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Further information

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Recent developments

FRENCH LEGISLATIVE AND REGULATORY DEVELOPMENTS

- **Absence of judicial revision of a contract on the ground of unforeseen events: The announced end of a French exception?**

The current financial and economic crisis, by significantly modifying the equilibrium of a great number of transactions, has again raised the issue of the revision of contracts on the ground of unforeseen events, which has been the subject of debates since more than a century. Since the end of the 19th century, in its famous *Canal de Craponne* decision of 6 March 1876, the French Supreme Court denied the judges the power to amend a contract despite the evolution of the economic context in which the operation occurred. However, recent changes have appeared in this field.

Since the 90's, judges may sometimes have strongly encouraged parties, on the basis of good faith, to renegotiate their contract in the event of significant factual changes. In a decision of 29 June 2010 (French Supreme Court, Commercial Chamber, *Pourvoi* no. 09-67.369), the Commercial Chamber of the French Supreme Court adopted a different approach by addressing the case from a causal standpoint. Indeed, one of the parties supported the theory of nullity of the performed contract on the ground that, due to the fact that the cost of the raw materials required for the service had tripled, the contract no longer had any real equivalent interest. This reasoning, dismissed by the judges ruling on the merits, was accepted by the French Supreme Court, which ruled that they should have examined "*whether the evolution of the economic context [...] had not had as effect [...] to destabilise the general economy of the contract intended by the parties [...] and to deprive of any real equivalent interest the undertaking of the company*".

In parallel, several projects relating to the reform of French law of obligations suggested a judicial revision of contracts in the case of unforeseen events, but none of them has yet succeeded. A bill has been presented to the French *Assemblée Nationale* on 22 June 2011, which aims at amending Article 1134 of the French Civil Code, by adding a new paragraph drafted as follows: "*If an unforeseeable change in facts renders performance excessively expensive for a party, which had not accepted to bear the risk, this party can request its co-contractor to renegotiate the contract but must continue to perform its obligations during the renegotiation phase. In the event of refusal or failure of the renegotiation, the court may, with the agreement of the parties, adapt the contract or, failing such, terminate it on the date and conditions it will determine*".

This paragraph is nearly identical to one of the Articles of a previous governmental initiative to reform French contract law. It would not be correct to indicate, as it yet results from the statement of the grounds of the bill, that this text would only codify the most recent case law. Indeed, if the adaptation of a contract by the parties following a

renegotiation phase is not new, the termination ordered by a court as a consequence of a change in the economic context would represent a major innovation. The proposed text subjects any adaptation of the contract to the agreement of the co-contractors, but also enables the court to end the contractual relationship. Therefore, the proposed change is major as French law would go from refusing to allow a judicial revision of a contract on the ground of unforeseen events to allowing the judicial termination in the event of a change in the economic context, opening the door to a significant number of terminations of contracts if this provision were to be adopted.

The first commentators of this bill agree on saying that this text will know the same outcome as the previous texts, which will yet not end the attempts in case law to force the renegotiation of the contract between the parties. Furthermore, the method consisting in thoroughly examining all the articles of a previous unsuccessful reform project does not seem very adequate while the government takes multiple initiatives to improve French law (see in this Bulletin, *Progress towards improvement of French Law*, by Christelle Coslin and Pauline Blondet). The debate should arise again at the time of the examination by the legislator of this bill which date is not yet scheduled.

Christelle Coslin/Stéphanie Toubol-Lazarus

- **The latest news regarding Incoterms**

Players in the field of international trade are familiar with and have been using for a long time Incoterms, i.e. international commerce terms as codified by the International Chamber of Commerce ("ICC"). These terms provide a uniform and internationally acknowledged interpretation of the most commonly used commercial terms and of the respective obligations of sellers and buyers during transactions.

Incoterms have been subject to significant developments in 2011. Firstly, the Incoterms 2010 published by the ICC became effective on 1st January 2011. This reform abandoned four terms and created two new ones. Indeed, the terms DAF (Delivered at Frontier), DES (Delivered at Ship) and DDU (Delivered Duty Unpaid) have been replaced by DAP (Delivered at Place). Similarly, the term DEQ (Delivered Ex Quay) has been replaced by DAT (Delivered at Terminal). There are now 11 Incoterms, which are still divided between the same two categories: (i) those used for transport by sea and internal waterways and (ii) those used regardless of the transportation method. To avoid all confusion with the previous terms, the parties will need to clearly indicate "2010" in their contracts when choosing one of these new terms.

The use of one of these terms must be thoroughly examined as it can, in certain situations, be interpreted as resulting in a choice of forum. By decision of 9 June 2011, the Court of Justice of the European Union ("CJEU") indeed compared them to a usage of international commerce within the

meaning of Article 5.1 of EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

In this case *Electrosteel Europe v. Edil Centro* (Case no. C-87/10), the CJEU was questioned to know whether a court could take into account the place indicated by the Incoterm to determine the place of delivery, and, consequently, the court with territorial jurisdiction in the event of a dispute relating to the sale of goods. Without any ambiguity, the CJEU considered that the court must take into account "*all the relevant terms and clauses of [the] contract which are capable of clearly identifying that place [of delivery], including terms and clauses which are generally recognised and applied through the usages of international trade or commerce, such as the Incoterms drawn up by the International Chamber of Commerce*".

As a consequence, one cannot sufficiently advise companies to re-examine their standard contracts, sets of clauses and general terms and conditions to ensure that references to Incoterms are up-to-date and are drafted so as not to give rise to conflicts with possible jurisdiction clauses.

Christelle Coslin/Delphine Lapillonne

• Progress towards an improvement of French law

In France, economic players are often struck by the wide number, complexity and sometimes incoherence of French legal texts as well as by the variety of their sources despite efforts to codify them. Becoming aware of the impact of such factors on the attractiveness and competitiveness of France in a global environment, the Government established on 7 July 2011 a new Circular relating to the quality of the law and replacing the previous texts of 2003 (Circular no. NOR PRMX1118705C, published in the Official Journal on 8 July 2011). This new text provides guidelines to the services of the various French Ministries concerning the preparation of regulatory standards, in particular decrees, in order to simplify French law and make it more accessible and understandable for economic players.

The Circular first of all seeks to improve the quality of regulatory texts. It thus encourages, before the preparation of new standards, to carry out an impact study assessing their necessity, their proportionality and their foreseeable effects. Moreover, the Circular insists on the importance of ensuring the coherence of the new texts with the existing texts. The Circular also limits time gaps before the adoption of regulatory texts by, among other things, imposing greater responsibilities on the services concerned and the obligation to program the texts.

Lastly, the Circular attempts to improve the intelligibility of the texts by more systematically requiring the publication of an explanatory note to be included with the publication of the decrees and certain ministerial orders (in particular those concerning companies). These notes, which aim is to simply

summarise the key points and major innovations of the new text, may provide useful indications to economic players. However, the consultation of such documents must not replace the reading of the decree itself, which is the only text with a normative value. The future will tell us if these instructions will give rise to concrete effects.

Christelle Coslin/Pauline Blondet

FRENCH PROCEEDINGS

• Additional procedural costs in first-instance and appellate proceedings

Among the numerous reforms resulting from the latest Corrective Financing Laws (no. 2009-1674 of 30 December 2009 and no. 2011-900 of 29 July 2011), there is the implementation of two new taxes that directly affect the parties involved in litigation.

Firstly, new Article 1635a (Q) of the French General Tax Code, resulting from the Law of 2011, created a contribution for legal assistance of an amount of 35 Euros applicable for each set of proceedings initiated in civil, commercial, employment and rural matters, whether before judicial or administrative courts. The National Council of Bar Associations is the beneficiary of this new contribution.

Borne by the claimant, it is payable at the time of the initiation of the proceedings. Decree no. 2011-1202 of 28 September 2011 specified its application terms and created, in civil matters, a new Article 62 in the French Code of Civil Procedure, which provides that non-payment of this contribution shall lead to the inadmissibility of the claim (that the court will rule *sua sponte* as the parties cannot raise such an inadmissibility).

Article 1635a (Q) also provides for a few exceptions to the principle of the payment of this tax. For instance, the beneficiaries of the legal aid and the State are exempt from this contribution. Similarly, certain proceedings are not subject to it, such as, in particular, proceedings initiated before the Commission for the Compensation of Victims of Offences, before the Judge for Freedom and Detention or proceedings dealing with situations of excessive debt of individuals and insolvency proceedings.

To better answer the numerous questions arising from the application of these new provisions, the Ministry of Justice and Freedoms (Civil Affairs and Seal Directorate) recently published a note on their application (Circular no. CIV/04/11). This document has notably been communicated to the Presidents of the French Supreme Court and Courts of Appeal for them to communicate it to the courts of their district and to the Prosecutor offices and heads of the clerk offices.

Two payment methods are provided for: either using a tax stamp (which can be bought from tobacco dealers, who are generally in charge of selling such stamps, or from the Courthouse) for proceedings initiated without a legal representative; or electronically, directly by the lawyer after registration with the court. The payment using a tax stamp has been possible since the entry into force of this contribution, i.e. for proceedings initiated as from 1st October 2011 while the electronic payment only became effective as from 1st January 2012.

Secondly, Article 1635a (P) of the French General Tax Code provides for the payment of a tax of 150 Euros payable by all the parties to appellate proceedings in cases where

representation by a lawyer is mandatory. This contribution is allocated to the Compensation Fund for the Profession of *Avoué* (representatives acting before the Court of Appeal), created following the exclusion of this profession by Law no. 2011-94 of 25 January 2011 on the reform of representations before the Courts of Appeal. This tax is paid by the client's lawyer for the record, either using tax stamps or electronically. However, it does not have to be paid by the parties benefiting from the legal aid.

The abovementioned Decree of 28 September 2011 has, in this respect, amended Article 964 of the French Code of Civil Procedure. In its new version, applicable as from 1st January 2012, this Article now provides that the parties must prove the payment of this tax, subject to the inadmissibility of the appeal or means of defence, depending on whether the defaulting party is the appellant or the appellee.

A great number of lawyers have expressed their disagreement with these new contributions that may damage the principle of free and equal access to justice. A demonstration was notably organised on 28 September 2011 before the Paris Courthouse at the initiative of the trade unions for judges, lawyers and their employees, who describe the contribution for legal assistance as a "*non-egalitarian and consequently unfair*" measure and request that it be abandoned. The National Council of Bar Associations has already announced that it submitted the provisions relating to this contribution to the censorship of the Council of State (French Administrative Supreme Court).

Christelle Coslin/Isabelle Mougin

EUROPEAN AND INTERNATIONAL LAW

• Progress towards a European Contract Law

The diversity of private law within the Member States often prevents companies and consumers from fully enjoying the benefits of the European internal market. The European institutions have always defended the idea according to which a uniform internal market cannot be operational without harmonisation efforts regarding private law. It was first of all considered to establish a European Civil Code, but this project never succeeded due to the strong criticisms of the legal community of the Member States.

The European Commission was thus forced to lower its ambitions and suggested the implementation of a European contract law to develop, strengthen and optimise the existing economic relationships within the European Union. The Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, published by the European Commission on 1st July 2010, notably considers the adoption of a Regulation, a Directive or a "tool box" for national legislators.

The different European institutions are rather favourable to the creation of an optional law. Thus, in an opinion dated 19 January 2011, the European Economic and Social Committee favoured a hybrid option including, on the one hand, a "tool box" serving as a common frame of reference to draw up cross-border contracts and, on the other hand, an optional regulatory regime, which could be used by the parties in their cross-border contractual relationships instead of national provisions. The Committee on Legal Affairs of the European Parliament approved the project to create standard contracts that the parties would be free to use for their cross-border transactions.

Following this, the group of experts established by the European Commission, including practitioners of the law, judges and academics from across Europe, submitted on 3 May 2011 a study on the feasibility of a European Contract Law. This study recalls the context and stakes of a European Contract Law through practical questions, such as the rights of consumers in the event of the defectiveness of products and the rules relating to abusive clauses. The study, which is only available in English, suggests 189 Articles in terms of European Contract Law.

The European Commission based itself on this study and published, on 11 October 2011, a Proposal for a Regulation on a Common European Sales Law. This new Regulation would enable cross-border parties to opt for the application of all or part of the 186 articles proposed in an annex. Such harmonisation of contract law would enable to increase legal safety for consumers and businesses and encourage the development of small and medium-sized enterprises, which represent 99% of the companies in the European Union.

Cécile Di Meglio/Aissatou Dem

• Proposed Regulation on the temporary freezing of the bank accounts of the debtor

Arlène McCarthy, Member of the European Parliament in charge of the question relating to cross-border debt recovery, has stated: "*We have passed laws to ensure court judgments can be enforced across Europe but without a simple way for victims to have stolen assets disclosed and frozen it is still too easy for fraudulent traders to hide their ill-gotten gains*". This statement shows the intention to overcome a weakness of the common market relating to the absence of an efficient European system of cross-border debt recovery.

The European Union already has a set of regulations facilitating the recognition and recovery of debts within the European Union: EC Regulation no. 44/2001, said "Brussels I Regulation", of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, EC Regulation no. 1896/2006 of 12 December 2006 creating a European order for payment procedure and EC Regulation no. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure. These Regulations are nevertheless insufficient to protect the rights of creditors wishing to obtain conservatory actions on the bank accounts of their debtor located in another Member State in order to avoid any risk of squandering or transfer towards another Member State.

These creditors, indeed, face obstacles that may be dissuasive, in particular national procedures of conservatory seizures, which are often lengthy and expensive and significantly vary from one Member State to another, as well as difficulties to locate the bank accounts of debtors.

At the request of the European Parliament, the European Commission thus filed, on 25 July 2011, a Proposal for a Regulation creating a European account preservation order to facilitate cross-border debt recovery in civil and commercial matters. Such a European order is not meant to replace the existing national systems, but to create an additional specific procedure to recover debts on accounts located in other Member States than the State which courts are ruling on the merits of the case.

Besides the cases where the creditor already has an enforceable writ in the Member State of origin (whether or not it is enforceable in the Member State of enforcement), the text proposed by the Commission enables a creditor to obtain a European account preservation order before initiating proceedings on the merits, or at any time during such proceedings, if it proves that its claim "*appears to be well founded*". The European order could be handed down by the courts of the Member State with jurisdiction on the merits or by the courts of the Member State in which the bank accounts of the debtor are located. In the first case, the order would automatically become enforceable in all the Member States. To ensure the efficiency of the system, which is mainly based on the surprise effect on the debtor, the European order would be handed down *ex parte*. Furthermore, the creditor

that would not have all the information on the bank accounts of the debtor could ask them from the Member State of enforcement before enforcing the order.

While this new procedure improves the situation of the creditor, it does not sacrifice the fundamental rights of the debtor. Therefore, before handing down the European order, the court could require the creditor to file a guarantee to ensure the compensation of the debtor in the event of any loss resulting from the subsequent cancellation of the order on the ground that it was deprived of any basis. After obtaining the European order and its service on the bank, the European order should be served on the debtor, that would have the possibility to exercise various actions (for cancellation, withdrawal or suspension) in the Member State of origin and/or in the Member State of enforcement. The debtor could also end the enforcement of the order by providing a guarantee to the creditor, or have it restricted, for a company, to the amounts that are not necessary to the carrying out of its usual activities.

The protections listed above have, however, not convinced the United Kingdom that decided, by governmental decision of 31 October 2011, to use the exemption clause from which it benefits. The British Government, indeed, fears that the interests of the debtor will not be adequately protected, in particular due to the non-adversarial nature of the handing down of the European order. The United Kingdom also justifies this dismissal by the fact that, unlike the rules applicable before English courts, the creditor does not have the obligation to provide to the court with jurisdiction the relevant elements in an exhaustive and honest fashion.

Such a Regulation, should it be adopted, would certainly enable to increase the rate of cross-border debt recoveries, which is currently particularly low. To ensure better efficiency of the debt recovery system within the European Union, a bill on the disclosure of the debtor's assets is expected for 2013.

Cécile Di Meglio/Aissatou Dem

• Entry into force of the new Lugano Convention

The Lugano Convention of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters has for a long time been considered as the extension of the Brussels Convention of 27 September 1968 having the same title. Indeed, the provisions of this Convention were greatly based on the Brussels model, which it was to transpose between the Contracting States of what was then the European Community and certain members of the European Free Trade Association (Iceland, Norway and Switzerland). To take the successive developments of the Brussels Convention into account, a new Convention has been executed in Lugano on 30 October 2007 to replace the first Convention bearing the same name.

The work for a new Lugano Convention started a long time ago. As early as 1997, the Council of the European Union

had expressed its intention to revise both the Brussels Convention of 1968 and the Lugano Convention of 1988 to harmonise them and take the case law of the European Court of Justice (which has become the Court of Justice of the European Union) into account. However, the revision process was interrupted after the entry into force of the Amsterdam Treaty of 1999, granting new abilities to the European Community in the field of judicial cooperation in civil matters. After the adoption of EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), replacing the Brussels Convention (except with respect to relationships with Denmark), the negotiations to adapt the Lugano Convention resumed and led to the text executed on 30 October 2007.

In addition to the European Union, Denmark (which did not grant this ability to the European Union), Norway, Switzerland and Iceland are parties to the revised Lugano Convention. It entered into force on 1st January 2010 between the European Union, including Denmark, and Norway, and on 1st January 2011 in Switzerland and finally on 1st May 2011 in Iceland. However, this entry into force coincides with the launch of a revision process of the Brussels I Regulation initiated by a proposed Regulation published by the European Commission on 14 December 2010 (see *A progress in the revision of the Brussels I Regulation: The European Commission proposal*, by Christelle Coslin and Delphine Lapillonne, Paris International Litigation Bulletin, July 2011). The harmonisation that is sought between both texts could thus be brief given the significance of the planned amendments of the Brussels I Regulation that are currently under discussion.

Christelle Coslin/Delphine Lapillonne

The so-called inefficiency of the French legal system: Myth or reality in civil and commercial matters?

Subject to numerous reforms these last years, the French legal system is often presented as inefficient or, to say the least, it is the objective of greater efficiency that is emphasised to justify these reforms. Indeed, the Magendie Report of 24 May 2008 ("*Celerity and quality of justice before the Court of Appeal*") described "*the French procedure [as] rather slow and inefficient*" and mentioned that the French legal system was encountering a triple crisis: "*trust crisis, conscience crisis, growth crisis*". In fact, it is following this report that a reform of the appellate procedure with mandatory representation has been implemented. This reform is meant to significantly reduce the duration of appellate proceedings (see *Proceedings before French courts - Reform of the appellate procedure with mandatory representation*, by Christelle Coslin and Constance Tiliard, Paris International Litigation Bulletin, July 2011).

Let's start with an observation: the European Court of Human Rights has handed down against France, between 1981 and 2006, 255 decisions acknowledging a violation of the right to a trial within a reasonable time, which is covered by Article 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, pursuant to the Report of the European Commission for the Efficiency of Justice ("*Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights*", 2006). France is the second country that is the most frequently concerned by such decisions after Italy (more than a thousand decisions of violation), but far beyond countries such as Germany (30 decisions of violation) or the United Kingdom (only 22 such decisions). However, these decisions mainly relate to proceedings before criminal courts.

Despite the recurring reiteration of this observation of slowness of the French legal system, it is rather interesting to compare it with the few statistics available to date relating to the activity of civil and commercial courts. Indeed, there is data that may provide keys to foresee the reality of the activity of these courts and qualify the assessment that is made of their work.

Are proceedings lengthy?

According to the Judicial Statistics Directory (2009-2010 edition), in 2008, Commercial Courts, ruling in first-instance (i.e. mainly the *Tribunaux de Commerce*) settled the cases brought before them in less than 6 months (on average 5.9 months in all of France). Among these courts, the Paris Commercial Court distinguished itself by dealing with the cases more quickly, on average in 4.3 months. However, these statistics must immediately be put into perspective as they not only cover standard disputes on the merits but also emergency proceedings (summary proceedings and proceedings where the parties have to appear at short notice).

Before the Courts of Appeal, proceedings last longer with an average duration, in 2008, of 12.4 months. Again here, the Courts in Paris and Versailles distinguish themselves by their

relative quickness: the Paris Court of Appeal settles cases in only a year and the Versailles Court of Appeal in 11.3 months on average (Judicial Statistics Directory, 2009-2010 edition). Appeals before the French Supreme Court last a little longer. Before this Court, the highest court of the French judicial system, the average duration of cases in 2009 was of 382 days, i.e. 12.7 months.

Are courts congested?

One of the reasons that has been brought forward to explain the slowness of certain proceedings is the congestion in French courts. In general, 2,642,823 decisions have been handed down in France in 2009 in civil and commercial matters, all courts taken together (*The key figures of the legal system*, Ministry of Justice and Freedoms, 2010). Even though this figure may already seem high, statistics tend to show that French judges do not manage to deal with all the new claims raised before them each year.

Therefore, the number of cases newly registered each year regularly exceeds the number of cases that are closed during the same year. For instance, this was the case of the Paris Court of Appeal between 2007 and 2010 as proven by the activity report of the Court for 2010. This was also the case of the Paris Commercial Court before which 30,229 new proceedings were initiated in 2008, when only 27,006 were closed (Judicial Statistics Directory, 2009-2010 edition).

It ought to be noted that all the courts of a same level do not necessarily encounter the same congestion problem. While 26,179 new cases were brought before the Paris Court of Appeal in 2009 (Paris Court of Appeal, Activity Report for 2010), the Versailles Court of Appeal only registered 8,232 new civil and commercial cases and cases relating to educational assistance during the same year (Versailles Court of Appeal, Activity Report for 2010).

In this respect, the number of new cases must be compared with the number of judges available to examine them within each court. In 2009, the Paris Court of Appeal had 232 judges, which means more than 112 new cases per year and per judge, i.e. 11 new cases per month, taking into account the judicial holidays (assuming that all the judges of this Court rule in civil and commercial matters). As a comparison, in 2007, the Paris Court of Appeal, which counted a similar number of judges (234), had only registered 21,110 new cases in civil and commercial matters, i.e. an average of 9 new cases per month and per judge.

In these conditions, one must hope that the proportion of first-instance judgments subject to an appeal remains limited. The rate of appeals concerning judgments handed down by Commercial Courts only represented, for instance, 13.4% in 2008 (*The key figures of the legal system*, Ministry of Justice and Freedoms, 2010).

In theory, the French Supreme Court has procedural means to limit the number of cases raised before it. However, unlike some of its foreign counterparts, the French Supreme Court only uses such means in a limited number of cases: in 2009,

only 19% of the 20,402 appeals before the French Supreme Court were held inadmissible without any thorough analysis. *In fine*, 1% of these appeals were deemed inadmissible during the same year and 26% resulted in a ruling of dismissal, while quashing represented 21% (French Supreme Court, Activity Report for 2010).

Conclusion

While they confirm the significant workload of the various courts (at different levels), the data set forth above do not strongly support the feeling of slowness of the French legal system that is generally felt. Indeed, taken together, these statistics seem to indicate that, on average, a commercial matter could be settled in court in approximately 18 months, from the start of the first-instance proceedings to the handing down of the appellate order. However, such average durations, which do not only cover commercial matters on the merits, are most of the time exceeded and, in particular, it is rare that proceedings on the merits before a Commercial Court last less than a year.

One ought to keep in mind the fact that commercial disputes involving multinational groups are often complex in nature and may present high stakes, which necessarily increases the duration of the proceedings. Proceedings can also be interrupted, for instance when expert proceedings are ordered, or suspended due to settlement discussions between the parties. This is all the more the case when there are a lot of parties and/or when the parties are companies located outside France due to longer notification periods or time for the translation of the procedural instruments. The recent procedural reforms, such as the one of appellate proceedings, nonetheless aim at enabling a more efficient judicial handling of disputes.



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The ultimate rejection (for the time being...) of class actions under French law?

Under French law, two types of civil actions present similarities with class actions: the collective interest action (*action d'intérêt collectif*) and the joint representation action (*action en représentation conjointe*). The collective interest action remains very different from US-style class actions. Indeed, only an accredited association may bring this action and it can only seek compensation for the loss suffered by a group. Therefore, only the collective interest of the consumers is protected and the collective loss compensated.

On the other hand, the joint representation action seeks to compensate individual losses through the representation of identified victims by an accredited association. This action may appear to be quite similar to class actions with an opt-in system (i.e. class actions where the group is defined by the people who declare themselves as part of the group, compared to the so-called opt-out class actions, which are generally defined by reference to a group which the members can decide to leave). Indeed, the beneficiaries of the joint representation action are only the victims who explicitly appointed the association. French law limits the conditions in which the mandate may be solicited and prohibits any solicitation by means of a public appeal on the radio or television, or by means of posting of information, tracts or personalised letters (Article L. 422-1 of the French Consumer Code). Moreover, authorisation must be given in writing by each consumer.

After years of discussions, the introduction of class actions in France recently faced two major rejections: one from the French Supreme Court and the other from the French Government.

Judicial reluctance to a joint representation action

A ruling of the French Supreme Court imposes a very strict interpretation of the abovementioned conditions for an association to act on behalf of consumers. Further to a decision of the French Competition Authority dated 30 November 2005 (Decision no. 05-D-65 of 30 November 2005 on practices observed in the mobile phones sector), which found several French mobile operators guilty of collusion and price fixing practices, a French consumer brought a claim before the Paris Commercial Court. The major French consumer association (*UFC - Que Choisir*) joined the claim to request compensation for the collective loss suffered by the consumers (as a general body). 3,500 consumers, assisted and advised by the French consumer association, then decided to join the claim to obtain damages compensating their individual losses.

The consumer association had created, on its website, a tool enabling consumers to calculate the amount of damages they could expect and give the association a mandate to play a role of intermediary between them and their lawyers. The mandate did, however, not explicitly grant authorisation to the French consumer association to represent them before the Court.

The French consumer association did, therefore, not formally initiate a joint representation action. It actually tried to bring an artificial class action before the French Courts, where such a form of litigation is not available. The Paris Commercial Court and then the Paris Court of Appeal dismissed all the claims considering that the French consumer association had in fact brought a joint representation action in breach of the provisions governing this type of action (Paris Commercial Court, 15th Chamber, 6 December 2007, Docket no. 2006057440 confirmed by Paris Court of Appeal, 22 January 2010, no. 08-09844). This decision was upheld by the French Supreme Court on 26 May 2011 (French Supreme Court, Commercial Chamber, 26 May 2011, *Pourvoi* no. 10-15676).

The French Supreme Court considered that the prohibition laid down in Article L. 422-1 of the French Consumer Code to solicit mandates through public appeal is separate from the protection of one's image and the presumption of innocence. The French Supreme Court also considered that the list of communication means mentioned in the above Article (public appeal on the radio or television, or by means of posting of information, tracts or personalised letters) is not exhaustive and that as a result, solicitation through a website is also prohibited. It is, therefore, almost impossible for French consumer associations to bring a joint representation action as they are not able to collect the required mandates. This decision is a clear stand of the French Supreme Court against attempts to bypass existing procedural rules (joint representation action) to actually bring a lawsuit in a form similar to that of class actions.

Government's refusal to introduce class actions

Many times postponed, the introduction of class actions *à la française* has once again been rejected by the French Government in 2011. Firstly, class actions have been withdrawn from the bill for the increase of the consumers' protection. Socialist Senators, who have the majority among the Senators, have nevertheless reintroduced a similar provision at the end of 2011. The majority of the Members of the French *Assemblée Nationale* will certainly pay attention to dismiss such provision during the second examination of this bill by the *Assemblée Nationale*. Frédéric Lefebvre, Secretary of State for Consumer Affairs, indeed explained that even though he thought the contrary before the economic crisis, the introduction of class actions in French law "*is not satisfactory*" as class actions could have dramatic consequences on the economy. Yet, Nicolas Sarkozy promised, in 2007, that he would introduce a procedural tool allowing consumers to bring together a claim before French Courts. Consequently, instead of a general class action that would follow the US model, Frédéric Lefebvre prefers to introduce several "targeted actions" adapted to each concerned sector (housing, mobile phones, rest-home etc.). It is likely that there will not be enough time for a vote on the creation of these actions before the French presidential elections of May 2012.

Impatient Members of the French Senate have also attempted to introduce in the bill for the increase of the safety of medicines and health products an amendment to create a class action to compensate physical and psychological losses. Class actions in the medical field had never been considered before. Indeed, the principle of full and individual compensation of bodily harm and moral losses implies a case-by-case analysis and is not compatible with compensation on the basis of a "*calculation method*" that would be set by the courts. This amendment has been dismissed by the Commission for Social Affairs of the French *Assemblée Nationale* on 20 September 2011 and the bill was adopted without this amendment at the end of 2011.

As far as France is concerned, it seems that the idea of introducing a form of class action has, for the time being, been abandoned by the Government. This idea could be the subject of further debate in the scope of the forthcoming elections. At the European level, the project to introduce class actions is, however, still under discussion.



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Uncertain jurisdiction in contractual matters within the European Union

The determination of the court before which one should initiate an action is an essential step when preparing a trial. Indeed, the wrong decision can significantly increase the duration of a dispute and consequently increase costs. Yet, in the absence of any jurisdiction clause binding the parties to an agreement, the determination of the court(s) with jurisdiction in contractual matters is rather difficult within the European Union.

This question is now governed by EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), which provides, in addition to the principle according to which the courts of the State of the defendant's domicile have jurisdiction, an alternative ground for jurisdiction in contractual matters. Article 5.1 thus provides that:

"A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies".

The first difficulty lies in ensuring that the action does indeed relate to a contract within the meaning of this text, which is not always obvious. This notion of contractual matters, like its natural corollary, tort matters, is an autonomous notion, which scope is specific to European law and results from the case law of the Court of Justice of the European Union ("CJEU"). Secondly, the implementation of Article 5.1 of the Brussels I Regulation also gives rise to a certain number of difficulties.

Origins of Article 5.1 of the Brussels I Regulation

At the beginning, Article 5.1 of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters ("Brussels Convention", replaced by the Brussels I Regulation) granted jurisdiction, without providing further explanations, to the court "for the place of performance of the obligation". In a subsequent version of this Convention, Article 5.1 was then amended to include the case law of the CJEU according to which the obligation referred to in this Article is that "which is at the basis of the claim" (CJEU, *De Bloos*, 6 October 1976, Case no. C-14/76).

This addition did not facilitate the application of this provision, in particular in the event of multiple obligations. In this case, the CJEU held that it is necessary to distinguish the main obligation to then determine the place of performance of such obligation. When there is no main obligation, jurisdiction is divided: the claimant, if it does not wish to bring an action before the courts of the State of the defendant's domicile (pursuant to Article 2 of the Brussels Convention and Brussels I Regulation), must summon the defendant before as many courts as places of performance of the corresponding obligations of equal significance (CJEU, *Shenavai*, 15 January 1987, Case no. C-266/85 and *Leathertex*, 5 October 1999, Case no. C-420/97). It is easy to see the difficulties arising from this case law when, among the obligations in question, the main obligation does not clearly appear in the agreement.

It is not necessarily simpler to determine the place of performance of the obligation concerned (once it has been identified). Indeed, this place of performance is understood as a legal notion that does not result from the sole factual circumstances of the case. As a consequence, the courts must examine the law applicable to the contract to determine the place of performance of the obligation that is the basis of the claim (CJEU, *Tessili*, 6 October 1976, Case no. C-12/76). Yet, the national laws of the Member States do not necessarily agree on the location of the legal place of performance of an obligation. To mention a classic and very important example in practice, the law designated as applicable to the contract will have a significant impact when an obligation to pay is at the heart of the dispute. Indeed, depending on the State concerned, payment may be due at the debtor's domicile, which is the case in France, or at the creditor's domicile, which is the case in Germany.

Such a method is obviously not satisfactory given the complexity to which it gives rise. The consideration of the law applicable to the contract to determine the place of performance, and, therefore, the court with jurisdiction, may result in jurisdiction conflicts (i.e. several courts accepting their own jurisdiction), at least in theory, in the absence of uniformity in determining the applicable law.

In light of the above difficulties, Article 5.1 was thus amended when the Brussels Convention became a Regulation. Even though it remained in the text (it became Article 5.1 a) of the Regulation), this provision as resulting from the Brussels Convention has become more limited in practice due to the inclusion of presumptions in Article 5.1 b) with respect to the place of performance in certain special contracts.

Indeed, rules specific to contracts relating to the sale of goods and provision of services have been laid down in Article 5.1 b). With respect to sales, it is specified that the place of performance is the place of delivery (or where delivery is expected pursuant to the contract). With respect to the provision of services, the courts are invited to seek the place of provision of the service according to the provisions of the contract. Such rules, which concern the contracts that are

most frequently used by the operators of international trade, aim at ensuring the principle of legal security that the rule laid down in Article 5.1 a) cannot guarantee. As expressed in Article 5.1 c), the rule of Article 5.1 a) is now only used in residual cases where the contract in question cannot be deemed a contract for the sale of goods or provision of services.

However, these presumptions, which are only applicable "*unless otherwise agreed*", entailed new questions and did, therefore, not enable to end discussions around Article 5.1. The CJEU, like national courts, regularly rule on the interpretation and application of this Article.

Seeking a definition of the sale of goods and provision of services

The first issue, indeed, relates to the definition of the special contracts referred to in Article 5.1 b). The notions of sale of goods and of provision of services within the meaning of the Brussels I Regulation are deemed autonomous by the CJEU. This means that they are given, under European law, a definition that may be different than the definitions given by the domestic laws of the various Member States. The use of the rules existing under French law at the stage of determination of the nature of the contract is thus not of any help.

Since the *Car Trim* decision, one cannot exclude that certain contracts that may be deemed as relating to the provision of services under French law be considered as contracts for the sale of goods within the meaning of the Brussels I Regulation. In this case, the dispute related to a contract for the delivery of certain components that were to be manufactured in compliance with numerous requirements relating, in particular, to the identity of the suppliers of materials. The CJEU noted that within the meaning of the Brussels I Regulation, a contract for the sale of goods could relate to things to be manufactured or produced, as it is the case pursuant to the Vienna Convention on the International Sale of Goods of 11 April 1980. Furthermore, two criteria enable to determine whether the main obligation of a contract relates to the sale of goods or the provision of a service: (i) is it the buyer that provides the materials used to manufacture the components? and (ii) is the supplier liable for the quality of its goods and compliance with the contract? If the buyer did not provide the materials, by only defining the sources of supply and the transformation processes, while the party having to deliver the goods bears this liability, the main obligation of the contract relates to the sale of the goods in question (CJEU, *Car Trim*, 25 February 2010, Case no. C-381/08).

With respect to the contract for the provision of services, it can only relate to the achievement of a "*particular activity*" in return for payment. As a consequence, the fact of refraining from doing something does not fall within the presumptions laid down in Article 5.1 b). Thus, for instance, a copyright licensing contract is not a provision of services within the meaning of the Brussels I Regulation as the author does not

provide any service and only undertakes to let the operator freely use the right for which the licence has been granted (CJEU, *Falco*, 23 April 2009, Case no. C-533/07). Pursuant to Article 5.1 c), such contracts are thus subject to the rule of Article 5.1 a).

While the *Falco* case law generally excludes the obligations not to take action from the scope of the provision of services, it does not solve all the uncertainties relating to the notion of "*particular activity*". Without a more specific definition of this notion, the various contracts must be examined on a case-by-case basis to determine whether they fall within one of these presumptions.

For instance, the French Supreme Court recently quashed an appellate decision that had applied Article 5.1 a) to a contract relating to the carriage of goods by sea without checking whether it was a contract for the provision of services within the meaning of the Brussels I Regulation (French Supreme Court, Commercial Chamber, 16 November 2010, Bull. no. 181). This decision follows a decision of the CJEU that considered that a contract for the carriage of passengers by air was a contract relating to the provision of services (CJEU, *Rehder*, 9 July 2009, Case no. C-204/08).

The stakes are high: when in the presence of a contract for the sale of goods or provision of services, all the claims relating to this contract rely on the place defined in Article 5.1 b) (CJEU, *Color Drack*, 3 May 2007, Case no. C-386/05). This unity does not exist with Article 5.1 a) where several claims relating to a contract may concern different obligations performed in different places. Moreover, the law applicable to the contract does not have to be identified to determine the places of performance referred to in Article 5.1 b), unlike the method resulting from Article 5.1 a), which has recently been confirmed by the CJEU (*Falco*, mentioned above).

Seeking the place of delivery of the goods or of provision of the services

The identification of the places of performance referred to in Article 5.1 b) also gives rise to difficulties with respect to the place of delivery of the goods or of provision of the services. The first difficulty relates to the plurality of places of delivery or performance of the services. In the abovementioned *Color Drack* decision, the CJEU ruled on the place to be retained in the case of a contract for the sale of goods providing for several places of delivery within a Member State. To ensure foreseeability of solutions, the CJEU gave priority to the place of the main delivery (to be determined according to economic criteria) and, in the absence of a main place of delivery, the CJEU provided an option for the claimant between the various places of delivery.

The determination of the main place of performance was then extended to contracts for the provision of services by the *Rehder* decision mentioned above in a case involving places of performance in different Member States. In the same vein as the *Color Drack* decision, the CJEU also granted the

claimant, in matters relating to contracts for carriage by air, the possibility to choose between the jurisdiction of the place of arrival or of departure of the aircraft. These places may be deemed as bearing equal significance.

However, more recently, the CJEU adopted a different method in a case concerning a commercial agency agreement implying the provision of services in several Member States (CJEU, *Wood Floor Solutions Andreas Domberger*, 11 March 2010, Case no. C-19/09). Indeed, in the absence of a main place of performance of the services of the agent pursuant to the provisions of the contract or in the facts, the CJEU considered that it was necessary to limit jurisdiction to the domicile of the agent (and not create an option for the claimant between the various places of performance).

It ought to be underlined that this is a solution that is specific to the agency contract and does not enable to determine the approach of the CJEU in the presence of another contract for the provision of services. Even though the CJEU relies, in compliance with the spirit and letter of the Brussels I Regulation, on foreseeability and the proximity of the court designated as having jurisdiction, one can wonder whether such subtleties in the method retained, which may vary depending on the analysis of each type of contracts, are not actually detrimental to these objectives.

A second source of difficulties relates to the importance given to the parties' intention in the scope of the application of the presumptions of Article 5.1 b). Indeed, this text specifies that the places of delivery and provision of services are determined "*under the contract*" and that the jurisdiction of a court of a Member State only results from it "*unless otherwise agreed*". Certain contractual clauses relating to the performance of the contract may thus grant jurisdiction to certain courts, without (all) the parties necessarily being aware of it.

In this respect, the CJEU adopts an only slightly limited position as it considers that, to determine the place of delivery of the goods or provision of the services on the basis of the provisions of the contract, it is necessary to take into account all the relevant terms and clauses of this contract, including, the case arising, the terms and clauses that are generally recognised and used in the scope of international trade (CJEU, *Car Trim*, mentioned above and *Electrosteel*, 9 June 2011, Case no. C-87/10; see in this Bulletin, *The latest news regarding Incoterms* by Christelle Coslin and Delphine Lapillonne).

Conclusion

More than 10 years after the amendment of Article 5.1 of the Brussels I Regulation, and in particular the addition of the presumptions provided for in paragraph b), the foreseeability that is sought is still not achieved to date. There is a significant number of situations where the jurisdiction of the court hearing the matter can be challenged due to the very complex nature of the methods used by the CJEU to

determine the court with jurisdiction (determination of the main place of performance in matters relating to contracts for the sale of goods and provision of services and, failing such, granting or not of an option to the claimant depending on the type of contract; use of the applicable law to determine the legal place of performance of the obligations provided for by the other contracts, etc.). Furthermore, the obvious intention of the CJEU to adjust the solutions depending on each type of contract and to seek greater proximity seems to be detrimental to the general foreseeability of the connecting criteria in contractual matters.

In this respect, it is surprising that this provision, often criticised by legal authors and that is regularly questioned in case law, is not concerned by the currently discussed reform of the Brussels I Regulation. Unless there is a major amendment during this revision process, the parties will still have to work with the difficulties arising from the imprecise rules of jurisdiction in contractual matters, until, hopefully, a simplification of their interpretation by European case law.



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Rome II Regulation, clarifications as to its scope of application

Practitioners often face difficulties with EC Regulation no. 864/2007 on the law applicable to non-contractual obligations ("Rome II Regulation"), which are not over yet. Firstly, the creation of this Regulation had required much time and had been arduous. Three readings of the text by the European Parliament and European Council had been necessary to find a (partial) compromise between the various European institutions. This Regulation had thus been adopted on 11 July 2007 after more than 4 years of negotiations.

Then, after this adoption, its application in time gave rise to various concerns. Indeed, while Article 31 provides that the Rome II Regulation "*shall apply to events giving rise to damage which occur after its entry into force*", the date of entry into force is not explicitly specified in the body of the Regulation. Confusion could thus arise as a consequence of Article 32, which set the "*Date of Application*" of the Regulation on 11 January 2009. Based on a literal approach, certain authors considered that the Rome II Regulation was to apply as from 11 January 2009 to events giving rise to damage that had occurred after 20 August 2007 (i.e. the twentieth day following its publication in the Official Journal of the European Union on 31 July 2007, pursuant to Article 254, paragraph 1, of the EC Treaty, which provides for a date of entry into force by default when it is not specified in the European Regulations and Directives).

However, the continuous doubt with respect to this issue has recently been raised as the Court of Justice of the European Union ("CJEU") has been referred a question on this issue, which has been answered on 17 November 2011. More specifically, in the case *Deo Antoine Homawoo v. GMF Assurances* (Case no. C-412/10), the High Court of Justice of England had ordered that a referral question be raised before the CJEU on 18 August 2010 in order to know whether it ought to apply the Rome II Regulation to a traffic accident that occurred in France on 29 August 2007 and which involved a pedestrian residing in the United Kingdom. The referral question specified that the proceedings had been initiated on 8 January 2009; but that on 11 January 2009, the English Court had still not settled the issue of applicable law.

The CJEU entirely followed the Advocate General, Mr Paolo Mengozzi who, in his Opinion of 6 September 2011, was in favour of applying the Rome II Regulation only to events giving rise to damage that occurred as from 11 January 2009. After a thorough analysis of the preparatory works of the Regulation, the Advocate General considered that the legislator's intention was not to distinguish between date of application and date of entry into force, all the more so as in the Spanish, Dutch and Romanian versions, Article 32 was entitled "Entry into Force", thus rendering the confusion notably existing in the French and English versions irrelevant.

According to the CJEU, the sole reason for establishing a date of application different from the date of entry into force was to enable Member States to notify, before the entry into force of the Rome II Regulation, the international conventions to which they were already parties and which material scope

of application tallied with that of the Regulation (such as, for instance, The Hague Convention on the law applicable to products liability of 2 October 1973). Moreover, it seems rather difficult to subject damages that occurred between 20 August 2007 and 10 January 2009 to a text that the national courts could not apply during the same period. Such an interpretation was finally dismissed as it is detrimental to the objectives of legal security and foreseeability of the Rome II Regulation. Only an application to events giving rise to damage that occurred as from 11 January 2009 may enable a uniform application of this European text.

Other evolutions regarding this text could follow in the coming months. Indeed, a possible revision of the Rome II Regulation is under discussion to include in its material scope of application the violation of privacy and rights relating to personality.

These issues have explicitly been excluded by Article 1.2 g) of the Regulation as the negotiations had failed between the European Parliament, the European Council and the European Commission with respect to the rule of conflict of laws, which ought to govern these issues. At the time, it had been agreed that the European Commission would prepare a comparative study on the applicable law in the 27 Member States in terms of violation of privacy and rights relating to personality. This undertaking has been reaffirmed in Article 30.2 of the Rome II Regulation.

The thorough analysis of the applicable rules of conflict of laws in force in these matters in Europe, which was made public in February 2009, highlighted the differences existing between the 27 Member States, as well as the latent conflict between compliance with privacy and freedom of expression. As a conclusion, this study thus privileged a two-fold solution: the adoption of a European Directive defining a harmonised and minimum protection of privacy combined with the implementation of a rule of conflict of laws based on the place of establishment of the editor.

After having acknowledged this study, the Reporting Judge (*Rapporteur*) appointed on 2 September 2009 by the Legal Affairs Committee of the European Parliament to work on a possible amendment of the Rome II Regulation regarding these issues, Diana Wallis, already produced three working documents. The first one, published on 23 June 2010, presented the various possible options after the initial failure of the negotiations and favoured the search for a connecting factor that may be acceptable by all parties and that would enable the implementation of a common rule of conflict of laws. Indeed, she believed that the harmonisation of the substantive law still included numerous obstacles.

The second document, dated 25 May 2011, addressed the debates and controversies that still govern these issues and confirmed the position of Diana Wallis in favour of an extension of the material scope of application of the Rome II Regulation and the inclusion of a specific rule of conflict of laws. In this respect, she favours the wording suggested by Professor Jan Von Hein on the website conflictflaws.net,

which combines various connecting factors: the place where the rights relating to personality are directly and substantially affected by the infringement, combined with the taking into account of the foreseeability of the application of such law for the defendant, the right of reply being subject to the law of the editor or distributor/broadcaster. It is actually a rule of conflict of laws in these terms that Diana Wallis recommended that the European Commission adopt in its Draft Report of 2 December 2011.

Such a step forward would be particularly welcome while the CJEU has recently specified how EC Regulation no. 44/2001, said "Brussels I", of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was to be applied to these matters when the alleged breach resulted from content posted online on a website. By two consolidated cases, *eDate Advertising GmbH v. X* and *Olivier Martinez, Robert Martinez v. MGN Limited* (Cases no. C-509/09 and C-161/10), the CJEU indicated, on 25 October 2011, that a person deeming that he/she has been harmed by such content benefited from a jurisdiction option to obtain compensation of the entire loss by bringing the action either in the Member State of the place where the publisher of the content is established or in the Member State of his/her centre of interests. The CJEU also added that the courts of each Member State where the content posted online had been accessible could have jurisdiction, but only over the loss caused in such State.

The coming months should, therefore, provide clarifications with respect to the possible revision of the Regulation to extend its material scope of application. In any case, pursuant to Article 30.1 of the Rome II Regulation, the European Commission should soon submit a report on the application of the Regulation and a possible amendment suggestion. This report may represent, as Diana Wallis wishes, the opportunity to specify the position of the European Commission with respect to the requirement of a more substantial amendment of the Rome II Regulation.



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Four years after the *Christopher X* decision, US courts still give little deference to the French blocking statute

France has long viewed the application of US style discovery procedures to obtain evidence located in France as an attack against its sovereignty. Although both France and the US ratified The Hague Convention on the Taking of Evidence Abroad ("The Hague Evidence Convention") more than 35 years ago, US courts have still not limited extraterritorial discovery to the methods prescribed by The Hague Evidence Convention and authorised parties to seek the broader discovery allowed under the US Federal Rules of Civil Procedure ("Federal Rules").

As a result, in 1980, France enacted a criminal statute prohibiting individuals from cooperating with US discovery requests not made in accordance with The Hague Evidence Convention. No French court convicted anyone under the statute before the French Supreme Court's decision on 12 December 2007. Despite that decision, and with awareness of it, US courts still discount the prospects of criminal sanctions under the French blocking statute when considering whether or not to compel production of evidence from France under the Federal Rules or to limit it to the discovery available under The Hague Evidence Convention.

The French Blocking Statute: The intention to provide French companies with a legal excuse for not complying with US discovery requests

For the purpose of improving mutual judicial cooperation in civil or commercial matters, France, the US and multiple other countries ratified The Hague Evidence Convention of 18 March 1970, which entered into force in 1972 in the US and 1974 in France. This Convention prescribes means by which a judicial authority in one Contracting Country may request evidence located in another Contracting Country.

When it ratified The Hague Evidence Convention, France decided, in accordance with Article 23 (and together with many other European countries), that it would not execute letters of request issued for the purpose of obtaining "*pre-trial discovery of documents*". On 19 January 1987, France limited its Article 23 reservation declaring that it does not apply "*when the requested documents are enumerated limitatively in the letter of request and have a direct and precise link with the object of the procedure*".

Despite the accession of the US to The Hague Evidence Convention, US courts never limited parties seeking discovery to the methods allowed by this Convention and always permitted them to obtain evidence from French companies in accordance with the broader discovery available under the Federal Rules. French companies perceived such discovery as abusive and, in 1980, the French legislature therefore enacted a blocking statute prohibiting anyone, under threat of criminal sanction, to "*request, search for, or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of constituting evidence in view of foreign judicial or administrative proceedings or in relation thereto*", except when such communication is authorised pursuant to an international treaty or regulation, such as The

Hague Evidence Convention (Law no. 80-538 of 16 July 1980, Article 1 Bis).

The goal of this criminal statute, which is purposefully broadly drafted to encompass all types of documents and information, was to provide French companies with a legal basis for refusing to comply with US discovery requests under the Federal Rules. Nonetheless, French criminal courts did not convict anyone under this statute until 2007, which is one of the reasons why US courts historically gave little heed to the French law.

The 1987 US Supreme Court decision in *Aerospatiale*: The Hague Evidence Convention does not pre-empt the Federal Rules

US courts' approach was confirmed on 15 June 1987 when the US Supreme Court held in *Société Nationale Industrielle Aerospatiale v. U.S. District Court* (482 U.S. 522 (1987)) that The Hague Evidence Convention did not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory country. Moreover, the Supreme Court gave little deference to the French blocking statute by holding that, "[i]t is well settled that such [blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence, even though the act of production may violate that statute" and "American courts are not required to adhere blindly to the directives of such a statute" (*Id.* at 544 n. 29).

Rather, the Supreme Court directed lower courts to undertake a case-by-case comity analysis in order to determine in each situation whether it would be appropriate to resort to The Hague Evidence Convention procedures. The existence of a blocking statute such as France's "*is relevant to the Court's particularized comity analysis only to the extent that its terms and its enforcement identify the nature of the sovereign interests in non disclosure of specific kinds of material*" (*Id.*).

When the likelihood of prosecution becomes a reality: France's first criminal conviction under the blocking statute

On 12 December 2007, the Criminal Chamber of the French Supreme Court upheld a decision in which the Paris Court of Appeal ordered a French lawyer, *Maître Christopher X*, to pay 10,000 Euros for violating the French blocking statute (Bull. Crim. 2007, no. 309). This French Supreme Court decision was handed down in the larger case *Executive Life*, in which the French mutual insurer MAAF was sued before a Federal Court in Los Angeles, along other French corporations, by the California Insurance Department for fraud in connection with the 1991 purchase of Executive Life Insurance Co.

In April and December 2000, the Federal Court issued a number of requests for evidence under The Hague Evidence Convention to obtain from MAAF documents located in France relating to the allegedly fraudulent purchase. The French lawyer, agent of the American attorney representing

the California Insurance Department, took the initiative to call an ex-director of MAAF. According to the Paris Court of Appeal, during this call, the French lawyer alleged that the members of MAAF's board of directors had not been properly informed at the time of the purchase. In other words, "*he told a lie in order to get to the truth*". Thereafter, MAAF filed a criminal complaint against the French lawyer for violation of the French blocking statute.

The Paris Court of Appeal held that the French lawyer did not solely approach, in a neutral manner, individuals whose testimony could have been obtained in accordance with the provisions of The Hague Evidence Convention. To the contrary, it held that he had sought, without due authorisation, economic, commercial or financial information aimed at constituting evidence, because the information obtained could enable the plaintiff to select the ex-director as a witness and to guide his future testimony. The Paris Court of Appeal therefore found the French lawyer guilty of violating the French blocking statute and sentenced him to pay a fine of 10,000 Euros.

The convicted lawyer thereafter filed a challenge against this decision before the French Supreme Court, alleging, among other arguments, that he never solicited the information given by the ex-director, which, he alleged, had been provided spontaneously. He also claimed that in placing the call, he only attempted to obtain the ex-director's consent for giving testimony, as a person appointed as Commissioner under Article 17 of The Hague Evidence Convention may not use compulsion on the witness to force him/her to testify. The Criminal Chamber of the French Supreme Court dismissed the above arguments and upheld the Court of Appeal decision. This unprecedented decision made it clear that risks of prosecution and conviction under the French blocking statute are real.

The *Christopher X* decision was shortly followed by another decision from the Criminal Chamber of the French Supreme Court on 30 January 2008. Although it upheld the lower court's refusal to prosecute because of insufficient charges, the French Supreme Court did not award the latter's position according to which the French blocking statute does not apply to the "*communication to French people who request them, of contractual documents held on the US territory by American attorneys*". The French Supreme Court confirmed that the French blocking statute applies even if the requested documents are located in the US as long as, pursuant to Articles 113-7 and 113-8 of the French Criminal Code, there is a French victim at the time the offence is committed and that this French victim files a complaint with the French criminal authorities (French Supreme Court, Criminal Chamber, 30 January 2008, *Pourvoi* no. 06-84.098).

Four recent US decisions: Despite *Christopher X*, US courts refuse to find in the blocking statute grounds for requiring parties to use The Hague Evidence Convention

The recent conviction by the French Supreme Court, and its reminder of the broad scope of application of the French

blocking statute, has not convinced US federal courts that applicants seeking discovery in France should limit themselves to the means available under The Hague Evidence Convention. Four cases decided in the federal courts since the *Christopher X* decision have considered the French decision but given it little weight, and concluded that applicants for discovery from a French party may use the Federal Rules and are not bound by the strictures of discovery under The Hague Evidence Convention.

Strauss v. Credit Lyonnais

The first court to consider the import of the French blocking statute after *Christopher X* was the Federal District Court for the Eastern District of New York in its decision of 10 March 2008 in *Strauss v. Credit Lyonnais S.A.* (249 F.R.D. 429). In this case, the victims (and their estates) of multiple terrorist attacks allegedly perpetrated by Hamas in Israel alleged that, among others, Crédit Lyonnais, a financial institution incorporated and headquartered in France, had provided material support to terrorists in violation of US antiterrorism laws. The plaintiffs sought discovery from Crédit Lyonnais under the Federal Rules, and Crédit Lyonnais moved for a protective order compelling plaintiffs to seek discovery through The Hague Evidence Convention and excusing it from discovery that Crédit Lyonnais claimed was protected under the French blocking statute (*Id.* at 435, 437).

To determine whether plaintiffs should have to seek discovery only under The Hague Evidence Convention, the Court applied factors enumerated in Paragraph 442(1)(c) of the Restatement (Third) of Foreign Relations Law, as well as those articulated by the Supreme Court in *Aerospatiale*, and those previously mentioned in decisions of the district courts for the Second Circuit. Together, these seven factors were:

1. the importance to the litigation of the documents or other information requested;
2. the degree of specificity of the request;
3. whether the information originated from the US;
4. the availability of alternative means of securing the information;
5. the extent to which non-compliance with the request would undermine important US interests or compliance with the request would undermine important interests of the State where the information is located;
6. the hardship of compliance on the party from which discovery is sought; and
7. the resisting party's good faith (*Id.* at 438, 439).

The Court considered the effect of the French blocking statute only with respect to the fifth and sixth factors. With respect to the fifth factor (the comity analysis), the Court adopted the US Supreme Court's ruling in *Aerospatiale* according to which "*American courts are not required to adhere blindly to the directives of such a statute*" (*Id.* at 450). It also distinguished

the facts of *Christopher X* from those in the present case on the following grounds. In *Christopher X*, the prosecuted lawyer was not conducting discovery against a party within the confines of the Federal Rules or pursuant to court order. The lawyer had made false statements and MAAF filed a complaint with the French authorities to initiate the prosecution under the blocking statute (*Id.* at 451). These distinguishing facts, along with the interest the Court found that France would have in eliminating terror financing, weighed in favour of allowing discovery under the Federal Rules on the ground of the comity analysis.

With respect to the sixth factor, the hardship on Crédit Lyonnais of complying with the discovery request, the Court found that the prospect of facing criminal penalties for compliance weighed in favour of the objecting party. Nonetheless, the Court held that if the objecting party were a party to the action, as in that case, such hardship would be afforded less weight in the analysis (*Id.* at 454). Moreover, the Court found that Crédit Lyonnais had failed to show that the French government was likely to prosecute or otherwise sanction Crédit Lyonnais for having complied with a US court order compelling discovery.

Because on balance the factors weighed in favour of the plaintiffs (except possibly the foreign origination of the sought-after documents and Crédit Lyonnais' good faith), the Court denied Crédit Lyonnais' motion for a protective order and ordered it to produce all documents pursuant to the plaintiffs' discovery requests in accordance with the Federal Rules (*Id.* at 456). Thus, although the Court considered the possibility that Crédit Lyonnais could be prosecuted for complying with its order, the Court found such possibility to be remote because of distinguishing facts between this case and *Christopher X* and accorded the *Christopher X* decision little weight in the comity and hardship analyses, particularly in light of the fact that Crédit Lyonnais was a party to the action itself.

Subsequent case law

In October 2009, the Federal Bankruptcy Court for the District of Delaware also considered the effects of the French blocking statute in a discovery dispute in which a party sought discovery from a Dutch party that had claimed that the information sought was located at its affiliate's premises in France. After determining that the discovery sought was in the control of the Dutch party, Maasvlakte, and could be compelled, the Court in *In re Global Power Equipment Group* (no. 06-11045, 2009 WL 346212), applied the seven balancing factors articulated in *Strauss*.

In assessing France's comity interests, the Court concluded that "*the French interest here is particularly attenuated*" (*Id.* at *14). Maasvlakte was not a French company, the facility at issue in the litigation was not located in France, the majority of the information sought was not developed in France and the information sought in discovery was only transferred to France by the Dutch company, a party to the trial, subject to the Court's jurisdiction. Moreover, witnesses

had testified at deposition that the French government would have little interest in protecting such information from discovery (*Id.* at *14).

In considering the potential hardship on the party, the Court noted that Maasvlakte voluntarily submitted a proof of claim in the bankruptcy and thereby submitted to the jurisdiction of the Court. On the other hand, the Court acknowledged the possibility that Maasvlakte could expose itself to prosecution in France if it complied with discovery under the Federal Rules. The Court found, however, that the risk of prosecution was remote, because in the twenty years since the enactment of the blocking statute, the French authorities had only prosecuted under it once, and because Maasvlakte had not shown that there was any likelihood that it or its French affiliate would be prosecuted for complying with the discovery requests. In particular, the Court rejected Maasvlakte's argument according to which with respect to its affiliate in France, a non-party, The Hague Evidence Convention was the only means for obtaining discovery from it. The Court cited *Aerospatiale* for the Supreme Court's failure to make a distinction between discovery taken from a litigant or a third party (*Id.* at *16-17).

As in *Strauss*, the Court thus concluded that on balance the factors weighed in favour of permitting the party seeking discovery to employ the Federal Rules and did not require it to use the more limited means available under The Hague Evidence Convention.

Two cases in 2010 again gave short shrift to the French blocking statute. In *In re Air Cargo Shipping Services Antitrust Litig.* MDL (no. 06-MD-1775, 2010 WL 1189341 (29 March 2010)), the Federal District Court for the Eastern District of New York ordered the French airline Air France to produce documents that it had withheld on the ground that their production would be prohibited by the French blocking statute. The documents in question consisted of documents that the US Department of Justice had already obtained in the course of its criminal antitrust investigation into the same activities that formed the basis for the civil antitrust claims at issue in the case.

The Court applied the seven *Strauss* factors and particularly focused on the potential hardship on the defendant of producing the documents. The Court noted that although the Supreme Court had held that "*fear of criminal prosecution constitutes a weighty excuse for non production*" (*Id.* at *3, citing *Aerospatiale*, 357 U.S., at 211), other courts had found that the legislative history of the statute showed that it "*was never expected or intended to be enforced against French subjects but was intended rather to provide them with tactical weapons and bargaining chips in foreign courts*" (*Id.* at *3, citing *Adidas (Canada) Ltd. v. SS Seatrain Bennington*, nos. 80 Civ. 1911, 82 Civ. 0375, 1984 WL 423, at *3 (S.D.N.Y., 30 May 1984) and citing *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984)).

The Court recognised that "*but one prosecution [...] has ever been brought for violation of the blocking statute*" and

distinguished the *Christopher X* case on its facts, specifically because in this case the defendant had "*sought to circumvent the blocking statute through deceptive means*". The Court concluded that, with the hardship factor undercut by the unlikelihood of France pursuing the defendant under the blocking statute and with the US strong national interest in enforcing its antitrust laws, the comity analysis weighed in favour of compelling production of documents under the Federal Rules (*Id.* at *4).

On 14 December 2010, the Magistrate Judge for the Federal Court for the Eastern District of Virginia in *MeadWestvaco Corp. v. Rexam PLC* (no. Civ. A. 1:10-511, 2010 WL 5574325), rejected the defendant's attempt to resist discovery by relying on the French blocking statute. The Court acknowledged France's interest in preventing disclosure of the information, but cited other courts in finding that the statute should not be accorded much deference. Although the Court took note of the *Christopher X* decision, it found the facts distinguishable and concluded that the comity analysis weighed in favour of allowing discovery under the Federal Rules (*Id.* at *2).

Conclusion

Although US courts are aware of – and have explicitly considered – France's first conviction of a French national for violation of its blocking statute, they have continued in the vein of *Aerospatiale* and accorded the statute little weight in determining whether to protect French defendants from discovery under the Federal Rules. US Courts have uniformly distinguished the facts of *Christopher X* from the facts at issue in the cases in which they ruled. They have concluded that the blocking statute presented little or no hardship on parties seeking to resist discovery. It may be that for a US court to give a French conviction any import it will have to be under circumstances where the prosecuted party would be a party to the suit and would actually be acting in accordance with the Federal Rules. Even then, however, US courts appear reluctant to allow a French law to undermine the US courts' sovereign power to compel the type of broad discovery available to litigants under the Federal Rules.



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The new Italian rules governing financial penalties ordered to compel the enforcement of court decisions: Differences and similarities with the French regime

Origins of the financial penalty designed to compel the enforcement of court decisions

An *astreinte* – which derives from the latin *adstringere*, meaning compel – is a financial penalty ordered by courts which is accessory to a main legal decision against a debtor. The purpose of such penalty is to prompt the debtor to quickly comply with the legal decision by imposing an increasing financial pressure depending on the debtor's level of resistance.

The *astreinte* is a French praetorian creation, which goes back to the end of the 19th century. At the time, it did not rely on any legal provision and was considered as an alternative means of pressure. Its application was, therefore, limited to cases where standard means of enforcement did not allow for forced enforcement (for instance, in matters relating to obligations to take action or to refrain from acting, for which, in the event of non-compliance, the creditor can only claim for damages pursuant to Article 1142 of the French Civil Code). The absence of any legal texts on the *astreinte* did not prevent French courts from using it more and more frequently, by progressively abandoning all reference to the principles of civil liability and by considering it as a sentence.

It is only long afterwards that such penalty was regulated by Law no. 72-626 of 5 July 1972 and, later on, in a more complete manner, by Articles 33 to 37 of Law no. 91-650 of 9 July 1991 and Articles 51 to 53 of Decree no. 92-755 of 31 July 1992, relating to the reform of civil enforcement proceedings. In compliance with the principles established by case law, these Articles consider the *astreinte* to be a punitive penalty, "*distinct from damages*" pursuant to Article 34 of the Law of 9 July 1991.

While in France the *astreinte* has encountered a significant development, with respect to both the subject of the obligation to which it is attached¹ and to the personality of the debtor², until 2009, Italian law did not provide for any general indirect means of pressure, such as the *astreinte*. It is true that a small number of legal provisions established the possibility to hand down such a penalty in specific matters³. Yet, it is only on the occasion of an umpteenth reform of the Italian civil procedure, with the enactment of Law no. 69 of 18 June 2009, which created Article 614a of the Italian Code of Civil Procedure, that the *astreinte* has generally been included in

Italian law⁴. This new regime, which similarities are numerous with the French system, provides creditors with new means to ensure compliance with a legal decision against an Italian debtor, even though, as indicated hereafter, the scope of application of the new provisions seems to be limited to certain obligations.

Brief overview of the Italian penalty regime

Pursuant to Article 614a of the Italian Code of Civil Procedure ("CCP"), the court, at the request of the creditor (provided that such a request does not appear to be manifestly unfair), can order an *astreinte* together with the main obligation ordered. In this case, the court sets the amount to be paid by the debtor in the event of the breach, non-enforcement or late enforcement of the obligation imposed on the debtor. In this respect, the decision is automatically and immediately enforceable. The same Article provides that the court shall liquidate the amount of the penalty depending on the quantum of the dispute, the nature of the main obligation, the assessed or foreseeable loss, as well as any relevant circumstance.

Like under French law, pursuant to Article 614a of the CCP, any legal decision against a party may be handed down with a penalty. Courts ruling on the merits or in summary proceedings as well as arbitral tribunals all have the power to order such a penalty. The Courts have a discretionary power to impose this sort of penalty and may, again at their entire discretion, either accept or refuse to order the penalty requested by a litigant. However, the Courts cannot *sua sponte* order an *astreinte*.

To date, Article 614a of the CCP has not been applied on numerous occasions by Italian courts. Therefore, the interpretation of this Article was first of all the result of the work of legal authors, before being truly established by case law. In Italy as in France, legal authors consider that the *astreinte* is a sanction. Its purpose is, therefore, not to compensate the loss arisen from the late compliance or non-compliance, but to overcome the debtor's resistance in complying with a main obligation thanks to the use of a means of pressure, which is entirely distinct from damages. Such an interpretation seems to be confirmed by Article 112, paragraph IV, of the Italian Code of Administrative Justice, pursuant to which the claimant can request both compensation for a loss and the application of a penalty.

This distinction between an *astreinte* and damages is not without any impact. For instance, it is acknowledged that the amount of the penalty can exceed the assessment of the loss effectively suffered by the creditor and that the penalty can be maintained even after the loss has been entirely compensated. Furthermore, the penalty, once liquidated, shall entirely be paid to the creditor, which may, *in fine*, receive an amount exceeding the loss effectively sustained. This solution is greatly debated as it may lead to enrichment without cause (*arricchimento senza causa*).

¹ It is acknowledged that an *astreinte* can be handed down "as an accessory to an order to pay a certain amount of money", French Supreme Court, Social Chamber, 29 May 1990, Bull. Civ. V, no. 244; JCP G. 1990, IV, p. 285.

² Following the significant reforms brought by Law no. 80-539 of 16 July 1980 and especially by Law no. 95-125 of 8 February 1995, administrative courts have the power to order injunctions against public law legal entities, together with a penalty to ensure full compliance with the administrative decisions.

³ For instance, in matters relating to the protection of trademarks and inventions (see Articles 124 and 131 of the Italian Intellectual Property Code); in employment matters (see Article 18 of Law no. 300 of 20 May 1970 – *Statuto dei lavoratori*); in matters relating to the protection of consumers (see Articles 37 and 140, paragraph 7, of Decree no. 206 of 6 September 2005 – *Codice del Consumo*).

⁴ Decree no. 104 of 2 July 2010, which amended Article 114, paragraph 4, (b), of the Italian Code of Administrative Justice, also introduced the *astreinte* in administrative matters.

With respect to the scope of application of the *astreinte*, even though Article 614a of the CCP is entitled "*Compliance with obligations to take action that cannot be enforced in kind by third parties (infungibile) or obligations to refrain from acting*", certain legal authors, supported by certain courts⁵, consider that any obligation to take action or to refrain from acting can be ordered with an *astreinte*, including the obligations to take action or to refrain from acting that may be enforced in kind by a third party (*fungibili*). These legal authors rely on the saying *rubrica legis non est lex*, according to which the title of a law does not determine its scope.

The main differences with the French regime

Under French law, the implementation of the *astreinte* occurs following two stages. Firstly, the court orders the penalty under the form of a threat, before, secondly, eventually liquidating it if the debtor delays the performance of or refuses to perform its obligations. French law lays down two types of *astreintes*: the provisional one, which amount may be modified at the time of the liquidation and the definitive one, which can only be ordered for a limited period of time and after the prior determination of a provisional penalty.

To the contrary, an *astreinte* under Italian law is necessarily a definitive penalty. The court determines, when it is ordered, the amount and terms of such penalty and, in the event of late or non-compliance with the obligation by the debtor, the creditor may initiate enforcement proceedings to obtain the amount determined pursuant to the terms established by the court. The liquidation of the penalty by the court is, therefore, not a pre-requisite for the creditor to require payment in the case of non-compliance.

The powers of the Italian enforcement court are, consequently, more limited than the powers of its French counterpart. Unlike France, where the Enforcement Judge can attach an *astreinte* to a decision (whether the decision has been handed down by the latter or by another judge) and liquidate the penalty ordered by another judge, Italian enforcement courts do not have the power to order or liquidate a penalty. As a consequence, under Italian law, the penalty can only be ordered by the Court having handed down the main order. Moreover, Italian courts cannot order it *sua sponte*, while the French courts can do so.

Lastly, the obligations that may come with a penalty differ. Under French law, any obligation, regardless of the source, may give rise to an order against the debtor subject to a penalty. Therefore, the penalty is possible, and even frequent, in matters relating to infringement of real rights, for instance when the case relates to destroying or rebuilding a building which has been made in breach of a property right. Under the Italian system, the *astreinte* can only relate to obligations to take action or to refrain from acting. As mentioned above, the question of knowing whether the penalty can be applied to obligations to take action or to refrain from acting that cannot be enforced in kind by a third

party is debated by legal authors, most being in favour of a general application of the *astreinte* to all obligations to take action or to refrain from acting.

Conclusion

Even though the Italian regime governing the *astreinte* has taken a lot from the French legal system, the scope of application of this means of pressure provided for by Article 614a of the CCP is still limited to date. The future decisions of Italian courts, which will specify the extent of the Italian regime governing *astreintes*, will thus have to be monitored.

In particular, the circulation within the European Judicial Area of Italian decisions ordering an *astreinte* raises some questions. Pursuant to Article 49 of EC Regulation no. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, "*a foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin*". However, can one consider that the amount of the penalty is "*finally determined*" by a decision ordering an *astreinte* that is final and directly enforceable, without requiring any liquidation, as provided for under Italian law? The Court of Justice of the European Union never examined this question and, for instance, French case law has already denied in the past the enforceable nature of such foreign decisions, which prevents them from being granted the *exequatur*.

Similarly, the limited extent granted to the *astreinte* under Italian law would *a priori* not enable a creditor to request from an Italian court that such a penalty be ordered to ensure enforcement in Italy of a foreign decision, as, pursuant to Article 614a of the CCP, the penalty only seems to be defined as an accessory measure ordered by the court ruling on the merits.

An efficient protection of creditors in Italy against non-compliance or late compliance with legal decisions shall, or not, result from the answers to such questions.



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⁵ See Court of Terni, Order of 6 August 2009, *Giur. It.*, 2010, 637 and following.

In practice: The dematerialisation of French civil procedure

Since the beginning of the 21st century, French civil procedure has undergone several significant reforms, notably initiated following the so-called Magendie I and Magendie II reports of 15 June 2004 and 24 May 2008 (respectively entitled "*Celerity and quality of justice*" and "*Celerity and quality of justice before the Court of Appeal*"). The main objective of these reforms is to modernise French procedural rules. As the latest reform to date, the dematerialisation of the civil procedure concerns all practitioners of the French legal system (in particular, lawyers, judges, clerks and other court personnel) and required the intervention of providers of computerised services and software editors. Dematerialisation consists in implementing electronic means of communication between practitioners of the legal system to progressively replace paper communications.

The basis of electronic communications

Dematerialisation was first of all made possible since the Law no. 2004-575 of 21 June 2004 on Confidence in the Digital Economy, which introduced the principle of electronic communications to replace paper communications in the French Civil Code (Article 1108-1). This principle is a general one and thus applies before civil, criminal and administrative courts.

With respect, in particular, to the civil procedure, Decree no. 2005-1678 of 28 December 2005 introduced in the French Code of Civil Procedure a new title specifically dedicated to electronic communications. Applicable since 1st January 2009, this text is the main basis of the dematerialisation and concerns all civil courts (*Cour d'Appel*, *Tribunal de Grande Instance*, *Tribunal d'Instance*, *Juridiction de proximité*). Thus, Article 748-1 of the French Code of Civil Procedure provides that "*sending, filing and notifying procedural instruments, exhibits, notices, warnings or convocations, reports, minutes as well as copies and enforceable copies of decisions can occur electronically in the conditions and pursuant to the terms laid down in this Title [...]*".

Ministerial Orders completed this text by notably detailing the instruments that may be communicated electronically before the Civil Courts and the French Supreme Court and specifying the terms governing the entry into force of this principle. With respect to appellate proceedings, Decree no. 2009-1524 of 9 December 2009, amended by Decree no. 2010-1647 of 28 December 2010, introduced the obligation to communicate the notices of registration of *Avoués* (lawyers acting before the Courts of Appeal) in a case, and the notices of appeal electronically. Failing such electronic communication, these acts may be held inadmissible. Dematerialisation, which occurs at the same time as the merger between the professions of lawyer and *Avoué*, shall apply generally to all procedural instruments as from 1st January 2013 (see *Proceedings before French courts - Reform of the appellate procedure with mandatory representation*, by Christelle Coslin and Constance Tilliard, Paris International Litigation Bulletin, July 2011).

These texts also specified the conditions of security and confidentiality of the electronic communications system. Numerous agreements were subsequently concluded between the various local Bar Associations and clerk offices of the courts in order to ensure the concrete implementation of the electronic communication system. Indeed, the dematerialisation of procedures does not rely on the sole use of standard communication technologies (Internet and standard electronic mailboxes) to exchange procedural instruments, because such technologies do not offer the required level of reliability and confidentiality (in particular with respect to the regulatory obligations imposed on the practitioners of the legal system). As a consequence, a system of highly secured private networks has been implemented, on the one hand, for communications between lawyers and clerk offices of civil courts (called the *Réseau Privé Virtuel Avocats* - Lawyer Virtual Private Network, "RPVA") and, on the other hand, for communications among civil courts (called the *Réseau Privé Virtuel Justice* - Justice Virtual Private Network, "RPVJ").

Even though they are not yet connected to these networks, the Commercial Courts have also applied the dematerialisation of procedures using other means. The National Council of Bar Associations is actually currently examining the possibility to connect them to the same networks for the purpose of simplification.

Dematerialisation: What it concretely means for lawyers

Lawyers are connected to the RPVA by way of a connection implemented by their Bar Association. They thus access the "*ebarreau*" portal, which enables them to exchange with the clerk offices of the civil courts via an electronic mailbox system. Each lawyer has a cryptographic key that contains an electronic signature certificate, which is protected by a password. This certificate identifies the lawyer and authenticates communications with the civil courts.

Nowadays, most exchanges between lawyers and lower civil courts pass through the RPVA: whether for the purpose of requesting a date for a hearing or accessing procedural calendars, sending a letter to a court, filing submissions, communicating lists of exhibits, receiving procedural bulletins and decisions, etc. Lawyers are informed of all communications posted on their *ebarreau* electronic mailbox through the sending of an email alert in their usual electronic mailbox.

For instance, before the Paris Civil Court, submissions must be filed electronically with the clerk offices at least 48 hours before the date of the hearing. This time period enables the clerks to acknowledge the communication and update the file of the court. Certain acts, such as the notice of registration of a lawyer in a case before the Civil Court, are still communicated on paper.

These terms nevertheless vary depending on the courts in question as they result from local agreements between each Bar Association and the courts of the same district, taking into account local customs and the technical difficulties

encountered. The lawyers before the Paris Bar, for instance, are connected to the Civil Courts of Paris, Nanterre, Bobigny and Créteil, as well as to the Paris Court of Appeal.

Furthermore, the instructions given by the Clerk offices may differ depending on the court concerned, or even within the same court. In Paris, the 3rd Chamber of the Civil Court, specialised in intellectual property matters, has been appointed as pilot Chamber for electronic communications. The implementation of the electronic communications system was thus imposed on Parisian lawyers before this Chamber, without them being able to bypass it. It is only since March 2011 that the procedures tested before the pilot Chamber were extended to the other Chambers of the same Court.

Current status of the dematerialisation

Electronic communications, supposed to facilitate exchanges, may have rendered them more complicated in certain cases insofar as certain Clerk offices now refuse phone calls that do not relate to the settlement of a technical difficulty concerning the functioning of the RPVA and the *ebarreau* portal. It is no longer possible to obtain information on judgments over the phone, as was the case before (in particular in the event of the postponement of a decision). The operative parts of decisions are systematically made available to lawyers online and the copies of judgments are sent to the lawyers via *ebarreau* as soon as they are available.

Moreover, the implemented systems are still in the test phase and are constantly developing, which does not facilitate access or use. The Ministry of Justice and Freedoms and the National Council of Bar Associations have provided, these last few months, numerous training sessions and regularly provide answers to the requests for information of law practitioners and courts to help them use these new systems more easily.

Another limit of the functioning of the RPVA lies, to date, in the fact that all lawyers are not yet registered. According to the National Council of Bar Associations, as at 1st February 2011, 5,414 law firms were connected to the RPVA and 17,000 lawyers connected to the *ebarreau* portal (which represents a fairly limited proportion). As a consequence, in practice, it is still sometimes necessary to use electronic and paper communications depending on the relevant services of the courts in question. These "comings and goings" also complicate the management of applicable procedural time periods, which are stricter since the implementation of electronic communications.

Furthermore, the issue relating to the access to these systems by the parties to proceedings themselves also arises, in particular in the scope of proceedings in which representation by Counsel is not compulsory. Access via a website, as in other foreign countries, could be considered.

To conclude, the objective consisting in improving exchanges among practitioners of the legal system and simplifying the processing of files by the courts is not yet entirely met. Despite the already achieved and continuous progress, there

is still a long way to go to see the complete dematerialisation of the French civil procedure.



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Translator's Corner: *Avocat*

Have you already opened a dictionary to translate a word from French into English and looked at what seemed to be a hundred different translations? Indeed, many French legal words do not have exact equivalents in English and may thus appear tricky. But we can help you better understand such concepts!

In this edition, we will tackle one of the most used words in our day-to-day activity: "*avocat*". In both French and English, a lot of words exist for the same notion; yet they cannot all be used in every situation and may cover great differences in the legal status of the person designated. Here is what you should keep in mind.

In French, the word "*avocat*", from the Latin *advocatus*, meaning the summoned one, refers to a representative of the law who advises, assists and represents clients before courts. However, another notion is often used in this language to refer to a specialist of the law, "*juriste*". While the two words can both be used interchangeably in a general context, one has to be careful with the specific notion of "*juriste d'entreprise*", which is often cut to simply *juriste*, and which, though it also refers to a specialist of the law, presents significant differences that ought not to be forgotten.

The main difference between an *avocat* and a *juriste d'entreprise* relates to their status. Indeed, the *avocat* must sit special bar exams: the term "*bar*" refers to the fact that at the very beginning of the profession, *avocats* were placed behind a railing, separating them, probably for protection purposes, from the public. As a consequence of the bar exam, the *avocat* takes the oath and becomes subject to strict ethical rules governing the profession, including the legal privilege of confidentiality attached to correspondence with clients and among *avocats*. They are entitled to represent clients before the courts, wearing a gown, and even have the monopoly of the representation of parties before most French courts. Before the French Supreme Court and the French Administrative Supreme Court (*Conseil d'Etat*), there exists a specific category of *avocats* called "*avocats aux Conseils*". *Avocats* are usually self-employed as their professional ethical rules require them to remain independent (even when working within a law firm, they tend to work under a "collaboration contract" which is not governed by general employment law).

To the contrary, the *juriste d'entreprise*, who may have done the same studies as an *avocat* without sitting the bar exams, is an employee of a company where he/she works within the legal department. It often happens that the *juriste* will call upon the services of the *avocat*, for instance, in the scope of disputes or in matters where he/she needs the specific expertise of an *avocat*. Since the *juriste d'entreprise* is not bound by the *avocats'* ethical rules, none of his/her communications within his company or group are protected by the confidentiality attached *per se* to the *avocats'* correspondence with clients. One should bear in mind the differences in status between *avocats* and *juristes*

since they may have concrete legal consequences and may not be found in other countries.

How best to render these differences in English? Obviously, one can use the distinction between "outside Counsel" and "in-house Counsel", which are rather neutral in terms of legal status, but are generally widely understood. In addition, the English language, whether British or US English, offers several other choices to talk about an *avocat* or a *juriste d'entreprise*. Indeed, you can notably find "lawyers", "Counsel", "solicitors" and "barristers" or "attorneys".

Lawyer is the general term to designate someone whose profession is to practice law, in particular conduct lawsuits and advise as to legal rights. It is commonly used because it avoids any confusion between the specific words of British and US English. Another rather general word is Counsel, which is an invariable noun and refers to a lawyer or group of lawyers engaged in trials or appointed to advise and represent clients in legal matters.

The terms solicitor and barrister are specifically used in England and both present a lot of similarities with the French *avocat*. To clearly distinguish a solicitor from a barrister, one can consider that a solicitor is a general practitioner and a barrister is a surgeon. Indeed, a solicitor advises clients, represents them before lower courts and prepares cases for the barrister who is entitled to try cases before the higher courts. Like the *avocat*, a solicitor mainly works for law firms, even though between 20 and 25% work in-house, while barristers group in Chambers and are members of the different Inns. On the other hand, barristers are the only ones who wear gowns, like the *avocats*, yet, they have the privilege of also wearing wigs! The training of solicitors and barristers is relatively similar, but, like an *avocat*, a barrister sits Bar finals. Barristers do not have clients as such, as they are referred cases by solicitors who brief them to defend the interests of their clients. The advice and professional correspondence of solicitors and barristers are generally confidential and benefit from legal professional privilege.

On the other side of the Atlantic, the word attorney, which is, indeed, mainly and nearly only used in US English, might also come up. The term attorney, or the complete name "attorney-at-law", is usually interchangeable with lawyer, as it refers to the qualified individual certified to practice law and defend individuals in a specific jurisdiction. The attorney in the US, like in other countries, is bound by the obligation not to disclose information relating to representation without the client's consent. Also, attorney-client privilege is very important and protects all communications between a client and its attorney. When using the word attorney, one should beware of a possible confusion with the terms "district attorney" or "attorney general" which do not refer to the profession of lawyer as such but to criminal prosecutors. Unlike in England, the US system does not distinguish the professionals who are entitled to appear before courts and those who cannot.

As you can see, each language has its own specificities and depending on the situations and the jurisdictions, one may have to use the specific words *avocat* and *juriste d'entreprise*, solicitor and barrister or attorney in order to respect the legal status attached to each profession. But, a question remains: what to do when you face a more general situation? In this case, you should be fine by simply using Counsel or lawyer to cover all practitioners of the law, whatever the jurisdiction and, last but not least, by using these general notions, you will not be taking any risks of offending anyone!

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