G. Conclusion

The 1996 Hague Convention has undoubtedly suffered from the vagaries of European politics during its short life, but it is at last to derive some benefit from the communitarization of private international law as it is able to enter into force simultaneously for eighteen of the nineteen outstanding Member States not already States Party. At a stroke the 1996 network will be doubled, and in turn the instrument will become far more attractive a prospect for jurisdictions in Africa, the Americas and Asia. As it stands at the cusp of real success, the Hague Conference must capitolise on the momentum generated by the common ratification by the European Union States to ensure that key States come on board in every continent, for it is as a global framework that the Convention stands to have most significant and lasting impact. Even if it only comes close to mirroring the ratifications and accessions of the 1980 and 1993 Hague Conventions, the 1996 Convention will have repaid the faith and ambition of the Conference in elaborating such an ambitious instrument, as well as serving as a useful reminder of what can be achieved in a global forum.

PETER MCELEAVY*

II. *FORUM CONVENIENS* AND ANTI-SUIT INJUNCTIONS BEFORE FRENCH COURTS: RECENT DEVELOPMENTS

In *Owusu*[1], *Turner*[2] and *West Tankers*,[3] the European Court of Justice made it clear that, within the European judicial area, English courts were no longer at liberty to decide issues of international jurisdiction on the basis of common law features such as *forum non conveniens*, or to issue anti-suit injunctions. To secure the reciprocal enforcement of judgments in Member States the latter have adopted through Council Regulation 44/2001 ('Brussels I') common rules as to when their national courts will exercise jurisdiction to hear a dispute, and these make provision for neither *forum conveniens* nor anti-suit injunctions. However, the position of what is now the Court of Justice of the European Union is unlikely to apply to the use of discretionary jurisdictional tools in situations falling outside the scope of the Brussels I Regulation. The aim of this paper is to examine the attitude of French courts in the latter context. In particular, there are two recent examples showing that French courts have decided to follow their own path, and clearly rule that neither *Owusu* nor *Turner* impact upon the resolution of non-European cases. Even more suprisingly, it seems that in situations falling outside the scope of the Brussels I Regulation, French courts are less relectant than they previously were to allow discretion in the exercise of jurisdiction or to uphold anti-suit injunctions.

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[1] C-281/02 ECR I-1383 *Owusu v Jackson*,; Rev crit DIP (2005) 698 note C Chalas.
[2] C-159/02 ECR I-3565 *Turner v Grovit*; Rev crit DIP (2004) 654 note H Muir-Watt.
[3] C-185/07 *Allianz SpA v West Tankers Inc* [2009] 1 A.C. 1138.

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A. Forum Non Conveniens *before French Courts*

The first example is the *Flash Airlines* case, whereby the question was explicitly asked for the first time of a French court whether it would agree to decline jurisdiction on the grounds of *forum non conveniens*. Following the decision of the *Cour d'appel de Paris* on 6 March, 2008[4] the question was examined by the *Cour de cassation* on 30 April 2009.[5] The dispute arose after a Boeing 737-300 crashed into the Red Sea a few minutes after leaving Sharm El Sheikh (Egypt) for Paris (France) on 4 January, 2004. All 135 passengers, most of whom were French, and the cabin crew, died. Both the airline company and its insurer were Egyptian. The owners of the plane, its manufacturer (Boeing), along with most of its subcontractors, were American. Legal proceedings were brought before both French and US courts. A first group of 645 plaintiffs sued Flash Airlines and its insurer before the French courts. A second group sued the American parties before the District Court for the Central District of California. On 28 June, 2005 the Californian court[6] declared itself *forum non conveniens*. Indeed, considering the French nationality of most plaintiffs, the fact that a French court would offer a proper indemnification and would respect the basic rules of due process of law, it appeared to the American court that French courts would presumably be the proper forum. The District Court held, however, that it would not definitively decline jurisdiction unless (a) the defendants would agree to submit to the jurisdiction of French courts and (b) French courts were to accept jurisdiction over the dispute.

In August 2005, 280 plaintiffs of the second group decided to petition the French courts to obtain a judgment declining jurisdiction. In a judgment dated June 27th 2006, the French first instance court (*Tribunal de grande Instance de Bobigny*) held that no provision of French law whatsoever entitled a French court to regulate its own jurisdiction. The plaintiffs seized the Cour d'appel de Paris which accepted, in a judgment dated March 6th 2007, to grant an order that it had no jurisdiction in order to enable the plaintiffs to go back to California and resume the proceedings that had started there. However, two years later, the Supreme Court for private matters (*Cour de cassation*) reversed the Cour d'appel's decision on a procedural ground (the validity of the appeal), which makes it difficult to understand whether it would agree to allow French courts to decline jurisdiction on the basis of the doctrine of *forum non conveniens*. The case will have to be re-examined by the Tribunal de grande instance de Bobigny, and it cannot be predicted whether the Cour de cassation will again be called upon to consider the matter.

Despite these uncertainties, this case remains interesting, as French courts had to deal with unprecedented questions. The first question that was asked was whether French court had international jurisdiction in the matter (1). The second question was whether jurisdiction could be declined on the basis of the doctrine of *forum non conveniens* (2).

[4] Paris, 1ère chambre C, 6 mars 2008, *JDI* 2009, 171, note G Cuniberti; *D* 2008, jurispr, 852 obs Gallmeister; *D* 2008, jurispr 1452, note P Courbe; *JCP éd G* 2008 II 10115, note Bruneau; *Gaz Pal* 20 février 2009, 48–50, note M-L Niboyet.

[5] Cass Civ 2ème, 30 avril 2009, Bull civ II n°107.

[6] *Gambra et al. v International Lease Finance Corporation et al.* 377 F Supp 2d. 810 (2005 CD Cal).

1. Did French courts have jurisdiction ?

On the one hand, under French law, French courts did not have jurisdiction. The Cour d'appel de Paris first decided that, as the defendants were US-based, the Brussels Regulation did not apply. The same was true under the French traditional rules of jurisdiction, which provide that French courts have jurisdiction over tort cases when either the defendant is domiciled in France or the accident took place in France (article 46 of the French *Code de procedure civile*—CPC), neither of which was the case here. The only possibility left was Article 14 of the civil code which provides that French courts have jurisdiction as long as the plaintiff is French. However, this article was held not to apply as the French plaintiffs were deemed to have waived it by suing abroad—in California.

On the other hand, the Cour d'appel de Paris made it clear that, as it was interested in the result of the proceedings, and 'there was no reason why it should not have its say on the matter',[7] it could not stick to the basic rules of French jurisidiction, and had to find a way to grant itself jurisdiction. Thus, considering the attitude of the Californian court, as well as the context of international cooperation in which the case took place, the Cour d'appel de Paris decided to grant declaratory relief to the plaintiffs, even though such a possibility is traditionally unavailable under French law.

Indeed, it is a general and central principle of French civil procedure that no declaratory relief is available.[8] Article 31 CPC states that no action can be brought before a court, unless the claimant has a 'legitimate and present interest'. In principle, the interest of a plaintiff cannot be either future or hypothetical. The meaning of the rule is that parties should not ask courts to rule on an issue which is not directly necessary for the solution of the dispute at stake, the risk being that plaintiffs might seize a court to prevent a possible dispute or turn the courts into mere consultants, having to answer questions that were not consistent with a judicial dispute.[9] In particular, a plaintiff trying to obtain from a French court a judgment declining jurisdiction lacks a legitimate and present interest. In this case, a present interest would have been a demand to obtain damages for the victims, which was not, obviously, the purpose of the claim brought before the French courts. That is why, in its judgment dated 27 June 2006, the French court of first instance decided that such an action was inadmissible. However, the court of appeal overruled this decision.

[7] Le juge français 'ne peut être le seul à être exclu du débat sur sa compétence internationale' (Judgement) 33.

[8] The question of the law governing the availability of a declaratory relief was not discussed in the case. French law must have been applied as the *lex fori*, as this question is seen as a matter of procedure (See M-L Niboyet, 'Contre le dogme de la *lex fori* en matière de procédure' in *Vers de nouveaux équilibres entre ordres juridiques, Mélanges en l'honneur de Hélène Gaudemet-Tallon* (Dalloz, 2008) 363; Cass civ 1ère, 4 décembre 1990, Rev crit (1991) 558 note M-L Niboyet-Hoegy; *JDI* (1991) 371, note D Bureau, where the court stated: '*l'exigence d'un intérêt né et actuel est commandée, en raison de son caractère procédural par la loi du for*'; and, recently, Cass Civ 1ère, 4 juillet 2007, n°04-15.367, Rev crit (2008) note H Muir-Watt; *Procédures* 2007 n°10, 14, obs R Perrot; *Droit et patrimoine* avril 2008, note M-L Niboyet; Cass Civ 1ère, 6 février 2007, n°07-12672).

[9] M-L Niboyet-Hoegy, *L'action en justice dans les rapports internationaux de droit privé* (Economica, 1986) *spéc* n° 540 et s; D Bureau & H Muir-Watt, *Droit international privé* (PUF, Tome I, 2007) 190–191.

The Cour d'appel de Paris decided that, since the question was 'in keeping with a context of mutual trust (between French and American judges) which implies a co-operation and coordination of the legal systems',[10] the plaintiffs had a 'legitimate and present interest to obtain a French decision on its international jurisdiction'. The Court thereby ruled, notwithstanding what has already been said on the principles of French civil procedure, that there was 'no contradiction' to declare admissible an action seeking a ruling that the court had no jurisdiction.

2. *Could the French Court decline jurisdiction on the basis of the doctrine of* forum non conveniens?

The doctrine of *forum non conveniens*, which is a special feature of common law legal systems and is based on the use of discretionary powers for a court to retain or decline jurisdiction, has no equivalent in civil law countries. The latter are, as a whole, reluctant to give significant discretionary powers to a court.[11]

The context of the *Flash Airlines* case could have been an opportunity for the Cour d'appel de Paris to examine whether it was the *forum conveniens* or not. First, it cannot be said that a discretionary approach to jurisdiction is unknown to French courts. Council Regulation 2201/2003 concerning the jurisdiction and the recognition and enforcement of judgment in matrimonial matters of parental responsibility ('Brussels IIa') allows for jurisdiction to be transferred from one court to another 'better placed to hear the case' with which the child has particular connection, when it is in the best interests of the child (article 15). There can be no doubt this provision introduces into civil law countries a mechanism that shares various common points with the *forum non conveniens* doctrine, even though there are several differences between the two features.[12]

Next, it seems that the Cour de cassation already forsaw the possibility for French courts to use discretionary powers in the *Fercométal* case on 22 March 2007.[13] Moreover, on 23 May 2006, the Cour de cassation held in *Prieur v de Montenach* that article 15 of the civil code[14] could no longer be used to determine whether a foreign court lacked jurisdiction from a French perspective.[15] *Fercométal* followed the same approach, deciding that neither could Article 14 of the civil code[16] be seen any more as

[10] 'La question s'inscrit dans un contexte de confiance mutuelle qui appelle à une coopération et une coordination des différents systèmes de droit' (Jugement) 33.

[11] On the differences between the French and the Common Law approach, see M-L Niboyet & G Geouffre de la Pradelle, *Droit international privé* (LGDJ, 2007) 463.

[12] On those differences, see D Bureau & H Muir-Watt, *Droit international privé* (PUF, Tome II, 2007) 798.

[13] Cass Civ 1ère 22 mai 2007, *D* 2007 AJ 1596, obs. I Gallmeister; B Audit, 'Vers la consécration du for de la nationalité française du demandeur (article 14 du Code civil)', *D* 2007. Chr. 2548; Rev crit (2007) 610 note H Gaudemet-Tallon; *JDI* 2007.956 note B Ancel & H Muir-Watt; *Gaz Pal* 1er juin 2007, note M-L Niboyet.

[14] Art 15: 'French persons may be called before a court of France for obligations contracted by them in a foreign country, even with an alien'See B Audit, 'Vers la consécration du for de la nationalité française du demandeur (article 14 du Code civil)', *D*. 2007. Chr. 2548; B Ancel & H Muir Watt, 2007 *JDI* 956, 966.

[15] See G Cuniberti, 'The Liberalization of the French Law of Foreign Judgments' (2007) 56 ICLQ 931.

[16] Art 14: 'An alien, even if not residing in France, may be cited before French courts for the performance of obligations contracted by him in France with a French person; he may be called

a imperative provision protecting the interest of a French plaintiff. This means that whenever a French citizen seizes a French court on the basis of article 14 of the civil code, the court will be free to decline its own jurisdiction if it has the conviction that it is not the proper forum. In France, it is presently discussed whether the latter case can be understood as an admission of an equivalent of doctrine of *forum non conveniens* under French law. On the one hand, some scholars argue that, from now on, French courts will be able to accept or decline jurisdiction on a discretionary basis, which is precisely the idea underlining the mechanism of *forum non conveniens*.[17] On the other hand, others point to the fact that a close analysis of the procedure followed before the Cour de cassation shows that, to some point, it could have decided to use the forum non conveniens doctrine, and seemingly decided not to do so.[18]

Prudently, though, the Cour d'appel de Paris clearly showed it was unwilling to decide whether French or foreign courts were the forum conveniens. That is why the Cour d'appel, stating that a 'French court, bound by its own rules of jurisdiction, cannot decide whether a foreign court is a more appropriate forum',[19] decided to apply the traditional rules of French international jurisdiction.

At first sight, it could seem that, by declining to exercise its jurisdiction, and arguing that French courts were the *forum conveniens*, the Californian court was trying to force the French courts into taking over the *Flash Airlines* litigation. However, the Cour d'appel de Paris did not follow this path, and decided it did not have jurisdiction. This move will probably force the Californian court to reconsider its own jurisdiction, possibly putting an end to the long habit of American courts to use the *forum conveniens* doctrine as a de facto immunity for American companies when sued by foreign plaintiffs.[20]

B. Anti-Suit Injunctions before the French courts

In a judgment dated 14 October 2009 (*In Zone Brands International INC v In Zone Brands Europe*),[21] the Cour de cassation decided to enforce a judgment of a US court ordering a French company not to sue a US company before the French courts, accepting thereby the legal effects of an anti-suit injunction. The dispute arose out of a distribution contract signed between a French and an American company whereby the French company was in charge of distributing children's beverages in Europe. The contract included a choice of law clause which provided for the application of the laws of the state Georgia, and a choice of court agreement providing for the jurisdiction of Georgian State courts.

before the courts of France for obligations contracted by him in a foreign country towards French persons'.

[17] See B Audit, 'Vers la consécration du for de la nationalité française du demandeur (Article 14 du Code civil)', *D* 2007. Chr. 2548; B Ancel & H Muir Watt, *JDI* (2007) 956, 966.

[18] See: H Gaudemet-Tallon, Rev Crit DIP (2007) 610; M-L Niboyet, *Gaz Pal* 1er juin 2007.

[19] 'Le juge français, tenu par de règles matérielles de compétence, ne peut déclarer qu'un tribunal étranger est plus approprié'.

[20] See, for instance, *Re Union Carbide Corp Gas Plant Disaster at Bhopal, India in Dec 1984*, 809 F.2d 195 (2nd Cir 1987).

[21] Cass Civ 1ère, 14 octobre 2009, n° 08-16369.

When the American party terminated the contract, both the French company and its director issued proceedings before the *Tribunal de commerce de Nanterre* in France. The American defendant challenged the jurisdiction of the French court, and initiated judicial proceedings in Georgia in accordance with the choice of court agreement. In March 2006 the Superior Court of Cobb County issued an anti-suit injunction enjoining the French parties to dismiss the French proceedings. As the American party sought a declaration of enforceability of the American judgment, the French parties argued that the anti-suit injunction infringed French sovereignty and their right to a fair trial (Article 6 of the European convention on human rights), and should thus be denied recognition.

The Cour de cassation did not accept the French parties' argument and upheld the declaration of enforceability of the American judgment. The Cour de cassation stated, first, that for the American party to sue before the American courts was not a fraud, as the parties had agreed to the jurisdiction of that very court in their contract. The court also pointed out that there was no violation of Article 6 ECHR, as the American court was ruling on its own jurisdiction and was only enforcing a choice of court which had been agreed to by the parties. More importantly, it said that anti-suit injunctions were not contrary to public policy as long as they only aimed at enforcing a pre-existing contractual obligation, and the claim did not fall within the scope of a treaty or European regulation.[22]

It is the first time that the Cour de cassation has adopted a clear position on the effect of anti-suit injunctions in France. In the past it had given effect to in personam injunctions, but had not adopted a clear line on the matter.[23] Indeed, in 2002, in the *Banque Worms* case,[24] the Cour de cassation admitted that a French court could issue an injunction whereby a party was forbidden to enforce a decision on assets situated abroad, but the validity of this injunction was not the main question at stake, and one could argue that, as this injunction took place in a insolvency case, it remained unclear whether the same reasonning could be used in other fields. However, in 2004, in the *Stoltzenberg* case,[25] whereby, the Court was asked whether a 'Mareva injunction' was contrary to French public policy, the Cour de cassation ruled that while Mareva orders could be declared enforceable in France, anti-suit injunctions could not, as they would infringe the sovereignty of the jurisdiction the courts which were indirectly targeted by the injunction. Along with the *Turner* Case of the ECJ, the *Stolzenberg* case made it difficult for the Cour de cassation to enforce a foreign judgment issuing an anti-suit injonction. That is the reason why in *In Zone Brands International INC*, the Cour

[22] '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 contractuelle préexistante'.

[23] See H Muir-Watt, 'L'extraterritorialité des mesures conservatoires in personam' [1998] Rev crit DIP 27.

[24] Cass Civ 1ère, 19 novembre 2002, *Banque Worms v Epoux Brachot*, *JCP* 2002 II. 10201, Conclusions de l'Avocat Général J Sainte-Rose and note Chaillé de Néret; *D* 2003.797, note G Khairallah; *Gaz Pal* 2003 23 juin 2003, obs M-L Niboyet; Rev crit DIP (2003) note H Muir-Watt; *JDI* 2003, 132, note P Roussel-Gall.

[25] Cass 1ère civ. 30 juin 2004, Rev crit DIP (2004) 815, note H Muir-Watt; *JCP G* 2004, II, 10198, avis de J Sainte-Rose, *RTDciv* 2004, 549, obs P Théry; *Gaz Pal* 15 janv 2005, 28; *JDI* 2005, 114, note G Cuniberti.

de cassation held that not all anti-suit injunctions were to be enforced in France: a anti-suit injunction would only be enforced, if two conditions were met:

– first, the claim must not fall within the scope of a treaty or European regulation (this ensures that the *Turner* and *West Tankers* cases are respected);
– next, the anti-suit injunction must only aim at enforcing a pre-existing contractual obligation (that is either a choice of court agreement or a arbitration clause).

Flash Airlines and *In Zone Brands* show how difficult it has become for the Cour de Cassation, like other supreme courts in Europe, to deal with international jurisdiction. In its willingness to enforce some of the special features of common law countries, for reasons of international comity as well as judicial efficiency, the Cour de Cassation has had to cope with the procedural constraints of its own judicial system along with the jurisprudence of the ECJ.

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