



Jurisdiction Considerations in French/U.S. Divorce

August 2012

By Delphine Eskenazi, Frances Goldsmith and Leigh Baseheart Kahn

When Being the First Does Not Necessarily Make You the Winner

The international mobility of spouses and the increase in binational couples (sometimes with each spouse having dual citizenship) has heightened the jurisdictional questions at stake during a divorce: One spouse may enjoy advantages over the other, depending on which jurisdiction handles the matter. The first reaction international divorce lawyers have, then, when dealing with mobile or dual citizen couples is to be the first to file a petition with the national court of choice.

The advantages found in one jurisdiction over another could stem, for example, from the level of maintenance typically awarded or the conflict of law rules used by such jurisdiction to determine the matrimonial property regime (separation of assets, separation of assets with equitable distribution, civil law community property, etc.). In Europe, the race for jurisdiction is so neck-and-neck that counsel can be found liable if the court clerk fails to specify the hour the petition was filed in addition to the date. *Cour de cassation* [French Supreme Court], 1st civil chamber, 11 June 2008, No. 06-20.042. Being the first to file enables the most diligent spouse to invoke the rule of *lis alibi pendens*, which allows the court petitioned second to refuse to exercise jurisdiction when facing parallel litigation in another country. This refusal is mandatory for courts of Member States of the European Union when the court petitioned first is situated in a fellow Member State. (Article 19 of the Brussels II bis Regulation of November 27th 2003, clearly states that "where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seized [petitioned] shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.")

The Race to the Courthouse, Across the Atlantic

As concerns parallel litigation outside of Europe, French courts will refuse to exercise jurisdiction when a foreign jurisdiction has been seized for litigation where the parties and the subject disputed are identical and the decision to be rendered is susceptible to be effective in France — namely if: 1) the court that rendered the decision has a sufficient link with the dispute; 2) the decision was not obtained by the petitioner fraudulently; and 3) the decision is not contrary to French public policy. In divorce proceedings, French courts will generally refuse to take jurisdiction if the courts of a state of the United States are petitioned first. By the same token, a French court will normally take jurisdiction if it is first seized.

The competition to file first may, however, turn out not to be the deciding factor in any given set of parallel proceedings. Rather, the importance of winning that sprint to the courthouse may be superseded by a race to be the first to have a decision declaring the divorce final, according to a case from the French Supreme Court. *Cour de cassation*, 1st civil chamber, Sept. 30, 2009, No. 08-18769. It has left attorneys and petitioners wondering whether it isn't worth a spouse's while to attempt filing a petition in a "speedier" jurisdiction, even if the other spouse has previously filed elsewhere.

In this case, the wife filed in Massachusetts over a month after the husband filed for divorce in Toulouse, France. (The husband had filed his divorce petition on Oct. 28, 2005, and the wife filed her divorce petition in the United States on Nov. 21, 2005. It is possible that the wife had not been served yet and was not aware of the husband's French petition at the time she filed in Massachusetts.) The French Supreme Court ruled that the decision rendered by the Massachusetts courts on Aug. 16, 2006, declaring the divorce between the spouses final, was to be recognized in France in accordance with French exequatur rules.

The Court of Appeals decision, accepting that the U.S. decision could be recognized in France, was rendered on May 20, 2008, almost two years after the divorce decision rendered by the U.S. courts. The divorce was therefore final in the United States before the Toulouse Court of Appeals even had the opportunity to resolve the issue of *lis alibi pendens*, and it concluded that the dissolution procedure in France had been rendered moot. Consequently, the provisional measures ordered by the court — including the French equivalent of custody and maintenance awards during the pendency of the action — had lapsed.

Moreover, the Toulouse Court of Appeals, and then the French Supreme Court, considered that the petition filed by the wife was not necessarily fraudulent, even though the husband had already filed in France. The validity of her petition was based on the following findings: 1) The wife had resided with her three children in the United States for more than six months before her petition was filed; 2) There was no proof that the wife filed in Massachusetts with the intent of receiving a more favorable decision there; and 3) The husband was notified of the proceedings before the U.S. courts and acknowledged having received the exhibits submitted by the wife.

The spouse who does not wish to have the divorce heard and determined in France, therefore, would be well advised to persevere and obtain a ruling from a "speedier" U.S. jurisdiction, enabling it to invoke the rule of *res judicata* against the other spouse's argument of *lis alibi pendens* — the primary caveat being, of course, the need to determine whether such a "speedier" jurisdiction is available (such as was the case in the Massachusetts case discussed herein). In addition, the solution adopted by the Toulouse Court of Appeals, affirmed by the Supreme Court, may have differed had the husband submitted an appeal against the U.S. decision pronouncing the divorce, therefore impeding the divorce from becoming final. However, given the apparent differences in procedural delays between France and the United States, the outcome analyzed may have been the same had the American higher courts rendered a decision first.

Looking at It from the Other Side

The appellate courts of New York dealt with the opposite of the situation addressed by the Toulouse Court of Appeals — *i.e.*, a judgment being issued first in France, even though proceedings were commenced first in New York — in two separate decisions in the matter of *Bourbon v. Bourbon*. In that action, the wife in 1998 commenced an action for divorce in New York, where the parties — both French citizens, married in France — had relocated 14 years earlier. The husband commenced an action for divorce in France one week later. In March 1999, New York's Appellate Division, Second Department, reversed an order of the trial court, which had dismissed the wife's complaint for divorce. The Appellate Division found, *inter alia*, that the doctrine of comity did not serve as a basis for New York to decline jurisdiction in favor of the French courts where, at that time, the court presiding over the matter commenced by the husband had issued only a temporary order of support, and not a final judgment of divorce. *Bourbon v. Bourbon*, 259 A.D.2d 720 (2nd Dep't 1999).

By the time that New York's appeals courts had cause to hear the matter again — in *Bourbon v. Bourbon*, 300 A.D.2d 269 (2nd Dept. 2002) — more than three and a half years later, much more had occurred in the husband's French action. By that point, the Departmental Court of Paris had issued a divorce decree, had awarded alimony and child support, had fixed custody and access, had addressed the use and ownership of the parties' New York home, and had delegated to a public official the process of liquidating the parties' assets pursuant to their prenuptial agreement. In addition, the *Cour D'Appel De Paris* had confirmed the decree and its terms, save for a modification of the alimony award and the use of the New York home. Further, the New York appellate court held, the record in the matter did not indicate that either the husband or the wife filed a notice of appeal to the *Cour de cassation* within the requisite time period, rendering the French decree a final judgment.

As a result, noting that comity is generally granted to bilateral foreign judgments of divorce where jurisdiction was properly acquired by the foreign court, and "absent some showing of fraud or a violation of a strong public policy of the State," the Second Department held that the trial court had properly recognized the French divorce decree under the doctrine of comity. As a result, the wife's claim for equitable distribution of assets under New York law was barred by the doctrines of *res judicata* and collateral estoppel in light of the French court's determination of those issues.

A Contrasting Decision

A contrast is provided by the New York case of *Cahen-Vorburger v. Vorburger*, 284 A.D.2d 141 (1st Dept. 2001), with respect to the division of property. (Since the children of the marriage were found to be habitual residents of New York pursuant to the Hague Convention, the proper jurisdiction with respect to custody, visitation and child support were not at issue.) There, the husband commenced an action for divorce in France

in May 1998, a month before the wife filed a dissolution action in New York. A judgment was rendered first in the later-commenced French proceeding, but that judgment was appealed by the wife in France. That appeal was still pending by the time that the New York matter came before a New York appellate court on the issue of the husband's request for a stay of the New York proceedings based upon the existence of the French judgment. The New York appellate court upheld a refusal to grant the stay in light of the fact that, under French law, a judgment being appealed is not deemed a final judgment. Therefore, that trial court decision was not entitled to recognition under the doctrine of comity.

Conclusion

The lesson to be taken from these cases is that lawyers representing clients wishing to have divorce proceedings entertained in the United States, rather than in France, in the hopes of obtaining a more generous financial award and settlement, should remember that matter may not be concluded until the divorce has been proclaimed final by either jurisdiction. Filing first is no longer the finish line of the race, but rather, the starting point.

Delphine Eskenazi is of counsel to the firm of UGGC & Associés in Paris, France. She is admitted to both the Paris and the New York bars. **Frances Goldsmith** is an associate with UGGC & Associés, also resident in Paris. **Leigh Baseheart Kahn** is a partner at Mayerson Abramowitz & Kahn, LLP, in New York City.