



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

Contesting of delegations of authority in *sociétés par actions simplifiées*

Several recent Court of Appeal rulings (in particular, CA Versailles, 14th div., June 25, 2008, CA Versailles 5th div., Sept. 24, 2009 and CA Paris, 2nd div., Dec. 3, 2009 and Dec. 10, 2009) dealing with the validity of delegations of authority within a simplified joint stock company (*société par actions simplifiée* or "SAS") have held that a delegation of authority within an SAS, to the benefit of a General Manager (*Directeur Général*), Assistant General Manager (*Directeur Général Délégué*), or any other person – whether a third party or not – is only enforceable against third parties to the SAS if and when (i) the by-laws expressly provide for such a delegation of authority and are on file with the competent registry, and (ii) such delegation of authority is mentioned on the company's short-form certificate of incorporation (K-bis form).

Any act concluded in an SAS by a person other than its CEO (*Président*) on the basis of a delegation of authority that does not comply with these formal requirements can thus be held invalid.

General Managers or Assistant General Managers, as corporate officers, hold their authority not pursuant to a delegation of authority from the CEO of the SAS but from their appointment and the corresponding declarations made with the Registry of Companies (Registre du Commerce et des Sociétés or "RCS"). Since their authority is inherent to their corporate office, Courts of Appeal seem to confuse the concept of an executive and non-executive General Manager (i.e., salaried or independent).

These decisions, in employment law cases, have added conditions for validity of delegations of authority in an SAS which do not exist in *sociétés anonymes*.

While waiting for the Supreme Court to make known its position in this respect, the safest strategy to follow is (i) respect the formal requirements (registration with the RCS and express provisions in the company's bylaws) set by the appeals court judges so as to avoid any risk of invalidity of acts or instruments entered into by a person other than the CEO, such as decisions to fire employees of an SAS, or (ii) have the CEO sign all acts and instruments binding the company.

Company law news: briefs

Scope of a commitment to support a subsidiary contained in a letter of intent

A parent company cannot transform a strict performance duty (*obligation de résultat*) it has entered into toward a bank by sending a second letter of intent downgrading its commitment to a best efforts duty (*obligation de moyen*) (Cass. com., Jan. 19, 2010).

Insider Trading – Privileged Information

Information that the earnings of a listed company will outperform market expectations constitutes privileged information since such information is specific, objective, non-public and likely to have a significant impact on the trading price (CA Paris, div. 7-5, Feb. 23, 2010).

Director's liability to shareholders: distinct personal harm

As a shareholder is not a third party with respect to the company, it is dispensed from having to prove a fault separable from the duties of a director (*dirigeant*) in order to assert that director's liability. However, it is nonetheless required to prove personal harm distinct from that sustained by the company (Cass. com., March 9, 2010).

Right-of-first-refusal arrangements: contribution of securities

A right-of-first-refusal provision covered the cases where an agreement's signatories would "contemplate selling" their securities.

The Supreme Court considered that such provisions should be interpreted strictly.

A contribution of securities to a company thus falls outside the scope of application of that right-of-first-refusal which exclusively governs sales (Cass. com. Dec. 15, 2009).

Dispute in case of disposal of corporate rights: price setting or arbitration provision

A memorandum of understanding providing for calculation of the additional sale price by a third party in case of disagreement should be construed as a price-setting provision and not as an arbitration provision, as long as the third party estimator's duties involve perfecting an incomplete contract by making a factual determination and not by making a legal determination.

The importance of this qualification lies in the avenues of recourse that are available. While an arbitral award is subject to appeal, a decision by a third-party estimator is not (Cass. com. Feb. 16, 2010).

SAS: invalidity of a share put option

While the courts authorize share put options in case of dismissal of a salaried shareholder, this type of covenant should be construed not as a termination arrangement but as a squeeze-out arrangement which in an SAS must be stated in its bylaws to be legally valid. Absent such a provision in the bylaws, such a share put option is unlawful and will be held null and void (TGI Paris March 4, 2009 div. 9-2 RG 07/17033).

An employee dismissed for serious misconduct cannot be deprived of the benefit of his or her stock options

In case of dismissal for serious misconduct, denying the dismissed employee the right to exercise his or her stock options constitutes a prohibited financial penalty that may not be stipulated in a stock option plan (Cass. soc. Oct. 21, 2009).

BANKING LAW

Banker's advisory duty

Case law has progressively created a duty for bankers granting loans/credit facilities to warn inexperienced borrowers of the risks of indebtedness associated with excessive borrowing.

The liability of the bank can be asserted if three conditions are met:

- 1) the borrower is "uninformed", which is determined, regardless of whether the borrower is a private individual or a professional, based on the latter's ability to measure the risk taken and on the complexity of the transaction;
- 2) the borrowing is excessive, meaning that it leads to indebtedness insofar as it exceeds the financial capacity of the borrower;
- 3) the banker fails to alert the borrower to the risk of indebtedness resulting from the granting of the loans, by previously examining the feasibility of the project being financed and the financial capacity of the borrower.

In recent months, several decisions of the Supreme Court have specified the liability rules applicable to claims against bankers for breach of this advisory duty.

➤ **A decision by the commercial division of the Supreme Court dated Oct. 20, 2009 (no. 08-20.274) first specified the definition of the harm arising out of a breach of this duty.**

It held that "*the harm arising out of breach by a financial institution of its advisory duty should be construed as a loss of an opportunity not to contract*".

The Supreme Court thus reversed the ruling of the appellate court which, in finding the lender liable to pay damages equal to the amount of the debt, had deemed that the harm for the borrower consisted in having to repay the loan that was granted to him. This solution necessarily postulated that had the banker duly performed his duty, the borrower would not have entered into the agreement, when in fact the borrower is always free not to follow the advice he receives.

- **In a decision dated Nov. 19, 2009 (no. 08-13.601), the first civil division of the Supreme Court specified the conditions under which banks incur liability.**

The Supreme Court confirmed that the banker's advisory duty exists only when the loan granted is excessive.

It suffices for the loan granted to match the financial capacity of the borrower for the bank to be dispensed from this duty.

- **In two other decisions from Nov. 2009 (no. 08-70.197 and no. 07-21.382), the Supreme Court specified the rules regarding proof of breach by bankers of their advisory duty.**

In cases involving breaches by bankers of their advisory duty, the burden of proof is reversed. In a decision dated Nov. 17, 2009 (no. 08-70.197), the commercial division specified that the burden of proving whether the borrower was experienced or not lies with the bank since it is up to the latter to show that it was justified in not giving such warning.

In a second decision dated Nov. 19, 2009 (no. 07-21.382), the first civil division stated that it was also up to the bank to prove that the loan was consistent with the borrower's financial capacity. However, the fact that the first loan repayment dates have been met without difficulty will generally be relied upon as a *posteriori* proof that the loan was consistent with the borrower's capacity.

To furnish proof thereof, the banker will have to show that he granted the loan on the basis of the information requested by him and on which he can rightfully rely. In this respect, a decision of the first civil division dated Dec. 8, 2009 (no. 08-14.848) held that: "*an uninformed borrower does not have grounds to accuse the bank of breaching its advisory duty when such borrower has acted in bad faith forwards the bank by inciting it to grant him the loan*". The borrower's bad faith thus operates to override the banker's breach of duty.

- **In a latest decision dated Jan. 26, 2010 (no. 08-18.354), the commercial division of the Supreme Court specified the point of departure of liability claims against bankers for breaches of their advisory duty.**

The Supreme Court held that: "*The statute of limitations of a claim in liability against the banker runs from the date on which the harm occurred, or the date on which the victim became aware of it, if the victim which establishes that he did not have prior knowledge; the harm resulting from a breach of the advisory duty which consists in the loss of an opportunity not to contract, is manifested as soon as the loan is granted*".

In practice, the borrower becomes aware that a loan is excessive and accordingly that his or her banker may have failed in his duty on the date of the first repayment default. If the default takes places several years after the loan is granted, the loan cannot be considered excessive since the initial repayments were made without any difficulty.

INSOLVENCY

Insolvency: clarification of definition of current liabilities

In application of §L.631-1 Comm. Code, judicial receivership proceedings (*redressement judiciaire*) are opened against any debtor having a commercial activity who, unable to meet his current liabilities with his available assets, becomes insolvent.

Pursuant to a decision of Feb. 9, 2010 (Cass. com., Feb. 9, 2010, no. 09-10.880), the Supreme Court held that a claim for payment whose final outcome depends on legal proceedings that are underway is a contested claim, which as such is not certain and may not be included in the current liabilities of the debtor.

In that case, one of the creditors of the company had sought to place it in judicial liquidation on the basis of a claim that was the subject of proceedings before the Court of Appeal, following a decision in summary proceedings that had been appealed by the debtor company with the result that the outcome of the claim had yet to be definitively adjudicated.

The Commercial Court issued a stay while awaiting the final decision of the judges on the merits as to the validity of the claim.

The Court of Appeal had reversed that ruling and ordered the opening of judicial receivership proceedings against the debtor, considering that the decision in summary proceedings obtained by the creditor gave the contested claim the certain, liquid and payable nature required and thus warranted its inclusion in the current liabilities of the debtor company.

This decision was quashed by the Supreme Court, which held that such a claim does not meet the criterion of certainty inasmuch as its final outcome depends on proceedings on the merits that are pending.

COMPETITION/DISTRIBUTION

First application of concept of significant imbalance within the meaning of §L. 442-6, I-2 of the Commercial Code

§L. 442-6, I- 2 Comm. Code provides: "*subjecting or attempting to subject a trading partner to obligations creating a significant imbalance in the rights and obligations of the parties (...) incurs the liability of the perpetrator and obliges him to make redress for the harm caused*".

The Commercial Court of Lille has handed down the first decision applying this provision (introduced by the law on the modernization of the economy ("LME") dated Aug. 4, 2008), in which it has ruled against a distributor on the basis of manifest imbalance (T. com. Lille, Jan. 6, 2010, no. 2009-05184, Min. éco v. SAS Castorama France).

Upon referral by the Minister of the Economy, the Commercial Court of Lille found that some of the practices implemented by the distributor corresponded to an unfair commercial practice within the meaning of §L. 442-6, I- 2 Comm. Code. It thus found that the following practices characterized a significant imbalance:

- 1- monthly prepayments on deferred discounts,
 - 2- imposition of a late payment penalty at a per diem rate of 1% of the amount paid,
 - 3- the automatic and unilateral nature of the wire transfer payment, without any possibility of set-off,
- and
- 4- absence of modification of prepayments during the course of the contract in case of a drop in the volume of business.

Using as a pretext the shortening of payment terms introduced by the LME, which set the maximum payment terms applicable as of Jan. 1, 2009, the distributor had modified the terms of payment of the prepayments of deferred discounts (or "year-end rebates") so as to improve its own cash flow. The distributor had thus instituted monthly prepayments payable at month-end for the payment of conditional rebates.

The difference between the terms of payment applied by the distributor and those required for the prepayments (2 to 3 months) was unfavorable to the supplier, such payment terms being neither symmetrical nor the subject of any genuine negotiation.

The obligation to make payment by bank wire transfer, without any possibility of setting off invoices, heightened the imbalanced nature of the terms of payment when the distributor reserved the right, for its part, to carry out setoffs. The court further observed that the "*choice of how to make payment should remain a negotiable economic right*".

The court observed that the practice of monthly prepayments had negatively impacted the working capital of the suppliers, which was not offset, and created a significant imbalance in the rights and obligations of the parties to the benefit of the distributor.

The court of first instance also considered that the fact of imposing, without discussion, penalties for delay on its suppliers at a per diem rate of 1% of the amount paid qualified as usurious, and by also carrying out an automatic set-off of such penalties against sums owed by the distributor to its suppliers, had aggravated the imbalance in the relationship to the detriment of the supplier.

In addition, the distributor, by organizing such practices, failed to comply with the branch agreement (specifying exceptions to certain rules) applicable to it.

Lastly, the terms of purchase did not contain any provision providing for any modification of the amount of the discounts in case of a change in the volume of business. Requests for credit notes were sent by the distributor in advance, without any subsequent "true-up" of those amounts with the actual volume of business.

The significant imbalance between the parties was reinforced by the fact that the practices were neither reciprocal nor symmetrical since the terms of payment applicable to the supplier and to the distributor were not the same.

The Court ordered the cessation of such practices and fined the distributor €300,000, compared to the fine of €2m requested by the Minister of the Economy.

The Minister of the Economy, by serving nine complaints before the close of 2009, has shown her commitment to enforcing §L. 442-6, I- 2 of the Commercial Code ("Comm. Code"). The decision that will be entered on appeal, as well as those in the eight other cases, will further clarify this rule of law which relies on subjective notions (such as "*imbalance*" or its "*significant*" nature).

INTELLECTUAL PROPERTY / NEW TECHNOLOGIES

Notions of producer and author in §L. 132-31 of the Intellectual Property Code

A contract commissioning advertising work should be formalized in writing pursuant to the provisions of §L. 132-31 of the Intellectual Property Code (the "IPC").

Under §L. 132-31 IPC "*the contract between the producer and the author entails, unless otherwise stipulated, assignment to the producer of the exploitation rights in the work, provided the contract specifies the separate remuneration payable for each mode of exploitation, based on the significance and nature of the medium*". In the event these conditions are not met, the ordinary rule of contract law governs the contractual dealings between the parties.

The issue of the legal qualification of the "producer" and especially of the "author" has been hotly debated in the courts and by legal theorists for several years now. Some consider that the author of the advertising work must necessarily be an individual and that the producer should thus be considered to be the advertising agency. Conversely, others argue that the author can also be a legal entity and that the producer should thus be deemed the advertiser.

In a landmark decision dated Dec. 8, 2009 (Cass. civ. 1^{ère}, Dec. 8, 2009, appeal no.: 08-18360), the first civil division of the Supreme Court issued its opinion on who qualifies as the producer and as the author under §L. 132-31 IPC.

In the case before it, a transportation company had commissioned an advertising agency to carry out all of its advertising campaigns. The terms of their agreement had been formalized in a quote and in an invoice. At the end of the contract, the agency, complaining that its customer had used the works it produced, without its authorization, whereas it considered that the exploitation rights had not been assigned to the customer, sued its customer for payment of exploitation rights under §L. 132-31 IPC.

In that case, the Court of Appeal of Lyon had considered that §L. 132-31 IPC applied to the contractual dealings between the parties, considering that the customer qualified as the producer within the meaning of that section, and that no contractual provision restricted the possibility of exploiting the advertising work the customer had commissioned from the advertising agency.

In quashing that ruling, the Supreme Court clearly stated that §L. 132-31 IPC does not apply to the relations between the advertiser and the advertising

agency (legal entity), since that provision solely governs "contracts granted by the author, physical person, in the exercise of his exploitation right".

Google heavily sanctioned for having digitized hundreds of copyright-protected books

In a particularly high-profile case, the Court recognized that Google was guilty of infringement by digitizing hundreds of protected literary works and by making them available to the public via its platform "Google Book Search", on the website "www.books.google.fr".

Google was ordered to pay €300,000 in damages. It was also ordered to cease and desist from continued exploitation of such works, subject to a fine of €10,000 per day in case of noncompliance.

Beyond the high damages awarded, this decision is important for having adjudicated on two issues of law that were accessory to the main claim.

1. The first hinged on the standing to sue of professional associations/unions.

In the case at point, the complainants included, besides the publishing houses assignees of the rights to the works reproduced without authorization, Syndicat National de l'Édition ("SNE") and Société des Gens de Lettres ("SGDL").

Google contested their standing to sue, arguing that they were not assignees of the rights to the digitized works.

The Court nonetheless considered that SNE had standing insofar as §L. 331-1(2) IPC provides that organizations defending professional interests "are entitled to institute legal proceedings to defend the interests protected pursuant to their charter".

As regards SGDL, the Court declared that it had standing inasmuch as, even if only six works in its catalogue had been digitized, in application of §31 of the Code of Civil Procedure "a declared association is entitled to seek redress at court for harm caused to the collective interests of its members".

2. The second and thornier issue hinged on the applicable rule of law. This is an issue that often arises in complex offences, namely disputes involving cross-border infringement (which is very often the case over the Internet).

Google argued that only US law applied to the dispute, on the grounds that "the law applicable in the field of complex offences committed over the Internet is that of the State on whose territory the litigious acts took place, unless a particularly close

connection can be established with France, which would be impossible in the instant case inasmuch as the digitization process for the works concerned took place in the United States".

This is a delicate argument as it involves making implying a determination as to how to interpret the terms "on those territory the litigious acts took place".

Indeed, this territory can be understood as that where the reproduction (serving as the basis for the offence of infringement) took place (in this case the United States), or else as the place where the harm was produced (here, the broadcasting in France in the French language).

The Court nonetheless considered that French law applied, since it presented a "sufficient connection to France", on the grounds that:

- the dispute concerned works of French authors digitized so as to be made accessible to French Internet users from French territory,
- the majority of the complainants were established in France,
- the domain name enabling access to the website "www.books.google.fr" has an ".fr" extension,
- "www.books.google.fr" is in French.

It now remains to be seen whether the Court of Appeal of Paris, before whom the case has already been brought, agrees with this analysis.

Liability of a referencing service provider

In a decision dated March 23, 2010, the European Court of Justice (the "ECJ") ruled (a) on the lawfulness of the use as keywords, with a referencing service provider, of signs corresponding to trade marks, without the consent of their proprietors, and (b) on the resulting liability of the referencing service provider.

In that case, Google, which offers a referencing service called "AdWords", was sued by several companies, including Louis Vuitton, for infringement of their respective trade marks.

Indeed, when a user performs a search on the basis of one or more words corresponding to these trademarks, the search engine displays advertising links to sites offering imitations of the products or competing products.

(a) *On the use of keywords corresponding to third-party trade marks in the context of an online referencing service:*

Recalling that the use of signs corresponding to trade marks, without the consent of their proprietors, infringes the exclusive right held by the proprietor when made by the user in the context of the user's own commercial communication, the Court considered that this was not the case of a referencing service provider. In effect, the latter allows its clients (advertisers) to use signs which are identical with, or similar to, trade marks, without itself using those signs.

This being the case, only advertisers commit trade mark infringement by using the signs of a competitor to propose similar or identical products or services, in the context of their own commercial communication.

The trade mark proprietor is thus entitled to prohibit that use by the advertiser if it is liable to have an adverse effect on one of the functions of the mark.

In that case, the ECJ considered that the function of indicating the origin of the mark has been adversely affected when the advertiser does not enable an average Internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark, this being a matter for the assessment of the national jurisdictions.

The proprietor of the trade mark is also authorized to prohibit an advertiser from using a sign that is identical to his trade mark when such use adversely affects the advertising function of the mark, as a factor in promoting sales or as an instrument of commercial strategy.

In the instant case, the ECJ considers that the use of a sign that is identical to a third party's trade mark in the context of a referencing service such as Google AdWords is not likely to adversely affect the advertising function of trade marks. The "free" display of the website of the proprietor of the trade mark among the highest positions of the list of "natural" results provides visibility for the Internet user of the goods or services of the proprietor.

(b) *Liability of the referencing service provider:*

Directive 2000/31/EC of June 8, 2000 ("electronic commerce") limits the liability of intermediary service providers in the information society.

The ECJ considers that an online referencing service provider may benefit from the exemptions thereunder provided it acts as a neutral intermediary with a merely technical and passive role. This implies that the service provider has neither knowledge nor control over the information which it stores.

It is up to the national courts to determine whether a referencing service provider's liability may be limited on this basis.

In contrast, the ECJ stressed that Google, as part of its referencing activity, plays a role in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords a factor that is likely to call into question the benefit of such limitation of liability.

In a nutshell, the liability of advertisers may be incurred, while that of the referencing service provider may only be incurred in cases where it has played the role of an active intermediary controlling the data which it stores.

REAL ESTATE LAW

CONSTRUCTION LAW

Project manager's liability incurred in case of hidden subcontracting

Pursuant to the terms of §14-1 of Act no. 75-1334 dated Dec. 31, 1975 on subcontracting, if the project owner has knowledge of a subcontractor on the building site that has not been presented to it and whose terms of payment it has not approved, it must give notice to the main contractor to obtain the approval of such subcontractor and have the subcontractor's terms of payment approved.

Otherwise, the project owner's liability is incurred.

In such a case, can the project owner implead the project manager who also had knowledge of the presence of such subcontractor at the building site?

In a first decision in 2008, the Supreme Court considered that a project manager, who had informed the project owner of the presence of a subcontractor on the building site, at a time when the project owner still had the possibility of regularizing the subcontractor, could not incur liability (Civ. 3^{ème}, March 12, 2008, 07-13.651).

In a new decision on Feb. 10, 2010, the 3rd Division of the Supreme Court reiterated its position by finding a project manager liable for breach of his advisory duty, as not having alerted the project owner in a timely manner as to the presence on the building site of an unauthorized subcontractor whose terms of payment had not been approved.

In that case, the project owner had commissioned a real estate complex comprising a hotel and stores. He had entrusted the "roof cover" work package to a contractor, which had subcontracted the supply and installation of the Luzern roofing slate as the apparent roof.

As the main contractor had been placed in judicial receivership, the subcontractor sued the project owner to collect payment of the remaining balance due to it on the basis of §14-1 of the Act of Dec. 31, 1975.

The project owner impleaded the project manager in the proceedings.

The Supreme Court confirmed the holding by the Court of Appeal of Chambéry on Nov. 25, 2008, considering that the project manager, who had not informed the project owner of the presence of the subcontractor in a timely manner, should indemnify the project owner, to an extent to be determined by the judges on the merits.

In the two Supreme Court rulings of 2008 and 2010, the project manager had been entrusted full project management responsibility, including responsibility for directing and coordinating work, and it fell within the project manager's duties to alert the project owner of the presence on the building site of a hidden subcontractor.

In a nutshell, when a project manager who has a full project management role fails to alert the project owner in a timely manner of the presence of a hidden subcontractor, the project owner who has been ordered to indemnify the subcontractor under §14-1 of the Act dated Dec. 31, 1975 may implead the project manager so as to be held harmless.

COMMERCIAL LEASES

Special rules on the continuance of commercial leases underway

The reform introduced by the order dated Dec. 18, 2008 has ended the controversy as to the combined application of §L. 622-13, L. 622-14 and L. 631-14 Comm. Code as regards the continuance of a lease subject to the rules on commercial leases.

Previously, the lessor could serve notice on the judicial receiver requesting him to adopt a position on the continuance of the lease and obtain its termination in the event of the receiver's failure to respond.

The Dec. 18, 2008 order excluded this possibility for judicial protective or receivership proceedings (*procédures de sauvegarde ou de redressement*) opened since Feb. 15, 2009.

However, the issue of the effectiveness of such notice remained unsettled for proceedings opened since Dec. 1, 2006, in view of the ambiguous solution given in this respect by Act no. 2005-845 dated July 26, 2005.

In a landmark decision by its commercial division dated March 2, 2010 (Com. March 2, 2010, no. 09-10.410), the Supreme Court resolved the issue by finding that, in the case of a tenant placed in judicial receivership during that period, the service by the lessor of a notice on the judicial receiver requesting the receiver to adopt a position on the continuance of the lease is ineffectual and that the lease is not terminated automatically in case of failure to respond to that notice.

In that case, by decision dated Nov. 8, 2006, the lessee of the commercial premises under a renewed lease had been placed into judicial receivership. The lessor had served notice on the official receiver to adopt a position as to the continuance of the lease by letter dated Dec. 20, 2006.

Date when notice of termination must be given

The Act of Aug. 4, 2008 amended the wording of §L. 145-9 Comm. Code with respect to the date for giving notice. Henceforth, *"leases for premises (...) are only terminated by the effect of a notice given for the last day of the calendar quarter and at least six months in advance"*.

On Jan. 28, 2010, the 18th division of the Civil Court of Paris specified the scope of application of this provision, considering that it only applied in case of tacit extension or renewal.

In that case, the commercial lease became effective on Feb. 16, 2004, had a term of nine years, and provided for the possibility of termination every three years for the lessee alone, by giving seven months prior notice.

The lessee served extrajudicial notice of termination on July 6, 2009, indicating that *"the lease agreement expressly provides that the lessee shall have the possibility of notifying termination upon the expiry of each three-year period, by extrajudicial process served at least six months before the expiration of the three-year period underway"*, citing the very terms of the Act of Aug. 4, 2008, and the notice was given for Feb. 15, 2010.

While the date on which the notice was served was not at issue, the actual document had been served to the lessor's representative, and not to the lessor, and was thus found to be invalid.

In that case, the Civil Court of Paris held that: *"the new provisions of §L.145-9 of the Commercial Code, stemming from the Act of Aug. 4, 2008, as regards the date when notice of termination must be given, when the contractual timeline is not that of a calendar quarter, apply in case of tacit renewal of the lease, but not when notice of termination is given at the end of the three-year period"*.

EMPLOYMENT LAW

Harassment

Employers are under a strict duty of security

In two cases (*Cass. Soc., Feb. 3, 2010, no. 08-44019; Cass. Soc., Feb. 3, 2010, no. 08-40144*), two employees had suffered sexual and moral harassment at the hands of other employees.

Each of the employers too, in both cases, had taken measures to put an end to such conduct – in particular by putting distance between them – as soon as they learned of such conduct. The employees considered that the employment contracts had been terminated due to breach by their employer.

The Supreme Court recharacterized their resignation as a dismissal without real and serious cause, considering that the employers had breached their strict duty to guarantee security as regards the physical and mental health of their employees.

Moral harassment and recommendations of the occupational doctor (*Cass. Soc., Jan. 28, 2010, no. 08-42616*)

In this ruling, the Supreme Court considered that the fact that an employer had failed to modify the duties of an employee, despite the prescriptions and recommendations of the occupational doctor, characterized moral harassment.

In the case at point, the employee worked as a shelf manager which implied, according to the employer, lifting heavy weights. Yet, following a workplace accident, the occupational doctor had considered that the employee was unfit to carry heavy weights.

The employer failed to take such recommendations into account and made several proposals to the employee for different positions, but which were lower level and also incompatible with the recommendations made by the occupational doctor.

Workplace health

Restructuring and strict security obligation (Cass. Soc., Feb. 17, 2010, no. 08-44298)

Following a restructuring, an employee's health condition significantly deteriorated.

Although the employer had been alerted to the causal link, it failed to take any measure to ensure her recovery. The employee was ultimately declared unfit for her position by the occupational doctor.

In this respect, the Supreme Court considered that the restructuring had placed significant pressure on the employee, including the deterioration of her working conditions.

On that basis, the Court ruled that the employer had breached the strict security obligation it was under as regards the protection of the health and safety of that employee.

Collective negotiations

A federation of trade unions can form a union branch (Cass. Soc., Jan. 13, 2010, no. 09-60155)

In this decision, the Supreme Court stated that a federation of trade unions ("*union de syndicats*") has the same civil capacity as a trade union ("*syndicat*"). It also considered that a trade union's membership in a federation enables the latter to rely on the members thereof so as *inter alia* to form a union branch.

As a result, a federation of trade unions, in the present instance the Confédération autonome du travail (CAT), may create a union branch ("*section syndicale*") and appoint a trade union representative for that branch, even in the absence of any members in the establishment concerned.

Clarifications on the representative nature of trade unions during the transitional period under the Act of Aug. 20, 2008 (Cass. Soc., March 10, 2010, no. 09-60246 and no. 09-60065)

In these two decisions, the Supreme Court provided clarifications on the assessment of the representative nature of trade unions affiliated to one of the 5 national federations after the date of the Act of Aug. 28, 2008 ("*Loi portant rénovation de la démocratie sociale*").

Since Aug. 21, 2008 and until Aug. 21, 2013, the 5 main trade union organizations (CGT, FO, CFDT, CFTC, CFE-CGC) benefit from an irrefutable presumption of representativeness on a national level. During this transitional period, any trade union having been affiliated to one of those organizations prior to the Act dated Aug. 20, 2008, benefits from a presumption of representativeness within the company until the organization of new professional elections within the company.

But what about unions that became affiliated to them after that date?

In these two decisions, the Supreme Court also extended this presumption, during the transitional period, to trade unions that became affiliated to one of the 5 organizations at a later date.

In that aim, the Court recalled that access to collective negotiations corresponds to a constitutional principle enshrining trade union freedom. It is thus up to those unions that became affiliated at a later date to confirm their representativeness by obtaining sufficient votes at the next professional elections.

Termination of contract of employment and individual right to training (DIF)

Special care should be given to the mandatory DIF references:

1/ The dismissal letter must indicate the number of individual training hours acquired by the employee since failure to do so necessarily harms the employee (Cass. Soc., Feb. 17, 2010, no. 08-45382).

2/ The work certificate is strictly required to mention the remaining number of individual training hours acquired, the amount corresponding to that balance, and the competent collection body (OPCA) (Decree no. 2010-64 dated Jan. 18, 2010, J.O. dated Jan. 19, 2010).



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.

• **BANKING AND FINANCE**

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**

Advice and litigation with commercial contracts, i.e. service, sale, distribution, concession, franchise, commercial agent agreements, distributor/supplier relations, general terms of purchase/sale, commercial partnerships, manufacturing and subcontracting agreements, business sale agreements, management leases, consumer law, public and private procurement contracts.

• **LABOR AND EMPLOYMENT LAW**

Advice and litigation work in collective and individual disputes as well as in social security law and criminal labor law.

• **INTERNATIONAL LITIGATION / ARBITRATION**

Litigation and arbitration work covering all facets of business, company and securities law, as well as insolvency procedures and white-collar crime. Representation at all stages of the dispute, from pre-litigation to litigation before judicial or arbitral courts, protective measures and enforcement

• **REAL ESTATE LAW**

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.

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ISO 9001

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

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