Arendt Case Review

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Contents

which recalls certain principles applicable to expert reports and medical liability.

The dispute in this case concerned the liability of two specialist doctors for the damages suffered by the plaintiffs as a result of a surgical procedure performed on one of the plaintiffs. Claims were brought against the doctors primarily on the basis of contract and secondarily in tort.

On judicial and extrajudicial expert reports

The District Court recalled that an expert report is in principle not enforceable against any person who was not called to or represented at the expert's intervention in order to preserve the rights of the defence.

A judicial expert report, ordered by a judge, must respect the adversarial principle in order to be valid and effective against the parties who were present or represented during the intervention of the expert. In accordance with Article 446 of the New Code of Civil Procedure, the judge is not bound by the findings or conclusions of the technician, but *"the judges must not depart from the opinion of the legal experts except with great caution and when they have just reasons to admit that the legal experts were mistaken, or when the error of the latter is already evident from the report or from other elements acquired in the case, or when there are serious elements allowing the conclusion that he has not correctly analysed all the data submitted to him"*.

A unilateral or unofficial expert report, requested by a party from an expert, is by definition not adversarial and does not have the value of a judicial expert report. It may nevertheless be submitted during judicial proceedings if it is communicated beforehand to all the parties so that they may have the opportunity to discuss it in adversarial fashion. Indeed, "*the judge may only use unilateral expert reports on the twofold condition that they have been regularly submitted during the proceedings and subjected to the adversarial discussion of the parties and that their data are corroborated by other elements of the case file. He may refer to [such a report] as an element of comparison with the other evidence submitted for his assessment. He may not, however, rely exclusively on an expert report drawn up at the request of one of the parties"*.

The Court noted that the unilateral expert report submitted in this case was communicated to the opposing party, who used it in their own submissions. The purpose of this unilateral expert report was to discuss a diagnosis and not to determine the damages suffered by a patient or their current state of health. For these reasons, the report was deemed valid for use as evidence and there was no reason to disregard it.

On the doctor's liability

The Court recalled that *"the nature - contractual or tortious - of medical liability depends essentially on the legal status of the doctor who provides care to the patient"*. As a member of a liberal profession, if the doctor intervenes in a hospital environment under the "open" regime, a contract is formed between the patient and the doctor. *"This distinction between a hospital contract and a medical contract leads, in terms of liability, to a division between the hospital liability of clinics and the medical liability of practitioners, and in principle excludes liability* in solidum *between the two"*.

Concerning the doctor's liability towards third parties, *"the doctor's liability is tortious when the damage is caused to persons other than the patient himself. The relative*

effect of the contract prevents third parties who are not beneficiaries of a contractual stipulation for third parties from invoking the contract concluded between the victim and the doctor, except in cases where they are acting on behalf of the victim".

The Court recalled that the doctor's obligation towards his patient is in principle an obligation of means and that it is therefore up to the plaintiff to establish an error on the part of the doctor, the prejudice suffered and the causal link between the error and the damage. *"The doctor is liable only if, having regard to the state of science and the established rules of medical practice, the victim is able to establish that he has acted with recklessness, inattention or negligence resulting from a definite disregard of his duties. The doctor must do everything possible to prevent complications, including those that are rare (...) and may incur liability at the time of diagnosis, at the time of the choice of treatment, in the phase of treatment of the patient (i.e., the performance of the medical act) and/or in the follow-up with the patient once the treatment has been carried out"*.

In the present case, the Court noted that the court-appointed experts had found that, during the surgical operation, one of the specialist doctors had made a technical error in carrying out the operation. The Court therefore declared that this doctor was liable to the patient on a contractual basis and to the other plaintiffs on a tort basis. The other doctor, on the other hand, was liable neither in contract nor in tort. "*In the absence of liability incurred in relation to the patient, the claim of her relatives, victims by ricochet, must also be declared unfounded"*.

CIVIL LAW
Allocation of provisions

District Court of Luxembourg
Civil judgment no. 2022TALCH17/00132 of 18 May 2022
Docket no. 166862

which holds that the provisions already paid by the insurer must be deducted first from the capital and then from the interest of the final indemnity.

According to Article 1254 of the Civil Code *"The debtor of a debt which bears interest or produces arrears may not, without the consent of the creditor, set off the payment he makes against the capital in preference to the arrears or interest: payment made against the capital and interest, but which is not in full, is set off against the interest first"*.

Despite the majority view of case law, the District Court noted that this article does not require the allocation of provisions to compensatory interest, which in the final analysis constitutes damages intended to complete the reparation of the loss. Indeed, *"Article 1254 of the Civil Code is applicable only insofar as it concerns liquidated interest due at the time of payment, whereas a claim in tort exists and can only produce interest on arrears from the day on which a decision fixing the amount of damages is enforceable"*. The debtor cannot be forced to apply its payment to a sum of interest which is neither liquid nor due, but it can do so voluntarily. In this case, *"its payment will then have the character of either an advance payment if the interest is liquid but not due, or a deposit unless it is not liquid"*.

CIVIL PROCEDURE
Security for costs

District Court of Luxembourg
Commercial judgment no. 2022TALCH02/00913 of 10 June 2022
Docket no. TAL-2021-09029

which holds that under Article 257(2) of the New Code of Civil Procedure, nationals of the United States of America are not required to provide a *cautio judicatum solvi* under the Treaty of Friendship, Establishment and Navigation between the United States of America and Luxembourg of 23 February 1962 (the "Treaty").

In order to reach this conclusion, the District Court turned to the parliamentary preparatory work of the bill approving the Treaty and noted that, according to the opinion of the Council of State and according to the Minister of Foreign Affairs, Article III of the Treaty abolishes the obligation of US nationals to provide security for costs on Luxembourg territory.

For this reason, the Court concluded that "*notwithstanding the fact that the Treaty does not* expressly *stipulate the exemption from provision of security for costs, it follows from the parliamentary work relating to the law approving the said Treaty and from the very terms of Article III that the intention of the parties was to exempt their respective nationals from the obligation to provide security for costs in the territory of the other party*".

CIVIL PROCEDURE
Offer of evidence

Court of Appeal of Luxembourg
Judgment no. 50/22-VII-CIV
Docket no. CAL-2020-00176

which recalls certain principles applicable to the offer of evidence.

In this case, the appellant had been convicted by the criminal courts for putting a vehicle on the road without valid insurance. During the period of non-coverage, the appellant had caused a traffic accident in which two people were injured. The criminal court ruled on the issue of the suspension of the insurance contract and the lack of insurance of the vehicle at the time of the accident, but not on the issue of the insurer's coverage of the victims' damages after the accident.

In a civil judgment, the Luxembourg District Court ruled on the claim for assumption of responsibility for damages and settled the question of reinstatement of the guarantee by the insurer, stating that in accordance with Article 23 of the amended law of 27 July 1997 on insurance contracts, the insurance contract had taken effect again for the future, i.e. at 00:00 on the day after the premium had been paid. The District Court noted that the insurance premiums were not paid by the policyholder until after the accident had occurred and thus dismissed the appellant's claim to be held harmless by the insurer from the judgments made and to be made against him.

On appeal, the appellant did not dispute that the insurance contract was validly suspended at the time of the accident but made an offer of evidence, by witness testimony, to establish the existence of a commitment on the part of the insurer. He argued that following the report of his accident to the witness, the insurer agreed in an email to cover the damages of the accident on condition of immediate payment of premiums, in full knowledge of the wrecked state of the vehicle.

The Court of Appeal recalled that *"for an offer of evidence to be admissible, the request must be formulated in precise terms. The party offering to give evidence by witnesses must refer precisely to all the facts that have occurred at the time of the request and about which it intends the witnesses to testify. The presentation of the request for an enquiry must be such as to enable the judge to examine whether each of the facts specified is relevant or admissible, and to enable the opposing party to precisely know the subject matter of the enquiry and thus to prove the contrary. For these purposes the presentation must be precise, relevant and admissible".*

In this case, the Court of Appeal decided that the offer of evidence should be rejected insofar as it tended to establish facts that were not relevant for resolving the dispute. The offer of evidence also had to be rejected because the email did not contain any commitment on the part of the insurer, and it is not for the witness to interpret the evidence submitted to the Court's appreciation. The Court therefore declared the appeal to be unfounded.

COMMERCIAL LAW
Non-competition clause

District Court of Luxembourg
Commercial judgment no. 2022TALCH06/00622 of 12 May 2022
Docket no. TAL-2021-03478

which recalls the conditions of validity of non-competition clauses in franchise agreements.

In this case, a real estate agency had entered into two franchise agreements, including a non-competition clause, with two agents and sued the latter for alleged acts of competition in breach of the contractual provisions during the term of the agreements and the post-contractual non-competition period.

On the applicable law

The District Court recalled that *"an anti-competitive practice which is not capable of affecting trade between Member States does not fall within the scope of Community law but within that of national law"*. Given that the post-contractual non-competition clause in this case was not such as to restrict trade between Member States, and that the prohibition of anti-competitive agreements or decisions under Article 101(1) of the Treaty on the Functioning of the European Union applies only insofar as they affect trade between Member States, the Court applied Luxembourg law.

On the validity of the non-competition clause

The purpose of a non-competition clause is to prohibit one party from competing with another party by engaging in a similar professional activity during the term or after the expiry of the contractual relationship. As the fundamental principle of freedom to pursue a professional activity is a matter of public policy, the District Court reviews the validity of a non-competition clause irrespective of whether the parties have recognised the clause, as it infringes on the freedom of enterprise and the freedom to work. These freedoms may however be contractually limited provided that the clause does not imply a general and absolute prohibition of the said freedoms. Indeed, *"it follows that, in order to be valid, a non-competition clause must be limited either in time or in space (or both), it must be intended to protect the legitimate interests of the beneficiary of the clause, it must not place the person bound by the obligation in a situation that no longer allows him to exercise his profession normally and it must be proportional"*.

The Court recalled that *"in the area of franchising, the validity of non-competition clauses has been accepted insofar as they are indispensable to protect the know-how transmitted and the assistance provided by the franchisor and as they are suitable for preserving the identity and reputation of the network. The creditor may have a legitimate interest in protecting its know-how or confidential information, in protecting itself against the risk of misappropriation of its customers or, in the particular case of franchising, in protecting the common identity and reputation of the network. It is accepted in the franchise agreement that only if the transmitted know-how is original and constitutes an important positive element with regard to the clientele will the non-competition clause to which the franchisee is bound be accepted"*.

In this case, the real estate agency did not establish that the information transmitted to agents, namely the use of a database, the creation of marketing plans, the acquisition of negotiation and consulting techniques, training, and technical and commercial assistance, would be know-how specific to its franchise. Considering the infringement of the fundamental principle of the defendants' freedom to exercise a professional activity on the one hand, and the interests of the plaintiff that the clause was supposed to protect on the other hand, the Court decided that the non-competition clause was disproportionate and should be declared void.

EMPLOYMENT LAW
Collective agreement

Labour Court of Luxembourg
No. 1380/22 of 12 May 2022

which recalls rules applicable to interpretation of collective agreements.

In this case, a trade union summoned the defendant company to appear before the Labour Court in order to have some provisions of the collective agreement applicable to the company's employees interpreted. The trade union made its request based on Article L.162-13 of the Labour Code, which provides for a specific procedure for trade unions.

The Court recalled that a collective agreement *"has a regulatory character in an undertaking, but without taking away its contractual nature and its character as a private law contract"*. The Court is to interpret the provisions in question *"in accordance with the law, where the law provides a response, otherwise in accordance with the intention of the parties"*. The Court also recalled that the rules of interpretation applicable to contracts as set out in Articles 1156 et seq. of the Civil Code apply to collective labour agreements, and that it is a matter of principle that *"when a clause is obscure or ambiguous, its interpretation should be made in favour of the employee"*.

In this case, the request for interpretation concerned the provisions of an addendum to the collective agreement. The Court found the provisions in question to be clear and unambiguous, and decided that the interpretations requested by the union were not in line with the principles laid down in the Labour Code and the legislation in force. Consequently, the request was declared unfounded.

EMPLOYMENT LAW
Harassment

Labour Court of Luxembourg
No. 1007/22 of 24 March 2022

which notes that *"no employer who has been informed of the existence of acts resembling psychological harassment can tolerate such conduct at the risk of being held liable"*.

In this case, the claimant summoned his former employer before the labour court to have it ordered to pay compensation and damages for unfair dismissal. His employer accused him, among other things, of psychological harassment in the workplace, in violation of its internal policy against harassment. The employer had received complaints from numerous employees in relation to the claimant's inappropriate behaviour, use of degrading language, communication style, aggressive behaviour, and sexist behaviour.

The Court recalled that *"psychological harassment is defined as any behaviour that is intended to undermine the dignity of a person and to create an intimidating, hostile, degrading, humiliating or offensive environment"*. It is the employer's responsibility to *"ensure that any harassment of which it is aware ceases immediately by taking appropriate measures with regard to the person who is the perpetrator, and as sexual harassment in the course of employment relations constitutes misconduct within the meaning of labour legislation, these measures may go as far as the dismissal of the person whose behaviour is intolerable, outrageous and offensive"*.

After examining the elements in the file, including the testimonial evidence, the Court observed that the witnesses confirmed the criticisms in the letter setting out the grounds for dismissal, and even added additional incidents. These numerous and serious facts justified the dismissal of the applicant with notice.

In view of the nature and outcome of the dispute, the Court also awarded procedural indemnities to the employer.

EMPLOYMENT LAW
Payment of bonuses

Labour Court of Luxembourg
No. 1687/22 of 9 June 2022

which distinguishes between gratuities that remain gifts and those that are salary supplements.

In this case, an employee who had resigned had his former employer summoned before the Labour Court to have it ordered to pay him a sum for bonuses which the employer had refused to pay.

The Court recalled that "*in the absence of unequivocal contractual stipulations on the payment of a bonus as part of the salary and on its method of calculation, it is up to the applicant to establish the general nature, fixity and constancy of these bonuses (...) A bonus of an optional, voluntary and variable nature constitutes a gift. As a result, the allocation remains at the discretion of the employer and the employee cannot demand its renewal. As regards a bonus provided for as a wage supplement, it will take its compulsory nature and its nature of a wage liability of the employer from the individual employment contract, the collective agreement, the unilateral commitment of the employer or from consistent practice. This consistent practice, 'continuous practice in the company' according to established terminology, will have to be established by the employee, the plaintiff in the action for payment*".

The employee's employment contracts in this case stipulated the discretionary nature of all bonuses and gratuities paid to the employee and did not establish an acquired right for the employee.

Moreover, the employer never expressly or tacitly waived the discretionary nature of the bonuses, contrary to the employee's arguments. The Court recalled that a tacit waiver results from a behaviour or an attitude that implies a certain and unequivocal waiver. Indeed, the waiver of a right belonging to a person cannot be presumed. In this case, at each contractual renewal the employer specified that any bonus and premium constituted a gift left to the discretion of the employer. Consequently, the Court declared the employee's claims unfounded.

TAXATION
VAT - application for registration

District Court of Luxembourg
Civil judgment 2022TALCH14/00068 of 27 April 2022
Docket no. 164479

which confirms the non-retroactive nature of a spontaneous application for VAT deregistration, qualifying the applicant as a VAT taxable person obliged to comply with the obligations under the VAT law throughout the VAT identification period.

In this case, the dispute concerned a company which, more than one year after its incorporation, applied for VAT registration under the simplified system with effect from the date of its incorporation and which, a few years later, at the time of the issue of an *ex-officio* taxation assessment aimed at taxing services received from abroad under Luxembourg VAT, contested its VAT registration and applied for its deletion with retroactive effect to the date of registration.

Background

By judgment of 26 February 2020, the Court of Appeal reversed a judgment of the District Court of 2 November 2016 and declared the application for annulment of the tax assessments issued by the administration admissible and confirmed the judgment insofar as the restitution of the amounts unduly paid was concerned. The question of the liability of the plaintiff company had not been decided at the time of the judgment of 2 November 2016, so that no decision on this matter had yet been taken. The proceedings validly taken up by an exempted limited partnership under Cayman Islands law, following the liquidation of the company, sought to annul the aforementioned tax assessments, based on the same arguments, namely the error made, the wrongful registration for VAT and its lack of status as a taxable person.

On the claimant's alleged error

The claimant alleged that it misunderstood its legal obligations when it filed a voluntary application for VAT registration with the competent tax office. It allegedly made a mistake as to the qualification to be attributed to the nature of its activities. However, according to the District Court, it was neither established nor even alleged that the company had contested with the competent authorities (the AEDT) the fact that it had been registered for the simplified VAT regime with retroactive effect. It only contested its status as a VAT taxpayer after receiving *ex-officio* tax assessments for the years 2010 and 2011. In the court's view, the company's spontaneous application for a VAT identification number, with a declaration of taxable services from abroad, as well as the absence of any reaction on its part when it received the retroactive VAT registration letter, together with its corporate purpose, providing for the possibility of granting credit, showed, on the contrary, that the company deliberately and consciously applied for VAT registration, indicating

its intention to carry out economic activities falling within the scope of VAT. Consequently, the application for reversal or cancellation of the *ex-officio* tax assessment on the grounds of its alleged error had to be rejected.

On the error in the allocation of the VAT identification number by the AEDT

The claimant then alleged that the AEDT wrongfully allocated a VAT number to it. However, although the Member States have a certain margin of appreciation, this cannot be unlimited. If the authorities concerned refuse, there must be a legitimate reason for doing so (*see* CJEU 14 March 2013, Case C-527/11, *Ablessio SIA*, paragraph 23). According to the District Court, the AEDT could not have foreseen at the time of the application that the company would allegedly not carry out or would subsequently abandon its intention to carry out economic operations. Furthermore, the granting of a VAT number cannot be refused to an applicant who is not yet in a position to demonstrate that it has the material, technical and financial means to carry out the economic activity declared at the time of its application for registration (*cf*. *Ablessio SIA* case, points 25 and 26).

On retroactive registration

The claimant then criticised the AEDT for granting it retroactive VAT registration. This argument also falls short of the mark, as the claimant never contested this before the receipt of the *ex-officio* assessments, such that it agreed with this retroactivity.

On the status of taxable person

It then challenged its status as a taxable person because it had never intended to carry out any economic activity within the meaning of the VAT law. Here again, the District Court rejected this argument because the AEDT could not presume at the time of the allocation of the VAT number that the applicant would not subsequently, for reasons of its own, engage in economic transactions within the scope of VAT. Moreover, the VAT number is an important piece of evidence of transactions carried out. Any trader must be able to rely on the entries in the register of VAT identification numbers of the competent authority in order to assess the tax regime applicable to a transaction (*see Alessio*, paragraph 17 *et seq*.). Contrary to the applicant's allegations, the existence of a VAT identification number, issued at the formal and spontaneous request of the applicant, establishes the taxable status of the identified company. The status of taxable person depends on the application for VAT identification made by the applicant, as supported by its declared intention to carry out transactions within the scope of VAT and not on the possible absence of output transactions. The only consequence of the absence of economic activity is the right to deduct. In the District Court’s view, the claimant was subject to VAT and was therefore obliged to comply with all the legal obligations under the VAT law, so that this argument raised by the claimant also had to be rejected.

On the request for retroactive deletion

For the District Court, accepting a retroactive deletion would undermine the legal certainty of intra-Community transactions and the financial interests of the European Union. The VAT system is governed by clear rules applicable uniformly to all traders active on the European market in order to ensure that VAT is collected fairly, to ensure the neutrality of the VAT system and to ensure that traders are treated equally, while at the same time ensuring that the European Union's own

resources are safeguarded. These objectives require that the VAT rules be applied by the state authorities as intended (*see* TAL, 24 February 2012, No. TAL-2020-00779). Retroactive deletion for reasons of mere convenience of the taxpayer who claims that the VAT registration would have been wrongly carried out because the qualification as a taxable person would be financially unfavourable as a result of a change in its business model or business activity deviating from the initial projections cannot be accepted. As a result of its freely requested VAT identification for three years, it is obliged to bear the VAT burden on the acquisitions of services from abroad made by it during this period.

Consequently, the District Court rejected the request for retroactive deletion of the VAT identification number and maintained the *ex-officio* tax assessments made by the AEDT. This judgement is in line with another decision issued on 24 February 2021 (no. 2021TALCH01/00045).

NEWS

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