<u>NO EXTINCTIVE PRESCRIPTION FOR EXEQUATUR PROCEEDINGS UNDER FRENCH LAW</u>

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According to a judgment of January 11, 2023, the *Cour de cassation* (the French equivalent of the US Supreme Court for civil, commercial and criminal matters) states, pursuant to the Lugano Convention of September 16, 1988, that "the action for exequatur is in itself not subject to any extinctive prescription".

In the case judged by the *Cour de cassation*, a Swiss cantonal prosecution office issued on **November 14, 2002** an act of default of property ("*acte de défaut de biens*") to the benefit of a creditor who remained partially unpaid, this *acte de défaut de biens* mentioning that the consideration for the payment was two acknowledgments of debt dating back to March 1, 1993 for $ 100 000 and Swiss francs 1 400 000. As such, we understand that under Swiss law, the creditor who participated in an attachment and who has not been fully disinterested receives an "*acte de défaut de biens*" for the unpaid amount, this act being equivalent to acknowledgment of debt.

The creditor waited until the beginning of 2018 to submit an application before the French court for enforcement of this "*acte de défaut de biens*", which is the equivalent of a Swiss judgment/decision.

One of the main issues discussed before the *Cour de cassation* was relating to the question of limitation/prescription. The judgment states that, "*if the rules of limitation of the State of origin are likely to affect the enforceability of the judgment and, consequently, the interest for the claimant of bringing an action* (in France) *in order to enforce the* (foreign*) judgment and if the* (French) *rules of limitation are likely to affect the enforcement of the* (foreign) *judgment once it has been declared enforceable* (in France)*, the action of the party applying for enforcement is in itself not subject to any extinctive prescription*".

This is the first time, to our knowledge, that this principle has been stated in this way, which gives to this decision a certain importance. Before examining it, however, some remarks need to be made on the Lugano Convention.

1. The Lugano Convention

In French-Swiss relations (and more generally in relations between, on the one hand, the States of the European Union and, on the other, Switzerland, Norway and Iceland), the rules of jurisdiction and the rules related to the recognition and enforcement of judgments in civil and commercial matters are governed by the Lugano Convention, of which there are two successive versions.

The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "the new Lugano Convention") which was signed on October 30, 2007, replaced the Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter "the old Lugano Convention").

In the case judged by the *Cour de cassation* on January 11, 2023, the "old" Lugano Convention of September 16, 1988 was applicable, because the Swiss authority issued its "acte de défaut de biens" in 2002.

The old Lugano Convention arose from the creation of the European Free Trade Association ('EFTA') and the establishment between the Contracting States of that association and the Member States of the European Union **of a system similar to that of the Brussels Convention**. It was ratified by the States concerned, apart from the Principality of Liechtenstein. Following the subsequent accession to the European Union of several EFTA Member States, the only Contracting States which are not currently Member States of the European Union are the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation. The Republic of Poland ratified that Convention on 1 November 1999 but became a Member of the European Union on 1 May 2004.

The old Lugano Convention, the new Lugano Convention, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis Regulation)[1] share some common principles and objectives:

- **to strengthen in the EU Member States and in the Contracting States the legal protection of persons therein established;**
- **for this purpose, to determine the international jurisdiction of the courts, to facilitate recognition, and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlement.**

[1] On 22 December 2000, the Council adopted Brussels I Regulation, which replaces the 1968 Brussels Convention with regard to the territories of the Member States covered by the TFEU, as between the Member States except Denmark. By Council Decision 2006/325/EC, the Community concluded an agreement with Denmark ensuring the application of the provisions of Brussels I Regulation in Denmark. The 1988 old Lugano Convention was revised by the new Lugano Convention signed at Lugano on 30 October 2007 by the Community, Denmark, Iceland, Norway and Switzerland. The new Lugano Convention entered into force between the EU and Norway on 1 January 2010, between the EU and Switzerland on 1 January 2011 and between the EU and Iceland on 1 May 2011. Finally, on 12 December 2012, the EU adopted the Brussels I bis Regulation, which repeals Brussels I Regulation. Brussels I bis Regulation, which does not affect the application of the new Lugano Convention, shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.

It must also be recalled that the Contracting Parties adopted the new Lugano in 2007 to extend the principles laid down in Brussels I Regulation to the Contracting Parties in order to strengthen legal and economic cooperation.

The old Lugano Convention prescribes the main following rules in relation with the recognition and enforcement of judgments:

- 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court;
- a judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required;
- any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Section 2 and 3 of the old Lugano Convention, apply for a decision that the judgment be recognized;
- under no circumstances may a foreign judgment be reviewed as to its substance;
- judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there;
- the application shall be submitted in France to the presiding judge of the *tribunal de grande instance* (now called *tribunal judiciaire*);
- the procedure for making the application shall be governed by the law of the State in which enforcement is sought;
- a party seeking recognition or applying for enforcement of a judgment shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity;
- a party applying for enforcement shall also produce documents which establish that, according to the law of the State of origin, the judgment is enforceable and has been served.

2. The judgment of the *Cour de cassation*

The court of first instance of Toulon (a city in the South-East of France) issued a judgment in 2018 to enforce the Swiss “acte de défaut de biens” of 2002 according to the rules laid down by the old Lugano Convention. This French judgment was upheld in appeal by a decision of the court of appeal of Aix-en-Provence of June 15, 2021.

The debtor then filed a special appeal (“pourvoi en cassation”) before the *Cour de Cassation*, it being said that this court does not constitute a third level of jurisdiction above the lower courts and the courts of appeal.

It is mostly called up on not to decide on the merits of the case, but to say whether the rules of law have been correctly applied, based on the facts sovereignly assessed in the decisions given by the lower courts. Thus, the *Cour de cassation* does not, strictly speaking, rule on the disputes that gave rise to the decisions referred to it, but on the rulings themselves.

Before the *Cour de cassation*, the debtor claimed that the enforcement in France of a foreign judgment is governed by French law in relation with limitation period. However, the court of appeal judged that the limitation period for the debt established by the Swiss *acte de défaut de biens* was, according to Swiss law, of twenty years from the date of delivery of the said *acte de défaut de biens*. The fact of applying Swiss law instead of French law would therefore justify, according to the debtor, that the *Cour de cassation* annuls/quashes the decision of the court of appeal.

The *Cour de cassation* disagreed with the debtor. Indeed, it judged in its judgment of January 2023 that if the Swiss rules of limitation are likely to affect the enforceability of the *acte de défaut de biens* and, consequently, the interest for the claimant of bringing an action in France in order to enforce this *acte de défaut de biens* and if the French rules of limitation are likely to affect the enforcement of the Swiss judgment once it has been declared enforceable in France, the action of the party applying for enforcement is in itself not subject to any extinctive prescription.

The principle laid down by the *Cour de cassation* is important.

Indeed, for the reasons underlined in **bold** in our Section 1, **this principle should apply both within the framework of the Lugano Conventions and within the framework of the Brussels I and I bis Regulations.**

It might also apply to the case of a **"classic" exequatur action**, when a party seeks to recognize in France a judgment of a foreign State (like a US or a Japanese judgment) which is neither a Member State of the EU, nor a Contracting State of the Lugano Convention, nor a State (like Mauritania or Cameroun) who signed a treaty with France related to the recognition of judgments.

It must be recalled that in the absence of an international agreement providing for the recognition and enforcement of foreign judgments, the "*ordonnance d'exequatur*" constitutes the legal procedure by which foreign judgments are given "force exécutoire", i.e. are given res judicata effect and rendered enforceable in France. The exequatur proceeding is not a new plenary action, but rather represents an abbreviated procedure: the granting of an exequatur is simply the recognition by a French court of the validity and enforceability in France of an already existing judgment rendered by a foreign jurisdiction. With the notable exception of foreign judgments relating to personal status matters (and despite the fact that a foreign judgment, even when it lacks an exequatur, may have evidentiary and other legal consequences in French proceedings), foreign judgments which have not been granted an exequatur are devoid of legal effect in France as a general rule.

The only legal recourse left to the beneficiary of a foreign judgment who has failed to obtain an exequatur is to sue in France on his original cause of action.

Although specific reference is made to the exequatur in several provisions of the French Code of Civil procedure, especially in relation with arbitral awards rendered abroad, the task of devising rules for its procedural and substantive application was left to the courts, especially to the *Cour de cassation*.

Generally speaking, a final and conclusive judgment (of a civil or commercial nature) which is not capable of appeal obtained in a court of competent jurisdiction of a foreign country and in respect of which enforcement has not been stayed by any such court, would be granted exequatur by the French court without a review of the merits, provided in particular that:

- the foreign court that initially issued the judgment had jurisdiction over the case;
- the procedure followed by the foreign court does not conflict with principles of due process applied in France or with *ordre public international français* (French international public order) or French *lois de police* (territorial mandatory rules);
- the foreign judgment is not tainted with fraud;
- the foreign judgment is not incompatible with an earlier judgment rendered by a French court in the same matter.

We will comment below the three aspects of the principle laid down by the Cour de cassation in its judgment of January 11, 2023.

3. The enforceable character of the foreign judgment

It is certain that a judgment given in a foreign State shall be enforced in France only and when it has been declared enforceable in that foreign State.

The principle is stated by the old Lugano Convention of 1988 (art. 31) and the New Lugano Convention of 2007 (art. 38) as well as by the Brussels I (art. 38) and I bis (art. 39) Regulations[2].

Within the framework of the standard exequatur regime, the *Cour de Cassation* judged on several occasions that a party applying for enforcement shall produce documents which establish that, according to the law of the State in which it has been given, the judgment is enforceable and has been served[3].

The decision of January 11, 2023 draws the consequences of this approach, by stating that "*the rules of limitation of the State of origin* (in this case the Swiss rules) *are likely to affect the enforceability of the judgment and, consequently, the plaintiff's interest in bringing exequatur proceedings*".

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[2] Concerning Brussels I and Brussels I bis Regulations, it must be recalled that, in so far as, in accordance with recital 34 of Brussels I bis Regulation, that regulation repeals and replaces Brussels I Regulation, which itself replaced the 1968 Brussels Convention, the interpretation provided by the Court of Justice of the EU with regard to the provisions of the latter legal instruments also applies to Regulation No 1215/2012 (Brussels I bis Regulation) whenever those provisions may be regarded as 'equivalent' (judgment of the Court of Justice of the EU dated 10 March 2022, *BMA Nederland*, C-498/20, paragraph 27 and the case-law cited).

[3]

This solution must be approved. Indeed, it is necessary, on a case-by-case basis, to determine whether the foreign judgment is indeed still enforceable in the State where it was pronounced at the time when its enforcement will take place in France. This general idea explains that if a request for revision of the foreign judgment has been filed abroad, the exequatur judge must determine whether it is likely to call into question the fact that the foreign judgment has become final (*Cour de cassation*, May 21, 1997, No. 95-17.200) or that if a foreign judgment is granted "exequatur" in France before being overturned by the foreign Supreme Court, the French judgment of exequatur is then deprived of its legal basis and must be annulled (*Cour de cassation*, Sept. 23, 2015, No. 14-14.823);

On the other hand, the principle laid down by the *Cour de cassation* in its judgment of 2023 leads to the conclusion that if the foreign judgment is not or no longer enforceable, the plaintiff has no interest in bringing exequatur proceedings, this fact being an absolute bar to proceeding within the meaning of article 122 of the French code of civil procedure.

Likewise, if the judgment is not enforceable in the State of origin, it should not be enforced in France. It is possible that a judgment will be effective in the State of origin without being enforceable there, for example, because enforceability has been suspended pending an appeal (either automatically or by an order of the court). Moreover, a judgment that is no longer enforceable in the State of origin - because, for example, it has been overturned on appeal or the limitation period for its enforcement in the State of origin has expired - should not thereafter be enforceable in France.

4. No limitation for the exequatur action

The judgment of January 11, 2023 also states, still with regard to the old Lugano Convention, that "*the exequatur action itself is not subject to any limitation period*". It seems that this principle is stated in these terms for the first time by the *Cour de cassation*.

This solution seems quite logic.

Indeed, when it comes to having a foreign judgment enforced in France, the fundamental requirement is that this judgment be enforceable abroad. As long as it is, the possibility of bringing an action to obtain its enforcement in France must be open, regardless of the time that has elapsed since its delivery.

5. Enforcement in France of the foreign judgment

On the other hand, at the stage of the enforcement in France of the foreign judgment, the question of a possible time limit can reappear, as retained by the judgment of January 11, 2023 when it states that the rules of limitation "*of the required State are likely to affect the enforcement of the judgment declared enforceable*".

This principle seems to be stated in these terms for the first time in the context of the old Lugano Convention. It is, however, a simple illustration of a more general principle which applies within the framework of the Brussels I and I bis Regulations and within the framework of "standard" exequatur proceedings.

In the context of the Brussels I Regulation, the Court of Justice stated that "*since the enforcement, in the strict sense, of a decision issued by a court of a Member State other than the Member State in which enforcement is sought, and which is enforceable in the latter Member State, has not been the subject of harmonisation by the EU legislature, the procedural rules of the Member State in which enforcement is sought are to apply to matters relating to enforcement. In particular, it is clear that, in so far as Regulation No 44/2001 has not laid down rules concerning the enforcement of decisions given by a court of a Member State other than the Member State in which enforcement is sought, the latter remains free to make provision, in its own legal order****, for the application of a time limit for enforcing such decisions****, which have been recognised and declared enforceable in the latter Member State.*" (CJEU 4 Oct. 2018, case C -379/17, point 33 and 34).

This rule has been confirmed by article 41 of Brussels I bis Regulation which states that "*the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed.*"

When the French standard rules of exequatur apply (especially when a plaintiff tries to enforce in France a US or an English judgment), the *Cour de cassation* judged that the dispute arising from the enforcement in France of a foreign decision declared enforceable in France is subject to French law as regards time limitation (*Cour de cassation*, November 19, 2009, No. 08-20.501).

6. Conclusion

This judgment is very interesting since it helps to clarify some of the rules relating to the recognition and enforcement in France of foreign judgments especially within the framework of the old Lugano Convention.

However, all foreign creditors must be aware of the fact that according to article L. 111-4 of the French code of civil enforcement procedure ("code des procedures civiles d'exécution"), the enforcement of a French or of a foreign judgment can be pursued only for 10 years (starting from the date of the French judgment which grants exequatur to the foreign judgment in the case of a non-EU judgment or in the case of a "non-Lugano judgment"). Also, limitation periods exist in relation to the appeal against the enforcement order.

More generally, the cost and time to enforce a foreign judgment, be it a Swiss judgment, an EU judgment or a non-EU judgment, will depend on a wide range of factors, including in particular how difficult it could be to determine the location of the debtor's assets, the nature of those assets and the type of enforcement measures the creditor is looking for.

Instructing a competent French lawyer who has experience in foreign judgment's recognition and enforcement is a key asset for foreign creditors who are willing to enforce their judgment in France and will increase the probability of efficient debt-collection.