Arendt Case Review

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Arendt Case Review is a newsletter produced by the Arendt Litigation Group to update you on recent decisions made by Luxembourg and EU courts.

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Third-party application to set aside a judgment in criminal matters: "yes, no, maybe?"

Third-party application to set aside a judgment in criminal matters

Erga omnes effect of judgments in criminal matters | Legal remedy

Court of Cassation of the Grand Duchy of Luxembourg
Decision No 141/2023 of 14 December 2023
Case reference No CAS-2023-00044

Question(s) before the Court

- *Can a **third party apply to set aside a judgment in criminal matters under** Article 612 of the New Code of Civil Procedure?*
- *Under what **conditions**?*

Main takeaway

☑ *A third party may apply under Article 612 of the New Code of Civil Procedure to set aside a ruling in criminal matters on the condition that only the civil law aspects of the criminal ruling are challenged and that criminal law does not provide an alternative legal remedy.*

Rule

The Court stated that as per Article 612 of the NCPC: "*A party may make a third-party application against a ruling that adversely affects their rights and to which neither they nor those they represent have been joined. However, Article 612 of the New Code of Civil Procedure does not apply to criminal matters*".

Analysis

The Court emphasised that "*the legal remedy via third-party application to set aside, which is available under Article 612 of the New Code of Civil Procedure to third parties with regard to a ruling that adversely affects their rights and to which neither they nor those they represent have been joined*", is not governed by a text specific to criminal procedure.

This legal remedy, which is aimed at third parties, does not apply to decisions on criminal matters made by the criminal courts. It is available with regard to decisions on civil matters made by criminal courts that may prejudice third parties to these decisions and as a supplementary rule to the Code of Criminal Procedure in the absence of any legal remedy provided to third parties by the rules specific to criminal procedure.

In this case, the Court of Cassation rejected the appeal on the basis that the applicant had an alternative legal remedy available to them in the Code of Criminal Procedure.

Our perspective

This decision can certainly be considered a precedent, as the former position of the criminal courts was that a third-party application to set aside a criminal judgment within the procedure prescribed by Article 612 of the New Code of Civil Procedure was not possible, even if limited to the civil law aspects of the judgment, due to the *erga omnes* effect[1] of rulings in criminal matters.

[1] The legal effect is considered to be *erga omnes* when the decision is binding not only on the parties to the proceedings, but also on all third parties (individuals, judges, public authorities).

The unseizability of settlement accounts with a system operator is of an absolute and general nature

Unseizability of settlement accounts | System operator or settlement agent

Court of Cassation of the Grand Duchy of Luxembourg (interim proceedings)
Decision No 99/2023 of 28 September 2023
Case reference No CAS-2022-00111

Question(s) before the Court

- *What is **the legal effect of the "unseizability of all settlement accounts"** introduced by Article 111(5) of the amended law of 10 November 2009?*

Main takeaway

☑ *The unseizability introduced by Article 111(5) of the amended law of 10 November 2009 is of an absolute and general nature.*

Rule

The Court of Cassation stated the legal effect of Article 111(5) of the amended law of 10 November 2009: *"No settlement account with a system operator or a settlement agent, nor any transfer via a credit institution under Luxembourg or foreign law sent to such a settlement account may be seized, sequestered or blocked in any way by a participant (other than the system operator or settlement agent), a counterparty or a third party".*

Analysis

In this case, in the context of interim proceedings (CAL-2020-00554), an appeal was made to the Court of Appeal against the lifting of a seizure order that targeted settlement accounts of a system operator for breach of the mandatory rule of public policy introduced by Article 111(5) of the amended law of 2009. On the basis of the arguments of the appellant parties, the Court of Appeal had held that the request to lift the order was the subject of serious objections, such that the absolute and general nature of the unseizability of all settlement accounts was not, according to the Court, established "*unequivocally from the legal context and that it can just as easily, on the basis of strong and plausible arguments, be characterised as relative and take effect only insofar as a seizure measure affects a settlement account*".

In contrast, the Court of Cassation held that by "*holding that the absolute and general nature of the unseizability of all settlement accounts instituted by Article 111(5) of the amended law of 10 November 2009 is not established unequivocally from the legal context*", the Court of Appeal had breached the cited provision. The Court of Cassation partially quashed the decision challenged (*cassation partielle*).

Our perspective

This decision confirms the previous case law[2] and validates the absolute and general nature of the rule on unseizability of settlement accounts held by a system operator[3].

[2] Court of Appeal 21 November 2018 No 169/18; Court of Appeal 1 April 2020 no 49/20; District Court (*Tribunal d'arrondissement)* of and in Luxembourg, 13 May 2020, No 2020TALREFO/0017

[3] In addition, the Court of Appeal's decision (referral after quashing by Court of Cassation) of 25 January 2024 No 9/24 reiterated the principle stated by the Court of Cassation. The ruling of the District Court of and in Luxembourg of 13 February 2024 No 2024TALCH01/00041 also followed the principle of the Court of Cassation.

Insurance policy: probative principles in insurance

Insurance policy | Burden of proof | Distributive application of Article 1315 of the Civil Code

Luxembourg Court of Appeal
Decision No 102/23-IX-COM of 30 November 2023
Case reference No CAL-2023-00172

Question(s) before the Court

- *Who has **the burden of proof** with regard to cover under an insurance policy?*

Main takeaway

☑ *The policyholder must prove three specific items:*

- *(1) the insurance cover exists;*
- *(2) the insured risk has occurred;*
- *(3) they are entitled to the insurance cover.*

Rule

The Court stated that, with regard to cover under an insurance policy, the jurisprudence provides for the distributive application of the two paragraphs of Article 1315 of the Civil Code:

- a proof of cover: "*anyone who seeks to enforce an obligation must prove the said obligation*";
- a proof of "exemptions" by the insurer (exclusions, limitations, lapses, etc.): *"equally, anyone claiming to be discharged from liability must prove the fact(s) that extinguish their obligation".*

The Court emphasised that a policyholder who requests that their insurance company honour the cover they have purchased is subject to a threefold burden of proof: *(1) the policyholder must provide proof that the insurance cover exists; (2) they must establish that the insured risk has occurred; and (3) they must demonstrate that they are entitled to the insurance cover.* Furthermore, the Court stated that the insurer's obligation "*arises only on the condition that there is conformity between the risk that has occurred and the risk insured*".

Analysis

In this instance, the policyholder asserted that a loss that occurred after termination of the insurance policy was simply the direct and necessary result of an earlier loss that was covered by the insurance company. The dispute revolved around the extent to which the burden of proof of insurance coverage fell on the policyholder. The Court held that in view of clear discrepancies between the witness statements and other evidence in the file, the policyholder had not provided proof that the second loss constituted a direct and necessary result of the first covered loss. As the policyholder did not prove that the damage claimed fell within the scope of the cover, the Court therefore declared their appeal unfounded and upheld the ruling of 24 November 2022, which had already dismissed the request.

Our perspective

The value of this decision is in the clarification of the probative requirements incumbent on the policyholder in the context of insurance cover. The Court stated that the burden of proof is split between the policyholder and insurer as per Article 1315 of the Civil Code. Therefore, a policyholder who makes a claim against their insurance company under the cover purchased must (*inter alia*) prove that they are entitled to the insurance cover. In other words, that the loss claimed (which the Court reiterated constitutes a legal fact that can be proved by any legal means) amounts to a risk insured as per the insurance policy.

Does GDPR protect an economic beneficial owner?

Personal data | Banking secrecy | Economic and beneficial owner

Luxembourg Court of Appeal
Decision No 141/23-II-CIV of 6 December 2023
Case reference No CAL-2021-00650

Question(s) before the Court

- *Does **the fact of being the beneficial owner** of a company constitute "protected personal data"?*

Main takeaway

☑ *Data concerning a legal person can be considered personal data if it makes it possible to directly or indirectly identify a physical person.*

Rule

The Court emphasised that the concept of an "*identifiable person*" does not require that "*all information that could identify the person concerned must be held by a single person*". In addition, the Court held that "*although it is accepted that legal persons are excluded from the benefit of data protection, it cannot be legitimately concluded from this that data concerning a legal person does not constitute personal data concerning a physical person. In view of the preceding, it is sufficient that this data enables the identification of the person, directly or indirectly, in order for it to be considered personal*".

Analysis

In its ruling of 7 October 2020, the District Court of and in Luxembourg prohibited Company A from transferring to the US authorities (DOJ) personal data concerning Mr X with regard to:

- the accounts of companies Y and Z (*all information that makes it possible to identify X as an economic owner or as connected with these accounts*); and
- personal accounts belonging to Mr X (*all data*).

Mr X requested that the decision be partially varied in order to prohibit the transfer of all banking data related to Companies Y and Z.

In this instance, the Court noted that Mr X is "*the economic and beneficial owner*" (*bénéficiaire économique et effectif*) of Company Y. Although the concept of "*bénéficiaire économique*" does not exist in Luxembourg company law or contract law, the Court concluded that the fact of being a beneficial owner *(bénéficiaire effectif*) of Companies Y and Z constitutes "*protected personal data*". The Court held that all data concerning accounts opened under the names of Companies Y and Z constituted protected personal data and thus prohibited its transfer.

Our perspective

The Court confirmed that the concept of "identifiable person" does not require all information to be held by a single entity. Furthermore, the Court specifically stated that data concerning a legal person may constitute personal data if it makes it possible to identify a physical person. This may change the way in which financial institutions transfer banking data in the context of anti-money laundering requirements.

Reopening liquidation: impact of the law of 7 August 2023 on business preservation

Immediate application | Business preservation | *Ratione temporis* scope of application of the law of 7 August 2023

District Court of and in Luxembourg
Commercial judgment
No 2023TALCH06/01347 of 30 November 2023
Liquidation No L-13756/22

Question(s) before the Court

- *What is the **ratione temporis**[4] scope of application of the law of 7 August 2023 on business preservation and modernisation of insolvency law, modifying the provisions of Article 1200-3 of the law of 10 August 1915 on commercial companies?*

Main takeaway

☑ *The provisions of the new Article 1200-3 of the law of 10 August 1915 on commercial companies are procedural laws and therefore apply immediately.*

Rule

The Court noted that the law of 7 August 2023 on business preservation and modernisation of insolvency law, in force since 1 November 2023, introduced a new Article 1200-3 into the amended law of 10 August 1915 on commercial companies. The Court stated that in the event that a new law enters into force while proceedings are ongoing, "*procedural laws take immediate effect, but without rendering invalid actions validly carried out previously*". Prior to the introduction of this provision, the Court would reopen judicial liquidations that had been closed and for which an asset was identified after closing of the liquidation, pursuant to Article 536 of the Commercial Code.

Analysis

The Court therefore held that the request was introduced validly before the entry into force of the law of 7 August 2023 on the basis of Article 536(4) of the Commercial Code. Furthermore, the Court held that "*as the provisions of Article 1200-3 are characterised as procedural law, they are to be applied immediately*". The Court set aside the closure decision and ordered the reopening of the liquidation of the SARL and that its decision be immediately enforceable.

Our perspective

In this decision, the Court reiterated the principle of immediate application of procedural law, applied in the context of the new law of 7 August 2023 and Article 1200-3 of the law of 10 August 1915 on commercial companies.

[4] I.e. the scope of application by reason of time.

Bonuses and premiums: Court decides in favour of contractual clauses setting a discretionary bonus

Employment contract | Nullity of discretionary bonus clauses | Bonuses and premiums

Luxembourg Court of Appeal
Decision No 148/23-III-TRAV of 14 December 2023
Case reference No CAL-2023-00103

Question(s) before the Court

- *Are **discretionary bonus clauses valid**?*
- *Under what **conditions**?*

Main takeaway

☑ *The discretionary, voluntary or gratuitous nature of bonuses paid to employees generally does not contravene any mandatory legal public policy provisions.*

Rule

The Court confirmed that *contractual provisions between parties giving a discretionary, voluntary or gratuitous nature to bonuses paid to employees do not contravene any mandatory legal public policy provisions and are valid in principle*.

Analysis

In this instance, the Court held that "*the parties have expressly agreed on the discretionary nature of any bonus or premium paid to the employee, which is thus purely gratuitous in nature*". The Court highlighted that the fact of "*having paid such premiums in the past does not permit the conclusion that the contractually agreed prerogative has been unequivocally abandoned*". As a result, the Court declared the request to nullify discretionary bonus clauses to be admissible but unfounded.

Our perspective

In this decision, the Court held that contractual provisions establishing the discretionary, voluntary or gratuitous nature of bonuses paid to employees do not contravene any mandatory legal public policy provisions and are valid. The decision is consistent with the settled case law position, which states that a discretionary bonus (*liberalité*) cannot be an element of salary and remains at the discretion of the employer, unless it is due in accordance with an express commitment resulting from an employment contract or a collective agreement or the obligation to pay results from an established custom. Furthermore, the Court clarified that paying premiums does not change the nature of a purely discretionary bonus, thus the burden of proving an established custom rests on the employee.

Proof of damage resulting from mutual administrative and tax assistance proceedings

Administrative and tax assistance | Banking secrecy | Compensable damage

Luxembourg Court of Appeal
Decision No 419/23-V of 5 December 2023
Case reference No CAL-2021-00650

Question(s) before the Court

- *Was professional secrecy (**banking secrecy**) **breached** during tax adjustment proceedings?*
- *Can taking legal action **give rise to civil liability**?*

Main takeaway

☑ *The simple fact of having to pay taxes following a tax adjustment, for which a person was liable in any event, cannot be considered as compensable damage.*

Rule

The Court stated that "*to be eligible to bring a direct legal action, it is necessary and sufficient for the person taking legal action to be able to claim to have been personally subject to damage due to the infraction that is the subject of the public prosecution, meaning that they establish that they may have been a victim of the infraction, a fact that is for the trial judge only to assess*". However, it is not necessary for the damage to be entirely proven. It is nevertheless "*essential for direct, personal and causal harm to be alleged*".

Analysis

In this instance, the direct applicant complained that Company X had breached professional secrecy by providing the Luxembourg tax authorities with data on their financial situation that went beyond the period indicated in the request for information sent by the French tax authorities. The applicant maintained that they were then subject to a tax adjustment by the French tax authorities, as they had not declared all of their financial assets held abroad. The Court held that the applicant "*has not, however, provided proof that they have suffered direct, personal and causal damage [...], whilst no-one may claim that having to pay tax following a tax adjustment, which they owed anyway, constitutes compensable damage*" and declared the direct summons inadmissible.

With regard to the counterclaims, the Court stated the principle that "*taking legal action does not generally give rise to civil liability*". In addition, "*the judge must identify a "clear fault", an "act of malice or bad faith""* or at least a *"gross mistake equivalent to fraud"*. In this instance, the Court held that "*the party making a counterclaim does not present any element of proof that would demonstrate that [the direct applicant] acted with an intention to harm or with blameworthy carelessness, as appropriate*". The Court declared that the claim for compensation for abusive and vexatious proceedings was unfounded.

Our perspective

In this decision, the Court of Appeal restated the formal conditions for commencing a legal action. The Court held that the applicant did not satisfy the necessary formal criteria for the direct legal action to be admissible, due to a lack of the required proof of damage.