

## **French International Case-law**

### **From 1<sup>st</sup> April 2016 to 31 March 2017**

The aim of this chronicle is to provide a brief, yet revealing overview of French case law in international matters. The list of decisions reported here is not exhaustive; we have decided to select only the most significant decisions rendered by French courts in a time-period of one year in order to offer insightful materials to English speaking scholars and practitioners.

Some explanations are also provided about how French courts apply private international law as well as public international law, including international arbitration and law of sovereign immunities. The absence of significant developments on a specific topic is signaled by the following sign: (...).

To facilitate discussion, we have organized the case-law into key themes which articulate around two main topics: *Procedural issues* (I) and *Substantive issues* (II). The first part of this chronicle, “*Procedural issues*”, covers a large area of questions, from rules on jurisdiction to incidents of procedure; it also includes international arbitration and sovereign immunities. The second part, “*Substantive Issues*” deals with the application of substantive international law provisions by French courts. Both public and private international law are concerned, but special attention is paid to case-law related to conflict of laws rules, either national or derived from European instruments.

Authors are all PhD candidates or PhDs from French universities.

Any feedbacks or comments are very welcomed at the following e-mail address: [rdiassas@gmail.com](mailto:rdiassas@gmail.com).

## **I- PROCEDURAL ISSUES**

Procedural issues occur in front of French judges in three situations: traditionally each time a French judge will be seized to hear a case related to an international situation, which we have called cases in Judiciary (A). Two specific situations have been distinguished, the first one relates to French judges’ solutions in international arbitration issues (B), and the second one is about the specific case-law related to sovereign immunities issues (C).

### *A. Cases in Judiciary*

Two main questions have to be addressed when analyzing procedural issues that appear when an international case is brought before French judges. The first one concerns the rules determining jurisdiction of French courts over disputes arising out of an international

relationship (1) and includes situations when other foreign judges have been seized at the same time are also dealt with (2). The second question concentrates on the recognition and enforcement of foreign judgements in France (3).

## 1. Jurisdiction

Rules that determine if a French judge has jurisdiction to hear a particular case can derive from an international or a European instrument (b), or, in the absence of both, from its national rules (a).

### *a. National rules on jurisdiction*

No significant caselaw applying national rules on jurisdiction was rendered this year, with the exception of the decision discussed below and related to French criminal courts' power to hear a case on defamatory contents accessible on the internet.

**Jurisdiction of French criminal courts over defamatory contents accessible on the internet.** French criminal courts have jurisdiction over « criminal offenses committed within the territory of the Republic » (art. L 113-2, Criminal Code). Applying this rule to online offenses, including to online libel issues, has long been an issue. In this decision (**Crim., 12 July 2016, n° 15-86.645**), the Criminal Chamber of the *Cour de Cassation* held that the simple online accessibility from French territory to a defamatory content is not sufficient to establish that the offense has been committed within the French territory and, therefore, that the dispute falls within French criminal courts jurisdiction.

In the present case, the victims were both Japanese nationals domiciled in Japan, and the defendant, a South African national, had published the alleged defamatory statements in English on a website hosted in the United States. It is now well established by French case-law that claimants have to show that the content is « directed towards the French public » (for a libel case: *Crim.*, 9 September 2008, n° 07-87.281; for a copyright infringement case: *Crim.* 14 December 2010, n° 10-80.088) for French criminal courts to have jurisdiction over the dispute. Obviously, there was no reason in this case to consider that the statements were directed to the French public. Therefore, French criminal courts had rightfully refused to hear the case.

This ruling is a good illustration of how the *Cour de cassation* exercises judicial review to avoid French criminal courts from having universal jurisdiction over online offenses.

This solution might however be subject to some change in the future. The French parliament has recently enacted a special rule regarding online offenses (**Law n° 2016-731, 3 June 2016**). A new article L. 113-2-1 of the Criminal Code creates a legal fiction according to which, provided that the victim of an online offense is a French resident, the offense is deemed perpetrated within the French territory. This new provision regrettably creates a privilege of jurisdiction for the French residents who are not required to establish that the

website or its content is directed to the French public anymore. In our case, both the victims, domiciled in Japan, would have been deprived of such privilege. Moreover, the scope of this questionable rule could go beyond criminal offenses since the Brussels 1 *bis* Regulation provides that « an action for damages ... based on an offense » can be brought before the « court seized of the [criminal] proceedings » (art. 7-3).

Basile Darmois

*b. Uniform European Rules on Jurisdiction*

Several European instruments indicate uniform rules on jurisdiction that are binding for French judges and therefore will apply when the case's matter falls within the domains of these regulations in their three elements: subject-matter or material scope, temporal scope; and their relationship with other legal instruments. Further, the ECJ decisions that interpret those instruments are binding for French courts.

Those main EU instruments are, the Brussels I Regulation Recast (or *bis*)<sup>1</sup> that has recently replaced the Brussels I Regulation<sup>2</sup> (replacing itself the 1968 Brussels Convention<sup>3</sup>) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; the Brussels IIa Regulation (or *bis*)<sup>4</sup> concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Some more recent EU private international regulation provide both for conflict of laws and conflict of jurisdictions as well as recognition of foreign decisions rules

---

<sup>1</sup> Brussels I Regulation Recast (or *bis*), Regulation (EU) n° 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32012R1215>.

<sup>2</sup> Brussels I Regulation, Council Regulation (EC) n° 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001R0044>.

<sup>3</sup> Brussels Convention, Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels on 27 September 1968, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41968A0927\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:41968A0927(01)).

<sup>4</sup> Regulation Brussels IIa (or *bis*), Council Regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) n° 1347/2000, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R2201>.

in fields that were governed by national rules until recently (for instance, on matrimonial property regimes<sup>5</sup>, successions<sup>6</sup> or the property consequences of registered partnerships<sup>7</sup>).

i) **Rules allocating jurisdiction in the absence of choice of court**

- Defendant to be sued in the country of domicile (general jurisdiction under article 2 of the Brussels I Regulation)

**Persons to be sued in the country of domicile, domicile of a company, articles 2 and 60 of the Brussels I Regulation.** In two recent decisions (Civ. 1e, 19 October 2016, n° 15-25.864 and Civ. 1e, 22 February 2017, n° 16-12.408) the First Civil Chamber of the French *Cour de Cassation* considered the notion of ‘principal place of business’ of a company for the purposes of Brussels I Regulation.

In both cases the claimants brought proceedings before the French courts against the two defendants, *Air Canada*, a Canadian airline company, and *Air Algérie*, an Algerian airline company, on the basis that these companies “principal place of business” within the meaning of Article 60 of the Brussels I Regulation was located in France. If that were indeed the case, French courts would have general jurisdiction under Article 2 of Brussels I Regulation.

The facts giving rise to the litigation were similar. The claimants, domiciled in France, were passengers who purchased their tickets from two airline companies: the first ticket for a flight Lyon-Tlemcen was provided for by *Air Algérie*; the second one for a flight Genève-Montréal by *Air Canada*. In both cases claimants were seeking compensation for delays of their flights on the basis of Article 7 of the Regulation 261/2004. The main issue raised before the French *Cour de cassation* was whether the defendants, *Air Algérie* and *Air Canada*, have their “principal place of business” in France, as the claimants contended and whether Brussels I Regulation provisions applied such as to establish French court’s jurisdiction.

---

<sup>5</sup> Matrimonial property regimes Regulation, Council Regulation (EU) n° 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016R1103>.

<sup>6</sup> Regulation on Successions, Regulation (EU) n°650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32012R0650>.

<sup>7</sup> Council Regulation (EU) n° 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1104>.

In both cases, lower courts considered that the principal place of business of the defendants within the meaning of Article 60 of the Brussels I Regulation was indeed located in France (more precisely in Paris). The defendants appealed (*pourvoi en cassation*) to the French *Cour de cassation*.

In *Air Algérie*, the *Cour de cassation* followed the Paris Court of Appeal's ruling and held that an airline company that had its statutory seat in a third State, but which (according to information provided for by the French Business Register, *Registre du commerce et des sociétés - infogreffe*), "had in France ten places of business, and among them the principal place of business is situated in Paris" may be sued before the jurisdictions where this "principal place of business" (*principal établissement*) is located. It therefore seemed that the localisation of the principal place of business of a company in France for the purposes of Article 60 of Brussels I Regulation was satisfied with a formal comparative analysis of the different places of business that the company had in France and registered as such in the French Business register.

In *Air Canada*, the French *Cour de cassation* proceeded to a more in depth analysis. The Court examined the two criteria observed by the Chambéry Court of appeal in order to identify if the principal place of business of Air Canada is situated in France: the formal criterion (the company's different places of business registered in the French Business Register) and the factual grounds (which focused on the one hand on the human resources, i.e the number of employees allocated by the company to the place of business in question, and on the other hand on the presence of directors or other persons entitled to enter into legally binding commitments on behalf of the company).

The *Cour de cassation* then concluded in its succinct style that the test put forward by the lower court was "unable to properly establish that the principal place of business [within the meaning of Article 60 of the Brussels I Regulation] of this company is situated in France". Hence, considered the Court, the *Cour d'appel* failed to provide a sound legal basis for its decision.

This latter decision could be interpreted as strengthening the test used to identify the principal place of business of a company for the purposes of Brussels I Regulation. However, the French *Cour de cassation* does not offer clear cut indications about the relevant criteria that should be applied in order to properly establish if the principal place of business of a foreign company is situated in France.

Furthermore, the *Cour* also eludes the particularities of the 'principal place of business' as an autonomous concept within the meaning of Article 60 of the Brussels I Regulation, as well as the question to know if a more global approach would be suitable when interpreting this notion. In other words, one might legitimately wonder if the comparative analysis conducted by the judges in order to identify the principal place of business should take into account all the company's places of business and not only those situated in France, as it was the case in the decisions analysed.

It is worth mentioning that according to the French *Cour de cassation*, submitting a preliminary question on this topic to the Court of Justice of the European Union is not

necessary since there seems to be “no reasonable doubt” regarding the interpretation of EU law provisions.

Luana Piciarca<sup>8</sup>

**General jurisdiction of French courts under Article 2 of the Brussels I Regulation, internal venue rules, protective jurisdiction in matters related to consumers.** In two decisions concerning refunding claims for delayed flights (**Civ. 1e, 22 February 2017, n° 15-27.809** and **Civ. 1e, 22 February 2017 n° 16-11.509**), the First Civil Chamber of the *Cour de cassation* had to deal with the proper internal venue rules which give jurisdiction to a specific court, when French judicial authorities as a whole have general jurisdiction under Article 2 of the Brussels I Regulation.

The claimants were passengers who purchased their tickets for two international flights operated by Air France; they were seeking compensation pursuant to Article 7 of Regulation 261/2004. All parties were domiciled in France; and both proceedings were brought before the courts of the claimants’ domiciles (*forum actoris*) on the basis of Article R. 631-3 of the French Consumer Code. The latter reads as follows: “The consumer may seize either one of the courts that have territorial jurisdiction under the provisions of the Civil Procedure Code, or of the courts of his domicile at the time when the contract was concluded or at the time when the harmful event occurred”. The defendant (Air France) agreed that French courts have general jurisdiction under Article 2 of the Brussels I Regulation, but argued that allowing the claimants to sue before the courts of their domicile under the internal territorial rule of venue provided for by Article R. 631-3 of the French Consumer Code would violate the effectiveness of Brussels I provisions, since Article 15-3 expressly excludes this type of contract from the special protective provisions of section 4, chapter 2 of the Brussels I Regulation.

The French *Cour de cassation* answered briefly that, pursuant to Articles 2, 15-3 and 16-1 of the Brussels I Regulation, a passenger could not bring proceedings before the courts of his domicile, on the basis of the internal territorial rule of Article R. 631-3 of the French Consumer Code. Indeed, the Court expands, claims related to a contract for the carriage of passengers, with the exception of contracts providing for a combination of travel and accommodation, have been expressly excluded from the protective provisions of Brussels I Regulation in matters relating to consumer contracts.

It thus seems that the *Cour de cassation* chose to “deactivate” an internal territorial rule of jurisdiction when its application together with that of Article 2 of the Brussels I Regulation would give jurisdiction to the court of the claimant’s domicile (*forum actoris*), therefore leading to the same result as that expressly prohibited by Articles 15-3 and 16-1 of the Brussels I Regulation.

---

<sup>8</sup> Many thanks to Chris Thomale for his careful review and insightful comments on an earlier version of the case notes I have written for this survey.

At first glance, these two decisions could have appeared as a simple question of determining the appropriate internal venue rules. Instead the *Cour de cassation* preferred to conduct its reasoning in terms of global coherence of the jurisdictional provisions of the Brussels I Regulation and articulation with the internal venue rules. The French High Court's solution may face to two types of criticism. The first one concerns the rationale of the Brussels I model. One may argue that since contracts for the carriage of passengers are excluded from Section 4 of the Brussels I Regulation, the European legislator has simply considered that claims related to this type of contracts should be governed by the other Brussels I provisions. Accordingly, the defendant's home courts could ascertain general jurisdiction on the basis of Article 2; in this case, it would belong to internal venue rules to determine the court that is locally competent, as the Jenard rapport underscores. Depending on the degree of protection afforded to consumers by the domestic rules of the different Member States, an "internal" *forum actoris* could be eventually envisaged as a solution in this type of contracts if the claimant is domiciled in the same Member State as the defendant. If this solution leads indeed to an outcome similar to the one prohibited by Articles 15-3 and 16-1, it would seem however excessive to conclude to the violation of the effectiveness of these latter provisions on that sole basis.

The second criticism concerns the adverse effects that this type of reasoning may have on the protection granted to consumers by domestic legislations. French scholars seem to agree on this specific point<sup>9</sup>.

Luana Piciarca

- Contracts and torts

***Forum contractus* under Article 5-1 of the Brussels I Regulation, the autonomous notion of provision of services.** An interesting case involving cross-border debt securities issues was brought before the Commercial Chamber of the French *Cour de cassation* (**Com, 1 March 2017, n° 14-25.426**).

Kommunalkredit, an Austrian company had issued securities under the form of "capital notes" to the benefit of a fiduciary, which issued in return "capital certificates"; these certificates were bonds, i.e. gave right to periodic interest payments. The claimant, *Union mutualiste retraite* (UMR), a French retirement mutual company, bought a certain number of "capital certificates" through a professional intermediary, Barclay's Bank Plc, a company which had its registered office in the UK and at least one of its branches situated in France. Shortly after this transaction, the Austrian issuer was nationalized and reorganized under Austrian law. Claiming reliance on false and incomplete information provided by the English intermediary, UMR sought to obtain the annulment of the purchase. At the same time he also brought a liability action against the intermediary Barclay's Bank Plc and the

<sup>9</sup> See G. POISSONIER, P. DUPONT, *JCP E* 2017, p. 1266.

issuer, Kommunalkredit (divided after its reorganization in two separate entities Kommunalkredit Austria and KA Finanz AG) in order to recover the loss incurred in the unsuccessful investment.

The question at issue was to determine if French courts had jurisdiction to hear the case under Article 5-1, b second indent or under Article 5-3 of the Brussels I Regulation, as the claimant argued.

The Paris Court of appeal analyzed the purchase of the “capital certificates” by UMR as a money loan according to French law, and considered that the operation falls as such under the special rule of Article 5-1 b) relating to the provision of services; the place where the services “*were provided or should have been provided*” is situated at the French branch of Barclay’s, where UMR as a “lender” transferred the funds.

The *Cour de cassation* overruled the lower court’s decision for lack of a sound legal basis. The *Cour* re-iterated the need for an autonomous interpretation of the notion “provision of services” which has to be understood independently from national law and accordingly to the criteria set forward by the ECJ’s case-law. The French Supreme Court emphasized that “by confining itself to inferring the existence of a provision of services, necessary for the application of Article 5.1 (b) of the above-mentioned Regulation, from that of a loan contract under French law and without characterizing the existence of an activity of the provider of services in return for compensation, the Court of Appeal did not give a legal basis to its decision”.

Thus, in order to characterize a contract as a “provision of services” for the purpose of Article 5-1 b) second indent, it is necessary to establish the existence of two elements: firstly, that the party considered to render a service, carries out a particular activity (which represents the characteristic obligation leading to jurisdiction); secondly, that this activity is carried out in return for remuneration. The French Supreme Court interpretation in this case seemed in line with the *Falco* case (ECJ, 23 Apr. 2009, *Falco Privatstiftung and Thomas Rabitsch*, case C-533/07, spec. point 29, which stresses that “(...) the concept of service implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration”)<sup>10</sup>. The Court of justice recently confirmed in the *Saale Kareda* case that money loans meet these criteria when provided by professionals (ECJ, 15 June 2017 *Saale Kareda*, case C-249/16)<sup>11</sup>.

Luana Piciarca

---

<sup>10</sup> For further developments in French literature see among others *D.* 2009. 2390, obs. S. BOLEE; *RJ com.* 2010. 245, note M.-É. ANCEL.

<sup>11</sup> See A. MARMISSE-d'ABBADIE d'ARRAST, *RTD Com.* 2017 p.743. See also the observations of Professor G. VAN CALSTER on this topic (<https://gavclaw.com/2017/06/01/uneasy-cohabitation-kareda-v-benko-special-jurisdictional-rules-contract-or-tort-for-a-recourse-claim-brought-between-jointly-and-severally-liable-debtors>).



**Article 5-3 of the Brussels I Regulation.** When determining the competent courts to bring a tort claim, assessing the exact location of the place where the damage occurs is problematic when the victim suffered a pure economic loss. This decision of the Commercial Chamber of the *Cour de cassation* (**Com., 18 January 2017, n° 15-25.661**) shows how the French judge deals with this difficulty under article 5-3 of Brussels 1 Regulation (Regulation (EC) n°44/2001).

A bill of exchange was falsified and paid on an account opened at a German bank. The drawee, a French company, brought an action in France against the German bank for lack of vigilance in checking the holder's identity and the regularity of the bill. While a first instance court had rendered a substantive ruling awarding damages to the French drawee, the *Cour d'appel* dismissed the claim for lack of jurisdiction. Looking into the possibility for the claimant to proceed either before the court of the place of the causal event or before the court of the place where the damage occurred (ECJ, 30 November 1976, C-21/76, *Mines de potasse d'Alsace*), the Appellate Court held that both the causal event and the damage were located in Germany. The judge considered indeed that « the initial damage was constituted by the delivery of the bill of exchange on the account opened at the German bank and by its payment » and that the debit to the bank account of the French company, held by a French bank, was no more than a mere « consequence » of the initial damage. Therefore, such a connecting factor with the French territory was irrelevant to support the French courts' jurisdiction. The Commercial Chamber of the *Cour de cassation* confirmed this ruling.

The French *Cour de cassation's* position is far from being surprising. Article 5-3 has to be interpreted strictly in order to ensure that the jurisdiction of the courts where the damage occurs doesn't turn into a *forum actoris*. For that reason, the ECJ has constantly recalled regarding pure economic losses that the place where the damage occurs does not refer to the place of the claimant's patrimony, which is where the claimant is domiciled (ECJ, 19 September 1995, C-364/93, *Marinari* ; ECJ, 10 June 2004, C-168/02, *Kronhofer*). But, instead of taking into consideration such an abstract legal concept as patrimony, the place of the bank account to which the financial loss was suffered can be put forward as a stronger criterion to support the jurisdiction of the courts where the victim is domiciled. The ECJ has admitted such a reasoning regarding the loss suffered by an individual as a result of an unsuccessful financial investment (ECJ, 28 January 2015, C-375/13, *Harald Kolassa*). However, the European court has more recently judged that the scope of the *Kolassa* decision had to be confined « within the specific context of the case which gave rise to that judgment » (ECJ, 16 June 2016, C-12/15, *Universal Music*, reason 37), and that « the 'place where the harmful event occurred' may not be construed as being (...) the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materializes directly in the applicant's bank account (...) » (*Ibid.*, decision). By considering the financial loss suffered at the place of the bank account as a

mere consequence of the primary damage, the French *Cour de cassation* seems to follow perfectly the ECJ interpretation.

Basile Darmois

## ii) Choice of court clauses

**Choice of court clauses, validity and scope.** The first paragraph of Article 23 of the Brussels I Regulation (Article 17 of the Convention and Article 25 of the recast) provides the formal requirements for an agreement on jurisdiction to be valid.

Formal validity is met when the agreement is in writing (art. 23-1 a)), however when the clause is part of a whole set of one party's general conditions, it begs the questions of whether the writing requirement is met, and of the actual consent of the other party. Another way to consider jurisdiction clauses inserted into unilateral general conditions of sale would be to qualify them as an usage of international commerce widely known by the parties, or as established practices between the parties which would therefore allow a presumption of consent (art. 23-1 b) and c)).

The ECJ favoured the former branch of the alternative. However, even though the clause is considered to be evidenced in writing within the meaning of article 23-1 a), two further conditions must be met: the contract must be signed by both parties and must contain an express reference to the general conditions<sup>12</sup>. In the absence of such express reference, the ECJ's case law seemingly leaves room for an argumentation based on tacit acceptance of the clause by the purchaser, if he never raised any objections against the inclusion of the clause by the vendor in cost estimates, bills, and purchase orders over a sufficiently significant period of time<sup>13</sup>. For its part, the French *Cour de cassation* already had the opportunity to stress quite plainly that lack of sufficient visibility of the clause prevents any form of tacit acceptance<sup>14</sup>.

A French court could soon provide a more complete answer, since such a set of facts were recently presented to them once again. One party had seized the French courts, supposedly in violation of a choice of jurisdiction clause favouring English courts and included in the general conditions of sale of his counterparty, which he had never challenged. The *Cour d'appel* had set aside the clause, considering that the appellant had not fulfilled the burden of proof as to the accessibility of his general conditions. Although censorship by the *Cour de cassation* was predictable according to the ECJ's template as presented above, the superior

---

<sup>12</sup> ECJ, 14 December 1976, *Estasis Salotti di Colzani*, Aff. 24/76; see also C. NOURISSAT, obs. sous ECJ, 7 July 2016, Aff. C-222/15, *Höszög Kft, Procédures*, 2016 p. 362; and about the validity of a clause inserted in a prospectus, see C. KLEINER, obs. sous ECJ, 20 April 2016, Aff. C-366/13, *Profit Investment SIM SpA, Stefano Ossi, Andrea Mirone, Commerzbank AG*, JDI, 2017. n°2 p.8.

<sup>13</sup> ECJ, 14 December 1976, *Galeries Segoura SPRL v Société Rahim Bonakdarian*, 25-76.

<sup>14</sup> Com, 24 November 2015, n°14-14.924, *Bull.*

Court did not rely on European precedents and rather put forward that according to French procedural law, the burden of proving the parties' consent fell not upon the parties but upon the judge (**Civ 1e, 18 January 2017, n°15-25.678**). It will therefore be for the *Cour d'appel* after referral (or second Court of appeal) to review the facts and, perhaps, take the opportunity to offer a more straightforward general answer to this often-occurring difficulty. For the sake of completeness, this decision aggregates with another one according to which the burden of proving the content of the foreign applicable law is also for the Courts to assume<sup>15</sup>. Therefore, by drawing this parallel, this recent decision may be analysed as an illustration of a striking general feature of French law in comparison to other national laws<sup>16</sup>.

On that same day (**Civ 1e, 18 January 2017 n°15-26.105**)<sup>17</sup>, the *Cour de cassation* confirmed its previous case-law by reiterating that the applicability of a French mandatory provision (in that case article L.442-6-I, 5° of the French Code of commerce) to a dispute does not entail the French courts' exclusive jurisdiction over it<sup>18</sup>. Hence, the non-application of such provision is no bar to recognizing and enforcing a foreign judgement<sup>19</sup> nor an arbitral award<sup>20</sup>.

More importantly, and in accordance with ECJ case-law, this decision conveys that for the purposes of article 23 of the Brussels I Regulation, the scope of a choice of jurisdiction clause is not necessarily limited to the strict contractual category of claims. It can be construed as encompassing contract-related disputes of a different nature. In the present case, the contract between the parties contained a choice of jurisdiction clause in favor of English courts, which was applicable to all disputes relating to "the present contract". A party introduced before the French courts an action for damages founded on an abrupt termination of a long-standing business relationship. Because this action is not qualified as contractual but as tortious according to the French *lex fori*, the claimant was hoping to circumvent the choice of jurisdiction clause. But such an attempt was deemed to failure, in light of recent European decisions which should be read be combinedly. Firstly, the ECJ held in the *Granarolo* case that an action for damages founded on an abrupt termination of a long-standing business relationship "is not a matter relating to tort, delict or quasi delict within the meaning of that regulation if a tacit contractual relationship existed between the parties"<sup>21</sup>. The same

<sup>15</sup> Com, 28 June 2005, n°02-14.686, *Bull.* 2005 IV N°138 p. 148, *Itravo*.

<sup>16</sup> For example, contrarily to what English or Scottish law provides. K. J. HOOD, "Drawing Inspiration? Reconsidering the Procedural Treatment of Foreign Law", *J. Priv. Int'l L.* 2006. 181.

<sup>17</sup> D. BUREAU, H. MUIR WATT, "Existence et effet de la clause attributive de juridiction face à une loi de police du for exclu", *Rev. crit. DIP* 2017. 269.

<sup>18</sup> Com, 24 November 2015, n°14-14.924, *Bull.*

<sup>19</sup> Civ. 1e, 22 October 2008, n°07-15.823, *Sté Monster Cable Products Inc c/ AMS*, *Bull.* 2008, I, n°233.

<sup>20</sup> Civ. 1e, 21 October 2015, n°14-25.080, *Bull.*

<sup>21</sup> ECJ, 14 July 2016, *Granarolo*, C-196/15. For a criticism of this decision based on the ECJ previous case-law on characterization, see D. de LAMMERVILLE, L. MARION, "Nature de l'action en réparation pour rupture brutale d'une relation commerciale établie : la CJUE crée la surprise en imposant la qualification contractuelle", *JCP E* 2016, n°39, 1507.

may be said to apply, *a fortiori*, where an express contract has been signed, as in the aforementioned French case. This reasoning further relies on the *Brogasser* case<sup>22</sup>, which addressed the matter of an *anti-trust action* in the presence of an express contract containing a choice of jurisdiction clause. The court ruled that despite the tortious qualification under national law, the action must be construed as relating to the contract where the conduct complained of may be considered a breach of the terms, with respects to the purpose of the contract. It seems reasonable to think that the same applies to an action for damages founded on an abrupt termination of a long-standing business relationship in the context of an express contract.

The question remains as to the possibility to express the combination of these cases in the form of a general rule, which would be that *all* civil liability claims made in tort under national law may be interpreted by the Court as contractual within the meaning of article 5-1 of the Brussels I regulation (7-1 of the Recast) where the conduct complained of may be considered a breach of an express or tacit contract. The French court seemingly paves the way for the adoption of such a rule: the French court states in broad terms that the judge has a discretionary margin of appreciation to construe the will of the parties, possibly to submit *any* dispute *relating to or resulting from the contract* to the chosen forum<sup>23</sup>. This assertion should nevertheless be cautiously handled, since the interpretation of the choice of jurisdiction clause could be argued to be a matter for the Regulation itself where applicable<sup>24</sup>, or by the law governing that clause<sup>25</sup>, and not for the *lex fori* to decide. A synthetic enlightenment by the ECJ on this question would be welcome in the future.

Philippine Blajan

**Asymmetrical choice of jurisdiction clause.** Departing from its previous case law<sup>26</sup>, the French *Cour de cassation*, in civil formation, implicitly confirmed the validity of an asymmetrical choice of jurisdiction clause<sup>27</sup> included in a credit facility agreement. The Court did so by setting aside the borrower's argument, founded on the cited previous case law, that the clause was 'potestative', hence null and void (**Civ 1e, 25 May 2016, n°15-10.163**)<sup>28</sup>.

<sup>22</sup> ECJ, 13 March 2014, *Brogasser*, C-548/12. For an analysis of this decision, see B. HAFTEL, "Absorption du délictuel par le contractuel, application du Règlement (CE) n°44/2001 à une action en responsabilité délictuelle", *Rec. crit. DIP* 2014. 863. See also ECJ, 21 May 2015, CDC, C-352/13.

<sup>23</sup> Civ 1e, 21 October 2015, n°14-25080, *Bull.*

<sup>24</sup> ECJ, 13 November 1979, *Sanicentral GmbH v Collin*, C 25/79, pt 6-7.

<sup>25</sup> As provided by art. 5 of the 2005 Hague convention on choice of court agreements.

<sup>26</sup> Civ 1e, 26 September 2012, n°11-26.022, *Bull.* 2012, I, n°176, *Banque Rothschild*; Civ 1e, 25 March 2015, n°13-27.264, *Bull.* 2015, I, n°72, *Damne Holding*.

<sup>27</sup> Frequent in international finance agreements, they bind one party to sue in a specific court whilst permitting the other either to choose between identified courts, or to sue in any court with jurisdiction.

<sup>28</sup> Since then, the commercial formation of the Court explicitly abandoned the *Rothschild-Damne Holding* case-law in Com, 11 May 2017, *Diemme*, n°15-18.758, *non publié*.

Moreover, the case involved an unprecedented configuration of facts where the jurisdiction clause's effects were extended to a third party. A guarantee on first demand had been stipulated in favour of a beneficiary, namely the bank *Crédit agricole Luxembourg*. The Court held that the *Crédit agricole mutuel de Lorraine*, as the guarantor who had fulfilled its obligation towards the beneficiary by supporting the obligor's obligations, was effectively subrogated in the beneficiary's rights and could therefore claim the benefit of the choice of jurisdiction clause inserted in the loan agreement on which the guarantee was based.

In order to avoid an exaggerated extension of this case law though, it is worth stressing that the guarantee remains independent from the loan agreement. As a consequence, the beneficiary cannot claim the benefit of a jurisdiction clause contained in the guarantee agreement<sup>29</sup>. Besides, the ECJ ruled very recently in a way that confirmed that extension cases should be handled cautiously. The Court held that for the purposes of article 23 of the Brussels I regulation, a jurisdiction clause in a contract between two companies cannot be relied upon by the representatives of one of them to dispute the jurisdiction of a court over an action for damages which aims to render them jointly and severally liable for supposedly tortious acts carried out in the performance of their duties<sup>30</sup>.

Philippine Blajan

## 2. Procedure

Different procedural issues can arise at the beginning or throughout the proceedings and may ask for appropriate measures in order to ensure an efficient conduct of the trial. Articles 6 and 7 of the Brussels I Regulation (now articles 7 and 8, Brussels I *bis* Regulation) allow the consolidation of separate claims in the interest of coordinating judicial procedures and avoiding contradictory judgements. Articles 27-30 of the Brussels I Regulation (articles 29-33 Brussels I *bis* Regulation) provide the means of control of concurrent litigation of identical or similar disputes brought before different national courts.

Several decisions regarding multipartite litigation (a) and *lispendens* (b) were rendered by French courts this year.

### a. *Plurality of defendants*

**Plurality of defendants (art. 6-1 of the Brussels 1 Regulation).** Article 6-1 of Brussels 1 Regulation (Regulation (EC) n°44/2001) provides that a « person domiciled in a Member State may also be sued (...) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled provided the claims are so closely connected

<sup>29</sup> Com, 4 March 2014, n°13-15.846.

<sup>30</sup> ECJ, 18 June 2017, *Georgios Leventis et Nikolaos Vafeias*, C-436/16.

that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ». Because this provision is an exception to the general rule according to which a defendant has to be sued before the courts for the place where he's domiciled (article 2, same Regulation), it must be interpreted strictly. Consequently, the application of article 6-1 literally requires three conditions: a same situation of fact (ECJ, 13 July 2006, C- C-539/03, *Roche Nederland*), a same situation of law (*Ibid.*) and a risk that irreconcilable judgements may be handed down. In the present case (**Com., 5 April 2016, n° 13-22.491**), the Commercial Chamber of the *Cour de cassation*, facing a community design infringement committed in several Member States by several defendants, recalls that these three conditions are independent of each other.

As for the first condition, the *Cour d'appel* had drawn from a body of evidence demonstrating clearly that the infringements committed by several companies in several Member States resulted from a same situation of fact. All the defendants belonged to the same group of companies, operated under the same commercial logo, and used websites accessible from the holding company's website and which domain names, all registered by the holding company, looked alike. Far more conclusive, all the defendants bought the contested product from the same supplier and, consequently, were sued for selling the same product under the same trademark. Obviously, there was no reason to view these infringements as resulting from different situations of fact.

As for the second condition, given that the rights of the legitimate owner were governed by the same European regulation (Regulation (EC) n°6/2002 on protecting Community designs), the second condition, requiring a same situation of law, was to be regarded as satisfied. Even if the facts of the Community design infringement could be split into as many infringements as there are Member States where the counterfeit product was distributed, establishing liability of each distributors still depend upon a same situation of law.

But that does not imply that the third condition, relating to a risk of irreconcilable judgments, is met. At most, it may be conceded that a same situation of fact and law significantly raises the risk that irreconcilable judgments may be handed down. However, it does not prevent the *Cour d'appel* to explain how the two pending proceedings can end up in two irreconcilable judgments. That's why the *Cour de cassation* quashes the decision in which the *Cour d'appel* had considered that the third condition of article 6-1 automatically derive from the two first ones.

Basile Darmoiois

*b. Lis pendens and connexity*

***Lis pendens* in the Brussels I Regulation system, seisin of the court, service of documents.** In a case involving parallel proceedings arising from a supposedly breach of

contract (**Civ. 1e, 13 July 2016, n° 15-20.900**) the French *Cour de cassation* dealt with practical questions related to the date of the seisin of the courts for the purposes of Article 27 of the Brussels I Regulation. The dispute arose between on the one hand, Energie Meaux, a French company and, on the other hand, several companies of the group Wartsila (two of them, Wartsila France and Wartsila NSD France, were established in France, the third one, Wartsila Netherlands had its registered office in Netherlands).

Energie Meaux filed a contractual claim for payment before the French courts; the Wartsila companies seised the Dutch courts with a negative declaration of liability (“*déclaration négative de responsabilité*”).

Consistently with the broader interpretation of the so called “triple identity of the proceedings” adopted by the ECJ in *Gasser* (ECJ, 9 December 2003, aff. C-116/02) and in *The Ship Tatry* (ECJ, 6 December 1994, aff. C-406/92), the *Cour de cassation* considered that the two sets of proceedings brought before the French and the Dutch courts satisfy the test of Article 27 (same parties, same object and same cause of action). The solution is a classical one.

More problematic was instead the determination of the exact moment when the two courts were seised pursuant to Article 30 of the Brussels I Regulation. Questions arose regarding the proof of the seisin date.

In application of Article 30-1 of the Brussels I Regulation, the First Civil Chamber considered that the French courts are seised at the moment when the document to be served to the defendant is received by the authority responsible for the service, in this case the Dutch judicial officer. Without a proof of the date of receipt by this authority of the document to be served, the seisin of the French court cannot be clearly established and the Dutch court has to be considered first seised.

Luana Piciarca

### **3. Recognition and enforcement of foreign decisions**

The recognition and the enforcement of foreign decisions in France are governed either by national rules (a) or by provisions derived from European instruments (b).

#### *a. National Rules on recognition and enforcement of Judgements applied by French Courts*

##### **i) Statutory and Family matters**

#### **Recognition of foreign certificate in front of French authorities, formal conditions.**

In a decision rendered by the *Cour de cassation* that has received little publicity from legal

journals (**Civ. 1e, 13 April 2016, n° 15-50.018**)<sup>31</sup>, it was reminded that judges must confirm foreign acts regarding individuals' civil status before they can produce an effect in France. A man born in the Comoros in 1976 brought an action in front of French courts to see his French citizenship resulting from his parentage to an alleged French father recognized in France. His lineage was confirmed by a Moroni court legalized (authentication mechanism for foreign public documents) by the Comoros Ministry of Foreign Affairs.

The Court of Appeal of Lyon accepted to recognize the claimant's French citizenship on the ground that it had been established for and by Comoros authorities.

This decision was quashed on the basis of an international custom<sup>32</sup> stating that, in the absence of bilateral or multilateral conventions<sup>33</sup>, French consular authorities must legalize acts drafted by foreign authorities before these acts can produce effects in France. The *Cour de cassation* had previously relied on international custom as a source of this rule in two 2009 decisions<sup>34</sup> following the repeal<sup>35</sup> of a 1681 Statute that formally enunciated this rule. The *Cour de cassation* wishes to underline the importance of this procedure to guarantee the authenticity of foreign legal documents regarding local drafting methods. It also wished to reinforce the ongoing existence of this rule despite the ambiguity of the reference to international custom<sup>36</sup>.

Edouard Adelus

**Recognition of foreign adoptions in France.** The *Cour de cassation* has rendered two decisions on recognition of foreign adoptions in France (**Civ. 1e, 22 June 2016, n° 15-18.742 ; Civ 1e, 7 December 2016, n° 16-23.471**)<sup>37</sup>. The first case deals with the recognition of a foreign adoption and confirms the extent of the control exercised on a foreign judgment at the stage of its enforcement. The ex-wife of the adoptive father and

---

<sup>31</sup> See also, on this case, the observations of A. HERMET, above, especially on the place of international custom in front of French Courts.

<sup>32</sup> *Ibid.*

<sup>33</sup> Especially the Hague Convention of October 5th 1961 abolishing the requirement of legalisation for foreign public documents. France is a party to this convention unlike Comoros.

<sup>34</sup> Civ. 1e, 4 June 2009, n° 08-10.962 and n° 08-13.541, *D.* 2009.2004, note P. CHEVALIER.

<sup>35</sup> Ordonnance n° 2006-460, April 21 2006.

<sup>36</sup> See: J. MATRINGE, *RGDIP*, 2010-2, p. 428.

<sup>37</sup> P. de VAREILLES-SOMMIERES, « Le juge de l'exequatur du jugement d'adoption n'est pas juge de l'adoption », *Rev.crit DIP* 2017, p.560 ; *JDI* 2017, p. 565, C. CHALAS ; S. GODECHOT-PATRIS, « La tentation de la révision en matière d'adoption », *RJPF* 2016, n° 10, p. 38. *Gaz. Pal.* 2017, n° 14, p. 56, V. DARMOIS ; M.-C. LE BOURSICOT, « Jugements d'adoption prononcés à l'étranger : quelle doit être, en France, l'étendue du contrôle du consentement à l'adoption ? », *RJPF* 2017, n° 3, p. 35 ; M. DOUCHY-OUDOT, « Exequatur d'une décision étrangère d'adoption », *Procédures* 2017, n° 3, p. 21 ; *JCP G.* 2017, p. 327, note A. GOUTTENOIRE, P. MURAT et al. ; *JCP G.* 2016, p. 2419, obs. F. MAILHÉ.



their son appealed against the French decision granting exequatur to an adoption judgment issued by the courts of Cameroon. The claimants argued on the basis of article 34, indent f) of the 1974 France-Cameroon Agreement on co-operation in judicial matters that the judgment was contrary to French public policy. This violated public policy according to their argument, since the civil status of the adopted child could not be established with certainty. The birth certificates produced before the Paris *Cour d'appel* showed that the adopted girls had the same mother and were born just one month apart, the first one on the 3 May 1993 the second one on the 28 April 1993. The Cameroonian adoption judgment, on the contrary, indicated that one of the adopted girls was born in 1995, and thus entailed no logical contradiction. Nonetheless, the Paris *Cour d'appel*, after comparing the birth certificates and the adoption judgment, accepted the arguments of the appellants and revoked the exequatur of the adoption judgment.

The *Cour de cassation* quashed this decision as it constituted a prohibited re-examination of the foreign judgement on its merits. Only the Cameroonian courts, which examined the adoption application and granted the adoption judgement, had the power to examine the civil status of the children to be adopted as it resulted from the birth certificates.

In the second case of 7 December of 2016 the *Cour de cassation* also had to deal with a refusal of lower courts to enforce an adoption decision of the courts of Ivory Coast based on the fact that the biological parents of the adopted child had not given explicit consent in accordance with the terms of article 370-3 of the Civil Code<sup>38</sup>). It was pointed out that the parents had not been informed that the adoption would be an *adoption plénière*, which cuts in a definite manner any link with the family of origin. The *Cour de cassation* quashed the decision for violating article 370-3 of the French civil code and of article 36 of the 1961 France-Ivory Coast Agreement on judicial cooperation and recognition of foreign decisions. Thus, it was made clear that the consent requirement of article 370-3 of the French civil code is to be applied by the French courts only when an application for an international adoption is directly brought before them. Accordingly, the fact that the foreign jurisdiction did not apply the same rule in the same terms as provided for by the French legal order could not lead to a decision contrary to the French public policy in the sense of article 36 of the France-Ivory Coast Agreement. Consequently, the refusal of French judges to order the enforcement of the foreign adoption judgement constituted an unjustified re-examination of the case on its merits, prohibited as such at the stage of the enforcement of foreign decisions. This ruling confirms a constant position of French case law about the limited control exercised at the stage of recognition and enforcement of foreign judgements.

Konstantinos Rokas

---

<sup>38</sup> See F. MAILHÉ, « Contrôle du consentement à une décision étrangère d'adoption », JCP G 2016, p. 2419.

**Recognition of foreign surrogacy judgements.** Two decisions of the Rennes *Cour d'appel* of 12 December 2016 and 6 March 2017 (**Rennes *Cour d'appel*, 12 December 2016 RG n° 15/08549 and 6 March 2017 RG n° 16/00393**) illustrate an interesting evolution of French case law on parental status of children born following a surrogacy procedure that took place outside of France<sup>39</sup>. These decisions are the first where French courts accept the transcription of birth certificates mentioning both intended parents.

In that sense these judgments go beyond the effects previously recognised by the *Cour de cassation* in its most recent case law. In two decisions of 3 July 2015 the *Cour de cassation* had only accepted to transcribe the mentions stating the intended fathers as legal fathers, thus presuming their genetic link to the children whose names appeared in the birth certificates<sup>40</sup>. The solution has to be praised, although in four other decisions delivered on the 5 of July 2017 (Civ. 1e, 5 July 2017 ; n°15-28.597 ; Civ. 1e, 05 July 2017 ; n°16-16.901 ; 16-50.025 ; Civ. 1e, 5 July 2017 ; 16-16.455 ; Civ. 1e, 5 July 2017, n° 16-16.495)<sup>41</sup> the *Cour de cassation* rejected this approach and has on the contrary adopted the proposal, recommending a reconstruction of a legal link between the second parent, the mother or the father, who is not genetically connected with the child.

The recent case law of the Rennes *Cour d'appel* marks a significant evolution compared to this latter solution. In the first of the cases brought before the Rennes *Cour d'appel*, the surrogacy had taken place in Ukraine; in the second case, in Ghana. In both countries the birth certificates established by the foreign authorities mentioned as parents both intended parents. The Court based its ruling on article 47 of the French Civil Code, articles 8 and 14 of the European Convention of Human Rights and article 3 of the New York Convention on the rights of the Child. By confirming the transcription of the birth certificate, judges have chosen to promote the continuity of personal status, a paramount consideration of private international law. The judges specified that no conflict of law rule should be applied in their work to decide on the transcription, which should exclusively be decided on the basis of article 47 of the Civil code. This solution is in our view more protective of the child's rights than the one chosen by the *Cour de cassation* in its decisions of the 5th of July 2017. The reconstruction of the family link with the intended parent through adoption<sup>42</sup> endangers the position of the child, who might remain parentless and with its rights from

<sup>39</sup> *Gaz. Pal.* 2017, n° 25, p. 77, note I. REIN-LESCASTEREYRES, C. LE CAM-MAYOU; *RJPF* 2017, n° 3, p. 21 ; see also for two previous decisions of the same court who did not accept the transcription of both intended parents J.-R. BINET, « Coup d'arrêt(s) dans l'admission des effets de la gestation pour autrui », *Dr. fam.* Dec. 2015, comm. 201.

<sup>40</sup> See in English among others S. FULLI-LEMAIRE, « International Surrogate Motherhood before the French *Cour de cassation* – The Door is now Ajar », *ZEuP* 2017, p. 471.

<sup>41</sup> H. FULCHIRON, « La Cour de cassation consacre la parenté d'intention par adoption », *D.* 2017, p. 1737 ; *JDI* 2017, p. 1291, J. GUILLAUMÉ ; A. GOUTTENOIRE, « Le statut sur mesure des enfants nés de GPA à l'étranger », *JCP* 2017, p. 1691.

<sup>42</sup> For this proposal see esp. H. FULCHIRON, Chr. BIDAUD-GARON, « Reconnaissance ou reconstruction ? À propos de la filiation des enfants nés par GPA au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme », *Rev. crit. DIP* 2015, p. 1.

parentage compromised if something happens to the intended parents before the adoption takes place. This was not however the view of the public prosecutor (*Ministère public*), who appealed the decisions of the Rennes *Cour d'appel* to the French *Cour de cassation*. The 29 November 2017 decision of the *Cour de cassation* quashed the 12 December 2016 decision<sup>43</sup>.

Konstantinos Rokas

**Recognition of a foreign divorce, application of the 1957 Franco-Moroccan Convention on mutual legal aid and enforcement of judgements.** In this case (**Civ 1e, 4 January 2017, n° 15-27.466**), two Moroccan citizens married in France on 26 August 2006<sup>44</sup>. On the 27 October 2010, the wife filed an application for the annulment of this marriage on grounds of bigamy. The Agen *Cour d'appel* rejected the request based on a certificate issued by the general consulate of Morocco showing that the first marriage had been dissolved in July 2006 and that the divorce judgment granted by the Moroccan court became final and irrevocable on 26 July 2006. The *Cour de cassation* quashed this decision for infringement of article 21, c, in combination with articles 16, c, and 19 of the Franco-Moroccan Convention of 5 October 1957. Indeed, these provisions impose as a requirement for granting the exequatur of a foreign decision that a certificate must be issued by the officer of the court (*greffier compétent*) stating the final and irrevocable character of the judgement. The certificate of the Consulate could not be used as a substitute. This judgment shows that problems still occur in the implementation of interstate international conventions on judicial cooperation, which in this case were linked to the formal requirements to assess the final character of a judgment. Such requirements can be considered as strict. They are however reasonable in the judicial cooperation among states where there is no equivalent of the principle of mutual trust and of the principle of recognition which govern cooperation within the European Union.

Konstantinos Rokas

## ii) Civil and Commercial matters

**Recognition and enforceability of foreign decisions in France, conditions, public policy.** In France, three conditions govern the recognition and the enforcement of foreign decisions in domestic private international law: the review of the indirect competence of

<sup>43</sup> Civ 1e, 29 November 2017, n° 16-50061, confirming its 5 July 2017 decisions; A. GOUTTENOIRE, *JCP* 2017, p. 2306 confirming its 5 July 2017 decisions.

<sup>44</sup> A. DAMIENS, « Invocation d'un divorce prononcé au Maroc dans une instance en nullité pour bigamie: l'exequatur soumis à la production du certificat du greffier compétent », *RJPF* 2017, n° 3, p. 26 ; M.-C. LASSERRE, « L'exequatur en France d'une décision marocaine de divorce, entre subtilités et spécificités conventionnelles », *Petites Affiches* 2017, n° 59, p. 15.

the foreign court, the absence of fraud, and the international public policy exception<sup>45</sup>. In a decision dated 22 March 2017, the First Chamber of the Civil Division<sup>46</sup> of the *Cour de Cassation*'s deals with the third of these conditions, precisely with the respect of the rights of the defense included in the procedural part of the public policy exception (**Civ. 1e, 22 March 2017, n°15-14.768**).

In the present case and as a result of a proceeding conducted before a Russian court, a French company was sentenced by default to pay various sums of money to a Russian company. The Russian company obtained from the French Judge a declaration of enforceability of the Russian decision. In return, the French company contested this declaration and ultimately seized the *Cour de Cassation*. The French company argued that some of the conditions under which the proceeding was conducted before the Russian court violated the French procedural public policy and, therefore, that the French court should not have declared the Russian ruling enforceable.

The main complaint pointed out the time period the defendant was provided to appear in court in Russia (and to arrange a proper defence), which is considered as an adequate ground to refuse to recognize a foreign decision in France if this period is insufficient to avoid being judged by default<sup>47</sup>. However, two documents, a delivery order and a certificate of receipt, established that the summons to appear before the Russian court was issued on 21 October 2010, which, in the *Cour de cassation*'s opinion, is sufficient proof that the French company was given reasonable time to prepare its defence (ten months).

The rest of the arguments dealt with the service of the above judgement, and the exercise of the French company's right to appeal. First, the service form had not been translated into French, which violates the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. But the *Cour de cassation* dismisses the argument, considering that this circumstance was the result of the negligence of the French Central Authority in charge of international judicial cooperation (art. 5, same Convention). Far more problematic was the Russian rule of civil procedure according to which the defendant was given one month to appeal from the day of the judgement delivery (and not from the day of the reception of the form). But the French High Court continues to see no justification to trigger the public policy exception. The reasoning is simple: since the French company failed to appear before the Russian first instance court, it's pointless to wonder whether its right to appeal was sufficiently effective.

---

<sup>45</sup> Since, Civ. 1e, 20 February 2007, n°05-14.082, *Cornelissen*: "to accord the enforceability [in France of a foreign decision] outside the scope of an international convention, the French judge must control three conditions, that are the indirect competence of the foreign judge, based on the connection of the dispute with the [foreign] seized judge, the compliance with the procedural and substantive international public order and the absence of fraud of law; the exequatur judge do not have to verify if the law applied by the foreign judge is the one designated by the French conflict of laws rule".

<sup>46</sup> Which is the division of the French *Cour de cassation* normally competent to deal with private international law matters.

<sup>47</sup> Civ. 1e, 20 December 2000, n° 99-12.777.

This ruling illustrates that triggering the international public policy exception is subject to an analyze *in concreto* and must be characterized within the circumstances of the case. It is likely that, in other circumstances, the Russian rule of civil procedure would have resulted in a breach of the litigant's right to appeal and, therefore, bar the recognition of the foreign decision in France.

Basile Darmoïs

**Recognition and enforceability of foreign decisions in France, effects.** To become enforceable in France, foreign judgements, except those rendered by an EU Member State's court (for which European rules apply), are submitted to the exequatur procedure laid down in articles 509 and seq. of the French Civil Procedure Code. A foreign judgement opening an insolvency proceeding must therefore be subject to this specific procedure to produce various effects in front of French courts, including the interruption of the period of time for a respondent to answer the legal submissions of claimant in a judicial procedure. In the present case (**Civ. 1e, 6 July 2016, n°15-15.850**), the *Cour de cassation* reminded the conditions set by French case-law to such recognition<sup>48</sup> and confirmed this ruling in a peculiar context.

Because of an arbitration conducted in France, a Qatari company had been declared to owe various sums of money to another Qatari company. On August the 1<sup>st</sup> of 2013, the debtor company requested the award to be set aside before the Paris Court of Appeal.

On the 25<sup>th</sup> February 2014, a Qatari court pronounced the dissolution and ordered the liquidation of the debtor company. This last Qatari decision was later annulled by Qatari's courts. This kind of incident would normally, under French procedural law, interrupt the proceedings as well as the period of time available to a defendant to answer the claimant's submissions, at least in the Qatari legal order. It would however be otherwise if this cause of interruption was raised in front of French courts without the foreign decision opening the liquidation being recognized in France. The *Cour de cassation* had to decide whether a foreign liquidation judgment may have a direct effect on the French procedure, without exequatur.

In the French jurisdictional system, the Court of appeal has jurisdiction over actions for annulment of awards (art. 1519, Civil Procedure Code). Therefore, these actions are governed by the general rules applying to proceedings before this court (art. 1527, same Code), rules among which the defendant's legal submissions (if the defendant is domiciled in a foreign country) must be submitted within four months, instead of two, from the date of the service of the claimant's ones (art. 911-2, same Code). The defendant's submissions shall be otherwise inadmissible (art. 909, same Code). In the present case, these submissions were approximately submitted four months and a half after the claimant's submissions were submitted. The four-month deadline seemed therefore expired.

---

<sup>48</sup> In Civ. 1e, 20 February 2007, n° 05-14.082, *Cornelissen, op. cit.*

The Paris Court of appeal decided that the defendant's submissions were admissible because the Qatari insolvency procedure would have interrupted the time-limit for the respondent to answer (1<sup>st</sup> decision rendered on 6 January 2015). The Court of Appeal consequently decided to reject the application to set aside the award (2<sup>nd</sup> decision rendered on 10 March 2015).

The *Cour de cassation* quashes both decisions (the second one being considered as the direct result of the first one) on the ground that, « without exequatur, a foreign decision ordering a judicial liquidation could not have produced any effect » in France, which encompasses effects over procedural deadlines. « Any effect » reminds more broadly that, regarding foreign judgements opening insolvency proceedings, that is to say patrimonial judgements (or money judgements according to the English terminology), the French exequatur procedure is not subject to exceptions.

Basile Darmoio

*b. European Uniform Rules on recognition and enforcement of Judgements applied by French courts*

(...)

The enforcement of European civil and commercial judgments under the schemes provided for by the European instruments is usually straightforward. No significant decisions have to be reported for the time period envisaged.

*B. Cases related to international arbitration*

The control of international arbitration awards has recently been divided between judicial courts (1) and administrative courts for awards related to specific contracts governed by French administrative law (2). The latest form of control has been shaped by important decisions rendered during the last three years.

**1. Control of awards by judicial courts**

Several decisions were rendered this year that fall in four categories: the arbitration agreement (a), the arbitral tribunal jurisdiction (b), the attributes of the arbitration's actors (c) and the control of international public order (d).

*a. The arbitration agreement*

**i) The arbitration agreement existence**

**Evidence of an arbitration agreement.** Under French Law, to be valid an arbitration agreement doesn't have to be in writing if it concerns an international arbitration, unlike domestic arbitration where a writing agreement is mandatory. If the award is subject to judicial review in front of French jurisdictions, they shall only seek the will of the parties to file for arbitration. On 25 May 2016 (**Civ. 1<sup>e</sup>, 25 May 2016, n°15-13.151**), the *Cour de cassation* stated that the validity of the copy of an arbitration clause is presumed unless the evidence of forgery or counterfeit can prove otherwise. In this case, a party requested the annulment of an award on the ground that the copies of the contract including the arbitration clause were not in conformity with the originals. According to this party, unless the originals are provided, its consent cannot be established. The *Cour de cassation* stated that the acceptance of the arbitration clause shall be presumed. Only the evidence that the copies are counterfeited could render inapplicable the clause.

Timothée Andro

**Application of an arbitration agreement in general conditions of sale.** On 9 November 2016 (**Civ. 1<sup>e</sup>, 9 November 2016, n°15-25554**), the *Cour de cassation* recognized an implied consent to an arbitration clause included in general terms and conditions of sale. Several sale orders concluded between two companies referred to general terms and conditions of sale which contained an arbitration clause. After a dispute arose between them, one of the companies initiated proceedings before an arbitral tribunal, while the other one challenged the application of the clause. The *Cour de cassation* stated that the arbitration clause was applicable. According to the Court, the application of the arbitration clause had never been contested during the time of the different contracts' execution. The mention of the clause in the sale orders was explicit and the general terms and conditions of sale easily accessible. For these reasons the *Cour de cassation* stated that the consent to the arbitration clause was implied.

Timothée Andro

**ii) The arbitration agreement applicability**

**Prima facie character of the arbitration clause inapplicability.** A fifth decision, on 21 September 2016 (**Civ. 1<sup>e</sup>, 21 September 2016, n°15-28.941**), specified the notion of a clear inapplicability of an arbitration clause. The Court of appeal of Aix-en-Provence had held that the arbitration clause was clearly inapplicable because of the lack of will of the parties

to file for arbitration. The **Court** appeal considered that due to the absence of signature and after a deep examination of contractual negotiations, the clause could not be applicable. However, the *Cour de cassation* overruled the Court of appeal's decision. The *Cour de cassation* underlined that if the Court of appeal had to conduct a deep examination of the negotiations, the inapplicability of the arbitration clause was not clear, nor obvious. Therefore, the arbitral tribunal should be the sole judge of its own jurisdiction.

Timothée Andro

**Competence of the Minister of Economic Affairs to act against distribution contracts, inapplicability of an arbitration agreement.** On 6 July 2016 (**Civ. 1e, 6 July 2016, n°15-21.811**), the *Cour de cassation* had to decide whether an arbitration clause could prevent the Minister for Economic Affairs from taking **actions** regarding economic public policy. Pursuant to the article L. 442-6 of the Commercial Code<sup>49</sup>, the Minister of Economic Affairs can request the judge to stop illegal practices, ask for contracts or clauses to be declared void and impose fines. In this case, the Company Apple Distribution Internationale and Apple France had signed a distribution contract with the company Orange including an arbitration clause. The Minister for Economic Affairs submitted the concluded contract to French courts to declare several clauses of the agreement null and void. Apple challenged the jurisdiction of French jurisdictions by relying on the arbitration clause. The *Cour de cassation* confirmed the decision of the Paris' Court of Appeal. According to the courts, the Minister for Economic Affairs acted as the guardian of the economic public policy and shall not be blocked by an arbitration clause disconnected from the Minister' action. Its mission is indeed to preserve the market competition. The *Cour de cassation* specified that the Minister's action provided for in Article L. 442-6, III, of the Commercial Code can only be challenged before the national jurisdictions. Moreover, as a third party, the Minister could not rely on the arbitration clause stated in the distribution contract. As a consequence, the arbitration clause was inapplicable to the dispute.

Timothée Andro

**Impecuniosity and its effect on the applicability of the arbitration clause.** With a judgment rendered on 13 July 2016<sup>50</sup> the *Cour de cassation* rejected an appeal against a judgment by the *Cour d'appel de Paris*, binding the appealing party to an arbitration **agreement** even though the party was the subject of insolvency proceedings. The liquidator of the appealing party had brought an antitrust action against Airbus Helicopters

<sup>49</sup> Article L. 442-6 of the Commercial Code, modified by the Law n°2016-1691, 9 December 2016.

<sup>50</sup> Civ. 1e, 13 July 2016, n°15-19389.



and its German subsidiary before a state court, notwithstanding an arbitration clause that Airbus Helicopters and the insolvent company had concluded earlier. The court declared itself incompetent because of the existence of an arbitration agreement<sup>51</sup>. The liquidator attacked this decision, bringing forward that the arbitration agreement was inapplicable because of the impecuniosity of the liquidated company. Both the *Cour d'appel* and the *Cour de cassation* on appeal rejected this argumentation by stating that the alleged lack of funds due to the ongoing insolvency proceedings would not render the arbitration agreement “manifestly inapplicable” as required to disregard the arbitration agreement and continue before the state court. They have thereby affirmed a position the French jurisprudence took all along<sup>52</sup>, position which is not without controversy even in neighbouring legal systems<sup>53</sup>.

Rüdiger Morbach

*b. The arbitral tribunal jurisdiction*

**i) The scope of the arbitral tribunal's jurisdiction**

**Extension of the arbitration agreement to third parties.** According to French law, only a manifestly non-applicable or void arbitration agreement would deprive the tribunal from the right to hear the case. Indeed, article 1465 of the French Civil Procedure Code sets that “The [arbitral] tribunal has exclusive jurisdiction to hear disputes relating to its jurisdictional power’s challenge”<sup>54</sup>. Therefore, and pursuant to article 1448 of the Civil Procedure Code, “If a dispute regarding an arbitration clause is referred to a national tribunal, this tribunal shall declare it has no jurisdiction unless [...] the arbitration clause is clearly non-valid or manifestly inapplicable”. Derived from the competence-competence principal a remarkable solution that is peculiar to French caselaw on the extension, and its condition, of the arbitration’s agreement to third parties as well as an extensive interpretation of the agreement’s scope regarding its object. Two decisions illustrate those trends.

On 8 June 2016 (**Civ. 1e, 8 June 2016, n°15-16.241**) and 13 July 2016 (**Civ. 1e, 13 July 2016, n°15-21.345**), the *Cour de cassation* had to hear two cases about the issue of the arbitration clause’s *ratione materiae* and *ratione personae* scopes.

In the first case<sup>55</sup>, the *Cour de cassation* extended the scope of the arbitration clause to an insurance broker who was not a party to the insurance contract. A shipowner and an

<sup>51</sup> Article 1448 of the Civil Procedure Code.

<sup>52</sup> See CA Paris, 26 February 2013, n° 12/12953.

<sup>53</sup> See German Federal Court of Justice (BGH), 14 September 2000, III ZR 33/00.

<sup>54</sup> Article 1465 of the Civil Procedure Code, modified by the Decree 2011-48 of 13 January 2011, art. 2 (independent translation).

<sup>55</sup> Civ. 1e, 8 June 2016, n°15-16.241.

English insurance company had entered into a contract including an arbitration clause through a broker to ensure a ship. The vessel sank but the insurer did not compensate the damage. The shipowner referred both the insurer and the broker to the First instance tribunal of Papeete – French Polynesia. The tribunal held that it had no jurisdiction to hear the dispute between the shipowner and the insurance broker because of the arbitration clause, which was not applicable in this specific case. Yet, the *Cour de cassation* decided that even if the broker was not a party to the insurance contract, his involvement in the contract and his intention explicitly stated in his writings were enough to extend the arbitration clause to him. The negative effect of the competence-competence principle gives priority to the arbitral tribunal to hear the case.

In the second case<sup>56</sup>, the *Cour de cassation* extended the scope of an arbitration clause to shareholders who were not parties to the arbitration agreement. A French company and an American company entered into a distribution agreement including an arbitration clause. An **arbitral** tribunal rendered an award against the French company which was subject to insolvency proceedings. The shareholders of the French company decided to refer the American company to French courts for claims regarding torts instead of contractual claims. The French tribunal recognized its lack of jurisdiction because of the arbitration clause. However, the shareholders considered that, as third parties to the contract, the arbitration clause was not applicable to them because the scope of the clause was limited to contractual disputes. The *Cour de cassation* confirmed that the French tribunal lacked jurisdiction. The Court stated that, due to the general terms of the arbitration clause, the clause was not limited to contractual claims but also applied to claims emerging from a tort. The Court specified that the shareholders could not be seen as third parties to the contract because they took part in the contractual negotiations, they were aware of the arbitration clause and played an active role in the execution of the contract.

Timothée Andro

### **FIFA general terms of registration, arbitrator's power to decide on its jurisdiction.**

On 6 July 2016 (**Civ. 1e, 6 July 2016, n°15-19.521**), the *Cour de cassation* ruled on the *ratione materiae* and *ratione personae* scopes of arbitration agreements and reminded the importance of the competence-competence principle. The FC Sochaux's football club signed a registration form to participate in the World Cup's profits. This contract signed with the Fédération internationale de football – FIFA – included an arbitration clause designating the Court of Arbitration for Sport in Lausanne (“CAS”). Furthermore, in compliance with FIFA's rules, the FC Sochaux had to loan an American player to the American Federation of Football. This player had a traffic accident and the FC Sochaux decided to introduce proceedings against FIFA before French courts. In response, FIFA challenged the

---

<sup>56</sup> Civ. 1e, 13 July 2016, n°15-21345.

tribunal's jurisdiction by relying on the arbitration clause included in the registration form. According to FC Sochaux, the arbitration clause is limited to disputes arising from the contract and does not apply to tort actions. Yet, the FC Sochaux invoked FIFA's tortious liability on the ground of the former article 1382 of the French Civil Code<sup>57</sup> – which recently became the new article 1240. The *Cour de cassation* rejected the FC Sochaux's request. According to the *Cour de cassation*, the general terms of the registration form do not limit the scope of the arbitration clause. In addition, the Court emphasized that unless the arbitration clause was manifestly inapplicable, only the CAS could decide on its jurisdictional challenge.

Timothée Andro

## ii) The control of jurisdiction by judicial courts

For more than ten years, the *Cour de cassation* has often reminded the competence-competence principle and its implications on national jurisdictions<sup>58</sup>. This past year, the *Cour de cassation* rendered a number of decisions regarding the manifest character of the inapplicability of an arbitration agreement without which the dispute will have to be brought first in front an arbitral tribunal that would have priority to decide on its jurisdiction (positive effect of the competence-competence principle). The case would be heard by domestic courts only if the arbitration agreement is manifestly void or inapplicable or if the arbitral tribunal has considered that it did not have jurisdiction. Before an award is rendered, the domestic courts will have to decline their competence (negative effect of the competence-competence principle).

**Competition between arbitration and choice-of-court agreements.** On 9 November 2016<sup>59</sup> and 1st March 2017<sup>60</sup>, the *Cour de cassation* had to decide, regarding groups of contracts with competing provisions with choice-of-court or arbitration clauses, if the arbitration agreement was manifestly or not inapplicable.

In the first decision (**Civ. 1e, 9 November 2016, n°15-27.341**), the *Cour de cassation* decided that inserting a choice-of-court agreement in a second contract did not erase the parties' original will - established in a first contract - to go to arbitration if a dispute arises. In this case, two companies entered into a first contract which included an arbitration clause. Thirty years later, the same companies entered into a second contract containing this time

---

<sup>57</sup> Article 1240 of the Civil Code, former article 1382, modified by the Law n°2016-131, 10 February 2016.

<sup>58</sup> Civ. 1e, 16 October 2001, *Quarto Children's Books c. Editions du Seuil*, Bull. civ., 2001.I.254; *Rev. arb.*, 2002.919, note D. COHEN.

<sup>59</sup> Civ. 1e, 9 November 2016, n°15-27.341.

<sup>60</sup> Com., 1e March 2017, n°15-22675.

a choice of court agreement. On 20 August 2015, the Court of Appeal of Pau decided that the arbitration clause was inapplicable to the dispute. According to the Court of Appeal of Pau, the second contract should be regarded either as a termination of the original contract or as an amendment of the relevant provisions of the original contract. The *Cour de cassation* overruled the Court of appeal's decision and reminded that the competence-competence principle provided by article 1448 of the Civil Procedure Code indicates that in the absence of a manifest inapplicability of the arbitration clause, the arbitral tribunal should be the judge of its own jurisdiction.

In the second decision (**Com., 1 March 2017, n°15-22.675**), French subsidiaries of a Canadian group of companies (Lavalin Inc.) entered into several contracts with a French company. A first contract was signed in 2005 about relations' development in France between one of the affiliates (Lavalin) to the French company included a choice of court agreement designating the Créteil Commercial tribunal. Yet, five other contracts concluded in 2011 and 2012 by another affiliate (Lavalin international) with the French company for a technical support in Morocco contained an arbitration clause. In 2014 Lavalin international terminated those contracts. Arguing that the subsidiary had put well-established commercial relationships to a brutal end (article L. 442-6 I 5 Commercial Code which is an imperative rule under French law<sup>61</sup>), the French company decided to assign Lavalin, Lavalin International and Lavalin Europe and to refer the dispute to the Paris Commercial tribunal. The Canadian companies contested the Paris Commercial tribunal. On the one hand, the jurisdiction of the Paris Commercial tribunal was challenged because of the arbitration agreement, on the other hand because of the choice-of-court agreement in favour of the Créteil Commercial tribunal. The Paris Commercial tribunal nevertheless confirmed its jurisdiction, whereas the Court of Appeal invalidated this decision considering that both the arbitration agreement between the French company and Lavalin international, and the choice-of-court clause between the French company and Lavalin should have been respected, leaving the Paris Commercial tribunal competent to hear only the claims brought against Lavalin Europe. The French company brought the case before the *Cour de cassation*.

According to the French company, the arbitration clause was clearly inapplicable to claims brought against Lavalin international because the 2011 and 2012 contracts should be seen as a series of contracts deriving from the first and original 2005 contract, which does not contain any arbitration clause. More precisely, the French company argued that the arbitration clause included in the other contract had a limited scope. Further, the wording of the arbitration clause gave the arbitral tribunal jurisdiction to hear disputes only relating to the execution and interpretation of the contracts, excluding termination issues. The *Cour*

---

<sup>61</sup> Article L442-6-I-5 of the Commercial Code, modified by the Law n°2016-1691, 9 December 2016: « I. - Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers : [...] <sup>5°</sup> De rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte de la durée de la relation commerciale et respectant la durée minimale de préavis déterminée, en référence aux usages du commerce, par des accords interprofessionnels. [...] ».

*de cassation* stated that the series of contacts did not rise from the original contract neither did it relate to it because of (i) the lack of identity of parties, cause and object and (ii) the autonomy and independence of each affiliate. The *Cour de cassation* also reminded that the arbitral tribunal has exclusive jurisdiction to decide on its own jurisdiction, unless the arbitration clause is manifestly non-valid or manifestly inapplicable, and regardless that an imperative rule of law such as article L. 442-6 I 5 Commercial Code would apply to the dispute. Therefore, the Court of Appeal's decision was maintained on that point. The *Cour de cassation* however quashed the Court of Appeal on the part of the reasoning related to the choice-of-court clause: only specific courts are competent to hear disputes related to a brutal breach of an established commercial relation, among the Paris Commercial tribunal but not the Créteil Commercial tribunal according to article D. 442-3 of the Commercial Code. The *Cour de cassation* reminds that a choice-of-court in a domestic dispute (the 2005 contract was executed in France and signed by two companies incorporated in France) cannot exclude the application of imperative jurisdictional rules.

Timothée Andro

**Assignment, legal standing and jurisdiction.** A judgment of the *Cour d'Appel de Versailles*<sup>62</sup>, to which the *Cour de cassation* referred in 2015 after having quashed a judgment by the *Cour d'appel de Paris* from 2013, rejected itself all grounds brought forward against an arbitration award rendered in 2012 and ordered the plaintiff to bear the costs.

The litigation goes back to a hotel in Beirut which the plaintiff (Jnah Development) owned and which the defendant (Marriott International) operated. When the defendant did not adhere to the standards plaintiff wanted its hotel to be run by, a conflict arose which resulted in arbitration proceedings and two arbitration awards, one of which ordered the defendant to pay 6 Mio. USD to the plaintiff. A Mr. X, who in the meantime had taken over most of the shares of plaintiff and had been assigned the case and the fruits of its outcome, sued defendant again before another ICC tribunal. The tribunal however dismissed the claim, stating that the assignment did not allow Mr. X to start another arbitration. The *Cour d'appel de Paris* found that Mr. X had no legal standing himself (first judgment), but that he had been effectively empowered to act as plaintiff's agent (second judgment). The *Cour de Cassation* confirmed the first judgment and quashed the second.

Plaintiff was referred to the *Cour d'appel de Versailles*, where it submitted three grounds for setting aside the 2012 award, none of which was successful. First, plaintiff contended on public policy grounds that defendant had bribed witnesses, a contention the *Cour d'appel* found not to be proven by plaintiff. Second, plaintiff claimed on due process grounds, equally without success, to not have been able to obtain the proof needed to support the first contention. The third and last contention plaintiff brought up was that by denying Mr. X legal standing, the tribunal had ruled on jurisdiction and had done so erroneously, thereby

---

<sup>62</sup> CA Versailles 30 June 2016, n° 15/03050.

creating ground for annulment on the base of Art. 1510 n° 1 French Civil Procedure Code. The *Cour d'appel* did not follow plaintiff's argumentation, denying that Mr. X's legal standing was a question of jurisdiction and stating that the tribunal had never discussed jurisdiction in the proceedings.

Apart from the astonishingly long legal battle between the parties (the first arbitration award was rendered in 2001) and the enormous costs the three arbitrations and five state court proceedings must have generated, the legal significance of the case is somewhat limited. The power of a person to represent a legal entity before an arbitral tribunal is, according to the *Cour d'appel de Versailles*, not a question of jurisdiction.

Rüdiger Morbach

*c. Attributes of the arbitration's actors*

The relationship between parties and arbitrators frequently leads to disputes, some regarding the independence and the impartiality of the arbitral tribunal<sup>63</sup> or about other issues such as, this year, the payment of arbitrators' fees.

**Independence and impartiality of the arbitral tribunal, disclosure, public information.** The Paris Court of Appeal rendered a fifth decision in the Tecnimont case related to tribunal's independence and impartiality issues (**CA Paris, 12 April 2016, n°14/14884**).

In 1998, Tecnimont SPA – an Italian company – and Avax – a Greek company – entered into a contract including an arbitration clause. Nearly twenty years later, a dispute between them led to initiate an ICC proceeding. During the arbitration, the Greek company raised concerns regarding the impartiality of the chairman of the tribunal. According to Avax's counsel, there was an undisclosed relationship between the chairman's law firm and Tecnimont. Therefore, Avax required before the ICC court an order to investigate the chairman. But this challenge was filed after expiration of the limitation period provided for in the ICC rules. Pursuant to these rules, "*For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification*"<sup>64</sup>. The ICC dismissed the challenge and Avax continued to participate in the arbitration while reserving its rights. On 10 December 2007, a partial award was rendered in favour of the Italian company. Avax introduced a request for annulment before the Paris

<sup>63</sup> CLAY (Th.), *L'arbitre*, Thèse de doctorat, Paris II, 2000. HENRY (M.), *Le devoir d'indépendance de l'arbitre*, Thèse de doctorat, Paris I, 1996.

<sup>64</sup> Article 11 of the International Chamber of Commerce Arbitration Rules 1998.

Court of appeal to contest the validity of the award because the chairman lacked independence. This was the beginning of a series of decisions rendered by French courts. First, the Court of appeal of Paris; in February 2009<sup>65</sup>, quashed the award. According to the Court, the chairman of the tribunal did not comply with his obligation to disclose. Second, the *Cour de Cassation*<sup>66</sup> overruled the Paris' Court of appeal decision and remitted the case to **another** Court of appeal. The *Cour de cassation* stated that most of the facts alleged by Avax had been known and invoked in the challenging statement before the ICC. Third, the Court of appeal of Reims<sup>67</sup> quashed the award for the second time on the ground that the obligation of disclosure should apply as long as the arbitration proceedings lasts, and that the chairman behaviour could raise a reasonable doubt as to his impartiality and independence. Fourth, the *Cour of cassation*<sup>68</sup> reversed – for the second time – the decision of the Court of appeal of Reims and remitted the case to the Paris Court of appeal. The *Cour de cassation* outlined that the Court of appeal of Reims should have verified for each fact raised by Avax if the thirty-day limitation period of the ICC rules had been complied with. Finally, on 12 April 2016, the Court of appeal of Paris<sup>69</sup> rejected the request for annulment against the partial award on the grounds that: (i) the Court stated that the facts discovered by Avax after the thirty-day limitation period were public knowledge and easily accessible; (ii) the different facts alleged by the Greek company did not raise any reasonable doubt concerning the chairman's independence and impartiality; (iii) the challenge before the ICC was initiated after the expiration of the thirty-day limitation period.

Timothée Andro

**Independence and impartiality of an expert, link with an arbitrator, disclosure.** In a case rendered on 25 May 2016 (**Civ. 1e, 25 May 2016, n°14-20.532**), the *Cour de cassation* issued a decision in which the expert designated by one of the parties shared a connexion with an arbitrator. The legal issue could be summarized as follows: which party bears the burden of verifying whether the arbitrator has ties with a third party, i.e. the expert? A Russian company and a French counterparty introduced arbitration proceedings before the Chamber of Industry and **Commerce** of the Russian Federation to assess the price of shares. Once the award was rendered, the French party asked for its *exequatur* before French jurisdictions which was granted by the Paris *Tribunal de grande instance*. In response, the Russian company initiated a request for annulment to contest the validity of the award because one of the arbitrators lacked independence. Previously, the Russian company had challenged the tribunal before the Chamber of Industry and Commerce of the Russian

---

<sup>65</sup> CA Paris, 12 February 2009, *Revue de l'arbitrage*, 2009 at 186.

<sup>66</sup> Civ. 1e, 4 November 2010, n° 09.12-716.

<sup>67</sup> CA Reims, 2 November 2011, n° 10/02888.

<sup>68</sup> Civ 1e, 25 June 2014, n° 11.26-529.

<sup>69</sup> CA Paris, 12 April 2016, n°14/14884.

Federation. Before the *Cour de cassation*, the Russian company argued that the expert of the French party and the arbitrator worked for the Russian academic administration and that the expert was hierarchically dependant of the arbitrator. The Russian company argued that the arbitrator was subject to an obligation to disclose ties with the expert and that this situation raised a reasonable doubt as to the impartiality and independence of the tribunal. Lastly, it added that it did not fall within the parties' obligations to verify the arbitrators' ties with experts and to investigate them.

The *Cour de cassation* rejected the request for annulment against the award on the ground that most of the facts alleged by the Russian company were publicly known and accessible on the internet website of the academy. The *Cour de cassation* applies the same regime to the question of the arbitrator's link with an expert, then with a party. The *Cour de cassation* confirmed the existence of the arbitrators' obligation to disclose such information. Nevertheless, it seems that the burden of verifying the arbitrator's links weighs on the parties. Therefore, the parties will have to establish the lack of notoriety of the fact they alleged when they challenge arbitrators. Traditionally, the *Cour de cassation's* decisions specified that the obligation of disclosure shall be valued in the light of the notoriety of the situation and the effect on the award<sup>70</sup>. Further, the arbitrator's obligation of disclosure has been codified in 2011 in article 1456 of the Code of civil procedure<sup>71</sup>, applicable both to domestic and international arbitration.

Timothée Andro

***The joint liability of the parties for the payment of arbitrators' fees.*** On the 1<sup>st</sup> of February 2017 (**Civ. 1e, February 1st 2017, no. 15-25.687**), the *Cour de cassation* ruled, on the issue of the parties' joint liability to pay the arbitrators' fees. In this case, the French company Getma international and the Republic of Guinea entered into a contract concerning a harbour concession. In accordance with the arbitration clause of the contract, the parties initiated proceedings before the CCJA of the OHADA. However, once the tribunal rendered its award, Guinea refused to pay the amount previously agreed probably in the terms of reference. In response, the arbitrators brought their claim against the State before the Paris Court of Appeal, which held that Getma had to pay all the arbitrator's fees. Getma argued that the parties to an arbitration are not jointly liable for the debts stemming from arbitration proceedings. Indeed, the company considered that joint liability cannot be presumed and must be provided by law or an unequivocal clause in the contract. The *Cour de cassation* dismissed the claim of the Russian company by stating that

---

<sup>70</sup> E. GAILLARD, « Regain de sérénité dans l'appréciation de l'indépendance et l'impartialité de l'arbitre », note under Cass. Civ 1e, 6 December 2001, 16 May 2002 and 2 April 2003, *Rev. arb.*, 2003, p. 1231 ; M. HENRY, « Pluralité de désignation et de devoir d'indépendance et d'impartialité de l'arbitre », note, sous Paris, 29 January 2004, 10 et 17 February 2005, *Rev. arb.*, 2005, p. 709.

<sup>71</sup> Article 1456 of the French Civil Procedure Code.



the international nature of the arbitration excluded the application of any domestic law, which is the sign of a substantive rule (*règle matérielle*) created by caselaw, and that according to that such rules that govern the “contrat d’arbitre”, the parties are jointly liable toward arbitrators.

Timothée Andro

*d. The control of public order*

French caselaw related to the compliance with international public order of international awards is on the edge of shifting from a “minimalistic” to a “maximalist” control, to quote French doctrine’s analysis related to the different intensities of that control. During the one-year time-period studied, three decisions, one from the *Cour de cassation* (**Civ. 1e, 25 May 2016, n°14-29.264, Republic of Congo v. Commisimpex**) two others from the *Cour d’appel* of Paris (**CA Paris, 27 September 2016, n°15/12614, Maison Bauche v. Indagro**, and **CA Paris, 21 February 2017, n°15/01650, Republic of Kirghizstan v. Valeriy Belokon**), show the new direction took by the lower court toward a broader control related to corruption and money laundering activities, whereas the *Cour de cassation* has not yet validated this new shift<sup>72</sup>.

In the first case, the company Commisimpex introduced an arbitration proceeding in front of the ICC against the Republic of Congo to obtain the execution of a debt-rescheduling protocol. An award was rendered on 21 January 2013 that was later challenged in front of the Paris *Cour d’appel* on the ground that part of the debt validated by the protocol was obtained by corruption (CA Paris, 14 October 2014, n°13/03410). The Court however refused to set aside the award and dismissed the Republic of Congo’s argument that the award would give effect to a contract tainted by corruption and, thus, contrary to French international public order controlled on the ground of article 1520, 5° of the French Civil Procedure Code. To reach this solution, the court verified the calculations operated by the arbitrators to determine if part of the payment had a fraudulent cause and considered that the Republic of Congo did not demonstrate the existence of corruption. The court also rejected the general assumption that the Republic of Congo was subject to rampant corruption. It further considered inadmissible the arguments based on insufficient evidence used by arbitrators or the appreciation by the arbitrators of authorizations given to the protocol’s signatories because it would be a review of the substance. The distinction operated between element of facts necessary to consider whether validating the award would give effect to an illicit payment, and other arguments related to the questioning of the arbitrators’ power of interpretation is quite interesting because, the previous

---

<sup>72</sup> E. GAILLARD, *JDI* 2017/4, p. 20; M. AUDIT, S. BOLLEE, *Rev. Arb.* 2017.929. In English, see A.-M. LACOSTE, *ASA Bulletin*, 2018, pp. 31-52.

mainstream caselaw would have precluded judges from deepening their control into reviewing figures and elements of facts related to corruption. During the 2000s<sup>73</sup>, French caselaw inaugurated a limited control of international public order and the violation had to be “effective, tangible and flagrant”. The last condition lightened the control to a violation to public order by the award that was said to “strike the eyes”<sup>74</sup> and has been disapproved since then by a part of French doctrine. The Paris *Cour d’appel*, in this 2014 decision, is one of a new series that have eliminated this condition and explicitly proclaimed that “when an award gives effect to a contract obtained by corruption, it is of the annulment judge’s duty, seized on the ground of article 1520, 5° of the Civil Procedure Code, to research, in fact and in law, all the elements enabling him to adjudicate on the alleged unlawfulness of the contract and to appreciate if the recognition or the execution of the award violates the international public order in an effective and concrete manner”<sup>75</sup>. The Court of appeal decision was upheld by the *Cour de cassation* in a decision dated 25 May 2016 (n°14-29.264), that, however, do not explicitly validate this new intensified control. The *Cour de cassation* should soon decide on the matter in other cases that are in the process of being heard<sup>76</sup>.

In the meantime, the Paris *Cour d’appel* has had the occasion to mature its position and, in two cases, one about corruption the other about money laundering, to specify the implications related to the evidence of a violation by an award to French international public order (CA Paris, 27 September 2016, n°15/12614, *Maison Bauche v. Indagro*; CA Paris, 21 February 2017, n°15/01650, *Republic of Kirghizstan v. Valeriy Belokon*).

In a decision *Maison Bauche v. Indagro*, the Paris *Cour d’appel* invalidated an exequatur order of an award rendered in London on June 4<sup>th</sup>, 2015 by a sole arbitrator, related to corruption practices between the parties. The dispute arose from a sale of fertilizers. During the arbitral proceeding a complaint was filed by Maison Bauche against one of its former employee for having negotiated higher prices with Indagro in exchange of a bribe. The arbitrator

---

<sup>73</sup> Paris, 14 June 2001, *Rev. Arb.* 2001.773, note C. SERAGLINI; Paris, 18 November 2004, *Thalès v. Euromissile*, *JCP G* 2005, II, 10038, note G. CHABOT; *JDI* 2005.357, note A. MOURRE; *D.* 2005, pan. 3058, obs. T. CLAY; *RTD com.* 2005, p. 263, obs. E. LOQUIN; *Rev. arb.* 2005.529, note L. G. RADICATI DI BROZOLO; *RCDIP* 2006.104, note S. BOLLEE; *Cab. Arb.*, vol. III, *Gaz. Pal.* éd. 2006.87, doct. C. SERAGLINI; *Civ.* 1<sup>e</sup>, 4 June 2008, n° 06-15.320, *D.* 2008. 1684, obs. X. DELPECH, 2560, obs. S. BOLLEE, et 3111, obs. T. CLAY; *RTD com.* 2008. 518, obs. E. LOQUIN; *JCP G* No. 25, 18 June 2008, act. 430, note J. ORTSCHIEDT; *RTD eur.* 2009. 473, chron. L. IDOT. See also CA Paris, Ch. 1, 22 October 2009, *Linde*, *Rev. Arb.* 2010, p. 124, note T.-X. TRAIN; *Cab. Arb.* 2010/1, p. 181, note L. RADICATI DI BROZOLO.

<sup>74</sup> L. RADICATI DI BROZOLO, « Mondialisation, juridiction, arbitrage : vers des règles d'application semi-nécessaire ? », *Rev. Arb.*, 2003.1.

<sup>75</sup> Also eliminating the « flagrancy » condition, see. CA Paris, 4 March 2014, *rev. arb.* 2014.955, note L. DELANOY and not quashed by the *Cour de cassation* (*Civ.* 1<sup>e</sup>, 24 June 2015, 14-18.706, *rev. arb.* 2016, p. 221, note L.-C. DELANOY); CA Paris, 25 November 2014, *rev. arb.* 2015.556, and *ibid.* note C. FOUCHARD.

<sup>76</sup> It, for instance, did not favored a different control in *Cass. Civ.* 1<sup>e</sup>, 12 February 2014, 10-17.076, note L.-C. DELANOY, *Cab. Arb.* 2014/3, p. 585, or in *Civ.* 1<sup>e</sup>, 24 June 2015, 14-18.706, *ibid.*

suspended the proceeding the time for a French criminal court to condemn the employee and Indagro for private corruption, active and passive, offenses. The arbitrator rendered an award condemning Maison Bauche to pay 1.000.000 USD, an amount parties had agreed to during the proceeding but without taking into account Maison Bauche's counterclaims because it had not replenished a security for cost that had expired during the procedure. Maison Bauche sought the invalidation of the exequatur order in France, arguing that the award was contrary to international public order because it gave effect to a contract partly tainted by corruption.

The control of international public order criteria used were those of a violation effective and concrete, as well as "manifest" (instead of the classic criterion of "flagrancy" that seemed to have been abandoned<sup>77</sup>). To operate this control the Court specified that it had to investigate, in law and in fact, all the elements that would permit to appreciate the alleged illicity of the contract and that it is not bounded in this examination by the appreciations of the arbitral tribunal nor by the law chosen by the parties. The Court however reminded that a French criminal decision had a *res judicata* effect in front of a French civil judge and that, therefore, it was established that the contract had an illicit cause. It further found that it was reputable that the contractual imbalance in the contract was due to the illicit agreement between Indagro and the Maison Bauche's employee. Consequently, giving effect to the award would permit to Indagro to make profits from a corruption pact, which was considered inadmissible by the *Cour d'appel*. The *Cour de cassation* had had the opportunity to validate the decision of the *Cour d'appel* (Civ. 1e, 13 September 2017, n°16-25.657 and n°16-26.445) and, again, did not took position on the new intensity of the control.

In the decision *Republic of Kirghizstan v. Valeriy Belokon*<sup>78</sup> is about an award rendered on 24 October 2014 by an UNCITRAL tribunal that was set aside by the Paris *Cour d'appel* on the ground that the corporate banking structure the investor alleged to have been expropriated from and followed by the arbitral tribunal, was, in reality, covering a money laundering scheme. After the Kirghiz President Kourmanbek Bakiev was excluded from power by a riot in April 2010, a private bank, Manas Bank, was placed under an interim administration and finally dissolved in 2015. An arbitration proceeding was initiated in August 2011 based on article 9(2) of the BIT between Leetonia and the Republic of Kirgizstan and article 3 of the 1976 UNCITRAL Rules. The arbitral tribunal held that, in the absence of a criminal condemnation, the allegations of money laundering had to be discarded and therefore compensated the owner of the bank, Valeriy Belokon, for an unlawful expropriation as well as the violation of the fair and equal standard based on the fact that the criminal inquiries operated had been long, arbitrary, and were considered extremely broad regarding the criminal allegations directed toward the bank and its administration.

---

<sup>77</sup> See *supra* this chronicle, note n°75.

<sup>78</sup> L.-C. DELANOY, *ASA Bulletin* 2017, p. 551.

The Paris *Cour d'appel* reminded first that the prohibition of money laundering is one that French public order cannot accept a violation even in an international context. It added that money laundering prohibition is part of an international consensus based on the Merida Convention of 9 December 2003 and quoted its article 23(1). The Court then defined its mission: its mission isn't to control rather or not a party to the arbitration proceeding had to be considered guilty for money laundering according to foreign or French criminal law; it must only check when seized to annul an award if the recognition or the execution of the award would impede the objective of combating money laundering by permitting a person to benefit from the product of such an illicit activity in the way it is defined by the Merida Convention. However, such a control must be clarified on two points. First, the Court explains that its examination is not subordinated to a criminal condemnation and therefore, the argument based on the fact that the criminal proceedings in Kirgizstan had not yet lead to a criminal trial was irrelevant. It also acknowledges that the duration of the investigations doesn't appear, in this case, as manifestly disproportionate because money laundering is, by nature, complex to detect and is usually hidden by opaque structures that here include many offshore companies and, in addition, most of the persons accused in the criminal case have leaved Kirgizstan. Second, the control based on article 1520, 5° of the French Civil Procedure Code doesn't aim to decide rather or not the Republic of Kirghizstan actions are violations of a BIT, but only to consider if the execution of the award would help a party to benefit from the product of illicit activities. Therefore, this investigation, necessary to defend the international public order, is not limited to evidence produced in front of the arbitrators not bound by the arbitrators' assertions, appreciations and qualifications. Finally, the Court reminds that the evidence produced in the annulment proceeding must respect the principle of contradiction as well as the one of equality of arms and, consequently, rejected evidence that had, according to the Court, been obtain by the state in the use of an asymmetrical investigation power, the access to the criminal file and those that had been truncated or tendentiously selected.

Despite, the exclusion of some pieces of evidence, the Court vacated the award because it found "sufficient accurate, reliable and consistent evidence" that the bank had been used for money laundering activities. The Court relied on five clues. First, it considered that Mr. Belokon had tight links with the economic power holder of the country, contrary to the arbitral tribunal findings. Second, it found that the acquisition of the bank had surely been irregularly obtained. Third, the prudential control had been operated by a person closely linked to the former Kirgiz president and had a bank account in the bank. Fourth, Mr. Belokon had explained the dazzling success of his bank in Kirgizstan by the fact that he had previously run a private bank in Leetonia. This Latvian bank had however been sanctioned because of repeated violations to money laundering compliance regulation. Therefore, the use of the exact same techniques in Kirgizstan could easily protect money laundering activities. Five, the Court relied on the volume and the structure of the operations by comparing the activity of the bank from its purchase at an insolvency stage

in 2007, to its incredible success in a short amount of time. The Court established that in two years and eight months, the total value of the bank's transactions was equal to the GDP of Kirgizstan in 2008 and mainly related to non-resident companies. It concluded that such a success was impossible, in a country so poor, by using "orthodox banking practices". It finally stated that the execution of the award would give the opportunity to Mr. Belokon to use the illicit product of these activities and violates "manifestly, effectively and concretely" the international public order. The criterion of "flagrancy" is, once again, replaced by the Court by the one of "manifestly".

Even though this new control has not yet been validated by the *Cour de cassation*, it seems more appropriate regarding the latest evolutions of French criminal law modified recently by the Sapin 2 Law<sup>79</sup> with the introduction of new compliance obligations toward companies as well as the utilization of the red flags technique to identify risks of illicit practices. The creation of a new regime to control awards related to some aspect of French administrative law must also have motivated this change in civil courts practices when controlling the violation by awards of the French international public order.

Eloïse Glucksmann

## 2. Control of awards by administrative courts

The challenges of international arbitration awards including the control of domestic mandatory administrative rules in some specific type of contracts governed by French public law were referred to the French administrative courts instead of judicial courts in 2010. The latest had dealt until then with such challenges without according a different review to international awards related to disputes involving French administrative law. This recent devolution of powers to administrative courts has questioned the modalities of their control over international awards, established by caselaw. This year several decisions were rendered in two important cases that clarify that control. One decision relates to the annulment proceeding of an award rendered by a tribunal seated in France in an international dispute related to a public purchase contract. It specifies the modalities of the administrative judge's control over the award (**CE, 9 November 2016, n° 388806, Fosmax**). The second decision is about a dispute related to a public procurement contract settled by an arbitration tribunal seated abroad. The question that arose was about the competent judge, between administrative or judicial courts, to grant the exequatur to the award (*Cour administrative d'appel de Bordeaux, 12 July 2016, n° 13BX02331, SMAC*).

---

<sup>79</sup> Law No. 2016-1691 on "Transparency, Fight Against Corruption and the Modernization of Economic Life".

To understand the debate at stake, it must be reminded that the French judicial system is characterized by a division between, on the one side the jurisdictions of the judiciary order competent to solve civil disputes between private parties or sanction authors of criminal offenses. On the other side, the jurisdictions of the administrative order are competent to deal with disputes involving State-owned companies and related to administrative law. Each system is governed by its own rules and decisions can have different outcomes on similar topics. Since the backslide of the prohibition for public companies to consent to arbitration, administrative courts are competent to control awards rendered in domestic disputes when one of the party is a public company subject to administrative law<sup>80</sup>. However, challenges against an international arbitral award had always been carried out by judicial courts, regardless the fact that a French public party is involved, or French administrative law would apply. The question of administrative courts' jurisdiction to control awards rendered in international disputes was only recently raised and the question was brought in front of the *Tribunal des conflits*, a special jurisdiction in charge of deciding whether a dispute is of the administrative or the judiciary orders' competency.

In a decision *Inserm* dated 17 May 2010<sup>81</sup>, the *Tribunal des conflits* decided that, "a recourse against an arbitral award rendered in France in a dispute related to a contract concluded by a French public company and a foreign company, executed in France, and related to international commercial purposes – even if this contract would be considered as an administrative contract according to French domestic law" has to be brought in front of a judicial court. "By exception, the administrative judge will be competent for challenges against such an award each time it would imply to control the award's conformance to mandatory rules of French public law related to the occupation of public domain or to public purchase and procurement contracts, to partnership contracts and public service delegations, because considered as contracts submitted to an administrative regime of public order" (§2). Therefore, administrative courts have a residual competence to control challenges of international awards which scope, conditions and modalities were still subject to interrogations.

---

<sup>80</sup> Y GAUDEMET, « L'arbitrage : aspects de droit public », Rev. arb. 1992.241 ; P. DEVOLVE, « L'arbitrage en droit public français » in D. RENDERS, P. DEVOLVE, T. TANQUEREL (dir.), *L'arbitrage en droit public*, Bruylant, 2010 ; Ph. TERNEYRE, « L'arbitrage des litiges intéressant les personnes publiques », BJCP 2007.170.

<sup>81</sup> TC, 17 May 2010, *Institut national de la santé et de la recherche médicale (INSERM) c/ Fondation Letten F. Saugstad*, no 3754 ; D. 2010. 1359, obs. X. DELPECH, 2633, note S. LEMAIRE, 2323, obs. S. BOLLEE, 2933, obs. T. CLAY, et 2011. 2552, chron. Y. GAUDEMET, C. LAPP et A. STEIMER ; AJDA 2010. 1047, 1564, étude P. CASSIA, et 2337, tribune P. CASSIA ; RDI 2010. 551, obs. S. BRACONNIER ; RFDA 2010. 959, concl. M. GUYOMAR, et 971, note P. DELVOLVE ; Rev. crit. DIP 2010. 653, étude M. LAZOUZI ; RTD com. 2010. 525, obs. E. LOQUIN ; Rev. arb. 2010. 275, comm. M. AUDIT, p. 253 ; JCP 2010. I. 644, obs. J. ORTSCHIEDT, 552, chron. T. CLAY, 585, chron. E. GAILLARD, et 886, obs. C. NOURISSAT ; Cah. arb. 2010. 717, chron. D. FOUSSARD.

Those modalities were recently clarified in a *Fosmax* ruling of the *Conseil d'Etat* (**CE, 9 November 2016, n° 388806**)<sup>82</sup>. In this case, the French company Gaz de France (GDF), at the time a State-owned public industrial and commercial institution, contracted with a consortium, in which an Italian company joined tardively, for the construction of a methane terminal in the South of France. The contract was ceded to GDF's to one of its subsidiaries named Fosmax LNG. In a specific agreement, Fosmax and the consortium decided that any dispute regarding the performance of the construction contract would be submitted to arbitration. A dispute arose, and an arbitral tribunal rendered an award in Paris on 13 February 2015 (ICC no. 18466/ND/MHM). The question of the competent court to annul the award was finally raised because, according to French law, the competence of judicial or administrative courts derives from the nature, administrative or judicial, of the contract. The contract's nature had changed during its performance due to the cession from GDF to Fosmax LNG and the *Tribunal des conflits* had to remind that it is the signature's date that must be considered to decide rather or not a contract is submitted to administrative law<sup>83</sup>. The annulment procedure was therefore brought in front of the *Conseil d'Etat* – the administrative order Supreme Court. A decision was rendered on November 9, 2016 that stresses out the particularities of this new form of control.

According to the *Conseil d'Etat*, administrative courts will have to check the arbitration clause lawfulness, including on their own motion, which is established either when a legal provision or an international convention incorporated in domestic law expressly authorizes the recourse to arbitration to public companies. If the arbitration clause is considered lawful by the administrative judge seized, he will have to decline its jurisdiction over the arbitral tribunal. If it is not, the normal administrative law rules of jurisdiction, codified in the Code of Administrative Justice, will apply.

At the control of the award steep, the *Conseil d'Etat* specifies that administrative courts will have jurisdiction to annul international awards, partly of fully, but not to review them on the merits. This clarification is interesting because the *Conseil d'Etat* considers that it is not bound by the chapter on arbitration law included in the Civil Procedure Code applicable to judicial, but it however inspires itself from those rules. Are therefore controlled, first at the procedural stage: the regularity of the arbitration procedure including, if the arbitral tribunal has rightfully considered itself competent, was regularly constituted and was independent as well as impartial. Second on the substance: the award mustn't be contrary to international public order, it cannot give effect to a contract which object is illicit or affected by serious defect (such as a vitiated consent), nor disregard rules to which public companies cannot derogate to, such as the interdiction to consent to donations, to alienate the public domain or public law prerogative legal public bodies hold to protect the general interest during the performance of the contract, or when is disregarded European law public order rules (§5). The control operated by administrative courts is therefore much

---

<sup>82</sup> See also the general conclusions of Mr. Gilles PELLISSIER, public rapporteur of the case: RFDA 2016.1154.

<sup>83</sup> TC, 11 April 2016, *Société Fosmax LNG*, no. 4043.

more deepened than the one operated by civil courts<sup>84</sup>, creating two different controls within the same French legal order. Further, the *Conseil d'Etat* adds that same control shall be operated at the enforcement stage, as well as in the frame of an exequatur request, irrespective that the award would be rendered in France or abroad (§7) and has been used for the first time in the *SMAC* case<sup>85</sup>.

The award was finally found to be rendered regularly. It was however set aside for having disregard public order rules. The *Conseil d'Etat* found that the contract wasn't one governed by private law contrary to the arbitrators, which, by itself would not have been a cause the annulment if some rules of administrative law considered imperative by the administrative judge had not been disregarded: the arbitral tribunal had rejected Fosmax's demand to condemn STS to support all risk and payments for the construction work Fosmax had made executed by third parties, on the ground that Fosmax had not terminated its contract with STS before replacing it with another contractor. However, contractual dispositions that require to terminate the contract because replacing a contractor with another one, are considered void under French administrative law because contrary to public order, but for the first time in this *Fosmax* ruling. Therefore, the arbitral tribunal should not have applied them (§14).

Parallely, civil courts were seized of an annulment request of the award and an appeal of the exequatur order. All the demands were considered inadmissible, except for the annulment of the exequatur granted to the award by civil courts in 2015 because later, the *Tribunal des Conflits* decided directed the challenge of the award to administrative courts' jurisdiction, and the award was vacated by the *Conseil d'Etat* on November 9, 2016<sup>86</sup>.

Fosmax was about the annulment of an international award rendered by a tribunal seated in France. The *SMAC* case (*Conseil d'Etat*, 19 April 2013, n°s. 352750 and 36202, *Cour administrative d'appel de Bordeaux*, 12 July 2016, n°. 13BX02331 and *Tribunal des Conflits*, 24 April 2017, n°. C4075) is about an award rendered by a tribunal seated abroad. The dispute arose from a public procurement contract signed between a French legal body governed by public law, named Syndicat Mixte des Aéroports de Charente (SMAC), with two foreign companies, Ryanair Limited et Airport Marketing Services Limited, and executed in France. In 2013, the *Conseil d'Etat*, had been seized to decide rather or not the exequatur of awards rendered abroad had to be granted by courts from the administrative or the judicial order. In a decision dated April 19, 2013, the *Conseil d'Etat* acknowledged that administrative courts were not competent to deal with direct recourses against an

---

<sup>84</sup> The control operated by civil courts on the absence of violation of public policy by the award is on the hedge of evolving in the direction of a full review of the award, both on facts and law. If the Paris Court of Appeal has now well established this trend (see CA Paris, 21 February 2017, no. 15/01650, 16 January 2018, no. 15/21703 and CA Paris, 10 April 2018, no. 16/11182, contrary to CA Paris, 18 Nov. 2004, *Thalès v. Euromissile*, Rev. Crit. DIP 2006, p. 104, note BOLLÉE and Civ. 1e, 4 June 2008, *Société SNF Société Cytec*, no. 06-15320), it still has not been validated by the *Cour de cassation*.

<sup>85</sup> See below in this commentary.

<sup>86</sup> Paris Court of Appeal, 4 July 2017, no. 15/16653.



award rendered abroad; it however considered that the exequatur to such an award had to be granted by administrative courts because the contract was one governed by administrative law<sup>87</sup>. Two years later, the French Supreme Court of the judicial order this time, namely the *Cour de cassation*, took the exact opposite position claiming “the New York Convention of June 10, 1958 [...] applicable to an exequatur procedure in France regarding an award rendered in London, [because it] prohibits any type of discrimination between foreign awards and international awards rendered in France as well as the review of awards on the merits”. Further, this transfer of jurisdiction to administrative courts would have been a violation of the “international arbitration order”. The matter was brought in front of the *Tribunal des Conflits* that decided on April 24, 2017, that the exequatur request by Ryanair Limited and Airport Marketing Services Limited must be formulated in front of the administrative courts instead of the judicial courts<sup>88</sup>.

Parallely, SMAC had asked for the termination of the public procurement contracts to the administrative court of Poitiers, the request had been dismissed. The Appeal Court of Bordeaux confirmed this position on 12 July 2016<sup>89</sup> and detailed the conditions for that an administrative court decline its jurisdiction in favor of an arbitral tribunal: the administrative court must examine if the principle of prohibition for public legal bodies to sign arbitration clauses had been discarded<sup>90</sup> and verify the lawfulness of the clause. By doing so, the administrative court of appeal extends to international arbitration law a principle that only existed for domestic arbitration law in the following terms: “it derives from general principles of French public law that, except for derogations expressly specified by law or international conventions incorporated in domestic law, legal persons under French law cannot subtract themselves to the rules that determine the competence of national courts by deferring the settlement of a dispute in which they are a party and that relates to the domestic judicial order”<sup>91</sup> (§2). Therefore, the Court of Appeal considered that articles 1 and 2 of the European Convention on International Commercial Arbitration of 21 April 1961, ratified by France in 1968, allow a legal person of public law to compromise on international matters. The reasoning defers from the one the *Cour de cassation* had held in 1966, in a famous decision *Galakis*, that had created a substantive provision of private international law that validate arbitration clause signed by legal person

<sup>87</sup> CE, 19 April 2013, no. 352750, D. 2013. 1069, obs. M.-C. de MONTECLER, 1445, note P. CASSIA, 2293, obs. S. BOLLEE, et 2936, obs. T. CLAY ; AJDA 2013. 822, et 1271, chron. X. DOMINO et A. BRETONNEAU ; RDI 2013. 362, obs. S. BRACONNIER ; AJCT 2013. 427, obs. S. HUL ; RTD com. 2014. 326, obs. E. LOQUIN ; JCP 2013. 784, obs. J. ORTSCHIEDT ; Rev. arb. 2013. 761, note M. LAZOUZI.

<sup>88</sup> TC, 24 April 2017, no. C4075.

<sup>89</sup> Administrative Court of Appeal Bordeaux, 12 July 2016, no. 13BX02331.

<sup>90</sup> On the prohibition of public legal bodies to sign arbitration clauses in domestic disputes, see: CE, opinion, Ass. 6 March 1986, *Eurodisneyland*, in *Grands avis*, Dalloz, by T. DAL FARRA, Y. GAUDEMET, F. ROLIN, B. STIRN, 3<sup>rd</sup> ed., 2008, no. 12, obs. D. LABETOULLE. Without having been consecrated by the constitutional court however: CC, 2 December 2004, no. 2004-506 DC, AJDA 2004.2365; RTD civ. 2005.93, obs. P. DEUMIER.

<sup>91</sup> Already in CE, 23 December 2015, no. 376018, *Territoire des îles Wallis*, Lebon, p. 484 ; AJDA 2016.7 ; *ibid.* 1182, note A. GRAS ; D. 2016.2025, obs. L. d’AVOUT et S. BOLLÉE ; *ibid.* 2589, obs. T. CLAY.

of public law whenever the main contract is signed for international trade purposes<sup>92</sup>. The *Galakis* ruling is still applicable each time civil courts will have jurisdiction over the award's control<sup>93</sup>. The Administrative Court of Appeal held that the dispute enters the 1961 Convention's scope before controlling the lawfulness of the arbitration clause. It concluded that no imperative rule of administrative public order had been violated to decide its jurisdiction over the dispute.

The rules and conditions applicable to the control of an award by administrative courts are now established, rather the award was rendered in France about an international dispute or rendered abroad. There are still uncertainties, among which the identification of imperative administrative public order rules. This evolution might however encourage arbitrators to apply with caution and, more frequently, administrative law.

Eloïse Glucksmann

### C. Immunities

The matter of the law of Immunities has changed, during the studied period, only on the issue of immunities from execution, firstly concerning foreign States (1), secondly concerning international organisations (2).

#### 1. Sovereign immunities

**French law of Immunities from execution of Foreign States.** A decision of the Constitutional Council dated 8 December 2016<sup>94</sup> (**Constitutional Decision, 8 December 2016, no 2016-741**) had some important consequences on the French regime of immunities from execution. This decision validated a new legislature (**Act No. 2016-1691, 10 December 2016**)<sup>95</sup> that modifies in its articles 59 and 60 the applicable law related to immunity from execution of Foreign States property in France. Those modifications are now codified in three new articles, no L. 111-1-1 to L. 111-1-3 of the Civil Enforcement Proceedings Code (*Code des procédures civiles d'exécution*). This new Act is a revolution because French immunity law had always been set on a caselaw basis. Indeed, France, contrary to

<sup>92</sup> Civ. 1<sup>re</sup>, 2 May 1966, *Galakis*, Bull. civ. I, n° 256; D. 1966. 575, note J. ROBERT; JCP 1966. II. 14798, note P. LIGNEAU ; JDI 1966. 563, note D. G. ; Rev. crit. DIP 1967. 533, note B. GOLDMAN.

<sup>93</sup> On the allocation of jurisdiction between judicial and administrative courts on the control of awards, see the ruling *Inserm*, TC 17 May 2010, no. 3754, see above.

<sup>94</sup> Constitutional Council, 8 December 2016, no 2016-741 DC, *Loi relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*.

<sup>95</sup> Law No. 2016-1691 on "Transparency, Fight Against Corruption and the Modernization of Economic Life," known as the "Sapin 2 Law," at <https://www.legifrance.gouv.fr>. The statute was adopted by Parliament on November 8, 2016 and promulgated on December 9, 2016, the day after the French Constitutional Council validated it. It was published the day after.

the United States or United Kingdom, has never seen the utility of an Act on Immunities, because it was always considered that courts had created a proper set of rules on that matter. The 2016 Act is thus the more extended codification of immunity law in French law<sup>96</sup>.

This new law codifies in part the December 2, 2004 UN Convention on the Jurisdictional Immunities of States and Their Properties on foreign States property immunity from execution. It adds, compared to the above-mentioned convention, two conditions to validate to seizure of foreign states property in France: (i) to seize such property allocated to diplomatic missions, a waiver must be both express and specific<sup>97</sup>, (ii) in any case and whatever the allocation of the property aiming to be seized, a judicial authorization awarded in a non-adversarial procedure is now mandatory for that conservatory or enforcement measures be implemented against foreign state property. Mostly because of this last innovation, some Senators have challenged these new legislative provisions before the Constitutional Council. They argued that the new requirements violate the constitutional rights of private property and to an effective judicial remedy, because they form an additional obstacle to the execution of the obligation of the debtor. In its decision<sup>98</sup>, the Council declared it had operated a classic test of proportionality and concluded that while the new Law impacts the property right protected by the Constitution, this violation isn't a breach of any constitutional rights because it is urged by general interest purposes. This reasoning is subject to criticism because it is not a real proportionality test but a mere reminder of the content of the Act, without any control.

In that respect, the Council has four arguments in favour of the Act's conformity to the Constitution. Firstly, the new Act aims to protect the property of foreign public persons pursuant to international law, which is a general interest purpose. Secondly, conservatory measures or enforcement against property belonging to a foreign State are possible with the consent of that State, or when the property in question are in use or intended for use by the State for other than government non-commercial purpose according to the new article L. 111-1-2 of the Civil Enforcement Proceedings Code. This last provision is a codification of article 19 of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). Moreover, the restrictive provisions concerning States benefiting of the public aid for development or States in a situation of default are not considered as absolute: alternatives by which a creditor could benefit from conservatory measure or enforcement against property of such States exist and are sufficient according to the Constitutional Council<sup>99</sup>. Thirdly, the preliminary authorisation is filed in a non-

---

<sup>96</sup> See Victor GRANDAUBERT, 'France Legislates on State Immunity from Execution: How to kill two birds with one stone?' on *EJIL: Talk!*, <https://www.ejiltalk.org/france-legislates-on-state-immunity-from-execution-how-to-kill-two-birds-with-one-stone/>

<sup>97</sup> On the recent variations of French caselaw on that matter and the impact of the Sapin 2 Law, see Eloise GLUCKSMANN, comment of Civ. 1e, 13 May 2015, No. 13-17.751, *Commisimpex v. Republic of Congo*, *AJIL* 2017, vol. 2, pp. 453-460.

<sup>98</sup> Constitutional Council, 8 December 2016, no 2016-741 DC, *op. cit.*, spec §§ 61-74.

<sup>99</sup> The Constitutional Council firstly that fist the State, at the time of the acquisition of the debt, must be in default on this debt instrument or have proposed a modification of its terms; secondly, that the

adversarial procedure to avoid that debtors be informed of the seizure and consequently move the assets to protect them from any attachment. The Council considers the non-adversarial character of the procedure as a sufficient protection of the creditor's rights. The fourth justification to validate the Act set forward by the Council is quite intriguing: according to the Constitutional Council, "The judge in charge of authorizing the measure of constraint only verifies that the legal conditions for this measure have been fulfilled". The argument would therefore be that the Act does not breach the Constitution because the Judges will only enforce the Act... Such reasoning could be considered both inaccurate – the judges have a large margin of appreciation in the implementation of legislative texts – and irrelevant – the issue before the Constitutional Council was the conformity of the law itself to the Constitution, not the powers of the judges.

It is hard to find those arguments convincing, especially the fourth one. It is unfortunate that the Constitutional Council limited itself to repeat the content of the law, to finally declare that this content is consistent to the Constitution. It finally concluded that, "It follows from the foregoing that the contested provisions infringe neither the right of property, nor the right to obtain enforcement of a judicial decision".

Alexandre Hermet

## 2. International organisations Immunities

**Immunities from execution of International Organisations.** An important decision (**Civ. 1, 25 May 2016, n° 15-18646**)<sup>100</sup> concerns the immunity of execution of International Organisations and the right to access to a Tribunal, as set out in the ECHR, art. 6. The dispute involved the Central African States Bank (Banque des États de l'Afrique Centrale – BEAC) and a former employee of the Parisian office of this Bank. The BEAC is an international organisation, which has concluded an agreement with France for the establishment of an office in Paris (Agreement of 20th April 1988). This Agreement sets out that the BEAC has privileges and immunities on the French territory.

The claimant used to work for the Paris office of the BEAC and brought a claim against its former employer before a Paris labour law court. The BEAC was condemned to pay compensation for the breach of the employment contract. The BEAC then invoked the

---

measure could not be solicited more than forty-eight months after such default, after such modification or after a proposed amendment to the debt instrument has been accepted by two-thirds of the creditors ; in the latter case, the creditor could also always benefit from a conservatory measure or enforcement for an amount equivalent to that which he would have obtained had he accepted the proposal.

immunity from execution provided in the Agreement, but the Versailles Court of Appeal discarded the argument. The BEAC formed a request before the *Cour de cassation*.

Pursuant to the Agreement of 20th April 1988, the BEAC was provided an absolute immunity from execution on the French territory. The employee had argued that setting aside the Court of Appeal decision would have the effect to deprive him from the right to access to a tribunal and to the enforcement of its decision (both protected by article 6 of the ECHR). The question raised in front of *the Cour de cassation* articulated in an interesting way the question of access to a court and the absolute immunity from execution pursuant to the Agreement of 20th April 1988. Nonetheless, the *Court of Cassation* does not cite ECHR, but only the latter Agreement. The Court does not give primacy to the immunity from execution over the right to have access to a tribunal, but rather reconciled the two obligations. The solution is quite clear: to respect the immunity of the Organisation the claim must fail, but to respect the right to have access to a tribunal the claimant could be compensated by the French State. According to the *Cour de cassation*, that possible compensation is considered sufficient to respect the right to access a tribunal: “the litigant, who is confronted to the absolute character of the immunity from execution of an International Organisation has, by the implementation of the responsibility of the State, a remedy capable of enforcing his right of access to a court”<sup>101</sup>.

In other words, according to the *Cour*'s own interpretation France would not have deprived claimant from its right to have access to a tribunal (and as such possibly engage its international responsibility) as long as he can seek directly the State's liability. However, to declare the French State liable, the claimant will need to bring its claim before the administrative courts, which are separated from the civil courts in the French judicial organisation. The civil courts have avoided the confrontation between the two duties of the French State by respecting the immunity of the Organisation and let the administrative courts in charge to compensate the damages suffered by the claimant.

Alexandre Hermet

## II- SUBSTANTIVE ISSUES

Substantive issues cover three large areas. Firstly, this chronicle tries to provide an insight view of the application by French administrative and judiciary courts of International and European substantive law. The case law analysed here focusses on the direct effect and invocability of international conventional instruments before national courts. Several interesting decisions of civil courts applying international customary law may also be reported (A).

---

<sup>101</sup> *Ibid.*

The second area dealt with in this survey concerns the application by the French courts of conflict of laws provisions deriving either from national legislation or EU instruments. Emphasis was placed on statutory matters, as well as family and inheritance matters (B).

Finally, attention was paid to the application of international instruments promoting mechanisms of cooperation between national authorities (C). The case-law in this field mostly articulates around the application of the Hague Convention on the Abduction of children.

#### A. *Applicability and application of International and European substantive law*

### 1. Decisions related to the applicability and interpretation of International law

**International Customary Law before French Courts.** References to Customary International law are quite rare in French case-law and no decisions were rendered on that issue by the highest administrative (*Conseil d'Etat*) court during the period studied in this chronicle. However, several interesting cases rendered by civil courts stand out.

(i) First, it should be noted that civil courts – and administrative courts, but in a lesser extent – are reluctant to invoke customary international law, especially supreme courts. One decision dated 12 July 2016 (**Crim, 12 July 2016, n° 16-82.664**) related to the matter of extradition, is typical of that self-restraint: a Bosnian citizen, charged of Crimes against Humanity by Bosnian justice, was arrested in France. French Justice decided to extradite him to Bosnia, but he contested that decision. The Court of Appeals of Paris rejects his claim on the grounds that that Crime against humanity is a customary and peremptory in international law<sup>102</sup>. Without refuting these observations, the *Cour de Cassation* does not base its decision on Custom, but only on domestic laws and international Conventions (European convention on extradition, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights)<sup>103</sup>. Express reference to customary international law is indeed quite rare in French case law.

Nevertheless, such references are not impossible to find in specific matters and circumstances. For instance, a decision dated 13 April 2016 of the *Cour de Cassation* 's 1<sup>st</sup> chamber of the Civil division (**Civ 1e, 13 April 2016, n° 15-50.018**)<sup>104</sup>, is remarkable in this respect: the '*Visa*' of the decision – that is to say, the norm on which the decision is founded

<sup>102</sup> Paris Court of Appeal, Chamber of the Inquiry, 5th Section, 13 April 2016.

<sup>103</sup> Crim, 12 July 2016, n° 16-82664.

<sup>104</sup> Already on this decision in this chronicle, see E. ADELUS comment *supra*.

– is ‘International Custom’, without further specification (*‘Vu la coutume internationale’*). The case concerned the legalisation of a foreign act, more specifically the recognition of the French nationality to a person by a foreign judgement. Without a legalisation, an act concerning personal statute established by foreign authorities cannot create any juridical effects in France. The obligation to legalize foreign acts concerning the statute of individuals was created, in France, by a very old text, the Royal order on Navy adopted on August 1681 (called the Colbert Order)<sup>105</sup>, and was abrogated in 2006 by the French government<sup>106</sup>. The obligation to legalize foreign public acts related to civil statute of persons seemed then to have disappeared, a consequence that might not have been anticipated by the French Administration... A Decree signed on 10 August 2007<sup>107</sup> has solved some of the difficulties raised by the abrogation, but not all of them: the Decree only specifies the authorities in charge of the legalization of such acts. However, the 2007 Decree is silent on the existence itself of an obligation to legalize. The imperatively of such legalization could have therefore seemed in question.

In the absence of an applicable provision, the *Cour de cassation* had had to rely on customary international law to find a ground to such legalisation<sup>108</sup>. The decision of 13 April 2016, confirms this position. Indeed, the only available ground seems to be international custom, or to accept that foreign acts can produce juridical effects in France without a control by a public authority (in the absence of an applicable convention), which might have seemed inadequate to the *Cour de cassation*. Interestingly, some authors have raised the fact that no international customary rules existed on this matter<sup>109</sup>, contrary to civil judges’ opinion<sup>110</sup>. In conclusion, one might think that abrogating the Colbert Order, despite the age of this law, might have been premature.

(ii) The second main domain in which French courts rely frequently on international custom is the law of immunities. No decision on that matter were rendered during the

---

<sup>105</sup> Named by its drafter, the French minister Colbert.

<sup>106</sup> The French Government, with a delegation of powers of the Parliament, abrogated the Colbert’s Order on April 21st, 2006 (Order related to the legislative section of the code of the property of public persons, Art. 7, II, 7°).

<sup>107</sup> Decree of 10 August 2007, no 2007-1205.

<sup>108</sup> See, for instance: Civ. 1e, 4 June 2009, nos 08-13.541 et 08-10.962 ; Civ. 1e, 4 June 2009, no 08-13.541 ; Civ. 1e, 3 December 2014, n° 13-27857.

<sup>109</sup> See for instance: É. FONGARO, ‘La légalisation : coutume internationale ou pratique internationale ?’ in *La Semaine Juridique Notariale et Immobilière*, no 37, 11 September 2009, at 1260 ; Denis ALLAND, ‘« Vu[e] la coutume internationale... » ou non ?’ in *La Semaine Juridique Edition Générale*, no 24, 13 June 2016, at 695.

<sup>110</sup> See for instance the report by B. VASSALO, before the Court of Cassation on the matter of the advisory opinion of 4th April 2011: [https://www.courdecassation.fr/jurisprudence\\_2/avis\\_cour\\_15/integralite\\_avis\\_classes\\_annees\\_239/2011\\_3825/4\\_avril\\_2011\\_1100001\\_3922/benedicte\\_vassalo\\_19651.html](https://www.courdecassation.fr/jurisprudence_2/avis_cour_15/integralite_avis_classes_annees_239/2011_3825/4_avril_2011_1100001_3922/benedicte_vassalo_19651.html)

studied period, even though a new law<sup>111</sup> was enacted on foreign States immunity from execution<sup>112</sup>.

(iii) The third domain is relevant to the application and interpretation of international conventions. On that issue, it is worth referring to the caselaw related to arbitration to illustrate how courts attenuate their self-restraint attitude in some specific circumstances, such as when referencing to articles 31 and 32 of the Vienna Convention of the Law of Treaties as an expression of the customary law of interpretation<sup>113</sup>. Moreover, Civil Courts sometimes directly identified some rules of customary international law, using the theory of the two elements (practice and *Opinio Juris*). For instance, in the Decision of the Paris Court of Appeal, 25th April 2017<sup>114</sup>, the Court decided that: “it is not established [by the claimant] that Investment Treaties, State practice, and international justice decisions prove a customary principle”, and that there is no “international consensus, in the matter of international investments, on the principle of effective nationality”. That reasoning is consistent with the international way of determining international customary law.

Alexandre Hermet

**International Conventions before French Administrative Courts.** In French law and according to the division in domestic law between the civil and the administrative orders, administrative decisions are subject to a specific recourse that will be brought in front of administrative courts: the *Recours pour excès de pouvoir*. International law has an important place to play in the judicial review of contested administrative decisions through such recourse, especially international and European human rights law. Administrative judges have imparted the conditions to implement conventional and customary international rules in French administrative law. Two issues have been particularly discussed during the studied period: the extent of the invocability of international conventions by litigants (i), and the control of the compliance of domestic administrative decisions with ECHR provisions (ii).

(i) Three decisions rendered by the highest administrative court, the *Conseil d'Etat*, had to adjudicate on the possible direct effect and invocability of international conventions by

<sup>111</sup> Articles 59 and 60 of Law n° 2016-1691 on “Transparency, Fight Against Corruption and the Modernization of Economic Life,” known as the “Sapin 2 Law,” at <https://www.legifrance.gouv.fr>

<sup>112</sup> See this chronicle, *supra*.

<sup>113</sup> See *supra*, CA Paris, 12 April 2016, no 13/22531; CA Paris, 29 November 2016, joined cases nos 14/17964 and 14/20425; CA Paris, 25 April 2017, no 15/01040. A position the Court of cassation follows, see for instance: Civ 1, 11 July 2006, no 02-20389.

<sup>114</sup> CA Paris, 25 April 2017, no 15/01040, available at : <https://www.italaw.com/sites/default/files/case-documents/italaw8767.pdf>.



litigants (CE, 30 December 2016, 2<sup>nd</sup> and 7<sup>th</sup> *chambres réunies*, No 395337 ; 16 November 2016, No 392365 ; 1<sup>st</sup> June 2016, 4<sup>th</sup> and 5<sup>th</sup> *chambres réunies*, No 390956). The Direct effect doctrine has been clarified and systematised in French administrative law by the *Conseil d'Etat* case-law in a 2012 *GISTI et FAPIL* ruling<sup>115</sup>. Henceforth, a treaty provision can have a direct effect provided that two requirements are met. First, the object of the invoked provision must not be to regulate exclusively relations between States; second, the provision must not require any implementing act to produce effects toward individuals. Pursuant to these requirements, direct effect was denied to three groups of provisions last year: Articles 2 and 3 of the Convention no 120 of the Council of Europe on Spectator Violence and Misbehaviour at Sports Events and, in particular, at Football Matches<sup>116</sup>, Articles 2 (2), 9 and 10 of the International Covenant on Economic, Social, and Cultural Rights<sup>117</sup>, and the Elysée Treaty of the 22 January 1963, between France and Germany (Article II (C) (4))<sup>118</sup>. These confirmations of the direct effect test did not add more specifications related to the two requirements, but raised again the main question the direct effect theory triggers: by creating domestic requirements, not provided for in these conventions, restricting their domestic enforcement, does Administrative judges contribute to a breach of international conventions by France<sup>119</sup>?

In addition to setting strict requirements to limit the direct effect of international conventions provisions, the recent case-law of the *Conseil d'Etat* has established a new barrier to the domestic enforcement of international provisions (CE, 13 June 2016, no 372721): the *Conseil d'Etat* decided that after the direct effect test, these provisions should be declared usefully invocable (*utilement invocable*) before the administrative courts to challenge decisions took by diverse state's administrations. This specific requirement takes place only when a legislative act is contested: in French Administrative Law, a legislative act cannot be challenged before the administrative Judge, the Constitutional Council being the only Court competent to review those acts. But there is one important exception: when an administrative decision is challenged before administrative courts, the Claimant is entitled to claim that a legislative provision, on which the administrative decision is founded, breaches an International Convention. If the administrative Court confirms the infringement, it will put the legislative provision aside and can annul the administrative decision implementing the legislative provision or grounded on that legislative provision. This quite technical control of the legislative act is called the Control of Conventionality (*contrôle de conventionnalité*) and exists before the administrative Courts since the *Nicolo* case in 1989<sup>120</sup>. The most recent case-law insists on a new obstacle: that kind of control could

---

<sup>115</sup> CE, 11 April 2012, n° 322326, *Groupe d'information et de soutien des immigrés (GISTI) et Fédération des associations pour la promotion et l'insertion par le logement (FAPIL)*.

<sup>116</sup> Council of State, 30 December 2016, 2<sup>nd</sup> and 7<sup>th</sup> *chambres réunies*, No 395337, *Association nationale des supporters*.

<sup>117</sup> CE, 16 November 2016, No 392365, *Confédération nationale des associations familiales catholiques*.

<sup>118</sup> CE, 1<sup>st</sup> June 2016, 4<sup>th</sup> and 5<sup>th</sup> *chambres réunies*, No 390956, *Association Arrête ton char*.

<sup>119</sup> See the critique by C. SANTULLI, 'Chronique' in *Revue française de droit administratif* 2017 at 337-338.

<sup>120</sup> CE (Ass), 20 October 1989, *Nicolo*, Recueil Lebon 1989 at 19

be used only if the administrative decision challenged is grounded on a legislative Act in conflict with an international convention provision. According to the 2016 ruling, if the administrative decision is not implementing a legislative act, or if it is not adopted on the grounds of a legislative act, the control by administrative courts cannot occur (that is to say the international provision is not usefully invocable in judicial review). This position seems quite new in the *Conseil d'Etat* case-law, as some commentators said the first decision that had to deal with such issue was held on 13 June 2016<sup>121</sup>.

(ii) An important decision (**CE Ass., 31 May 2016, n° 396848, *Gonzalez Gomez***<sup>122</sup>) raises one fundamental issue related to the control operated by the *Conseil d'Etat* on the compliance of French law with ECHR provisions. Indeed, the implementation of international rules in the French legal system is rendered possible because of such control by courts. This control was set out in an important decision *Nicolo*<sup>123</sup>: the *Conseil d'Etat* decided that it had the duty to verify the compatibility of French legislation with international conventions. This control was, then, said '*in abstracto*', i.e. it only takes into account the wording of the domestic legislation. By contrast, in the 2016 decision, it declares that the wording of the French legislation forbidding insemination *post mortem* is consistent with the ECHR, but went further in its control to verify if the implementation of this legislation was also consistent with the ECHR. And it wasn't : the *Conseil d'Etat* held that, taking into account the special circumstances of the case, article 8 of the ECHR was breached. Indeed, the contested administrative decision was a refusal of the transfer to Spain, where insemination *post mortem* is allowed, of a death man's gametes. But the claimant was a Spanish woman, and the donor was Italian and infected by an important disease before his death, so that the retrieval of gametes in France was carry out because his disease and the treatments could make him infertile. Due to these circumstances, refusing to a Spanish woman the transferal in Spain of his death husband's gamete was considered as a breach of article 8 of the ECHR. By doing so, the *Conseil d'Etat*, seems to have operated a more 'concrete' review of the conventionality of French law.

Alexandre Hermet

## 2. Decisions related to the applicability and interpretation of European law

**Movement of individuals in the EU, articulation of rights deriving from EU and non EU law.** In an important decision dated 9 March 2017, the Second civil chamber of

<sup>121</sup> CE, 13 June 2016, no 372721; see C. SANTULLI, *op. cit.* at 339.

<sup>122</sup> Already on this decision in this chronicle, but from a private international law perspective, see K. ROKAS, comment, *infra*.

<sup>123</sup> *Op. cit.*

the *Cour de cassation* (**Civ. 2, 9 March 2017, n° 16-10.851**)<sup>124</sup> clarifies how the freedom of movement of individuals in the European Union (EU) can influence a bilateral convention between a EU member state and a non-member state.

A British national had worked in the United Kingdom, France and Monaco before retiring in the South of France. Once retired, he obtained from the French *Caisse d'assurance retraite et de la santé au travail du Sud-Est* (the *Caisse*) a retirement pension based on a limited rate of 32,50%. The litigant argued in court that he was entitled to a 50% rate. The disadvantageous rate was applied by the *Caisse* because it did not take into account the trimesters worked in Monaco. The First Instance Tribunal and the Court of Appeal both upheld the calculations. The latter argued that it was the best possible rate the litigant could obtain based on the 1952 Convention between France and Monaco on Social Welfare<sup>125</sup> and that only two out of the three countries involved were members of the EU. Thus, only the trimesters worked in the UK and in France could be jointly considered to calculate the number of semesters the litigant had worked and was allowed a retirement pension in the EU.

The *Cour de cassation* quashed the Court of Appeal decision by referring to article 45 of the Treaty on the Functioning of the EU – which opens the section on the freedom of movement of workers and clearly states their right to circulate in the UE and the refusal of all discrimination in this regard – and the 1952 convention between France and Monaco. The *Cour* quotes the Court of Justice of the European Union, which had considered that nationals of another Member State should receive the same treatment as nationals benefitting from a bilateral convention with a Non-Member State. The principle of non-discrimination holds that nationals from two different EU member states should both benefit from the bilateral convention between one of the two member-states and a non-EU state providing the inclusion of periods worked in the latter<sup>126</sup>.

The *Cour de cassation's* efforts to explain its decision emphasize the importance of the freedom of movement and non-discrimination principles, as well as an interesting application of European caselaw in front of domestic courts.

Edouard Adelus

**The limits of State liability for breach of European law by the judiciary.** A particularly interesting decision was rendered by the *Cour de cassation* reunited in Plenary Assembly on November 18, 2016 (**Cass. AP 18 November 2016, n° 15-21.438**)<sup>127</sup>.

<sup>124</sup> *JCP-S*, n° 13-14, 4 April 2017, 1111, comm. J.-Ph. LHERNOULD.

<sup>125</sup> Signed on 28 February 1962 and published in France by the Decree n°54-682 of 11 June 1954.

<sup>126</sup> CJEC, 15 January 2002, aff. C - 55/00, *Gottardo*.

<sup>127</sup> M.-C. SORDINO, « Principe de rétroactivité in mitius en droit pénal : nouveaux développements », *AJ Pénal* 2017, p. 125. J.-H. ROBERT, « La Cour de cassation jugée (favorablement) par elle-même », *Droit pénal* n°1, janvier 2017, comm. 8. F. PICOD, « La Cour de cassation ne pouvait manifestement mal faire », *JCP G* n° 48, 2016, p. 1288. C. BERLEAUD, « La suppression des contrôles aux frontières ne supprime pas l'infraction de fraude douanière », *Gaz. Pal.* n°42, p. 132. *JCI Procédure pénale*, synthèse

In this case, the *Cour de cassation* decided that there was no text or general principle from the European Union, or any stable case-law by the European Court of Justice according to which the principle of retroactivity “in mitius” (retroactivity of less harsh criminal laws) prevents the public authorities from suing and the courts from condemning misdeclaration to customs authorities designed to get an advantage attached to intra-EC imports made before the setting of the single market on January 1<sup>st</sup> 1993. By sanctioning this misdeclaration, the *Cour de cassation* did not violate the European principle of retroactivity “in mitius”.

The facts of the case need to be explained – as well as the very long procedure that comes with it.

In 1987 and 1988, a farming cooperative imported protein peas into France. To benefit from Community funding, it held to the customs authorities that these peas were not meant to be seeded – when they were – and that they came from the United Kingdom and the Netherlands – when they partly came from Hungary. In 1994, the customs authorities decided to sue the farming cooperative on the ground of incorrect declaration of origin and falsely declared imports. However, in the meantime, a law had been adopted in 1992 (law n° 92-677, 17 July 1992), according to which the Code des douanes would not apply anymore to intra-EC imports (art. 111 of the said law), and thus that customs and tax controls regarding that type of imports were abolished. Yet, art. 110 of this statute reserved the application of the dispositions of the Code des douanes to breaches committed before the entry into force of the law (January 1<sup>st</sup> 1993), meaning that breaches committed before that date could still be sued and condemned under the previous law. The Reims Court of Appeal (5 May 1999) cancelled the criminal procedure, on the ground that the offence had been repealed by the 1992 statute. The *Cour de cassation*, in its first (of many) decision on this case (18 October 2000, n° 99-81.320), enforced art. 110 of the law and decided that, since the facts were committed before the entry into force of the law, the farming cooperative could be sued and condemned for misdeclaration.

The cooperative farming lodged another appeal before the *Cour de cassation*, after it had been condemned by the Court of Appeal. It argued that this decision was a breach of the European principle of retroactivity “in mitius”: since the offence had been repealed by the new law, the new law should apply retroactively. The Criminal Chamber of the *Cour de cassation* decided on September 19<sup>th</sup>, 2007 (n° 06-85899) to dismiss the appeal. It held that the law only had an incidence on the control methods of the fulfilment of the conditions of community funding for protein peas, and not on the existence of the offence or the severity of the sanction attached to it.

The cooperative farming did then nothing less than refer the matter to the Human Rights Committee of the United Nations. It argued that the French *Cour de cassation* committed a breach of the U. N. principle of retroactivity “in mitius” set forth in article 15 §1 of the International Covenant on Civil and Political Rights (“If, subsequent to the commission of the

---

110. N. KILGUS, « Sanction douanière pour des faits antérieurs au marché unique et principe de rétroactivité », *Dalloz Actualité*, 29 novembre 2016.

*offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”)* The Human Rights Committee stated in its finding (21 October 2010, n° 1760/2008, *Cochet v. France*) that France indeed had violated this provision: article 15 §1 cannot be interpreted restrictively, meaning that if article 15 §1 aims at provisions imposing “a lighter penalty”, it applies *a fortiori* to provisions repealing an offence.

The farming cooperative then decided to file a suit against the French State in order to get damages on the ground of liability for breach of Community law: it argued that there was a gross negligence arising from the defective functioning of the public service that is justice, on the ground of art. L. 141-1 Code de l’organisation judiciaire (“*L’Etat est tenu de réparer le dommage causé par le fonctionnement défectueux du service public de la justice. Sauf dispositions particulières, cette responsabilité n’est engagée que par une faute lourde ou par un déni de justice.*”) and of the constant case-law of the European Court of Justice, according to which the non-contractual liability of the State for breach of Community law can arise from a manifest breach of European law by the judiciary (*Köbler v. Austria*, 30 September 2003, case C-224/01). It thus argued that the French State could be held liable for breach of Community law by the *Cour de cassation*, which refused to apply the European principle of retroactivity “in mitius” – although acknowledged by the European Court of Justice (3 May 2005, case C-387/02, *Berlusconi*) – to its case.

The Paris Court of Appeal decided on May 6<sup>th</sup>, 2015 that the *Cour de cassation* indeed violated the European principle of retroactivity “in mitius”. It stated, in what can be considered a very strong wording, that the *Cour de cassation* had « consciously chosen not to apply the European principle knowingly using a neither relevant nor appropriate motivation » (« *délibérément fait le choix de ne pas appliquer le principe communautaire, en recourant à une motivation dont elle n’ignorait pas qu’elle n’était ni pertinente ni adaptée* »). The Agent representing the State filed a final appeal in front of the *Cour de cassation*, which eventually decided that there was no statutory provision, European law principle or constant case-law by the European Court of Justice that prevented misdeclaration to customs authorities made to beneficiate from Community funding from being sued and condemned on the ground of provisions prior to the common market: the application of article 110 of the 1992 law did not violate the European principle of retroactivity “in mitius”.

This decision is very interesting in many aspects: criminal law, tax law, but also (and we shall focus on that) European and international law.

What really makes this case unusual and unprecedented is the question that has been asked to the *Cour de cassation*, namely whether its own decision had violated a European principle in a way that led to hold the State liable for this breach of law. This is the natural consequence of the *Köbler* decision of the European Court of Justice. Indeed, in this case, the ECJ did not only state that the State could be held liable for breach of European law also when the organ responsible for the breach was the judiciary and under which circumstances, especially when it comes to a supreme court – the standards are higher to protect the independence of the judiciary – it also addressed the much-discussed question of which jurisdiction should be competent to determine whether a decision made by the supreme court violated the European law, by stating that it was not up to the Court to

intervene in competence issues, which should be addressed on a national level (n°47). In France, neither the legislative nor the judiciary had answered that question – only the *Conseil d'Etat* had decided that every administrative tribunal or administrative court of appeal was competent when the breach has been committed by an administrative court (CE, 21 September 2016, *Lactalis Ingrédients*, n° 394360). This placed the *Cour de cassation* in the much delicate situation where it has to decide whether its own decision violated the European law. Even stranger, this put the Court of appeal in the situation of actually censoring (or at least trying to censor) the *Cour de cassation*, thus reversing the traditional roles and places of the judicial organization, where the *Cour de cassation* is supposed to cancel decisions wrongfully made by Courts of appeal.

As said, the Court of appeal censored the *Cour de cassation* in a very harsh manner. But it should have known that an appeal would be filed against its decision, and that the *Cour de cassation* would probably decide it did not breach the European law. The question that can be asked when it comes to this case is why no preliminary reference was made to the ECJ. The Court of appeal could have in that case asked the ECJ to give an interpretation of the criteria of “manifest infringement of EU law” – necessary to hold the State liable for a judicial decision made by a supreme court.

Moreover, one can observe again the lack of effects of the findings made by the Human Rights Committee of the United Nations. Although it stated that France had indeed violated the 1966 International Covenant on Civil and Political Rights, the Court of appeal actually referred to this finding also underlining its lack of enforceability. But the *Cour de cassation* does not even refer to it in its own motives – how could it, since it decides against the Human Rights Committee statement?

But one has to admit that this solution was not only motivated by the pride of the *Cour de cassation* not to acknowledge any mistake or fault on its part. This decision is coherent with the necessity enhanced by the *Cour de cassation* and French law in general – as mentioned in the report by M. Echappé as well as in the Prosecutor’s statement on the matter – of not giving any incentive to potential frauds on economic rules. These laws change so much and so fast, and on a consistent path that is the building of a common market, that it could be easy for frauds to make misdeclaration and then argue that, since the law has changed in the sense of more integration in the common market, they cannot be sued anymore. It is also coherent with the case-law of the ECJ, according to which the change of law has to be motivated by the will of the legislator to change their mind on the offence or on the crime (ECJ 6 October 2016, case C-218/15, *Gianpaolo Paoletti*) – which is not the case here: only the scope of application has changed in the process of the building of the common market. The non-application of the retroactivity “in mitius” principle in that case is then also motivated by economic and public order grounds.

Juliette Mignot

B. *Application of private international law related to substantive matters*

1. **National conflict of laws rules**

a. *Statutory and Family matters*

**Establishment of legal paternity of a child, application of a foreign law.** The *Cour de cassation* reminded the reasoning to follow to identify the law applicable, as well as its precise content, to the establishment of a child's fatherhood (**Civ. 1e, 4 January 2017, n° 16-10.754**). A Moroccan national was in the process of divorcing from her husband after having left the marital residence in France. An intermediary court decision recognizing the absence of settlement was delivered on May 25<sup>th</sup> 2006. She gave birth on February 8<sup>th</sup> 2009 and the divorce was confirmed the 8<sup>th</sup> of July of that year.

The mother brought an action in court to establish that her former husband was the father of her child. Under French substantive law, a filiation can be proven by any means (article 310-3 Civil Code). Further, the French caselaw considers that biological tests can always be requested<sup>128</sup> and that the a judge can use a father's refusal to comply to a court order as an adverse inference (if he doesn't have legitimate reasons to refuse the test) that, in addition to other findings, can be enough to establish a plausible filiation<sup>129</sup>.

However according to article 311-14 of the French Civil Code, the applicable French conflict of laws rule, a paternity action is governed by the mother's personal law on the day of the child's birth. Therefore, French judges had to apply Moroccan law.

The appellate court judges accordingly relied on article 158 of the February 3<sup>rd</sup> 2004 Moroccan Dahir according to which filiation is established by the cohabitation of the spouses, by the father's acknowledgement of the child, by the testimony of two *adouls*, by hearsay as well as by any other lawful means, including forensic evidence. The appellate judges rejected the paternity claim. However, the claimant argued that they had not correctly applied Moroccan law, especially because they had not indicated the Moroccan caselaw related to the application of this provision.

The *Cour de cassation* upheld the appellate judgment. It considered that the appellate judges had, as required, applied article 158 of the Moroccan Dahir when considering that the fatherhood was not demonstrated once it had been established that the divorced individuals had not been in contact with one another after the intermediary decision of May 2006, despite a lack of biological inquest. It further considered that the appellate judges had not "denatured" the foreign law regarding their factual findings and, more importantly, that not

<sup>128</sup> Civ. 1e, 28 March 2000, n°98-12.806; *Bull. civ.* I, n°103; *Defrénois* 2000, n°12, p. 769, note J. MASSIP; *D.* 2000, p. 731, note Th. GARÉ; *JCP-G* 2000, n°43/44, concl. C. PETIT and note M.-Chr. MONSALLIER-SAINTE MLEUX; *RJPF* 2000, 5/5138, note J. HAUSER.

<sup>129</sup> Civ. 1e, 10 June 2015, n°14-17.928.

checking the caselaw related to a foreign statute wasn't constitutive of a denaturation of this foreign law.

Indeed, the *Cour de cassation* is said to only judge 'the law' and is limited when it comes to challenging facts to what is called the *denaturation control*. Therefore, in this specific case, the *Cour de cassation* only verified that the lower court had applied the correct Moroccan statute, that it had correctly interpreted it, and that regarding the lower court factual findings, the correct solution had been inferred. This decision confirms the traditional holding that the judge competent to decide on the merit can interpret the foreign law applicable to the case. In the absence of a foreign judicial decision brought by the plaintiff, this judge is free to interpret the applicable statute<sup>130</sup>.

Edouard Adelus

**Transcription of a foreign same-sex marriage, effect in time, tenancy agreement.** In a decision dated 7 December 2016, the *Cour de cassation* had to deal with the question of the effect, in time, of the transcription of a foreign same-sex marriage on French registers (**Civ 1e, 7<sup>th</sup> December 2016, n° 15-22.996**). In 2011<sup>131</sup>, a man with both French and Spanish citizenship married an Italian national in Spain, prior to the French law on same-sex marriage entering into force<sup>132</sup>. The couple had their habitual residence in France. Difficulties appeared with the continuation of the tenancy agreement after the death of the French-Spanish husband, since he was the one who had concluded the contract. Normally, the other spouse would have the right due to the marriage to ask for an extension of the tenancy agreement in his name after this death. However, the marriage had not yet been transcribed at the moment of death. According to article 21 of the law of 17 May of 2013 the effects of marriages celebrated prior to the entry into force of the French law on same-sex marriage could only be opposed to third parties from the date of their transcription. This meant that the spouse who was not party to the tenancy agreement would not be able to invoke his right for an extension of the tenancy agreement. Thus, the Public agency of the city of Paris responsible for social housing (*Régie immobilière de la ville de Paris*) initiated proceedings to evict the husband and claim damages, and won. Nonetheless, the *Cour de cassation* quashed the decision of the *Cour d'appel* which held the eviction to be legal, despite the clear wording of article 21, which stated that effects of the marriage towards third

---

<sup>131</sup> Law adopted by the Parliament in 2013 (Loi n° 2013-404 du 17 mai 2013, available on-line at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&categorieLien=id>)

<sup>132</sup> See *JCP* 2016, p. 1380, obs. F. MAILHÉ; *RTD civ.* 2017, p. 102, obs. J. HAUSER; *AJ fam.* 2017, p. 146, obs. A. BOICHÉ ; J. WASZEK, « L'opposabilité rétroactive de la transcription du mariage d'un ressortissant français célébré à l'étranger », *Garç. Pal.* 2017, p. 66.



parties start from the date of the transcription. Based on articles 171-1 and 171-5 of the Civil Code and, in the absence of a deadline for the transcription of marriage in the civil status record, the *Cour de cassation* held that the transcription had a retroactive effect, even towards third parties. The court found that a differentiation existed for effects of marriages of same-sex couples due to the different wording of article 21, which was adopted on the occasion of the legalisation of same sex marriage in France- in comparison with article 171-5 Civil code<sup>133</sup>. Article 171-5 Civil code does not specify the date from which the transcription of marriage produces effects towards third parties, and this was considered to lead to a different treatment of heterosexual marriages compared to same-sex marriages and, thus constitutes an unjustified discrimination. The judges made the assumption that the lack of precision in article 171-5 Civil code -contrary to article 21- meant that marriages covered by the scope of application of this article produced effects towards third parties from the moment of the celebration. Thus, the wording of article 21 led to a discriminatory treatment of same-sex marriages, whose effects towards third parties started only from the moment of the transcription. The *Cour de cassation* has cut short to the risk of such discriminatory treatment and safeguarded the identical treatment of the effects of all type of marriages celebrated abroad<sup>134</sup>.

Konstantinos Rokas

**Bigamy, annulment of the second wedding, public policy considerations.** In its decision dated 19 October 2016 (**Civ 1e, 19 October 2016, 15-50.098**), the *Cour de cassation* had to hear a case in which a French man had married an Algerian woman in 1971 in Algeria, i.e., seven years after a first marriage with another woman<sup>135</sup>. Notwithstanding the divorce from his first wife, issued in 1973, the second marriage was null according to French law. Nonetheless, in 2014 the couple has sought the transcription of the marriage in France. They succeeded in having their marriage transcribed, but the public prosecutor (*Ministère public*) opposed this transcription. The *Cour d'appel* ordered the transcription based on the fact that 40 years had elapsed from the moment of the marriage, and as a result of that the action to seek the annulment of the second marriage on grounds of bigamy should be considered time-barred. The *Cour de cassation* quashed the decision of the *Cour d'appel* reminding the absolute character of the nullity of a bigamous marriage. The transcription of the marriage constituted a violation of articles 6 of the Civil code combined with article

---

<sup>133</sup> Article 171-5 : « To be effective against third persons in France, the act of marriage of a French person celebrated by a foreign authority must be transcribed in the French civil status records: If not transcribed, the marriage of a French person, validly celebrated by a foreign authority, produces civil effects in France for the spouses and the children [...] ».

<sup>134</sup> *JDI* 2017, B. BOURDELOIS, p. 884.

<sup>135</sup> See *Defrénois* 2017, p. 49; P. CALLÉ; *D.* 2017, p. 470, M. DOUCHY-OU DOT; *JDI* 2017, p. 146, note F. MONÉGER; D. SINDRES, « Le refus de transcription d'un acte relatant le mariage bigamique d'un Français à l'étranger », *D.* 2016, p. 2549 ; D. BUREAU, « Bigame un jour, bigame toujours ? », *JCP G.* 2016, p. 2199 ; V. LEGRAND, « Mariage polygamique : entre nullité et inopposabilité », *Petites Affiches* 2016, n° 248, p. 6.

423 of the Code of civil procedure. Public policy considerations gave the right to the Public prosecutor to seek the nullity of a bigamous marriage. In our view the couple could have had a better luck if they had chosen to argue that the annulment of the marriage 40 years after its celebration constitutes a violation of the right for respect of family life.

Konstantinos Rokas

**Interaction between administrative law and private international law rules, artificial insemination post-mortem.** In a decision dated 31 May 2016<sup>136</sup>, the *Conseil d'Etat* was seized of a case regarding post-mortem insemination (**CE, 31 May 2016, n° 396848**)<sup>137</sup>. A couple composed of a Spanish woman and an Italian man had initiated a medically assisted reproduction procedure after being informed that the husband suffered from cancer. The latter had given explicitly his consent for the retrieval of his sperm in France. He died on 9 of July 2015, and his wife sought the transfer of the genetic material to Spain, where she could legally be inseminated. The Agency of Biomedicine rejected the request on the basis of article L. 2141-11-1 of the Code of Public Health, which prohibits the exportation of genetic material for use not in conformity with the French rules on assisted reproduction. The wife challenged this decision before the interim relief judge so as to have the exportation of the genetic material to Spain authorised. This appeal was also rejected, and she had recourse to the *Conseil d'État*, the highest administrative court. The *Conseil d'État* ordered the hospital to do the necessary for the transfer of the sperm of the husband to Spain. The Judges found that although the application of article L. 2141-11-1 of the Code of Public Health was not *per se* contrary to the European Convention of Human Rights, its application in these particular circumstances constituted an infringement of the right for respect of private and family life protected under article 8 of ECHR. The decision merits our attention in that it affects indirectly questions as to the role of private international law rules before an administrative court and the efficiency of provisions with an extraterritorial scope. Thus, one could ask whether the administrative courts must take into account or even apply the French conflict of law rules on parentage (art. 311-14 of the Civil Code), designating as applicable the law of the nationality of the mother or any other

<sup>136</sup> Already on this decision in this chronicle, see A. HERMET, comment, *supra*.

<sup>137</sup> See among others A. GOUTTENOIRE, P. MURAT, *JCP G.* 2016, p. 1723 ; B. HAFTEL, « Insémination post mortem internationale, contrôle de proportionnalité et méthodes du droit international privé », *D.* 2016, p. 1477 ; H. FULCHIRON, « Contrôle de proportionnalité ou décision en équité ? », *D.* 2016, p. 1472 ; J.-P. VAUTHIER, F. VIALLA, « Le Conseil d'État autorise une exportation de gamètes destinée à une insémination post mortem », *JCP G.* 2016, p. 1479 ; *AJDA* 2016, p. 1092 ; *ibid.*, p. 1398, chron. L. DUTHEILLET de LAMOTHE et G. ODINET ; *D.* 2016, p. 1470, obs. M.-C. de MONTECLER ; *AJ fam.* 2016, p. 439, obs. C. SIFFREIN-BLANC ; *ibid.* 360, obs. A. DIONISI-PEYRUSSE ; *RFDA* 2016, p. 740, concl. A. BRETONNEAU ; *ibid.* p. 754, note P. DEVOLVÉ ; J. HAUSER, « Procréation médicalement assistée post mortem : le début du délitement ? », *RTD civ.* 2016, p. 600 et p. 834 ; J.-P. MARGUÉNAUD, « L'insémination post-mortem, ferment de révolution tranquille au Conseil d'État », *ibid.* 2016, p. 802 ; *ibid.* 2016, p. 578, obs. P. DEUMIER.

conflict of law rules in order to decide about such access to a medically assisted reproduction. This ruling confirms that conflict of law rules do not apply as to the terms of access to a procedure of medical assistance to reproduction. Rules as to the access to such techniques fall under public law, and the determination of their scope of application is thus made in a unilateral manner. What is interesting however is that the judges of *Conseil d'État* use elements of the reasoning mechanisms, which are proper to private international law. Accordingly, they invoke explicitly the links of the woman with Spain and the absence of any fraud. More precisely and in relation to the concept of fraud, they indicate the absence of an intention to bypass French law. The Court excludes fraud based on the fact that the woman sought to receive the adequate treatment in the country where she had been settled and where her family resides. One could legitimately question whether the decision would have been the same if the husband was of French nationality or if the wife was French and her husband Spanish. In the first case the relatives of the deceased would be affected by a foreign legislation, which according to French law should not be applied, whereas in the second case a French woman would have access to a treatment prohibited to other French Women. Moreover, it is interesting to add that the French court takes into consideration the Spanish legislation, explicitly mentioning that it allows the treatment the wife wanted to be submitted to. The fact that the *Conseil d'État* uses concepts common to private international law should not lead to confusion. These elements are taken into consideration among other elements for the needs of the proportionality reasoning. Despite the deficiencies and the complications of the proportionality mechanism, the use of conflict of laws rules as it is suggested<sup>138</sup> is not the best approach. This suggestion for application of conflict of laws rules criticises the solution of the *Conseil d'État* as uncertain and unforeseeable, but at the same time is not accompanied by a proposal of a specific conflict of law rule. Moreover, it contrasts with the reality of medical practice in France and in most countries of the world, which indicates that no such mechanism has been adopted as to the access to techniques of medically assisted reproduction. People that want to have access today know immediately, and independent from any consideration of an internationality element, whether they can have access to a specific technique or not. Thousands of people that are concerned by medically assisted reproduction have a specific and certain guidance as to the rules applied to them and the access to those techniques, and this amounts to a degree of legal security which should not be underestimated. In addition, adopting a new conflict of law rule –with terms yet to be determined– cannot be limited to *post mortem* procreation, but should extend to all artificial reproduction techniques. Consequently, such a rule would be applied as well for access to IVF with sperm donor (still prohibited in Poland) or with an egg donor (still prohibited in Germany). Therefore, the solution applied by the *Conseil d'État* -which accepts the unilateral determination of the scope of application of the provisions of the Code of public health- is despite its inadequacies, by far more clear and foreseeable than the proposal of applying conflict of

---

<sup>138</sup> See in particular, D. SINDRES, « Le tourisme procréatif et le droit international privé », *J.D.I.* 2015, pp. 429 ; and B. HAFTEL, *op. cit., supra*.

law rules. Finally, this solution leads to an informal coordination of different legislations and of different solutions which appears to be acceptable.

Konstantinos Rokas

*b. Patrimonial matters*

**Mortgage mandate, recognition of a foreign notary public act.** In this decision dated 14 April 2016, the French *Cour de cassation* offers a balanced view of the concept of “equivalence” (**Civ. 1e, 14 April 2016, n° 15-18.157**). A brief overview of the facts is necessary for the proper understanding of the case.

An undivided co-owner mandated her brother (one of the other co-owners; the third one being their father) to take a mortgage on their immovable located in France. The mortgage meant to secure their father’s loan (debtor), granted by a bank (creditor). The mandate was given in Australia with the assistance of a local notary public, but the Australian lawyer had restricted his task to the stamping of the agreement with an apostille. Australian notaries are very different from the French (and, in general, continental) ones, and the question was whether such a simple formalism could be translated into a French authentic act. Therefore, the main question was to determine if that particular foreign formalism met the French law standards. In other terms, is the notary public act to be looked at as an equivalent of the French notarial act? This concept of “equivalence” is key to understanding the *Cour’s* decision. Indeed, existing jurisprudence shows an approving attitude towards foreign acts as long as they appear to be equivalent to the French ones. Nevertheless, the comparability must be significant, that is to say that the notary public should make sure the appearer’s consent was fully informed. In this particular case, however, the Australian notary did not fulfil this kind of mission.

As a matter of fact, the *Cour* notes that the notary “had simply apostilled the mandate in the effect of constituting the mortgage” and therefore that “this act did not include the solemnities required in France for a notarial act, since the followed formalism was not equivalent to that of the French law as for the protection of the mortgage mandator”. Basically, the required information to the layperson on the exact extent of her commitment was missing. The information was not given effectively because the Australian notary communicated in English only, while the undivided co-owner did not master sufficiently this language. Thus, the mandate was invalid and the seizure of property procedure, which had been triggered in France by the creditor, had to be cancelled.

It should be underlined that although the equivalence wasn’t actually found in this case, the *Cour de cassation* has held, in a matter concerning an American notary public act, that the equivalence existed because of the participation of two lawyers whose function ensured the

parties' informed consent<sup>139</sup>. In conclusion, it is fair to say that the *Cour's* assessment process focuses on comparing substantially the notary's task to the *notaire's* one in order to evaluate its results on the quality of the consent.

Noëla Picari

**Rights at the parties' disposition, impossibility to raise the conflict of laws issue before the *Cour de cassation* for the first time.** This decision (Civ. 1e, 11 May 2016, no.15-10.818) is related to the application of the Franco-Moroccan Convention of 10 August 1981 on the status of persons and the family, to the matrimonial property regime and the effects that applies to the divorce of a Moroccan couple that was married for forty-one years.

Two Moroccan spouses got married under the matrimonial property regime called separate property in 1972. The husband decided to divorce after forty-one years of marriage and having seven children together. The divorce was finally granted on 12 January 2011 by a final decision of the French *Cour de Cassation* (decision no. 10-10.216) that ordered lower courts to apply the Franco-Moroccan convention to the dispute arising on the matrimonial property consequences of the divorce.

The wife had little revenue and no estate, whereas her husband was retired and remarried before having two additional children. His estate was composed of four immovable and four parcels of land.

In 2016, the *Cour de cassation* had to answer which law had to apply to the matrimonial aspects of the divorce. Indeed, in this second phase of the dispute, the wife had asked for a compensatory allowance because she took on all household responsibilities while her husband was working. A compensatory allowance, which purpose is to correct certain financial inequalities between the divorced spouses, had been awarded out of fairness by lower courts that applied French law. To avoid paying for the compensatory allowance the husband invokes the application of the Moroccan law before the *Cour de cassation*.

In French private international law, the compensatory allowance is an available right to its' beneficiary. The beneficiary may therefore renounce or transfer the right in question. Because such rights are in the sole private interest of the beneficiary, courts are not compelled to raise the conflict of laws issue and apply the according conflict rule *ex officio*. It was the case for the compensatory allowance, and the husband could not criticize the court of appeal silence about it.

However, the *Cour de cassation* did not rebut the husband's claim on this ground. It chose instead to remind that such a claim cannot be raised for the first time in front of the Supreme Court. This solution also draws from the nature of the right at stake: because it is available, it could not be invoked for the first time before the *Cour de cassation*.

---

<sup>139</sup> Civ. 1e, 23 May 2006, n° 05-18385, *Bull.* I, n° 256.

The solution draws on the two decades case-law (procedurally) treating foreign law as a fact and conflict issues as an optional issue for the judge<sup>140</sup>. But the question remains whether such case-law will stand against a new source of conflict rules: European regulations. And in this matter indeed, the European regulation on maintenance obligations covers compensatory allowance<sup>141</sup>.

Esther Bendelac

**Fraud in succession, trust.** Claims related to concealed assets that should have been part of a succession can sometimes arise. This decision (**Civ. 1e, 8 June 2016, n°15-13.741**) deals with such a matter, the concealment being organized through several trusts.

In this case, a father died in 1993 leaving seven heirs (a wife and six children) that had to split the estate of the deceased which included shares of an Australian company dedicated to the management of trusts.

The *Cour de cassation* quashed the Nouméa court of appeal decision that decided that one of the son's default to inform the other heirs of the existence of this company and the trusts it managed before the death of the settlor, his refusal to reveal the trusts' beneficiaries to the other heirs and the fact that, after being summoned by one of his brothers for assets concealment, he had annulled the shares of the company trustee, was not enough to characterise this son's will to disrupt the equal rights to inheritance of the other heirs.

For the *Cour de cassation*, the court of appeal should have explained why those specific elements weren't enough to characterise the intentional element of a fraud to the other heirs' rights. The *Cour de cassation* therefore sent back this specific question to be settled by the Nouméa court of appeal that will have to reconsider rather or not assets had been concealed.

Esther Bendelac

**Renvoi, qualification, distinction between the conflict of laws rules related to property law and succession law issues.** In a remarkable decision, the *Cour de cassation* operated the distinction between questions that depend of the preliminary stage of an inheritance (property law) or of the inheritance *per se* (succession law), to which a different conflict of laws rule applies. The Court reminds that, to apply the relevant conflict of laws

---

<sup>140</sup> Civ. 1e, 26 May 1999, *Mutuelles du Mans*, *Rev. crit. DIP* 1999, p. 707, note H. MUIR WATT ; *J.C.P.* 1999. IV, n° 2325 ; B. FAUVARQUE-CAUSSON, "Le juge français et le droit étranger", *D.* 2000, chron, p. 125.

<sup>141</sup> CJUE, 27 March 1979, n°143/78, *De Cavel* ; CJCE, 27 February 1997, C-220/95 *Van den Boogaard*.

rule, the controversial rights must be correctly qualified by judges (**Civ. 1e, May 25, 2016, n° 15-16.935**)<sup>142</sup>.

The partition of plaintiff's parents' belongings had been organized after the death of his mother in 2000. He opposed the inclusion in the partition of an apartment located in Spain, on the ground that he had previously become the apartment's owner due to a fifteen-year acquisitive prescription in Spanish law.

Nevertheless, the Court of Appeal included the apartment in the partition. Appellate judges applied the French conflict of law rule - *lex rei sitae* - applicable to immovable property that designated Spanish law; however Spanish conflict of law rules applicable to succession issues submit the entire succession to the national law of the deceased (who was French). Consequently, Spanish law operates a *renvoi* to French law<sup>143</sup>, that recognizes an acquisitive prescription only after a period of thirty years, instead of fifteen years in Spanish law.

The *Cour de cassation* quashed the Court of Appeal judgment by citing article 3, paragraph 2, of the Civil Code<sup>144</sup>. This provision was long ago bilateralized by the Supreme Court<sup>145</sup> to apply the *lex rei sitae* rule to any questions related to immovable property issues. Consequently, Spanish law was applicable due to the *situs* of the apartment. Consequently, the *Cour de cassation* did not operate any *renvoi* toward French law, indicating its disagreement with the Appellate Court on the correct conflict of laws rule to apply.

According to French conflict of law rules, when the controversial right concerns real estate, both questions (property law and succession law) are governed by the *lex rei sitae*. Whereas, under Spanish law, only the immovable property law is governed by the *lex rei sitae*; the law of the *de cuius* is applied to succession law issues. Therefore, the *Cour de cassation*, by refusing to apply a *renvoi*, distinguishes the preliminary stage, the question of the apartment's ownership, from the ultimate stage, the issue of the partition of the succession. The controversial rights here at stake raised a property law issue instead of a succession law one. In other words, the *Cour de cassation* explained that it is necessary to decide whether the deceased had owned the property before it can be included in the partition. The applicable law to identify the property must be determined before solving the question of the applicable law to the devolution of the assets and the determination of its beneficiaries.

Under article 1-g of the EU Regulation on successions<sup>146</sup> (it was not applicable *ratione temporis* to this case), the holding would have been the same since it excludes “*property rights [...] created or transferred otherwise than by succession*”.

<sup>142</sup> RTD Civ. 2016 p. 672, M. GRIMALDI; *AJ Fam*, 2016 p. 499, A. BOICHÉ.

<sup>143</sup> Applying the longstanding *Forgo* precedent: Cass. civ, June 24 1879, *Forgo*; B. ANCEL, Y. LEQUETTE, *Les grands arrêts de la jurisprudence française de droit international privé*, 3<sup>rd</sup> edition, n° 7.

<sup>144</sup> « Immovable property, including owned by foreigners, are governed by French law ».

<sup>145</sup> Civ., 14 March 1837, *Stewart*; B. ANCEL, Y. LEQUETTE, *Les grands arrêts de la jurisprudence française de droit international privé*, 3<sup>rd</sup> edition, n°3.

<sup>146</sup> Regulation (EU) n° 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of successions and on the creation of a European Certificate of Succession: article 84 providing that it shall apply from 17 August 2015.

Plaintiff also claimed that French courts should not have been competent to hear the case. Yet, the *Cour de cassation* considered itself competent despite the fact that article 92 of the French Civil Procedure Code sets an exclusive jurisdiction to the court of the *situs*. The case should have been heard in front of Spanish courts.

Edouard Adelus et Esther Bendelac

## 2. Conflict of laws rules deriving from international and European instruments

### *a. Conflict of law rules deriving from an international instrument*

**Application of the CISG.** In August 1999, a German company sold two power generators in to a French company. The two units were damaged in December 2001. The French company and its insurer sought remedies against the seller. The issue the *Cour de cassation* (Cass. com, 21 June 2016, n° 14-25.359)<sup>147</sup> had to face was related to the interpretation of article 39-2 of the 11 April 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG). This provision provides that the buyer loses the right to rely on a lack of conformity of the goods if it has not given the seller notice thereof in a period of two years after the date on which the goods were delivered. The CISG was applicable because the parties had their places of business in two different contracting States (article 1(1)(a) CISG) and had not opted out of the Convention's regime (article 6 CISG).

Plaintiff argued that this delay was a time limit that, once expired, barred any claim regarding the responsibility of the seller and the ability to seek the reparation of an alleged prejudice caused to the buyer. This reasoning had been followed by the Court of Appeal but was quashed by the *Cour de cassation*. The *Cour de cassation* had previously considered article 39 of the CISG not to be a time-limit provision but a two-year period to denounce the non-conformity of the sold goods<sup>148</sup>. It is true that this rule has been considered to bear an important burden on the buyer, particularly if he cannot detect the lack of conformity in this period. Nevertheless, the French Supreme Court confirmed that it is respectful of due process as understood by article 6 of the European Convention on Human Rights since the parties are supposed to be professionals and that article 39 of the CISG is balanced by article 40 CISG describing the seller's responsibility<sup>149</sup>.

The High Court's decision also stands out for its pedagogy in correcting the Court of Appeal's reasoning to identify the correct set of rules applicable to the dispute. The *Cour de*

<sup>147</sup> *AJ Contrats*, 2016, p.431, D. SINDRES ; D. 2017.613, C. WITZ ; *RTD Com.*, 2016, p.583, Ph. DELEBECQUE.

<sup>148</sup> Com, 3 February 2009, n° 07-21.827; Cass. Com, 8 April 2009, n° 08-10.678.

<sup>149</sup> Com, 16 September 2008, n° 07-11.803; D. 2009.1568 chron. C. WITZ.



*cassation* considers that the Court of Appeal had to apply the CISG, which it did. However, the Court of Appeal had decided that, regarding time limit provisions, the CISG incorporated the Limitation Period in the International Sale of Goods (New York, 14 June 1974) that consequently should also be applicable to the dispute. This solution has been sometimes discussed and UNCITRAL clearly links the two instruments on its website<sup>150</sup>. However, the *Cour de cassation* confirmed that such a reasoning is unacceptable (regardless of the fact that article 39 of the CISG isn't a time-limit provision). First, because France is only bound by regularly ratified treaties that, as a result, will have a supra-legal authority once they have been published in accordance with article 55 the 1958 French Constitution. Yet, neither France nor Germany have ratified the 1974 New York Convention on Limitation Periods. Second, where an international convention is silent, such as the CISG on time-limitation, the *Cour de cassation* refers to article 3 of the 15 June 1955 Convention on the Law Applicable to International Sales of Goods, to which France is a party, to remind that such lacunas must be filled with the relevant domestic law rule.

Edouard Adelus

*b. Conflict of laws rules deriving from an EU law instrument*

**Labor law contracts.** Several decisions are relevant to the localization of employment contracts within the application of the 1980 Rome Convention<sup>151</sup> replaced by the Regulation (EC) 593/2008<sup>152</sup> that provide a conflict of laws rules in that respect. Regarding labor law contracts, both instruments allow parties to choose the law governing the contract but this choice cannot deprive the employee of the mandatory protection that he would have received from the law that would have governed the contract in the absence of choice; the law of the country in which the employee regularly carries out his work<sup>153</sup>.

The preambles of these texts as well as CJEU decisions have recognized the necessity to foster a common interpretation of both instruments; decisions of the CJEU related to the interpretation of one is therefore relevant to the other. Judicial orders are bounded by the interpretation given by the CJEU. In that respect, the *Cour de cassation* has the duty to control that lower courts apply those provisions in accordance with EU law. In a more general manner, the *Cour de cassation* remains the judge of the law and verifies the way lower courts apply EU regulations.

In the absence of an explicit choice of law, the lower courts have to determine the law governing the contract. A court of appeal decision was quashed (**Cass. soc., 19 January 2017, n° 15-23.274**) for not having sufficiently demonstrated the localization of the

<sup>150</sup> <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html)>

<sup>151</sup> 1980 Rome Convention on the law applicable to contractual obligations.

<sup>152</sup> Regulation (EC) n° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

<sup>153</sup> Art. 6 of the Rome Convention and art. 8 of Rome I.

contract. The appellate court had considered that the French nationality of the employee and of the employer was not sufficient to overturn the relevance of German law since the employee had been positioned in Berlin and that the contract had been broken in accordance with that law. The *Cour* considered that this was insufficient evidence to demonstrate the parties' implicit choice of law in favor of German law or that the contract was more closely connected with Germany.

Another decision from the same day is interesting (**Cass. soc., 19 January 2017, n° 15-22.835**). A contract stipulated that the worker would work from his residence in Paris and that he would be required to travel regularly to London, the employer's headquarters, and other locations in Europe. The appellate court considered that English law should govern the contract. This decision was quashed by the *Cour de cassation* on the visa of article 6§2 of the Rome Convention. The *Cour de cassation* reminded that judges were bound by clear stipulation in the contract indicating the country the employee habitually carries out his work performance if no evidence showed that the work was actually habitually carried out in another country. Such a contractual stipulation can be considered as an implicit choice of law, as recognized by another decision from the same day (**Cass. soc. 19 January 2017, n° 15-20.095**).

This last decision also states that the party arguing that the law implicitly chosen by the parties must be set aside, must demonstrate that the law of the country of performance is more protective of the employee than the chosen law on a particular claim (working time for instance). It is only if this demonstration is satisfactory that the chosen law can be set aside. The judge deciding on the merits also has to fulfil this demonstration requirement to set aside the contractually chosen law (**Cass. soc., 1 February 2017, n° 15-23.723; Cass. soc. 8 March 2017, 15-28.021 and 15-28.022**).

None of these decisions are particularly novel but underline the *Cour de cassation's* will to conduct an efficient control of the decisions on the merits<sup>154</sup>.

Edouard Adelus

*C. Application of international instruments promoting mechanisms of cooperation between national authorities*

### 1. The Hague Convention on the Abduction of children

---

<sup>154</sup> Before the Rome I Regulation, the judicial use of article 6 of the Rome Convention, both provision being very similar, had been criticised: see: F. JAULT-SESEKE, « L'office du juge dans l'application de la règle de conflit de lois en matière de contrats de travail », *RCDIP* 2005.253. The *Cour de cassation* was criticized for its relative lack of involvement.

**Wrongful abduction of a child, child's interest, public policy considerations.** In two decisions rendered the same day (7 December 2016, no. 16-21.760 and no. 16-20.858), the *Cour de cassation* had to deal with the fate of children wrongfully removed by one of their parents. The first case<sup>155</sup> concerned the removal of a child born to a French mother and a French-Moroccan father. The couple divorced in 2009 and the mother took the child back to France in 2014. The husband tried to obtain a judicial order for the return of the child. His petition was accepted by the *Cour d'appel*, which -against following the spirit of the Hague Convention- considered that the exclusive attribution of parental authority to the mother according to article 171 of the Moroccan code of family law was contrary to the principle of equality and thus violated French public policy. However, the objective of the Hague Convention on the abduction of children is the immediate return of the child illegally displaced. Therefore, according to the Convention, the country that receives an application for the return of the child must only check whether there has been a wrongful removal of a child to another country. In order to ascertain the wrongful character of the removal, judges have to take into consideration the solution of the country of the habitual residence in this case Morocco. This determines who has the right of custody of the child. Following this interpretation of the convention, the *Cour de cassation* quashed the decision. However, it has to be mentioned that the right of custody has to be understood in the terms of article 5 of the Convention. And although the right of custody in this case was granted exclusively to the mother, the article 263 of the Moroccan fam. code requires the father to give his authorisation for a departure of the child of the country (art.)<sup>156</sup>. The fact that the father did not give his authorisation constituted a violation of his right of custody as this right is determined in article 5 of the Hague Convention. Thus, a wrongful removal could have been invoked not based on the grounds of the exclusive parental responsibility, but on the grounds of a violation of the aforementioned right of the father. This argument has not been brought before the court timely. Therefore, even if the argument of wrongful removal was plausible, the judges did not have the power to take it into account for procedural reasons.

In the second decision of the same day<sup>157</sup>, the Convention was applied in a different context. It dealt with a couple having its habitual residence in Canada. The mother travelled to France, where she gave birth to the child. After the birth she declared to her husband that she would not return to Canada. As a result, the father of the child initiated proceedings

---

<sup>155</sup> D. 2016, p. 2518, and p. 2017. p. 599, chron. I. GUYON-RENARD; *AJ fam.* 2017 p. 73, On this case law, see obs. A. BOICHÉ; H. GAUDEMET-TALLON, F. JAULT-SESEKE, *D.* 2017, p. 1011; V. LEGRAND, « Déplacement illicite d'enfant : le fond du droit de garde relève de la compétence des autorités de l'État de résidence habituelle du mineur », *Petites Affiches* 08.02.2017, n° 28, p. 6, available on-line at <https://www.lextenso.fr/lextenso/ud/urn%3ALPA123w6>; N. ASSUIED, « L'ordre public international ne peut pas faire échec au « droit de garde » tel que défini par la loi de la résidence habituelle de l'enfant avant son déplacement », *Gaz. Pal.* 04/07/2017, n° 25, p. 74.

<sup>156</sup> See in that sense *AJ fam.* 2017 p. 73, obs. A. BOICHÉ.

<sup>157</sup> A. GOUTTENOIRE, P. MURAT et al. *JCP G* 2017, pp. 327; S. GODECHOT-PATRIS, « Enlèvement international et appréciation stricte du danger », *RJPF* 2017, n° 5, p. 47.

in order to have the child returned to the country of the couple's habitual residence. The mother opposed the return, invoking among other arguments the existence of a grave risk for the child if returned to Canada. In support of her thesis she argued that the child had always lived with her, that the father of the child has left two days after its birth and that his professional obligations would not allow him to be sufficiently close to the child. The *Cour d'appel* accepted these arguments and refused to order the return of the child. The *Cour de cassation* quashed the decision and stressed that the facts presented by the mother could not be characterised as constitutive of a « *grave risk* », which « *could expose the child to physical or psychological harm or otherwise place it in an intolerable situation* », as it is required by the article 13 b) of the Hague Convention in order to validly refuse an order for the return of a child.

Konstantinos Rokas

## 2. Others

(...)