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The Revolutionary Change in Service of Process Abroad in French Civil Procedure

Article 69(10) of the Code of Civil Procedure in France included a technique for the service of process on a non-resident defendant abroad known as *notification au parquet.*

If suit was brought in a French court against a non-resident defendant, service of the initial process could be made upon the defendant by leaving a copy for him at the *"parquet,"* the office of the local Procureur-General. An effort was supposed to be made to give the defendant actual notice through diplomatic channels. However, this was, in practice, a fiction, because failure to notify did not invalidate the service. Further, the statutory period for the defendant's answer was so short that actual notice through formal diplomatic channels was physically impossible before the date when the plaintiff would take judgment by default. It has even happened that the statutory time for appeal from the default judgment will have expired before the defendant has any actual notice of the commencement of the action.[1]

The inadequacy of this system was emphasized by the further fact that, under Article 14 of the French Civil Code, the French courts have jurisdiction over any action where there is an "obligation" in favor of a French national against a non-resident foreigner.[2] In such a

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[1] See discussion in Normand, "La Délivrance des actes à l'étranger et les délais de distance dans le décret No. 65-1006 du 26 Novembre, 1965" (hereafter cited as "Normand"), 55 Sirey, *Revue critique de droit international privé,* 387-9 (1966); "International Cooperation in Litigation—Europe," Smit ed. pp. 123-9 (1965) (hereafter cited as "Smit").

[2] "14. A foreigner, even if a non-resident of France, may be compelled to appear before the French courts, for the enforcement of obligations contracted by him in France with a Frenchman; he may be compelled to appear before

case, the French court of the place of the plaintiff's domicile has jurisdiction.[3] Accordingly, in a situation where a French creditor claimed a right against an American debtor on a contract made in the United States, the creditor could bring suit in a French court, and the American defendant could be served by *notification au parquet,* possibly with no actual notice at all. This non-service could lead to a judgment by default, which would be valid in France and capable of execution against any assets of the defendant in France.[4] Also, if the time to attack the default judgment had expired before the defendant found out about the action, he was completely barred from any remedy or relief in the French courts.[5]

Some French courts attempted to ameliorate these hardships by requiring some proof of effort by the plaintiff to give the defendant actual notice. There were only a few such decisions and they were in conflict with the clear provisions of the Code.[6]

As a recent commentator expressed it: "It is no surprise that the French system has known nothing but adverse critics." [7] "Injustice, extravagance, absurdity; only politeness restrained the commentators from more vehement terms of reproach in voicing their disapproval of the application of Article 69(10)." [8]

United States lawyers will instantly recognize that the jurisdictional basis of our system of "long-arm" statutes and extra-territorial service is quite different from the French basis of jurisdiction. Our system requires that the forum in which the action is commenced must bear an appropriate relationship to the *defendant* and to his

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the French courts, on account of an obligation contracted by him in a foreign country with a Frenchman." Dalloz, *Code Civil* (1966). p. 9. (All translations in this article are the author's.)

[3] *Ibid.*, p. 9, fn. 9 and authorities cited.

[4] This concept is an "improper" basis for jurisdiction in the international field of the recognition of foreign judgments. The draft Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, prepared at the Extraordinary Session of 26 April 1966, excludes such a basis of jurisdiction in Article 10, which lists the situations in which "the court of the State of origin shall be considered to have jurisdiction for the purposes of this Convention." Further, "the nationality of the plaintiff" is expressly made an "improper" basis of jurisdiction, for purposes of the recognition of judgments, in Article 4 of the Supplementary Protocol to the Convention dated 15 October 1966.

[5] Normand, pp. 389-90.

[6] *Ibid.;* Smit, pp. 127-8.

[7] *Ibid.*

[8] *Ibid.*, p. 387.

activity within that territory. The forum must be a place to which the non-resident defendant may justifiably be required to come to defend against the plaintiff's claim. The duty on the plaintiff to give actual notice to the defendant is substantial. The equitable power of the court to open a default judgment where the defendant has a meritorious defense, and has been guilty of no delay after he has received actual notice, gives the defendant added protection.

Our system seeks a fair balance between the interests of the plaintiff and the non-resident defendant, namely, the interest of the plaintiff in suing at home rather than being required to pursue the defendant at a distant place, and the interest of the defendant in avoiding defending himself at a distant place which has no real connection with himself or with the cause of action. The balance is achieved by limiting the plaintiff's right to sue at home to certain types of action, by requiring an adequate "contact" between the defendant and the forum, by requiring reasonable efforts to give the non-resident defendant actual notice and time to defend himself, and by providing broad rules for the opening of default judgments on equitable grounds.

The French system on the other hand was one-sided. It was designed to protect the rights of the French plaintiff to proceed at home and it ignored the rights of the defendant.[9]

In 1963, against this background, the members of the Hague Conference on Private International Law, not including the United States,[10] began a revision of Part I of the Hague Convention on Civil Procedure of 1954. This Part dealt with the service of documents abroad. One of the announced purposes of this revision was to deal with the injustices inherent in *notification au parquet.*[11]

Then in 1964, at the Tenth Session of the Conference, the Convention for the Service of Judicial and Extra-judicial Documents Abroad in Civil and Commercial Matters was unanimously adopted.[12] It was ratified unanimously by the Senate of the United States on April 14, 1967.

[9] "The classic system of *signification au parquet* totally sacrificed all rights of the defense in favor of the plaintiff." *Ibid.*, p. 394.

[10] The United States did not join the Hague Conference until July 1964, pursuant to Public Law 88-244, 22 U.S.C. § 269g.

[11] See Conférence de la Haye, Actes et Documents (1964) Vol. 3. pages 11-2, 22, 49, 94.

[12] The Convention is discussed in some detail in Amram, "The Proposed International Convention on the Service of Documents Abroad," 51 *A.B.A.J.* 650 (1965).

[13] See *Cong. Rec.* April 14, 1967, Senate, pages S. 5221-2.

The Convention deals effectively with the problems inherent in *notification au parquet.*

Articles 15 and 16 of the official English text of the Convention read:

Article 15

Where a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and the defendant has not appeared, judgment shall not be given until it is established that

(a) the document was served by a method prescribed by the internal law of the State addressed for the service of documents in domestic actions upon persons who are within its territory, or

(b) the document was actually delivered to the defendant or to his residence by another method provided for by this Convention, and that in either of these cases the service or the delivery was effected in sufficient time to enable the defendant to defend.

Each contracting State shall be free to declare that the judge, notwithstanding the provisions of the first paragraph of this article, may give judgment even if no certificate of service or delivery has been received, if all the following conditions are fulfilled:

(a) the document was transmitted by one of the methods provided for in this Convention,

(b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,

(c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

Notwithstanding the provisions of the preceding paragraphs the judge may order, in case of urgency, any provisional or protective measures.

Article 16

When a writ of summons or an equivalent document had to be transmitted abroad for the purpose of service, under the provisions of the present Convention, and a judgment has been entered against a defendant who has not appeared, the judge shall have the power to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled:

(a) the defendant, without any fault on his part, did not have knowledge of the document in sufficient time to defend, or knowledge of the judgment in sufficient time to appeal, and

> (b) the defendant has disclosed a *prima facie* defence to the action on the merits.
> An application for relief may be filed only within a reasonable time after the defendant has knowledge of the judgment.
> Each contracting State may declare that the application will not be entertained if it is filed after the expiration of a time to be stated in the declaration, but which shall in no case be less than one year following the date of the judgment.
> This article shall not apply to judgments concerning status or capacity of persons.

France did not sign the Convention until January 12, 1967, and has not yet ratified it. But, without waiting even to sign the Convention, the French Government, by its Decree No. 65-1006 of November 26, 1965,[14] unilaterally effected a complete change in the structure of *notification au parquet,* in conformity with the philosophy and purposes of the Convention.

It will be recalled that the United States Congress, in Act No. 88-619, unilaterally and without any requirement of reciprocity, adopted internal domestic legislation revising and improving the procedures for international judicial assistance to foreign tribunals and litigants.[15]

Both the House and the Senate expressed themselves in favor of such unilateral non-reciprocal domestic legislation and stated that

> It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.[16]

Where possible, this is obviously a superior system. It provides a uniform system of procedure, whereas the Convention or treaty technique, limited to particular countries, may result in a multiple and non-uniform system.

Further, the action of the French government adopts in principle the suggestion of the United States delegation to the Hague in 1956, that the Hague Conference should not confine itself exclusively to the drafting of international Conventions, but should also

[14] The text of the Decree appears in 55 Sirey, *Revue critique de droit international privé* 115 (1966) and *Journal Officiel,* 2 December 1965, p. 10664.

[15] See Amram, "Public Law No. 88-619—New Developments in International Judicial Assistance in the United States," 32 *Dist. of Col. B.A.J.* 24 (1965), 36 *Penna. B.A.Q.* 383 (1965).

[16] U.S. Code Cong. & Adm. News, 88th Cong. 2d Sess. Vol. 2 p. 3783 (1964).

state the content of the Conventions in the form of uniform or model laws, which individual countries might adopt as internal legislation.[17]

The new French procedure, which became effective July 1, 1966, closely approaches the system of the Hague Convention and the Anglo-American system. It provides a true balance of the interests of both plaintiff and defendant.

The technique used is interesting. No change was made in the provision for the service of the process at the *parquet* of the Procureur-General. But revolutionary changes were made in the procedures under Article 69 which must *follow* the delivery of the documents at the *parquet* before the plaintiff may have a default judgment, and in the extent of the rights given the defendant to open a default judgment, if entered.

In the first place, the new decree provides a new set of time schedules within which a non-resident defendant may appear and answer. The outside world is divided into two zones, Europe and the rest of the world. Using as a base the normal time for appearance of a defendant in a domestic case, a non-resident defendant in another European country is given an additional month and a defendant elsewhere in the world, including the United States, is given an additional two months in which to appear.[18]

In a world of air-mail communications, these long additional periods should provide ample time for actual notice to every defendant whose address is known to the plaintiff.

As a further assurance of actual notice, it is now required in Article 1033-3 that the *huissier*, the official process-server, must, on the same day that he files the paper with the *parquet*, send an actual notice air-mail registered to the defendant, with return receipt requested.[19] Failure of the *huissier* to do his duty may lead to an

[17] Reese, 5 *Am. Jour. Comp. Law* 612 (1956); Nadelmann, 51 *Am. Jour. of Int. Law* 618 (1957).

[18] New Article 1033(2) of the Code reads:

". . . (2) The time for appearance, for stay of execution and for appeal are enlarged:—

(1) One month for those who reside in Europe.

(2) Two months for those who reside in other parts of the world."

[19] New Article 1033(3) par. 1 of the Code reads:

". . . (3) In case of the service of the writ at the *parquet* in accordance with Article 69(9 or 10), the process-server must, not later than the same day, send a certified copy of the writ by registered mail, return receipt requested, to the defendant residing in an overseas territory or in a foreign country, unless in the latter case the foreign State objects thereto."

action for damages against him by an injured defendant,[20] similar to an action in the United States against a sheriff or marshal on his official bond.

The registered letter may not be universally effective because certain countries, Germany for example, object to such legal notification by mail in their territory.[21]

A second and more effective protection of the defendant's interests is contained in the novel provisions of paragraph 3 of Article 1033-3, which reads:

> Further, if it does not follow from proof of receipt that the registered letter was received by the addressee, the time will be extended until the day of the delivery of the writ to the defendant.

This means that the plaintiff must either (a) submit the executed return receipt or (b) submit proof that the writ has reached the defendant through official channels.

The draftsmen of the Decree recognized that these privileges given the defendant can permit him to paralyze the proceedings by evading acceptance of the registered letter and by evading service of the writ. To checkmate this, the Decree permits the court to enter judgment by default, even though there is no proof of service, if three months have expired since the date the writ was delivered to the *parquet,* but only if the court specifically finds:

> . . . that all useful efforts have been made to bring knowledge of the writ to the defendant.[22]

For example, the plaintiff may show that the defendant has moved and left no forwarding address or that the foreign State will not permit the writ to be served in its territory for reasons of "sovereignty or security." [23]

From the viewpoint of the plaintiff, there may still be serious

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[20] Normand, p. 397 n.

[21] *Ibid.*, p. 398. The French government is publishing a list of States where this form of notice is unavailable.

[22] New Article 1033(3) par. 4 of the Code reads:

> "If there is no proof of such delivery within three months from the service at the *parquet,* the court may enter judgment if it makes an express finding that all useful efforts have been made to bring knowledge of the writ to the defendant. In an appropriate case, the court shall prescribe supplementary efforts to be made and shall enter such auxiliary orders as will properly protect the rights of the parties."

[23] Normand, pp. 400-1. And *cf.* Article 13 of the Hague Convention.

problems. It may take a long time to get such proof of the unsuccessful efforts in the foreign State and of the unlikelihood of success in the future. The communications through diplomatic or consular channels are always slow.

The Decree provides a modicum of relief for the plaintiff. If he is unable to produce satisfactory proof of "all useful efforts" so that the court will not grant him judgment by default, the court is to direct alternative methods of service to be tried. This may include the important and effective technique of permitting service to be made by the local process server abroad in conformity with his local law of service, thereby incorporating all the foreign devices for substituted service of a writ.[24]

The general principle behind all these provisions is the identical principle of the Hague Convention, namely, the court is not to enter judgment by default against a non-resident defendant unless the defendant is actually informed of the pending action or unless, after a fixed reasonable minimum period, this has failed, despite all reasonable efforts to do so. This effectively balances the interests of the plaintiff and the defendant.

However, the Decree is not identical with the Hague Convention. Formal ratification of the Convention by France will have the following effects, *inter alia,* with respect to actions that fall within the scope of the Convention:

> (1) The machinery to effect the service abroad will originate with the *huissier* himself, not with the officials of the *parquet,* and the *huissier* will be responsible for carrying them out.
> (2) The broad provisions of Article 15(1) of the Convention, when combined with Articles 8 to 11, will provide a more flexible and wider system of service than the 1965 Decree.
> (3) The three months minimum period, fixed in the Decree for the possible entry of a default judgment, will be doubled to a six months minimum period.

None of these is a matter of major significance.

French procedure also requires the service of notice of the entry of judgment in order to start the running of the time limit for appeal. If the defendant has appeared in the action, either personally or by counsel, this presents no problem, because the notice can be served upon the attorney of record or at the place in France which the defendant will have designated in his appearance.[25]

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[24] *Ibid.*, p. 402.

[25] Article 9(2) of the Code now reads:

The problem of service of notice of the entry of judgment will arise where the judgment is entered by default against a non-resident who has not appeared either in person or by counsel and who has no address for service in France. Under the prior practice, it was uncertain whether the time to appeal ran from the date the notice was served at the *parquet* or only from the date the notice was actually received by the defendant abroad.[26]

Now, under the 1965 Decree, the general rule with respect to notice of the entry of a default judgment, and the time limit for appeal, will parallel the rule with respect to the service of the original writ.[27]

The *huissier* will serve the notice at the *parquet* and at the same time will send the registered letter notice to the defendant abroad. When three months have passed following the notice to the *parquet,* and no proof of actual notice can be produced, the plaintiff may ask the court for an order permitting execution, which the court will award if the plaintiff proves that "all useful efforts have been made to bring knowledge" of the judgment to the defendant.

If the court is not satisfied, the court will prescribe the further efforts which must be made to give the defendant actual notice.[28]

". . . (2) A defendant residing abroad must designate an address in France. If he does not do so, the court will inform him that notice of the entry of judgment will be given him by notice to the clerk of the court."

[26] Normand, at page 412, cites illustrative decisions for both positions. New Article 445-2 of the Code reads:
". . . (2) . . . Further, if the defendant resides in a foreign country, the time for appeal, increased as provided in Article 1033-2, will run from the day of the service upon the defendant's solicitor or, if he has no solicitor, at the address designated, or finally, as provided in Articles 9(2) and 422(2), upon the clerk of court."

[27] New Article 158-3, par. 1 of the Code reads:
". . . (3) If the defendant resides in a foreign country, the time to stay execution shall run from the day of the service at the *parquet,* subject to the provisions for postponement set forth in Article 1033-3 (1, 2 and 3)."

[28] New Article 158-3, par. 2 of the Code reads:
". . . If the proof of the service upon the defendant is not received at the expiration of three months from the date of the service at the *parquet,* the plaintiff may submit an order permitting execution to the chief judge, who will satisfy himself that every useful effort has been made to bring knowledge to the defendant, or who will otherwise prescribe supplementary efforts to be made. If granted, the order permitting execution will certify that the time for stay of execution has expired."

Ratification of the Hague Convention by France should create no difficulty with respect to these provisions of the 1965 Decree. Article 16 of the Convention does not bear directly on the internal rules of the signatory States regarding the service of notice of the entry of default judgments. Article 16, however, does provide broad equitable grounds for the opening of default judgments within the discretion of the court and for the extension of the normal periods of time within which a defendant may move for relief against a default judgment.

Several conclusions may be drawn from this brief study of the 1965 Decree.

First, France has shown the merit of the suggestion made by the United States delegation to the Hague Conference [29] that, in appropriate situations, some or all of the conclusions of the Conference can be handled by internal legislation as distinguished from treaties. Much of the basic concept of the Hague Convention, as drafted in October 1964, appears in the Decree dated one year thereafter.

Second, the new Decree shows a close affinity to Anglo-American concepts of "due process" in its careful protection of the rights of the defendant. Whether or not a judgment entered by default, even under the protection of the Decree, will be entitled to recognition in the United States is a separate problem dependent upon the special rules for the recognition of foreign judgments, and upon whether the French court is deemed to have "jurisdiction." But even if the judgment is not entitled to international recognition, this will not for a moment detract from admiration of the efforts made to provide "due process" in the service of writ.

Third, the 1965 Decree will remain in full force and effect, for certain kinds of litigation, even if France formally ratifies the Hague Convention. The Convention provides, in Article 1, that it does not apply where the address of the defendant is unknown. Also, it ap-

[29] See Nadelmann, "The United States at the Hague Conference on Private International Law," 51 *Am. Jour. Int. Law* 618, 619 (1957); Nadelmann and Reese, "The American Proposal at the Hague Conference to use the Method of Uniform Laws," 7 *Am. J. Comp. Law* 239 (1958); Nadelmann, "The Hague Conference on Private International Law Ninth Session," 9 *Am. J. Comp. Law* 583, 587 (1960); Amram, "Uniform Legislation as an Effective Alternative to the Treaty Technique," *Proc. Am. Soc. Int. Law* (1960) page 62; Nadelmann and Reese, "The Tenth Session of the Hague Conference on Private International Law," 13 *Am. J. Comp. Law* 612, 614 (1964); Nadelmann, "The United States Joins the Hague Conference on Private International Law," 30 *Law and Contemporary Problems* 291, 302 (1965).

plies only to "civil and commercial matters," and therefore may exclude, *inter alia,* quasi-criminal matters that may be handled in the procedural form of civil litigation. Further, Article 16 of the Convention does not apply to judgments concerning "status or capacity of persons" and the important areas of divorce and adoption are not included within its coverage. Accordingly, the Decree will retain validity and importance in all events.