting entity.

[4]Pursuant to Article 1032 of the French Code of Civil Procedure, "*The matter will be brought to the court to which it has been remanded by way of a declaration to the clerk's office of that court*".

[5]Decree n°2019-402, May 3, 2019, published in the official journal of May 4, 2019

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