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Insights

PARIS LITIGATION GAZETTE ISSUE 5

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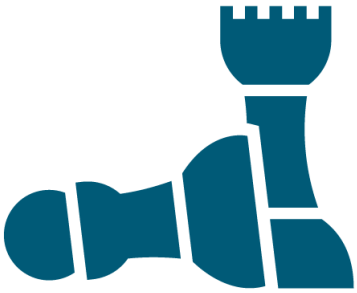

COMPETITION DISTRIBUTION

IGNORANCE OF THE EXCLUSIVE JURISDICTION RULES REGARDING RESTRICTIVE COMPETITION PRACTICES: PLEA OF INADMISSIBILITY OR PLEA OF LACK OF JURISDICTION? THE COURT OF CASSATION RECONSIDERS ITS POSITION

On 18 October 2023, the Commercial Division of the French Supreme Court (Court of Cassation) issued a noteworthy ruling, in which it judged its own case law on restrictive competition practices to be "*complex*", a source of "*legal uncertainty*" and inconsistent with "*the objectives of the proper administration of justice*" (Com., 18 October 2023, No. 21-15.378).

Under Articles L. 442-4, III, and D. 442-3 of the French Commercial Code, disputes relating to restrictive competition practices are assigned to eight specialised courts (the Commercial Courts of Marseille, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes). For more than ten years, the Court of Cassation has ruled that failure to comply with these rules was sanctioned by inadmissibility (*see* Com., 24 September 2013, no. 12-21.089).

In this judgment of 18 October 2023, the Court of Cassation decided to "*amend*" its previous case-law: the rules relating to specialised courts become exclusive jurisdiction rules, and not complying with those rules constitutes a plea of lack of jurisdiction that must be raised *in limine litis*.

AN INNOCUOUS CONTRACTUAL DISPUTE LEADING TO A BOLD OVERTURNED CASE-LAW

In November 2014, Airmargali entered into a contract with Home Master Led ("**HML**"), under which HML committed to supply and maintain equipment. The equipment was also subject to a finance

lease agreement concluded the same day by Airmargali and Location automobiles matériels ("**Locam**").

In 2017, HML was placed in receivership and then in compulsory liquidation and ceased to fulfil its obligation to maintain the equipment supplied to Airmargali. As the equipment showed serious malfunctions, Airmargali quickly stopped paying the rents owed to Locam for the rental of this equipment. As a result, Locam, deprived of its lease payments, brought an action against Airmargali for payment of these rents before the Commercial Court of Saint-Etienne, the jurisdiction designated by the jurisdiction clause in the contract.

As a counterclaim, Airmargali argued that the jurisdiction clause should be set aside in this case, since Article L. 442-6 of the French Commercial Code (now Article L. 442-1) relating to the sudden termination of commercial relations were applicable. It therefore raised a **plea of lack of jurisdiction arguing that the Commercial Court of Saint-Etienne did not have jurisdiction, as one of the specialised courts** designated by Articles L. 442-4, III, and D. 442-3 of the French Commercial Code should be competent to hear the case.

The Commercial Court of Saint-Etienne declared that it did not have jurisdiction and referred the case to the Commercial Court of Lyon, which is one of the specialised courts designated for hearing restrictive competition practices within the meaning of the French Commercial Code.

The Court of Appeal of Lyon, hearing an appeal by Locam against this judgment, followed the established case-law and considered that the lack of specialisation should be sanctioned by inadmissibility, declaring the counterclaim brought before the Commercial Court of Saint-Etienne inadmissible.

On 18 October 2023, the Commercial Division of the Court of Cassation brought the debate to an end.

THE QUALIFICATION OF LACK OF JURISDICTIONAL POWER LEFT ASIDE: RESTRICTIVE COMPETITION PRACTICES FALL WITHIN THE EXCLUSIVE JURISDICTION OF SPECIALLY DESIGNATED COURTS

In the judgment under review, the Cour of Cassation - this is rare enough to emphasize it - overturned its own case-law, which it describes as a "*complex jurisprudential construction*", resulting in"*confusing solutions that create legal uncertainty for the parties as to which court should hear their actions, claims or appeals*".

Until 18 October 2023, if a claim was brought before the wrong court, it was declared inadmissible and the claimant had to bring that claim again before the right court.

The Court considered that this solution did not correspond to the terminology of new Articles D. 442-2 and D. 442-3 of the French Commercial Code, which refer to the jurisdiction of the specialised

courts (and not to their jurisdictional powers).

The Court concludes that the rule resulting from the combined application of Articles L. 442-4, III, and D. 442-3 of the French Commercial Code designating certain courts to deal with restrictive competition practices, must now be regarded as an exclusive jurisdiction rule.

The Court of Cassation's reversal of case-law is not surprising, since it recently adopted an identical solution regarding Article L. 721-8 of the Commercial Code, which grants jurisdiction to commercial courts specially designated to hear certain collective proceedings (*cf.* Com., 17 Nov. 2021, no. 19-50.067).

WHAT ARE THE PRACTICAL CONSEQUENCES FOR LITIGANTS?

First of all, while a plea of inadmissibility can be raised at any stage of the proceedings, a plea of lack of jurisdiction must be raised *in limine litis*, failing which it shall be inadmissible. Such plea of lack of jurisdiction must also be motivated, or it will otherwise be inadmissible.

Then, depending on the circumstances and on the interdependence of the claims, the court to which the claim is erroneously referred must either (**i**) declare that it does not have jurisdiction and stay the proceedings until the specialised court has ruled on the claim, or (**ii**) refer the case directly to the specialised court.

Finally, contrary to the plea of inadmissibility, the plea of lack of jurisdiction interrupts the limitation period. The Court of cassation is being more protective for claimants regarding restrictive competition practices, who, until now, could see their claims fall under the statute of limitations.

THE FRENCH COMPETITION AUTHORITY IMPOSES HEAVY PENALTIES ON TWO SUPPLIERS FOR ONLINE SALES PROHIBITION PRACTICES

In December 2023, the French Competition Authority (the “FCA”) issued two decisions imposing heavy penalties on suppliers for online sales prohibition practices.

Mariage Frères, active in the premium tea sector, was fined €4 million on 11 December 2023. A few days later, the FCA imposed a €91.6 million penalty on Rolex, the famous luxury watch manufacturer. This is the highest fine imposed in 2023, even though the FCA rejected, for lack of evidence, the objection concerning the resale prices imposed on its retailers, which had been notified to Rolex.

These decisions are a reminder to suppliers of the importance of carefully examining their contractual documentation and auditing their commercial practices, whether in the context of a "free" distribution network or a selective distribution network.

BACKGROUND OF THE DECISIONS

In the first case, Mariage Frères was accused of having prohibited its distributors from selling its products online for more than 15 years. This prohibition was laid down in the General Terms and Conditions of Sale (“GTCs”) governing its "free" distribution network. These GTCs stipulated that :

- From July 2008 to December 2018, Mariage Frères was the only one authorised to distribute the contractual products online;
- As of January 2019, the sale of contractual products on the Internet (i) was subject to a separate agreement, and (ii) "*to a specific request and study by Mariage Frères to validate or not the integration of this additional point of sale into its network of selective retailers*".

In the second case, Rolex was accused of having prohibited its authorised retailers of its selective distribution network from selling Rolex brand products outside their points of sale or by mail order, between 2011 and 2022. This prohibition was set out in two successive versions of the distribution contract, dating respectively from 1977 (and which, at the time, had been the subject of an application for negative clearance to the European Commission, but no action had been taken on this request) and 1999.

Three main findings can be drawn from these two decisions regarding the prohibition of online sales:

The mere presence of clauses prohibiting online sales in contractual documentation is sufficient to establish an unlawful agreement

In both decisions, the FCA points out once again that the demonstration of a voluntary agreement does not require, in the presence of direct documentary evidence, the examination of additional behavioural evidence. It also underlines that a distribution contract or the GTCs are, by their very nature, direct documentary evidence of the existence of an agreement between the supplier and its distributor(s):

- The supplier's invitation is established by the mere dissemination of the contractual documentation containing the prohibition clauses;
- The distributors' acquiescence necessarily results from their acceptance of these documents, from which can be inferred their adherence to the prohibition of online sales.

In the decision regarding Rolex, the FCA also considered that the fact that the majority of distributors interviewed considered that the online sales channel was "*not very appropriate given customer expectations*", did not have commercial websites and were therefore unlikely to sell products online, was irrelevant. The mere contractual prohibition of online sales was indeed sufficient to prove the existence of a anticompetitive agreement.

Although already established in case-law, this solution reminds suppliers of the importance of auditing their contractual documentation, particularly when it is relatively dated, as it was the case

in the Rolex Decision.

Even an indirect ban on online sales is prohibited

According to settled case-law, suppliers shall not restrict the effective use of the Internet by a distributor. This prohibition covers both express prohibitions on selling products online and clauses that indirectly prohibit the use of the Internet as a distribution channel.

In the decision concerning Mariage Frères, the FCA clarified that making online sales subject to prior authorisation by the supplier constitutes an indirect restriction, provided that such a mechanism (i) does not grant resellers the right to sell products online, nor (ii) makes that right subject to compliance with certain specific conditions.

This clarification urges companies to be extremely cautious about any solutions they might be tempted to use to "bypass" the prohibition of online sales.

Legitimate objectives do not justify imposing a general and absolute prohibition of online sales

In the Rolex Decision, the FCA points out that a general and absolute prohibition of online sales is neither justified nor proportionate to the pursuit of legitimate objectives. It is therefore necessary to consider less restrictive alternatives, taking into account the solutions already developed and implemented by competitors. In particular, the FCA notes that :

- The objective of respecting the brand's aura and image during online sales can be guaranteed, through online product presentation standards, as Rolex's competitors do;
- Using blockchain technology to combat counterfeiting can guarantee the authenticity and traceability of purchased products while enabling online sales;
- In order to preserve the brand's image regarding the security of product shipments, it is possible to use carriers that guarantee the security when sending valuables, or to allow customers to collect products purchased online in shops.

Furthermore, in the Mariage Frères Decision, the FCA seems to consider, without explicitly stating it, that it would not even be possible in a "free" distribution network to regulate online sales in any way whatsoever, as such restrictions are not likely to be justified by the need to preserve the prestigious image of the products.

Any restriction on online sales by a supplier therefore requires a prior analysis of the risk it is likely to involve.

CANVASSING BY ELECTRONIC MEANS AND RGPD - CNIL, OCTOBER 12, 2023

Following several complaints filed by individuals concerning difficulties they had encountered in exercising their rights against a broadcasting company that distributes pay-TV offers, the CNIL [(*Commission nationale de l'informatique et des libertés*) which is the French Data Protection Authority], carried out online and off-site inspections of the said company.

On October 12, 2023, the CNIL's restricted panel ordered the latter to pay an administrative fine of 600,000 euros after finding the following breaches of the GDPR:

FAILURE TO OBTAIN CONSENT FROM INDIVIDUALS TO RECEIVE COMMERCIAL MARKETING EMAILS

(Articles L. 34-5 of the CPCE and 7 of the GDPR)

As the company regularly carries out commercial canvassing by electronic means, it was required to obtain the prior consent of the individuals concerned for this purpose.

During the CNIL inspections, the company failed to provide any relevant evidence that it had obtained the prior consent of the individuals targeted during its canvassing campaigns.

First, the standard data collection forms did not mention the entity on whose behalf consent was being collected. In the absence of this information, the persons concerned could not be considered as informed. Indeed, the CNIL emphasizes that informed consent requires full information on the identity of the data collector, and that, "if individuals have indeed given their consent to [canvassing] companies to receive electronic commercial canvassing, they have not validly consented to receive canvassing from the company" in cause.

In addition, the measures implemented by the company with its suppliers to verify the validity of the individual's consent proved insufficient.

FAILURE TO RESPECT THE OBLIGATION TO INFORM

(Articles 13 and 14 of the GDPR)

The CNIL's inspections revealed several breaches of the obligation to inform the data subjects. The company's confidentiality policy was imprecise as to how long personal data would be kept when a user account was created, and did not mention the possibility of filing a complaint with the CNIL. Also, during telephone calls as part of canvassing, the service provider did not systematically provide people with all the information required by the GDPR.

The CNIL notes that the company adjusted its privacy policy during the investigations procedure to address these breaches.

FAILURE TO RESPECT THE EXERCISE OF RIGHTS

(Articles 12 and 15 of the GDPR)

The company did not respond to certain claimants within the one-month period stipulated by the GDPR. It also failed to respond to certain access requests.

The CNIL considers that while these failings "do not reveal the existence of a structural failure to exercise rights", their materiality is constituted.

FAILURE TO PROVIDE A CONTRACTUAL FRAMEWORK FOR PROCESSING CARRIED OUT BY A PROCESSOR

(Article 28.3 of the GDPR)

The processing contract did not include all the mandatory information required by the GDPR. This constituted a breach of the obligation to provide a contractual framework for the processing operations carried out by a processor.

FAILURE TO ENSURE THE SECURITY OF PERSONAL DATA

(Article 32 of the GDPR)

The CNIL found the company in breach of its obligation to ensure the security of its employees' personal data. This failure was characterized by the fact that the storage of company employees' passwords was not sufficiently secure, thus constituting a potential threat to data confidentiality. In this regard, the CNIL points out that "the implementation of a robust authentication policy constitutes an elementary security measure that generally participates in compliance with the obligations of Article 32 of the GDPR".

FAILURE TO NOTIFY THE CNIL OF A DATA BREACH

(Article 33 of the GDPR)

During a data breach that was not notified to the CNIL, certain subscribers’ data was made accessible to other subscribers for a period of 5 hours.

CLARIFICATION REGARDING PASSING-OFF – COURT OF APPEAL OF PARIS, 10/11/2023, N°21/19126

In its ruling dated November 10, 2023, the Paris Court of appeal condemned a company specialized in design, manufacturing and marketing of clothing and accessories for acts of passing-off, ordering payment of €2,000,000 in civil damages to the fashion company Celine.

Indeed, the Court considered that the company had marketed and promoted, bags, and shoes that reproduced the characteristics of products marketed by Celine company wich operates in the field of creation of pret à porter items and luxury leather goods.

A PARTY CAN INVOKE NEW DESIGNS AT THE APPEAL STAGE, NOT TO ESTABLISH NEW CLAIMS, BUT TO DEMONSTRATE THE FRAUDULENT BEHAVIOR OF THE OPPOSING PARTY

At first, the appellant company argues that introducing new designs before the Court of appeal constitutes a maneuver by Céline to circumvent the provisions of Article 564 of the French Civil Procedure Code, which states that new claims in appeal are inadmissible.

However, the Court rejects this argument, emphasizing that these new elements do not constitute new claims within the meaning of Article 564 of the French Civil Procedure Code but rather new evidence aimed at demonstrating passing-off acts. Although Céline seeks higher damages than in the first instance, this does not constitute a new claim since the objective remains the compensation for the damage related to parasitic acts.

Indeed, the Court establishes the principle that "*is not new the claim by which a party increases the amount of its demands as long as it tends to the same end of compensation for the damages related to parasitic acts*."

PASSING-OFF IS CHARACTERIZED

The Court first recalls the definition of passing-off which "*consist, for an economic operator, to place himself in the wake of another to profit, without spending anything, from its efforts, know-how, acquired notoriety, or realized investments*."

Furthermore, the Court states that "*passing-off results from a set of elements considered as a whole. It can arise from copying a product, as long as it benefits from a reputation or notoriety such that marketing a similar product demonstrates the economic operator's intention to place himself in the path of a company. The liability action for passing off acts, which is available to those who cannot claim exclusive IP rights, is not contingent on the existence of a risk of confusion."*

The claimant first aims to demonstrate that the claimed products have a certain notoriety and are considered flagship products, even if specific sales figures are not provided.

In light of those elements, the Court of appeal considers that, despite the absence of detailed sales figures for each product, the provided elements are sufficient to demonstrate that Céline's models are flagship products, enjoying notoriety and representing individualized economic values.

The Court of Appeal then notes that several products were marketed concurrently with those of Céline, or shortly after their launch or presentation during a fashion show. It further observes that the reproduced models mostly originate from a single collection, thus characterizing a range effect. The Court therefore considers that these repeated reproductions cannot be fortuitous.

The appeal Court concludes that the wrongful behavior is characterized by the fact that these acts aims to profit, without financial investment, from Céline's investments and products notoriety, and that the circumstance that the copied products did not achieve commercial success is irrelevant to dissmiss those wrongful actions.

CLARIFICATION ON THE DETERMINATION OF THE FINE IMPOSED ON A COMPANY IN CASE OF BREACH OF AN RGPD OBLIGATION - CJEU, DECEMBER 5, 2023

In its ruling C-807/21 dated December 5, 2023, the Court of Justice of the European Union (CJEU) clarifies the notion of "enterprise" whose turnover serve as basis for the calculation of the administrative fine sanctioning the non-compliance with GDPR.

In the case, a preliminary ruling was referred to the CJEU in the context of a dispute between Deutsche Wohnen SE (DW) and the public prosecutor's office of Berlin regarding the calculation basis of an administrative fine imposed on DW, pursuant to Article 83 of the GDPR, for the violation of certain provisions of Articles 5 and 25 of the same regulation.

The referring court raises the question of whether an administrative fine can be imposed on a legal person in its capacity as the data controller for a violation previously attributed to an identified natural person.

IDENTIFICATION OF THE DATA CONTROLLER

The Court emphasizes initially that the principles, prohibitions, and obligations provided by the GDPR are addressed, in particular, to "data controllers" whose responsibility extends to any processing of personal data they carry out themselves or on their behalf.

Therefore, this responsibility constitutes the basis for imposing an administrative fine in case of a violation of an obligation under the GDPR.

Regarding the definition of "data controller" in Article 4(7) of the GDPR, the Court recalls that it is a broad concept, capable of designating a natural or legal person, a public authority, a service, or any other body that, alone or jointly with others, determines the purposes and means of processing.

Consequently, any person, whether natural or legal, who meets this definition is responsible for any violation referred to in Article 83, whether the violation is committed by the person itself or on its behalf.

In the event that the data controller is a legal person, it must be noted that the latter is responsible not only for violations committed by its representatives, directors, or managers but also by any other person acting within the scope of its business activity and on its behalf.

Furthermore, the CJEU establishes an important principle that no provision of the GDPR allows considering the imposition of an administrative fine on a legal person as the data controller would be be subject to the prior finding that the violation was committed by an identified natural person.

THE NOTION OF “ENTREPRISE” FOR THE CALCULATION OF THE ADMINISTRATIVE FINE

According to the referring court, national doctrine attaches importance to the notion of "enterprise" within the meaning of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). It specifies that the acts of any employee authorized to act on behalf of an enterprise are attributable to that same enterprise.

The CJEU responds that the notion of “enterprise” within the meaning of Articles 101 and 102 TFEU has no impact on whether and under what conditions an administrative fine can be imposed on a data controller who is a legal person.

However, with regard to the calculation of the fine, the supervisory authority must rely on the concept of “enterprise” in competition law, as defined in Articles 101 and 102 TFEU. The Court notes that this concept includes any entity, whether composed of natural or legal persons, engaging in economic activity, regardless of the legal status of that entity and its method of financing. All acts performed by natural persons authorized to act on behalf of an enterprise are therefore attributable to the enterprise itself and are considered acts directly committed by the enterprise.

Thus, the fact that the infringement is committed by a natural person acting in the course of their duties on behalf of an enterprise does not change the calculation method of the fine, which is based on a percentage of the total annual global turnover of the relevant enterprise, viewed as a whole.

This judgment reaffirms the principle laid down by the Guidelines of the European Data Protection Board (EDPB) titled “Guidelines 04/2022 on the calculation of administrative fines under the GDPR”, according to which, when administrative fines are imposed on an enterprise, the concept of enterprise must be considered in light of Articles 101 and 102 of the TFEU.

Indeed, competition law defines “enterprise” as an economic unit rather than a legal unit.

The CJEU case law therefore asserts that, in cases where the data controller is (part of) an enterprise within the meaning of Articles 101 and 102 of the TFEU, the combined turnover of the entire enterprise must be used to determine the upper limit of the administrative fine (see, for

example, *Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR*).

In conclusion, the violation of the GDPR results in the infliction of an administrative fine, whether the originator of the violation is a natural person or a legal person acting as a data controller on behalf of the company, which will be calculated based on the company's or group's turnover.

COMMERCIAL LITIGATION

FIRST RULING ON THE GROUNDS OF THE FRENCH CORPORATE DUTY OF CARE LAW

Consideration of the "societal" dimension of a company's activity is once again at the heart of the news. At a time when the European promotion of corporate social responsibility (ESG) is proceeding apace (transposition into French law of the CSRD directive, agreement in trilogue on the future CSDDD), the Paris judicial court has handed down the first decision on the merits based on French law on the duty of vigilance.

France has long been a forerunner in the field of CSR. In particular, Law no. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies imposes a duty of care on large companies headquartered in France with regard to a wide range of risks linked to human rights and environmental damage that their activity may generate via their subsidiaries and suppliers and subcontractors with whom a commercial relationship is established, in France or abroad.

Six years after the adoption of the French corporate duty of care Law, more and more multinationals in all sectors are being targeted by actions led by NGOs, local authorities and trade unions. In the absence of a substantive ruling on the quality of a due diligence plan, it has not been possible until now to draw up a standard of due diligence, whether in the case of preventive actions aimed at enjoining a company to produce a due diligence plan that complies with legal requirements, or in the case of actions for compensation following the occurrence of damage that a company's duty of due diligence should have prevented.

In its judgment of December 5, 2023 (TJ Paris, 1/4 social, December 5, 2023, RG 21/15827), the Paris Court ordered a major group in the sector of services to (i) complete its due diligence plan with a risk map containing sufficiently concrete and precise elements to enable an understanding of the

risk factors and priority actions to be implemented, (ii) to establish procedures for assessing subcontractors on the basis of the precise risks identified by the risk map, (iii) to supplement the vigilance plan with a mechanism for alerting and collecting reports after consulting the representative trade unions, and (iv) to publish a real system for monitoring vigilance measures. On the other hand, the court did not impose a fine on the injunctions issued, in view of the continuous improvement of the vigilance plan.

In essence, the French court emphasized the degree of precision expected of risk mapping, which must enable the concrete identification of risk factors in order to determine the set of vigilance measures to be implemented. He also emphasized the importance of dialogue with stakeholders, in particular representative trade unions, in the vigilance process. In theory, the parent company is not obliged to draw up the plan in consultation with stakeholders. This should not, therefore, be a reason to incur liability. Indeed, according to Article L. 225-102-4 of the French Commercial Code, the plan is intended to be drawn up with the stakeholders, but does not require consultation or negotiation with them for the creation of the plan or its implementation. On reading the decision, however, one wonders how this part of the article will be interpreted by the courts. It is highly likely, and in line with the spirit of the text, that the parent company will be held liable for not having sufficiently involved stakeholders at all stages of the duty of vigilance (mapping, drawing up the plan, remedying risks, monitoring implementation).

Finally, the judge's role has been clarified. The judge's task is to ensure that "the plan includes concrete, appropriate and effective measures that are consistent with the risk map", and it is specified that the judge has the "power to order the company to draw up a plan", within the framework of the self-regulation process, safeguard measures to be defined by the company in association with the stakeholders, as well as more concrete and effective complementary actions in relation to an identified risk", but he cannot "substitute himself for the company and the stakeholders to require them to introduce precise and detailed measures".

At the dawn of a Europe-wide corporate duty of care, the first ruling on the merits of the French law on corporate duty of care will have a considerable impact on the operational management of companies, both internally and in their value chain.

A MAJOR CHANGE IN CASE LAW REGARDING THE FAIRNESS OF EVIDENCE

In two cases, the French Supreme Court (Cour de cassation) has made an unexpected turnaround in case law concerning the fairness of evidence in civil matters (Cass. AP December 22, 2023, pourvoi n° 20-20.648 and 21-11.330).

In the first case, an employee went to court to contest his dismissal for serious misconduct. To provide evidence of this misconduct, the employer submitted to the judge a clandestine recording of a meeting during which the employee made remarks that led to his dismissal.

The Court of Appeal declared this evidence inadmissible.

As there was no other evidence to prove the employee's misconduct, the appeal court ruled that the dismissal was without real and serious cause.

In the second case, while an employee was absent, a temporary worker had used his computer workstation and learned of a conversation the employee had had in his inbox, in which the employee implied that the promotion the temporary worker had received was linked to his sexual orientation and that of his line manager. The temp forwarded this conversation to their employer. The employee was dismissed for serious misconduct, and then challenged the dismissal in court. In his view, the judge could not take his conversations into account, as their use undermined the principle of fair proof and violated his right to privacy.

The Court of Appeal excluded this conversation from the proceedings.

In both cases, an appeal to the French Supreme Court was lodged, and the question of the admissibility of evidence obtained by unfair means was put to the Court of Cassation.

For the first time, the Cour de cassation ruled that unfair means of proof can be presented to a judge if they are essential to the exercise of the litigant's rights. However, taking such evidence into account must not disproportionately infringe the fundamental rights of the opposing party.

This represents a real turnaround in case law, since until now the Cour de cassation has traditionally ruled in civil matters that "the production of evidence gathered without the person's knowledge or obtained through a maneuver or stratagem is inadmissible" (Ass. plén. January 7, 2011, no. 09-14.316 and 09-14.667; Com. November 10, 2021, no. 20-14.669 and 20-14.670).

To justify this reversal, the Cour de cassation relies on three sets of arguments.

- The ECHR, by virtue of Article 6§1 of the Convention, considers that it is appropriate to carry out a proportionality check between the right whose proof is unfair and the conflicting rights.
- The Cour de cassation has ruled that unlawful evidence is admissible if it is essential to the success of the claimant's claim, and if the infringement of the conflicting rights is strictly proportionate to the aim pursued (Com., May 15 2007, pourvoi n° 06-10.606).
- Lastly, the criminal court cannot exclude evidence on the grounds that it is illicit or unfair.

For all these reasons, the Cour de cassation now accepts that evidence obtained unfairly may be admissible. This admissibility is not automatic, however, and the judge will have to check whether the evidence in question prejudices the fairness of the proceedings. The production of such evidence must (i) be indispensable, and (ii) be proportionate to safeguarding the rights of the party producing it in relation to the rights of the other party.

THE BURDEN OF PROOF LIES ON THE PARTY UNILATERALLY TERMINATING THE CONTRACT

On November 22, 2023, the Commercial Chamber of the French Supreme Court (*Cour de cassation*) reiterated a solution codified in contract law, according to which **the burden of proof lies on the party initiating the unilateral termination of a contract for fault while extending its scope to contracts concluded before October 1, 2016** (French Supreme Court, First Instance Chamber, n°22-16.514)**.**

In this case, a company specializing in the sale of wine had entered into a service contract with a company whose purpose was to seek new investors. This company claimed that the other had been negligent in the performance of the contract and decided to unilaterally terminate the contract before its term. The victim of the termination brought a legal action before the Paris Commercial Court, claiming that the termination of the contract was not grounded.

The Commercial court upheld the plaintiff's claims and ruled that the termination of the contract was wrongful. Then, the Paris Court of Appeal upheld the judgment and dismissed the claim of the company that had initiated the termination. The latter brought the case to the French Supreme Court, arguing that the party suffering the breach had to prove that it had fulfilled its commitments under the contract.

The appeal before the French Supreme Court was dismissed, based on the grounds that "*the seriousness of the conduct of a party to a contract – which is subject to the provisions arising from the Order of February 10, 2016 - may justify that the other party terminating it unilaterally at its own risk. In the event of a dispute, it is up to the party who terminated the contract to provide proof of such conduct*."

As a result, if the unilateral termination may be performed by one of the parties to a contract, the burden of proof of the seriousness of the party's conduct leading to the termination will lie on the terminating party in in the event of a legal action brought by the victim of the termination.

This rule actually now applies to all contracts concluded after October 1, 2016 in accordance with Article 1226 paragraph 4 of the French Civil Code which has been newly created further to the Order of February 10, 2016 reforming the law of obligations.

The particularity of the French Supreme Court's decision at stake lies in the fact that it extends the application of the solution now enshrined in the aforementioned Article 1226 to contracts concluded before October 1, 2016. Under the law prior to the 2016 law of obligations reform, the rule laid down under Article 1226 was the result of a combined application of the "*Toqueville*" (French Court of Cassation, First Civil Chamber, October 13, 1998, n° 96-21.485) case law, which enshrined the right to unilateral termination, and the former Article 1315 of the French Civil Code, according to which "*it is up to the one who claims performance of an obligation to prove it*".

The decision from the French Supreme Court provides helpful textual clarification, confirming that the rule under Article 1226 of the French Civil Code actually aligns with the legal regime governing contracts concluded before October 1, 2016.

While the French Supreme Court's solution is not new *per se*, it is an handy exemple to remind the practical implications for all contracting parties wishing to unilaterally terminate their contract. Indeed, the party initiating the breach will need to make sure to collect and gather evidence in order to justify the seriousness of the alleged breach, in the light of a potential litigation brought by the other party to challenge the termination.

Also, in order to avoid any risks that the judge considers the termination of the contract as wrongful, [which could lead the party initiating the termination to a potential forced execution of the contract and/or the payment of damages], the party must ensure that the alleged fault is serious enough before unilaterally terminating the contract. It should be noted that the seriousness of the fault is not defined under the law and remains subject to the assessment of judges depending on the circumstances of each case (French Court of Cassation, First Civil Chamber, January 4, 1995 n°92-17.858 and July 2,1996, n° 93-14.130).

For example, the "*multiplication of product non-conformities [...] likely to have consequences for public health" may have constituted "serious misconduct on the part of the company*" (French Court of Cassation, First Civil Chamber, September 24, 1995 n°08-14.524). Also, in the case of the termination of a partnership contract, a company which had "*seriously breached the basic quality of its services, and that these serious and repeated breaches* [justified] *the termination of the contract without notice*" (French Court of Cassation, Commercial Chamber, October 20, n°14-20.416.).

For scholars, the level of seriousness required would be assessed according to a "*relatively low standard with no moral considerations, just as the legal regime of the judicial termination of a contract*" (H. BARBIER, *L'exécution et la sortie du contrat* : RDC 2018, n° 115g4 p. 40) but it is actually difficult to establish a serious fault's standard, which may be explained by the fact that each contractual situation is unique.

However, it seems that the seriousness of a co-contractor's behavior could be characterized in the case of a breach which makes it impposible for the other party to perform its own contractual obligations, or in the case of serious misconduct linked to considerations of public order (such as health or economic).

LABOR LAW

NO CARRY-OVER OF ANNUAL LEAVE GRANTED FOR A PERIOD COINCIDING WITH A COVID-19 QUARANTINE PERIOD

CJEU, 14 December 2023, C-206/22

Having been in contact with a person infected with Covid-19, a German employee was placed in quarantine the day before he was due to go on holiday. He then requested that his leave be carried over for the period coinciding with his quarantine, which his employer refused.

The German courts referred the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling on the compatibility with EU law of German case law to the effect that quarantine does not justify the carry-over of paid leave.

In its decision of 14 December 2023, the CJEU ruled that **Directive 2003/88 (which notably deals with paid leave) and the EU Charter of Fundamental Rights "*[do not preclude] national legislation or practice that does not permit the carry-over of days of paid annual leave which were granted to a worker who is not sick in respect of a period coinciding with a period of quarantine ordered by a public authority*, on account of that worker having been in contact with a person infected with a virus*".

First of all, the CJEU points out that the purpose of annual leave, which is to allow workers to rest and enjoy a period of relaxation and leisure, is different from that of sick leave which is to recover from an illness. Thereby, according to CJEU case law, a worker on sick leave during a period of paid annual leave is entitled to carry over his annual leave after his/her sick leave.

However, according to the CJEU, the situation is different in the case of a worker who is not sick but placed in quarantine during his/her period of paid annual leave.

Indeed, the CJEU considers that if a period of quarantine is, like incapacity for work due to illness, an unforeseeable event beyond the control of the worker, the situation of an employee in quarantine is different from that of a worker on sick leave.

Why? Because, contrary to a sick employee who suffers "*physical or psychological constraints caused by the illness*", a non-sick employee who is quarantined may, according to the CJEU, rest and enjoy a period of relaxation and leisure. It is true that quarantine may have an impact on the

conditions in which the employee spends his/her free time, but for the CJEU, it does not in itself affect the employee's right to paid annual leave.

As a result, the CJEU finds that the employer is not required to compensate for the disadvantages arising from an unforeseeable event, such as a quarantine ordered by a public authority, that would prevent its employee from taking full advantage of his/her right to paid annual leave, emphasising, moreover, that Directive 2003/88 "*is not intended to ensure that any event capable of preventing workers from enjoying fully and in the manner they wish a period of rest or relaxation is a reason for granting workers additional leave so as to ensure that the purpose of annual leave is attained*".

WHITE COLLAR

CAN EUROPEAN COMPANIES OBTAIN COMPENSATION FOR THE DAMAGE THEY SUFFERED AS A RESULT OF RUSSIA'S INVASION OF UKRAINE AND THE RELATED ECONOMIC SANCTIONS?

On December 19, 2023, the Council of the European Union approved a new set of sanctions against Russia, the 12thsince the outbreak of the conflict in February 2022. The objective of the new sanctions measures is to impose additional import and export restrictions on Moscow, to fight against the circumvention of sanctions and to eliminate existing loopholes.

While some Members of the European Parliament consider the results of sanctions against Russia to be mitigated, and are calling for the application of sanctions to be toughened, it should be stressed that economic and financial sanctions are a real challenge for European companies, because of the significant losses they generate and the restrictions they place on companies. According to a study published by the *Financial Times* in August 2023, Europe's biggest companies have suffered at least 100 billion euros in direct losses related to their activities in Russia since Vladimir Putin's invasion of Ukraine. In 2023, 176 companies recorded asset depreciations, exchange rate charges and other non-recurring expenses following the sale, closure or downsizing of activities in Russia.

This is the context in which the Netherlands' largest shipbuilder filed a lawsuit against the Dutch government last May. The company is seeking compensation for damages allegedly suffered as a result of sanctions imposed by the European Union and enforced by the Netherlands, an EU member state. The shipbuilder companie had signed contracts with Russian shipbuyers, but these contracts

could not be honored due to the European sanctions, without any compensation being offered to the company by the Dutch government or the European Union.

This legal action has brought a new dimension to legal battles relating to sanctions, by drawing attention to the consequences of the sanctions themselves for companies. Until now, there has been little concrete action aiming to compensate corporate entities for the economic damage caused by economic and financial sanctions.

Indeed, since the beginning of the Ukrainian crisis, efforts to compensate companies for economic damage have focused mainly on damage suffered on the Ukrainian territory. In May 2023, the Council of Europe set up a compensation procedure for companies for all damage suffered on Ukrainian territory as a result of Russia's actions. Companies will be able to declare their losses on the "*Register of Damage caused by the Russian Federation's aggression against Ukraine* ". This register represents the first concrete legal step in the implementation of a formal compensation mechanism for parties who have suffered economic damage in Ukraine. In particular, it provides for compensation for "*loss of property and revenue, and other forms of economic loss*". The first claims for compensation should be able to be submitted in the spring of 2024, according to the agenda set out by the Council of Europe.

However, nothing seems to have been implemented by the European Union to compensate for losses linked to the sanctions it has imposed on its members. Certain countries with strong commercial links with Russia in the maritime sector – such as Greece, Malta and Cyprus – have tried to obtain financial aid from Brussels to compensate for losses incurred as a result of the sanctions, but to no avail.

More successfully, some companies have taken legal action in the insurance field to obtain compensation for their economic losses: for example, an Irish company specializing in aircraft leasing signed an agreement of almost 645 million dollars with an insurance company in full settlement of the compensation claims it had filed.

The Dutch company's legal action to obtain compensation directly from the Member State has not yet been settled, but it is possible that other European companies may follow suit. This could give rise to discussions at the European Union level. A case to follow then...

COMPLIANCE

THE CONSECRATION OF LEGAL PRIVILEGE FOR FRENCH IN-HOUSE COUNSEL (TEMPORARILY) OFF THE TABLE

On 16 November 2023, in a decision No. 2023-855, the French Constitutional Council censured the provision of the Ministry of Justice's 2023-2027 Orientation and Programming Act on the confidentiality of legal advice given by in-house counsels, i.e. the benefit of a French-style "*legal privilege*".

This provision provided for the protection trough confidentiality and unseizability in civil, commercial and administrative proceedings of legal opinion drafted by in-house lawyers to the attention to managers, subject to certain conditions (i.e. the lawyer had to hold a master's degree in law and be able to prove that he or she had attended initial and ongoing training courses in ethics). However, the confidentiality of such advice was not enforceable in criminal or tax proceedings.

In France, the protection of legal advice and the documents on which they are based is only guaranteed by the attorney-client privilege and, in particular, by article 66-5 of law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions (*in personam* approach). In Common law countries, a very different concept prevails, since legal privilege also benefits to in-house counsels, and focuses more on the content of the communication than on its authors or recipients (*in rem* approach).

This distinction between the “attorney-client privilege” and the anglo-saxon notion of legal privilege has been reiterated both by the Court of Justice of the European Union (CJEU, 14 Sept. 2010, Case C-550/07) and the French Court of Cassation (Court of cassation, 1stciv., 3 Nov. 2016, No. 15-20.495).

Under French law, correspondences exchanged between clients and their lawyers is covered by attorney-client privilege (although it may be seized by the judicial and administrative authorities if it does not concern the exercise of the rights of the defence). On the other hand, while in-house counsels are bound by professional secrecy, the documents they draft are not specifically protected.

Admittedly, in a decision rendered on 8 November 2017, the Paris Court of Appeal (Paris Court of Appeal, 8 Nov. 2017, No. 14/13384) shifted towards an *in rem* approach by accepting that emails exchanged between in-house counsels and which synthesis the defence strategy drawn up by a lawyer are protected. However, the legal opinions drafted by in-house counsels are still not protected.

In June 2019, the Gauvain Report had already pointed out that France remained "*one of the few countries where the legal opinions of in-house counsels are not protected*" (*Gauvain Report, Restoring the sovereignty of France and Europe and protecting our businesses from laws and measures with extraterritorial reach*, p. 46), which had already been identified in the past as a loss

of competitiveness of legal departments in France vis-à-vis their foreign competitors (Report of Mr Prada on "*certain factors for strengthening the legal competitiveness of the Paris marketplace*").

Given the ever-increasing compliance obligations imposed on businesses and the growing inquisitorial powers of administrative authorities, it seemed urgent to enshrine a French-style legal privilege.

However, in a ruling handed down on 16 November 2023, the French Constitutional Council – raising the issue on its own motion – ruled that this provision, which "*has no connection, even indirect, with the provisions of Article 19 of the initial bill, relating to the diploma required to enter the legal profession*", was a *legislative rider*.

The Constitutional Council has a strict and severe case law on *legislative riders*, a method consisting of introducing a provision into a text by means of an amendment "*during the debates on the adoption of a law and unrelated to the purpose of the law*", in order to avoid drawing the attention of those who might oppose it.

This censure - which is based exclusively on a technical irregularity and not on the merits of rights of in-house counsel's *legal privilege* - should not lead us to assume that the idea of creating of a French-style "legal privilege" has been completely eliminated, all the more so since a consensus was reached on the subject between the Senators, the Deputies and the Government during the drafting of the Orientation and Programming Act for the Ministry of Justice 2023-2027.

The question of enshrining legal privilege has simply been postponed. In fact, the day after the Constitutional Council handed down its decision, Senator Louis Vogel tabled a bill to enshrine legal privilege for in-house counsels' legal opinions.

Until such time as the "French-style legal privilege" will be enshrined, the issue of protecting the confidentiality of sensitive documents produced by legal departments in civil, commercial and administrative proceedings remains unresolved.

In this respect, a number of good practices should be borne in mind:

- Exchanges between a lawyer and his client are covered by confidentiality (Court of cassation. Com., 4 Nov. 2020, No. 19-17.911). However, it is not sufficient to mention a lawyer in cc of the email in order to benefit from this protection, it is necessary to designate him/her as the addressee (Paris Court of appeal, 8 March 2017, No. 15/17136 and No. 15/7184; Paris Court of appeal, 22 May 2019, No. 18/08865);
- Internal documents exchanged within the company that contain the terms "*a meeting or correspondence with the lawyer*" relating to a defence strategy "*may not be seized*" (Crim 26 Jan 2022, 17-87.359), but it seems essential to clearly identify these documents with the words "CONFIDENTIAL – Synthesis of Avocat/Client exchanges".

RELATED PRACTICE AREAS

- Business & Commercial Disputes
- Litigation & Dispute Resolution
- Employment & Labor
- Intellectual Property and Technology
- Antitrust
- White Collar

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