Arendt Case Review

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Contents

which states that an action for retraction of a decision obtained by application on appeal must be brought before the Court of Appeal.

In this case, an appeal was lodged against a decision of the Court of Appeal ordering the provisional suspension of the effects of certain decisions taken by the management board and the partners of a company, until the time of a legal ruling on the validity of these decisions. The appeal was lodged with the President of the District Court of Luxembourg and sought the annulment or repeal of the interim measure based on Article 66 of the New Code of Civil Procedure.

This article provides that *"where the law permits or necessity requires that a measure be ordered without the knowledge of a party, that party shall have an appropriate remedy against the decision which adversely affects them"*. In light of the silence of the Code on the nature of this recourse and the applicable legal regime, the Court turned to French and Belgian case law and doctrine to conclude that the action for retraction is *"brought before the judge who rendered the unilateral decision, sitting in the same capacity and with the same powers as at the time of the unilateral decision. Thus, if the latter was a matter of summary proceedings, he will sit as a judge of summary proceedings; if it was a matter of enforcement, he will sit as a judge of enforcement; if it was a matter of the merits, he will sit as a judge of the merits (...) A correct application of the principles must therefore lead to the conclusion that the retraction procedure is submitted to the same judge as the one who issued the initial unilateral decision"*.

Consequently, *"the application for annulment, or for retraction of the measures ordered by the Court of Appeal on the basis of Article 66 of the New Code of Civil Procedure, must therefore be brought before this same Court of Appeal".*

CRIMINAL PROCEDURE
The primacy of criminal proceedings over the civil action

District Court of Luxembourg
Commercial judgment No. 2021TALCH02/00909 of 4 June 2021
Docket Nos. 127298, 130643, 132174 and 144963

which recalls the rules governing the primacy of criminal proceedings over the civil action (the adage "*le criminel tient le civil en l'état*").

In this case, some of the defendants requested a stay of proceedings pending the outcome of an ongoing criminal investigation based on Article 3 of the Code of Criminal Procedure. This article provides that *"the exercise of the civil action is suspended as long as no final decision has been taken in the criminal prosecution commenced before or during the pursuit of the civil action"*. In a judgment rendered a few years earlier in the same case, the district court had rejected a request for a stay of proceedings and had ordered the parties to proceed with the case. The case was heard only on the question of the stay of proceedings under Article 3 of the Code of Criminal Procedure.

First of all, the Court observed that the previous judgment had held *"that the existence of a criminal investigation, the outlines of which were not very well defined at the time, does not constitute an obstacle to the preparation of the case brought before the court sitting in commercial matters"* but that the appearance of new elements could lead the Court to reconsider this position. However, "*it is for the defendants seeking a stay of proceedings to provide proof of new elements justifying a review of the court's previous position*".

The Court recalled that *"if the criminal prosecution is initiated during the civil proceedings, or even before them, the civil court must stay the proceedings ex officio, at whatever level the civil proceedings may be, from the moment it learns of the existence of the criminal proceedings and finds that the conditions required for the application of Article 3, paragraph 2 of the [Code of Criminal Procedure] have been met ...The rule applies only if the criminal action and the civil action arise from the same act; it is immaterial that the two courts were seized for different purposes, as long as, because of the identity of the facts, the decision rendered by one of the courts seized cannot fail to have an influence on the decision of the other.*

In the present case, a judicial investigation had been opened concerning facts identical to those at the basis of the civil action, and some of the defendants in the civil action had in the meantime been charged, while other summoned persons had been heard by the investigating judge as witnesses or as suspects. The Court thus concluded that '*there is an increased risk that the continuation of the commercial action will prejudice the rights of defence of persons already charged or likely to be charged, while arguments developed in the proceedings pending before this court could be used against those persons in the criminal investigation. It is therefore appropriate to hold that the conditions relating to the ongoing criminal proceedings, the identity of the facts and the risk of the criminal case having an impact on the civil case have now been fulfilled in the present case... a stay of proceedings has become inevitable, considering also that a continuation of the investigation of the present dispute cannot lead to a judgment on the merits, on pain of violating the principle of the primacy of criminal proceedings over the civil action [« le criminel tient le civil en l'état »]".*

In light of these elements, the Court stayed the proceedings pending the outcome of the criminal proceedings.

which confirms certain principles applicable to the scope of the cassation and the referral to the court of appeal.

On the scope of the cassation

After a detailed analysis of the genesis of the amended law of 18 February 1885 on cassation proceedings, the Court concluded that the common intention of the Government, the Superior Court of Justice and the Council of State *"was to specify the scope of the cassation, and this in the restrictive sense of the scope of the intervening cassation assessed in relation to the plea that serves as its basis, and not in an extensive sense to include the entirety of the decision that has been censured"*. The amendments to the legal provisions of this law were not intended to change the legal regime governing the scope of cassation rulings and consequently, in accordance with the case law of the Court of Cassation, *"the annulment ordered by the Court of Cassation is not more far-reaching than the plea on which it is based"*.

On the impact of the cassation on the unexamined ground for cassation

The Court observed that the introductory wording of the operative part of the judgment which states that the cassation takes place *"without there being any need to rule on the second ground for cassation"* means that *"the Court of Cassation dispenses with consideration of the other ground(s) for cassation when the accepted plea alone results in cassation of the contested decision in its entirety, or at least for the provisions challenged by the ground for cassation that is not examined because it is indivisible from it or related to it (...), respectively, as meaning that the provisions of the contested decision criticized by this unexamined plea are included in the cassation, without, however, prejudging their value"*.

The effect of the cassation on the unchallenged provisions that are related to the annulled provision or are indivisible from it

With regard to the provisions of an overturned judgment which have not been subject to cassation but which relate to the overturned provisions or are indivisible from them, the Court held that *"the extension of the effects of the cassation to the provisions which are related to the overturned provisions or are indivisible from them logically follows"* and that it is up to the Court of Appeal to verify which provisions of the contested judgment are in such a relationship in order to delimit what falls within its purview.

COMMERCIAL LAW
Res judicata

District Court of Luxembourg
Order No. 2021TALREFO/00460 of 27 August 2021
Docket No. TAL-2021-07038

which recalls that *"decisions rendered in summary proceedings have only provisional authority, and may be modified in the event of new circumstances"*.

In the present case, the plaintiff appealed an order temporarily suspending the execution of a series of corporate decisions and requested the annulment or retraction of that order on the grounds of violation of *res judicata*. The first two decisions had previously been suspended by an order on application, but this initial suspension had been lifted following a first action for retraction. Subsequently, these decisions were suspended again along with other more recent corporate decisions.

After analysing the new circumstances that were invoked to justify the suspension of all of the decisions, the Court held that the more recent corporate decisions were not a mere continuation of the first two decisions, but rather new facts. Consequently, the authority attached to the decision which had annulled the first suspension did not prevent the judge seized of the case from analysing the new application; *res judicata* would not prevent this.

COMMERCIAL LAW
Acceptance of an invoice

Court of Cassation
No. 109/2021 of 1 July 2021,
Registry No. CAS-2020-00092

which confirms that the simple presumption provided for in Article 109 of the Commercial Code that applies to commercial contracts other than sales contracts is subject, inter alia, to the law of the forum, in accordance with Article 18(2) of Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

In this case, the dispute concerned a claim for payment of two invoices for management consulting services. The Court of Appeal had applied Article 109 of the Commercial Code, holding that *"for commercial contracts other than sales contracts, the accepted invoice only gives rise to a simple presumption of the existence of the claim, the judge being free to admit or refuse the acceptance of the invoice as sufficient presumption of the existence of the asserted claim"*.

The appellant in cassation appealed on the basis of a violation of Article 18 of the Rome I Regulation. The Court of Cassation dismissed the appeal and confirmed the reasoning of the judges of the Court of Appeal, stating that *"by holding that in relation to a commercial contract other than a sales contract the acceptance of the invoice provided for in Article 109 of the Commercial Code only gives rise to a simple presumption of the existence of the alleged claim and that it, as such, relates to the admissibility of the form of proof governed by Article 18(2) of the Rome I Regulation, the judges of the Court of Appeal did not violate the provision referred to in the plea for cassation".*

District Court of Luxembourg
Civil Judgment No. 2021TALCH17/00102 of 12 May 2021
Docket Nos. TAL-2019-03172 and TAL-2019-07158

which recalls the principles of liability for damage caused by things and the principles of evidence.

In this case, the plaintiff fell due to the presence of ice at a car park and brought a complaint against the car park custodian, the company hired to clean and salt the car park and their insurers.

The Court recalled that under the terms of Article 1384, paragraph 1 of the Civil Code, *"one is liable not only for the damage that one causes by one's own act, but also for that caused by the act of things that one has in one's custody"* and that *"in order to bring into play the presumption of liability of [this article] with regard to the custodian of an inert and immobile thing that has come into contact with the victim, the latter must prove that the thing which materially intervened in the realisation of the damage played an active role by establishing its anomaly by its position, its installation or its behaviour"*.

The Court accepted as principle that the presence of ice on a sidewalk in winter is considered a normal situation with which users must contend, but that this principle must be put into perspective depending on how long the ice or snow has been covering the sidewalk. Indeed, if the condition of a sidewalk that has not been cleared when it is snowing must be considered normal, this is not the case for ground that has not been treated with salt or an anti-slip product for several days.

In this case, the Court took into account the weather report, a report that established that salting had taken place twice on the day of the fall, and the fact that the fall had taken place on an outdoor parking space and not on a pedestrian crossing. In addition, parked vehicles may have prevented the parking space from being completely salted or contributed to the formation of an ice patch at that location despite regular salting operations.

The Court concluded that in the absence of proof of fault or negligence in causal connection with the damage suffered by the plaintiff, their claim was unfounded.

TAXATION
Transfer pricing, hidden profit distribution, validity and scope of advance tax confirmation

Administrative Tribunal of Luxembourg
Decision of 13 July 2021
Docket No. 43264

which holds that (i) an advance tax confirmation ("*rescrit fiscal*") is binding on the Luxembourg tax administration even if it has been issued with reservations, as long as these reservations are satisfied, (ii) interest on a profit participating loan cannot be recharacterised as a hidden profit distribution provided that it is shown that the interest due does not exceed an arm's length interest and (iii) where the range includes results of relatively equal and high reliability, any value in the range can be considered to satisfy the arm's length principle.

In this case, a Luxembourg company had financed a participation in its subsidiary with a ratio of 15% (equity) and 85% (debt, in particular a profit participating loan that carried a fixed interest and a variable interest corresponding to 99% of the net profits of the said participation). An advance tax confirmation was issued in 2013 by the tax administration confirming the non-requalification as a hidden profit distribution on the condition that the interest complies with the arm's length principle. In 2015, however, the tax office considered that the variable interest exceeding 85% of the net profit was not at arm's length because the partner should have a return proportional to the amount invested and reclassified the excess interest as a hidden profit distribution (with a 15% withholding tax) and that, therefore, the advance tax confirmation was not applicable. However, the taxpayer argued that the 15/85 debt ratio as well as the formula for determining the variable interest were confirmed by the advance ruling so that the only condition to be fulfilled is to prove that the interest rate on the profit participating loan is not excessive. To do this, the taxpayer prepared an economic transfer pricing analysis comparing the median interest charge on the profit participating loan with the interest that would have been paid for a standard fixed rate loan between third parties. The analysis showed that the interest on a standard fixed rate loan would have been higher than the median interest that would accrue on the profit participating loan.

The Tribunal rejected the qualification of a hidden profit distribution and held that (i) the advance tax confirmation remains applicable if the reservations are satisfied (which was the case here), (ii) the only reservation to be proven is the arm's length interest rate and (iii) an economic transfer pricing analysis that justifies (a) the median interest rate under an profit participating loan compared to an arm's length fixed interest rate accrued during the same period on a conventional loan is admissible and (b) any point in the interest range satisfies the arm's length principle.

This judgment is one of the few major transfer pricing decisions in Luxembourg case law and has the merit of providing greater legal certainty as to the application of the arm's length principle to profit participating loans. In addition, this judgment also demonstrates the increasing attention paid by the tax administration to compliance with this principle and the means used by the latter to challenge the structures. Finally, this is a new decision that recalls that advance tax confirmations are fully binding on the administration within the limits of the reservations made by the latter by application of the principles of legitimate expectations and legal certainty.

This decision is final.

EMPLOYMENT LAW
Dismissal for economic reasons

Labour Court of Luxembourg
No. 1910/21 of 21 June 2021

which recalls that in the event of dismissal for economic reasons, the statement of the reason for the dismissal must enable the labour court to assess the real and serious nature of the employer's situation at the time of dismissal. The letter stating the reason for the dismissal meets the requirement of precision of article L.124-5 of the Labour Code if the employer indicates the reasons for the restructuring of its company, the restructuring measures, as well as the impact of these measures on the employment of the dismissed employee.

The employer has the right to take reorganization and restructuring measures, including the elimination of positions to reduce operating costs. Indeed, *"the loss of a position following the reorganisation of a sector of the company constitutes a serious reason for dismissal provided that the alleged restructuring is real, i.e. that it is objective in nature and can be verified by external events, that it has led to the loss of the position of the dismissed employee and that the dismissal is directly linked to the restructuring"*. On the other hand, dismissal for economic reasons is abusive *"when it is unrelated to the alleged restructuring and is merely a pretext"*.

In the present case, all the employees of a Luxembourg branch were made redundant and their activities distributed to other entities of the corporate group as part of a restructuring involving the reduction of salary costs and other operating costs. The Court found that this closure necessarily led to the elimination of the applicant's post, as he worked exclusively in that branch. Since the applicant neither proved that his dismissal was carried out with wanton disregard nor established that his employer committed an abuse of rights in dismissing him, the Court found his dismissal to be justified.

EMPLOYMENT LAW
Testimonial statements, dismissal with notice

Labour Court of Luxembourg
No. 546/21 of 18 February 2021

which recalls the principles applicable to testimonial evidence and dismissal with notice. In this case, the dismissed employee contested the allegations made against her by her former employer.

On testimonial evidence

The Court recalled that *"it is well-established jurisprudence that it is for the court hearing the case to review the relevance of the statements made by the persons heard as witnesses, in particular by checking whether they are likely to reflect the truth and are free from bias. In assessing the statements, the court shall also take into account the function of the witnesses and the opportunity they may have had to witness certain facts. The same applies to the authors of testimonial statements"*.

In the present case, the Court analysed the admissibility of the testimonial statements submitted in the case and recalled that, under Article 405 of the New Code of Civil Procedure (NCCP), *"everyone may be heard as a witness, with the exception of persons who are incapable of testifying in court. The provisions on investigative measures introduced by the Grand-Ducal Regulation of 22 August 1985 and aimed at simplifying and liberalizing the methods of proof have broadened to the greatest extent possible the means likely to lead to the demonstration of the truth and have significantly removed the possibility of reproaching witnesses"*. The testimonial statements made by persons pursuing litigation that is similar but distinct from the present dispute are not to be rejected for this reason.

On the other hand, the court must set aside the statement if it does not comply with the requirements of Article 402, paragraph 4, of the NCCP, which stipulates that the statement must be in writing, dated and signed by the author, who must attach to it any official document, in the original or as a photocopy, proving his identity and bearing his signature. If no official identity document is attached to the certificate, this irregularity in form obliges the court to set it aside because it does not present sufficient guarantees to convince the court with certitude.

On the real and serious nature of the facts justifying the dismissal

In its letter setting out the reasons for the dismissal with notice, the employer explained how the employee's manoeuvres had caused it to lose all confidence in her. The Court recalled that the proof of the materiality of the allegations must be brought by the employer and that *"the real cause of the dismissal implies a material element, constituted by a concrete fact that can be proven and by a psychological element, that is to say the reason stated by the employer must be exact and provide the decisive cause that provoked the termination. The serious cause must be of a certain gravity that makes it impossible, without damage to the company, to continue the employment relationship. The fault thus envisaged is in some way between legitimate cause, exclusive of breach of contract, and serious fault, depriving the employee of notice and severance pay. The decisive criterion of this fault that justifies dismissal with notice is the impairment of the proper functioning of the company"*.

In this case, the employer accused the employee of having taken advantage of her superior's weakness in order to conclude an amendment to her employment contract, in defiance of her employer's bylaws, in order to be granted benefits that the employer considered exorbitant. The Court observed that the amendment *"contains such exaggerated elements that the employer would certainly not have conceded if it had been concluded in regular circumstances"* and declared the facts sufficiently real and serious to justify dismissal with notice because they were of such a nature as to definitively undermine the legitimate trust that an employer has in its employee.

European Court of Human Rights
Judgment of 12 October 2021
Application No. 35245/18

which found a violation by the State of the Grand Duchy of Luxembourg of Article 6 §1 of the European Convention on Human Rights.

In this case, the applicant challenged before the Luxembourg courts the principle and scope of compensation for the victim of a traffic accident, as awarded by the court of first instance and confirmed by the Court of Appeal (without liability for the accident having been disputed). The applicant had appealed to the Court of Cassation against a judgment of the Court of Appeal on the grounds of violation of Articles 1382, 1383 and 1384(1) of the Civil Code, pointing out that the damage was common to these three legal provisions, which are the basis of tort liability. Despite the fact that neither the first instance judgment nor the Court of Appeal judgment had specified the provisions of the Civil Code that applied to the case in question, the Court of Cassation declared the applicant's sole ground of appeal inadmissible for failure to specify the invoked legal grounds as provided for in Article 10(2) of the amended Law of 18 February 1885 on cassation appeals and proceedings.

Before the European Court of Human Rights, the applicant invoked Article 6 §1 of the European Convention on Human Rights, which states that *"In the determination of his civil rights and obligations (…) everyone is entitled to a fair and public hearing (…) by an independent and impartial tribunal established by law"*. According to the applicant, the excessive formalism of the Court of Cassation in assessing the conditions for admissibility of the appeal resulted in a violation of its fundamental right of access to a court.

The Court observed that *"none of the judicial decisions handed down in the case had ruled on the legal basis for the liability of [the insured], since neither the latter nor the insurance cover owed by the applicant had been challenged and the dispute related solely to the principle and scope of the victim's compensation. In fact, in its writ of summons, the victim had not specified the legal basis on which he intended to have the judgment established"*.

Consequently, *"the Court of Cassation - by ruling that the sole ground of appeal was inadmissible for failing to specify which of the three articles of the Civil Code referred to in the ground of appeal had been violated by the Court of Appeal, even though the latter had not itself specified which of these articles was the basis for the judgments handed down - took an overly formalistic approach, which undermined the very essence of the applicant's right of access to a court. There was therefore a violation of Article 6 §1 of the Convention due to the applicant's lack of access to a court"*.

NEWS & EVENTS

- Arendt is pleased to invite you to participate in the webinars of the **Arendt Case Law Forum** series. Three to five recent and particularly interesting cases in specific areas of expertise will be presented in each session.

  The next webinar will take place on **November 25, 2021**. Our experts Eric Fort, Alexandre Gobert, Ellen Brullard and Marianne Rau will share on the topic "**Private Clients: Recent case law relevant to estate planning in the areas of tax law, corporate law and inheritance law**".

  In order to participate in this free webinar, please register by clicking here on **the registration button.** You will then receive a registration confirmation with a personalized link.

  If you have any questions, please do not hesitate to contact our Events team (**events@arendt.com**).

- Next topic treated: **Data protection: Overview of Recent Case Law**, on **December 16, 2021**.

  In addition to a great deal of work on drafting procedures and recommendations, the CNPD has also published numerous decisions on its website, making data protection a hot topic in Luxembourg this year.

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