Arendt Case Review

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MANDATE AGREEMENT
Indemnity for losses incurred

District Court of Luxembourg
Commercial judgment no. 2018TALCH15/1029 of 11 July 2018

states that under Article 2000 of the Civil Code the principal must compensate the agent for "*losses which the latter has sustained on the occasion of its management, in the absence of an imprudent act being ascribable to it*".

In order to be claimed under Article 2000 of the Civil Code, the loss, irrespective of whether it has become manifest after the end of the mandate, must nevertheless and necessarily have arisen during this mandate.

However, in the case at hand, the harm alleged by the applicant only arose as a result of and following the filing of a civil action in the criminal proceedings, which was made more than 6 months after the end of the mandate.

The legal provisions relating to the mandate invoked as the principal basis for the application are therefore not applicable in the case at hand.

The same applies to the provisions relating to the contractual liability invoked in the alternative, as no contract bound the parties at that date.

INVOICE
Accepted invoice

Court of Appeal of Luxembourg, 4th Chamber
Commercial ruling no. 99/18 of 13 July 2018

which rules that proof by accepted invoice within the meaning of Article 109 of the Commercial Code, which provides that "*purchases and sales are evidenced by an accepted invoice*", is relative to the specific modes of evidence in commercial matters and therefore falls within the scope of the question of the admissibility of evidence within the meaning of Article 18 (2) of Regulation (EC) 593/2008 (Rome I), which is governed amongst others by the law of the forum.

As a consequence, the accepted invoice may be invoked where a pending dispute in Luxembourg is subject to foreign law.

This decision confirms previous decisions of the Court of Appeal (21 may 2015, n°39908; Cour d'Appel, 8 juin 2011, n°35650).

INVOICE
Payment of an invoice without reservations - waiver of recourse - insurers (subrogation)

Court of Appeal of Luxembourg, 9th Chamber
Civil Judgment no. 89/18 of 14 June 2018

points out that "*acceptance of an invoice or the payment without reservation of the amount invoiced constitutes an act equivalent to approval or reception. Payment of an invoice without reservation is equivalent in principle to approval of the object or services delivered.*

As regards contracts for services, this approval is equivalent to reception and therefore discharge of liability to the benefit of the contractor, at least concerning what is apparent and has not given rise to reservations. Where applicable, this discharge of liability is not restricted to execution in accordance with the contract and rules of the works invoiced. In the case of restoration work, acceptance of the invoice relating thereto is equivalent to recognition by the author of the said acceptance of the absence of liability of the author of the invoice as regards the origin of the disorder which was subject to the restoration work invoiced. On the other hand, in accepting the invoice, its addressee is recognised as a debtor given that the invoice is the confirmation of the debt of the latter."

In the case at hand, the company had made the full payment of the invoice without expressing any reservations. The Court of Appeal furthermore stated that at the time of the payment, the company "*had at its disposal all the elements of information required to assess in full knowledge of the facts the validity of the disputed invoice in light of the allegations currently made vis-à-vis the respondent in order to challenge its liability.*"

The Court of Appeal therefore ruled that "*by paying without reservation the disputed invoice, the company had waived any challenge to the respondent's liability as regards the disorder which was subject to the restoration work invoiced, on the one hand, and that it had identified itself as debtor of the sum invoiced, on the other hand.*"

Furthermore, the Court of Appeal also ruled that the appellants, who were only subrogated to the company's right in their capacity as insurers, could "*not rely on a claim for damages which the company had waived and which related to an amount for which the company had declared itself to be the debtor."*

UNILATERAL EXPERT ASSESSMENTS
Probative value

District Court of and in Luxembourg - 11th chamber
Civil judgment no. 2018TALCH11/00142 of 13 July 2018

"*Both the principle of the equality of arms, which requires that each party is offered a reasonable opportunity to state its case under conditions which do not place it at a clear disadvantage in relation to its adversary and the principle of adversarial proceedings imply that operations or results of an instruction issued to persons who were not represented or present cannot be declared effective*."

"*A report established unilaterally furthermore never has the same value as an adversarial report, in the sense that it may not serve as a single basis for a decision at law* (cf. Court of Cassation 08.12.2005, decision no. 63/05).

A report established unilaterally, which has been duly notified in the case at hand and which the parties have not been able to debate freely and to good purpose during the proceedings, will thus have the value of mere information on which the judge may only base his or her decision on condition that it is corroborated by other elements.

The judge therefore may only use a unilateral expert assessment on the double condition that it has been duly submitted to the proceedings and that its data is corroborated by other elements of the case. He may refer to a unilateral expert report which is duly issued and likely to be debated on an adversarial basis as an element for comparison with the other elements of proof submitted for his assessment. The judge may not however rely exclusively on a unilateral expert assessment."

COMPENSATION FOR DAMAGES
Benefit of the doubt (no)

District Court of and in Luxembourg, 8th Chamber
Judgment of civil interest no. 2018TALCH08/00187 of 11 July 2018

rules that "*under general law the victim must prove that the prejudice which he has suffered is due to an accident and that he may not invoke the benefit of the doubt* (cf. 1315 of the Civil Code)*. The benefit of the doubt may not serve as a basis for legal proceedings. It is up to the victim of an accident, as it is up to any plaintiff, to establish, in accordance with legal rules, by proof or presumption, the existence and extent of the prejudice suffered, and more specifically the fact that the injury invoked is imputable to the accident, as well as the medical link between this initial injury and the infirmity existing at the time when the claim is presented* (CA Aix, 23 March 1972, Gaz. Pal. 1973, 1, doctr. p. 58).

The evidence to be produced by the plaintiff may not result from a mere possibility or probability and the presumptions must be serious, precise and consistent (Max Le Roy, L'évaluation du préjudice corporel, Litec, 16th ed., no.19)."

COMPENSATION FOR DAMAGES
Compensatory damages and moratory damages

District Court of and in Luxembourg, 8th Chamber
Judgment of civil interest no. 2018TALCH08/00187 of 11 July 2018

points out "*the difference between compensatory damages and moratory damages, as well as the principles relating to the calculation of their respective starting points.*

Compensatory damages are damages which accrue from the inception of the prejudice to the date of the decision establishing the indemnity, while moratory damages are damages which accrue from the decision to the date of payment.

Moratory damages accrue automatically, with the result that the creditor is not required to have requested them (Georges Ravarani, La responsabilité civile des personnes privées et publiques, 2nd edition, numbers 757 to 761).

According to settled case-law, compensatory damages are construed ultimately as damages intended to supplement the reparation of the prejudice by insuring that the injured party obtains compensation for the supplementary prejudice caused to it by the time it takes for the person causing the prejudice to repair the effects thereof (Georges Ravarani, La responsabilité civile des personnes privées et publiques, 2nd edition, numbers 1122 et seq.).

As compensatory damages do not indemnify the victim for the consequences of the accident but only for the supplementary prejudice resulting from the deferred payment of the indemnity to which he was entitled at the time the prejudice occurred, the Court deemed that in the case at hand there were therefore no grounds for allocating compensatory damages for the prejudices assessed on the day of the judgment (loss of revenue and assistance of a third party), given that in the light of the specific circumstances of the case at hand, the delay as regards the indemnity was not imputable to the liable third party."

The Court therefore only granted the moratory damages from the day of the judgment until payment in full.

EXECUTION
Garnishment on unilateral request - duty of cooperation

Court of Appeal of Luxembourg, 9th Chamber
Civil Judgment no. 97/18 of 21 June 2018

rules that "*an application for authorisation to proceed with garnishment under Article 694 of the New Code of Civil Procedure is by law a unilateral procedure which takes place without the knowledge of the distrained party.*

The judgment at first instance rightly held in respect of unilateral proceedings that the plaintiff is bound by a reinforced obligation to provide complete and sincere information to the presiding judge."

Furthermore, Article 3.3.1, sub-paragraph 3 of the Internal Regulations of the Luxembourg Bar Council is applicable to the case at hand: "*A lawyer who makes a unilateral application or who requests a judgment by default must supply to the Court hearing the dispute the essential factual and legal elements particular to the verification of the soundness of his client's application*".

A lawyer who acts on the basis of a unilateral application is required to provide all the elements in an objective manner to the judge in order to provide the latter with all the arguments likely to enable him to assess the application submitted to him.

The order obtained in breach of the reinforced obligation of loyalty should be annulled."

CIVIL PROCEDURE
Civil liability – orders and decisions to dismiss proceedings - exception of *res judicata*

District Court of and in Luxembourg - 11th chamber
Civil judgment no. 2018TALCH11/00142 of 13 July 2018

rules that "*the decisions to dismiss proceedings handed down by the chambers of the council at first and second instance within the framework of the criminal proceedings initiated against an individual for manslaughter are not binding on him in respect of the civil analysis of liabilities.*"

As orders and decisions to dismiss proceedings rendered within the framework of criminal proceedings are essentially provisional, they cannot give rise to the exception of *res judicata* in respect of an action which is brought subsequently before the civil Courts by the injured party.

CIVIL PROCEDURE
Estoppel

Court of Appeal of Luxembourg, 7th Chamber
Civil Judgment no. 127/18 of 04 July 2018

rules that "*estoppel is a bar founded on the prohibition of contradicting oneself to the detriment of another party, otherwise referred to as the exception of indignity (exception d'indignité) or principle of incoherence, derived from a form of procedural good faith or morality. This principle thus prevents a party from invoking an argument which is contrary to an argument which it has previously advanced*."

"*The principle of estoppel essentially concerns contractual relations and implies that at least two elements must be present: within a single dispute between the same parties there must exist, on the one hand, incoherent conduct on the part of the party which creates a misleading impression and leads to revision of its position which it had asserted vis-à-vis the other party, thus frustrating the latter's legitimate expectations and, on the other hand, a change of position for the other party, which is itself required to change its original position as a result of the contradictory conduct of its adversary which is damaging to it. These two conditions must be satisfied for estoppel to be applied, because there can be no question of preventing all the initiatives of the parties and undermining the principle of the freedom of defence, or of affecting the very substance of the rights claimed by a litigant by requesting the judge to censor all the pleas and arguments of the parties*."

The Court of Appeal also states that "*given that the principle of estoppel constitutes a procedural bar intended to sanction in the name of good faith contradictions in the conduct of a party during proceedings, extracts of internet pages and press articles cannot have any impact on the assessment of the alleged conduct. However, nothing prevents the Court of Appeal from taking into account the conduct displayed by a party during interlocutory proceedings to obtain evidence brought with a view to the proceedings on the merits*."

CIVIL PROCEDURE
Relative effect of service - indivisibility

Court of Appeal of Luxembourg, 7th Chamber
Civil Judgment no. 132/18 of 11 July 2018

rules that "in *the event of a multiple litigants, the principle of the relative effect of service shall apply, except in the case of solidarity (solidarité) or indivisibility (indivisibilité)* (Dalloz Encyclopedia, 5th appeal, no. 537 and 538). *In respect of indivisibility, the serving of the judgment on the litigant which has lost by one of the successful parties benefits both parties; subsequently, at the expiry of the legal period commencing from this service, the losing party may no longer lodge an appeal against any of its adversaries* (Encyclopédie Dalloz, V° appel, no. 519 et 520)."

In the case at hand, the plaintiff had served notice on the three defendants in order to obtain a Court order requiring them to payjointly, or otherwise *in solidum*, damages resulting from the joint misconduct exercised with regard to it. The Court of Appeal therefore deemed the object of the dispute to be indivisible. As a result, the appeal brought by the initial plaintiff after the legal appeal period which runs from the service of the judgment executed by one of the defendants was deemed to occur outside the period in respect of all the respondents.

EMPLOYMENT LAW
Immediate termination of the employment contract on serious grounds

Labour Court of Luxembourg
Judgment no. 2740/2018 of 13 July 2018

which states that "*by virtue of Article L. 124-10 (3) of the labour code, notification of the immediate termination of the employment contract on serious grounds must be served by means of a registered letter sent in the mail which sets out precisely the alleged fact(s) imputed to the employee and the circumstances which are likely to attribute to them a serious character.*

The specification must satisfy the following requirements: it must first enable the party subject to the termination of the contract to know exactly the alleged fact(s) imputed to him or her and to thus decide in full knowledge of the facts to bring an action with a view to obtaining payment of the indemnities provided for by the law in the event of an irregular and wrongful dismissal.

It must then be such as to prevent the author of the termination from invoking a posteriori different reasons from those which did in fact cause the breakdown; and it must finally enable the Courts to assess the seriousness of the misconduct committed and to examine whether the grievances invoked before them are identical to the reasons notified.

This prescription is a matter of public policy and it is up to the Court to examine whether the reasons invoked in support of the termination are sufficiently precise, given that the precise formulation of the reasons is a guarantee against any arbitrary measure in the event of dismissal.

It is therefore the letter of dismissal which sets out the terms of the dispute before the Courts and which is the only valid medium for announcing the reasons."

The Court then states that "*the unauthorised intrusion by an employee into the office of a director and the unauthorised opening of a cupboard with a view to stealing objects which are located in that cupboard, particularly objects of a certain value, followed by the effective theft of these objects, constitutes a valid reason for dismissal with immediate effect, even for an employee with a very high level of seniority.*"

The Court considers however that "*the intrusion by an employee into the office of a director, the opening of the cupboard and the removal, without intention of appropriation, of objects located there without authorisation evidently constitutes inappropriate behaviour, depending on the circumstances, deserving of a warning, or indeed a disciplinary sanction, but do not constitute serious misconduct justifying dismissal with immediate effect of an employee with 25 years' experience.*"

Therefore, even assuming that the first two reasons set out are confirmed to be true, they would not however be sufficiently serious to justify the dismissal with immediate effect of the employee."

EMPLOYMENT LAW
Indemnity (time-bar)

Labour Court of Esch-sur-Alzette
Judgment of 9 July 2018 no. 1897/18

states that under Article L. 124-11, paragraph (2) of the Labour Code:

"A legal action brought to repair the wrongful termination of an employment contract must be brought with the labour Court, under penalty of being time-barred, within a period of three months from the notification of the dismissal or the reasons given for it. In the absence of reasons, the period shall start from the expiry of the period referred to in Article L. 124-5, paragraph (2).

This period is validly interrupted in the event of a written claim submitted to the employer by the employee, his representative or his trade union. This claim, shall give rise, under penalty of being time-barred, to a new period of one year".

and holds that *"in the light of its general wording, this provision refers to any claim for indemnification present following an alleged wrongful termination of an employment contract* (T.T. Esch-sur-Alzette, 22 June 2015, no. 1631/15, confirmed by the Court of Appeal, 15 December 2016, no. 42857 of the docket)", i.e. not only the claims for damages but also those for compensation in lieu of notice and severance pay.

In the case at hand, the claims of the applicant in respect of wrongful dismissal and for compensation in lieu of notice and severance pay were declared inadmissible as a result of being time-barred.

An appeal against this decision has been lodged.

EMPLOYMENT LAW
Gratification

Labour Court of Luxembourg
Judgment of 9 July 2018 no. 2552/18

rules that "*a gratification or bonus only constitutes an obligation for the employer in respect of the employee provided that it assumes the characteristics of a salary supplement and that no notion of gift can be ascribed to it.*

It may result from a practice but it is clear from case-law that in order to be classified as an element of a salary, a benefit must satisfy the characteristics of consistency, generality and fixity, which must be established by the employee."

In the case at hand, the applicant did not submit any document in respect of the payment of the bonus during his years of service with the company, and therefore did not establish the requirement of the alleged practice.

"Furthermore, even assuming that there had been regular payments of a bonus, the Court held that in the case at hand there could be no general, consistent and fixed practice binding the employer and requiring it to pay such gratification given that the employer had expressly stated in the provisions of the "executive bonus plan" that the bonus had the character of optional remuneration left to the discretion of the employer. The Court ruled that in the light of this document, the employer had clearly wished to exclude the bonus from the scope of the remuneration."

News

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- the presentation "*Litigation and Dispute Resolution*" in the 11th edition of ICLG written by **Marianne Rau**, Partner, by clicking on the following link: https://iclg.com/practice-areas/litigation-and-dispute-resolution-laws-and-regulations/luxembourg

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

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