



## International news in brief, Lamy Lexel, October 2008

Do you have development plans in France, are you considering doing business with French companies, are you thinking of establishing strategic bases in France or do you wish to modify your existing French legal entity? This legal news bulletin is designed with you in mind.

You can send any remarks or suggestions to the following address: [breves@lamy-lexel.com](mailto:breves@lamy-lexel.com)

### Your specialists in international projects

**André GAST**, aged 58, has been the joint manager of the Disputes and Arbitration department of LAMY LEXEL in Lyon since 1994. The department is composed of 10 lawyers, including 3 partners.



He started his career with a firm in Lyon, before created his own structure that he developed over a five-year period. In 1994, he became a partner of cabinet Lexel which was just being formed, thus contributing towards the extension of the Lamy Lexel structure.

At the same time he has always invested a great deal in the bodies of his profession: he was a member of the *Conseil de l'Ordre* and is at present the General Secretary for the *Centre de Médiation et d'Arbitrage*.

André GAST has acquired expertise in the various aspects of the litigation field. He has gained special expertise in distribution and competition, real estate law, industrial risks and is a specialist in alternative solutions to litigation and arbitration.

He assists companies in disputes that may arise and in the management of their lawsuits. He also advises them on the means of avoiding clashes before the judge by anticipating alternative solutions. He does the training and intervenes within the structures on the theme of alternative ways of settling disputes.

In order to succeed in these missions, he horizontally calls on the in-house expertise of his partners, in particular with regard to business law, social law, tax law, contract law... and is involved in international networks to ensure the best performance to each of his interlocutors.

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## Business Law

### ➤ Cross-border mergers within the European Union.

The achievement of mergers between trading companies of different member States was already made possible by the European regulations.

Nevertheless, the operation was legally complex due to the lack of transposition into French law of the European directives.

This is now done with the law of 3 July 2008 including various provisions adapting French company law to European law.

Thus the terms and conditions for employee information and consultation on the merger project were specified, the specific rights of the partners of the companies parties to a cross-border merger, the terms and conditions of the control of the legality of the merger and its effective date as well as the obligation for the new company to adopt a status allowing the employees to take part.

These various provisions apply to all the cross-border mergers for which the treaty is signed after 4 July 2008.

It is rather surprising to note that the control of the legality of cross-border mergers can be carried out, not as for national mergers, just by the court office of the commercial court, but also by a notary....

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### ➤ Fate of the security in the event of merger-takeover of the creditor company

Uncertainty remains as to the maintenance of the guarantees granted to the absorbed company after the merger.

During the acquisition operations one question often remains: what will become of the guarantees of the absorbed company?

Usually, it was agreed that unless there was an express demonstration of will for guarantees, their commitment would end as of the merger... and the debts occurring after the merger were no longer guaranteed by them (*Supreme Court*, 1<sup>st</sup> civil division 28.09.04). Doctrine is opposed to this case law, contrary both to the principle of total transfer of assets and liabilities and to the indifference of the guarantees with regard to the person of the creditor they guarantee.

A decision of 8 November 2005 had foreshadowed the possibility of a turnaround: the guarantee was maintained after the merger, on the basis of the total transfer of assets and liabilities.

By this decision dated 14 May 2008, the Commercial Division of the *Supreme Court* seems to be coming back to its previous case law insofar as it pronounces its decision depending on the date of birth of this guarantee. But the Court does not directly take a position on the fate of the guarantee in the event of merger. The Court just takes note that the « debt was not born after the merger », and cancel the judgment rejecting the creditors claim.

In the event of a debt prior to the merger, it is covered by the guarantee.

## Commercial Law

### ➤ Assessment of the activity of the Competition Council in 2007: the stringency favours the development of the commitment procedure

The assessment of the activity of the Competition Council in 2007 was published on 3 July 2008.

It would seem that the sanctions pronounced are severe, insofar as the economic damage caused by the cartels, certain vertical practices and certain abuses of dominant position are highly important and lead to an increase of prices of approximately 25 %. The heaviest sanctions (between 20 M€: linen hire and laundering, and 47 M€: renovation of the secondary schools in Ile de France) were pronounced in six cases, for a total amount of 221 million Euros.

At the same time, the development of negotiated procedures continued.

Commitments willingly undertaken by companies in response to the competition concerns of the Competition Board, in nine cases allowed the procedure to be closed before any sanction was pronounced.

Finally, the Board declares that it is in favour of the introduction of a group action so as to offer consumers the possibility of receiving compensation for the prejudice suffered.

On these basis, the Global Competition Review which assesses the performances of the competition control authorities each year, classified the Competition Board 6<sup>th</sup> at world level.

The efficiency of the Competition Board in its action against anti-competition practices should encourage the economic actors to increase their attention in the adoption and implementation of their commercial practices.

## Employment Law

### ➤ The modernisation of the labour market

The law on the modernisation of the labour market, published on 26 June 2008, and the application texts liberalize the French market by creating a new means of breaking off a fixed-term contract, by increasing the trial period and introducing a new type of fixed-term contract.

On the other hand, the severance pay for personal reasons is doubled and the required seniority condition is reduced to one year.

### ➤ The contractual termination

The law creates a new means of breaking off the unlimited work contract in addition to the classical terminations that are dismissal, resignation and retirement.

- **Notion of contractual termination**

In the future, employer and employee may mutually agree on the conditions of the termination of the unlimited work contract.

However, the law prohibits the use of this system for the termination of work contracts as a result of Job Saving Plans (“PSE”) and collective agreements for the forward planning of manpower and skills.

The law also stipulates that this termination concerns the protected staff representatives subject to the prior authorisation of the Occupational Safety and Health Administration under the conditions of common law.

- **Contractual termination procedure**

This procedure can be divided into 4 successive steps:

- Employer and employee agree on the principle of a termination after one or several meetings. The employee has the possibility of being assisted by a person of his/her choice belonging to the company or, when the company does not have any employee representative, by a person from the outside included in a list established for this purpose by the local authorities. The employer also has the possibility of being assisted if the employee him/herself is assisted.
- Execution of the convention

The agreement between the parties is materialised by a termination agreement in accordance with a form available from the Labour authorities.

- Cooling-off period

As of the date of execution of the contractual termination, each of the signatory parties to the termination agreement has a period of 15 calendar days to exercise his/her cooling off right. At the end of this cooling-off period (15 days), a request for approval is sent to the Departmental Labour Directorate by the most diligent party.

- The approval

The approval conditions the validity of the termination agreement. The director should ensure that all the conditions of form and grounds have been complied with as well as the parties' freedom of consent.

The authority has a period of 15 working days to give its decision.

Fault of notification within this period (tacit agreement), the approval is deemed to have been given.

- **Severance pay, unemployment benefits and disputed claims:**

An employee may claim a severance pay, the amount of which shall not be less than that laid down in with regard to dismissal i.e.  $1/5^{\text{th}}$  of the monthly salary per year of seniority, increased by  $2/15^{\text{ths}}$  of the monthly salary per year of seniority, for the years exceeding 10 years.

This severance pay is exempt from tax and social security contributions identical to that provided for redundancy payment and for transactional payment (in the event that the payment made is higher than the redundancy payment).

The advantage for the employee of this new method of termination instituted by the law on social modernisation is that he/she will be entitled to unemployment benefits under the conditions of common law if the termination agreement has been approved by the Labour authorities.

Finally, any disputes relating to the agreement, the approval or the refusal to approve fall within the exclusive jurisdiction of the *Conseil de Prud'hommes* (social tribunal) which will rule in first and last resort (no appeal possible, except for an appeal before the *Supreme Court*), excluding any other petition to the administrative judge.

## ➤ The trial period

- **Initial length of the trial period**

- for workers and employees: two months at the most,
- for lower management and engineers: three months at the most,
- for the executive staff: four months at the most.

- **Renewal**

The trial period is renewed once, on the conditions provided for in an extended branch agreement, its total duration not exceeding, depending on the professional categories, four, six or eight months.

In any event, for the renewal of the trial period to be possible, apart from the existence of an extended branch agreement, the express and non equivocal agreement of the employee is required.

- **Coming into force**

The duration of the trial periods fixed by the law have a compulsory character, except for:

- longer periods fixed by the branch agreements concluded **before** the date of publication of the law,
- shorter periods fixed by the branch agreements concluded **before** the date of publication of the law, but only until **30 June 2009**,
- shorter periods fixed by collective agreements concluded **after** the date of publication of the law,
- shorter periods fixed in the letter of engagement or the work contract.

- **Breaking off of the trial period**

The breaking off of the trial period still does not have to be motivated.

On the other hand, the law establishes a compulsory reciprocal notice period for the breaking off of the trial period.

Thus, an employer who puts an end to a trial period should observe a period of notice of:

- 24 hours for less than 8 days' presence,
- 48 hours between 8 days and one months' presence,
- 2 weeks after 1 months' presence,
- 1 month after three months' presence.

In any event, this period of notice shall not have for effect to extend the trial period beyond the maximum periods provided for above

This period of notice also concerns interruptions of trial periods of less than one week for fixed-term work contracts.

When it is the employee who terminates the trial period, he should observe a period of notice of:

- 24 hours, if the length of presence of the employee is less than 8 days,
- 48 hours, beyond that.

- **Recruitment of young people**

So as to facilitate the access of young people to professional life and in particular to an unlimited contract, the length of a sandwich course taken during the final year of study would be taken into account in the length of the trial period, without this being able to reduce it by more than half, unless there is a branch or company agreement offering more favourable provisions, in the event of being recruited by the firm at the end of the training course.

➤ **The fixed term agreement for a project**

The new legal provisions create, as an experiment for a period of 5 years from the coming into force of the law, a fixed-term contract for the completion of a specified object.

- **Conclusion**

This fixed-term contract is reserved for engineers and executives for the achievement of certain projects, the duration of which is unsure.

This contract, the duration of which is unknown, will be entered into for a minimum period of 18 months and a maximum period of 36 months.

This contract shall not be renewed. It should be entered into for the realisation of a specific object. In no event may it be used to meet a temporary increase in business.

Recourse to this contract will be subject to the conclusion of an extended branch agreement or, fault of which, a company agreement containing various mentions and in particular the economic requirements to which it is liable to bring an adapted reply.

As soon as it is concluded, the contract should specify:

- the project for which it is concluded and the completion of which constitutes the term of the agreement,
- the approximate duration considered for the project,
- the possibility of terminating the agreement at the anniversary date of its conclusion by either of the parties for any real and serious reason, this termination opening the right to severance pay amounting to 10 % of his/her total gross remuneration,

- the conditions and the period within which the employee should be informed of the arrival of the end of his/her contract or the proposal to continue the contractual relation in the form of an unlimited contract. This period of notice should not be less than two months.

- **Termination**

- The contract is terminated when the project for which it was entered into is achieved, knowing that this achievement should occur between the 18<sup>th</sup> and 36<sup>th</sup> months of the contract.

The employee is then given severance pay of an amount equal to 10 % of the total gross remuneration received, if the employer does not offer to continue his/her activity under an unlimited contract, beyond the achievement of the project.

- After the minimum duration of 18 months, it is possible to terminate the agreement before expiry of the contract, at the anniversary date of its conclusion, on condition that a real and serious reason is given.

The employee may also claim a specific payment amounting to 10 % of the total gross remuneration received.

### ➤ **Severance payment**

In the future, severance pay is due as soon as the employee has one year of seniority.

Furthermore, the law fixes the amount of the indemnity, regardless of the grounds, at 1/5<sup>th</sup> of the monthly salary per year of seniority, increased by 2/15<sup>ths</sup> of the monthly salary per year of seniority, for the years exceeding 10 years.

Of course, the provisions of the collective bargaining agreements remain applicable if they are more favourable.

## **Tax Law**

### ➤ **Intracommunity deliveries: an « audit » obligation of clients**

The Administrative Appeal Court of Paris judged that in the event of delivery of goods sent or transported within the territory of another European member State, company subject to VAT cannot be exempted if the operation being carried out is involved in a **fraud** committed by the buyer.

It is the contrary if he **ignored and could not be aware of the fraudulent nature of the operation**. Such is the case when he takes **any measure that can be reasonable expected of him to ensure that the operation is not part of any fraud**.

On the other hand, if it is established considering the objective elements, that this conditions is not fulfilled, the Tax Authorities are entitled to refuse the benefit of the exemption.

In this particular case, the company had trade relationships with its customer for several years. It could have known, **simply by using the data consultation service to consult the database available to tax payers**, that the number given by the latter was not mentioned in it and should therefore have undertaken all the necessary steps to check its business before starting or continuing its deliveries.

This applies, even if the customs authorities did not make any observations concerning the DEB showing a false identification number and that the lack of an identification number is not sufficient to establish that the person concerned is not liable for VAT.

*CAA Paris Novembre r28, 2007 n°05PA03246, 2<sup>e</sup> ch., min. vs Sté Abacus Equipement Electronique*

### ➤ **Parent-company-subsiary cross-border distributions: validation of the French system of the lump sum for expenses and charges**

The European Court of Justice (CJCE) has validated the French system for calculating the lump sum of expenses and charges of 5 % in that it includes, in the income from shareholdings to be taken into account, the tax credits granted in view of compensating a withholding at source operated by the Member State of the subsidiary.

An appeal lodged for excess of jurisdiction directed against the tax instructions concerning the suppression of the double taxation of dividends distributed by a subsidiary to a parent company (*General tax Code, article 216*), the CJCE judged that the notion of distributed profit by the subsidiary company under the parent/subsidiary Directive (*90/435/EEC of 23 July 1990*) is not contrary to the inclusion, in his profits, of tax credits that have been granted to compensate a withholding at source operated by the Member State of the subsidiary on behalf of the parent company.

*CJCE April 3,2008, case 27/07, Banque Fédérative du Crédit Mutuel*

### ➤ **The tax search procedure condemned by the European Court of Human Rights:**

The European Court of Human Rights judged that the grounds for appeal open to tax payers by internal law to contest the regularity of visits and seizures at home (*Livre des Procédures Fiscales, article L 16B*), are not in compliance with the provisions of article 6§1 of the European Convention for the Protection of Human Rights.

*CJEC 21 February 2008 n°18497/03, Ravon et al vs. France*

It can be noted that the draft bill for the modernisation of the economy, now being discussed, has taken note of this decision and foresees modifications of the present system.

# Litigation

## ➤ The on-line betting companies faced with the exploitation monopoly

The site Unibet.com, exploited by a Maltese company, is a major actor in on-line sports betting sites that are rapidly developing on the web at the moment.

In 2007 it proposed bets on the results of the tennis tournament at Rolland Garros.

The Tennis French Association(FFT) referred the matter to the Civil Court of Paris, considering that in proposing such bets - particular in France (sic), the site Unibet.com had impaired the exploitation monopoly of the sports federation on the events and competitions it organises, granted by article L. 333-1 of the Sports Code.

Unibet.com tried to resist this argumentation namely by putting forward the fact that this legislation does to focus on the exploitation of on-line bets and that in any event this exclusive right constitutes a restriction “*unjustified, inappropriate, disproportionate and discriminating*” to the free rendering of services in contravention with the Community legislation.

By a judgement entered on 30 May 2008, the Civil Court of Paris complied with the claims of the FFT and sentenced Unibet.com to pay it the sum of 500.000€ for the prejudice caused.

Through this same judgement, the Parisian judges also allotted to the FFT the sum of 300.000€ in repair of the “parasitical behaviour” of Unibet.com who “*thus deliberately placed itself in the wake of the Plaintiff to draw benefit, without paying anything, from the investments made by the latter to organise and promote the tournament in question.*”

On-line betting sites coming under foreign legislation are thus liable to be brought before the French jurisdictions ruling in compliance with French law in accordance with the “targeting” theory basing competence on the place where the damage occurred. (Court of Appeal of Paris 14 June 2006).

In so doing, the French sports federations succeed, for the moment, since it is only a decision pronounced by the first instance, in protecting their rights on the sports events they organise.

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