Flashairlines and Transatlantic Ping Pong

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> *As a moth is drawn to the light, so is a litigant to the United-States. If he can only get his case into their court, he stands to win a fortune. (Smith Kline & French Laboratories Ltd v. Bloch, Court of Appeal, 1983)*

This famous statement of Lord Denning illustrates perfectly how US American judges feel when seized by a foreign plaintiff in a product liability lawsuit against a domestic defendant. Since the 1970s' the spectre of forum shopping drove the US courts to abusively use the *forum non conveniens* doctrine resulting in a de facto jurisdictional immunity of domestic corporations when sued by foreign plaintiffs. In this context, court congestion and foreign nationality of the plaintiff have become the principal arguments used to justify dismissing a foreign plaintiff's suit on the ground of *forum non conveniens*. Looking at the past 40 years, it is difficult to identify any important product liability case where US courts accepted to retain their jurisdiction (the *Bhopal* case is perhaps one of the most prominent examples).

In this case, we can suppose that the Californian courts based their *forum non conveniens* issue on "public interest" considerations when they declined their jurisdiction to proceed on the liability product lawsuit filed by the 281 French plaintiffs against Boeing and its subcontractors. In this particular "judicial context", it seems to me that the French and US courts are not really displaying "judicial cooperation and mutual confidence" (as stated by the Paris Court of Appeal), but are rather engaged in a "*partie de bras de fer*" over the Atlantic, and this with unequal arms: As Gilles Cuniberti and Emmanuel Jeuland have explained very well in this online symposium, declaratory relief is unavailable under French civil procedure and I am also convinced that the Paris Court of Appeal ruled *contra legem* to enable the French plaintiffs to obtain a declaration that French courts lack jurisdiction. On the other side, I find it difficult not to support the

Court's attempts to help the French plaintiffs – for three basic reasons:

First, the US court's decision forces the French plaintiffs into the paradoxical move of petitioning a judgment declining jurisdiction. And second, if the defendants' strategy succeeds, we would have the startling result that not the plaintiffs, but the defendants hold the keys to choose their forum: the defendants successfully raise the *forum non conveniens* issue to avoid US justice and at the same time declare their readiness to submit to the French jurisdiction, which could be sufficient to establish jurisdiction (In fact, it is debated whether article 24 of the Brussels I regulation on jurisdiction and enforcement, which grounds jurisdiction on entering an appearance by the defendant, is only applicable, if the defendant is domiciled in one of the European Member States). Third and finally, it is equally startling for a continental European lawyer that the defendants' home courts cannot be the appropriate forum while, on the contrary, the home plaintiffs' forum is deemed to be convenient.

I am afraid that the *Cour de Cassation* is left with no other choice than reversing the Court of Appeal's decision, since the French civil procedure simply does not offer to a plaintiff declaratory relief to obtain from a court a judgment declining its jurisdiction. However, it is worthwhile noticing that, after a long debate, the French jurisprudence has accepted a declaratory relief to clear uncertainties about the *recognition* of a foreign judgment (*action en (in)opposabilité*). The Court of Appeal's decision could be the first step towards the admission of such a declaratory relief with regard to jurisdiction. In this context it should be noted that French civil procedure offers the judge the power to decline his jurisdiction *ex officio* (art. 92 CPC). This borne in mind, the Court of Appeal could have refused to rule on the declaratory relief action, and instead simply decline its jurisdiction ex officio (arguing that there is no ground of jurisdiction). In conclusion, the Court of Appeal did not much more than anticipate the result that it could have taken anyways (in application of art. 92 CPC). This aspect might be taken into account by the *Cour de Cassation*.

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