

French Cour de cassation rules (again) on duty of domestic courts to apply European rules of conflict on their own motion

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In the *Airmeex* case (Civ. 1^{re} 27 septembre 2023, n°22-15.146, available [here](#)), the French Cour de cassation (première chambre civile) had the opportunity to rule on the duty of domestic courts to apply European rules of conflict on their own motion. The decision is a great opportunity to discuss the French approach to the authority of conflict-of-laws rules.



The case concerns allegations of anticompetitive behaviour following a transfer of corporate control. The dispute broke out after two shareholders of the French corporation *Airmeex* transferred the sole control of the company to the Claimant. The latter, joined by *Airmeex*, alleged several anti-competitive behaviors on the part of his ex-business partners and seized French courts against the two former shareholders and their related corporations in Turkey. The claim was based on general tort law and on French rules regarding “unfair competition”. The claim covered the Defendants’ acts in Turkey as well as possible infractions in Algeria.

As it happened, none of the parties ever put the question of the applicable law in the debates and neither the trial nor the appeal judges did raise the potential conflict of laws. Indeed, both were content with the straightforward application of the *lex fori*, i.e. French law on “unfair competition”. The lower court hence dismissed the claim by application of French law. The Claimants then petitioned to the Cour de cassation arguing a violation of the applicable rule of conflict, namely article 6 of the Rome II regulation.

By its decision of September 27, 2023, the French Cour de cassation (première chambre civile) ruled in favour of the petitioners. Upholding its previous *Mienta* decision (available [here](#) in English), it decided that Article 6 of the Rome II

regulation was of mandatory application and was applicable to the alleged anticompetitive behaviours. Under these circumstances, the Cour de cassation held that the lower court should have enforced the mandatory rule of conflict of Article 6 Rome II on its own motion. As a consequence it censured the appeal decision insofar as it had applied the *lex fori* without going through the relevant conflictual reasoning.

Following the *Mienta* precedent, the *Airmeex* decision illustrates the renewal of the issue of the authority of conflict-of-laws rules.

The authority of the rule of conflict in French law

The key question in *Airmeex* concerned the obligation of domestic judges to apply, if necessary on their own motion, European conflict-of-laws rules.

The *ex officio* powers of national judges belong to the sphere of Member States' procedural autonomy. However, uncertainty remains as to the scope of this autonomy in relation to European rules of conflict, particularly when the said rules leave no room to parties' autonomy.

Tackling this issue in *Airmeex*, the French Court of Cassation upheld *in extenso* its previous *Mienta* ruling and stated that "if the Court is not obliged, except in the case of specific rules, to change the legal basis of the claims, it is obliged, when the facts before it so justify, to apply the rules of public order resulting from European Union law, such as a rule of conflict of laws when it is forbidden to derogate from it, even if the parties have not invoked them".

The *Airmeex* ruling confirms the existence of French judge's double hat in relation to conflict-of-laws rules, depending on the source of it.

On the one hand, for European rules of conflict, judges' obligation is subject to the criterion of imperativeness laid out in *Mienta* and *Airmeex*. If the European rule is not mandatory, an *a contrario* reading of the decision leads to conclude that the French judge does not have an obligation to apply it on its own motion. In the present case, the Cour de cassation deduced the imperative character of the rule of conflict of Article 6 Rome II from the prohibition of derogatory agreements set out in the 4th paragraph of the text (according to which "[t]he law applicable under this Article may not be derogated from by an agreement pursuant to Article

14"). Then, noticing the existence of a conflict in that the disputed facts were notably committed in Algeria and Turkey, the Cour de cassation sanctioned the cour d'appel for not having applied the relevant mandatory provisions of Article 6 of the Rome II regulation.

On the other hand, for French rules of conflict, the classical *Belaid-Mutuelle du Mans* system (established by case law) remains positive law, distinguishing between the rights which the parties can freely dispose of (*droits disponibles*, in which case judges are not obliged to apply French conflict-of-laws rules) and the rights which the parties cannot freely dispose of (*droits indisponibles*, in which case judges are obliged to apply French conflict-of-laws rules, on their own motion if necessary). In any case, courts retain the power to raise the conflict *ex officio* where the foreign element is flagrant, but their obligation to do so varies according to the nature of the rights disputed - a criterion often criticized for its imprecision.

In both *Mienta* and *Airmeex* cases, the derogatory regime of European rules of conflict is justified by a direct reference to the principles of primacy and effectiveness of EU law. Thus, for the Cour de cassation, the European conflict-of-laws rule does not enjoy a special status because it is a conflict-of-laws rule but rather because it is a (mandatory) European rule. Moreover, the criterion of the free disposability of rights was enforced on several occasions after *Mienta*, confirming that, in the eyes of the Cour de cassation, French judges have two quite distinct "offices".

While the *Airmeex* ruling does not innovate in relation to the authority of the European rules of conflict, compared to *Mienta*, the Cour de cassation has nevertheless slightly modified its motivation. By adding a reference to Article 3 of the French Code civil to those to Article 12 of French Code de procédure civile and the principles of primacy and effectiveness of EU law, the court connects its solution with the general theory of French private international law. It also allows convergence of regimes between the authority of the rule of conflict and the status of foreign law, contemporary case law in the latter domain developing on the ground of the same Article 3.

Despite being two distinct issues, strengthening the status of foreign law is the corollary of reinforcing the authority of conflict-of-laws rules. In France, foreign law is formally considered as a "rule of law" and the establishment of its content

is still regulated by the *Aubin-Itraco* system (also established on case law). This case law imposes a “duty of investigation” according to which the judge who recognizes the applicability of foreign law must “investigate its content, either on its own motion or at the request of the party who invokes it, with the assistance of the parties and personally if necessary, and give the disputed question a solution consistent with positive foreign law”. However, this apparent automaticity in applying foreign law shall not obscure the fundamental difficulties raised by the encounter with “otherness” in its legal form. Critical approaches to comparative law teach that there is an irreducible space separating *foreign-law-as-it-is-lived-in-its-country-of-origin* and *foreign-law-as-it-is-apprehended-by-the-national-judge*. This literature could fortunately inspire private international law in developing a procedural framework of hospitality for applying foreign law in its own terms.

Conclusion

The *Airmeex* and *Mienta* decisions will only partially content those who advocate for the general obligation of domestic judges to systematically enforce every single European rule of conflict. It will satisfy even less French’ majority scholarship, which considers that any rule of conflict should be obligatory for the judge. Nevertheless, it is in line with the traditional approach of the Cour de cassation that elaborates the authority of conflict-of-laws rules on the basis of substantive considerations.

The draft French Code de droit international privé runs counter to this current trend of the case law. Its Article 9 would impose the mandatory application of every rule of conflict, whatever their source or the nature of the rights in dispute. This question of the “office du juge” in the draft Code renders the pitfalls inherent in the codification process all the more apparent. Despite the generic principle enshrined in Article 9, the project multiplies special norms and exceptions in a quite scattered manner. We can express some reservations as to the interest of rigidifying a matter in which case law has, in spite of repeated resistance from the scholarship, chosen a pragmatic position grounded on substantial considerations, especially when such ossification is based on the hypertrophy of special regimes. Similar flaws appear to jeopardize the draft Code’s provisions on the proof of foreign law (namely Articles 13 and 14).

Although the attempt at codification is commendable and the actual result much honourable, the complex status of conflict-of-laws rules and foreign law seem

intrinsically irreconcilable with the simplification and systematization approach inherent in the exercise. It might be fortunate to recognize that, when it comes to foreign law, *“l’essentiel est là entre les mains du juge”*.