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France: A New Haven For Anti-suit Injunctions?

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In the aftermath of the turmoil *West Tankers* has created in the arbitration community, the *Cour de cassation* has confirmed France's reputation as being an arbitration-friendly jurisdiction by holding that anti-suit injunctions are not contrary to international public policy.

A French company (In Zone Brands Europe) had entered into an exclusive distribution agreement of beverages with an American company (In Zone Brand International). The contract granted jurisdiction to the courts of Georgia (USA). After the termination of the agreement by the American company, the French distributor and Mr X., President of In Zone Brands Europe sued it for damages before the *Tribunal de commerce* of Nanterre (France), whose jurisdiction was challenged by the American party. In parallel, In Zone Brand International seized the Superior Court of Cobb County, Georgia (USA). In a judgment dated 3 March 2006, the American judge issued an anti-suit injunction ordering the French party to discontinue the proceedings before the French courts and held that the French company owed monies to the American one. In Zone Brand International then sought recognition and enforcement ("*exequatur*") of the American judgment (i.e. the anti-suit injunction) in France. On 17 April 2007, the Cour d'appel of Versailles upheld the decision of the first instance judges and recognised the anti-suit injunction granted by the Superior Court of Cobb County. On 14 October 2009, the *Cour de cassation* confirmed this ruling. (*1*)

The French Supreme Court approved the anti-suit injunction on the ground that "*n'est pas contraire à l'ordre public international l'"anti suit injunction" dont, hors champ d'application de conventions ou du droit communautaire, l'objet consiste seulement, comme en l'espèce, à sanctionner la violation d'une obligation contractualle préexistante*." (*2*)

The judges' reasoning consisted in verifying whether the three conditions required for enforcement of foreign decisions (as set forth by the last French Supreme Court case rendered in that respect) were fulfilled: (*3*) (i) the absence of fraudulent avoidance of the normally applicable law, (ii) the evidence of a sufficient link between the dispute and the foreign court having rendered the judgment subject to recognition and enforcement proceedings, and (iii) the enforcement of the judgement is not contrary to international public policy. Concerning the first condition, the Court has pointed out that "*no fraud could arise out from seizing a court which has been expressly agreed to*

have jurisdiction".

The claimant alleged that forbidding a party to refer to French courts was an infringement of sovereignty, as the French judge was denied the right to decide on its own jurisdiction. The *Cour de cassation* noted that such was not the case: none of the party is deprived of its right to a judge, for the very reason that the purpose of the American judgement is to deal with its own jurisdiction and to hold that the jurisdictional clause binds the parties. There can be no violation of international public policy in an anti-suit injunction, whose purpose is to provide redress for the breach of a jurisdictional clause that has been agreed to in advance by the parties. A party who has agreed to refer to the American judge by a jurisdiction clause cannot change its mind; it is bound by its choice.

From a domestic point of view, this new decision clarifies the position of the *Cour de cassation* on the enforcement of anti-suit injunctions in France. It had previously held, indirectly but explicitly, that anti-suit injunctions infringed on foreign sovereignty, affected the jurisdiction of the courts of the relevant State. (*4*) However, two years before, it had allowed French judges to force a litigant to stop proceedings started abroad, so as to ensure the principle of universality of the bankruptcy. (*5*)

The judges' reasoning, which gives precedence to the binding effect of contractual obligations over the French judge's jurisdiction, is in line with the recent French case law which gives effect to the application of the doctrine of *estoppel* in France. (*6*) More generally, even if that case does not deal specifically with international arbitration, it is in line with the French tradition of party autonomy, respecting the parties' will not to have their dispute settled before French judges.

The scope of recognition of the anti-suit injunction remains narrow. First, it is excluded from the scope of international conventions and of EC law. Secondly, the decision is limited to anti-suit injunctions whose purpose is to condemn the breach of contractual obligations.

This favourable treatment of anti-suit injunctions stands in stark contrast to the traditional European hostility to what is regarded as an essentially Anglo-Saxon speciality. This reluctance has in particular been recently affirmed by the European Court of Justice, in the famous *West Tankers* case. (*7*) The ECJ held that the courts of an EU Member State could not issue an anti-suit injunction to restrain proceedings in the EU brought in breach of an arbitration agreement. This would be contrary to the general principle that every EU court seized of a dispute must itself determine whether it has jurisdiction to resolve the dispute before it; and any alternative would be inconsistent with the mutual trust and confidence between Member States' courts.

Nevertheless, the French judges have been careful, in the *In Brand Zone* case, to specify that the recognition of an anti-suit injunction is excluded from the scope of EC law in order not to be seen to contradict the *West Tankers* case. Even with such a narrow scope, one wonders whether, in practice, the French judges will not authorize such measures when the purpose of the anti-suit injunction is to enforce a jurisdiction or arbitration clause. It will not be the first time French judges have a "dissenting" case law (see the famous French case law on the recognition of an award annulled in

its country of origin, from the *Hilmarton* to the *Putrabali* case). `

As the *Cour de cassation* has limited the recognition to anti-suit injunctions whose purpose is to punish the breach of a contractual obligation, it seems that anti-suit injunctions would not be granted enforcement when they aim only to punish abusive proceedings, irrespective of a jurisdiction or arbitration clause.

Unlike the *West Tankers* case and further to French case law tendency, the *In Zone Brand* decision is obviously based on the party autonomy principle, which French courts are keen to defer to the furthest extent possible. Now that the *Cour de cassation* has recognised anti-suit injunctions whose purpose is to condemn the breach of a contractual obligation, without limiting its reasoning to jurisdictional clauses only, there is no reason to believe that it will not extend its protection to arbitration clauses. Party autonomy has a bright future ahead in France, and parties should pay attention to what they agree to per contract, as French courts are less and less likely to tolerate their reneging on their commitments.

1. Civ. 1ère, 14 October 2009, pourvoi n° 08-16.369, *In Zone Brands*.
2. *'An anti-suit injunction' is not contrary to international public policy (not within the scope of application of international conventions or European community law), whose purpose is only, as in the present case, to sanction the breach of a contractual commitment.*"
3. Civ. 1ère, 20 February 2007, pourvoi n ° 05-14082, *Cornelissen*.
4. Civ. 1ère, 30 June 2004, pourvoi n° 07-03.248, *Stolzenberg*.
5. Civ. 1ère, 19 November 2002, pourvoi n° 00-22.334, *SA Banque Worms*.
6. See, for instance, Civ. 1ère, 6 July 2005, Bull. civ. I, n° 302 ; Ass. Plén., 27 february 2009 : Bull. ass. Plén. n° 1 ; Civ. 1ère, 3 February 2010 (pourvoi n° 08-21.288).
7. CJCE 10 February 2009, aff. C-185/07, *West Tankers*.

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