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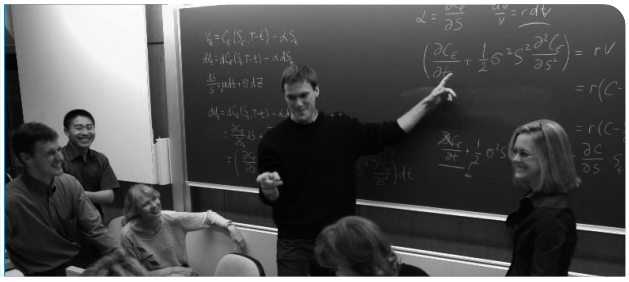

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Recognition and Enforcement of US Judgments in Switzerland and Europe

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| le savoir vivant |

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Preliminary Remarks

- Non-applicability of the Brussels I Regulation and Lugano Convention
- No bilateral recognition agreements between the US and the European countries
- Hague Judgment Project
- National rules on recognition and enforcement
  - Different from one country to the other
  - Some common features in the majority of countries

Preliminary Remarks

- Obstacles to recognition that are not-specific to US judgments
  - In some countries, non-recognition as a principle, or formal (treaty-based) reciprocity
    - E.g. Most Scandinavian countries, Austria
  - In other countries, special privileges for citizens or domiciliaries of the requested State
    - It's no longer the case in France (*Prieur* case from 2006)
    - Still so in Switzerland for judgments relating to contracts and torts (Art. 149 Swiss PIL Act)

Preliminary Remarks

- Protection of defendants domiciled in Switzerland (Art. 149 Swiss PIL Act):
  - No recognition of a foreign decision in matter of contracts or torts when:
    - The foreign court jurisdiction was not based on agreement or on voluntary submission
    - The decision does not relate to the activity of a defendant's establishment in the country of origin
    - The defendant was domiciled in Switzerland at the time of the foreign proceedings

Preliminary Remarks

- « Classical » technical difficulties due to disparities among the procedural systems
  - Meaning of « document that instituted proceedings »
    - See DFT 142 III 180 (« Motion for sanctions » v. « motion to set a hearing onex parte proof of damages »)
  - Assessment of the finality of the US judgment in light of the different available remedies
    - Post-trial motions
    - Appeal

Preliminary Remarks

- Particular features of the US litigation systems which are not (or should not be) an obstacle to recognition
  - Jury trial
    - OLG Saarbrücken, NJW 1988, 3100
  - Elected state court judges
  - Adversarial proceedings
  - The « American Rule » on costs
    - BVerfG NJW 2007, 3709; BGHZ 118, 312
  - Contingency fees agreements (provided they are not grossly excessive)
    - DFT 5P.128/2005; DFT 5P.201/1994; BGHZ 118, 312

Preliminary Remarks

- Particular features of the US litigation systems which are not (or should not be) an obstacle to recognition
  - The (possibly extraterritorial) application of US law to the merits
    - Normally, the law applied on the merits is not an obstacle to recognition
    - In France, since the *Cornelissen* case (2007)

The real controversial issues

- Jurisdiction of the court in the state of origin
- Different understanding of the role of judicial assistance (service of process, taking of evidence)
- Punitive damages
- (Certain aspects of) class actions

Jurisdiction

- In Europe, different approaches to « indirect » jurisdiction
  - Ad hoc rules, similar to the rules on « direct » jurisdiction, but sometimes more restrictive
    - Switzerland (see Art. 149 Swiss PIL Act)
  - Bilateralization of the the rules on « direct » jurisdiction
    - Belgium, Germany, Italy etc.
  - « Significant contact » test
    - France (*Simitch* case of 1986)
- Nevertheless, some common features
  - Possible to compare these criteria with the US admissible bases for jurisdiction

Jurisdiction

- General jurisdiction
  - The jurisdiction based on doing business (« continuous and systematic activity ») was of course extremely problematic
  - No more problem after *Goodyear* and *Daimler*
    - The new « at home » test is very close to the European test based on the defendant's domicile
    - Only doubts: how will US courts determine a company's principal place of business
      - « Nerve center » approach
      - A broader activity-based approach ?

Jurisdiction

- General jurisdiction
  - « Transient jurisdiction »
    - Still allowed in the US (*Burnham* case), however probably not for companies
    - Regarded as exorbitant in most European civil law jurisdictions

Jurisdiction

- Specific jurisdiction
  - In the area of tort law
    - Jurisdiction based on a pure « stream of commerce » doctrine might have been problematic in some cases
    - However, exorbitant application of that theory are quite clearly rejected by *McIntyre*, with a result that is distinctly more restrictive than in Europe
    - This decision allows European exporters to reduce the risk of product liability claims in the US

Jurisdiction

- Specific jurisdiction
  - With respect to Internet claims, the approach of US courts is also often more restrictive than in European courts
    - Simple accessibility of a website is normally insufficient, what is required is « purposeful availment », therefore « targeting »
    - In Europe, the case-law is often broader
      - Simple accessibility of the website in the forum state can establish jurisdiction, provided that there are potential damages (ECJ case law: *e-Date*, *Wintersteiger*, *Pinckney*, *Pez Hejduk* cases)

Jurisdiction

- Specific jurisdiction
  - In the area of contracts, however, the US jurisdictional reach stretches often far beyond the traditional European boundaries
    - In many European countries jurisdiction for contractual claims depends on the place of performance of the contractual obligations (often the characteristic obligation or the disputed obligation)
    - Under the « minimum contacts » test, « transacting business » may establish jurisdiction based on several other factors (« reaching out », place of negotiations, business meetings, place of payments etc.; e.g. *Burger King* case)

Jurisdiction

- Hague Judgment Project
  - The recognition bases provided in the 2017 Draft do not go much further
  - A significant progress can be expected only with respect to the more restrictive systems
    - Countries that are not prepared to recognize, or require formal reciprocity
    - Countries that protect their citizens or domiciliaries (Switzerland)

Role of judicial assistance

- A fundamental disagreement in principle
  - In some European states, service of process and taking of evidence are regarded as judicial tasks, and therefore as an expression of the State sovereignty
  - In the US these acts are often left to the parties, who are (only) subject to due process requirements
    - US Supreme Court, Mullane v. Central Hanover (1950)
- The corollary:
  - Mandatory and exclusive role of the Hague Conventions

    vs.
  - Concurrent use of national law mechanisms

Role of judicial assistance

- Practically, three main area of frictions:
  - Service by mail
  - Service to the US subsidiary of an European company
  - Pre-trial discovery

Service of process

- Service by mail
  - Possible under US law, unless prohibited by treaties or the foreign country's law (Rule 4(f)(2)(c) FRCP)
  - The US Supreme Court has explicitly recognized the mandatory nature of the Hague Service Convention
    - As opposed to the Hague Evidence Convention: *Volkswagen v. Schlunk* case 1988 v. *Aérospatial* case 1987
  - However, US authorities are split on whether Art. 10 of the Hague Convention allows or prohibits service by mail

Service of process

- Service by mail
  - This is clearly rejected (for sovereignty reasons) in some European countries
    - Countries who made a reservation against Art. 10 of the Hague Service Convention (Bulgaria, Croatia, Czech Republic, Germany, Hungary, Lithuania, Norway, Poland, Slovakia, and Switzerland)

Service of process

- Service by mail
  - This can lead to denial of recognition
    - Under specific conditions for recognition under national law, which require not only an « effective » but a « regular » service
      - E.g. Art. 27(2)(a) Swiss PIL Act
    - More general grounds based on State sovereignty
      - Violation of public policy
  - The Swiss Federal Tribunal has taken (and recently reaffirmed) a very strict position
    - DFT 142 III 180; see also DFT 142 III 355; DFT 135 III 623 (Lugano Convention); DFT 4.2.2008, 5A_544/2007
    - As opposed to the (apparent) flexibility of DFT 122 III 439

Service of process

- However:
  - Some European states are prepared to accept service by mail
    - Many European contries did not make a reservation against Art. 10 HSC: Belgium, Denmark, Estonia, France, Italy, Netherlands, Portugal, Slovenia, Spain, Sweden, United Kingdom…
  - Moreover, in some states, the more « relaxed » approach of the Brussels I Regulation/Lugano Convention may have an influence on national recognition standards
    - Recognition cannot be denied provided that the defendant received actual and timely notice (even if service was not « regular »)
    - Recognition cannot be denied if the defendant entered an appearance and was able to defend on the merits
  - Even in the restrictive countries, the sovereignty argument is not applied in a very consistent way
    - Why can this ground for denial be waved?

Service of process

- Service to an US subsidiary as agent of the foreign corporation
  - According to the US Supreme Court, this is not service abroad, therefore the Hague Service Convention is not applicable (*Volkswagen v. Schlunk* case, 1988)
  - This interpretation is rejected in some European States
- However:
  - A Special Commission of The Hague Conference has approved the US interpretation in 1989
  - Here also, the more « relaxed » approach of the Brussels I Regulation/Lugano Convention (effective service) may have an influence on national recognition standards

Discovery

- Discovery in the US perspective
  - The Hague Evidence Convention is not exclusive of other means for the taking of evidence abroad
    - US Supreme Court, *Aérospatiale* case (1987)
    - Therefore, US parties and courts can apply the relevant domestic rules (in particular Rules 26 et seq. FRCP)
    - This also because of the reservation made by several States under Art. 23 of the Hague Convention against « pre-trial discovery »

Discovery

- Impact on recognition
  - Recourse to discovery is not *per se* incompatible with procedural public policy
    - BGHZ 118, 312
    - Even if it puts great pressure on the European defendant

Discovery

- Impact on recognition
  - However, public policy might be violated :
    - When evidence situated in a European State was gathered through channels not provided for by the Hague Convention
    - When evidence was gathered through inadmissible « fishing expeditions »
      - See reservations against Art. 23 of the Hague Evidence Convention by almost all European countries (requests without a direct and necessary link with the proceedings in question)
      - Fishing expeditions areless likely after the restrictive re-reading of the pleadings rules (US Supreme Court, *Ashcroft v. Iqbal*, 2009)
    - According to a view, discovery might be in violation of data protection rules

Punitive damages

- Traditional view: they are incompatible with public policy
  - German BGH 1992
  - Japanese Supreme Court 1997
  - Italian Corte di Cassazione 2007

  - Main arguments:
    - Compensation as the exclusive goal of tort liability
    - Prohibition of the victim's enrichment
    - State monopoly for criminal sanctions

Punitive damages

- In Switzerland
  - Only two decisions by lower courts
    - Bezirksgericht Sargans: violation of Swiss public policy
    - Court of Appeal Basle 1989: not necessarily incompatible with Swiss public policy
      - Preventing an unjust enrichment of the tortfeasor
      - Limited penalty function also admitted under Swisslaw
  - Scholars also plead for some flexibility

Punitive damages

- New developments
  - In the US
    - US Supreme Court interventions to prevent « grossly excessive » awards
      - *BMW v. Gore*, 20.5.1996
      - *State Farm v. Campbell*, 7.4.2003
      - *Philip Morris USA v. Williams*, 20.2.2007
    - State law
      - Mandatory « caps »
      - Other regulations to the same effects

Punitive damages

- New developments
  - In Europe
    - Discussion on the possible introduction of punitive damages in some Member States (e.g. in France, art. 1371 of the « projet Catala »; art. 1266-I of the 2016 draft on civil liability law)
    - Discussion on their possible introduction in some areas of European law (such as antitrust law, IP rights etc.)
    - Recital 32 of the Rome II Regulation

      « […] the application of a provision […] which would have the effect of causing noncompensatory **exemplary or punitive damages of an excessive nature** to be awarded may, **depending on the circumstances of the case** and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (ordre public) of the forum »

Punitive damages

- Recent decisions
  - Supreme courts of three European Member States on recognition of judgments
    - Spanish Tribunal Supremo 1.12.2001
    - French Cour de cassation 1.12.2010
    - Italian Corte di cassazione 2016
  - Other relevant decisions
    - German Constitutional Court 24.1.2007: Admission of service of process even though claimant requested a punitive damages award
    - ECJ 25.1.2017, C-367/15: Compatibility of punitive damages for counterfeiting with the EU directive 2004/48

Punitive damages

- Common element of these decisions
  - No *apriori* incompatibility with public policy
  - Refusal of excessive awards

Punitive damages

- No apriori incompatibility with public policy
  - Main grounds
    - Restrictive understanding of public policy
    - Awareness that civil law countries also recognize some form of civil law punishment
      - *Astreintes*, penalty clauses, punitive awards in some specific areas (such as IP rights or employers' discrimination)
    - Awareness that tort law has not a purely compensatory goal, but may also pursue a punitive and dissuasive function

Punitive damages

- Exclusion of excessive awards
  - What kind of proportionality test?
    - Reference to the damage and to the reprehensibility of the conduct (similar to the *Gore* test adopted by the USSC)
    - However, the amount that could have been awarded under the *lex fori* will also (continue to) be a paradigm

    → Many US awards will still be rejected!

Punitive damages

- If the award is excessive, partial recognition is still possible
  - General opinion (although not expressly stated by the French Cour de cassation in 2010)
  - See also the 1999 and the 2017 Hague Draft Conventions

  - Meaning of « partial recognition »
    - Partial recognition of the declaratory or injuctive relief
    - Partial recognition (and enforcement) of the award for compensatory damages (including pain and suffering and other kind of non-financial loss: BGH 2007)
    - Including also what has been awarded to cover legal costs (see the 1999 and the 2017 Hague Draft Conventions: « whether and to what extent the damages awarded serve to compensate costs and expenses relating to the proceedings »)

Punitive damages

- Is partial recognition possible when the different parts of the award are not clearly separated?
  - The requested court should be able to assess the different parts
  - It should also be possible to « mitigate » the award (this is not necessarily incompatible with the prohibition of *révision au fond*)

Class Actions

- More frequent objections against recognition
  - Significant amount of the claimed damages
  - Determination of the damages award by way of statistical methods
  - Great pressure over the defendant
  - Possible conflict of interests between the member of the class and the class representative
  - Preclusive effect on absent class members: violation of their individual freedom to bring a claim and their right to be heard
- No *apriori* violation of public policy
  - Already BVerfG 14.6.2007 (confirmed by BVerfG 3.11.2015)
  - Recent developments also go in the same direction

Class Actions

- Recent developments
  - In the US
    - Class Action Fairness Act 2005
    - Restrictive interpretation of the commonality requirement (US Supreme Court, *Wal-Mart Stores v. Dukes*, 2011)
  - In Europe
    - EU Commission Recommandation of 11 June 2013 on compensatory collective redress mechanisms
    - Introduction of some form of collective redress in several European States (although generally not in the form of mandatory or opt-out actions)

Class Actions

- Main obstacle: binding effect for certain absent class members
  - Right to be heard / freedom to decide whether to bring the claim
  - In principle, no *res judicata* effect in following cases:
    - Mandatory class action (without an opt-out possibility)
    - Non-mandatory class action (with an opt-out possibility), for those class members who did not receive a proper notice
    - For future potential plaintiffs (who could not be notified)

Class Actions

- *Quid* for class members who did receive proper notice?
  - No problem for US class members (no *Inlandsbeziehung*?)
  - For European (non-US) class members, one opinion rejects *res judicata* effect unless there was a positive opt-in
  - Under a more open view, European (non-US) class members are also bound provided that
    - Notice was actually received (or at least « proper »)
    - The class representatives guaranteed adequate representation (no conflict of interests)
  - Belgian Court of Appeal (Gent) 23.3.2017
  - More easily admitted in those countries that have introduced some sort of opt-out actions (besides Belgium, Bulgaria, Denmark, Netherlands, Portugal)

Conclusions

- On certain issues, US and Europe are coming closer, which should facilitate recognition of US judgments in Europe
  - Developments in the US case law on personal jurisdiction
  - Developments with respect to punitive damages
  - Developments with respect to class actions
- However, serious obstacles are still in place
- The Hague Judgment Project (if successful) could facilitate recognition in some countries, but will probably not bring about spectacular changes

Thank you for your attention!

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