BERSAY & ASSOCIES
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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 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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IN THIS ISSUE

COMPANY LAW

Invalidity of service agreements entered into between a company and its Chief Executive

(Cass. com., Sept. 14, 2010, no. 09-16084)

The French Supreme Court (Cour de cassation) ruled that an agreement entered into between a limited company and a company formed by its Chief Executive, for general management services associated with his position is invalid. This invalidity is based on the lack of cause for the agreement and because the Board of Directors' exclusive power to determine the compensation of the Chief Executive was circumvented by this agreement.

The French Supreme Court held that the agreement did not have any justification, as it duplicated the work the Chief Executive performs out of his corporate duties. The situation was tantamount to compensating the company formed by the Chief Executive for services carried out by the latter as part of his duties as Chief Executive.

In that ruling, the Supreme Court also reiterated that the Chief Executive's compensation was a matter for the Board of Directors to decide and could not be determined by an agreement entered into with a third party, regardless of whether authorized by the Board.

Clarifications concerning L. 225-96 of the French Commercial Code

(Cass. com., Oct. 26, 2010, no. 09-71404)

L. 225-96 of the French Commercial Code empowers only an extraordinary shareholders' meeting of a limited company to amend all of the provisions of the by-laws. The French Supreme Court interpreted this provision narrowly, by refusing to invalidate resolutions passed by a shareholders' meeting on the grounds that it had not approved the report by the Board of Directors on the amendment of the company's by-laws.

Transfer of an administrative authorization in case of merger by takeover

(Cass. soc., Oct. 6, 2010, no. J 08-42728, K 08-64729, M 08-42730, N 08-42731, P 08-42732, Q 08-42733, R 08-42734, S 08-42735 and T 08-42736)

The employment division of the French Supreme Court held that a merger by takeover *"was not of the nature, on its own, to call into question the authorization delivered, which continues to inure to the benefit of the new employer until its possible withdrawal by the competent administrative authority".* This being the case, the administrative authorization (in the case at issue, an authorization given by the work inspector to calculate working time by reference to a monthly period) held by the absorbed company was transferred to the absorbing company, which could rightfully use it.

A seller's warranty that liabilities are as stated does not cover a liability arising out of an event subsequent to the sale

(Cass. com., Sept. 28, 2010, no. 09-16261)

Although the seller did not contest the buyer's claim under the warranty, it was held not to apply since the event giving rise to the liability, the renewal of fixed-term contracts, was subsequent to the date of the sale.

Impact of the breach of a covenant on the right to receive payment when transferring shares

(Cass. com., Sept. 28, 2010, no. 09-16261)

A company director who sold his shares while covenanting in the deed of sale to remain in office for a specified period of time, did not lose his right to receive payment of the balance he was owed due to breach of covenant since the deed did not specify that payment was contingent upon to any condition or restriction.

Validity of delegations of firing authority within SAS companies

(Cass, ch. mixte, Nov. 19, 2010, no. 10-0.215; Cass, ch. Mixte, Nov. 19, 2010, no. 10-10.095).

In these two much-awaited rulings, handed down on November 19, 2010, the French Supreme Court, sitting in a joint bench formation (second civil division, commercial, financial and economic division and employment division) ruled against the controversial positions taken by the Versailles and Paris Courts of Appeal on the conditions of validity of delegating authority to fire in simplified joint-stock companies (SAS).

Pursuant to the terms of Article 227-6 of the French Commercial Code, an SAS is *"represented in its dealings with third parties by a chairman appointed under the conditions laid down in the by-laws. The chairman is vested with the broadest powers to act in the company's name in all circumstances, within the limits of its corporate purpose (…) The by-laws may stipulate the circumstances in which one or more persons other than the chairman, having the title of chief executive or deputy chief executive, may exercise the powers conferred on the chairman by this section."*

The question before the joint bench was whether such provisions restrict the power to terminate those directors appointed in the by-laws of an SAS (chairman and chief executive or dissociation of positions and chairman and chief executive), or whether this power can be delegated to another member of the company, as is the case in other types of companies.

In the first case (Versailles Court of Appeal, Nov. 5, 2009, unpublished, R. X. v Whirpool France SAS), the notice of termination had been signed by the Human Resources Director. The Versailles Court of Appeal held that the dismissal lacked real and serious cause.

In the second case, (Paris Court of Appeal, Dec. 3, 2009, no. 09-5422, Pellerin v SAS ED), the Paris Court of Appeal held that the dismissal of an employee by a desk officer was invalid, and ordered the employee to be reintegrated to his post.

The joint bench reversed these two appellate decisions and laid down three guidelines:

- Article 227-6 of the Commercial Code does not rule out the possibility for the legal representative of an SAS (the Chairman if so provided by the by-laws, the Chief Executive or the deputy Chief Executive) to delegate the power to carry out specific acts, such as hiring or firing an employee;

- delegation of authority to fire may be tacit and stem from the functions of the employee implementing the dismissal procedure, thus obviating the need to file a notice of delegations given with the Registry of Trade and Companies;

- in case the delegation of authority is exceeded by the delegatee, the company (the delegator) may, expressly or tacitly, ratify the act *ex post facto* (in the case in point, the dismissal notice was what was at issue).

According to the press release issued by the French Supreme Court, this decision *"has thus ended an interpretation that it* [the court] *considers contrary to the provisions of Article 227-6 of the Commercial Code based on confusion between the general power of representation of the SAS with respect to third parties subject to the provisions of the aforementioned rule of law, and the delegation of functional authority, which permits the representatives of any type of company, including an SAS, to delegate, in accordance with the ordinary rule of law, part of their powers, so as to ensure the company's internal operation."*

LITIGATION

Clarification of "fault separable from the performance of duties" incurring a director's personal liability vis-à-vis third parties

(Cass. Com, Sept. 28, 2010, no. 09-66255)

Case law has long accepted that a director's personal liability may only be incurred vis-à-vis third parties on the basis of a *"fault separable from the performance of the director's duties".*

This somewhat ambiguous notion of *"fault separable from the performance of duties"*, had been defined by the French Supreme Court in 2003 as *"an especially serious intentional fault incompatible with the normal exercise of a corporate position"* (Cass. Com., May 20, 2003, no. 99-17092).

Based on that case law, an intentional criminal offense harming a third party, had already been deemed to qualify as a fault separable from the performance of duties (Cass. Crim., May 20, 2003, no. 02-84307).

However, this case law left a major issue unresolved: is any criminal offense *ipso facto* a fault separable from the performance of duties?

In a recent case reviewed by the court, the director of a SARL, a building contractor company, refrained from insuring itself against structural damage and liability coverage, as required under Article 111-34 of the French Building and Housing Code and Article 243-3 of the French Insurance Code.

The question presented to the French Supreme Court was whether such omission, constitutive of a criminal offense, might also qualify as a fault separable from the performance of duties of a nature to incur the director's personal liability vis-à-vis third parties.

The issue was unclear since, in ruling dated January 4, 2006, the French Supreme Court had considered that even if the action amounted to a criminal offense, this type of fault could not be deemed separable from the performance of duties (Cass. 3ème Civ., January 4, 2006, no. 04-14731).

In its recent ruling dated September 28, 2010, the French Supreme Court held that this criminal offense constituted a fault separable from the performance of duties, since the director *"had intentionally agreed to open the litigious construction site without STF company being covered by an insurance policy covering the builder's statutory ten-year liability"*.

By so doing, the French Supreme Court clarified the notion of *"fault separable from the performance of duties"*: only intentional criminal offenses are faults separable from the performance of duties that can incur a director's liability vis-à-vis third parties.

Clarification on the extension of the time limit for arbitration under Article 1456 of the French Code of Civil Procedure

(Cass. Civ 1ère, Sept. 22, 2010, appeal no. 09-17.410)

Under Article 1456 of the French Code of Civil Procedure, *"if the arbitration agreement does not specify the time limit, the assignment of the arbitrators shall only last for a period of six months as of the date when the last of them accepted the assignment".* Absent any contractual provision on point, any arbitral award issued after this six month time limit is subject to cancellation under Article 1484 (1) of the French Code of Civil Procedure, as having been entered into on the basis of an arbitration agreement that has expired.

The ruling handed down on September 22, 2010 by the first civil division of the French Supreme Court provides clarifications on the extension of that time limit.

In that case, the appellant claimed that the arbitrators could not accept their appointment unless it was sufficiently clearly defined for them to agree to their mission on a fully informed basis. According to this argument, acceptance would necessarily have required the signature of a mission statement, and in this case, none was signed. By extension, they argued that no referral could be made to the arbitrators before such mission statement was signed, and that the six-month period would only begin to run from the date of such a signature.

The French Supreme Court disagreed, by strictly applying Article 1456 (1) of the French Code of Civil Procedure: the time limit begins to run from the date when the last of the arbitrators has accepted his assignment. In the case before it, the records showed that the last arbitrator had accepted his appointment on March 20, 2008. The lower court should thus have rendered its decision no later than September 20, 2008, inasmuch as there had been no extension. Since the award was rendered on December 2, 2008, the French Supreme Court invalidated it as issued outside the time limit.

A referral can therefore be made to arbitrators without any need to wait for the signature of a mission statement, which is, in any event, not mandatory. Admittedly, in many institutional procedures, in particular the ICC's arbitration procedure, a mission statement is mandatory, and often used by the parties, including in the scope of an *ad hoc* procedure. Having a mission statement is

effectively very useful to govern the procedure and frame the respective claims by the parties, the issues to be adjudicated and the procedural rules applicable.

The parties may, of course, extend the time limit for arbitration in a mission statement or in any other document formalizing their agreement, as allowed by Article 1456(2) of the French Code of Civil Procedure: *"The legal or contractual time limit may be extended either by agreement between the parties or, at the request of one of them or of the arbitral tribunal, by the president of the civil court (…)"*.

It should be stressed that when the rules applicable to the arbitration require the signature of a mission statement, it is generally accepted that if one of the parties refuses to sign it, arbitration can nonetheless continue. However, as pointed out in the ruling referred to above, if the extension of the time limit for arbitration results solely from a mission statement not being signed by one of the parties, absent of any other agreement regarding the time limit for arbitration, then such extension has no value and the provisions of Article 1456(1) apply: the time limit remains that set by Article 1456(1) of the Code of Civil Procedure and begins to run as of the date of acceptance of his appointment by the last arbitrator.

In other terms, the starting point of the time limit (or rather the duration of the arbitration procedure) can be extended by a mission statement, or by any other document, provided it is signed by all of the parties.

In the case in point, one of the parties had not signed the agreement dated July 2, 2008 setting the time limit for the delivery of the award on December 2, 2008. As a result, that document was ineffective and could not validly extend the time limit.

The Jérôme Kerviel vs Société Générale case

(*11ème Chambre du Tribunal correctionnel* of Paris, Oct. 5, 2010)

The Paris Criminal Court entered judgment in the Jérôme Kerviel case on October 5, 2010.

The court found the trader guilty of the offense of breach of trust, fraudulent entry of data into a computer system and forgery and use of forgery, sentencing him to 5 years in prison, with 2 years suspended. The court also handed down a lifetime trading ban against Jérôme Kerviel, prohibiting him from engaging in any direct or indirect activity as a market operator or on financial markets.

The court sentenced Jérôme Kerviel to pay €4,915,610,154 in damages to Société Générale.

Jérôme Kerviel, who primarily traded in two types of derivatives, options (warrants and turbo-warrants) and futures and forwards, was charged with having taken unauthorized positions exceeding his trading limit, having sought to hide them by making fictitious trades so as to cover the losses or the profits made and of having forged e-mails to mislead his supervisors.

Informed of the situation in January, Société Générale closed out all of the positions taken by the trader in a trading context qualified by the banking commission as *"very unfavorable"*. The closing out of positions generated a loss of €6.3 billion, which, after deduction of the profits of €1.4 billion made by the trader on December 31, 2007, totaled €4.9 billion.

Jérôme Kerviel's line of defense primarily hinged on the argument that he had always acted under the complacent oversight of his supervisors, who could not have been unaware of the positions he took, which were made in the bank's interest and with its implicit encouragement, and that the trader had not personally profited, under unwritten rules that were subject to change and without any set limit. On the charge of forgery and use of forgery, the defense argued that the false documents that the trader had created had not sought to falsify the truth, but merely to respond to the requirements of the bank's risk control officers which, although having full knowledge of the actual trades being made, wanted Jérôme Kerviel to give the appearance of compliance.

These arguments did not pursuade the court, which found Jérôme Kerviel guilty of the three charges.

First, the court found Jérôme Kerviel guilty of breach of trust~~faiblesse~~, for having willfully, and without his superiors' authorization, exceeded his trading limit, by committing Société Générale to trades he was not authorized to make and for amounts that exceeded the bank's equity level. While the bank may have been negligent in its internal risk-control obligations, the court, observing that the bank had already been fined on that basis, held that Jérôme Kerviel had intentionally sought to cover up those trades.

It also considered the trader guilty of fraudulently entering data into the computer system for entering his inaccurate positions into the bank's system, so as not to set off the different warning systems.

The court also found Jérôme Kerviel guilty of forgery and use of forgery, for creating false e-mails, ostensibly originating from other people, to explain away certain anomalies found in some of his positions to the risk-control officers.

The defense's arguments concerning the allegedly *"improper"* closing out of his positions by Société Générale, in a disastrous financial environment, also failed. First, the bank's decision to immediately close out the positions was based on serious reasons, such as the fact that the positions taken exposed it for amounts in excess of its equity. Second, even assuming that the bank's course of conduct was

improper, it is a well-established principle of French law that any contributory negligence by the injured party only operates so as to reduce its right to redress in non-intentional torts. But when intentional torts are involved, where the perpetrator intended the result – and the three offenses with which Jérôme Kerviel was charged being intentional torts –, contributory negligence by the injured party cannot be asserted to exonerate the tortfeasor from his liability. In that sense, the losses sustained by the bank when closing out the positions did not stem from the closing out of the positions *per se,* but from the trader's course of conduct.

Therefore, from a strictly legal standpoint, ordering Jérôme Kerviel to repay the full amount of the loss, once the trader was found by the court to have been the *"sole designer, initiator and perpetrator of the system of fraud having provoked the harm caused to the civil party"*, is understandable. While the enormity of the recovery amount is perplexing, it corresponds to the positions taken by Jérôme Kerviel (approximately €50 billion) and to the loss sustained by Société Générale (€4.9 billion).

This decision might be explained by the court's desire to protect the bank and close the door to the multiple lawsuits that its shareholders would doubtless have brought against it to obtain recovery for the losses sustained, had the bank been found liable.

Société Générale will naturally never collect the award and has already made known that it will not attempt to collect it. However this story is to be followed, as Jérôme Kerviel has already filed an appeal.

COMPETITION / DISTRIBUTION

Report on assessing sanctions for anticompetitive practices

In a report submitted on September 20, 2010 to the Minister of Economy, Industry and Employment (the "Report"), a task force made up of competition law specialists proposed ideas for sanctions for anticompetitive practices, in order to make them more predictable, proportional and transparent.

The task force's work focused both on procedural issues and on the method of calculating fines and, according to the Minister, constitutes a solid basis for the preparation of future guidelines by the French Competition Authority.

So as to respect the principle of adversarial proceedings, the report recommends that the *rapporteur* inform undertakings, upon the notification of objections or in any case no later than at the time of issuing his report, of his assessment of the damage to the economy as well as, if applicable, the nature of the sanction being considered and the criteria followed in calculating the fine.

As regards the calculation of the fine, the Report proposes abandoning the use of the total turnover of the undertaking being fined as the basis of the fine, and recommends defining it based on a percentage (for example 5% to 10%) of the value of the sales of the products or services that are the subject of the incriminating practice. This amount would then be weighed against mitigating or aggravating circumstances such as, cooperation or not by the undertaking, the period of cooperation, the economic and financial situation of the undertaking concerned, repeat offenses, hindrance or not of the investigation, the ringleader role of the undertaking in the incriminating practice, as well as more novel criteria, such as weighing on the basis of the average profit margin in the sector concerned, consideration of compliance programs or programs to indemnify injured parties proposed by the undertaking directly.

In line with the decision-making practices of the French Competition Authority, the parent company's liability should only be incurred, according to the Report, if it has taken part in the practices or ordered its subsidiary to engage in them.

The Report stresses the limits of a system of sanctions based solely on the liability of undertakings. It recommends creating a range of individual sanctions (criminal penalties, ban on managing undertakings or holding a corporate office, etc.).

In addressing criminal penalties for individuals, the Report only refers to fines and does not recommend prison sentences.

The French Competition Authority will study these proposals and decide whether to integrate them into its forthcoming guidelines on its sanctions policy, which the Minister of Economy has asked it to publish, if possible, before the end of 2010.

The European Court of Justice maintains that in-house lawyers are not covered by legal professional privilege

(ECJ, April 7, 2010, C-550/07)

The European Court of Justice ("ECJ") confirmed that the protection of confidentiality of communications did not extend to communications between the in-house lawyers of Akzo, who was also a member of the Netherlands Bar, and their clients.

The ECJ considered that the confidentiality of communications between lawyers and their clients should be protected at the European Union level. Referring to the ruling in AM&S Europe/Commission (C-155/79), the ECJ observed that communication with a lawyer must have a connection with the exercise of the *"client's rights of defense"*. It must also be a communication with an *"independent lawyer"*, meaning *"a lawyer who is not bound to the client by a relationship of employment"*.

The independence requirement implies the absence of any relationship of subordination between the lawyer and his client. The ECJ has stressed that, due to their economic dependence on their employer and relationship of employment, in-house lawyers generally exhibit considerably stronger personal connection to the corporate strategies pursued by their employer. They do not enjoy the same degree of independence from their employer as external lawyers in relation to their clients.

As a result, on a European level, undertakings cannot invoke the protection of confidentiality of communication within an undertaking or group with their in-house lawyers, or between the latter and the clients of the undertaking or group.

INTELLECTUAL PROPERTY / NEW TECHNOLOGIES

Patent law: the patentability of computer programs examined by the Enlarged Board of Appeal of the European Patent Office

(Opinion dated May 12, 2010 - G3/08)

Unlike US and Japanese patent legislation and case law, the European Patent Convention dated October 5, 1973 ("EPC") excludes from the scope of patentability computer programs *"as such"*, as not fulfilling one of the conditions necessary for patentability, namely the existence of technical nature.

Article 52 of the EPC – *"Patentable Inventions"*, drafted in 1973, provided that:

(1) European patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step.

(2) The following in particular shall not be regarded as inventions within the meaning of paragraph 1: (a) discoveries, scientific theories and mathematical methods; […] (c) schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers; [...]

(3) The provisions of paragraph 2 shall exclude patentability of the subject-matter or activities referred to in that provision only to the extent to which a European patent application or European patent relates to such subject-matter or activities as such."

In 1973, the EPC drafters had effectively deemed it preferable not to give a clear legal definition to this exclusion and to leave this matter up to the European Patent Office ("EPO") and to the national courts.

Accordingly, in decision T-1173/97 dated June 1, 1998, the EPO's Board of Appeal considered that the distinction between a program as such or a program embedded in a computer system was irrelevant, and that an additional technical nature must be shown, even if the software had been claimed in connection with its data-storage device.

However, since the start of the XXIst century, the value created by a patented innovation, in particular in the automobile or telecom industry, is increasingly defined in terms of software programming, rather than in terms of the software itself.

Technical problems are in fact often resolved by solutions implementing a computer program.

Faced with the rapid evolution in computing techniques, the EPO's Member States decided, in an act revising the convention dated November 29, 2000, to amend the terms of Article 52(1) of the EPC, which now provides that *"European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application*."

Also, cognizant of this major technological leap, some of the decisions of the EPO's Board of Appeal have allowed the delivery of invention patents for programs integrated in an innovative industrial process, giving them a technical character or contributing to an innovative technical effect.

By way of example, the "Hitachi" (T-258/03) decision dated April 21, 2004 and "Microsoft" decision (T-424/03) dated February 23, 2006 considered that software *"used"* in a computer system still had a technical nature, making it an invention within the meaning of Article 52 of the EPC. The board drew a distinction between a *"method used in a computer system"* and a *"computer program"*.

The issue of patentability thus amounted to not systematically excluding patent applications comprising computer programs but in assessing their creative nature. Examiners will thus have to check whether the technical character of a computer program contributes or not to implementing a technical solution to a specific problem.

Noting the discrepancies and sources of legal uncertainty caused by these decisions, the EPO's President referred the matter to the Enlarged Board of Appeal in October 2008, so as to clarify and harmonize European case law.

On May 12, 2010, the EPO's Enlarged Board of Appeal issued a much-awaited opinion on the issue of the patentability of computer programs under the EPC.

In opinion G3/08, the Enlarged Board recognized that there were two diverging positions but nonetheless indicated that *"case law in new legal territory does not always develop in linear fashion, and earlier approaches may be abandoned or modified"*. It thus considered that there had been legitimate legal development and the case law was not contradictory.

The Enlarged Board found that the legal criteria for a referral had not been met in the absence of two recent contradictory case law decisions.

The Enlarged Board thus seemed to validate the most recent case law decision by the board of appeal. In effect, opinion G3/08 does not call into question the changes introduced by decisions T-258/03 and T-424/03, which accordingly reflect the current posture of EPO case law.

However, we will doubtless have to wait until the finalization of the European Union patent project for new proposed regulations and/or directives on software patentability to see the light of day.

The conditions of validity of the European Union patent will effectively be reviewed by the EPO and will thus be subject to its case law. It will be subject to all the more scrutiny and criticism, since what will be involved is a single software patent for the entire European Union.

Trademark law: Israel joins the International Trademark System

The government of Israel deposited its document for accession to the Madrid Protocol for the International Registration of Trademarks, which entered into force in Israel on September 1, 2010.

Since then, it has been possible to designate Israel when filing an "international" trademark application with the International Bureau of the World Intellectual Property Organization ("WIPO"), by paying the special taxes required by the Israel Trademark Office, namely:

- 449 Swiss francs for an application for an international registration designating Israel, for one class of products or services and 337 Swiss francs for each additional class;

- 801 Swiss francs for an application for renewal of one class or products or services after 10 years of registration and 676 Swiss francs for each additional class.

Although these taxes are amongst the highest individual taxes of countries adhering to the Madrid Protocol, Israel's accession will come as good news for trademark registrants from "member-countries" of the Protocol.

Trademark law: clarifications to the doctrine of exhaustion of rights

(ECJ, June 3, 2010, case C-127/09)

In the context of a preliminary question put to it by a German court, the European Court of Justice has just handed down a very interesting decision clarifying the doctrine of the exhaustion of the rights of a trademark proprietor.

This doctrine, of European Community origin, was introduced into French law by Article 713-4 of the French Intellectual Property Code.

In application of that doctrine, a trademark proprietor cannot bring a claim for infringement if he has

previously authorized the placing of a product on the market displaying his mark.

In the case at issue, a large perfume group accused a Swiss company of having marketed *"tester"* bottles (placed in stores, and made available to customers) without its consent, when such bottles were not intended for sale.

During the first-level proceedings, the court had dismissed the perfume group's claim on the basis that its rights had been exhausted. According to the lower court, by transferring *de facto* power of disposal of those goods, the group had consented to their being put on the market. Marketing being the criterion for the application of the doctrine of exhaustion of rights.

Since the court of appeal referred a preliminary question, the ECJ, considered that the perfume group, while effectively having surrendered disposal of the testers, had nonetheless expressly opposed permitting the marketing of the product, insofar as the testers were not intended for sale.

The ECJ reiterated the principle that the doctrine of exhaustion of rights cannot validly be invoked if goods are marketed in breach of a contractual provision.

REAL ESTATE LAW

CONSTRUCTION LAW

The general contractor is not liable vis-à-vis third parties for damages caused by his subcontractor

(Cass. Civ. 3ème, Sept. 22, 2010, no. 09-11.007)

While the general contractor is accountable to the project owner for contractual breaches by its subcontractor, it cannot be held liable in tort by third parties for tort damages caused by its subcontractor.

This rule has already been affirmed by the French Supreme Court on the basis of Article 1382 of the French Civil Code on tort liability.

In a ruling dated September 22, 2010, the third civil division of the French Supreme Court upheld this rule, and specified the legal basis of its reasoning.

In the case in question, in the content of building afiber optic network, a *"multitube pipe"* belonging to France Télécom, a third party to the construction work, had been pierced during guided drilling. This job had been subcontracted to a specialized contractor.

The Court of Appeal had held the general contractor was liable to France Télécom for the faults committed by that subcontractor.

Applying Articles 1382 and 1384 of the French Civil Code, the French Supreme Court reversed that ruling on the grounds that: *"The general contractor is not liable to third parties for damage caused by his subcontractor for which he is not the party responsible"*.

The French Supreme Court specified that, inasmuch as the subcontractor was not the agent of the general contractor, the latter cannot be liable for faults by the subcontractor on the basis of the Agent-Principal liability under Article 1384(5) of the French Civil Code.

COMMERCIAL LEASE

Termination by right of a commercial lease by application of a cancellation clause implies a breach of the express obligations contained in that lease

(Cass. com., Sept. 15, 2009, no. 09-10.339)

In a ruling dated September 15, 2009, the commercial division of the French Supreme Court strongly reaffirmed its position on the conditions of application of a cancellation clause contained in a commercial lease agreement.

In the case before it, a commercial lessee (DB Gestion) had entered into two separate agreements with a real estate partnership (SCI). The first concerned premises for commercial use located on the first and second floor, while the second, entered into almost a year later, covered a residential unit located on the third floor of the same building. A few years later, the lessee received notice from SCI, asserting the cancellation clause, and enjoining DB Gestion from carrying out any commercial activity out of the third-floor premises.

The court of appeal sided with SCI and terminated the commercial lease, finding in particular that the lessee *"has failed to justify any title or any authorization from the lessor; such occupancy is contrary to the scope of application of the commercial lease and the continuance of the breach, one month after the enjoinder, has not been contested"*.

The French Supreme Court held that decision to be incorrect since *"termination by right of a commercial lease by application of the cancellation clause implies a breach of the obligations expressly contained in that lease"*.

Since a cancellation clause contained in a lease agreement creates the right to terminate the agreement, it must be strictly interpreted by the courts. The courts effectively consider that such a clause may only be applied in case of a breach of an express provision of the lease.

However, in the case in point, the lessee was alleged to have breached an obligation contained in the residential lease agreement, and not the commercial lease agreement. Accordingly, the cancellation clause, which cannot be used to sanction the breach of an obligation in a different agreement, could not be applied.

A provision in a lease transferring to the lessee the cost of major repairs and of walls and roofs, must be narrowly interpreted

(Civ. 3ème, Sept. 29, 2010, no. 09-69.337)

While "major repairs" may be placed at the expense of the lessee by an express provision of the lease agreement, the French Supreme Court has reiterated that such provisions must be narrowly interpreted.

In the case before it, a provision of a lease, covering several commercial premises and buildings, provided that the lessee was liable for the cost of major repairs, including walls and roofs, but that the lessor would provide, at its cost, the materials needed for re-roofing. When the lessor delivered those materials to the lessee, the latter refused to perform the work. Following a court injunction ordering the lessee to do the work, the lessee had the work performed and then sued the lessor to recoup his costs.

The Court of Appeal ordered the lessor to pay, finding that the lessor had improperly applied the provisions of Article 1134 of the French Civil Code by deciding that the repair works of the roofing of one of the rented buildings were its responsibility, when an express provision of the agreement required the lessee to pay for such costs.

The lessor also argued that, considering that the lease agreement covered several buildings, the repair work on the roof of only one of them corresponded to a partial repair thereof, and not a complete repair.

The French Supreme Court, upholding the decision of the judges on the merits, stated that *"the provision in the lease transferring to the lessee the cost of major repairs and of the envelope of the building should be narrowly interpreted and cannot cover the complete re-roofing of one the buildings covered by the lease agreement"*.

The French Supreme Court thus reiterated the principle of the strict interpretation of exceptions and, in line with its case law in this field, did not give any value to the disputed provision since what was involved was the complete re-roofing of a building, which as a consequence released the lessor from its obligation to deliver the premises (i.e., to grant the lessee complete possession of the premises).

EMPLOYMENT LAW

No pre-dismissal actions are possible during maternity leave

(Cass. soc, Sept. 15, 2010, no. 08-43.299)

Article 1225-4 of the French Employment Code prohibits employers from terminating the employment of employees on maternity leave. Except in case of serious misconduct or impossibility of continuing the employment relationship, the contract can also not be terminated during pregnancy, or during the four weeks following the end of the maternity leave. Violating this rule will result in any termination being invalid.

In the case before it, the French Supreme Court faulted the Court of Appeal for having failed to determine *"whether the hiring of another employee during the maternity leave of the employee had had as its purpose to permanently fill her position, such that it could be characterized as a pre-dismissal action"*.

The scope of this ruling may go beyond the question of hiring a permanent replacement for employees during their maternity leave.

Until now, courts allowed employers to initiate dismissal procedures within the 4 weeks following the end of the maternity leave, so long as the dismissal was notified after the expiration of the legal protection period.

This ruling could call into question that process, since a notice to attend a preliminary meeting in view of possible dismissal might be qualified as a pre-dismissal action.

Putting a protected employee back into his previous position after an unsuccessful attempt at a promotion requires the employee's agreement

(Cass. soc., Sept. 30, 2010, no. 08-43862)

Promotions are frequently accompanied by a probationary period which, if unsuccessful, results in the employee going back to his or her previous position. If the employee refuses, despite an express provision along these lines in the employment contract, this may be cause for dismissal.

In its ruling dated September 30, 2010, the French Supreme Court considered that this rule does not apply to protected employees.

In effect, the consent of protected employees is not only required for any changes to their employment contract, as is the case for all employees, but also for any simple change to their working conditions. Effectively, *"the decision to return the employee to his previous duties"* constitutes such a change to the conditions of employment.

In such a case, *"it is up to the employer, either to maintain them [the protected employee] in the new position, or else request administrative authorization for dismissal from the work inspector".*

This decision applies consistent case law, and through it is not surprising, it is problematic. Some employers may effectively be reticent to promote staff representatives, despite the prohibition against discrimination (in particular based on trade union membership).

Means of measuring the electoral base of sector-based trade unions validated by the French Constitutional Council

(Cons. const., Oct. 7, 2010, no. 2010-42 QPC)

Article 2122-2 of the French Employment Code, stemming from Act no. 2008-789 dated August 20, 2008, provides that, for sector-based trade unions (i.e., trade unions for managerial-level employees), their electoral base, which serves to determine their representativeness, is measured based only on the results obtained in the electoral colleges where they can present candidates, and not across all colleges as is the case for other trade unions.

Several trade union organizations denounced this method, which they considered to be a violation of the principle of equality before the law. The French Supreme Court requested a preliminary ruling on its constitutionality from the Constitutional Council *(Conseil constitutionnel)*.

In its decision, the Constitutional Court considered that *"trade union organizations which, by their charter, represent certain categories of workers (…) are not in the same situation as other trade union organizations"*. The difference in treatment is *"directly correlated with the purposes of the law",* which is to *"avoid the fragmentation of trade union representation"*. Therefore, the law is in conformity with constitutional principles.

As a result, the means of measuring the electoral base,' and thus of trade union representativeness, based on the professional elections organized since the entry into force of the Act dated August 20, 2008, was valid.

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