BERSAY & ASSOCIES
Société d'Avocats

Legal Newsletter

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We are delighted to bring you this latest edition of our legal newsletter.

As in our previous newsletters, this edition features topical legal issues or problems you are likely to encounter.

We alert our readers to the fact that the articles in the newsletter are not intended to provide you with exhaustive information and do not constitute legal advice.

Please feel free to contact us with any comments and/or queries you may have.

This newsletter is also available in French and in Japanese

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COMPANY LAW

An act by an SAS company in violation of its by-laws will not necessarily be invalidated

(Cass. com. May 18, 2010, Société Française de gastronomie v. Société Larzul, no. 09-14.855)

In a ruling dated May 18, 2010, the commercial division of the French Supreme Court *(Cour de cassation)* held that a decision taken in noncompliance with a provision of the bylaws or of the internal rules of a commercial company does not entail its invalidity, unless the provision breached stems from a mandatory rule of law.

In the case at point, the bylaws of a simplified joint stock company ("SAS") established a collegial body the existence of which is not required by the rules governing SAS companies, namely a Board of Directors responsible for overseeing the management of the company. In accordance with the bylaws of the SAS, the Board of Directors should have been comprised of at least four members. Also, pursuant to the terms of the internal rules of the SAS, the number of directors designated by each of the shareholders should have reflected the parity in the allocation of share capital (in the case at point, two representatives on the Board of Directors for each of the two shareholders of the SAS). Yet, after the resignation of one of the two directors representing one of the shareholders, the Board of Directors, reduced to three members, had nonetheless held two meetings even though the quorum requirement had not been met.

The French Supreme Court refused to invalidate the decisions taken at those Board meetings, recalling that, in accordance with §L. 235-1 of the Commercial Code, the invalidity of acts or decisions taken by the decision-making bodies of a commercial company can only result from the breach of a mandatory provision of book II of the Commercial Code or of the laws governing contracts. It indicated that *"subject to the cases where reliance has been made on the possibility, provided by a mandatory provision of law, of contractually amending the rule laid down by it* [e.g., provisions of the bylaws concerning the calling of a Board of Directors' meeting of a limited company (SA), etc.], *non-compliance with the provisions contained in the bylaws or in the internal rules is not punishable by invalidity"*.

This principle had already been laid down and was recently confirmed by the French Supreme Court in a case involving a partnership (*société civile*) (Cass. 3e civ., April 13, 2010, no. 09-65.538; Cass. 3e civ., July 19, 2000, no. 98-17.258), as well as in connection with an economic interest grouping (Cass. com., June 14, 2005, no. 02-18.864). However, this is the first ruling directly on point for SAS.

One sanction that remains possible in case of noncompliance with a provision of the bylaws is asserting the civil liability of the perpetrator so as to obtain redress for the harm or loss sustained and an award of damages.

Insider trading: the prohibition on using insider information is not absolute

(Cass. com. March 23, 2010, no. 09-11.366)

§622-1 of the Rules of the Financial Markets Authority ("AMF") requires any person holding insider information to refrain from using that information by buying or selling the financial instruments to which it relates for so long as the information remains nonpublic. This prohibition relies on an irrefutable presumption of the existence of the offence once its materiality has been established. In such case, the inside trader will only be able to avoid the penalty under this rule by showing proof of a compelling reason.

A French Supreme Court ruling on March 23, 2010 has specified, *a contrario*, what should be understood by a "compelling reason".

In the case at point, during the summer of 2005, following the losses sustained by Cyberdeck company ("Cyberdeck"), its directors had organized a capital increase reserved to Casalva Germany GmbH ("Casalva"), at a price more than two and a half times lower than the market price. Cyberdeck's shareholders had approved this capital increase in November 2005, despite the fact that in October 2005, before the plan to increase share capital had even been made public, the director and sole shareholder of Casalva had sold 1,143,447 shares in Cyberdeck on behalf of Casalva. In view of the price of the capital increase, this disposal allowed Casalva to make a capital gain of €375,161. Considering that insider trading had been established since, first, knowledge of the insider information had been established and, second, that it had been used so as to sell shares on the market, the AMF's enforcement committee entered a fine of €1,200,000 against Casalva's director and sole shareholder.

Casalva's director argued before the French Supreme Court that he had sold the Cyberdeck securities, not out of personal interest, but so as to obtain the funds necessary for the capital increase, itself intended to secure the future of Cyberdeck.

The French Supreme Court rejected his arguments by specifying that: *"inasmuch as the materiality of the offence defined by §622-1 of the AMF's general rules have been established, it is up to the person incriminated on this basis to show that the disputed transaction was justified by a compelling reason".* It

thus approved the position taken by the Court of Appeal, which was that the need to obtain funds so as to subscribe to Cyberdeck's capital increase could not constitute such a reason, even if carried out in an interest that was not personal.

The shareholder-manager of a SARL can vote on his or her compensation

(Cass. com. May 4, 2010, no. 09-13.205)

Pursuant to the terms of §L. 223-19 of the Commercial Code, agreements entered into directly or through intermediaries between a limited liability company ("SARL") and one of its managers or shareholders ("regulated" or self-dealing agreements) are in principle subject to the approval of the general meeting of shareholders, with the manager or the interested shareholder being unable to take part in the vote. Exceptionally, this procedure does not apply to agreements in respect of day-to-day transactions provided they are concluded at arm's length.

The upshot is that if a manager's compensation should be considered a regulated agreement within the meaning of §L. 223-19 of the Commercial Code, then the shareholder-manager should not take part in the vote on its determination.

In a ruling on February 26, 2008, the Poitiers Court of Appeal had denied a request for the invalidation of the decisions taken by a meeting having decided on the compensation of the company's manager, considering that the shareholder-manager could take part in the vote inasmuch as his compensation constituted a day-to-day transaction concluded at arm's length (the same reasoning had been followed by the Paris Court of Appeal in a decision dated January 25, 2007, no. 05-24853). Such a solution did not shield all of the decision concerning the compensation of the managers from invalidity since the "normal" nature of the compensation was subject to challenge.

The ruling entered by the French Supreme Court in this case has practical implications since while validating the decision by the Poitiers Court of Appeal, it substituted the legal rationale by specifying that: "the determination of the compensation of the manager of a limited liability company by the meeting of shareholders not stemming from an agreement, the manager may, if a shareholder, take part in the vote". By simply setting aside the application of the provisions on regulated agreements, the French Supreme Court thus allowed avoiding discussion of the "*normal*" nature of the compensation.

As regards minority shareholders, the means remaining available to them to contest the compensation of a manager – majority shareholder, is that of abuse of majority power.

COLLECTIVE PROCEDURES

Debtor protection or "safeguard" procedure: eligibility of the procedure

(Paris Court of Appeal, pôle 5, ch. 9, February 25, 2010)

The Paris Court of Appeal cancelled decisions opening protection procedures, considering that the debtor companies had not experienced "difficulties" within the meaning of §L.620-1 of the Commercial Code.

This section specifies that: "*a protection procedure* [is created and] *opened at the petition of a debtor (…) who shows difficulties that it is unable to overcome, without being insolvent*".

In the "*Cœur Défense*" case, the Paris Commercial Court had opened protection procedures against the French company Heart of La Défense ("Hold") and its sole shareholder, the Luxembourg company Dame Luxembourg. The main creditor of those companies, a securitized mutual fund (the "FCT"), had filed a notice of third-party opposition against those decisions, considering that the procedure had been instrumentalized so as to frustrate the enforcement of a collateral pledge.

The FCT's main argument hinged on the fact that neither of the two companies could establish sufficiently serious difficulties so as to justify the opening of a protection procedure. Hold did not claim having operational difficulties in its property leasing activity and its sole shareholder was only a guarantor up to the value of its Hold shares, which were covered by the pledge.

The FCT was unsuccessful before the lower court but won its claim on appeal, with the Court of Appeal granting its claim as a creditor and cancelling the decisions opening the protection procedure. The Court observed that Hold could not evidence any "difficulties" within the meaning of §L.620-1 of the Commercial Code since the composition of Hold's shareholding structure was not of a nature to have an impact on its activity.

The Court recalled that the aim of the protection procedure was not to protect the interests of shareholders, but solely the activity of the company.

COMPETITION/DISTRIBUTION

New European Commission regulation on vertical agreements and concerted practices adopted on April 20, 2010

On April 20, 2010, the European Commission adopted Regulation no. 330/2010 which presumes the compliance of vertical agreements (agreements concluded between suppliers and distributors) with antitrust legislation, provided they respect certain thresholds and do not contain any hardcore restrictions (the "Regulation").

This Regulation and the guidelines accompanying it entered into force on June 1, 2010 and remain valid until 2022. However, these rules will not apply to agreements already in force on that date during the transitional period ending on May 31, 2011. This new text aims at more efficiently taking into account the purchasing power of distributors in competitive analysis and at encouraging online sales.

(a) The assessment of the purchasing power of distributors in competitive analysis

The rule laid down in Article 3 of the Regulation sets a second 30% market share threshold below which the block exemption applies.

Under the former regulation, only the market share held by the supplier was to be taken into consideration in determining whether the agreement could benefit from the exemption.

Under the new rule, both the supplier's and the buyer's market share are to be considered when calculating this threshold. What is involved is to take into account the fact that some retailers may wield a level of market power likely to have restrictive effects on competition.

In a press release on April 20, 2010, the Commission announced that the new rules should be beneficial for small and medium-sized enterprises "which could otherwise be excluded from the distribution market". The French Competition Authority, in its press release on April 20, 2010, considered that this new Regulation will assure "more efficient control of mass retail distribution" and is aligned with its priorities, the French Competition Authority having recently initiated self-referrals for opinions on several matters concerning mass retail distribution.

(b) Online sales encouraged by the European Commission

The Commission recalled that online sales cannot be the subject of absolute prohibitions imposed by suppliers on distributors who are members of their network.

The Commission has, however, given indications concerning exceptions to this principle and examples of certain behaviors that can be considered as hardcore restrictions in the sector of online sales (points 52 and 54 of the new guidelines).

Accordingly, any obligation for the distributor to automatically re-route customers located outside their territory, or to suspend transactions by consumers if their credit card data correspond to an address outside the distributor's territory, amounts to a hardcore restriction. The same applies when the manufacturer limits the proportion of overall sales that a distributor may make over the Internet or asks the distributor to pay a higher purchase price for units sold on-line.

The French Competition Authority welcomed these changes, which it considers as being "in the service of the real economy" and guaranteeing "more legal security for the suppliers and distributors practicing it, to the benefit of greater competition by prices".

In a ruling on April 7, 2010, the French Supreme Court's commercial division says that damage to the economy cannot be presumed

(Cass. Com., April 7, 2010, no. 09-12.984)

This ruling was made in relation to three applications for review brought respectively by Bouygues Télécom, SFR and Orange France against a Paris Court of Appeal decision dated March 11, 2009.

The decision of the Paris Court of Appeal was confirming a decision by the French Competition Authority (no. 05-D-65) dated November 30, 2005 (the *Conseil de la concurrence,* renamed the *Autorité de la concurrence*), which had fined these three operators for anticompetitive market-sharing pursuant to §L.420-1 of the Commercial Code and Article 81 of the EEC Treaty (now Article 101 of the EU Treaty).

According to the French Competition Authority, the collusion was characterized by regular exchanges of confidential information relating to the market, between 1997 and 2003, of a nature to reduce the commercial autonomy of each of them and to thereby affect competition on that oligopolistic market and, also, by the stabilization of their respective market

shares around objectives that had been jointly defined between 2000 and 2002.

The French Competition Authority had fined these companies between €16 to €41m based on the first set of facts and €42 to €215m based on the second set.

The French Supreme Court disallowed the arguments of the parties, specifically in connection with the global calculation of the fine and the characterization of the exchanges, with the exception of the argument presented by Orange concerning the amount of the fine.

The Court of Appeal had confirmed that the assessment made by the French Competition Authority of the damage caused to the economy was accurate, considering that the existence of damage to the economy should be "presumed in the case of a cartel".

The French Supreme Court reversed the decision of the Court of Appeal on this point, on the grounds that pursuant to §L.464-2 of the Commercial Code "the amount of the penalty for a practice, having for its object or that may have for its effect to prevent, restrict or distort the free play of competition, must be proportionate to the scale of the damage caused by this practice to the economy" and therefore, "this damage may not be presumed".

In this respect, the French Supreme Court considered that the size of the market and the fact that all of the operators acting on that market took part in the exchange of information were not sufficient elements to gauge the extent of the damage caused to the economy. In its view, *"the price sensitivity of demand"* should have been taken into account in assessing the damage.

INTELLECTUAL PROPERTY / NEW TECHNOLOGIES

Host or publisher? The January 14, 2010 ruling by the French Supreme Court in the Tiscali case

This case involved the unauthorized reproduction of comics on the personal pages of an Internet user displayed on a website operated by Tiscali Media.

Upon discovering this unlawful use, the publishing companies of the comics asked Tiscali to provide them with the identity of the author of the pages. The identification details having proved nonsensical and of no help whatsoever, they sued Tiscali Media in infringement and for breach of §43-9 of the law of September 30, 1986, as amended by the law of August 1, 2000, which requires access providers and hosts hold and store data of a nature to permit the identification of any person having contributed to the creation of content of services provided by them.[1]

In the first-level proceedings,[2] the lower court confirmed the technical function of Tiscali as a hosting provider and found it liable for breach of its legal obligation stemming from the aforementioned §43-9.

The Court of Appeal[3] upheld the first-level decision but went even further by finding Tiscali to have the status of a publisher. The Court effectively considered that *"its intervention cannot be limited to this mere technical service inasmuch as it offers Internet users the possibility of creating their personal pages from its site"* and commercially operates its site by proposing that advertisers place paying advertising space directly on the personal pages, such as the litigious page, on which different ear-space ads appear. Under such conditions, as no longer benefiting from the rules on the exemption from liability of hosts,[4] Tiscali was found guilty of acts of infringement, in addition to having breached its obligation to hold and store data.

The French Supreme Court's ruling, without explicitly using the term publisher, upheld the Court of Appeal's decision by finding that the services

[1] Article 43-9 of the law of September 30, 1986 was repealed by the law dated June 21, 2004 on trust in the digital economy, which frames this holding and disclosure obligation in similar terms.
[2] TGI Paris, 3e ch., 1e section, February 16, 2005.
[3] CA Paris, June 7, 2006.
[4] Article 43-8 of the law of September 30, 1986 provided that hosts are not criminally or civilly liable for the content hosted by them unless, following a referral by a court, they fail to act promptly to prevent access to such content.

provided went beyond mere technical storage functions, with the result that Tiscali could not invoke the benefit of §43-8 of the law of September 30, 1986.

Although this ruling was entered under the aegis of the law of September 30, 1986, now repealed, the solution it came up with remains entirely relevant as does its scope inasmuch as the law on trust in the digital economy, which now governs the obligations and the liability regime of hosts, did not fundamentally call into question the principles that were laid down by the former law.

By confirming the decision which had qualified Tiscali as a publisher and disallowed the application to it of the reduced liability regime applicable to hosts, the French Supreme Court has called into question the separation of the functions of host and publisher, and has fanned confusion which, if confirmed, may prove dangerous for Internet technical service providers.

Trademark and copyright law: restrictive interpretation of copyright assignments

(Cass. com., February 16, 2010, application for review no. 09-12.262)

A ruling made by the commercial division of the French Supreme Court has specified two key points in trademark law.

The first concerns the joint application of copyright law and trademark law in contractual matters. The second concerns the thorny issue of the starting point of the statute of limitations.

1. The first issue that was adjudicated was whether, in the absence of an express provision authorizing the registration of a work as a trademark in an agreement for the assignment of copyright, the assignee could seek trademark registration of the work.

In the case at point, the author of a design had assigned some of his rights to L'Oréal, for the purpose of reproducing it on perfume cases and packaging. L'Oréal subsequently filed a trademark application for the design.

Considering that this application for trademark registration and the display of the design on clothing went beyond the scope of the assignment, the author of the design sued L'Oréal in copyright infringement and breach of the integrity of his work.

In its defense, L'Oréal argued that *"considering the customary practice arising out of the nature of the obligation contracted by the author, who assigned his rights in and to a design in view of its reproduction on cases and packaging of products intended to be commercially exploited, absent an express provision prohibiting this, the filing as a trademark of packaging reproducing such design so as to designate the products for which its reproduction has been authorized does not constitute an act of infringement"* (emphasis added).

For its part, the French Supreme Court, upholding the Court of Appeal's decision, stated that *"no practice can entail on its own, absent an express provision to the contrary, that the assignment of the reproduction rights in and to a work on cases and packaging implies the assignment of the right to register the design as a trademark"*.

The lesson to be learnt from this ruling is that, according to the French Supreme Court, in order for the right to apply for trademark registration to be assigned, it has to be expressly stipulated in the agreement for the assignment of copyright.

Accordingly, this right cannot be implicitly assigned.

2. The second point adjudicated concerned the thorny issue of the point of departure of the statute of limitations on claims in infringement.

§2270-1 of the Civil Code (as drafted prior to the law of June 18, 2008) provided that the statute of limitations of ten years began to run as of the occurence of the injury or harm or the date when the victim became aware of such injury or harm.

By referring to this provision, the Court of Appeal considered that the plaintiff could not have had knowledge of the filing of the application for the litigious trademark upon the date of its registration, but only when he had requested a copy of that trademark from the national trademark office.

The French Supreme Court nonetheless differed, finding that a claim in infringement regarding the registration of a trademark is statute barred after the accomplishment of the trademark registration formalities (covered by §R. 712-23 of the Intellectual Property Code), making this registration public and enforceable against third parties.

This solution, while having the merit of adjudicating a long debated issue that has given rise to contradictory decisions, may seem severe, inasmuch as few people regularly consult the trademark register.

This solution does, however, have the merit of offering stronger legal security inasmuch as it avoids all discussion of proof from such time as effective knowledge of the disputed registration is established.

The new statute of limitations (brought down to 5 years, pursuant to the terms of §2224 of the Civil Code) requires increased vigilance and regular monitoring of the trademark register.

REAL ESTATE LAW

A lessor cannot assert provisions of leases departing from the status of commercial leases so as to defeat the lessee's commercial property rights

(Cass. Civ 3ème, April 8, 2010, no. 08-70.338)

Under §L.145-5 of the Commercial Code:
"When the lessee takes possession of the premises, the parties may depart from the provisions of this chapter [on the status of commercial leases] *provided that the total term of the lease or of successive leases does not exceed two years."*

In the case at point, upon the expiration of an initial lease with a term of 23 months entered into with a trading company, a lessor had signed a new lease departing from the rules on commercial leases for a term of 23 months with the majority shareholder of that same company, which continued to operate its business out of the leased premises under the same name. At the end of this second lease, the lessor entered into yet another such lease with the same company with a term of 23 months.

The French Supreme Court sanctioned this fraudulent course of conduct by the lessor by authorizing the lessee to assert the status of a commercial lease, despite the fact the lease had waived such status.

Mandatory depollution of a classified facility by the departing commercial lessee

(Cass. Civ. 3ème, May 19, 2010, no. 09-15.255)

The physical return of leased premises by a lessee does not necessarily constitute the legal return of the premises, specifically when the lease covers a facility that is classified in view of the protection of the environment.

In such case, the lessee will only be deemed to have returned possession of the leased premises once it has satisfied, as the "last operator", its depollution obligation.

Pursuant to a ruling on May 19, 2010, the civil division of the French Supreme Court specified that this depollution obligation also applies to a lessee whose lease has been terminated by notice of nonrenewal served by the lessor.

In the instant case, the lessee, who had been served notice to quit by the lessor, accompanied by an offer to pay a termination indemnity, operated a garage with a service station. Following receipt of the notice, the lessee had vacated the premises without complying with the provisions of the regulation dated June 22, 1998, requiring it to permanently neutralize the facility.

Insofar as the lessee only satisfied these provisions one year after having left the leased premises, the Court confirmed that it was liable to pay an occupancy indemnity until the date when it evidenced having come into compliance with the provisions of that regulation.

Precisions as to the definition of subcontractors

(Cass. 3ème civ., April 14, 2010, no.°09-12.339)

Pursuant to the terms of law no. 75-1334 of December 31, 1975, the main contractor is required to present to the project owner (i.e., the client) any subcontractors on whom it relies for the performance of the contract in view of having their terms of payment accepted and approved.

If the main contractor breaches this obligation, the project owner, upon discovering the presence of a subcontractor on the work site, is required to serve notice on the main contractor to present the subcontractor to it (§14-1).

Otherwise, the project owner's liability will be incurred and the latter may be ordered to pay damages to the subcontractor, corresponding to the balance of the contract for which the subcontractor has not been paid.

A contractor may benefit from this protective status if meeting the criteria defining a subcontractor set forth in §1(1) of the law: *"Within the meaning of this law, subcontracting is the operation whereby a contractor entrusts pursuant to a subcontract and under his liability, to another person called the subcontractor, performance of all or part of the 'enterprise contract' or of all or part of a public procurement contract entered into with the project owner".*

In application of that provision, a ruling by the 3rd civil division of the French Supreme Court on April 14, 2010 reaffirmed this definition of a subcontractor by further clarifying it.

In the context of the performance of a contract, a main contractor had entered into a subcontracting agreement with a firm for the manufacture of piles in cement. This firm had been accepted and its terms of payment approved by the project owner.

However, the main contractor made a mistake when it laid down the piles and had to order new piles from its subcontractor. A second contract was thus entered into.

Subsequently, the main contractor was placed into liquidation. The project owner paid the subcontractor

under the first contract, but refused to pay the sums corresponding to the new order.

The Court of Appeal found against the project owner who, having had knowledge of the presence of the firm on its site, should have required that it be presented to it in accordance with §14-1 of the law.

The French Supreme Court reversed the decision, however, on the grounds that in the scope of the new order, the firm who manufactured the new pile could not be deemed a subcontractor of the contract initially entered into between the project owner and the main contractor.

Indeed, the Court considered that the new order corresponded to a new contract that had for its purpose, not the works defined in the contract initially entered into between the project owner and the main contractor, but rework due to the mistake in their placement by the main contractor.

Accordingly, a firm is only a subcontractor if it can show that the work entrusted corresponded to performance of part of the work covered by the main contractor's agreement and not simply repairs of mistakes made by the main contractor.

EMPLOYMENT LAW

Acknowledgement of *de facto* termination and breaches by the employer

(Cass. Soc., March 30, 2010, no. 08-44236)

In this case, an employee had acknowledged the *de facto* termination of his contract of employment by his employer on the grounds that the employer had failed to respond to his request for the validation of his external job placement plan within the time period imparted by the plan to safeguard employment ("*Plan de sauvegarde de l'emploi*"). The French Supreme Court found a breach by the employer but considered that it was not of a nature to prevent the pursuit of the contract of employment.

Indeed, according to the employment division of the French Supreme Court, only a *"sufficiently serious breach"* is of a nature to justify acknowledgement by the employee of the termination of his or her contract of employment, which then produces the effects of an unfair dismissal (i.e., without real and serious cause).

Typically, this type of breach will be characterized when the employer imposes on the employee a modification of an essential condition of the contract of employment, such as compensation *(for another recent ruling, see Cass. Soc., March 24, 2010, no. 08-43996)*.

The term of office of a trade union representative ends upon each renewal of the works council

(Cass. Soc., March 10, 2010, no. 09-60.347)

Hitherto, the courts have considered that the term of office of trade union representatives to a works council was independent of that of elected members and that the former were thus appointed for an indefinite term, in the same way as trade union delegates.

In its ruling dated March 10, 2010, the French Supreme Court now considers that the term of office of trade union representatives to the works council ends upon the renewal of the elected members of that body. The term of these two offices are now aligned.

As a result, *"any interested person"* (the employer in the same way as other trade union organizations) may seek acknowledgement of the expiry of the term of office of a trade union representative remaining in place following the election of the elected members of the council, without it being possible to assert the limitation period of 15 days pursuant to R. 2324-24 of the Labor and Employment Code in connection with

the contestation of the regularity of the election or of the designation of trade union representatives.

This solution should be applied even if, unlike in this case, the trade union who had appointed the representative has retained elected members on the council following the new vote. The trade union should thus make a new appointment, of the same or another person.

However, it is not clear whether this solution can be transposed to companies with a headcount of under 300 where trade union delegates, who are designated without any limitation in time serve, by law, as the trade union representatives to the works council.

Disciplinary procedure: prior misconduct can no longer be invoked as the basis for a new disciplinary measure

(Cass. Soc., March 16, 2010, no. 08-43.057)

An employer who has knowledge of acts of misconduct by an employee is required sanction them all at the same time. The employer may not decide to sanction only some of them and subsequently sanction others even if not statute barred. By notifying a first sanction, the employer implicitly recognizes that the other acts do not warrant a sanction. In such case, the employer is considered as having *"exhausted all of its disciplinary power"*.

This decision does not, however, call into question the possibility for the employer to take into consideration previously sanctioned behavior in support of a new sanction, in case the employee persists in his or her wrongful course of conduct or commits new acts of the same nature, provided the earlier sanction is not time barred (after 3 years) or amnestied.

In addition, the French Supreme Court's ruling does not prevent the employer from sanctioning acts subsequent to the earlier sanction or which, although earlier, had not been known to the company at the time.

Part-time work: payment of overtime versus replacement with a rest period?

(Cass. Soc., February 17, 2010, no. 08-42.828)

Despite a widely observed practice, the French Supreme Court finds that in the absence of a legal provision contemplating it, an employer cannot replace the payment of overtime carried out by a part-time worker by granting the latter rest time.

The solution thus differs from that for a full-time employee for which the law provides, under certain conditions, the possibility of substituting a salary increase by a compensatory rest period, in case of the accomplishment of overtime.

Personalized placement agreement without an economic rationale: what compensatory notice allowance?

(Cass. Soc., May 5, 2010, no. 08-43.652)

In our latest *Employment Newsflash,* reference was made to several rulings whereby the French Supreme Court required the employer to present the economic rationale of the contemplated termination of an employee's contract of employment, by no later than the time when the latter signs up for a personalized placement agreement ("CRP"). Otherwise, the termination will be considered as unfair dismissal (i.e., without real and serious cause).

In case a CRP is signed up for, the amount corresponding to a maximum period of two months notice should not be paid to the employee, but to the Employment Division, in the form of a specific placement allowance. When the notice period that is customarily due to the employee is more than two months, the employer is required to pay the employee a compensatory allowance corresponding to this higher fraction.

Pursuant to the terms of this new ruling, the French Supreme Court decided that, when the CRP has no rationale (notably absent the indication of its economic rationale), the employee is entitled to the compensatory notice allowance of which he was deprived to the benefit of the Employment Division, as well as to the corresponding paid leave.

This decision can be compared to cases where the employee has acknowledged the *de facto* termination of his or her contract of employment for causes warranting such acknowledgement, or successfully contests his dismissal for unfitness. In fact, in these cases too, even if the employee has not carried out his or her notice period, the employer is required to pay a compensatory allowance, by way of an additional sanction.

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AREAS OF LEGAL PRACTICE

- **MERGERS & ACQUISITIONS**

Engineering of takeovers and deal structuring, legal due diligence, restructuring operations, joint ventures, obtaining necessary administrative permits and licenses, drafting and negotiation of documentation (letters of intent, sale & purchase agreements, warranties that assets and liabilities are as stated, bank guarantees, shareholders' agreements, etc.), merger deals, takeovers of companies in difficulty or in the framework of insolvency procedures.

- **CAPITAL INVESTMENTS AND LBOS**

Representation of investment funds, issuers, targets and company officers, during the due diligence, advisory and negotiation processes

- **COMPANY LAW**

Asset and equity transactions, capital increases, issuance of composite securities (notes convertible or repayable in shares, share subscription warrants, investment certificates, priority dividend shares etc.), stock option agreements, company founder share plans, temporary business combinations, management fees and cash management agreements, changes to charter/by-laws and legal secretariat services.

- **SECURITIES LAW**

IPOs and preparatory work, drafting of prospectuses, legal secretariat services for listed companies, relations with market authorities, securities litigation.

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Advice on loan and financing agreements, warranties/guarantees, syndication, banking regulations, financing of acquisitions and structured asset financing (particularly of real estate).

- **COMMERCIAL CONTRACTS / ECONOMIC LAW**

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Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

- **COLLECTIVE PROCEDURES**

Alert, restructuring and reorganization procedures, amicable composition and ad hoc representation procedures. Court-ordered reorganization, continued operation, sale and continuation plans, liquidation.

- **COMPETITION LAW (FRENCH AND EU)**

Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. Representation before the competition authorities and courts in cartel, anti-competitive practices, abuse of a dominant position and unfair competition. Advice on merger control (conduct of feasibility studies, preparation of notification files, negotiation with the national and Community control authorities), and on State aids/subsidies.

- **IT LAW**

Development and integration of software, licenses, assignments and other software contracts, facilities management, maintenance of IT systems and software, appraisals of the compliance of IT services, anti-piracy fight.

- **ELECTRONIC COMMUNICATIONS**

Regulatory domain; construction of networks, co-localization of facilities, agreements and general terms of supply of services, access and interconnection agreements, judicial or administrative litigation (against the decisions of the regulatory authority).

- **INTERNET**

Creation and hosting of websites, affiliation, partnership, audit of websites, application for and defense of domain names, market shares, online auctions, ASP licenses.

- **MEDIA**

Advertising (protection, operation) and marketing; sponsoring; regulation of broadcasting and of electronic communication services (TV, mobile phone TV, Internet TV, video on demand etc.).

- **PROTECTION OF PERSONAL DATA AND PRIVACY RIGHTS**

Relations with the CNIL; specific regulations on electronic communications (geolocalization services, storage of traffic data); breach of privacy rights, defamation.

- **LITERARY AND ARTISTIC PROPERTY RIGHTS, COPYRIGHT AND NEIGHBORING RIGHTS**

Protection and licensing of copyright and neighboring rights; audiovisual (cinema, TV) and multimedia (online and offline video games, cd-roms etc.) production and co-production; motion picture regulations; distribution licenses (TV, merchandizing, video distribution, derivative rights); rights of performing artists, sports law; infringement litigation (customs seizures, infringement seizures, proceedings before civil and criminal courts).

- **INDUSTRIAL PROPERTY**

Advice and litigation in the field of trademarks, patents and/or design and model applications, transfers of technology and/or know-how, unfair competition and passing off.

Wide network of foreign correspondents

The Firm has developed a wide network of foreign correspondents in most industrialized countries and in some developing countries.

ISO 9001

The Firm was the first Paris law firm to obtain ISO 9001 certification back in 1998.

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