Dear Members of the International Arbitration, International Litigation, and International Mediation Committees of the Section of International Law:

Thank you for your continued interest in and support of The International Dispute Resolution News.

In this edition, we have two articles that we believe will be of interest to you. First, this issue includes an article on developments in mediation in Italy, including the impact of the obligatory mediation provisions of the Italian Mediation Law which went into effect in 2011. Those provisions now require litigants to participate in mediation proceedings before access can be had to the Italian courts with regard to many types of disputes. The second article addresses recent developments in recognition and enforcement of U.S. judgments in France.

As always, we have included a number of case notes, summarizing recent decisions that may be relevant to your practice, as well as a calendar of events that may be of interest to the committees’ members.

We hope that you will be attending the Spring Meeting in New York in April and look forward to seeing many of you there.

We invite submissions of proposed articles and case notes for future editions. If you are interested in submitting an article or a case note for publication, please contact Ekaterina Schoenefeld at eschoenefeld@schoenefeldlaw.com.

The Editors
Mediation Goes Mainstream in Italy

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1. Arriving to a Mediation Law

In Italy, Alternative Dispute Resolution (ADR) has been a topic of discussion for the past twenty years or so, particularly after the passage of the Chamber of Commerce Reform Law in 1993, which supported the creation of Conciliation Chambers within member organizations. In 2003, with the passage of the Company Reform Law, the first Register for conciliation bodies was established with the Ministry of Justice and the first rules regulating mediation services were issued.

For years, the use of mediation in Italy remained limited. It was either linked to the activities of the Chambers of Commerce or to certain specific disciplines, such as Law 249/1997, which established the Authority for Guarantees in Communications and introduced the obligatory attempt at conciliation for telecommunications and electronic communications disputes. (However, the regulations were completed by the Authority only in 2001, when it issued the first implementing regulations.) In the finance and banking spheres, Legislative Decree 179/2007 provided for the institution of a Conciliation and Arbitration Chamber at the Italian Securities and Exchange Commission (CONSOB) for disputes arising between investors and intermediaries, and, with the introduction (in 2005) of art. 128 bis of the Consolidated Banking Act (Testo Unico Bancario), banks are required to participate in a system of extrajudicial dispute resolution.

The European Union (EU) has played a fundamental role in the diffusion and regulation of ADR. For several decades, European policies and rules, with an eye towards the development of a unified market of goods and services, have been pushing the Member States to use mediation as a means of dispute resolution. The EU believes that certain types of controversies are particularly suitable for mediation, including disputes involving consumer protection and cross-border matters. Two EU Recommendations and EU Council Resolution of 25 May 2000, though limited to consumer disputes, have set guidelines in this sector and have opened the way to the creation and diffusion of mediation organizations or service providers.

In 2008, the EU further promoted the importance of ADR practice through a Directive, which is perhaps the most important step taken to date in the harmonization process for all civil and commercial disputes concerning available rights. The EU Directive was created with the goal of providing certainty to parties with respect to enforcement issues and to invite Member States to provide disputants with a guarantee of service, including a conciliator’s ethics code, training requirements, and the possibility for court-ordered conciliation. The Directive covers cross-border disputes—those disputes in which at least one of the parties is domiciled or resident in a Member State different from that of any other party. However, the Directive leaves to each national State the decision of whether to implement the Directive’s rules also to internal disputes, as well as the determination of whether to mandate mediation.

Thus, using both of these possibilities, the Italian legislature, with Legislative Decree 28/2010 (the Mediation Law), has chosen to extend the 2008 Directive to include its internal mediation law controversies of a domestic/internal nature and has, in addition, made mediation mandatory for disputes in a large number of categories. This amplification of the types of disputes that must go to mediation before a party can sue in the courts is the legislators’ attempt to alleviate the number of cases burdening the court system.

The Ministry of Justice in Italy is, in fact, attempting to resolve the problems of the serious backlog of the Italian courts. The data published by the Ministry of Justice indicate that, of 4.8 million registered cases per year, 4.6 million decisions are rendered by the Italian judges per year. The difference between the number of new cases and the number of concluded proceedings has brought about, through the years, a backlog of approximately 5.6 million pending cases. It is clear that the obligatory attempt at mediation imposed for numerous types of cases was included as a measure to decongest the courts and to broaden the instruments available to citizens to resolve disputes in a system in which access to the courts’ jurisdiction is still viewed as the sole and exclusive remedy for dispute resolution.

Since 20 March 2011, when the obligatory mediation provisions of the Mediation Law went into effect, many bar members have been involved in protests and strikes, seeking to abolish the obligatory mediation provisions. This is a result of at least two major factors. First, the Italian bar was not called upon by the government to participate in the drafting of the
new rules. This is evident from the fact that there is no requirement for legal representation in the case of obligatory mediation. In addition, attorneys’ fees in Italy are determined by the National Bar Association and approved by the Ministry of Justice, and are primarily based on activities related to litigation.\(^1\) Attorneys’ fees for mediation services are not provided in the list of professional fees. The commission of the National Bar Association in charge of fee review is currently working on the modification of fees and plans to include mediation in its next recommendation to the Justice Ministry. In the meantime, the Constitutional Court has been charged with the question of the constitutionality of some of the rules set forth in The Mediation Law, and a decision is expected soon.

2. Mediation in Italy: A General Overview

In March 2011, The Mediation Law, which provides for obligatory mediation, entered into effect in Italy. The rules now require litigants to participate in mediation proceedings before access can be had to the Italian courts with respect to many types of disputes. The subject matter covered by the Mediation Law was selected to put particularly litigious cases through the mediation process first. In addition, some of the categories were selected because of the need and/or interest in maintaining relations between the parties.

The mandatory requirement applies to cases involving the following types of controversies: condominium disputes, real property rights, division, inheritance law, family agreements, lease and rental agreements, bailments, enterprise leases, damage claims for auto and boat accidents, medical malpractice claims, and libel, as well as insurance, banking, and financial contracts. The Italian legislature has postponed for one year (until March 2012) the mandatory mediation requirement for matters involving condominiums and auto and boat accidents, which in reality amount to the majority of the litigation subject to obligatory mediation. In this way, the Ministry has tried to appease the attorney opposition to mandatory mediation.

Mediation may also be obligatory as a consequence of a specific agreement between the parties contained in the contract and/or in the corporate provisions. A contractual clause referring disputes to mediation might read as follows:

Should a dispute arise with respect to the agreement, the parties agree to refer the dispute to mediation with [choice of mediation center].

A risk arises, however, with respect to the impartiality of the mediation provider, as this type of contractual clause may grant too much power to the stronger of the parties as a result of their relation with the provider. One way to avoid such risk could be to include a choice of mediation providers.

In addition, the Italian Mediation Law gives judges the discretionary right to invite or order the parties to mediation (in controversies other than those listed above). The parties are not, however, required to reach an agreement in such case. In practice, this provision is not being used by the courts.

With respect to compulsory mediation, the party refusing the proposed agreement may find itself penalized later; even though it may win its case at trial, the refusing party may not be awarded its expenses if the proposed agreement is the same as the court decision. In reality, it would be very unlikely that the two are the same, as the mediation agreement (like the proposed agreement), is not based necessarily on law. Whether this provision will work depends on how the judges interpret this rule. Thus far, it appears that judges are generally not inclined to suspend court proceedings and order the parties to mediation.

There are several specific exclusions to the use of mediation, including civil actions brought forth in criminal proceedings, forced executions, council room proceedings, possessors proceedings, and requests for temporary injunctive relief. The law does not remove a party’s right to request urgent provisional measures during the mediation proceedings. Circumstances that warrant such urgent request are defined by the Italian Civil Code as the danger that the possibility of recovery of one’s rights (generally credit rights) could be put to risk.

The innovation of this new law is the four-month maximum duration of the mediation process. The term begins to run on the date the request for mediation is made. A request for mediation brought to a mediation organization does not prejudice the possibility of preserving one’s rights before the judicial authorities, because the statute of limitations is tolled from the time the mediation request is made until the mediation proceeding ends with either a written agreement or a record of the parties’ failure to conciliate.

Should the parties reach an agreement, it would be registered with the mediation provider. In order to render the agreement enforceable, the interested party must request its validation by the President of the Court, who would also check that it does

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\(^1\) The last list of attorney’s fees was approved by the Ministry of Justice in a law of second degree in the Decree of 8 April 2004, n. 127. Prior to this, litigation was viewed as the sole means of dispute resolution and thus the government, which sets attorney’s fees (with a minimum and maximum range in relation to the value of the controversy), has dealt almost exclusively with litigation. With regard to other legal activities, which are exceptional to the Italian legal system (even the general term “stragiudiziale,” which encompasses everything outside of litigation, demonstrates this distinction with litigation, e.g. “giudiziale”), fees have been set for legal opinions (both oral and written), contracts, and arbitration and are substantially fixed rates based on the value of the matter. In practice, international law firms do bill at hourly rates, but small, local firms still tend to follow the fee structure set by law as they deal mostly with litigation matters.
not violate the public order or binding laws. If, with respect to a dispute that falls within one of the mandatory categories, no agreement is reached during the mediation proceeding, the parties may initiate legal proceeding before the courts. Importantly, all declarations and information obtained or disclosed in mediation proceedings are confidential and may not be used in any eventual court proceedings involving the same (even partial) dispute.

The solution may be decided and agreed to by the parties, or proposed to the parties by the mediator, whether upon their request or the mediator’s own initiative. In practice, the proposal upon the initiative of the mediator is problematic, as often the mediator may not be able to have all the elements upon which to base an opinion. In fact, the tendency is to not use this mechanism, which is viewed as a risk by the mediation organizations and mediators themselves.

At the time of appointment, attorneys must inform their clients of the possibility/requirement of using mediation proceedings and the tax relief possibilities. Parties are exempt from the registration tax on their agreement for controversies of up to €50,000. For agreements exceeding this amount, the registration tax is due only upon the excess amount. In the case of a successful mediation, the parties shall be eligible for up to a €500 tax credit on the fees due to the mediation provider.

3. The Mediation Organizations
Ministry Decree no. 180 of 18 October 2010, subsequently modified by Ministry Decree no. 145 of 6 July 2011 (which went into effect on 25 August 2011), regulates the mediation service that the accredited mediation organizations may render. Mediation services may be offered by public or private bodies, including bar associations and other professional orders and Chambers of Commerce. Providers must be registered with the Ministry of Justice, which sets the standards for mediation providers, the means of registration, and mediation fees, and maintains the register of mediation providers. Each mediation provider should have its own procedural rules and code of ethics.

In order to be registered on the Ministry of Justice’s list of mediation organizations, the providers must prove that they have the following: financial and organizational skills; liability insurance of at least €500,000; administrative and accounting transparency; independence, fairness, and confidentiality; and at least five mediators. How providers demonstrate their skills and independence, fairness, and confidentiality is currently under debate. The Ministry of Justice is examining the question of how to verify and monitor these qualifications. A mediator may generally work for more than one mediation provider, but not more than five.

Every mediation provider has to approve its own mediation rules. These rules must be deposited with the Ministry of Justice and must address, in particular, the following issues: conflicts of interest; the signing of the Declaration of Fairness by the mediator prior to the commencement of the mediation; and criteria for the nomination of the mediator.

The providers must set up a registry for the mediation proceedings handled by the same. It can be an electronic database and must indicate all the notes related to every single proceeding, the personal data of the parties, the subject of the dispute, the name of the mediator, the length of the process, and its result. The Justice Ministry must also maintain two separate sections in the Registry of Mediation Organizations: one for public providers (including those created by the Chambers of Commerce and professional orders) and another for private providers. Each provider must keep a list of mediators divided into three sections: the general list of mediators and two separate lists of mediators with special expertise in handling cross-border and consumer disputes. In practice, however, many providers still have not activated these special registers. Mediators of international disputes must also register their foreign language competencies.

Mediators must have a degree or be chartered by a professional order. To the great disappointment of the Italian professionals, in particular the bar, the mediation law has made it possible for those who have received a short degree (three years of university studies), not necessarily in law or economics, to become mediators.

Mediators are required to have attended a course of at least fifty hours, with theoretical and practical lessons, mediation case simulation, and a final exam lasting at least four hours. Moreover, all mediators must attend refresher courses of at least eighteen hours every two years. In case of violation of the law, chartered mediators would be punished by their professional order (if members of a professional order) and removed from the list of mediators.

Ministry Decree no. 145/2011 opportunely requires each mediator to have a specific education/training (which is related to the kind of competency required to handle various controversies) and sets forth an obligation of participation in at least 20 mediation proceedings, whether acting as mediator or as assisting intern, during the two year continuing education course period. Additionally, the Decree establishes that each mediation be assigned on the basis of the specific professional competency of the mediator, which can also be deduced from the type of degree held by the mediator.

In this start-up phase of the mediation system, the number of accredited providers has tripled in only a few months and
there are now more than 300 such organizations. There is a call from various sides for more severe control by the Ministry with respect to the organizations' independence and the professionalism of the mediators in order to avoid the risk of increased conflicts of interest. The recent modifications introduced by Ministry Decree 145/2011 provide for the use of inspection services by the Ministry of Justice (originally intended to oversee the activities of the judicial offices) to control the mediation organizations' activities.

4. Costs of Mediation Proceedings and Experts

Fees are set by the Ministry of Justice and must be paid by each of the parties. The initiation fee is €40 (VAT included) and is paid by the requesting party.

The base fees may be increased or decreased by the mediation providers within set limits in relation to the complexity of the case, the success of the mediation proceeding, and the formulation of the agreement proposal. In the case of mandatory mediation, the fees are reduced by one-third if the mediation takes place. In case the mediation does not take place (due to failure of one of the parties to appear), the party who did not appear must pay €50 to the mediation organization. With the recent passage of the Finance Act, a counter-party who fails to appear at the mediation proceedings is now also liable for the amount of the filing fee already paid to the court by the party initiating proceedings (also an amount scaled on the value of the controversy). Ministry Decree no. 145/2011 provides that the organizations may waive the fee minimums.

In controversies requiring particular technical competence the mediation provider may nominate one or more auxiliary mediators. Should the case necessitate an expert opinion, the mediator may appoint an expert registered with the Expert Register of the courts. This is particularly frequent where a valuation of damages is necessary and must be based on the opinion of a forensic expert. The procedural rules of the mediation provider should set forth the means of calculation and method of payment of such experts.

5. Mediation in Italy As It Exists Today

The main point of disagreement in Italy regards the introduction of obligatory mediation for certain types of disputes. The Ministry of Justice has disclosed that, in the first month of effectiveness of the new Mediation Law, the majority of mediation proceedings did not take place because of the total absence of the parties at the negotiations. In addition, court-ordered mediation is not happening at all. Although the Ministry would like to see a more active role for judges ordering parties to mediation, there is much animosity between the current government and the magistrates. Thus, there is a negative perception of the law and judges are not using their powers to further the use of mediation.

It is clear that no mediation proceeding will grant a positive outcome if the parties are not sufficiently prepared or assisted by attorneys familiar with systems of ADR. There is a risk that the obligatory provision will render the entire mediation proceeding a useless formality to be satisfied before being able to resort to the courts, at least involving those who are uninformed about the use of ADR. The Italian judicial system is still far away from such programs as the Multi-Door program in the District of Columbia Superior Court in Washington, D.C. But with the Mediation Law, Italy has taken its first steps in the right direction.

There is a school of thought, held by the Ministry of Justice, for example, that maintains that, without the creation of the mandatory provision for mediation, there would not be much interest in or debate over mediation. It is hoped that broadening such interest and debate would result in a diffusion of mediation centers organized by local governments to provide information for the general public on all aspects of mediation, thus making mediation acceptable and even, possibly, desirable. It will certainly take time and education about the instruments of ADR before overcoming the idea, still common in Italy, that the only way to resolve disputes is to resort to the courts.

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6 Value of the dispute (in €): Fee due by each party (VAT included):
up to 1,000.00 € 65.00
from 1,001.00 to 5,000.00 € 130.00
from 5,001.00 to 10,000.00 € 240.00
from 10,001.00 to 25,000.00 € 360.00
from 25,001.00 to 50,000.00 € 600.00
from 50,001.00 to 250,000.00 € 1,000.00
from 250,001.00 to 500,000.00 € 2,000.00
from 500,001.00 to 2,500,000.00 € 3,800.00
from 2,500,001.00 to 5,000,000.00 € 5,200.00
over 5,000,000.00 € 9,200.00

7 Law 148 of 14 September 2011, which is integrated into the Legislative Decree 138 of 13 August 2011.
Recognition and Enforcement of U.S. Judgments in France – Recent Developments

By Nathalie Meyer Fabre

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

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

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

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

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

This practice was definitively abandoned by the Court of Cassation in Munzer, in 1964.1 In this fundamental decision, the Court of Cassation defined five cumulative conditions for recognition: (1) the foreign court must properly have jurisdiction under French law; (2) the foreign court must have complied with its own procedural rules; (3) the foreign court must have applied the appropriate law under French conflict-of-law principles; (4) the decision must not contravene French concepts of international public policy; and (5) the decision must not be a result of fraude à la loi (evasion of the law) or fraudulent forum shopping.

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

It was only in 1985 that a further change was made to the Munzer conditions, softening the jurisdictional test. Under Munzer, the French courts verified whether the foreign court had jurisdiction on the basis of the French law criteria for the jurisdiction of a French court in an international case. In Simitch,3 the Court of Cassation changed this rule. To satisfy the jurisdictional test, it is now required that (1) the case does not fall within the “exclusive jurisdiction” of the French courts, (2) there is a “characterized link” between the case and the foreign country, and (3) the plaintiff's choice of the foreign forum was not fraudulent. The latter condition means that the plaintiff must not have manufactured or “engineered” jurisdiction in order to evade a judgment under French law and effectively corresponds to the fifth condition of the Munzer test.

The Simitch jurisdictional test left one major obstacle to be overcome. This obstacle was Article 15 of the French Civil Code. This provision reads: “A French person may be called before a court of France for obligations contracted by him in a foreign country, even with a foreigner.” Article 15 had been interpreted against its words by the French courts as creating a rule of exclusive jurisdiction. French nationals and French corporations could, therefore, always resist recognition and enforcement of a foreign judgment in France; provided that such exclusive jurisdiction rule had not been waived by, for example, a choice of court clause in a contract or voluntary appearance by the French defendant before the foreign court without any challenge of its jurisdiction.

This exorbitant interpretation of Article 15 was much criticized by French legal scholars. Indeed, one suspicion was that it had been maintained purely as a lever to be used in treaty negotiations with the United States. By startling coincidence, just after the failure of the negotiations over the
initiative started by the United States of a Hague Convention on Recognition and Enforcement of Foreign Judgments and the adoption of the narrower 2005 Hague Convention on Choice of Court, the Court of Cassation abandoned in 2006 in *Prieur*, its almost 80-year old exorbitant interpretation of Article 15, restoring it as a non-exclusive jurisdictional rule.4

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

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

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

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

Under the jurisdictional test, their exclusive jurisdiction being limited now that Articles 14 and 15 of the French Civil Code no longer operate as exclusive jurisdictional rules, the French courts will henceforth more frequently have to grapple with the question as to whether the link between the dispute and the foreign court is sufficient to warrant exercise of jurisdiction by the foreign court. Since the ruling in *Simitch* in 1995, this condition has been interpreted liberally, such that if there is no issue of the exclusive jurisdiction of the French courts in the balance, the link can result from one or a number of factual circumstances, considered casuistically. Although the place of domicile of the respondent is normally considered as a primary ground for jurisdiction (the judge of the respondent’s domicile being sometimes called the “natural judge”), other connecting factors (e.g. place of performance in a contractual dispute, place of the damage in a tort claim, habitual residence of either party in family matters, etc.) may warrant jurisdiction of other fora. Connecting factors may be deemed sufficient, even if they do not correspond to any criteria justifying the jurisdiction of the French courts in international cases.

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

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

Interestingly, in two recent cases, the Court of Cassation accepted to recognize and enforce U.S. court judgments issued in family matters at the request of one of the spouses, despite the fact that the other spouse had, before the start of the U.S. proceedings, initiated proceedings in a competent court in France.7 The Court of Cassation did not follow the traditional principle prior tempore, potior jure. It only checked that (i) there was a characterized link between the dispute and the U.S. forum (in this respect the fact that the child(ren)’s habitual residence was in the U.S. probably played a decisive role), and that (ii) there was no fraudulent forum shopping—it being clearly specified that the mere fact of bringing an action before the U.S. courts knowing that prior proceedings had been started in France was not considered as “fraudulent.” The Court of Cassation’s main concern in these two cases was

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7 Exclusive jurisdiction of the French courts exists in cases such as disputes over rights in immovable property located in France or concerning the validity of a French patent (comp. Article 22 of Council Regulation (EC) n°44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"). It also exists if the parties have agreed to submit to the exclusive jurisdiction of the French courts.

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

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

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

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

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

Financial and other procedural penalties sanctioning contempt of court raise an issue as to their characterization under French law. The question is whether they should be regarded as criminal in nature and thus not enforceable as money judgments or as civil sanctions subject to the recognition regime applicable to civil and commercial matters. In SEC v. Credit Bancorp Ltd the receiver appointed by the U.S. District Court of the Southern District of New York, Mr. Loewenson, obtained an order for pecuniary sanctions against Credit Bancorp’s CEO, Mr. Blech, a U.S. citizen, for failure to cooperate in the liquidation process and the tracing of diverted assets as he had been enjoined to do by a previous court order. Mr. Blech was found to be in contempt of court. The liquidator sought to enforce the penalty of more than US$13 million in France. The Court of Cassation ruled, without elaborating its reasons why, that the financial penalty sanctioning the non-compliance with a foreign court’s injunction was of a civil nature, and thus capable of enforcement before the civil courts. Taking into account the magnitude of the fraud (US$200 million) for which Mr. Blech was being sued, it further held that the principle of proportionality had not been violated.

The Court of Cassation’s reliance upon the proportionality principle announced the position it would take with respect to another demonized U.S. institution: punitive damages awards. The Court of Cassation issued its first decision on this subject on December 1, 2010 in Fountaine Pajot, holding that “an award of punitive damages is not, per se, contrary to public policy”, adding however that this principle does not apply “when the amount awarded is disproportionate with regard to the damage sustained and the debtor’s breach of his contractual obligations.”

10 ECHR, July 20, 2001, Pelligrini v. Italy, application n°30882/96.
12 Court of Appeal of Amiens, May 12, 2011, case n°09/05545.
13 Court of Appeal of Poitiers, February 26, 2009, case n°07/02404.
16 Ibid.
The dispute in this case involved an American couple residing in the U.S. who had purchased for their personal use a catamaran manufactured by the French shipping company called Fountaine Pajot. The buyers filed suit in California, claiming that the boat presented defects which made it unsailable. During the proceedings, it appeared that the defects resulted from serious structural damage caused to the boat by a storm whilst the boat was still in the French shipyard, and from the hasty overhaul works conducted by Fountaine Pajot before delivery. Fountaine Pajot raised jurisdictional objections, which were dismissed, and then chose not to participate in the procedure. On February 2003, the Superior Court of California (County of Alameda) ordered Fountaine Pajot to pay to the plaintiffs a total amount of $3,253,734.45, comprised of $1,391,650.12 for the refurbishment of the boat, $402,084.33 for their attorney’s fees and $1,460,000 by way of punitive damages.

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

The U.S. plaintiffs should, however, be able to obtain a partial enforcement, of only the non-punitive elements of the damages awarded by the U.S. judgment. Such a partial exequatur is indeed possible in France when the foreign judgment clearly separates the various heads of damages awarded, singling out at least the punitive damages. Otherwise, the French court is not authorized to reduce the amount of the damages awarded by the foreign court, as this would amount to a review on the merits of the foreign judgment.

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

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

22 Court of Appeal of Poitiers, February 26, 2009, case n°07/12404. To justify the exclusion of punitive damages the Court of Appeal relied on the “principle of full compensation” (principe de la réparation intégrale) as it is traditionally professed under French liability law, according to which damages must fully repair the harm caused, but which excludes any consideration of the seriousness of the wrongdoer’s actions.

23 It should be noted that French courts have the power to moderate or increase the penalty if it is manifestly excessive or derisory as compared to the actual damage (Article 1152 of the Civil Code).

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

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


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

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

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

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

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

If one excludes the last example which involves a highly debated social and ethical issue, the above overview of recent French decisional law shows that the conditions for the recognition and enforcement of foreign judgments in France have not only been reduced to the strict minimum (jurisdiction test, public policy test, absence of fraud test), but are also interpreted in a quite liberal way, allowing foreign institutions which have traditionally been seen as alien to the French system to develop their effects in France. In view of the most recent developments, it may be said that the French “common law” recognition regime, applicable in particular with respect to U.S. judgments, is not fundamentally different from that prevailing among the member states of the European Union, and is clearly more favorable than that established by many bilateral treaties in force between France and other countries.
In December, the United States Court of Appeals for the Second Circuit held that, based on the doctrine of forum non conveniens (FNC), the district court should have refused recognition of an international arbitral award, notwithstanding the U.S.’s treaty obligations under the Panama Convention and the New York Convention. If this case remains good law, then sovereigns wishing to defeat enforcement actions brought in New York now have a new potential basis for doing so.

Following a fee dispute in connection with a consulting agreement, Figueiredo, an engineering company, won a $21.6 million award in an international arbitration against the Government of Peru, one of its agencies, and a government program relating to the engineering project (collectively “Peru”). However, a Peruvian statute provides that government agencies could dedicate no more than 3 percent of their annual budgets to satisfy awards and judgments; this statute would preclude Figueiredo from collecting the full amount of the award if it had tried to enforce it in Peruvian court. Figueiredo sued to confirm the award in New York to the Panama Convention, or, alternatively, the New York Convention, both of which are enforceable under the Federal Arbitration Act. The District Court denied Peru’s motion to dismiss, which had asserted various grounds, including that adjudication would be more appropriate in Peru under the doctrine of FNC. The Second Circuit certified for interlocutory appeal the FNC issue, among others.

Even though it was uncontested that the Peruvian statutory cap would not apply to U.S. proceedings, the Second Circuit (Judge Newman) held that the district court had abused its discretion when it determined that FNC did not bar the enforcement action, because the statutory cap constituted a “principal public interest factor to be weighed in assessing the FNC claim…." 2011 WL 6188497, at *1. Although neither the Panama nor the New York Conventions explicitly provide that FNC may bar the enforcement of an arbitral award, the majority nevertheless concluded that the doctrine applied to the case, because it is a U.S. “procedural law,” and agreements made in those treaties are subject to such laws.

The Second Circuit held that the district court erred in deeming a Peruvian forum inadequate: “the fact that a plaintiff might recover less in an alternate forum does not render that forum inadequate.” Id. at *4. Further, “the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there.” Id.

Judge Lynch filed a lengthy dissent, voicing his concern that the court had applied FNC in such a way that might “suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration,” id. at *13, and more broadly that “this decision will distort the law of forum non conveniens in this Circuit and undercut the transnational effort (in which the United States is an active participant) to promote commercial arbitration.” Id. at 18.

1 This case note was submitted by Matthew Kalinowski of Morgan, Lewis and Bockius LLP in New York.
arbitrator to decide; when the parties argue differing interpretations of silence and ask the arbitrator to decide the correct interpretation, the arbitrator must decide the issue.

When an issue is submitted to an arbitrator, § 10(a)(4) – which allows courts to vacate an arbitrator’s award if she exceeds the scope of her powers – does not apply. The court concluded that the parties submitted the question for arbitration, putting it within the scope the arbitrator’s power. And that was the only question; a court does not consider whether the arbitrator reached the correct decision, simply whether she had the power to decide the issue.

For now, the decision means that arbitrators within the Second Circuit may construe silence in a contract when asked to do so by the parties. Stolt-Nielsen is not a bar to such consideration. Moreover, it reemphasizes the wide latitude afforded to arbitrators’ decisions.

Federal Arbitration Act Preempts State Contract Law


In Concepcion, the Supreme Court overturned the Ninth Circuit decision that arbitration clauses which prohibit class arbitration are unconscionable – and, thus, unenforceable under the Federal Arbitration Act (FAA). In so deciding, the Court reaffirmed strong commitment to the primary objective of the FAA: to ensure that arbitration agreements are enforceable according to their terms. States cannot create law which frustrates that objective.

The offending, so-called Discover Bank rule came out of the California Supreme Court, where that court found arbitration agreements containing class-action waivers unconscionable. Such agreements effectively prevent recovery under a contract of adhesion, the court said, because of the disparity in bargaining power between the parties and the diminutive value of each individual claim. Thus, arbitration agreements containing class-action waivers are unconscionable under California law.

In Concepcion, both the Northern District of California and the Ninth Circuit determined that, per § 2 of the FAA, application of the Discover Bank rule revokes an agreement to arbitrate. Section 2 provides that arbitration agreements in consumer contracts are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” Unconscionability, the courts determined, provides the grounds “at law or in equity” to revoke an arbitration agreement. Thus, AT&T’s arbitration agreements, coupled as they were with class-action waivers, were unconscionable and unenforceable.

The Supreme Court disagreed: “Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s Discover Bank rule is preempted by the FAA.” The principle purpose of the FAA, the Court reasoned, is to ensure that arbitration agreements are enforced according to their terms. That purpose allows parties to design streamlined procedures that are tailored to the type of dispute, reducing the cost and increasing the speed of dispute resolution.

In essence, the Court said that parties may contract out of class arbitration; a ruling to the contrary would sacrifice the efficiency and informality that Congress hoped to foster under the FAA. Further, because class action has such high stakes and because arbitration has such few avenues for judicial review, class arbitration greatly increases the risk to defendants. And class arbitration would not necessarily benefit plaintiffs. Indeed, the district court found that the plaintiff, here, would be able to recover more efficiently under AT&T’s individual arbitration provisions. That finding factored not insignificantly in the Court’s decision.

The Court’s decision is significant because it will allow companies to reduce their exposure to international class disputes. United States courts certify international classes for litigation. With the Concepcion decision, companies may effectively contract out of class action litigation and into arbitration – individual arbitration. Thus, companies may opt entirely out of potentially business-killing international class disputes.

District of DC Dismisses Petition For Enforcement of Arbitral Award Against Foreign State Agency On “Minimum Contacts” Personal Jurisdiction Grounds


In March 2011, the Federal District Court for the District of Columbia dismissed a petition for the enforcement of a foreign arbitral award against a foreign state agency on the grounds that the Respondent agency did not have the required “minimum contacts” with the United States to permit the Court to exercise personal jurisdiction over it. The Petitioner, GSS Group Ltd. (GSS), had obtained a US$44.3 million arbitral award against the National Port Authority of Liberia (NPA) in 2009. The ad hoc arbitration, which was presided over by a single arbitrator seated in London, concerned a contract for the construction and operation of a container park at the Freeport of Monrovia.
In its petition for enforcement of arbitral award, the Petitioner argued that the statutory basis for personal jurisdiction had been met, because Petitioner had served process on the NPA in accordance with the Foreign Sovereign Immunities Act, which is applicable to the NPA as a foreign state agency or instrumentality. Petitioner had also argued that the constitutional “minimum contacts” test for personal jurisdiction was irrelevant, because it does not apply to foreign states, nor—critically—to a foreign state’s agencies or instrumentalities.

The D.C.C. agreed with Petitioner that the statutory requirements for personal jurisdiction over the NPA were satisfied. It also agreed with Petitioner that foreign states are not afforded Fifth Amendment due process rights. However, the Court disagreed with Petitioner’s assertion that the NPA, as an independent foreign state-owned corporation (one that was not so closely associated with the foreign sovereign as to be legally indistinguishable from it), could not benefit from due process protections.

The Court noted that federal courts have long assumed that due process protections extend to private foreign persons for purposes of personal jurisdiction. See Asahi Metal Indust. Co. v. Super. Ct., 480 U.S. 102 (1987). It then characterized the NPA as falling “somewhere between” the categories of a private foreign person and a foreign sovereign. After noting that the Petitioner did not contest evidence of the NPA’s independence from Liberia—including evidence that the NPA was responsible for its own finances, that it received no funding or subsidies from the Government of Liberia, that its primary purposes were commercial, and that the Government was not involved in its day-to-day management—the Court concluded the NPA benefits from the due process protections afforded to private foreign persons for purposes of personal jurisdiction. The Court also noted that the Petitioner had failed to argue that the NPA possessed sufficient minimum contacts with the United States such that personal jurisdiction was proper.

This opinion is significant because it contributes to the somewhat murky jurisprudence concerning constitutional protections for foreign state agencies or instrumentalities in U.S. courts. The Court pointed out that the reasons for which a foreign sovereign cannot benefit from U.S. constitutional protections simply aren’t in play for a truly independent foreign agency or instrumentality. Unlike a foreign state, an independent foreign state entity does not have the diplomatic presence or political authority that would allow it to mediate disputes through international law or diplomacy. In that respect, an independent foreign agency is more akin to a foreign corporation than a sovereign. The Court conceded that the established jurisprudence granting due process protections even to private foreign persons for jurisdictional purposes “coexists uneasily” with jurisprudence in other contexts holding that non-resident aliens without connections to the United States cannot claim rights under the U.S. Constitution. Nonetheless, because Asahi and its progeny remain Supreme Court precedent, the Court concluded that it was in no position to reject it.

1 This case note was submitted by Annalise Nelson. Ms. Nelson completed a clerkship at the International Court of Justice in The Hague. Prior to her clerkship, Ms. Nelson worked at Hogan Lovells LLP. Ms. Nelson may be reached at nelson.annalise@gmail.com.

Seventh Circuit Orders Award Enforcement in Patent Ownership Dispute


In an opinion written by Judge Easterbrook, the Seventh Circuit ordered a district court to confirm an arbitration award regarding patent ownership under a joint venture contract. Both Affymax, Inc. (Affymax) and Ortho-McNeil-Janssen Pharmaceuticals, Inc. (Ortho) claimed independent ownership of a group of patents, the 078 patents. A panel of arbitrators determined that Ortho independently owned the 078 patents, and Affymax appealed the award to the District of Illinois.

The district court vacated the award as it applied to foreign patents, those corresponding to the local 078 patents. In its opinion, the district court stated that the arbitration panel had “manifestly disregarded the law,” because it did not analyze ownership of the foreign patents separately. The court inferred manifest disregard from the panel’s silence on foreign patents in its award. Therefore, the court said, arbitration had not settled ownership of the foreign patents, and it declined to enforce the award. Ortho appealed the district’s decision to the Seventh Circuit.

The Seventh Circuit found jurisdiction over the appeal. Generally, the Federal Circuit’s jurisdiction is exclusive over appeals in patent cases. However, the court said, enforcement of an arbitration award is a contract dispute, not a patent dispute. Moreover, the underlying dispute, itself, concerned contract interpretation, not patent law. As a contract dispute, the Seventh Circuit had jurisdiction to hear the appeal.

Having found jurisdiction, the court concluded that the Federal Arbitration Act (FAA) does not allow a court to vacate an arbitration award when a panel “manifestly disregarded the law.” Rather, the court said, the FAA authorizes only four reasons for a court to vacate an award. And that list is exclusive.

The circuit expressed confusion as to what law the district court even thought manifestly disregarded. Assuming that the district court was concerned with the panel’s failure to separately address foreign patents in the award, the circuit
On December 7, 2010, the District Court for the District of Columbia severely limited a U.S. court’s ability to adjudicate claims of injunctive relief presented by a U.S. citizen classified as a terrorist and targeted by the U.S. government for extrajudicial killing.

Anwar Al-Aulaqi, a dual U.S.-Yemeni citizen, has been classified as a “Specially Designated Global Terrorist” due to his involvement with al-Qa’ida and terrorist activities. Anwar is currently hiding in Yemen and has stated intentions of never making himself available for criminal prosecution in U.S. courts. He, however, has also never been publically charged with any crime. It is alleged, by Anwar’s father, that the U.S. government has targeted Anwar for extrajudicial killing. As Anwar is in hiding, his father brought this suit in the District Court. The government responded with a motion to dismiss the suit, which was granted by Judge Bates.

In making its decision, the Court relied on the plaintiff’s lack of standing, the political question doctrine, and on the state secrets privilege.

First, the Court stated it could only entertain similar suits if the targeted individual personally availed himself/herself to the Court. Unless a targeted citizen abroad peacefully surrenders to U.S. authorities or, alternatively, establishes sufficient communications with an attorney and the courts (i.e., via video conferences), no other party—even family members—may bring suit on the targeted individual’s behalf under “next friend” standing or “third party” standing or under the Alien Tort Statute.

Second, even if an individual makes himself/herself available to the courts, the adjudication of the merits implicates the political question doctrine. Even if standing is established, the Court is ill-equipped to decide whether the targeted individual abroad can be considered enough of a threat to warrant an extrajudicial killing without due process. Policy making decisions that involve national security and threats to the U.S. will not, therefore, be left to the courts to referee.

Third, while Judge Bates respected the U.S. Government’s wishes not to rule on the state secrets privileges argument, he did shed some light on the topic. The Court stated the Government correctly argues the state secrets privilege should be invoked when there is a reasonable danger that adjudication of the matters would disclose certain military matters that should be kept secret. Although the Court opted not to rule on this point, it suggested the adjudication of a case involving the decision to target an individual for extrajudicial killing for his/her threat to national security would invoke the state secrets privilege.

Overall, when the government targets a U.S. citizen living abroad for an extrajudicial killing, the citizen will be unable to turn to the courts for injunctive relief.

The trustee of a Cayman-islands investment trust sued a German state-owned bank seeking damages on behalf of the trust for the late performance of securities purchase agreements. The Regional Court (Landgericht – LG) of Hanover dismissed the suit for lack of standing. It found that the trustee was not entitled to enforce claims belonging to the trust. This misunderstanding is symptomatic of a civil-law jurisdiction in which only a handful of court decisions over the last sixty years concerned a trust at all and where no court decision had so far examined in detail the structure of a trust or its treatment under German civil procedure.

German Appellate Court Confirms Trustee’s Standing to Enforce Claims Of Investment Trust


The trustee of a Cayman-islands investment trust sued a German state-owned bank seeking damages on behalf of the trust for the late performance of securities purchase agreements. The Regional Court (Landgericht – LG) of Celle dismissed the suit for lack of standing. It found that the trustee was not entitled to enforce claims belonging to the trust. On appeal, the Higher Regional Court (Oberlandesgericht – OLG) of Celle determined that the trustee, according to its submissions, held legal title to the claims of the trust and therefore had standing to sue. Upon remand to the first instance, the parties settled.

The first-instance decision of the Regional Court as well as prior indications of the judge to the parties betrayed confusion about the legal structure of a trust and the position of a trustee. The court apparently understood a trust to be a legal entity capable of holding legal title and of bringing suit. It regarded the trustee as a mere agent of the trust and, finding a lack of authority to bring suit on behalf of the trust, dismissed the trustee’s suit. This misunderstanding is symptomatic of a civil-law jurisdiction in which only a handful of court decisions over the last sixty years concerned a trust at all and where no court decision had so far examined in detail the structure of a trust or its treatment under German civil procedure.
On appeal, the Higher Regional Court recognized that a trust is not a legal entity and that it therefore could not hold legal title to any claims. Instead, it is the trustee who has legal ownership of claims and other trust assets. In the German legal system, therefore, the trustee brings suit in its own name and on its own behalf. Neither a so-called Beddoe application pursuant to the laws of the Cayman Islands (to approve the payment of legal fees out of the trust’s assets) nor any other internal measures within the trust are required for the trustee’s suit to proceed in a German court. However, according to the Higher Regional Court, a court order granting a Beddoe application can be used to prove the existence of the trust and the position of the trustee where these are disputed.

But standing to sue alone does not win the case. For a contract claim to succeed, the trustee must also show that it became party to the agreement at issue. This can be a problem where the persons making the agreement, as is usual, only referred to the trust. Contract drafters are therefore well-advised to expressly state that the trustee enters the contract in its own name and not as an agent of the trust. In informal dealings, such as when contracting via letter or e-mail, the respective communication should include a similar clarification. Otherwise, it might not be easy to convince the court that the claiming trustee was intended to become party to the agreement. In this case, the Higher Regional Court pointed out in dicta that it seemed more likely than not that the securities trader ostensibly representing the trust was actually contracting on behalf of the trustee.

In sum, the decision of the Higher Regional Court of Celle is a welcome recognition of the basic structure of common law trusts and of the trustee’s position to enforce claims of the trust against third parties. It should be taken into account not only in litigation but also when drafting agreements involving a trust.

Stallion argued that the New York courts could not enforce the PCC award because, in the PCC action, Galliano served notice improperly under the Hague Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters (Hague Convention). The New York courts disagreed, ordering the PCC award enforced; the Supreme Court of the United States denied certiorari.

Stallion argued that the New York courts could not enforce the PCC award under Article 53 of the New York State Civil Practice Law and Rules (CPLR). In order for a New York court to enforce any foreign award, Article 53 requires the foreign court to have had personal jurisdiction over the defendant. And personal jurisdiction cannot be had when notice is served improperly.

Galliano served notice only in French. However, the Hague Convention requires that notice also be translated into English. Thus, as notice for the PCC action did not contain an English translation, the French court never obtained personal jurisdiction, and the New York courts could not now enforce the award under Article 53 of the CPLR.

The Court of Appeals said that if Stallion had received no meaningful notice of the PCC proceeding, “that lack of notice would serve as a legitimate basis for not enforcing the judgment in our state.” However, Stallion was, in fact, aware of the PCC action, precluding any argument that the service was “fundamentally unfair.” Therefore, the court concluded, propriety of service under the Hague Convention – and PCC jurisdiction – was an issue for the French court to decide. The PCC assumed jurisdiction, making judgment enforceable under Article 53.

In its petition to the Supreme Court of the United States, Stallion argued that service was “fundamentally unfair,” that it was not “reasonably calculated to apprise it of the PCC proceeding.” Further, Stallion argued, whether service was proper under the Hague Conventions was an issue for the U.S. courts to decide, concluding that the lower court’s holding constituted undue, speculative deference to a foreign court’s exercise of jurisdiction over a U.S. defendant. The Supreme Court denied certiorari.

1 This case note was prepared by Dr. Stephan Wilke and Dr. Stephan T. Meyer, partner and associate, respectively, with Gleiss Lutz, Stuttgart, Germany (www.gleisslutz.com). Both authors are admitted to the New York and German bars.

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Recognition of Foreign Judgments: Failure to Translate Pleadings into English Not Fatal* 1


Galliano, a British fashion designer, filed suit on a licensing agreement against Stallion, a U.S. corporation, in the Paris Commercial Court (PCC) and served Stallion with process. Stallion never appeared, and the PCC issued a default judgment in Galliano’s favor. Subsequently, Galliano sought to have the PCC award enforced in a New York court.

1 This case note was prepared by Vincent Chirico, Esq. and Genna Saltzman, Silverman Sclar Shin & Byrne PLLC, New York, New York.
2012 CALENDAR OF EVENTS

April 17-21
Section Spring Meeting
Grand Hyatt New York
New York, New York

August 2-7
Annual Meeting
Hyatt Regency
Chicago, Illinois

September 30 - October 5
IBA Annual Conference
Dublin, Ireland

October 16-20
Fall Meeting
Fountainebleau Resort
Miami, Florida

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