

Lamy Lexel International News in Brief

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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.

Your specialists in international projects

So that you know us better, from both a human and a technical point of view, we regularly introduce you to those lawyers of the LAMY LEXEL legal firm who are specifically involved in international projects for our clients and partners.

Michel MASOERO, 45, holder of a DJCE (Postgraduate Law Degree in Legal Consultancy) obtained at the University of Lyon 3 in 1985, began his career as a tax specialist for Arthur Andersen International, then joined the law firm Vergnole – de Villers – Lexel Conseil in 1989 as an associate. He was co-opted as partner in 1992.



Michel MASOËRO was Chairman of ACE Rhône-Alpes from 2000 to 2002.

He drives fast cars and slow motorcycles (Harley fanatic).

After building his team, he then merged with that of Jean-Claude Vericel and Jean-Pierre Gitenay in 2003, within the Lyon Business Law Department, which is now composed of 6 partners and 15 associates.

He has also set up the team dedicated to the Advanced Technologies within LAMY LEXEL.

Michel MASOËRO specializes in the acquisition, transfer and merger of medium-sized companies; in particular he assists:

- technological companies,

- fast growing company managers (Rhône Alpes “quadras”),
- issues among family shareholdings.

Working in close cooperation with the managers, he helps them with strategic and negotiation aspects, using business networks like as many levers for his clients.

He thus operates mainly in the following fields:

- Acquisitions / transfers / company mergers
- Capital investment
- Leverage buy-out
- Financial engineering

Michel MASOËRO works with the other partners of the firm on a daily basis so as to offer each client a global and personal service, integrating aspects of business law, tax and social issues, with a strategic vision of the assignment, reflecting the economic goals of the company.

He is also a lecturer at the EM Lyon Business School (Master in Finance and Master in Creation), and at Sup de Co Clermont Ferrand.

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Business Law

➤ The direct action for payment of the subcontractor is not a question of international public order

A French company, subcontractor of a German company (the main contractor) working for another French company (the owner) has been commissioned with various works on a site in France. The main contractor having been the object of a bankruptcy proceeding in Germany, the subcontractor asked the owner to pay the cost of his services under Section 12 of the French Law of 31 December 1975 on Sub-contracting.

The French Supreme Court (i.e. “*Cour de Cassation*”) first noted that the subcontract and the contract for work were, in accordance with the applicable clauses of law agreed to by the parties, both subject to German law, which does not include any provision enabling the subcontractor to request payment directly against the owner.

So doing, it ruled out the benefit of the direct action provided for in Section 12 of the above-mentioned French Law, considering that this provision is not a mandatory rule (i.e. “*Loi de Police*”) under Section 7 indent 2 of the Rome Convention of 19 June 1980 and is therefore inapplicable to contractual relations subject to the laws of a foreign country (Cass. Civ. 1st – 23 January 2007).

This decision confirms the strict interpretation of the notion of mandatory rule by the French jurisdictions, which had already refused this qualification for the direct action for payment of the carrier provided for in Section L.132-8 of the Commercial Code (CA Rennes -

5 September 2006).

➤ **International exclusive distribution: enforcement of the Vienna Convention and obligation for the supplier to ensure that the exclusive distribution rights are complied with**

The company Yves Saint-Laurent Parfums (YSLP) granted the company Mimusa CA the exclusive distribution of its products throughout the territory of Venezuela. Due to repeated late payments from its distributor, the company YSLP decided not to renew the exclusive distribution agreement and even stopped its deliveries during the notice period. The distributor then took out summons against YSLP for repair of the prejudice it considered it had suffered.

After reminding that the framework agreement was subject to French law as a result of the parties' choice, the French Supreme Court (i.e. "*Cour de Cassation*") considered that the Vienna Convention of 11 April 1980 on contracts for the sales of goods applied to the sales realised between the company YSLP and its distributor since the parties had not expressly excluded its enforcement and this even though the framework agreement was excluded from the scope of the said Convention.

Therefore, the *Cour de Cassation* justified the suspension of the deliveries by YSLP under Section 71 of the Convention which provides for the possibility for a party to allege a preventive plea of non performance when it appears that the other party will not fulfil its obligations, considering its solvency.

The *Cour de Cassation* also considered that YSLP had not committed any fault in the breach of commercial relations, since section L.442-6, 1, 5° of the Commercial Code expressly authorises a party to terminate an agreement without any notice, since the other party has not fulfilled its obligations.

The *Cour de Cassation* did however sentence YSLP for not having caused the other authorised distributors of the YSLP network to respect the exclusive rights of Mimusa CA throughout the territory of Venezuela (Cass. Com. - 20 February 2007).

Commercial Law

➤ **The supplier is bound to guarantee the exclusivity granted to its distributors**

The company Yves Saint Laurent Parfums (YSLP) granted the company MIMUSA the exclusive right to distribute its products throughout the territory of Venezuela. Following a dispute concerning the breach of the contract, MIMUSA reproached YSLP its inertia further to the appearance of a distributor realising parallel sales of its products in the territory granted to it on an exclusive basis.

Coming back to the position of the Court of Appeal of Versailles that had considered that the responsibility of company YSLP was not involved, the *Cour de Cassation* declared (20 February 2007) that "*it was the supplier's responsibility to ensure that the exclusivity it had granted was respected*".

This adduced reason, stated in general terms, **calls on suppliers, promoters of exclusive distribution networks, to observe a mandatory rule as regards ensuring that the exclusivity they have granted is respected**, fault of which their responsibility is to be involved.

Nevertheless, in compliance with the competition community rules and considering the poor level of control the supplier has on his network, especially in international exclusive distribution, it is highly probable that this solution will be nuanced in the future so that the supplier will only have to bear an obligation of means.

IP / IT

➤ **Personal data: the Commission Nationale de l'Informatique et des Libertés (CNIL) takes stand on the annual classification and rating of the employees**

Employees' annual rating and career potential are "confidential" data within companies. For all that, the *Loi Informatique et Libertés* (i.e. Data Protection Act) guarantees any employee the right to obtain communication of such data should it be used for making a decision concerning him/her.

Data concerning the professional assessment of employees are generally considered by human resource managers as sensitive information and therefore confidential. This confidentiality is sometimes opposed to an employee wishing to have access to his file by referring to the Data Protection Act.

At its plenary meeting of 8 March, the Commission Nationale de l'Informatique et des Libertés thus examined the claims lodged against a large international company for refusal to communicate to its executives their exact "rank" and "career potential".

The Commission considered that the "annual ranking" and "potential" values are data that can be communicated to the concerned employee since they are taken into account for deciding on his/her pay rise, promotion, posting, etc.

The CNIL therefore reaffirms the principle according to which an employee should be able to have access to the human resources management data used to take a decision concerning him/her.

Pursuant to [section 39 of the Act of 6 January 1978 amended in August 2004](#), in this case, an employee may also ask for a copy of the document containing these assessment data, and the meaning of the codes or value applied to him/her.

The position of the CNIL is shared by its European counterparts.

It also joins the analysis made by the Direction des Relations du Travail who underlines that the Labour Code imposes an obligation of transparency on the employer with regard to hiring and professional assessment: "*The Act also introduces, to the benefit of candidates and employees, a principle of confidentiality concerning the obtained results. (...) It is obvious that this confidentiality is with regard to third parties and is not opposable to the persons concerned: such persons may, on request, have access to the results*".

For its part, the *Cour de Cassation* considers that the non communication of his/her rating sheet to an employee who has requested it constitutes one of the elements characterizing discriminatory behaviour towards him/her (Cass. Soc. - 23 October 2001).

➤ Computer and Information Systems Managers: a strategic role

Today, Computer and Information Systems Managers play a strategic role within the company. Their assignment not only consists in ensuring data security, but also that the company complies with the intellectual property rights concerning the equipment and software made available to employees.

Indeed, under French law, the risks are significant, both for the Computer and Information Systems Manager and for the company:

- When the Computer and Information Systems Manager has signed a delegation of powers with his/her general management, he/she may be recognised as being the author or accomplice of an infringement under the provisions of section L.335-2 of the Intellectual Property Code, and exposes him/herself to sanctions of up to two years imprisonment and a fine of 150,000 euros,
- furthermore, since the 16 December 1992 Act, a legal entity can be found guilty « *of offences committed, on their behalf, by their bodies or representatives* », (section L.121-2 of the Criminal Code). The company then exposes itself to a fine of up to 750,000 euros possibly accompanied by further penalties provided for in section 131-39 of the Criminal Code (closure of the establishment, exclusion from procurement contracts...),
- finally, if the terms and conditions of a licence are not complied with, the company risks involving its contractual civil liability for infringement, thus exposing itself to being sentenced to pay damages.

Within this context, the Computer and Information Systems Manager should ensure that all its interlocutors comply with the intellectual property rights he/she is responsible for and, in any event, should implement all possible means (and be able to prove it) to ensure his obligations are fulfilled.

It therefore depends on the different interlocutors of the Computer and Information Systems Manager that we will analyse the risks in question and the preventive measures that the Computer and Information Systems Manager must implement.

What does the information obligation of the Computer and Information Systems Manager involve with regard to the General Management?

The Computer and Information Systems Manager should ensure that his General Management is informed of any risk of infringement the company is liable to face. In this respect, the Computer and Information Systems Manager should undertake the following actions:

- check that all the software used in the company is covered by a licence,
- check that the terms and conditions of the licence are complied with, and in particular that the company does not exceed the maximum number of authorised users and/or the number of stations in which the software is installed,
- communicate with the General Management in particular so as to inform it of the extent of the licences in relations to users' requirements.

What recourse does the Computer and Information Systems Managers have vis-à-vis a negligent General Management?

There is no standard answer to meet up to such a situation. As an employee of the company, the Computer and Information Systems Manager is normally bound to obey the General

Management. At the most, the Computer and Information Systems Manager could acknowledge his General Management's position by writing a memorandum.

With regard to professional secrecy, the CNIL in its report on "Cyber surveillance at the workplace", dated 11 February 2002 considers that « *the administrators of networks and systems should not disclose any information they might be brought to become aware of in the exercise of their functions, and in particular when it is covered by the secrecy of correspondence or concerns the users' private life and does not question the good technical working of the applications, nor their safety, nor the interest of the company.* »

What risks are linked with the use of computer tools by company employees?

As person in charge of the company's computer system, the Computer and Information Systems Manager should make sure that the in-house users (whether or not they are specialists) comply with the instructions for use of the company's information system.

In this respect, the Computer and Information Systems Managers is advised to undertake the following actions.

Inform each user of the rules to be respected with regard to intellectual property and in particular by reminding them:

- that no element accessible through a computer or telecommunications network such as text, reports, graphics, images, logos, photographs, videos, music, etc. is a priori free of rights. Therefore the user may not reproduce, store, or broadcast such elements on the company's computer or electronic means,
- that it is prohibited to copy any software, if the user does not have a licence granted by the author of this software. If he has such a licence, he is entitled to make one copy of this software for backup only,
- that he may not freely copy any qualitatively or quantitatively substantial part of any database, at one or more times, without having obtained the prior written permission of the database producer.

Add a computer and information systems charter to the company's internal rules and regulations controlling the computer means made available to the employees and to allow for sanctions if necessary in proportion with the aim looked for.

In the event of illegal use of the software being recorded within the company, the responsibility is incumbent on the company managers and/or, if applicable, the person to whose benefit a delegation of powers has been granted in this respect (for example, the computer manager or the information systems manager) and/or the final user, if it is proven that he/she introduced or used a copy of software without complying with the terms of the licence.

The breach of any of the rights of the author of a software programme is considered as an infringement (section L.335-3 of the Intellectual Property Code). In France, an infringement is punished by two years imprisonment and a fine of 150,000 euros (Section L.335-2 of the Intellectual Property Code). For companies, punishment is a fine of 750,000 euros; final or temporary prohibition from entering into procurement contracts; interdiction to draw cheques (Art. 131-39 of the Criminal Code).

Tax Law

➤ **Acknowledgement of the tax transparency of foreign companies: the members of foreign partnerships are entitled to contractual benefits**

Reminder of the previous doctrine

Unless expressly stipulated in double tax treaties, the tax authorities do not recognise the transparency of foreign partnerships.

Therefore, for the application of tax treaties, foreign partnerships not being liable to tax, the tax authorities did not recognize that these companies had the capacity of resident.

Furthermore, the tax authorities refused to examine whether the members of this partnership could be qualified as residents and therefore take advantage of the contractual benefits. The partnership was acting as a “screen”.

In application of this doctrine, neither the entity, nor the partners could claim the application of the treaty.

The reform of the administrative doctrine

This reform draws consequences from the decision of the Supreme Administrative Court “Diebold Courtage” dated 13 October 1999.

In future, when a foreign partnership benefits by a tax transparency system in the State in which it is situated, the tax authorities accept, under certain conditions, to **look “through”** this structure in order to determine whether the partners of this company are residents under the tax treaty concluded between France and the partners’ State of residence.

The interest of this reform

From now on, France will apply **contractual tax deductions at source** on the passive income (dividends, interest and royalties) for which France has a right to tax under the treaty that binds the State of residence of the **member of the foreign partnership** who is considered, for this purpose, as the **beneficiary** of the French source income.

No deduction at source or withholding shall be made on the fraction of French source income going through a foreign partnership company and due to a partner residing in France.

➤ **Finally... the transposition into French law of the Anglo-Saxon trust**

A trust is the transfer of property limited in time and use: a person (the “principal”) transfers assets or rights to a second person (the “trustee”) who agrees to administer them for a given purpose and to return them at a given date.

The use of the trust is reserved for **legal entities liable for corporate income tax**. It remains prohibited for individuals.

There are two different forms of trust:

- the **management trust** which consists in transferring assets to the trustee with mission to manage them on behalf of the principal or a third party beneficiary,
- the **security trust** which allows a debtor to transfer assets to the trustee as guarantee of the payment of a debt.

One of the aims of the 19 February 2007 Act is to ensure the **tax neutrality** of the trust, both when it is constituted and during its operation.

This is how, for example, transfers of assets within the trust will not give rise to the taxation of capital gains nor the collection of transfer duties against payment and that the income drawn from the trust estate will remain taxed in the principal's name in accordance with a principle of tax transparency.

➤ **Non-compliance of the tax on certain advertising expenses with community law: ask for the reimbursement of this tax!**

The tax on certain advertising expenses (General Tax Code, section 302 bis MA) was **declared illegal** by the Supreme Administrative Court in a decision dated 21 December 2006.

The Supreme Court considers the tax illegal on the grounds that the funds collected were intended to finance aids for press companies, the tax system should have been, prior to its institution, notified to the European Commission, pursuant to section 88-3 of the Treaty of Rome.

Under section L.190 of the Book of Tax Procedures, you can obtain the reimbursement of the tax paid since **1st January 2003**.

The tax authorities may refuse the reimbursement of the tax paid after 1st January 2006.

Real Estate Law

➤ **The conditions of application of the exemption of liability for VAT provided for by section 257 bis of the General Tax Code**

Last 26 December the tax authorities published a tax exemption clarifying the conditions of application of the exemption of liability for VAT provided for by section 257 bis of the General Tax Code.

The tax authorities stipulate that the transfer of real property entered into the fixed assets and allotted to the achievement of real estate rental liable to VAT, should be considered as occurring within the scope of the transfer of a global amount of assets allowing the application of the exemption from payment of the real estate VAT or allowing the application of the regularisation of the VAT previously deducted if the transfer of the said real estate does not enter into the scope of VAT.

If the sale is not liable to the VAT system, the seller will no longer have to carry out the regularisation provided for in 210 annex II of the General Tax Code. If the sale comes within the scope of VAT (257-7 of the General Tax Code), it does not bring the real estate out of the VAT system, (i.e. it is not considered as the first sale since the real estate is deemed to constitute a universality).

Exemption from VAT does not apply to the transfer of real property registered in stocks by an estate agent, even if they are rented in VAT whilst awaiting resale, except if this transfer falls within the scope of the take over by a third party of the real estate business.

In practice, this tax exemption allows the clarification of the scope of this exemption from payment of VAT and therefore to put an end to the number of discussions resulting from the tax exemption of September 2006.

Litigation

➤ **A small silent revolution: the European Convention on Human Rights has made it a right for the person subject to law to have his/her case dealt with by the State jurisdictions within a “reasonable period”.**

Therefore, the French legislator endeavours to materialize this right by reforming the many provisions contributing towards the inertia of our judicial administration.

It is within this new outlook that the 5 March 2007 Act was adopted (sections 5§3 and 6§1). This Act gave the legislator the opportunity of carrying out a « *small silent revolution* » by altering the provisions of section 4 of the Code of Criminal procedure which, in its previous version provided that: “*The civil action can also be exercised separately from the public action. The judgement of this action exercised before the civil jurisdiction is stayed until the final judgement has been pronounced in the public action, if it has been instituted.*”

From these provisions resulted the principle well known of law practitioners according to which: « *le pénal tient le civil en l'état* ».

Faced with a criminal action, when the public action has been instituted, the civil judge was thus bound to postpone his judgement until the criminal decision had been rendered.

Therefore, the end purpose of this text has often been diverted for dilatory purposes by the practitioners.

For example:

- a dispute brought up by an employee against his dismissal was paralysed by a complaint lodged for theft with institution of legal proceedings for damages lodged by his employer,
- a debtor sued before the civil and commercial jurisdiction delayed the day of payment by lodging a complaint for fraud or dispute of validity.

The law was thus instrumentalized and encumbered with “false cases”.

That is why the legislator in 2007, paying attention not to increase the practitioners’ rumour on the eve of a major political deadline, just altered the drafting of section 4 by adding a 3rd paragraph, providing that:

“the institution of the public action does not impose the suspension of the judgement of the other actions brought before the civil jurisdiction, irrespective of their nature, even if the decision to intervene before the criminal court is liable to have direct or indirect influence on the solution to the civil proceedings.”

In the future the civil judge will just have to carry out preliminary study so as to consider whether there is a real risk of entering contradictory decisions and in this sole event to postpone the judgement.

In the other cases, he will in the future be able to enter his decisions without waiting for the result of the criminal proceedings which will undoubtedly save considerable time in the processing of files.

We will now just have to wait and see whether the Courts will be relieved.

➤ **Application of an international arbitration clause despite its contradictory character**

A French company and a Belgian company entered into a services agreement including an international arbitration clause which, in its first paragraph, appointed the French Arbitration Association and in a second the International Chamber of Commerce of Paris.

Faced with this contradiction concerning the competent arbitration body, the Court of Appeal of Aix-en-Provence had judged that the arbitration clause was evidently inapplicable and had referred the parties to the State jurisdictions.

The *Cour de Cassation* (Cass. Civ. 1^{ère} - 20 February 2007) censured the decision of the Court of Appeal on the grounds that despite its contradictory character, the international arbitration clause provided for in the agreement showed the parties' will to have recourse to arbitration and should therefore be enforced, referring the case to the President of the *Tribunal de Grande Instance* in order to settle the problem.

This decision reminds us that an international arbitration clause is only inapplicable in the event of evident nullity and that the arbitrator is in principle the sole competent for giving an opinion on the arbitral competence (principle of “competence – competence”), the State jurisdictions should, except in the event of evident nullity, declare themselves incompetent.