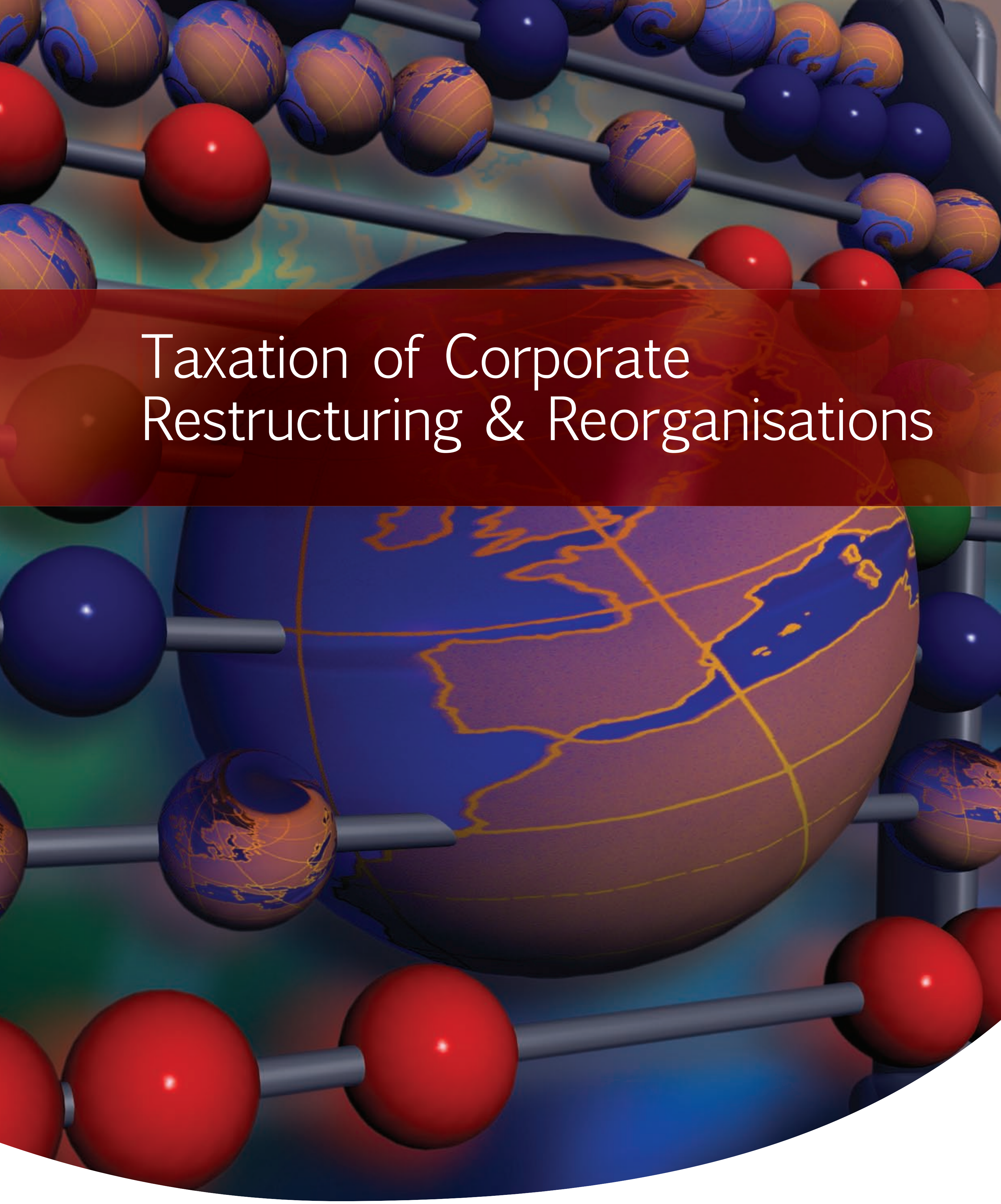

Taxation of Corporate Restructuring & Reorganisations

Tax Planning International: Special Report

Taxation of Corporate Restructuring and Reorganisations

Corporate restructuring or reorganisation refers to partially dismantling or otherwise rearranging a company to make it more profitable. As the recent financial market crisis spreads to the real economy and M&A activity grinds to a halt, corporate restructuring and insolvency departments are gearing up for a sharp increase in workload. As tax is one of the key costs to business, it is critical that the tax implications of any restructuring is known before it is undertaken.

This Special Report takes a broad look at the area of corporate restructurings and reorganisations from a number of national perspectives, always bearing in mind that restructurings often cross national borders. Articles focus on key tax issues in the context of the current economic climate including areas such as business restructuring, corporate debt, transfer of assets and cross-border mergers. Transfer Pricing aspects of business restructuring are analysed, in the light of the recent OECD discussion draft on *Transfer Pricing Aspects of Business Restructurings*. Practical aspects such as tax due diligence and corporate turnaround are also considered, and finally, the Appendix gives a round up of recent developments in the area of corporate restructuring and reorganisation.

Contributors include major global law firms from over a dozen key jurisdictions in Europe, North America and the Pacific, giving both professional and industry perspectives on this area of increasing importance as the global economy enters challenging times.

Senior Commissioning Editor: Stephen Mullaly

Taxation of Corporate Restructuring and Reorganisations is published by BNA International Inc., a subsidiary of The Bureau of National Affairs, Inc., Washington, D.C., U.S.A.

Administrative Headquarters: BNA International Inc., 29th Floor, Millbank Tower, 21-24 Millbank , London, SW1P 4QP, U.K.; tel. +44 (0)20 7559 4801; fax. +44 (0)20 7559 4840; e-mail: marketing@bnai.com; website: www.bnai.com

Taxation of Corporate Restructuring and Reorganisations forms part of BNAI's *Tax Planning International: Special Reports*, a series of Reports focusing on key topics in international tax.

Contents

  TPSR:TCRR ISBN: 978090652490-9

Business Restructuring in France

Xenia Legendre,
Hogan & Hartson, Paris

This article examines the tax and legal issues surrounding business restructuring for French companies.

I. Introduction

Imagine a multinational where in each jurisdiction a wholly-owned subsidiary manufactures and sells the products to customers. While the financial results of the operation are consolidated, the risks of the operation are spread over various countries and various legal entities and not mutualised. Taxation remains national. Hence, the effective tax rates may reach astounding numbers (like 70 percent). Business and practitioners came with a solution commonly known as "business restructuring" when all major risks (currency, transportation, marketing, inventory, client credit, product liability) are pooled together in one central entity while national companies operate under limited risk models (like toll manufacturing and limited risk distribution). The structure results into a substantial decrease of the (taxable) profits in each national company for the benefit of the central entity - more risks means more reward.

Once set up, the structure is exposed mainly to the permanent establishment and transfer pricing challenge. Its implementation raises the issue of the taxation of the exit from the existing frame. As usual, everything must be screened through the abuse of law. This article will briefly discuss the main issues (other than transfer pricing) for a French company ("FrenchCo") which would convert from a full-fledged distributor to a limited risk player. This subject is very topical since the release of the OECD working paper on September 19, 2008 (*Discussion Draft on the Transfer Pricing Aspects of Business Restructurings*)[1] for comments by the business community and practitioners.

II. Exit Exposure

A. Indemnification

The first issue here is whether FrenchCo is entitled to claim (taxable) indemnification from its affiliated counterparties for the termination of the existing arrangements and if it fails to assert its rights to indemnification whether the tax authorities might consider that FrenchCo should be taxed on a deemed income under the theory of abnormal management act – *acte anormal de gestion*.[2]

Indeed, all actions by a commercial company are expected to be at arm's-length terms and made in its best corporate interest although a taxpayer is not expected to maximise profits out of the business it is conducting[3] nor can it be challenged for an unfortunate diversification of its business.[4]

Each case is, however, very fact intensive. Legal rights of FrenchCo have to be taken into account. Existing arrangements may be for a fixed term or for an indefinite term. Under French law, a contract entered into for a fixed term automatically terminates upon the agreed term, without need to effect any formality[5] and, subject to the giving of sufficient notice, a distribution agreement entered into for an indefinite term may be lawfully terminated at any time by either party; however, the termination of long established business dealings requires that written notice of termination of adequate duration be given to the distributor under Article L.442-6-I-5° of the French Commercial Code[6] and applies as a matter of public policy (*loi de police*).[7] Courts evaluate in their discretion the sufficiency of the notice on a case-by-case basis based on the circumstances of the case. By way of example, a notice of 6 months was held insufficient where the concession lasted 21 years and a notice of 9 months was held insufficient where the contractual relationship lasted more than 35 years.[8] In the latter instance, courts held that the duration of notice had to be at least two years based on good faith, the distributors turnover and margin, marketing investments by the distributor, the difficulty in finding substitute distribution opportunities for equivalent products and the market situation.

In addition to the protection afforded by Article L. 442-6-I-5° of the French Commercial Code, termination of a distribution agreement must not be wrongful.[9] Although grounds for the termination need not be communicated to the distributor, termination was found wrongful, among other examples, where the supplier terminated the contract notwithstanding significant investments recently made by the distributor.

Therefore, if FrenchCo has not been notified of the contemplated restructuring well in advance of its implementation or made substantial investments shortly before the termination (presumably with the supplier's blessing or at its request), it could have claimed indemnification and the failure to do so is probably an abnormal management act.

B. Transfer giving rise to income and transfer tax

The second issue is whether the proposed changes constitute a transfer by FrenchCo of clientele, goodwill or "business", giving rise to income tax and transfer tax.

FrenchCo certainly owns its clientele before restructuring although with respect to branded products some case law suggests that clients belong to the brand. However, the Supreme Court has recently recognised that a store that operates pursuant to a franchise agreement under the name of the franchiser does have a clientele, on the grounds that local clientele results from "the means developed by the store" and from its "activity, which is generated by contracts with suppliers and financiers," entered into in the stores name and at its own risk.[10] The point is whether the activities and tangible assets of the distributor provide the supplier with the ability to effectively reach customers in the relevant territory, and whether the distributor bears an effective business risk.[11]

In essence, tests applied to determine whether FrenchCo owns a clientele after the restructuring will be the same (e.g., the size of the company, relationships of the sales force with the retailers, ability of the company to make decisions on how to conduct its affairs, business conducted in its own name and its own risk). However, the proposed reduction in the responsibilities of FrenchCo in the distribution process pursuant to the limited risk distribution agreement (the "LRD") might weaken the position. Indeed, frequently obligations imposed on FrenchCo under the new structure would be greater than under prior arrangements and its freedom of commercial movement will be restricted. FrenchCos risk associated with the conduct of its business will be greatly decreased. FrenchCo will cease to bear the risks associated with the inventory, since title to the products will pass to the distributor "immediately prior to the delivery" to customers and the storage of products will be arranged by the central entity (or the cost of the storage will be borne by the central entity). The transportation risk, the currency risk and the customer credit risk will also be borne by central entity. FrenchCo will also not be responsible for outside marketing expenses or the product liability risk. In other terms, and subject to limited exceptions, the only risk effectively borne by FrenchCo after the restructuring will be a general financial risk which any entity conducting business must incur, i.e., payment of salaries, rent for the premises, etc.

However, the fact that little risk is borne by FrenchCo under the new structure should arguably not be decisive to answer the question whether FrenchCo remains the owner of the clientele. In principle, ownership of a clientele must be evidenced by a companies' ability to reach customers, rather than by its exposure to a business risk. In line with this reasoning, the reference to the risk borne by the business in case law[12] was criticised by respected authors, as inconsistent with the definition of clientele.[13]

Despite the significant transfer of risks involved in the restructuring deeply changing the buy side of the business, the "sell" side of the business, i.e. the one that generates and service clients, will remain with FrenchCo. As a result, the same tests that indicate that FrenchCo has clientele of its own should also be met under the revised operating structure and no (taxable) transfer of clientele should be successfully upheld.

III. Going Forward

The central entity should be very vigilant to avoid the challenge on the basis of existence of a permanent establishment in France. Indeed, tax reassessment based on the permanent establishment would provide the French tax authorities ("FTA") with procedural tools which it would not have for transfer pricing challenge, such as (i) an extended statute of limitations (six years instead of three),[14] (ii) *taxation doffice* proceedings,[15] and (iii) the possibility, in limited circumstances, to impose 80 percent penalty.[16] These specific provisions might be decisive for the FTA in the choice between transfer pricing and permanent establishment angles.[17]

Assuming the central entity is incorporated in a jurisdiction which has a tax treaty with France and assuming the substance of the central entity supports its effective tax residence in the jurisdiction of its incorporation, the central entity may only be subject to corporate income tax in France if it has a fixed place of business in France (assume not) or if it acts through a dependent agent. The issue is whether FrenchCo could be found to be a dependent agent of the central entity. The OECD Model Treaty considers that where a person (FrenchCo) acts on behalf of an enterprise (the central entity), a permanent establishment is assumed to exist if this person (a) is not of independent status, and (b) has and habitually exercises an authority to conclude contracts in the name of the enterprise. The two conditions are cumulative.

The question of whether FrenchCo is independent must be analysed from both legal and economic standpoint. The "legal dependence" of FrenchCo vis-à-vis the central entity means the central entitys ability, by statute, to direct FrenchCos actions. FrenchCo, as a separate legal entity, should not be regarded as "legally dependent" vis-à-vis the central entity. A courts analysis of whether FrenchCo is "economically independent" from the central entity will consist of a review of all facts relevant to the FrenchCo's relationships with the central entity. Given (i) the central entity's status as FrenchCos sole supplier, and (i) central entitys control of FrenchCos business, it is unlikely that FrenchCo would be regarded as an "independent" agent within the meaning of any applicable tax treaty (subject to specifics of the actually applicable tax treaty).

Ann. 38.6 of the OECD Commentary to the OECD Model Treaty (the "OECD Commentary") suggests that an agent is "*less likely*" to be independent if his activities are performed wholly or almost wholly on behalf of only one enterprise over the lifetime of the business or a long period of time. According to the OECD Commentary, this fact alone should not be decisive, since all relevant facts and circumstances must be taken into account.

The Supreme Administrative Court, however, held that a person may not be considered to be independent when this person carries out its activities solely in relation to one other person.[18] The circumstances in this precedent were different from FrenchCo's situation, as the "other person" in this instance was the sole client of the French entity, and not its sole supplier. In addition, the alleged agent was in a loss position and regularly received subsidies from its sole client, thus reinforcing the idea of an economic dependence, whereas FrenchCo is expected to generate profits. Despite these differences, however, the general wording of the 2003 precedent suggests that a court would probably rule in favour of FrenchCo's economic dependence. Indeed, the relationship between FrenchCo and its customers is largely monitored by the central entity, and conditioned by FrenchCo's relationship with the central entity.

Going to the second criterion, although the question whether a person has an "authority to conclude contracts in the name of the enterprise" should be decided solely with reference to the possibility for such person to enter into agreements that are in the name of the enterprise, the OECD Commentary suggests that a broader interpretation should be preferred, as it states that "the phrase "authority to conclude contracts in the name of the enterprise" does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise," but "the authority to conclude contracts must cover contracts relating to the operations which

  TPSR:TCRR ISBN: 978090652490-9

constitute the business proper of the enterprise."[19] In line with this theory, the French Supreme Administrative Court held in the above-cited Interhome AG decision that an agent should not be deemed to have the power to conclude contracts in the name of an enterprise unless it "has the power to engage the enterprise in a commercial relationship pertaining to the enterprises business proper," i.e., unless (i) the enterprise is bound by the contracts signed and (ii) the relevant contracts constitute the enterprises business, and not the agents own business.[20] Based on the OECD Commentary and this decision, the relevant criterion is not the name in which the agent carries out its business, so much as the agents ability to enter into contracts that are binding on, and constitute the proper business of, the principal.

In principle, the requirement for a "binding effect" means that customer contracts negotiated and entered into by FrenchCo effectively create rights and/or obligations for the central entity. It should be very clear from the LRD that FrenchCo should have no power to conclude contracts that are binding on the central entity.

French law typically distinguishes between three categories of distribution agreements. Under the first category, a distributor purchases products from a manufacturer and subsequently sells them to customers in its own name and for its own account; such buy-sell relationship, if resulting from a prior framework license/distribution agreement, is deemed a concession relationship (*concession*). Under the second category, the so-called commissionaire arrangement (*commissionnaire*), the distributor acts in its own name when dealing with customers, but it does not acquire title to the products sold and it merely performs selling services on behalf of the manufacturer. The third type of agreements includes contracts whereby a distributor acts in the name of, and on behalf of the manufacturer without acquiring title to the products; such agreements are deemed commercial agency agreements (*agence commerciale*).

The characterisation of an agreement as a *concession*, a *contrat de commissionnaire* or a *contrat dagent commercial* determines the legal regime applicable to the relationships between a distributor and its counterpart licensor/manufacturer, and has various consequences on the parties' respective rights and obligations, including the binding nature of the contract on the manufacturer.

The LRD would be clearly labelled to be a buy-sell contract. However, the FTA could challenge such characterisation, either directly pursuant to the so-called "abuse of law" (*abus de droit*) theory, or more simply on the grounds of Article 12 of the Revised Code of Civil Procedure ("NCPC").[21]

In essence, the difference between a buy-sell, concession agreement and a *commissionnaire* or an agency agreement lies in both the economic substance and the legal rationale of the contract.

From a legal standpoint, a buy-sell *concessionnaire* is a person who acts in its own name and for its own account as an unconditional buyer of products from the supplier, which are subsequently resold to its customers.[22] French commercial case law has determined that this characterisation cannot be challenged solely because the supplier dictates the resale price,[23] exercises a very narrow control over the distributor[24] or prohibits the dealings in the competing products.[25] The sole legal test effectively applied by courts to determine whether a seller acts under a concession arrangement or a *commissionnaire* agreement lies in the existence, in buy-sell concession relationships, of a transfer of title from the supplier to the distributor – even if such transfer is a flash transfer of title. Proof of the transfer of title is typically inferred from the fact that customers are directly invoiced by the distributor.

As regards the economics of a contract, the level of the distributors net margin does not appear to constitute a decisive test.[26] However, a buy-sell distributor is typically expected to bear certain risks, such as (i) the risk of inventory; (ii) customer credit risk; (iii) price risk; and (iv) product liability risk. None of these risks will be borne by FrenchCo under the LRD. The general financial risk (payment of salaries, premises, etc.) is a risk borne by each enterprise and does not point specifically to any particular type of contract. Moreover, the mechanism used for the transfer of products is, in practice, similar to that which is typical of a *commissionnaire* contract.[27] Therefore, based solely on the economic test, the LRD may well be characterised as a *commissionnaire* or an agency arrangement rather than a genuine buy-sell concession agreement.

The test that differentiates between a *commissionnaire* agreement and an agency contract is the determination of whether the distributor acts in its name or in the name of the principal. An agency agreement always provides that the agent acts in the name and on behalf of the principal, whereas a *commissionnaire* only acts in his own name. Under the LRD, the relationships between FrenchCo and the customers are expected to be carried out solely in the name of the FrenchCo.

The impossibility for a person, subject to limited exceptions, to contractually create rights or obligations that are binding on a third party is a fundamental principle of French law.[28] In line with this principle, buy-sell customer contracts may only create rights and obligations on the parties thereto. Assuming the characterisation of the LRD as a *concessionnaire* contract were respected, customer contracts will not have any binding effect on the central entity.[29] The absence of a permanent establishment in such a situation is consistent with the common sense idea, that an "agent" should only exist where a person is found to represent another person. A company acting in its own name and for its own account cannot be considered to constitute a "dependent agent" of another company.

The same conclusion should in theory be reached if the LRD is recharacterised as a *commissionnaire* agreement. Although actions of FrenchCo would then be seen as actions taken on behalf of the central entity, case law has determined that customer contracts entered into by a *commissionnaire* create no right or obligation on the principal.[30] Only an agent, acting in the name of the principal, has the power to bind the principal. Notwithstanding this legal analysis, a recent decision of the Paris Court of Appeals in the Zimmer case[31] held that a *commissionaire* creates a permanent establishment for its principal on the basis of the theory that "the French subsidiary had a practical ability to engage its principal in a trade". This decision has been criticised by the practitioners and scholars as inconsistent with the French commercial law applicable to *commissionnaire* arrangements.[32] The taxpayer filed a recourse with the Supreme Administrative Court.

Again the reality has to follow the contracts. Indeed, in the Interhome AG case the Supreme Administrative Court ruled out the existence of a permanent establishment because no evidence had been provided that the way in which the agent participated in negotiations “led to regard” the agent as having an authority to bind, legally or in fact, the principal. This wording suggests that a permanent establishment may have been found to exist if the agent had only “appeared to have” an authority to bind the principal. We do not believe that this “appearance of an authority” criterion supersedes the general principle set forth in the decision, which refers to the agents actual ability to bind the principal.

This line of reasoning falls into the same category as certain references in legal commentary (including the OECD Commentary) to an agents “de facto” authority to conclude contracts, as opposed to his “de jure” authority. The meaning of an agent’s “de facto” authority is unclear under French civil law. Authors have suggested that such “factual” authority might result from situations where an agent would in fact make decisions on behalf of the principal, and the principal’s approval of the agents decisions would be a mere formality.[33] In other words, an implied authority to conclude contracts could be inferred if the agent appears to have a permanent authorisation to negotiate contracts for the principal.[34] This theory casts a shadow of uncertainty on the “binding effect” test, which could become an issue in cases where the separateness of the respective roles of FrenchCo and the central entity would not be preserved.

IV. Abuse of Law

The contemplated restructuring should be tested for abuse of law, on the basis of fictitiousness and motivation.

A. Issue of substance

<u>The first issue is substance</u>. The decrease in risks justifies the decrease in profit potential. But risks which are arguably transferred should be significant for FrenchCo (in the past based on the historical performance of these risks and in the future based on the reasonable business assumptions in a particular industry – maybe it is better to agree to strip the risks and live with a guaranteed margin rather than keep the exposure to uncertain market conditions, particularly in light of the current crisis).

<u>Risks are transferred if the control over them is transferred to the central entity</u>. Risk is something which requires elaboration of strategy and monitoring as well as day-to-day arbitrage decisions. Therefore, they are actually transferred to the central entity if the central entity has human and financial resources and capacity to deal with them and assume them when they materialise. In addition, human resources managing the risks should be incentivised as “owners” of that risk and not be in a service-providing mood.

<u>Risks are transferred if they are actually assumed by the central entity</u>. Thus, for instance, if a loss-making business (by definition spread over various legal entities within the multinational) is spun off and sold, the loss generated by the sale must be taken by the central entity to the extent of the risks transferred to the central entity. This result may be achieved by special provisions in the LRD and the toll manufacturing agreements organising indemnification of the limited risk players by the central entity or through a special divestiture structure.

B. Purpose of the restructuring

<u>The second issue is the purpose of the restructuring</u>. Courts have adopted a narrow interpretation of the “tax purpose” of a transaction, consistent with the idea that a taxpayer, when confronted with several options, has the right to chose the option which enables him to obtain the best tax treatment. A transaction which is partially aimed at obtaining tax savings, or even a transaction which is principally tax driven is not abusive, provided that tax savings are not the “sole purpose” of the transaction.[35] French Courts have sometimes inferred from the fact that a transaction had consequences other than tax savings, that the purpose of the transaction was not solely the decrease of a tax liability.[36]

V. Conclusion

Based on these precedents and assuming substance has been respected, FrenchCo should be in a position to argue that the proposed restructuring is not solely motivated by the tax savings associated with it, and that is also involves material business and risk profile consequences for FrenchCo and the multinational group to which it belongs. The business activities of FrenchCo and of the group will be enhanced by the new structure, due, *inter alia*, to the completely centralised management structure and the mutualisation of the business risks across Europe (i.e., Europe will be actually treated as a single market!)

***Xenia Legendre** is a tax partner in the Paris office of Hogan & Hartson. She has extensive experience in French and international tax matters. She focuses her practice on the taxation of French and multinational corporations, particularly on the structuring of merger and acquisition transactions, joint ventures, and restructuring projects. In addition, she has substantial experience advising on the tax aspects of capital market transactions. She may be contacted by email at: xlegendre@hhlaw.com*

1 For more details, see Caroline Silberztein in *La Revue de Droit Fiscal* n° 46, November 2008, p. 11 *et seq. Projet de rapport de lOCDE sur les aspects prix de transfert des réorganisations dentrepises*

2 Corporate income tax is charged at a 33 1/3 percent rate on the deemed income and is increased by late payment interest of 4.8 percent per annum plus penalties. Penalties range from 10 percent to 40 percent depending on the taxpayers good or bad faith. The statute of limitations is three years from the end of the fiscal year in which income is deemed incurred. In addition to the corporate income tax, the net after tax deemed income is treated as a hidden distribution even if the beneficiary of such disguised distribution is not a direct shareholder, pursuant to Article 111-c of the French Tax Code (the “<u>FTC</u>”). If the beneficiary is not a French tax resident, such disguised distribution is subject to a withholding tax of 25 percent under Article 187 of the FTC. Applicable tax treaties may reduce this withholding tax.

3 CE July 7, 1958, n° 35977, Droit fiscal 44/58, c. 938.

4 CE October 9, 1991, n° 67642-69503, Laboratoires pharmaceutiques Goupil, Droit Fiscal 29/93, c.1493.

5 Les obligations, M. Fabre-Magnan, PUF 2004, § 188 p. 510.

6 Pursuant to Article L. 442-6 I 5° of the French Commercial Code (as amended in 2001), “a long established commercial relationship may not be brutally terminated, even partially, without written notice taking into account the length thereof and without complying with the minimum notice period deriving from trade usage or industry agreements. When the commercial relationship relates to products sold under the distributors brand, the duration of the notice must be twice than the one applicable for products that have not been sold under the distributors brand...”

  TPSR:TCRR ISBN: 978090652490-9

7 See, CA Nîmes, Chambre 2 Section B, November 13, 2003, SA Sada/SARL Geca.

8 CA Paris, December 8,. 1994, D. 1997, som. p. 52, obs. Ferrier D. CA Bordeaux, 2ème ch., June 11, 1996, n° 95-00.1359, Lettre distrib. 1996, n° 9.

9 Cass. com. October 5, 1993, n° 91-10.408.

10 Cass. civ. March 27, 2002, n° 615, Trévisan c/ Basquet.

11 See, comments under Cass. civ. March 27, 2002, in RJDA June 2002, n° 604.

12 In particular, in a decision of the Paris Court of Appeals (CA Paris, October 4, 2000, SCI FBH-Champigny c/ Atlas) and in the March 2002 Supreme Court decision (Cass. civ. March 27, 2002, n° 615, Trévisan c/ Basquet).

13 See, J. Derruppé, Petites Affiches, November 16, 2000; H. Kenfack, D. 2001, p. 1718.

14 Article L. 169 of the French Book of Tax Procedures (BTP).

15 Article L. 66-2 of the BTP.

16 Article 1729 of the FTC.

17 In a recent precedent (CE June 20, 2003, n° 224407, Sté Interhome AG – this case is discussed in more detail in section C.2), the FTA had first initiated transfer pricing proceedings against the French affiliate of Swiss based Interhome AG; but in the course of the proceedings the FTA had changed the legal basis for the reassessment, and attempted to demonstrate that such French affiliate constituted a permanent establishment of its Swiss parent company.

18 CE June 20, 2003, n° 224407, Sté Interhome AG. This assertion was criticised by respected authors, because in line with the OECD Commentary, Courts should be encouraged to analyse the specific facts of each case, and not infer that an agent is dependent from one single criterion (See, P. Dibout, J.-P. Le Gall, Droit fiscal 47/04, p. 1662).

19 OECD Commentary, 5.32.1 and 5.33.

20 CE June 20, 2003, n° 224407, Interhome AG.

21 Under Article 12 of the NCPC, the Judge is not bound by the legal terminology adopted by the parties in the agreement. Any fictitious scheme may be sanctioned as an “abuse of law” pursuant to Section L. 64 of the BTP.

22 Cass. com. May 13, 1970, JCP.G.1971.II.16891; CA Versailles November 6, 1997, RJDA 5/98, n° 579.

23 CA Paris, December 22, 1966 JCP.G.1967.II.15085.

24 Cass. com. May 13, 1970.

25 CA Paris, October 21, 1983.

26 Cass. com. June 21, 1983, Bull. civ. IV, p. 158.

27 As between the *commissionnaire* and the principal, the title is never acquired by the *commissionnaire*, but the third party customer enters into the acquisition agreement with the *commissionnaire*, and not with the principal. Title to the products passes directly from the principal to the third party, but such third party has no direct action against the principal, nor has the principal any action against the third party. The *commissionnaire* books the transaction as if it were a buy-sell arrangement entered into on the same date. In substance, such an arrangement is very similar to that implemented by the LRD.

28 Article 1119 of the French Civil Code.

29 Under mandatory provisions of the law, customers may have a recourse against a manufacturer (e.g., if a product is defective); however this recourse arises from the law, and not from the sales contract.

30 The Supreme Court held that the purchaser of the product sold by a commissionaire only has a legal action against the commissionaire, because it has concluded the contract in its own name (Cass. com. May 28, 2002, n° 00-12358, Sté Bertola c/ Sté SMB).

31 CAA Paris, February 2 , 2007 , n°05-2361, Société Zimmer Ltd.

32 See Stéphane Gelin in *La mort fiscale du commissionnaire*, Option Finance n° 932, May 2007, p. 24 or the same author in *Du nouveau dans le régime fiscal du commissionnaire?* , Feuillet Rapide 25/07, p. 17.

33 P. Dibout, J.-P. Le Gall, prec.

34 This interpretation is the more likely under the OECD Commentary, pursuant to which the phrase authority to conclude contracts in the name of the enterprise does not confine the application of the paragraph to an agent who enters into contracts literally in the name of the enterprise; the paragraph applies equally to an agent who concludes contracts which are binding on the enterprise even if those contracts are not actually in the name of the enterprise. Lack of active involvement by an enterprise in transactions may be indicative of a grant of authority to an agent. For example, an agent may be considered to possess actual authority to conclude contracts where he solicits and receives (but does not formally finalise) orders which are sent directly to a warehouse from which goods are delivered and where the foreign enterprise routinely approves the transactions. (OEDC Commentary, 32.1)

35 For example, the fact that a smaller company with material loss carryforwards absorbs a larger one, thus allowing a rollover of the carryforwards into the merged entity, will not generally be regarded as an abuse of law (CE, March 21, 1986, Société Auriège). To our knowledge, there are only a few precedents where a transaction was considered to have been solely driven by a tax purpose (for an example, see CE, February 3, 1984, n° 499).

36 For example, the Supreme Court ruled that the conversion of a company incorporated under the form of an *société à responsabilité limitée* into a *société anonyme* shortly prior to the sale of the companys shares, although possibly motivated (at least in part) by material transfer tax savings, does not constitute an abuse of law, since it has consequences beyond the tax savings (Cass. com, December 10, 1996, RMC France). See, however Cass.com, March 20, 2007, Sté Distribution Casino France, where the Supreme Commercial Court ruled that a chain of operations (contribution of a going concern for shares followed by the sale of shares) should be viewed as a direct sale of the going concern subject to transfer tax.