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Recognition and enforcement of a US decision in France: The defendant's disinterest in the American proceedings can be costly

In a decision dated September 16, 2020, the *Cour de Cassation* (French Supreme Court) ruled on the conformity of California law with French international procedural public policy. By the combined application of several California procedural rules, a French defendant had been deprived of a remedy. The *Cour de Cassation*, asked to rule in the context of the procedure for the recognition and enforcements of the American judgment, nevertheless considered that there was no violation of French international public policy.

Analysis of a decision with surprising implications.

Background

The American company Paragon, a distributor of computer software, and the French company XT Soft, an IT consulting firm, were business partners.

They had been bound since 1996 under a license agreement covering the marketing and distribution of computer products.

A dispute arose concerning the amount of royalties owed by XT Soft (which apparently remained unpaid).

Pursuant to the jurisdiction clause set forth in the license agreement, Paragon initiated proceedings against XT Soft before the District Court of California and sought the payment of various amounts.

The summons was duly served upon XT Soft in France, but XT Soft chose not to join the American proceedings and the District Court of California therefore entered a default judgment in favor of Paragon on September 22, 2014.

XT Soft was ordered to pay USD 502,391.15 by the American court.

According to California law, XT Soft then had one year from the **date of the decision** to appeal (and not – an important nuance – from the service of this decision, as in France).

Paragon, in a both skillful and unfair approach, did not notify XT Soft of the decision within the one-year period.

The time-limit for lodging an appeal therefore expired and XT Soft's right to appeal lapsed.

Thereafter, on March 16, 2016, Paragon sued XT Soft before French courts in order to obtain the recognition and enforcement of the American judgment.

But … the French trial judges did not hear it this way. On January 25, 2019, the Versailles Court of Appeals dismissed Paragon's request for the recognition and enforcement of the American judgment.

The reason? Non-compliance with international procedural public policy.

Brief reminder of the conditions governing the recognition and enforcement of foreign judgments in France

Before going any further, a brief reminder of the rules applicable to the recognition and enforcement of foreign judgments (also known as *exequatur* proceedings) under French law.

Exequatur is the decision by which the competent French court authorizes the enforcement in France of a foreign judgment or legal instrument[1].

Indeed, in the absence of an international convention (as is the case between France and the United States of America), foreign judgments can only be enforced on the French territory under specific legal conditions[2], i.e. they must have been declared enforceable by a French judge[3].

To grant enforcement, the French judge does not "retry" the case but only ascertains that a series of requirements, established by case law, are met.

French case law has set out three cumulative requirements[4]:

- The indirect jurisdiction of the foreign judge based on the connection of the dispute with the court before which the matter was brought;
- Compliance with international substantive and procedural public policy;
- The absence of fraud.

In the dispute between Paragon and XT Soft, the main question for the French judge was whether there had been a breach of international procedural public policy.

On this point, the *Cour de cassation* has already held that a foreign decision may only be considered contrary to international procedural public policy if it is established that the interests of a party have been effectively compromised by a violation of fundamental procedural principles[5].

Concerning the case at hand, is California law contrary to international procedural public policy, which would justify a decision to deny enforcement?

For the trial judges, this was indeed the case. The Versailles Court of Appeals, in its decision of January 25, 2019, thus considered that "*the absence of a legal requirement of due and proper notification combined with the fact that the time limit for appeal runs from the time the judgment is entered is such as to deprive the defendant of any effective remedy and this absence of procedural guarantee contravenes the right to a fair trial and the right to effective remedy guaranteed by Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms*"[6].

In its decision dated September 16, 2020, the *Cour de cassation* did not follow this line of reasoning.

The decision issued by the Cour de Cassation on September 16, 2020

It is true that the situation was quite unique.

The fact that, on the one hand, California law makes the time limit for appeal run from the date of the decision (and not from the date of its notification) and, on the other hand, the fact that notification is not mandatory led to a problematic situation for XT Soft, which was ultimately deprived of the possibility of exercising a right of appeal.

Seen from this perspective, there was indeed a problem in terms of the rights of the defense and the right to a fair trial.

However, the *Cour de Cassation* took a different view.

While it is true that XT Soft was deprived of a right of appeal, due to Paragon's skillful use of California law, the *Cour de Cassation* nonetheless held that "*the American decisions could not reveal a breach of international procedural public policy*" and that there was no evidence of an infringement of XT Soft's rights to a fair trial and effective remedy insofar as XT Soft **was aware of the summons and the proceedings before the California court**.

By ruling so, the *Cour de Cassation* made a particularly flexible assessment of international procedural public policy since it finally considers that a foreign law that "may" infringe the rights of the defense in certain situations remains consistent with international procedural public policy if it does not actually infringe them.

It had already adopted such an approach when, for example, it considered that failure to mention the available

remedies upon the service of the foreign judgment was not contrary to procedural public policy insofar as the defendant was aware that proceedings had been initiated before a foreign court[7].

It eventually sanctioned in veiled terms the disinterest of the litigant in the foreign proceedings. If it had been interested – even slightly – in the proceedings in the United States, it could have appealed in due time.

But is this certain? There is nothing to say for sure.

In the end, whatever the *Cour de Cassation* may say, California law leads to real legal uncertainty.

In the case at hand, this is tantamount to validating the unfair procedural tactics of the opposing party, which remains questionable to say the least…

In conclusion, do not believe that you are protected from proceedings brought against you abroad. And if you do not wish to join in, be sure to check as soon as possible the possibilities and deadlines for appeal available to you (so as not to be trapped like XT Soft).

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[1] Fasc. Lexis 360, EXEQUATUR – *Reconnaissance et exécution des jugements et actes étrangers* – February 15, 2010, Paul Laroche de Roussane

[2] Article 509 of the French Code of Civil Procedure

[3] Article L111-3 of the French Code of Civil Enforcement Procedures

[4] Munzer decision, 1st Civil Chamber of the *Cour de Cassation*, January 7, 1964; Bachir decision, 1st Civil Chamber of the *Cour de Cassation*, October 4, 1967; Cornelissen decision, 1st Civil Chamber of the *Cour de Cassation*, February 20, 2007)

[5] 1st Civil Chamber of the *Cour de Cassation*, September 19, 2007

[6] 1st Civil Chamber of the *Cour de Cassation*, September 16, 2020, n°19-11.621

[7] 1st Civil Chamber of the *Cour de Cassation*, November 29, 1994

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