Abusive Forum Shopping?

On April 28th, 2010, the Paris Court of Appeal dismissed the claim of Vivendi that its shareholders had abused their right to sue by initiating a class action against the company in New York, and thus dismissed the appeal lodged by Vivendi against the first instance judgment.

The argument of Vivendi was that its shareholders had abused their "right to forum shopping" by failling to bring their action before the "natural forum" (*juge naturel*) of the parties, i.e. a French court, and by bringing it instead before a foreign court. To give credit to its case theory, Vivendi, a French company, had only sued a couple of French shareholders in France. The remedy sought was an anti-suit injunction.

I have already summarized the facts of this case in a previous post. Suffice to say that a class action had been initiated in New York by shareholders, many of whom were French, but also many of whom were not. Shares had been traded in France, but also in the US. The directors of Vivendi were accused of having made financial misrepresentations in the US while living there. Vivendi was accused, and eventually found guilty, of numerous violation of US securities law.

Abuse of Law

So, were French courts the natural forum for this case? The Paris Court of appeal did not think so.

First, it underlined that, in tort matters, the Brussels I Regulation granted

jurisdiction to a variety of fora, without establishing any hierarchy between them.

Second, it insisted that there were serious connections indeed between the dispute and the US: shares traded in the US, alleged violations of US law, directors living in NY and making representations there.

Third, it was in no way fraudulent to bring an action in New York for French plaintiffs, who were free to assess and conclude that US law was more favorable to their interests.

Finally, the Court rejected the argument that the issue of the enforceability of the American judgment was at all relevant. There has been debate in France with regard to whether the recognition of a class action judgment would be constitutional. The Court held that the issue was irrelevant, as the American judgment could no doubt be enforced in the US, where Vivendi has significant assets.

So what did Vivendi exactly mean when it argued that French courts were the natural forum for the dispute? As the Court underlined, Vivendi never argued that French courts had exclusive jurisdiction. Vivendi actually relied on an old French case where French courts had been found to be the natural forum for the purpose of applying Article 14 of the French Civil Code. It is hard to see how it could be relevant at all for a dispute falling within the scope of the Brussels I Regulation. But some French scholars find Vivendi's position perfectly legitimate. In an article published two weeks ago in the *Recueil Dalloz* (*Contentieux d'affaires et abus de* forum shopping), professor Daniel Cohen argued that French courts were indeed the natural forum for this dispute, and that the shareholders had abused their right. He concluded that French courts should not become second rank fora, that the French legal order should fight against American judicial imperialism, and that the Court of appeal had a great opportunity to convey a message to the American court. In a newspaper article published at the same time, Ms Lafarge-Sarkozy, who practises at Proskauer, recognised that the political dimension of the case could hardly be denied.

Remedy

Unfortunately, as the Court did not find that the plaintiffs had abused any of their rights, it did not rule on the remedy. We will have to wait to know whether French courts consider that they have jurisdiction to grant antisuit injunctions (they

certainly can be friendly to foreign injunctions). An interesting question is whether the Brussels I Regulation had any impact on their power to do so (yet to be confirmed, to say the least).