Arendt Case Review

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Civil liability
Security obligation of the operator of a café - restaurant

Court of Appeal of Luxembourg, 9th Chamber
Judgment no. 143/18 of 22 November 2018
Number 44050 of the roll

holds that the operator of a restaurant or an establishment where beverages are sold is bound, in addition to the primary obligation to provide food and drink, by a security obligation in respect of his clients.

If the restaurant or café owner is bound by a security-performance obligation for the food and beverages which he serves to clients, in that they must be safe and not cause harm to those who consume them, his security obligation is merely an obligation of means as regards the facilities on the premises.

As a consequence, it is up to the client who claims to have suffered harm as a result of a fall on the premises of a café or a restaurant to prove that the operator to which he was bound by a contract failed to discharge his general obligation of prudence and diligence as regards the facilities on the premises.

In the case at hand, the fall took place at a location in the premises where the tiling was defective, in the sense that certain pieces of tiling had been detached and removed, causing a difference of some centimetres in elevation in relation to the remainder of the surface. This location was not prohibited for users and did not contain any warning signs.

In these circumstances, the Court of Appeal confirmed the judgment at first instance which ruled that the café owner had breached his security obligation, that the victim was not at fault and that the café owner bore exclusive contractual liability.

Lease
Standing to act as regards the renewal of a lease

Magistrate's Court of Luxembourg (rental lease)
Judgment no. 3589/18 of 9 November 2018

holds that, after finding that at the time of filing its legal claim the company had standing to attempt to obtain a renewal of its lease agreement, this standing nevertheless was extinguished from the moment during the proceedings when it terminated, of its own accord, its commercial operations which it furthermore had voluntarily dissolved.

The court therefore rejected as unfounded the application for renewal of the lease from the date at which its commercial operations had ceased to exist.

The Court thus points out that the loss of standing to act during the proceedings does not affect the admissibility of the action given that the conditions of admissibility are assessed in light of the writ introducing proceedings, but that the disappearance during the proceedings of the circumstances on which the standing to act was based causes the application to become unfounded.

Insurance contract
Exclusion of intentional and gross negligence - public order

Court of Cassation
Judgment no. 122/2018 of 06 December 2018
Number 4038 of the roll

points out that Article 14, sub-article 1, of the amended law of 27 July 1997 on the insurance contract entitled "Fraud and Negligence" and stating that "**Notwithstanding any agreement to the contrary, but without prejudice to Article 103, item 1, the insurer may not be required to provide its cover in respect of any person who has caused a loss intentionally or fraudulently**" is a public order provision.

The Court of Cassation therefore decided that by virtue of the above-mentioned Article 14, sub-article 1, any coverage of the personal liability of an insured person, even a minor, who causes a loss intentionally shall be refused and held that the appeal judges had therefore breached this article in ruling that applications for cover directed against the insurance company by minors having committed intentional negligence were well-founded.

Statute of limitations
Starting point

Court of Appeal of Luxembourg, 8th Chamber
Judgment no. 61/18 of 17 May 2018
Number 43863 of the roll

holds as regards the ten-year limitation period laid down in Article 189 of the Commercial code that "*the starting point for the ten-year period of statute of limitations is the day on which the obligation can be enforced via legal proceedings*". In the case at hand, as regards liability actions, the starting point for the period is the day on which the harmful event caused by an alleged breach of duty became apparent to the plaintiffs, with the result that "*the judges at first instance rightly held that the period runs from the day when the duty can be enforced via legal proceedings, in this instance from the day on which the beneficiary of a right to legal recourse was aware or should have been aware of the facts enabling him to enforce it*".

In the case at hand, the Court ruled that the starting point for the ten-year limitation period under the statute of limitations is the moment when the appellants became or should have become aware of the denunciation of an illegal act by the employee attributed to the bank during the interview with the investigating judge on the existence of an account, with the denunciation in question having triggered their right to take action. The judges considered that the starting point for the period of prescription was the date of the arrest of the one of the appellants. The person arrested had access at that time to the investigating judge's file and so the judges decided that the person should have been aware of the denunciation at that time. On the *"contra non valentem agere non currit praescriptio" rule,* the Court of Appeal states that "*the starting point for the statute of limitations does not reside in effective awareness of the facts and that the onus is on the party which has the right to take action to demonstrate that it legitimately ignored them or that it was completely unable to take action*". In the case at hand, the Court of Appeal held that impossibility to take action, as a result of an impediment, must arise by operation of the law or through agreement or a case of force majeure. This rule is therefore not applicable where the party which had the right to take action still had, at the time the impediment ended, the necessary and sufficient time to take action before the expiry of the statute of limitations.

Statute of limitations
Starting point

District Court of and in Luxembourg, 8th Chamber
Civil judgment no. 2018TALCH08/00141 of 12 June 2018
Number 184323 of the roll

holds that the statute of limitations for an action runs from the date at which the damage was caused or from the date at which this damage becomes apparent to the victim if the victim establishes that that he had no prior knowledge thereof. As regards placing orders, the District Court therefore decided that the "*starting point for the statute of limitations is therefore the order of the placement or, at all events, the execution of the order, but where investors provide evidence that they were not immediately aware of the damage, the statute of limitations runs from the moment when the damage became apparent*". In the case at hand, the District Court ruled that the damage was not therefore incurred on the day of the resale of the securities, but on the day on which the investors become aware that their investment was exposed to substantial losses.

The District Court furthermore confirms the case-law of the Court of Appeal holding that "*the statute of limitations runs from the day on which the holder of a right has or should have become aware of the facts enabling it to exercise it, i.e. from the day on which the damage caused by a breach of a duty became apparent to the plaintiff*".

This ruling confirms two previous rulings, i.e. the judgment of the Court of Appeal of 17 January 2013, number 37066 of the roll and judgment no. 61/18 of the Court of Appeal of 17 May 2018, number 43863 of the roll.

Arbitration clause
General terms and conditions - acceptance

District Court - 6th chamber
Commercial judgment no. 2018TALCH06/01146 of 6 December 2018

which, in order to analyse whether the arbitration clause appearing in the general conditions of a company X was applicable to the dispute, pointed out initially that Article 1135-1 of the Civil Code, states that "*the general conditions of an agreement pre-determined by one of the parties are only binding on the other party if this latter party has been able to take cognisance thereof when signing the agreement and if it must, depending on the circumstances, be deemed to have accepted them*", and that the Civil Code, as regards the general conditions, requires both criteria relating to knowledge and acceptance to be fulfilled.

The Court then found that "*It follows from the information and documents tendered before the court that the parties had been in a business relationship from 2008 and that since October 2015 the parties had been operating in accordance with the "back to back business" model referred to above. It is furthermore evident that [company X] specified in each of its emails as well as in each purchase order form sent to [company Y] that its general conditions are an integral part of the agreements entered into between the parties. All of these emails and purchase order forms also refer to the internet site of [company X] on which its conditions are freely accessible.* "

In this way, the Court arrived at the conclusion that "*In the light of the above, [company Y] must necessarily have been aware of the inclusion of the general conditions in the disputed agreements as well as their contents.To the extent that [company Y] did not prove or even allege that it had disputed the application of these conditions before the hearing of 30 October 2018, it must be deemed to have accepted them*".

As a result, the Court stated that it did not have jurisdiction to hear the application of Company Y on the basis of the arbitration clause which was contained in the general conditions of company X.

Applicable law
Loan agreement - Assignment of claim

District Court of Luxembourg , 15th chamber
Judgment no. 2018TALCH15/01493 of 28 November 2018
Number TAL-2018-00062 of the roll

holds that in an agreement for a loan, the principal characteristic is the service provided by the lender, i.e. the provision of the money loaned. As in the case at hand the lender's registered office was located in Germany, the legal relationship which serves as the basis for the assigned claim is governed by German law, which determines the assignability of the claim, the relationship between the assignee and the assigned debtor, the conditions under which the assignment may be enforced and the final discharge of the performance by the assigned debtor.

According to the case-law of the French Court of Cassation, "it is incumbent on the judge who recognises that a foreign law is applicable to seek out, either of his own motion or at the request of a party which invokes it, the substance thereof with the assistance of the parties and personally if need be, and to give to the disputed issue a solution which is in accordance with the foreign substantive law". The judge is only required to undertake personal investigations if he is not satisfied with the elements produced by the parties of their own volition or at his request.

The priority appeal for collaboration amongst the parties is also likely to ensure respect of the principle of adversarial proceedings in the search for the meaning of the foreign law.

The court therefore invited the parties to supply the relevant information under German law (legislation, case-law, legal scholarship) on the content and conditions of the assignment of the disputed claim and its enforceability vis-à-vis the assigned debtor.

Conflict of laws
Rules of handling of evidence - law of the forum

District Court - 6th chamber
Commercial judgment no. 2018TALCH06/01146 of 6 December 2018

rules that as regards a commercial agreement entered into between a Luxembourg company and a Romanian company that "*The proof that the general conditions are binding on [the Romanian company] is subject to the admissibility of evidence and the law of the forum.*"

The Court bases its decision on Article 18, sub-article 2 of Regulation (EC) no. 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter "Regulation (EC) no. 593/2008") which states that "*A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.*"

On the basis of the above-mentioned article, the Court holds that "*as regards the admissibility of the modes of proof of contracts or acts, Regulation (EC) no. 593/2008 therefore asserts the alternative jurisdiction of the law of the forum and of the law which governs the form of the contract or act. In accordance with general principles, the law of the forum has exclusive jurisdiction to deal with the administration of proof".*

Garnishment
Prohibition on seizing settlement accounts

Court of Appeal of Luxembourg, 7th Chamber
Judgment no. 169/18 VII (summary proceedings) of 21 November 2018
Number CAL-2018-00296 of the roll

rules that in view of the clear and precise wording of Article 111 (5) of the amended law of 10 November 2009 on payment services, any seizure which is carried out in the hands of a system operator constitutes a manifestly unlawful disorder within the meaning of Article 933, first sub-article of the NCCP, which the judge sitting in summary matters is called on to bring to an end.

Article 20 of the amended law of 1 August 2001 on the circulation of securities is similar to Article 111 (5) of the amended law of 10 November 2009 on payment services, with the exception that its scope is limited to assets in securities accounts.

The Court of Appeal states furthermore that neither the European Convention on Human Rights nor its additional protocols expressly present the right to the enforcement of judgments as a fundamental right.

In the judgment Hornsby vs Greece of 19 March 1997, the European Court of Human Rights affirmed that the right of access to the courts would be illusory if the internal legal system of a contracting State allowed definitive and mandatory judgments to remain inoperative to the detriment of a party. The Court further affirms that the enforcement

of a judgment or a ruling from any court must therefore be considered to be an integral part of the trial within the meaning of Article 6, paragraph 1 of the European Convention on Human Rights.

This European right to enforcement is not however an absolute right. As a result, the enforcement of a court ruling cannot be carried out in complete disregard for considerations relating to the general interest.

However the regime of exemption from seizure provided for in Article 111 (5) of the amended law of 10 November 2009 on payment services and Article 20 of the amended law of 1 August 2001 concerning the circulation of securities is a public order provision which is essential for the effective operation of securities settlement systems and for the purposes of reducing risks which such systems may create at an individual level for its participants and at a collective level for the financial markets as a whole by virtue of the close links between the systems.

Labour law
Cross-border transfer of an undertaking

Court of Appeal of Luxembourg, 8th Chamber
Judgment no. 139/18 of 22 November 2018
Number 45332 of the roll

states that "***in accordance with Article L.127-1 of the Labour Code, the provisions of the Labour Code relating to the safeguarding of employees' rights in the event of transfers of undertakings apply on each occasion that the undertakings, businesses or parts of undertakings or businesses to be transferred are located on the national territory of the Grand Duchy of Luxembourg***" and that as a result Articles L. 127-1 *et seq.* apply to the transfer of a company which has previously had its registered office in Luxembourg, irrespective of whether the latter has been transferred to Germany.

This clearly confirms that the fact that the transferor and the transferee have been governed by foreign laws and established in two different territories is not deemed to be an obstacle to the application of the principle of the transfer of contracts.

The Court of Appeal thus points out that the provisions of the Labour Code relating to the safeguarding of employees' rights in the event of transfers of undertakings also apply in the event of cross-border transfers where the entity to be transferred falls within the territorial scope of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

Labour law
Transfer of an undertaking - object (delimitation of the part of the undertaking transferred)

Court of Appeal of Luxembourg, 8th Chamber
Judgment no. 140/18 of 22 November 2018
Number 43195 of the roll

states that "*to determine whether the conditions for the transfer of an economic entity which is organised in a stable manner have been satisfied, it is necessary to take into consideration all factual circumstances which characterise the operation at issue, which include notably the type of undertaking or business in question, the transfer or non-transfer of tangible elements, such as buildings and moveable assets, the value of intangible elements at the time of the transfer, the takeover or non-takeover of most of the staff by the new manager, the transfer or non-transfer of the clientele, as well as the degree of*

similarity of the activities exercised before and after the transfer and the duration of any suspension of these activities. These elements however only constitute partial elements as regards the overall assessment which is required and cannot therefore be assessed separately. It is therefore the continuity of a set of organised means of production and the pursuit of an identical or similar activity which must be considered. "

In the case at hand, the parties disagreed as regards the object of the sale with the appellant asserting that, in keeping with the ruling of the judges at first instance, the entire 'Private Banking and Wealth Management' department had been transferred while the respondents argued that only certain elements of the 'Private Banking' activity, of which the appellant was not a part, had been sold.

The Court of Appeal is of the opinion that it does not follow from the signed sales agreement that the entire 'Private Banking and Wealth Management' department had been transferred and that the position in which the appellant was employed continued to exist after the transfer.

The Court of Appeal points out that "***legal scholarship and case-law both hold that the key element as regards the theory of the transfer of undertakings is the survival of the employment position, in other words, the employee's activity must continue to exist (Court 13 November 2008, no. 33669 of the docket). As this has not been established, there are no grounds to apply Articles L. 127-1 to L. 127-3 of the Labour Code in respect of [the employee], given that his position did not form part of the transferred entity***".

This ruling overturns the previous judgment no. 4009/2015 of the Luxembourg Labour Court of 13 November 2015 which held that the employee "*was unjustifiably excluded from the employees attributable to the 'Private Banking and Wealth Management' department"*.

Recovery of direct taxes
Jurisdiction - Statute of limitations

District Court of Luxembourg - 17th chamber
Civil judgment no. 2018TALCH17/00320 of 05 December 2018
Number 187769 of the roll

holds that by virtue of Article 8 of the law of 7 November 1996 on the organisation of administrative courts, the director of the direct contributions and the administrative courts have jurisdiction to rule on disputes relating to the validity of the taxation.

Alongside litigation relating to setting the tax rate, for which the administrative courts have jurisdiction, recovery litigation relates to the formal validity of the prosecution notice, the enforceability as well as the causes of the extinction of the Treasury's claim. This litigation is governed by the New Code of Civil Procedure.

This is also the position of case-law which holds that the ordinary courts have jurisdiction to hear actions relating to formal irregularities in writs of execution for direct taxes and the arguments invoked by the debtor to establish that its debt has been extinguished by payment, set-off or novation.

More specifically, as regards statutes of limitation, it was stated that if the issue of statutes of limitation is raised during tax recovery, it will fall under the jurisdiction of the ordinary courts.

The district court therefore stated that it had jurisdiction to rule on the arguments raised vis-à-vis the order, or the grounds for extinction of the Treasury's claim via statutes of limitations, and the payment of the debts subject to the order respectively.

Procedure
Writ initiating proceedings - inadmissibility of an application with a different additional legal basis

Court of Appeal , Judgment no. 177/18 of 5 December 2018
Number 44234 of the roll

holds that "*Where a plaintiff expressly declares that he has founded its action brought before the judge on a specific legal cause, such party, unless the defendant consents thereto, may not modify its claim during the proceedings to give itself an additional legal basis*. *Such criteria do not apply to an application added during the proceedings which was virtually included in the initial application (cf. Court of Appeal, 18 June 2008, no. 33579 of the roll, confirmed by the Court of Cassation on 23 April 2009, no. 2634 of the register).".*

The Court of Appeal furthermore held that "*It is admitted that a simple provisional writ of summons to a joint ruling is essentially distinct from a third party notice per se given that it does not lead, as in the case of the latter, to an award, but is merely intended to deprive third parties of their status in order to prevent them from invoking the relativity of res judicata and launching subsequent third party proceedings before the same court which ruled on the object of the application and the statement of the arguments contained in the writ of adjournment. It follows therefrom that an application for an award may not be brought by way of simple submissions against a party which had been only summoned for a joint ruling and that the plea of inadmissibility is therefore well-founded (Court of Appeal 7 January 1975. Pas. 23, p. 68)*.".

Order handed down on consumer protection
Appeal procedure - Application of the procedure as regards appeals against summary judgments

Court of Cassation
Judgment no. 124/2018 of 13 December 2018
Number 4042 of the roll

held that in the light of Article L-320-3, paragraph 4 of the Consumer Code that "t*he magistrate presiding over the chamber of the District Court dealing with commercial matters, or the judge who replaces him, who orders a measure on the basis of the special powers conferred on him by Article L. 320-3 of the Consumer Code, rules as a judge on the merits, but in accordance with the procedure for summary proceedings*" and that as a consequence, the appeal raised from his ruling must "*be introduced and judged in accordance with the provisions of Article 939, sub-article 3 of the New Code of Civil Procedure*", or in accordance with the procedure applicable in summary proceedings.

This ruling of the Court of Cassation concerns a special procedural question relating to the filing of an appeal against an order handed down in respect of the protection of the consumer by the President of the chamber of the district court of Luxembourg sitting in commercial matters, ruling as a judge on the merits but in accordance with the procedure for summary proceedings.

The defendant, an insurance company, had lodged an appeal against an order which had declared a clause in the general terms and

conditions of its insurance policy null and void. This appeal had been lodged pursuant to the procedure applicable as regards appeals against summary judgments (summons on a fixed date, without invitation to appear by counsel).

The issue of the admissibility of this appeal had been referred to the Court of Appeal which had declared the appeal to be inadmissible given that the respondents had not been summoned to appear in accordance with the general law procedure applicable in appeal proceedings - therefore by way of appearance within fourteen days via counsel (Article 585.2) of the New Code of Civil Procedure) - but in a manner which derogated from general law, i.e. the appeal procedure applicable as regards summary proceedings.

The Appeal Court had held that although the appeal deadline of fifteen days provided for in Article L. 320-3 of the Consumer Code is the deadline applicable as regards summary proceedings, the absence of specifications regarding the manner of appearance and the procedure to be followed during appeal proceedings implied that the appellant was required to follow the appeal procedure under general law.

The Court of Cassation quashed this ruling and thus upheld the first ground of appeal stating that an appeal against an order handed down by a judge by virtue of the special powers conferred on him by Article L. 320-3 of the Consumer Code must indeed be raised and judged in accordance with the procedure for summary judgement pursuant to the provisions of Article 939, sub-article 3 of the New Code of Civil Procedure.

Note: A judgment of the Court of Cassation handed down on 11 January 2018 (no. 3/2018) had ruled in the same way on an appeal against an order issued on the basis of Article 815-6 of the Civil Code which appointed a temporary administrator in a joint tenancy succession.

Although the judgment of the Court of Cassation of 13 December 2018 (no. 124/2018) now clarifies the question of the launch of an appeal against an order handed down on the basis of prohibitory injunctions as regards consumer protection, special vigilance is still recommended in other matters where special powers are also conferred on a judge ruling on the merits, but as in summary proceedings.

Current news

The Arendt Litigation Group will hold its first Seminar: "*How to act in the face of the growing powers of the authorities*? *The right to effective appeal*" on **5 February 2019, at 11.30 am, at Arendt House**
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/