



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 that you are likely to encounter.

We draw our readers' attention 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

Sanction against communicating inaccurate market information: applies even in the absence of intent

(Cass. Com. 15 June 2010, No. 09-14968)

Article 632-1 of the Financial Market Authority ("AMF") Regulations forbids any person from "*knowingly disclosing or communicating information (...) which gives or is likely to give inaccurate, imprecise or misleading information about financial instruments (...) if this person knew or ought to have known that the information was inaccurate or misleading*". Failure to abide by this regulation is likely to incur a financial sanction from the AMF.

A ruling handed down on 15 June 2010 by the French Court of Cassation (*Cour de Cassation*) has clarified, however, that the sanction against communicating inaccurate market information does not require any proof of intent.

In the case in point, in October 2004 as part of its plan to raise funds by issuing shares with warrants, Prologue Software communicated information suggesting that following this securities issuance and the subsequent exercising of the attached warrants, its liquidity problems would be solved once and for all. However, on 2 November 2004 the company announced it was no longer able to meet its repayment obligations. The AMF Sanctions Commission fined the company and its manager on 28 February 2008 a total of €100,000.

In an attempt to exonerate himself, the manager of Prologue Software argued before the French Court of Cassation, that he had been acting in good faith.

The Court of Cassation dismissed his defence on the grounds that the provisions of article 632-1 of the AMF Regulations "*do not require any proof of intent*". The Court of Cassation therefore held that negligent behaviour is included within the scope of the violation, stating that anyone who communicates information is under a duty to verify its accuracy. Wherever the author of a communication "*ought to have known*" that the information being communicated was incorrect, a violation may be found regardless of whether there was any knowledge of the inaccuracy.

It should be noted however that this applies only to the **communication** of information, meaning primary information originating from the issuer or the issuer's manager.

On the other hand, **distribution**, which involves a third party rendering public information that it did not create, will only be sanctioned if it was done "*knowingly*", in other words if the distributor was aware that the information was inaccurate.

Conditions for invoking the personal liability of managers towards shareholders: a simple fault is enough

Cass. Com. 9 March 2010, Nos. 08-21.547 and 08-21.793, No. 294)

For the first time, the commercial chamber of the French Court of Cassation has concluded that "*if shareholders wish to seek reparation for damages that they have personally suffered by invoking the liability of directors and the managing director, the faults of which the directors are being accused does not need to have been intentional, of particular severity or inconsistent with the normal exercise of their corporate responsibilities*".

Gaudriot, a company listed in May 2000 on the new market which has now been replaced by Alternext, had increased its capital three times by means of a public issue of shares, the last of which was in July 2002.

An audit in December 2003 revealed an irregularity in the "products still to be invoiced" line item of the accounts for the 2002 financial year, which resulted in a significantly over-estimated turnover.

After the company was put into court-supervised reorganization and following the adoption of an asset disposal plan, the company's listing was removed by Euronext in 2005. Having suffered injury in relation to this reversal of fortune, certain shareholders then served proceedings on the former Chairman of the Board and on the company's former Directors, citing in particular their right to compensation under article L.225-251 of the Commercial Code. They claimed that they had been motivated to invest in Gaudriot and to hold their shares on the basis of false and misleading information, as well as due to the withholding of information and the presentation of incorrect accounts by the managers.

Ordered by the Court of Appeal to pay damages and interest, the directors then applied to have the ruling quashed arguing that *"the personal liability of a director towards a third party can only be upheld if he has committed a fault separable from his position in office and which can be personally attributed to him; a fault is separable when the director intentionally commits a fault of particular severity that is inconsistent with the normal exercise of his corporate responsibilities..."*

The Court of Cassation rejected this argument.

This decision gives consistency to case law regarding whether there is a need to prove the existence of a fault separable from corporate responsibilities in order to be able to invoke the civil liability of a director towards the shareholders. The Court ruled that this is not the case.

Listed companies: improving the exercise of shareholder rights by electronic means

Decree 2010-684 of 23 June 2010 partly transposes Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

With the aim of improving information for shareholders of companies whose shares are traded on a regulated market (hereinafter "Listed Companies"), the decree sets out a series of measures regarding (1) the on-line publication of information relating to the General Meeting, (2) the content of the meeting notifications published in the BALO (Compulsory Legal Notifications Gazette), and (3) the terms of shareholder representation.

1. On-line publication of information relating to the General Meeting

Listed Companies are henceforth required to have a website in order to fulfil their obligation regarding information for shareholders (new article R.210-20 of the Commercial Code).

1.1. On-line publication of information prior to the Meeting

For an uninterrupted period starting no later than 21 days before the Meeting (15 days during a public takeover bid), Listed Companies must publish the following information and documents on their shareholder information website (new article R.225-73-1 of the Commercial Code):

- Meeting notification,
- The number of existing voting rights and the number of shares comprising the share capital, broken down by share category,

- Any documents that are to be presented to shareholders during the General Meeting (e.g. reports from the Board of Directors or Management Board and Supervisory Board, Auditors' reports),
- The content of any resolutions proposed by the Board of Directors or the Management Board (the text of any resolutions proposed by shareholders must be published immediately upon receipt),
- Distance and proxy voting forms or the single voting form, unless the company sends these forms to all its shareholders.

1.2. On-line publication of information after the Meeting

Within fifteen days after a General Meeting, Listed Companies must use their shareholder information site to publish the result of all votes, including at least the following details (new article R.225-106-1 of the Commercial Code):

- The number of shareholders present or represented at the Meeting,
- The number of shareholder votes present or represented at the Meeting,
- For each resolution, the total number of votes cast, stating the number of shares and proportion of share capital that they represent, the number and percentage of votes for the resolution and the number and percentage of votes against the resolution, including abstentions.

2. Content of the meeting notification published in the BALO

Any Listed Company and any company whose shares are not all registered must publish a meeting notification in the BALO at least 35 days prior to the Meeting (15 days during a public takeover bid). The publication must henceforth contain the following additional information (article R.225-73 of the Commercial Code, modified):

- All information required by article R.225-66 of the Commercial Code (e.g. company name, company form, share capital, head office, date, time and place of the meeting),
- A description of the procedure to be followed by any shareholder wishing to partake in and vote at the Meeting (in particular the method for proxy, distance or electronic voting),

- A description of the steps for exercising a right to request inclusion on the agenda of a proposed resolution and for submitting written questions to the Board of Directors or Management Board, as applicable (in particular the postal address and any email address to which proposed resolutions and written questions may be sent, the deadline for submission etc.),
- The place and conditions, and especially the deadline, for shareholders to obtain and return voting forms,
- The address of the shareholder information website (Listed Companies only) and, if applicable, the address of any site created to allow shareholders to vote electronically,
- The accounting entry date for shares conferring the right to partake in the Meeting, stating that only shareholders who on this date meet the conditions set forth by article R.225-85 of the Commercial Code may participate,
- The text of any proposed resolutions that will be submitted to the Meeting by the Board of Directors or the Management Board,
- The date of availability and place for obtaining the full text of any documents that will be presented to the Meeting and of any resolutions proposed by shareholders,
- If applicable, whether it is necessary to submit resolutions for the assessment, approval or agreement, as applicable, of any special meetings of holders of priority dividend shares (non-voting) or groups of holders of securities giving access to equity.

3. Representation of shareholders at a Meeting

Listed Companies must henceforth allow notifications and revocations of proxy appointments to be received electronically (article R.225-79, new paragraph 6 of the Commercial Code).

In addition, article R.225-79, new paragraph 5 of the Commercial Code states that a proxy appointment for a shareholder at a General Meeting may be revoked under the same terms as those required for appointing the proxy (in writing, electronically if applicable).

* * *

The decree also extends the minimum notice period for a second General Meeting in the absence of a quorum during the first Meeting. There should henceforth be 10 days between when the second Meeting is called and when it is held, instead of 6 days as required previously (the notice period for a second Meeting during a public takeover bid remains unchanged at 4 days). Unlike the other measures stated above, this new provision applies also to non-listed limited companies.

* * *

The decree applies to General Meetings that are held from 1 October 2010. These measures must therefore be taken into account when preparing a Meeting scheduled on or after this date.

LITIGATION

The Faurecia decision: an end to the case law "saga" on limitation of liability clauses?

(Cass. Com. 29 June 2010, No. 09-11.841)

In a ruling handed down on 29 June 2010, the Commercial Chamber of the French Court of Cassation wished to clarify the question regarding the validity of liability-limiting clauses, something which has been the subject of several U-turns in case law ever since the famous 1996 *Chronopost* decision, which it has today revived.

In the case at point, a service provider, Oracle, agreed to install software for Faurecia, an industrial supplier. The two companies signed a software implementation contract as well as related licence, maintenance and training contracts. Not having received the deliverables, Faurecia ceased paying the fees and then filed a claim against Oracle for wilful misconduct or rescission for failure to perform all the contracts signed by the parties.

The first ruling handed down by the Court of Cassation stated that Oracle had "*breached a core obligation thereby negating the clause that limits liability*" (Cass. Com. 13 February 2007, No. 05-17.407) and partially quashed the appeal ruling. However, in disregard of the Court of Cassation's ruling, the Court of Appeal that had referred the case to the higher jurisdiction refused to negate the limitation of liability clause.

The Commercial Chamber then followed up with a ruling handed down on 29 June 2010. It concluded, in the first place, that "*a clause limiting liability is only considered not written if it contradicts the core obligation owing by the defaulting party*".

In the second place, the court felt that *"gross negligence cannot be construed from a simple breach of a contractual obligation, even a core one, but should be based on the severity of the defaulting party's behaviour"*.

Therefore, in order for any clause that sets out the penalty for breach of a core obligation to be set aside, it must contradict the defaulting party's obligation, in other words void it of its substance.

This is no longer assessed based solely on the nature of the obligation - whether core or otherwise - but also on what effects the limitation of liability clause has on the obligation.

The solution adopted by the Court of Cassation thereby reinforces freedom of contract in this area, insofar as limiting clauses often arise from a wish to distribute the risk of breach, freely negotiated by the parties. This is in fact what the Court of Cassation held in this case, concluding that the limiting clause was the result of free negotiation, that the limits it placed were not abusive and that it indeed had consideration.

Therefore, the simple breach of a core obligation is not enough to constitute gross negligence. This ruling marks a return to a subjective interpretation of gross negligence, which was traditionally defined as negligence of extreme severity bordering on wilful misconduct and denoting the unfitness of the defaulting obligor to fulfil his contractual duty. Therefore, as a penalty, a defaulting party who has seriously failed to fulfil his contractual obligation cannot benefit from a clause in the same contract intended to limit his liability.

INSOLVENCY PROCEEDINGS

Draft reform of the Safeguard Law: creating a "fast-track financial safeguard procedure"

A new draft reform of the Safeguard Law was submitted to the Chancellery on 27 July 2010, the key proposal of which was to create a *"fast-track financial safeguard procedure"*.

With amicable proceedings (conciliation, ad hoc creditors' representative), all creditors have to agree unanimously on the plan to reorganise the company. If a proposed solution is supported by a very large majority of creditors but not all, the manager's only solution is to initiate safeguard proceedings.

The bill sets out, alongside the traditional safeguard procedure, plans to create a *"fast-track financial safeguard procedure"* which can be requested by a debtor that, following conciliation proceedings (a compulsory first step), has obtained the majority support of its creditors.

The effects of such a procedure would be limited to the financial creditors alone and there would be no consequences for the debtor's commercial partners whose debts would not be frozen but settled within the agreed contractual deadlines.

This new safeguard procedure would therefore be more flexible in operational terms and would cause as little disruption as possible to the commercial relationships of companies that have resorted to conciliation in anticipation of financial difficulties.

Claims over sold goods covered by a retention of title clause

(Cass. Com. 8 June 2010, No. 09-14.408)

If it is established that, on the date of a judgement opening bankruptcy proceedings, a debtor's assets include goods that were sold subject to retention of title, a debtor who has then resold such goods after the date of the judgement may be ordered to pay their price to the seller.

Article L.624-16(2) of the Commercial Code (previously article L.624-124) states that “*property sold subject to retention of title also can be claimed, if it existed in kind on the date of the judgement opening the proceedings*”.

So what should be done when goods that existed in kind on the date of an opening judgement are then resold to a third party subsequent to the judgement?

In the case in point, the seller of the goods found himself in this situation and was unable to recover the goods in kind. He therefore asked the court to order the debtor to pay him the price of such goods, based on former article L.624-124 of the Commercial Code.

The Court of Appeal dismissed the seller’s claim on the grounds that, since the goods had been resold to a third party purchaser, the seller only had a claim against the third party purchaser for such part of the resale price of the goods as had not yet been paid to the debtor.

The Court of Cassation quashed the Court of Appeal ruling on the grounds that, from the moment that the seller, as is his responsibility, provides proof that his goods existed in kind on the date of the opening judgement, it is up to the debtor to provide an explanation as to what has subsequently happened to the disputed goods.

COMPETITION/DISTRIBUTION

Clarification on the anti-competitive exchange of information between companies

The Competition Authority took advantage of the publication on 6 July 2010 of its 2009 Annual Report to dedicate a topical study to the anti-competitive exchange of information.

An exchange of information may constitute the basis of an anti-competitive agreement as prohibited by article 101, paragraph 1 of the Treaty on the Functioning of the European Union (TFEU) and by article L.420-1 of the Commercial Code, if it allows economic operators, generally competitors, to adopt mechanisms that help them coordinate their sales strategies.

In its study, the Authority reiterated the main elements that need to be considered during a competition analysis of an exchange of information. Assessments into the anti-competitive effects of an exchange of information are conducted on a case-by-case basis, and are meant to take into account a combination of factors such as the nature of the information exchanged, the standards of proof, the market structure, the public nature of the information and how the exchange occurred.

1. The content of exchanges

If an exchange of information has taken place, the first step is to determine whether the purpose of the exchange was itself anti-competitive. This can be the case in particular when the exchange relates to future information or if the communications are intended solely for competitors (to the exclusion of consumers or business clients).

If it is established that the exchange of information had no anti-competitive purpose, the effects of the exchange should then be assessed case by case, taking into account the “*specific circumstances*” in which they occur.

Exchanges of information relating to prices, volumes and costs are more likely to have anti-competitive effects than information of another nature. A distinction will be made between competitors who gather pricing information and discuss it with their clients or third parties, and those who discuss pricing elements or changes in prices with other competitors.

2. Standards of proof

According to the competition authorities, companies who are involved in collusion are presumed to be demonstrating anti-competitive behaviour.

They are therefore presumed to have used the information exchanged with their competitors to determine their own market strategy. The deliberate transmission by a company of incorrect information intended to mislead its competitors does not overturn this presumption of its participation in an unlawful exchange of information.

This presumption can only be overturned if the company that took part in the exchange can demonstrate that its participation in anti-competitive agreements has ceased and that it has expressly and in writing distanced itself from the object and content of such discussions. In addition, as pointed out by the European Commission, "a company involved in such practices must provide proof" that the collusion had no effect on its market strategy.

3. Market structure

The Competition Authority points out that transparency between economic operators on a market will benefit consumers, whereas concentration in a given market is likely to encourage agreements between companies.

The existence of large barriers to entry into a market, changes in demand, strong competition and even the possibility of reprisals are all factors that the Competition Authority uses when analysing the structure of a market.

4. The public nature of the information exchanged

In principle, the exchange of information that is already public does not constitute a breach of article 101, paragraph 1 of the TFEU or article L.420-1 of the Commercial Code. The public nature of information is assessed based on the difficulty and cost of obtaining it.

5. Terms of the exchange

An anti-competitive exchange of information occurs when the information is transferred directly to competitors, through a third party structure such as a professional association, or illicitly or in a manner known to everyone. The frequency and the systematic nature of the exchanges are also significant factors used for the assessment, even if the infrequency or irregularity of the exchanges is not enough, on its own, to rule out any anti-competitive nature.

Consumer access to the information being exchanged can, in some cases, support the pro-competitive nature of the exchange. This can be the case, in particular, when the information can be used to compare the offers of different vendors and thereby encourage them to increase their competitiveness.

INTELLECTUAL PROPERTY/NEW TECHNOLOGIES

Domain names: limiting the jurisdiction of French courts in cases of infringement by foreign websites

(Cass. Com. 9 March 2010, appeal No. 08-16.752)

It has long been established that the French courts have jurisdiction to rule on infringements committed by foreign websites if it can be demonstrated that the incident occurred in France.

In practice, in order to bring a foreign company that has infringed a French trademark before a French court, it used to be necessary to make an affidavit of infringement in France in order to demonstrate that the foreign website was accessible from France.

Now, with its ruling of 9 March 2010, the Court of Cassation has restricted this solution to those websites that specifically target the French public, inasmuch as they are available in French or can be used to order products from France.

By doing so, the Court of Cassation also resolved an issue that had given rise to divergent opinions from the Paris Court of Appeal.

For example, in a ruling handed down on 26 April 2006, the Paris Court of Appeal concluded that French courts only had jurisdiction if a "sufficient, substantial and significant link" with the French public could be proven.

On the other hand, under the terms of a decision dated 2 December 2009, this same court abandoned this criterion and, merely because the website in question was accessible in France, adopted a more flexible approach to the jurisdiction of French courts as regards foreign websites.

From now on, claimants will need to prove that French internet users are indeed targeted by the infringing website in order for the French courts to be granted jurisdiction.

Trademark rights: search engine liability for posting adverts

(Cass. Com. 13 July 2010, appeal No. 06-20.230)

Google was sued for infringement of the Louis Vuitton trademark and for unfair competition towards the latter as a result of the AdWords service that it has developed and offers to clients.

The AdWords system allows advertisers to purchase keywords in order to create links associated with trademarks (which are often filed by third parties). Often, however, these links direct users to websites selling counterfeit goods.

In a ruling dated 28 June 2006, the Paris Court of Appeal upheld the ruling against Google (Paris Regional Court, 4 February 2005). It refused to accept that Google was eligible for the special liability system established by the law of 30 September 1986, as Google had claimed.

Applying the language of that law, Google claimed that it was simply providing customers an information storage service. Google also maintained that it could only be held liable as regards this activity if, when requested by a court authority, it had not acted swiftly to prevent access to the unlawful web content.

The French Supreme Court, to which Google had appealed, nevertheless quashed the appeal ruling insofar as it did not specify how the service rendered by Google constituted advertising under the terms of article L.121-1 of the Consumer Code (which defines misleading commercial practices).

The case was therefore once again referred to the Paris Court of Appeal, which will have to specifically define the nature of the service provided by Google before it can confirm any liability.

Patent law: draft law aimed at modifying the system for remunerating employees for their inventions

(White paper to promote research and salaried innovation, No. 2288 of 5 February 2010)

A white paper filed on 5 February 2010 and currently being reviewed by the National Assembly could bring major changes to the way in which employees are paid for their inventions.

The current system (described in article L.611-7 of the Intellectual Property Code) provides that employee inventions (inventions created by an employee whilst performing an employment contract comprising an inventive mission) are the property of the employer. This same system says that the employee's payment for his invention is determined by collective agreements, company agreements and individual employment contracts.

On the grounds that this system does not encourage salaried engineers to innovate, deputies have submitted a white paper aimed at establishing in principle a rule of proportional remuneration for employees.

This rule, which already exists for non work-related inventions (created by employees outside of the mission conferred upon them under the terms of their employment contract), would therefore allow an employee to claim remuneration proportionate to the commercial use to which his invention will be put.

We will need to wait for the final version of this law, as voted by Parliament, before we can know exactly how intellectual property clauses contained in employment contracts will need to be altered.

REAL ESTATE LAW

The liability of a deputy project owner

(Paris CAA, 2 July 2010)

A deputy project owner who has been instructed by the project owner acts in the latter's name and on his behalf. Therefore, any contractual obligations arising from contracts signed between a deputy project owner - acting in the name of his principal - and contractors are the responsibility of the project owner alone.

As a result, any claims for liability brought by a contractor against a deputy project owner have no grounds.

In the case in point, a public project owner instructed a company to act as deputy project owner for renovation work on a building.

Following an unsuccessful call for tenders, the deputy project owner, acting in the name and on behalf of the project owner, signed a negotiated contract with a group of contractors to carry out the work.

After the work had been accepted, the group of contractors declared it had incurred additional costs and sent a detailed claim to the project manager which was then expressly rejected by the project owner.

The group then filed a claim before the Paris Administrative Court hoping to obtain a joint ruling against the project owner and the deputy project owner for the amount of its claim.

The administrative court admitted the claim for the joint ruling against the project owner and the deputy project owner but reduced the amount of compensation being claimed.

The Paris Administrative Court of Appeal overturned the administrative court's ruling, stating that by acting in the name and on behalf of the project owner, the deputy project owner cannot be held liable by a contractor who has a legal relationship with the project owner alone.

A bank guarantee cannot be enforced if work has not been accepted

(Cass. 3rd Civ. 13 April 2010, No. 09-11.172)

Pursuant to article 1 of Law 71-584 of 16 July 1971, the payment of deposits as part of a private contract may be accompanied by a legal holdback equal to 5% of the amounts due.

The purpose of this holdback is to guarantee that any work needed to lift reserves that were issued upon acceptance of the project is carried out. This holdback can only therefore be implemented if the work has been accepted.

However, this holdback can be replaced by a bank guarantee provided by the contractor, issued by one of the financial establishments listed by decree (Decree 71-1058 of 24 December 1971).

In the case in point, the project owner had instructed a contractor to carry out several phases of a works contract.

The contractor had provided a bank guarantee for the amount of the holdback. The contractor later abandoned the worksite and so the project owner proceeded to carry out an audit of the quality of work in the absence of the contractor. It then used the guarantee in payment of the holdback.

The Court of Appeal ordered the bank to pay the holdback on the grounds that it does not only apply to poorly executed work but also to failure to execute work as promised.

The Court of Cassation quashed the ruling handed down by the Court of Appeal since a holdback is aimed solely at guaranteeing performance of work that has been accepted subject to reserves and not the correct completion of a project. In addition, it concluded that an audit of the quality of work is not equivalent to a statement of acceptance. Therefore, in the absence of any acceptance of the work, the bank guarantee could not be enforced.

Tertiary Sector Rent Index invalidated by the Constitutional Council

Following on from the Commercial Rent Index (CRI), the MIPIM in March 2009 gave rise to an inter-professional agreement to create a Tertiary Sector Rent Index (TSRI) that should be used for activities excluded from the scope of the CRI.

This new index, intended to be more stable than the Construction Price Index (CPI), was designed to index the rent prices relating to logistics platforms, industrial activities, and premises used solely for office space or by the self-employed.

It was a composite index calculated as follows:

- 50% of the Consumer Price Index (annual average),
- 25% of the CPI (annual average), and
- 25% of the value of the GDP (annual average).

This inter-professional agreement needed to be ratified by legislation and so was included in the Finance Act for 2010.

It was first overturned by the Constitutional Council on the grounds that it had no place in a law relating to public finance.

It was then included as part of the law on Limited Liability Sole Proprietorships adopted by the National Assembly and the Senate.

At the request of more than 60 members of parliament, the Constitutional Council again invalidated the provision that set forth the creation of the TSRI on the grounds that this article has no connection to the initial subject of the draft law.

For this index to eventually be applicable to commercial rents, it needs to be included in a new bill and again submitted to a parliamentary vote.

In the meantime, professionals from the tertiary sector must continue suffering from unstable fluctuations in the CRI.

EMPLOYMENT LAW

DISCIPLINARY ACTION AND EMPLOYMENT CONTRACTS

Can a disciplinary file be used to assess the professional qualities of an employee when determining the order of redundancies?

(Cass. Soc. 19 May 2010, No. 09/40103)

Although article L.1233-5 of the Labour and Employment Code allows for an employee's professional qualities to be taken into account when determining the order of redundancies in cases of collective redundancies for economic reasons, in the case in point the Court of Cassation clarified one of the elements that can be used to assess "professional qualities".

The Court concluded that a disciplinary file may be used to assess an employee's professional qualities provided that:

- Sanctions contained in the disciplinary file have not become time-barred (3 years – article L.1332-5 of the Labour and Employment Code),
- The disciplinary file is not the only source of information used to assess professional qualities (in the case in point, the decree maintained that this file "*is just one element, alongside the aptitude and versatility*" of the employees),
- There is no abuse of procedure.

Warning regarding the disciplinary nature of emails used to reproach employees

(Cass. Soc. 26 May 2010, No. 08-42893)

This ruling gives us the opportunity to remind ourselves of how important it is for an employer to choose his words carefully when sending an email to one of his employees.

In the case in point, an employer had sent one of his employees an email containing many complaints and demanding a radical change. The morning after, this same employee was called to a preliminary meeting then dismissed for the same reasons as those listed in the email.

Referring to his managerial authority, the employer claimed that the email in question was not a sanction and that, consequently, the complaints it contained were grounds for the dismissal of the employee.

Without giving weight to the medium used, the Court of Cassation points out that a letter addressed to an employee containing various complaints and stating that he must make radical changes is a way of sanctioning certain behaviour that the employer deems inappropriate and must be considered a warning. Therefore, dismissal is not permitted on these same grounds.

The Court of Cassation did give weight to the fact that the employer had made his comments in writing. The comparison of an email to a letter was made even clearer, in the case in point, by the Court's lack of hesitation over using the term "letter" to describe the correspondence.

NON-COMPETITION CLAUSE

When to lift a non-competition clause in the absence of any agreed deadlines provided by contract or collective agreement?

(Cass. Soc. 13 July 2010, No. 09-41626)

The French Court of Cassation brought about a change in case law by ruling that in the absence of any deadline set by an applicable collective agreement or an employment contract, a non-competition clause must be lifted "**at the time of dismissal**" and no longer within a reasonable deadline, as it had previously ruled.

Otherwise, it concluded that the employee would be left "*uncertain as to his freedom to work*".

This is also why, in its ruling, the Court negated the clause allowing the employer unilaterally to waive application of the non-competition clause at any point during its period of application (24 months). In the case in point, the clause had been lifted nearly two and a half months after the notification of dismissal.

Therefore, in the absence of any agreements to the contrary, when a clause in the contract sets out a deadline for lifting the non-competition requirement it must also ensure that this deadline is observed, in line with this legal precedent. Otherwise, an employer could be prevented from lifting the clause and made to pay a financial consideration for the full duration of the non-competition clause.

However, the Court of Cassation did leave a degree of uncertainty as regards the meaning of "*time of dismissal*". Does this mean the day on which the employee was notified of his dismissal or the end of the notice period? Pending clarification from the Court of Cassation, it would be more prudent to use the date on which the employee was notified of his dismissal.



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.

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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