Arendt Case Review

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PRIVITY OF CONTRACT
Breach of contract invoked by a third party

Administrative Court of Grand-Duchy of Luxembourg
Judgment of 14 March 2019, docket no. 41486C and 41487C

which grants a stay of proceedings as regards injunction rulings for the provision of information in the context of tax proceedings initiated by a foreign tax administration while the Court of Justice of the European Union rules on:

- The compatibility with certain provisions of the Charter of Fundamental Rights of the European Union of the absence of a remedy available to the taxpayer, a third party concerned or a third party holding information against an injunction ruling.
- In the event of the recognition of the existence of a remedy, on the extent to which the likely relevance of the information requested is verified in the context of the request for information from the foreign tax administration and in the context of the injunction decision issued by the Luxembourg tax administration.

While the legal framework for the exchange of information on request in tax matters has recently been amended in order to allow holders of information to bring annulment actions against decisions of the Luxembourg tax administration requiring them to provide information, the fact remains that the questions submitted to the Court of Justice of the European Union retain their full usefulness. The replies will potentially make it possible to extend the number of persons able to form actions for annulment against the injunction rulings of the Luxembourg tax administration and to define the scope of information that may be required in the context of the exchange of information on request between tax authorities.

INSURANCE LAW
Validity of warranty exclusion clauses in the event of gross negligence

District Court of Luxembourg - 8th chamber
Civil judgment no. 2018TALCH10/00017 of 22 January 2019, docket no. 176980

which states that the exclusion clause for losses incurred as a result of the insured party's negligence, which is contained in the insurance contract, must comply with the provisions of the amended law of 27 July 1997 on insurance contracts (hereinafter the "1997 Law") and in particular Article 14, paragraph 2, which provides that "[*t]he insurer shall be liable for losses caused by the negligence, even gross negligence, of the policyholder, the insured party or the beneficiary. However, the insurer may waive its obligations as regards the cases of negligence which are expressly and restrictively set out in the contract*."

The Court held that the insurer may "*waive its obligations in the event not of gross negligence in general but for certain cases of gross negligence expressly and restrictively set out in the contract*".

To arrive at the conclusion that a clause drafted in general terms is contrary to the law, the Court relies on Belgian case law as the wording of Article 14 of the 1997 Law is identical to that of Article 62(2) of the Belgian Law of 4 April 2014 on land insurance contracts (former Article 8(2) of the above-mentioned Belgian Law of 25 June 1992).

Belgian case law holds that a clause which sanctions the breach of a duty of care or excludes coverage of a breach of the laws, regulations and practices governing the activity concerned is formulated in general terms and does not permit the insured party to know whether insurance benefits will be granted in the event that a claim arises.

On the basis of the above-mentioned case law, the Court holds that contractual provisions imposing on policyholders the obligation "*to anticipate events (i.e. harm) which are normally foreseeable and unavoidable*" and "*to comply with the*

rules of the profession and the legal, administrative and contractual provisions" impose a general objective which must be fulfilled. It concludes that "*these waivers of liability do not fulfil the legal condition of expressly and restrictively determining gross negligence likely to lead to a waiver of liability*".

FICTITIOUS COMPANY
Conditions

Court of Appeal of Luxembourg, 4th Chamber
Judgment no. 8/19 IV-COM of 9 January 2019, docket no. 44685

which holds that if the fictitious nature of a company may be proved by any means, the party which invokes its fictitious nature bears the burden of proof.

In the case at hand, the appellant was acting as the beneficial owner of a company governed by Panamanian law. It sought the contractual liability of the bank arguing that the Panamanian company, which held securities accounts opened in the bank's books, was merely a fictitious company as it lacked *affectio societatis* and had no commercial activity or corporate purpose.

The Court of Appeal points out that the lack of *affectio societatis* is characterised by "*a lack of willingness to create a company and to derive benefit from the fruits of the common undertaking*". In the case at hand, it states that, according to the company's articles of association, the company had been incorporated with a subscribed capital of USD 10,000, represented by 100 shares with a nominal value of EUR 100 each. If no information is provided as regards the number of shareholders or the distribution of shares, the Court notes that "*equality between shareholders is not an absolute principle in company matters, so that a shareholder may hold the vast majority of shares without the company being fictitious*" and adds that "*the non-existence of a company cannot be deduced from the fact that one person alone owns all the shares: Cass. com. 15 February 2005, Jurisdata no. 2005-027197).”* Finally, the Court of Appeal notes that the company's articles of association contain a description of its corporate purpose and that it had opened two securities accounts in the bank's books with the result that the existence of a commercial activity was also given.

FICTITIOUS COMPANY
Conditions

Court of Appeal of Luxembourg, IX Chamber
Judgment no. 26/19 IX-COM of 28 February 2019, docket no. 42305

which holds that "*the fictitious nature of a company must be assessed according to the law to which it is subject*". Having noted that the company was in this case established in Panama and (despite the fact) that none of the parties had invoked Panamanian law, the Court of Appeal declared that it was not in a position to judge upon the litigation.

In the same manner as in the previous case, the appellant was the beneficial owner of a holding company governed by Panamanian law and sought the contractual liability of the bank arguing that the company governed by Panamanian law, which held two accounts opened in the bank's books, was merely a fictitious company. The appellant argued, in particular, that there had been no reason for the creation of the Panamanian company. It is interesting to note that the Court of Appeal does not acquiesce with this view and states that "*as a general rule, holding companies, the purpose of which is in principle to acquire holdings, are created to pursue the objective of tax optimisation (...). While this practice is certainly not synonymous with corporate solidarity, it is still common and not illegal. Assuming that the bank had, as (the appellant) contends, taken the initiative behind this stratagem, the appellant endorsed it implicitly but necessarily by providing assistance without raising any objection and as a result cannot complain about it after the event*".

THE RULE OF "CRIMINAL PROCEEDINGS STAY CIVIL PROCEEDINGS" Conditions for staying proceedings

Court of Cassation of Luxembourg
Judgment no.44/2019 of 14 March 2019, docket no. 4097

Which holds that Article 3, paragraph 2, of the Code of Criminal Procedure, from which the plea that criminal proceedings stay civil proceedings is derived, does not impose any sanction and that the strict rule of interpretation is therefore not applicable to it.

The Court concludes therefrom that this provision cannot prohibit the distinction between domestic and foreign criminal proceedings.

THE RULE OF "CRIMINAL PROCEEDINGS STAY CIVIL PROCEEDINGS" Rules of interpretation

District Court of Luxembourg
Commercial judgment no. 2019TALCH02/00045 of 11 January 2019, docket no. TAL-2017-00385

Which holds that the rule stating that criminal proceedings stay civil proceedings is enshrined by law in Article 3, paragraph 2, of the Code of Criminal Procedure, which provides that if the civil proceedings may be exercised separately from the criminal proceedings, they will be suspended in this case until a final decision has been made in the criminal proceedings brought prior to or during the civil action.

The principle expressed in the phrase "*criminal proceedings stay civil proceedings*" is a public policy principle in the sense that the judge hearing the civil action is required, even of his own motion, to stay the proceedings from the time the criminal proceedings are brought if the decision to be taken in the criminal proceedings is likely to influence the decision to be taken by the civil court (Court 29 June 2011 No 36534 of the list).

Any possible influence of the decision in the criminal proceedings on the civil judgment requires the civil court to stay the proceedings in order to ensure that the civil and criminal judgment do not contradict each other. The stay of proceedings is necessary whenever the criminal judge is called upon to rule on an issue on which the civil judge will have to take a position when he hands down his judgment. There is no need to establish further identity of cause or purpose or even of parties. The civil judge is furthermore not required to rule on ongoing criminal proceedings or to assess their admissibility or merits (Court 1 December 2010 No 33542 of the list).

Case law tends to broaden the notion of identity of facts. Currently, it holds that there is no need for identity of purpose, parties or even identity of cause of action for the stay of proceedings to take effect. It is sufficient that the two actions share a common issue that the court cannot rule on without determining the offence committed and afterwards without ensuring that there is no risk of contradicting the criminal court.

AUTHORITY OF RES JUDICATA IN CRIMINAL MATTERS OVER CIVIL MATTERS
Scope

District Court of Luxembourg
Civil judgment no. 2019TALCH10/00059 of 12 March 2019, docket no. 187895

Which states that according to case law, criminal judgments also have authority over civil matters and that the justification for the rule of the authority of *res judicata* in criminal matters over civil matters is based on the principle of the primacy of criminal judgments over civil judgments.

The Court further states that the civil provisions of a criminal judgment only have the force of *res judicata* in civil matters under the same conditions as a civil judgment.

The only provisions of a criminal judgment that have absolute authority in civil matters are those necessary for the resolution of the criminal trial. The main criterion for the scope of the absolute authority of *res judicata* in criminal matters over civil law is the notion of the findings required by the criminal judge to reach his decision, irrespective of whether it results in a sanction being imposed or an acquittal. The force of *res judicata* does not apply to overabundant findings.

The necessary findings are those relating to the participation of the accused in the criminal act or to the existence of the material fact of the offence, the seriousness of the facts if they have an influence on the classification of the offence, especially the existence of the harm, as well as the acquittal as a result of the absence of criminal misconduct on the part of the accused. On the other hand, findings that were not necessary to resolve the criminal dispute, i.e. to arrive at either a conviction or an acquittal, do not have any effect.

MEDICAL LIABILITY - Distinction between negligence / misdiagnosis

District Court of Luxembourg
Commercial judgment no. 2019TALCH08/00023 of 30 January 2019, docket no. 179460 and 185078

Which recalls established case law which lays down that a mere misdiagnosis is not sufficient to incur the liability of a doctor or the public institution where he practises. It is up to the victim of the misdiagnosis to prove the existence of a real breach by the doctor of his obligations in making the diagnosis.

Under medical liability law, the notion of error must be distinguished from that of negligence (J. PENNEAU, Faute et erreur en matière de responsabilité médicale: LGDJ, 1973). Indeed, "*negligence describes the conduct that a bonus medicus would not have demonstrated; on the other hand, the error that is inherent in human fallibility lies in wait for the best doctor*" (Y. LAMBERT-FAIVRE and St. PORCHY-SIMON, Droit du dommage corporel: Dalloz, 7th ed. 2012, no. 657). There is therefore in principle a boundary between negligence which, even if it is tenuous, gives rise to liability and error which does not entail liability, a boundary which is clearly maintained in the field of diagnostic procedures.

Case law also holds that doctors cannot make diagnoses without due consideration; as is the case for all professionals, they must exercise their profession with the required knowledge and caution and acquire all the information which is necessary or which is merely useful to them in conducting their research. Above all, a careful and thorough examination of the patient is essential (T.A.L., 14 July 1986, No. 1197/86).

Errors in medical technique relating to diagnostic procedures may be divided into three categories: errors committed in analysing the symptoms observed; those resulting from the use of insufficient investigative resources; and, finally, those

consisting in not seeking the informed opinion of other doctors when faced with a difficult diagnosis (JCl. Civil Code, Art. 1382 to 1386, Rec. 440-40: Liability for medical malpractice, updated on 19 February 2019, No. 26).

With regard to negligence resulting from the use of insufficient means of investigation, it is a principle that the private or hospital doctor must carry out the most appropriate examinations and investigations in accordance with the data acquired on a scientific basis. In accordance with Article 33 of the Code of Ethics for the Medical and Dental Professions enacted by the medical board and approved by a ministerial order of 7 July 2005, doctors must use "*as far as possible, the most appropriate scientific methods*". If this is not the case, an error in medical technique is committed.

Moreover, with regard to the errors of not seeking the informed advice of other doctors, it is accepted that when faced with a difficult diagnosis, the doctor has an obligation to seek the informed advice of colleagues who are as specialized as possible in the field in question.

ARBITRATION CLAUSE - Lack of jurisdiction of state courts (raised by the parties)

District Court of Luxembourg
Commercial judgment no. 2019TALCH08/00017 of 22 January 2019, docket no. 176980

Which holds that the effect of an arbitration clause is to render the courts of the State incompetent to judge a dispute subject to an arbitration agreement. This lack of jurisdiction necessarily implies that jurisdiction is exercised by the arbitrators whose mandate derives from the agreement or the ordinary arbitration clause. The latter clause automatically entails the lack of jurisdiction of the ordinary judges even if the arbitration tribunal has not yet been constituted by an agreement concluded in application of this clause.

However, as a rule recourse to the arbitration tribunal is voluntary and the parties may waive it in any event, for example by failing to invoke an arbitration clause. The lack of jurisdiction of national courts resulting from an arbitration clause is a private matter and is covered if the objection has not been raised in limine litis (Court of Appeal, 16 March 2011, No. 36336 of the docket; District Court of Luxembourg, 11 January 2012, no. 131.707 of the docket).

LIABILITY IN TORT OF A CONTRACTING PARTY TOWARDS A THIRD PARTY

Luxembourg Court of Appeal, IVth Chamber
Judgment no. 8/19 IV-COM of 9 January 2019, docket no. 44685

The above-mentioned judgment recalls that in order for a contracting party's liability to be incurred vis-à-vis a third party, the conditions for the implementation of liability in tort must be met. There must therefore be evidence of wrongdoing together with a prejudice caused, as well as the existence of a causal link between these two elements. As regards wrongdoing, the Court of Appeal stated that "*a distinction must be made in this respect between the non-performance of an obligation which is limited to the contracting parties and the non-performance of an obligation which, due to its very nature, has an impact on third parties".*

It was thus incumbent on the appellant to establish that the bank's alleged wrongdoing *"constitutes, irrespective of the contract, recklessness or negligence, regardless of the agreement. The wrongdoing relied on by the third party in support of its action in tort must be distinguished from the non-performance or even the improper performance of the contract and be detachable from or independent of it*."

In the case at hand, the bank's client was a Panamanian company holding two securities accounts opened in the bank's books. The appellant, who acted as beneficial owner of the company, was not a party to the contract with the bank and could not therefore seek to establish the contractual liability of the bank. The appellant, who alleged that the bank did not comply with its obligation to inform, was however unsuccessful in its action in tort as the judges noted that it had failed to specify the extent to which such alleged breach of contractual obligations constituted tort vis-à-vis itself.

In this case, the wrongdoing has a particular character. Probably because of the relative effect of the agreements the wrongdoing relied on by the third party in support of his action in tort must be distinguished from the actual non-performance of the contract: it must be "detachable" from or "independent" of the contract. This solution differs from that which had been accepted by the Court of Appeal in a judgment of 2 July 2008, according to which "*a third party to a contract may invoke, on the basis of liability in tort, a breach of contract to the extent that such breach caused harm to it*" (Court of Appeal 2 July 2008, BIJ 2008, p. 152), which amounted to saying that the non-performance of a contractual obligation alone constitutes tort towards third parties.

BUILDING PERMIT
Stay of execution - Conditions

Administrative Tribunal of the Grand Duchy of Luxembourg
Order of 18 March 2019, docket no. 42408

Which states that, under Article 11(2) of the amended law of 21 June 1999 laying down the rules of procedure before the administrative courts, a stay of execution may be granted only if, on the one hand, the execution of the disputed decision is likely to cause the plaintiff serious and definitive harm and, on the other hand, if the grounds put forward in support of the appeal against the decision appear serious.

As regards the condition of serious and definitive harm, the Administrative Tribunal states that this is harm which, by its nature or extent, exceeds the common inconveniences and sacrifices imposed by civic life and must be considered an intolerable violation of the equality of citizens before public authorities. In the case at hand however, the plaintiffs merely stated that the immediate execution of the building permit might cause them serious and definitive harm, since, if the work were to be started, there would be reason to fear that the building process would be largely under way by the time the final judgment will be handed down with the result that the resulting harm could hardly be remedied. This single allegation of harm, which was not otherwise detailed or substantiated, was deemed insufficient by the Administrative Tribunal, which holds that a statement of serious and definitive harm cannot be limited to a hypothetical statement, nor can it be limited to the mere mention of precedents or be comprised of general considerations.

Furthermore, the Administrative Tribunal points out that, according to the most recent case law, the mere fact of being a neighbour is not sufficient to establish standing to bring an action to terminate a building permit and that, as a result, having the status of neighbour, even a direct neighbour, does not ipso facto imply the existence of serious and definitive harm.

The Administrative Tribunal therefore held that the risk of serious and definitive harm was not justified to the requisite legal standard and rejected the application for a stay of execution.

CURRENT NEWS

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Read the blog on the case-law of the Court of Justice of the European Union by Philippe-Emmanuel Partsch, by clicking on the following link: http://eucaselaw.com/.