was exacerbated by construing such clauses unduly narrowly. He found that the dispute was one 'relating to delivery' in a wide sense and so should be arbitrated. Insofar as Schedule III was inconsistent with the arbitration clause, Schedule III should be construed to give effect to the arbitration clause.

Protectionist stance

In the *Front Comor*, the court adopted a protectionist stance towards anti-suit injunctions to protect arbitration agreements.

An anti-suit injunction is an order by the courts of one state restraining a party from commencing or continuing court proceedings in the courts of another state in breach of a court jurisdiction clause. The European Court of Justice (ECJ) ruled in 2004 that it is no longer possible for anti-suit injunctions to be used within the EU primarily because they are inconsistent with EU Regulation 44/2001 (the Regulation), which regulates the allocation of jurisdiction between EU Member States. Whether or not it is still possible to use anti-suit injunctions to prevent proceedings brought in breach of an arbitration agreement within the EU as opposed to court proceedings is unclear.

In 2000, the *Front Comor* hit a jetty in Sicily. The charterparty was governed by English law and provided for arbitration in London. The charterer arbitrated, claiming its uninsured losses against the owners, and recovered its insured losses from Italian insurers. The insurers sought to recover these amounts from the owners in the Italian courts. The Commercial Court in London granted the owners a temporary anti-suit injunction to stay the insurers' action in Italy in favour of the arbitration. The insurers sought a discharge of this injunction.

Colman J found that the insurers were bound to resolve their claims against the owners through arbitration, in accordance with the charterparty. Following previous authority, Colman J granted an injunction against the insurers to prevent further action in the Italian courts.

He referred the question of the use of anti-suit injunctions within the EU in support of arbitration to the House of Lords, who in turn referred it to the ECJ.

In its reference, the House of Lords strongly supported the view that the courts of EU Member States should retain the right to issue anti-suit injunctions in support of arbitration. Referring to provisions of the Regulation excluding arbitration from its scope and applying recent ECJ case law, Lord Hoffmann argued (i) that the ban on anti-suit injunctions does not apply to arbitration or to court proceedings where the subject matter is arbitration; and (ii) that the courts' ability to issue such injunctions is an attractive feature of English arbitration and that the EU would impose an unnecessary handicap on itself if this power were restricted. Whether the ECJ will be persuaded by these arguments given significant arguments to the contrary from other countries within the EU remains to be seen.

The courts' power to grant anti-suit injunctions staying court and arbitral proceedings outside the EU will be unaffected by the ECJ's decision.

The ECJ's decision is likely to be two years away, but is eagerly anticipated by the litigation and the arbitration communities.

FRANCE

New developments for qualification of foreign judgments for recognition and enforcement in France[1]

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In most cases, when reviewing foreign court decisions for the purposes of their recognition and enforcement (*exequatur*) in France, French courts are bound by the rules found in applicable treaties on the reciprocal recognition and enforcement of foreign judgments in civil and commercial matters, whether multilateral treaties (eg, the 1968 Brussels Convention, the 1988 Lugano Convention for decisions rendered in the EC Member States and the then EFTA member countries, and more recently the EC Regulation 44/2001)[2] or bilateral treaties. However, where no treaty applies, French courts apply general French rules, which are often less flexible than treaty rules, and despite the diplomatic and legal efforts in the field of international judicial cooperation, the situations where such general rules apply are still manifold, since there are a number of countries without treaties with France. These include nations with largely industrialised economies such as Brazil, India, Japan, Russia and, noticeably, the United States and Canada.

Therefore, French legal developments in the field of general requirements for the *exequatur* of foreign court decisions must be kept in mind whenever pondering whether to start judicial proceedings involving a French party or a party with significant assets in France.

Two recent significant French Supreme Court decisions have considerably narrowed the gap between general rules and treaty rules, presumably in response to the growing legal influence of the European

statutes. French courts will now be required to adopt an increasingly more flexible approach when reviewing foreign judgments in civil and commercial matters from a non-treaty foreign jurisdiction.

Traditionally, the test of when to grant *exequatur* was fixed by the Cour de cassation in the 1964 *Munzer* decision.[3] Under that test the French judge must be satisfied that five conditions are met, namely the appropriateness of the jurisdiction of the foreign court that issued the decision, the adequacy of the procedure followed before that same court, the application of the appropriate substantive law under French conflict rules, compliance with international public policy rules and the absence of fraud.[4] The main contribution of *Munzer* was that foreign judgments would no longer be reviewed on the merits. However, there remained significant uncertainties or restraints on two main issues, which the two recent Supreme Court decisions described below, *Prieur* and *Cornelissen*, have now respectively clarified, namely the jurisdiction of the foreign court and the law applied to the merits of the dispute.

The *Prieur* decision and the jurisdiction of the foreign court

Munzer had provided no clue on the issue of evaluating the exercise of jurisdiction by the foreign court, with French courts content to apply French domestic rules on *in personam* jurisdiction when reviewing a foreign judgment submitted for *exequatur*. In 1985, the Cour de cassation in *Simitch* narrowed the breadth of the French court's inquiry by requiring recognition whenever 'the underlying dispute has well established connections with the country of the seat of the court that rendered the judgment and unless the foreign court was chosen by fraud'.[5] In other words, the foreign judge had adequate jurisdiction unless there were no true connections with the dispute or in the event of fraud.

Simitch nevertheless retained one significant additional exception, namely that jurisdiction would only be deemed valid so long as no other rule granted exclusive jurisdiction to French courts. This restriction extended to a number of subject-matter areas governed exclusively by French *in rem* jurisdiction, and generally also to the rules privileging French nationals, ie, Articles 14 and 15 of the French Civil Code.

Specifically, Articles 14 and 15 grant to French nationals the privilege of bringing suit against foreigners before French courts (this is Article 14),[6] or defending in the French courts against suits by foreign litigants (Article 15).[7] However, although the wording of both statutes contains no mandatory language,[8] they have long been construed as granting an *exclusive* privilege, thereby ruling out the recognition by the French courts of the jurisdiction of the foreign courts.[9] This longstanding interpretation by the French courts has met with increasing objections by most French legal scholars, who have branded it as outdated legal protectionism. Indeed, under this reading of Article 15, a French defendant could successfully block the *exequatur* in France of a foreign judgment, unless he had been found to have waived his rights, eg, by admitting to the jurisdiction of the foreign court. Accordingly, even judgments that would satisfy each of the other tests for *exequatur* could be arbitrarily denied recognition and enforcement in France.

By their nature, Articles 14 and 15 belong to the category of nationalistic statutes that treaties on jurisdiction typically set aside (eg, Article 3 of the 1968 Brussels and the 1988 Lugano Conventions), but they remain available whenever dealing with a judgment from a non-treaty country.

Unexpectedly,[10] the Cour de cassation switched positions in 2006, by deciding in *Prieur* that:

> 'Article 15 of the Civil Code only provides for the optional jurisdiction of the French courts, and by nature may not result in setting aside the indirect jurisdiction of a foreign court, when the underlying dispute has well established connections with the country of the seat of the court that rendered the judgment and unless the foreign court was chosen by fraud.'[11]

Accordingly, under *Prieur*, Article 15 of the Civil Code returned to its original wording as an optional rather than a mandatory exclusive rule, and may no longer serve as a defence by a French litigant to the recognition and enforcement in France of a foreign judgment.

After *Prieur*, Article 14 could still be invoked as a *direct* jurisdictional rule, to sustain the jurisdiction of a French court, where a French plaintiff brings suit in France against a foreign defendant, but Article 15 no longer allows French courts to deny the *indirect* jurisdiction of a foreign court.

The question remained whether the rule in *Prieur* could be extended to *lis pendens* cases.

For example, in the event that a French defendant, sued in a foreign court, should retaliate by bringing suit against the plaintiff in France, does the French party run the risk of dismissal of his suit in France due to the pending action abroad, or may he object to a *lis pendens* defence by raising either Article 14 or Article 15?

Indeed, in this hypothetical case, had earlier case law not been reversed by the *Prieur* ruling, the French litigant could conceivably have opposed the *lis pendens* defence by invoking either or both of:

(1) Article 14, which provides for the *direct* jurisdiction of a French court over an action by a French national, and which is arguably construed as an exclusive jurisdiction rule; or
(2) Article 15, which, under the case law that prevailed up to *Prieur*, also operated as an exclusive rule denying the indirect jurisdiction of the foreign court over a French national.

However, in our view, we see no reason why the *Prieur* rationale, though cabined to Article 15 (the court in *Prieur* does not mention Article 14), could not extend to Article 14, as both statutes have the same optional language. Accordingly, this should prevent non-recognition of the jurisdiction of the foreign court by a French court under Article 14.

Likewise, the fact that *Prieur* was handed down in the context of a defence to a submission for *exequatur* in France, should not in our view prevent its extension to a *lis pendens* dispute.[12]

This is precisely the holding of an even more recent decision by the Cour de cassation. In *Banque de développement local BDL*,[13] the court upheld the jurisdiction of a French court on the basis of Article 14 of the French Civil Code using language comparable to the court's wording in *Prieur*,[14] which was decided under Article 15. The case involved a French construction materials supply company that was suing an Algerian bank in France for the unpaid price of its deliveries to Algeria. The Cour de cassation specifically noted that the case had not yet been brought before any foreign court, a consideration which had no relevancy to the court's decision other than to serve as *obiter dictum* to indicate that its ruling should be extended to the hypothetical of a *lis pendens* situation.[15]

Therefore, in our opinion, *Prieur* may be reasonably relied upon as removing Articles 14 and 15 of the French Civil Code as a protectionist weapon for French litigants in transnational disputes. Accordingly, defence against decisions rendered by courts in countries with inequitable legal systems will now be based on violations of international public policy rather than on Articles 14 and 15.

The *Cornelissen* decision and the law applied to the merits of the dispute

More recently, on 20 February 2007, the French Cour de cassation in *Cornelissen* narrowed even further the scope of the analysis to be conducted by a French judge in scrutinising foreign court decisions submitted for *exequatur* in France. The 'five conditions' stated in *Munzer* back in 1964 are now reduced to three: the indirect jurisdiction of the foreign court which issued the decision, based on the existence of connections between the dispute and the foreign court; compliance with international public policy rules covering both the substance of the decision and the procedure; and the absence of fraud;[16] therefore, the French judge does not have to verify that the substantive law applied by the foreign judge is the law designated by the French conflict rules.[17]

Interestingly, while the court in *Cornelissen* did not have to deal with the issue of exclusive French jurisdiction (neither of the parties was a French national), it confirmed (or at least did not contradict) the solution handed down a year earlier in *Prieur*. When reciting the condition dealing with jurisdiction, the court in *Cornelissen* duplicated the ruling in *Prieur* requiring the existence of appropriate connections between the dispute and the foreign court, but did not revert to the exception mentioned in the 1985 *Simitch* decision relating to an exclusive French jurisdictional rule.[18]

But the most important contribution of the *Cornelissen* decision is that the French Supreme Court finally dropped the requirement that the French judge check the adequacy of the choice of substantive law made by the foreign court.

This decision has been unanimously approved in all of the recently published commentaries and we would expect further articles in the upcoming issues of the main French international law periodicals to concur. Indeed, Professor Lagarde, a leading French legal authority, had even advocated that position in the 1960s,[19] and no French court decision had been reported in the past denying *exequatur* solely on the ground that the substantive law applied by the foreign judge was not the law designated by the French conflict rules.[20]

However, the question remains whether, under *Cornelissen*, the French court is entitled to deny *exequatur* where the foreign judge disregarded a French mandatory rule of law (*loi de police*).

Whenever an award by a foreign court conflicts with a French international public policy rule (*ordre public*), it will be set aside and not enforced by the French courts. But mandatory rules of law are distinguished from public policy rules in that French judges are required to apply them at an earlier stage of their decision-making process, before engaging in any ordinary conflict of law discussion. Therefore, if as a result of *Cornelissen*, the French judge no longer checks his foreign colleague's conflict of law analysis, query which of the three conditions for *exequatur* spelled out in *Cornelissen* should be invoked in support of a denial of *exequatur* based on the foreign court's failure to apply a French mandatory rule of law.

While legal scholars all concur that a foreign court decision that disregards a French mandatory rule of law is not eligible for an *exequatur* in France, they provide in their comments on *Cornelissen* a number of alternative solutions as to the appropriate condition to invoke in such a situation, ranging from non-recognition of the validity of the jurisdiction of the foreign court[21] to a finding of breach of public policy, though none of these suggestions has been conclusively adopted.

At this early juncture, we may conclude only that *Cornelissen* further liberalises French *exequatur* rules, but part of the loss of French judges' control may presumably be offset in the future by their closer scrutiny of foreign court decisions from the perspective of French international public policy,[22] or by enlarging the coverage of the last condition for *exequatur*, namely

the '*fraude à la loi*', which could arguably be expanded into a general fraud theory.[23]

In closing, we would also observe that *Cornelissen* is, to our knowledge, one of the rare examples of an *exequatur* granted in France to a treble damage decision by a US court. Most French legal scholars concur in finding that, as a matter of principle, punitive or aggravated damages violate French public policy[24] and the general French civil law rule whereby compensation may not be awarded in excess of the actual amount of damage suffered. However, in *Cornelissen*, the defendant sought to oppose the *exequatur* on other grounds (lack of jurisdiction *in personam* and inadequate choice of the substantive law) for undisclosed tactical reasons, which ultimately failed. Accordingly, the issue of a treble damage award, from the standpoint of French public policy rules, has not yet been tested in the French courts. One author suggests that the Cour de cassation would have been unable to adjudicate that issue because this would have implied deciding facts (the quantum of damages suffered), in which the Cour de cassation never engages.[25] However, in our opinion, there would have been no need to investigate actual damages if, as would seem to be the case by reading the legal grounds raised by the defendant, the award by the US court clearly stated that the court resorted to a treble damage ruling.[26]

Therefore, for the time being, this issue remains untested. Moreover, the French legal approach to punitive damages may well change in the near future as the government has commissioned an expert report which contemplates amending the Civil Code to allow for such type of award.[27]

Notes

1 English translations provided in this article of excerpts from French statutes or court decisions are aimed at conveying the legal meaning of the French text rather than a literal translation.

2 Council Regulation (EC) No 44/2001, OJ 2001 L12/1. Denmark, however, chose not to participate in the adoption of the Regulation.

3 Cass civ 1ère, 7 January 1964, *Munzer, RCDIP* 1964 344, note Batiffol; *JDI* 1964 302, note Goldman; *JCP* 1964 II 13590, note B Ancel. The five conditions spelled out in *Munzer* were narrowed to four by the *Cour de cassation* in its *Bachir* decision of 4 October 1967 (D 1968.95, note Mezger; RCDIP 1968.98, note Lagarde; JCP 1968.II.15634, note Sialelli; JDI 1969.102, note Goldman), as the court in *Bachir* removed the condition bearing on the adequacy of the procedure followed by the foreign court, matters of procedure remaining subject to French international public policy rules, ie, due process of law rules.

4 Fraud in this context refers to '*fraude à la loi*', a French legal concept meaning fraud designed to eschew the application of the appropriate substantive law.

5 Cass civ 1ère, 6 February 1985, *Simitch, RCDIP* 1985 369, note Francescakis p 243; *JDI* 1985 460, note A Huet.

6 'An alien, even if not residing in France, may be summoned before the French courts for the performance of obligations contracted by him in France with a French person; he may be called before the courts of France for obligations contracted by him in a foreign country towards French persons.'

7 'French persons may be summoned before a court of France for obligations contracted by them in a foreign country, even with an alien.'

8 'An alien...may be summoned before French courts...', or 'French *persons* may *be summoned before a court of France...*' (emphasis added).

9 Req, 17 March 1830, *Ovel, S* 1830 I 95.

10 Indeed, until very recently, the *Cour de cassation* had upheld the same interpretation of Articles 14 and 15 by finding that they enacted an 'exclusive' jurisdictional rule: 6 December 2005, *Epoux Zajdner*, Juris-Data no 2005-031196; mentioned in Les Grands Arrets de la Jurisprudence Française de Droit International Privé 2005, 759.

11 Cass civ 1ère, 23 May 2006, *Prieur, RCDIP* 2006 870, note H Gaudemet-Tallon; *JDI* 2006 1377, note Ch Chalas; *D* 2006 chron p 1846, B Audit; *JCP* 2006 II 10134, note P Callé; *Petites Affiches* 22 September 2006, p 10, note P Courbe.

12 See B Audit, *Droit International Privé*, 4ème éd, Economica [2006], § 389, p 321, who explains that the rationale in *Simitch* that facilitated *exequatur* proceedings should also apply to *lis pendens* defences; therefore, the same should apply to *Prieur*. Specifically, one of the requirements of a successful *lis pendens* defence is that the decision expected from foreign court proceedings begun before the proceedings in the French court be eventually admissible for recognition and enforcement in France.

13 Cass civ 1ère, 22 May 2007, *Banque de développement local BDL, Gaz Pal* 1-2 June 2007, p 11, note M-L Niboyet; JDI 2007.956, note B Ancel and H Muir Watt.

14 '[A]rticle 14 of the Civil Code only provides for an option to the French plaintiff, and does not express a mandatory rule of jurisdiction in his favour, to the exclusion of the indirect jurisdiction of a foreign court already in charge of the case and unless the foreign court was chosen by fraud.'

15 This is the reading of the decision advocated by Professor Niboyet in her comments published at Gaz Pal, *supra* note 13, at p 13. We share her views.

16 '*Fraude à la loi*', see note 4, above.

17 Cass Civ 1ère, 20 February 2007, *Cornelissen, D* 2007, p 115, note L d'Avout and S Bollée; *Gaz Pal* 29 April-3 May 2007, p 2, note M-L Niboyet; *Gaz Pal* 11-12 May 2007, p 4, note F Guerchoun; RCDIP 2007.420, note B Ancel and H Muir Watt.

18 However, we should caution that *Prieur* only removed defences to *exequatur* based on Articles 14 and 15, but left unaffected that part of the *Simitch* ruling that reserves as an exception the other exclusive jurisdiction rules, which are subject-matter jurisdiction rules (*in rem*).

19 In comments published in respect of the *Bachir* decision, Cass civ 1ère, 4 October 1967, *RCDIP* 1968 98 at 104: 'It is now open to believe that our law on exequatur should develop towards a much narrower control reduced to the foreign judge's international jurisdiction, compliance with French international public policy, bearing on both the merits and the procedure, and the absence of fraud.'

20 B Audit, *Droit International Privé, supra* note 12, at § 476, p 384.

21 This is based on the rationale that, in many cases, a mandatory rule of law is designed to protect a certain class of litigants or certain situations, and is therefore structured jointly with an exclusive jurisdiction rule, so that when disregarding a French mandatory rule of law, a foreign court often simultaneously disregards a French exclusive jurisdictional rule as well.

22 D'Avout and Bollée, in their comments under *Cornelissen, supra* note 17, at p 1118, argue that the French judge could continue reviewing the law applied by the foreign court by reinforcing certain public policy objections.

23 Professor Niboyet proposes in her comments under *Cornelissen*, that as a supplement for the loss of their review of the choice of substantive law by the foreign court, the French reviewing courts expand the scope of the last requirement in the test for *exequatur* (the '*fraude à la loi*'): Niboyet, *supra* note 17, at §§13-14.

24 B Audit, *Droit International Privé, supra* note 12 at § 802, p 646.

25 Niboyet, *supra* note 17, at § 11; also suggested by B Ancel and H Muir Watt, *supra* note 17 at 423.

26 In fact, the defendant had sought from the French courts that exequatur be denied to the US court decision, because the US court had applied US law rather than Colombian law, which the defendant favoured precisely because Colombian law did not carry a treble damage rule.

27 See draft Article 1371 of the Civil Code, in 22 September 2005 Report by Professor Catala to the Minister of Justice.