Arendt Case Review

Arendt Case Review is a newsletter designed and produced by Arendt Litigation Group

July 2019

Executive Summary

CIVIL LIABILITY
Proof

Court of Appeal of Luxembourg
Judgment No. 116/19 II - CIV of 19 June 2019, docket no. 41449

wich recalls that in matters of both tort and contractual liability, the burden of proof of the event giving rise to liability lies with the plaintiff.

In the present case, following the rupture of a valve which had caused significant damage, it was immediately dismantled by the plaintiff's employees, "without the presence of the defendants or a bailiff or expert contradictorily appointed, and without other measures having been taken to avoid the decline of evidence, such as taking photographs documenting the condition of the pipeline before the valve is removed and the dismantling of the valve, or even identifying the valve or keeping it in conflict for expert appraisal. In addition, the failed valve was not returned to the laboratory responsible for analyzing it until 4 days after the disaster and disassembly.

For these reasons, the Court held that the plaintiff had not established that the valve dismantled and analysed was indeed the one provided and delivered by the defendants. As proof of the traceability of the valve was therefore not provided in this case, the defendants' liability could not be accepted.

CONTRACT INTERPRETATION
Silence (no)

Luxembourg Court of Appeal
Judgment No. 105/19 IV-COM of 3 July 2019, docket no. 44810

which notes that while some silences are not meaningless and, exceptionally, the law may attach effects to silences deemed unambiguous, it remains that in the absence of expressed will, there can be no place, strictly speaking, for interpretation (JCI Civil, Art. 1188 to 1192, Fasc. 10 : Contract, Interpretation of the Contract, The Instrument: Concept, Standards, Scope, No. 10, 4 May 2017).

COMMERCIAL LAW
Ten-year limitation period
Starting point

Court of Appeal of Luxembourg
Judgment No. 78/19 IX - COM of 20 June 2019, docket no. 45157

wich recalls the principles laid down in Article 189 of the Commercial Code concerning the ten-year limitation period between traders, as well as the rules concerning the starting point of the limitation period.

In general, the limitation period only begins to run from the day on which the holder of the claim was entitled to take action to obtain payment of its claim, i.e. the day on which the claim becomes due. In a contract of enterprise, the Court points out that the claim becomes due after completion of the work, unless otherwise stipulated by the parties. The date of issue of an invoice, on the other hand, has no effect on the starting point of the ten-year limitation period. It is only used as evidence.

In the present case, the Court notes that the parties had not made the price payable subject to a special condition, so that the date of signature of the report of reception of the work should be taken as the starting point for the ten-year limitation period, and not the date of issue of the invoice for that work, which had been sent more than 10 years later. Similarly, as soon as the contracting authority grants the acceptance, the existence of reservations to be lifted does not affect the starting point of the limitation period.

It should be noted that the limitation period does not run against a person who is unable to act as a result of an impediment resulting either from the law, the agreement or force majeure (cf. not. Cass. Plenary Assembly, 23.12.1999, Bull. civ. A.P. n°9). However, this impossibility to act must be proved by the plaintiff who avails himself of it (cf. Cass. Com. 21.03.1995, Bull. civ. 1995. IV. n°92).

There are also grounds for interrupting the limitation period, provided for in Articles 2244 to 2248 of the Civil Code, namely interruption by an act of prosecution of the creditor and interruption by an act of recognition of the debtor's debt. However, the Court points out that the sending of an invoice or a formal notice does not constitute acts of prosecution and therefore does not interrupt the limitation period (cf. B. Starck, H. Roland and L. Boyer, op. cit., n° 2219 et seq.; A. Weill and F. Terré, op. cit., n°1112).

COMMERCIAL LAW
Apparent mandate theory

District Court of Luxembourg
Commercial judgment No. 2019TALCH15/01054 of 10 July 2019, docket no. 172261

which reminds that the theory of apparent mandate cannot be invoked when contracting with a company. A judgment of the Court of Appeal of 17 January 2008 (No. 31726 of the roll, Pas. 34, p. 147) held that "The respondent is right to oppose this thesis [apparent mandate theory] by invoking Article 53, paragraph 4 of the Law of 10 August 1915 on commercial companies, which provides that the clause, which indicates the persons who may validly represent the company, is enforceable against third parties. The appellant should have inquired about L.'s powers within the bank. It cannot therefore rely on an apparent mandate».

A judgment of the Court of 21 February 2018 (Case No 43184) specified the solution adopted in the above-mentioned judgment of the Court of 17 January 2008 as follows: "This solution is necessary in view of the evolution of the provisions of the amended law of 10 August 1915 on commercial companies. Before a reform by the law of 23 November 1972, case law allowed third parties who had dealt with the company to invoke the apparent mandate. This solution had been found by the courts to protect third parties who had contracted with a company since, at the time, these third parties could be opposed by the company to the irregularity of the appointment of the body with which they had dealt. Since the reform introduced by the law of 23 November 1972 and the introduction of the current provisions of Article 191 bis, paragraph 4, into the law on commercial companies, third parties may rely on the publication of the appointment of the corporate body with which they have dealt, without regard to the regularity of its appointment. In return, they can no longer be entitled to oppose appearance to have duly published statutory provisions set aside (cf. JP Winandy : Company Law Manual, 2011, pp. 72 and 249). To decide otherwise would be to remove all meaning from Article 191 bis paragraph 4 of the law (currently Article 710-15 according to the new numbering) on commercial companies."

COMPANY LAW
Cancellation of resolutions of a general meeting

District Court of Luxembourg
Commercial judgment n° 2019TALCH15/00940 of 26 June 2019, docket no. TAL-2018-04853 and TAL-2019-00321

As to the lack of an exact indication of the applicant's domicile

Under Article 153 paragraph 2 of the New Code of Civil Procedure, "*Any act of a bailiff shall indicate under penalty of being declared void... 2) a) if the applicant is a natural person: its surname, first names, profession and domicile*". The Court states that this means the applicant's actual and current domicile must be provided and that failure to comply with this formality entails a nullity of form. Consequently, the annulment of the act is subject to the existence of a grievance duly invoked and established.

In the present case, the Court held that the lack of exact information from the plaintiff did not give rise to a complaint for the defendant, who, having regard to the information contained in the summons, could not have misunderstood the author of the summons or the subject of its claims.

As for the limitation period under Article 1400-6 of the amended law of 10 August 1915 on commercial companies ("1915 Law")

According to Article 1400-6 of the 1915 Law, the nullity of acts and deliberations subsequent to the incorporation of the company may be requested within a period of six months. The Tribunal recalls that the departure date begins "from the date of actual or presumed knowledge of the voidable decision". Generally, the date of publication of the meeting in the Official Journal is taken into consideration and, in the event of concealment, this date is postponed to the day of discovery of the concealment. "However, if the person concerned obtained knowledge of the resolution at an earlier date, the six-month period shall be calculated from that earlier date".

As for the indication of a false address and a false postal code in the convening notice to an extraordinary general meeting

The fact that a registered letter has been sent to an address containing a spelling error and mentioning a false postal code is not such as to make it impossible to duly convene a meeting.

In this case, the plaintiff had never indicated her postal code in the proxies issued for the meetings, nor in the procedural documents, and the address could be spelt in several ways (translated from Russian). The registered mail was returned to its sender with the mention "unclaimed", the box "unknown" not being ticked. The Court thus concluded that the mail had arrived at the correct Post Office and that it had not been received by the applicant on her own initiative.

As for the deadline for convening an extraordinary general meeting

Articles 450-8 and 450-9 of the 1915 Law lay down the rules for convening general meetings, and provide in particular that when the shares are registered, and in the absence of a choice of another means of communication, the convening notice shall be made by registered letter at least eight days before the meeting is held.

The Court points out that "the date to be taken into account in assessing whether the eight-day time limit has been respected is the date on which the letter convening the general meeting was sent and that the date of receipt of the letter convening the meeting is irrelevant".

As regards the qualification of the contribution of a receivable and the application of preferential subscription rights

Article 420-23 (5) of the 1915 Law, amended by the law of 10 August 2016, enshrined the principle of a contribution in cash-compensation, which means that a capital increase may be carried out by offsetting against claims held against the company and that this contribution is considered as a contribution in cash.

However, three conditions must be met: (1) the claim must be certain, therefore without debate, (2) it must be liquid, therefore assessable in cash, and (3) it must be due, therefore due on the day on which the creditor must pay up the shares.

In the present case, the capital increase by contribution of a receivable, qualified by the shareholders' meeting as a contribution in kind, was reclassified by the Court as a contribution in cash, since the receivable met the three conditions mentioned above.

As a result of this reclassification, the Court recalled the principles governing shareholders' preferential subscription rights. Indeed, in joint stock companies, as soon as a contribution is qualified as cash, existing shareholders necessarily benefit from a preferential subscription right, in accordance with Article 420-26 of the 1915 Law. Shareholders nevertheless have the opportunity to limit or cancel this preferential right for a limited period of 5 years, either in the Articles of Association or by decision taken at an extraordinary general meeting, provided that they have specifically announced this proposal in the convening notice.

The regulation concerning shareholders' preferential subscription rights in the event of a capital increase is a matter of public policy of protection and its violation may be invoked "regardless of any consideration relating to the interests of the company and the shareholders and the existence of prejudice on their part" (cf. Court of Appeal, 14 July 2010, list n°34800).

In the present case, it appeared from the documents on file that the preferential subscription right had not been respected. The Court therefore annulled the decisions taken at the extraordinary general meeting, in accordance with Article 100-2 of the 1915 Law.

BANKER'S LIABILITY
Substituted agent

District Court of Luxembourg
Commercial judgment No. 2019TALCH15/00993 of 3 July 2019, docket no. 187492

which holds that the beneficiary's banker acts not only as an agent of his client, to collect the amount transferred by the principal, but also as a substitute agent of the principal, who instructs him to enter the amount transferred to the credit of the beneficiary.

In this case, the plaintiff had to make a bank transfer following a capital call from an investment fund in which the plaintiff had subscribed shares. The plaintiff mistakenly paid the amount of capital called up in the wrong currency, which led the investment fund's custodian bank to convert the currency. This conversion resulted in a devaluation of the amount transferred.

As a substitute agent, the receiving banker has a duty of care and diligence to execute the transfer transaction for the purposes intended by the originator.

The Court also recalls that the duty of care, under which the substitute banker has the obligation to detect obvious and apparent anomalies, which cannot escape a normally prudent and diligent banker, must be counterbalanced by the banker's duty of non-interference, which prohibits any interference in the client's affairs.

The Court also specifies that the banker's obligation to verify is only an obligation of means and must be interpreted in a reasonable manner, in particular with regard to the number of transfers that the banker makes on a daily basis. Consequently, the banker's liability is only engaged if the ordering customer provides proof of a fault on the part of the banker.

!

In the case at hand, the bank was not found guilty of any fault.

LEASE - INSURANCE
Competence rationae materiae

Court of Appeal of Luxembourg
Judgment No. 74/19 IV - COM of 8 May 2019, docket no. 43443

In this case, the building owner's fire risk insurer was acting against the tenant on the one hand and the tenant's civil liability insurer on the other.

The Court raised of its own motion in appeal on appeal the question of the jurisdiction of the District Court seized of the first application to hear this action for liability.

It held that it is settled case law that "when a subrogated insurer brings an action against the liable third party, jurisdiction is determined with respect to the insurer as if the insured were acting against the liable party". Consequently, the courts competent to hear the dispute are those which would have been competent without the effect of subrogation. In the present case, in matters of rent leases, the exclusive jurisdiction of the Magistrates' Court is not in doubt (Article 3.3° of the New Code of Civil Procedure).

The Court recalled that "the jurisdiction of the Magistrates' Court extends not only to the existence of the contract and the performance of normal obligations between lessors and lessees as well as to the termination of the lease, but also includes all disputes that may result from the non-performance of any obligation of the lessor or lessee. As it is a rule of exceptional jurisdiction, it is strictly interpreted and takes into account the very nature of the dispute, it is of public order and the judge must raise it ex officio".

However, a close connection between two applications may, in certain cases, produce the effect of a legal extension of jurisdiction, which would therefore be an exception to the normal rules of jurisdiction. However, "this solution is rejected if the related claim concerns a matter for which the court of exception has exclusive jurisdiction. The legal extension of jurisdiction cannot be used to obstruct the rules of jurisdiction which are of public policy".

In the present case, since the jurisdiction of the Magistrates' Court is a matter of public policy, the existence of a connection between two disputes could not justify the jurisdiction of the District Court to hear the two applications.

On the other hand, as regards direct action brought against the tenant's civil liability insurer, it is the ordinary courts which have jurisdiction under the insurance contract. However, this action can only succeed if the liability of the insured tenant is proven. Since this assessment falls within the exclusive competence of the Magistrates' Court, the District Court initially seized of the request did not have the competence *rationae materiae* to hear it. The Court stayed the proceedings until the competent court (the Magistrates' Court) had made a final decision on the question of liability incurred by the tenant.

CIVIL AND COMMERCIAL PROCEDURE
Estoppel (bar to proceedings)

District Court of Luxembourg
Commercial judgment No. 2019TALCH02/00862 of 17 May 2019, docket no.178246

which reminds us that estoppel is a bar to proceedings based on the prohibition against contradicting oneself to the detriment of others, otherwise known as an exception of indignity or principle of incoherence, derived from a kind of moral or procedural good faith. This principle thus precludes a party from invoking an argument contrary to that which it has previously put forward (JurisClasseur, civil procedure, Means of defence - General rules, fasc. 128, n°75; Assemblée Plénière, 27 February 2009, Bull.2009, n°1; Cass.fr. chambre commerciale, 20 September 2011, n°10-22888, RTDC 2011, p.760, note Bertrand FAGES).

The principle of estoppel essentially concerns contractual relations and implies that at least two elements are present: in the same dispute between the same parties, there must be, on the one hand, inconsistent conduct by the party which creates a misleading appearance and reverses the position it had claimed from the other party, thereby misleading the latter's legitimate expectations, and, on the other hand, an effect of the change of position for the other party, which is itself led to change its initial position as a result of the conduct of its adversary which is prejudicial to it. These two conditions must be met in order for the estoppel to be applied, since there can be no question of preventing all the parties' initiatives and infringing the principle of freedom of defence, nor of affecting the very substance of the rights claimed by a litigant, by asking the judge to become the censor of all the pleas and arguments of the parties (Court, 4 July 2018, No 44893 of the list).

The principle of estoppel is a bar to procedings intended to sanction in the name of good faith the contradictions in a party's conduct during a trial. While there may be uncertainty as to whether estoppel is applicable in the event that contradictory positions are defended by the same party in two different proceedings, it is nevertheless clearly recognised in the case law that the principle of estoppel only sanctions inconsistent behaviour in a procedural context. »

CIVIL AND COMMERCIAL PROCEDURE
Force of res judicata

District Court of Luxembourg
Commercial judgment No. 2019TALCH02/00862 of 17 May 2019, docket no.178246

which recalls the regularity of the judgment does not affect the force of res judicata (Cass. 1re civ., 22 July 1986: Bull. civ. I, n° 225. - Cass. 3rd civ., 7 Dec. 1988: JCP G 1989, IV, p. 48. - Cass. com., 19 Oct. 1993: Bull. Civ. IV, No. 341; JCP G 1993, IV, 2657). In the same vein, the force of res judicata does not depend on whether or not the decision has been served (Cass. 1st civ., 25 Feb. 1997 : D. 1997, inf. rap. p. 92 ; JCP G 1997, IV, 859 : Gas. Pal. 197, jurispr. panel. p. 270. - Cass. 3e civ., 20 June 2007, n° 06-12.569 : Bull. civ. III, n° 110).

Consequently, even a vitiated judgment has the force of res judicata: no matter how serious the irregularity may be, since the judgment benefits from this force as long as it has not been challenged by an appeal. The irrevocably judged res judicata also covers the "errors" of the judgment. It is necessary even in the event of a breach of a principle of public policy (Cass. 2nd civ., 25 Oct. 2007, n° 06-19.151 : JurisData n° 2007-040999 : Bull. civ. II, 240).

Consequently, as long as no appeal is lodged against the irregular decision, it retains the force of res judicata and, if it has become res judicata, it may be enforced (Cass. civ., 24 Nov. 1947 : Bull. civ. n°32 ; RTD civ. 1948, p. 502. - Cass. soc., 21 Apr. 1961: Bull. civ. IV, n° 434. - Cass. 1st civ., 14 June 1966: Bull. civ. I, n° 363. - Cass. soc., 21 June 1966: Bull. civ. IV, n° 636. - Cass. soc., 4 June 1969: JCP A 1969, IV, 5573. - Crim. Cass., 21 July 1976: D. 1976, inf. rap. p. 258)

CIVIL AND COMMERCIAL PROCEDURE
Interim proceedings and arbitration clause

District Court of Luxembourg
Order n°2019TALREFO/00279 of 21 June 2019, docket no.TAL-2019-00209

which recalls that it is a principle of law that the existence of an arbitration agreement does not constitute an obstacle to the jurisdiction of the judge hearing the application for interim measures to take provisional measures or to allocate a provision, unless there is a special agreement exempting these cases from the jurisdiction of the summary proceedings. However, such a special agreement does not exist in the present case, insofar as the attribution of jurisdiction to the "President of the Chamber of Commerce of the District Court of Luxembourg-City" (in addition to the consideration that the parties remain in default of specifying under which legal provision the magistrate presiding over the Commercial Chamber at the District Court of Luxembourg would have powers to order an expert opinion in the event of disagreement between the parties) being derogatory to the common law, the arbitration clause must be interpreted restrictively. It concerns only the principal and, in the absence of an express expression of will, the waiver by the parties of their right to apply for interim measures cannot be deducted from the arbitration clause. The inoperative nature of arbitration agreements in matters of summary proceedings has been linked to the provisional nature of the summary proceedings order (Court 5 December 1988, role 10606; Court 30 January 1989, role 11039; Court 25 June 1991, role 13074).

which reminds us that in order to prosper on the basis of Article 350 of the New Code of Civil Procedure, the plaintiff must justify a legitimate reason for its request, which must be aimed at preserving or establishing facts with a view to a definite but subsequent dispute (Jacques and Xavier Vuitton, Les référés, Editions du JurisClasseur, 2003, No. 532).

In addition to the need for a legitimate reason, there is also the need for the operational nature and relevance of the measure requested.

The applicant is thus required to demonstrate, in addition to the legitimacy of the measure requested, that it is relevant, i.e. appropriate, useful and proportionate to the subsequent dispute requiring it.

The usefulness of the requested measure shall be assessed in light of the facts characterising the legitimate ground. The adequacy of the measure to the circumstances justifying the action on the merits, the alleged facts and the facts to which the investigative measure relates, must be sufficiently plausible to justify the measure.

The facts to be established or preserved, and therefore the measure requested, must be relevant to the possible future dispute and useful in resolving it.

A link must therefore be characterized by the plaintiff between the future dispute, the requested measure and the facts that are at its origin. Otherwise, the measure must be rejected (Jacques and Xavier Vuitton, Les référés, Editions du JurisClasseur, 2003, n° 548 to 555).

Luxembourg case law has also repeatedly pointed out that the facts on which the possible future dispute is based must be sufficiently plausible and characterised to justify the judge's intervention. This requirement makes it possible to avoid perverting the institution of probationary summary proceedings, by preventing them from becoming merely a means of pressure or a means of pursuing aims unrelated to their purpose. Such a requirement is essential to the coherence of the institution, failing which the conditions for recourse to probationary summary proceedings could easily be circumvented by the allegation of a false or pointless dispute (Court of Appeal, 27 February 2008, Pas. 34, p. 162).

EMPLOYMENT LAW
Dismissal
Systematic delays

Labour Court of Esch-sur-Alzette
Judgment E-TRAV-184/17 of April 4, 2019, docket no.968/19

which declares the dismissal of an employee who is systematically late at its place of work as justified and well-founded.

In the present case, the applicant (employee) was notified two warnings from his employer concerning his almost daily delays and inviting him to be more punctual, a remark also made by the employer during the employee's annual appraisal interview. Noting, inter alia, that the employee had accumulated more than 24 delays over a calendar period of approximately three months despite these challenges, the employer dismissed the employee with notice.

Considering that "*systematic delays justify the dismissal of an employee, regardless of whether these delays have created a dysfunction in the company, insofar as the employer is entitled to require its employee to respect every day the working hours agreed between the parties",* and that it was "*moreover of little importance to know to what extent the delays disrupted the employer's services, since the employee was at fault simply because of his systematic delays that were not authorised or excused*", the Labour Court of and in Esch-sur-Alzette dismissed the employee's claims in full, declaring them unfounded.

EMPLOYMENT LAW
Incompetence ratione materiae of the labour courts - Removal with immediate effect of a CEO - delegated to the day-to-day management

Court of Appeal of Luxembourg
Judgment No. 90/19 of 27 June 2019, docket no. CAL-2018-00011

which recalls that "the employment contract is defined as the agreement by which a person undertakes to place its activity at the disposal of another, under the subordination of which he places himself, for remuneration, with the consideration that for there to be a relationship of legal subordination, the contract must place the employee under the authority of his employer who gives orders concerning the performance of the work, controls its performance and verifies its results. The existence of an employment contract depends neither on the will expressed by the parties nor on the name or qualification they have given to their agreement, but on the factual conditions in which the employee's activity is carried out" and that "having regard to the absence of any written employment contract and the respondent's objections as to the existence of an activity as an employee in the appellant's favour, it is for the appellant, who relies on it in support of his request, to establish its reality".

In this particular case, the appellant had been appointed by the Management Board Chief Executive Officer (CEO), who was delegated to the day-to-day management with general power of attorney. The Court held that the appellant had received from the Management Board, in its capacity as representative of the company, a mandate to carry out the day-to-day management and to represent it. Contrary to what the appellant argued, the Court of Appeal considers that "(t)he (the appellant's) pay sheet, as well as the fact that he was in receipt of a supplementary pension and a certain number of days of leave are not such as to establish, in the absence of any other evidence, that there was a subordinate relationship between the appellant and the respondent, as an agent and his principal could freely agree on a remuneration and the conditions under which the mandate must be exercised. »

The Court also found that the appellant "organized his own working time by not reporting to anyone, that he did not inform his colleagues of his absences, nor of their cause or duration, and that it was only following complaints from his employees (of whom he was the superior according to the organization chart provided by the respondent) that the Management Board was informed of his absences and inappropriate behaviour. »

The Court of Appeal thus concluded that the appellant had failed to establish that he had discharged the day-to-day management of the company in the context of a subordinate relationship.

NEWS

Clara Mara-Marhuenda and **Gregory Minne** spoke about the "**Cross-Border Insolvency Proceedings**" at the "**Intensive Course on Cross-Border Insolvency Proceedings**" conference, organised on **9 July 2019** by the ERA (Academy of European Law) in Trier.

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