

International News in Brief Lamy Lexel

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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.

Guy-Pierre CARON, aged 35, joined LAMY LEXEL in February 2004 as senior executive in the Litigation Arbitration Mediation department in Paris.



He started his career in industry, working as a legal advisor for Warner Music International, before practising as a lawyer for the legal firms De Pardieu Brocas Mafféi & Leygonie and Dubarry Le Douarin Veil.

He mainly deals with litigation cases relating to business law (civil, commercial, and criminal) and social law, as well as intellectual property.

Being bilingual and holder of an LLM in German law, Guy-Pierre has been successful in developing an international clientele.

His professional experience in music has also enabled him to build a significant clientele amid the world of show-business and design.

The commercial, technical and managerial abilities he has shown in his work for the firm have therefore opened the road to partnership.

LAMY LEXEL is delighted with this appointment which adds value to the performance of its team of associates and illustrates the firm's confidence in a talented young lawyer.

Business Law

➤ Conflicts of laws / Conflicts of jurisdictions

Fixing of the competent jurisdiction in the event of several places of delivery within a same Member State: ECJ, 3 May 2007, case C-386/05, Color Drack GmbH

Article 5.1.b of the EC Regulation n°44/2001 provides that, in the event of sale of goods, **the competent court is the one of the place where the goods have been or should have been delivered.** This assumption however brings up several difficulties of interpretation when more than one place of delivery is involved.

In this case, an Austrian company had bought goods from a German company to be delivered directly to several retailers located in Austria.

The German seller having refused to take back the unsold goods and reimburse the Austrian buyer in compliance with the sale agreement, the latter referred the case to the Austrian court where its registered office was located.

The Court of Appeal to which the case was referred to overrule the court's decision for lack of jurisdiction *ratione loci*, considering that the sole place of connection provided for in article 5.1.b of the above-mentioned Regulation could not be fixed in the event of several places of delivery.

On appeal, the *Oberster Gerichtshof* submitted an interlocutory question to the European Court of Justice (ECJ) relating to the interpretation of the above-mentioned article 5.1.b.

First of all, the ECJ confirmed that the assumption of article 5.1.b applied both in the event of just one or of several places of delivery within a same Member State. Then the ECJ specified that, in the latter case, it was necessary to fix **the place that ensured the closest connection between the contract and the competent jurisdiction, i.e., generally speaking, the main place of delivery which, according to the Court, should be fixed depending on economic criteria.** It is only if it is impossible to fix the main place of delivery that the claimant can take legal action against the Defendant before the court of the place of delivery of his choice.

Through this interpretation, the ECJ has, from a legal point of view, clarified the competency *ratione loci* if several places of delivery are involved, but has brought up new practical issues with regard to the determination of the main place of delivery, without specifying the definition of the economic criteria to be accepted.

➤ Community legislative news

- Coming into force of the new European regulation on chemicals: EC Regulation n°1907/2006 of the European Parliament and Council dated 18 December 2006

The new European regulation on chemicals, REACH (Registration, Evaluation, Authorisation and Restrictions of Chemicals) became effective on 1st June 2007.

REACH legislation provides for the registration, over a period of 11 years as from 1st June 2008, of approximately 30,000 chemical substances manufactured or imported into the European Union in quantities of more than one tonne per year. Manufacturers and importers should provide the European Chemicals Agency (ECHA) with a technical file (properties, uses and precautions of use) for its database, as well as a report, for chemicals manufactured or imported in quantities of more than 10 tonnes per year, on the chemical safety (risks, exposure scenarios and risk management measures).

REACH regulation also provides for a system of prior authorisation from the Commission for the use of substances of “very high concern” (CMR 1&2, PBT, vPvB3...). Requests for authorisation should include an analysis of alternative substances and a substitution plan, where suitable alternatives exist. The authorisation will be granted if the risks can be appropriately managed or, if this is not possible and if no safer alternative exists, if the socio-economic advantages exceed the risks.

The daily management of REACH is administered by the new European Chemicals Agency (ECHA) which started its activities in Helsinki on 1st June 2007. The ECHA has launched a website, <http://echa.europa.eu>, giving general information on REACH. From 1st June 2008, this website will also be offering an interface for the on-line registration of chemicals concerned by REACH.

- Law applicable to non-contractual obligations: adoption of the Rome II Regulation: EC Regulation n°864/2007 of 11 July 2007, JOUE 31 July 2007

On 11 July 2007, the European Parliament and the Council adopted the Regulation on the law applicable to non-contractual obligations, referred to as “Rome II”. This Regulation falls within the **objective to develop a “space for freedom, safety and justice”** and thus completes the EC legislation existing in the field of judicial cooperation in civil matters.

The Rome II Regulation applies to **non-contractual obligations in civil and commercial matters**. Are more especially excluded from its field of application, tax, customs and administrative matters as well as the non-contractual obligations relating to law of persons, family or company law.

The Rome II Regulation concerns **any conflict arising out of a tort, unjust enrichment, business management or a pre-contractual obligation**.

Article 4 paragraph 1 of the Regulation provides for the principle of “*lex loci damni*”: the law applicable to a non-contractual obligation arising out of a tort is that of the country in which the damage arose, irrespective of the country where the damage generating event occurred and irrespective of the country where the indirect consequences of this tort occur.

However, this principle includes an exception and a dispensation.

The exception to this principle is provided for in paragraph 2 of article 4 of the Regulation when the person claimed to be liable and the person suffering from the damage have their usual residence in the same country on the date of occurrence of the damage: in this case it is the law of this country that applies.

As for the dispensation, provision is made in paragraph 3 of the above article 4, if it results from all of the circumstances that the tort presents “links that are evidently closer” with another country: in this case it is the law of this country that applies.

In matters of pre-contractual obligations, article 12 of the Regulation provides that the law applicable to a non-contractual obligation resulting from negotiations carried out before the conclusion of the contract, whether the contract is effectively concluded or not, is **the law that applies to the contract or would have applied if the contract had been concluded**. Otherwise, the applicable law will be determined according to the rules of article 4 mentioned above.

Finally, article 14 of the Regulation gives to the parties the possibility of choosing the law applicable to the non-contractual obligation binding them.

It should be noted that the Rome II Regulation will become effective on 11 July 2009 and will apply to the sole torts arising after that date.

Commercial Law

➤ **Competent jurisdiction in matters of exclusive agency agreement: Cour de Cassation, 1st Chambre Civile, 23 January 2007 - Waeco International GmbH vs Cardon et al.**

In 2000, several French dealers had signed a framework franchise agreement with a German licensor, under which the exclusivity was granted to them for the distribution of certain products throughout the territory of France. Complaining of the breach of business relations by the German licensor, the dealers issued a writ against the latter in 2002, before the Commercial Court of Cannes, so as to obtain rescission of the framework contract and compensation for their prejudice. The licensor then put in a plea of lack of jurisdiction of the French courts.

The Commercial Court of Cannes and the Court of Appeal of Aix-en-Provence successively dismissed the plea of lack of jurisdiction on the grounds that the relations between the licensor and the dealers consisted in the sale of goods delivered in France and the provision of services (concession and exclusivity) performed in France. Therefore, in application of article 5.1.b of the Community Regulation n°44/01 of 22 December 2001 on jurisdiction and the execution of decisions in civil and commercial matters, an action could be brought against the licensor in France, where the goods were delivered and the services performed.

The Cour de Cassation annulled this analysis. First of all it reminded that the exclusive framework agency agreement is not a contract of sale or performance of services, which excludes the application of article 5.1.b of the above Regulation. The Court considers that application should be made of article 5.1.a of the **Regulation**, which designates as competent “*the court of the place where the obligation serving as basis for the demand has been or should be executed*” relating to contracts for which the **Regulation does not fix in advance the place of execution**. Now, this place of execution should be determined pursuant to the law applicable to the contract.

In application of the **Rome Convention** of 19 June 1980 on the law applicable to contractual obligations, the competent law – fault of being the express choice of the parties – is presumed to be **that of the country where the establishment to perform the specific service is situated**, i.e., in this case, Germany, the country of the licensor’s establishment granting the exclusivity. The Cour de Cassation therefore requested that, in accordance with German law, should be sought “*the place where the obligation serving as basis for the demand has been or should be executed*”.

This ruling, fully in compliance with present case law relating to exclusive agency agreements, has the merits of clearing setting the method for determining the competent jurisdiction, by making a joint application of Regulation n°44/01 and the Rome Convention.

Tax Law

➤ Dividends distributed to a European parent company

In the decision known as “Denkavit” of 14 December 2006, the European Court judged that any national legislation granting **a different tax treatment to dividends distributed by a subsidiary** depending on the State where the parent company is situated (same State as the subsidiary or another Member State) is **an unjustified impediment to the principle of freedom of establishment within the European Union**.

Taking note of this decision, French Tax Authorities now admit that **if there is no artificial arrangement**, the dividends distributed by a French subsidiary to company located in a member state of the EU or established in Island or Norway and holding **at least 5%** of the share capital of the subsidiary will be exempted from French withholding when not subject to corporate income tax in the parent company’s State.

Indeed, under such circumstances the withholding tax cannot be deducted from the corporate income tax and the parent companies find themselves in a less favourable position than parent companies established in France and benefiting from tax exemption.

We should also like to remind you that in application of a European Directive of 1990 transposed into French law since 1st January 2007, withholding tax on dividends are no longer applicable within the EU for shareholdings of **more than 15%** (rate reduced to 10% from 1st January 2009).

- **Repression of international tax evasion: profits coming from companies established in a country with a privileged tax system: article 209 B of the General Tax Code (“GTC”)**

The Finance law for 2005 deeply changed the system contained in article 209 B of the GTC.

French Tax Authorities have just eased the taxation on long term capital gains applicable mainly to the sale of shares and patents. Henceforth, the net capital gains achieved by the entity established abroad will be taxable, not at the normal rate of 33.33% but in accordance with a prorata between the reduced rate (19%) and the normal rate.

- **Sale of shares of real estate companies: exemption from capital gains tax on the shares of a company owning a partner’s principal dwelling place**

The sale by a natural person of shares of a company whose main assets are real estate either comes under the system of capital gains on securities or the system of real estate capital gain, depending on whether the company’s registered office is in the EU or in France.

However, since 1st June 2004, capital gains on the sale of shares of a real estate company are exempted from income tax when the building is occupied free of charge by a shareholder and is his principal dwelling place.

French tax authorities stipulated that this exemption will only concern the portion of capital gain determined according to the value of the accommodation occupied by the shareholder compared with the global value of the company’s assets.

Real Estate Law

- **Contestability limited to non-registered leases of more than 12 years (Cour de Cassation – 3rd Chambre Civile – 7 March 2007)**

The registration of leases covering more than twelve years is a compulsory formality provided for by articles 742 of the General Tax Code, 28 and 33 of the decree of 4 January 1955.

This formality is regulated by a time limit: property leases limited to more twelve years should undergo the registration formality within a period of three months from their date of conclusion (article 33 of the decree n°55-22 of 4 January 1955).

The purpose of this lease registration is to make the lease opposable to third parties, in particular to the buyer of a building should it be put up for sale.

However, it should be reminded that registration at the mortgage office is not the only way of making a deed opposable. The law (sections 1743 and 1328 of the Civil Code) stipulates that a

deed also becomes opposable to third parties when it is drawn up by a solicitor or acquires an exact date, i.e. the date of registration of the deed, the day of the death of one of the parties having signed it or the day on which it was transcribed in a deed drawn up by a public official. Furthermore, since 1976 case law has accepted that the knowledge of a lease before the date of the sale or auction makes the lease opposable to the buyer.

In its ruling of 7 March 2007, the Cour de Cassation has eased its previous case law by declaring that a lease of more than twelve years that has not been registered is opposable to the buyer of the rented property for the period not exceeding twelve years, if such buyer was aware of it before the sale.

Thus, from its thirteenth year, the lease would no longer be opposable to the buyer who would then be free to evict the tenant.

This case law is not unanimously approved by the practitioners and the doctrine. In practice, it is difficult to imagine how this solution could be applied since it does not correspond with market practices.

Litigation

➤ **Mandatory prohibition to appeal in matters of international arbitration: Cour de Cassation, 1st Chambre Civile, 13 March 2007 - Chefaro International BV vs Barrère**

A trademark licensing agreement entered into on one hand by a French licensor and a Swiss licensor and on the other hand a Dutch licensee, provided for an arbitration clause according to which *“the parties expressly declare that they entrust the court of arbitration with the mission to come to an amicable arrangement, without for all that waiving the right to lodge an appeal against the arbitration award to be made.”*

On the basis of this clause, the Dutch licensee instituted an action for the cancellation of the arbitration award, which was dismissed by the Cour de Cassation, confirming the decision of the Court of Appeal of Paris on this point.

The Cour de Cassation first confirmed the qualification of international arbitration, considering that this arbitration *“questioned certain interests of international trade»* considering the rights and obligations of the agreement, its place of execution and the cross-border payment of the fees.

As a result of this qualification, the Court implemented article 1504 of the New Code of Civil Proceedings excluding the appeal for a partial reversal of a decision in international matters, without allowing the parties to go against it.

Due to the autonomous character of the arbitration clause, the Court considered that **only the stipulation relating to the appeal should be deemed not written, without the validity of the arbitration clause being affected in its principle** and this, even though the parties had made of the possibility of lodging an appeal a determining condition of their will to resort to arbitration.

➤ **International arbitration award et exequatur: Cour de Cassation, 1st Chambre Civile, 29 June 2007, n°06-13.293 - PT Putrabali Adyamulia vs Rena Holding**

An Indonesian company had sold goods to a French company. Following the loss of these goods during transport and the French company's refusal to pay the price, the Indonesian seller referred the matter to the English Court of Arbitration, in accordance with the arbitration clause contained in the contract of sale.

The Court of Arbitration judged that the French company was founded in refusing to pay the price. This award was cancelled by the *High Court of Justice* of London, following an appeal lodged by the Indonesian company in accordance with the applicable arbitration regulation.

The Court of Arbitration to which the case was again submitted, sentenced the French buyer who requested the President of the Tribunal de Grande Instance of Paris the exequatur of the first arbitration award, which he obtained.

In an appeal before the French Cour de Cassation, the Indonesian company contested:

- on one hand, the exequatur of the first award due to its cancellation,
- and on the other hand, the refusal of exequatur of the second award it had personally requested.

The Cour de Cassation dismissed the appeal on the following grounds:

- o with regard to the first point:
 - the regularity of an international arbitration award should be examined in relation to the rules applicable in the country where its acknowledgement and its execution are requested, in this case, in France;
 - no provision of French law on international arbitration puts forward the cancellation of an award in its country of origin as ground for refusal of acknowledgement and exequatur.
- o with regard to the second point:
 - the exequatur of the first award having been granted, the exequatur of the second award could no longer be requested insofar as it was based on an identity of purpose.

This decision, in compliance with the French legal and procedural rules on exequatur, may however seem arguable from a loyal procedural point of view, point that was brought up by the Indonesian company but which was not examined by the Cour de Cassation.