



La Revue

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Hammonds Hausmann Legal Newsletter

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EDITORIAL

FRANCE: THE DECLINE OF THE JUPITERIAN MODEL

(The Monarch, the Bureaucrat and Kristin Scott Thomas)

France and the law? On the one hand there is the old love story, with prestigious legislators, famous lawyers, the Declaration of the Rights of Man, much admired codes, a passion for public law, constitutions neatly succeeding one another.

On the other, let's not delude ourselves, Chamfort (an 18th century French philosopher) turns the clock back with a single deadly phrase: he reminds us that, in contrast to the English, the French do admire authority but they despise the law.

Paradoxically, a sign that the French are subject to what could be coined as a certain "decline in the law" is the relentless pursuit of normative inflation, recently denounced in the annual report of the "Conseil d'Etat" (the highest French administrative law court).

We all learnt at university that "too many laws kills the law" (this multiplication becomes a source of uncertainty and legal complexity). Yet nothing can stop certain legislators from what is in effect, "*permanent legislative strobe lighting*".

By way of example, the "Conseil d'Etat" noted in its last report that work time has been amended by 8 laws or orders in less than 12 months; the tax reduction regime for grants to charities has been modified on average twice a year between 2000 and 2005; and that 6 laws have been passed in 3 years on the subject of apprenticeships.

To fully loop the loop, one needs to bear in mind the existence of the law of 9 December 2004 "*to simplify the law*".... Kafka, Borgès? It's up to you!

A recent illustration related to the new French insolvency law (dated 26 July 2005) demonstrates this legal loss of direction. The economic daily "La Tribune" issued on 27 April, announced the opening of 125 protection procedures, during the first trimester of 2006. The French Minister of Justice stated in relation to this (in what was, I imagine, a rather smug tone): "*Such figures are very revealing as to the immediate nature of the awareness of interest in reform throughout the whole country, by courts of all sizes*".

Sad jargon, sad reports; bureaucrats and the media agenda dictating their own laws...

Turning to the bigger picture, and the current crisis which hit the country last autumn (rioting in the suburbs), and this spring (student demonstrations against the "*contrat première embauche*" or "*first employment contract*"), many foreign observers and journalists made relevant and accurate comments about a dangerous accumulation of:

- Economic structural crisis (lack of flexibility and accumulation of selfish protected interests);
- Crisis of identity (the French Republic's trinity 'liberty, equality, fraternity' no longer has the magic totemic effect it used to enjoy);
- Crisis of authority and decline of cultural values;
- Difficult integration of cultural minorities within the French society etc.

I suppose one can argue that this global "malaise" is not uniquely French but also applies to other European countries.

However, at the core of this turmoil it seems to me that there is a simple structural explanation, which has to do with the issue of law (law and the French society), which has been overlooked.

Historically the French trump cards have always been the State, the administration and public order. France is, and has always been, a monarchy (whether you call the monarch a king, an emperor or a president).

The French social model (legal, political, economical) is "Jupiterian" (i.e. from top to bottom), by contrast to a horizontal decentralized "Mercurian" model championed in the majority of other western countries.

The French pyramidal system becomes an oddity in a global modern refeudalized world. and France was not prepared for the globalisation wave (or Tsunami !).

The future is simple; there is no alternative but to adapt and to re-invent a new social contract.

The good news is that a large and growing minority (an optimist might go as far as calling it a majority) of French people are now aware of this social deadlock and understand that they can no longer indulge in pipe dreams and the generosity of an expiring welfare state.

The French would probably be prepared to undertake the necessary reforms. The difficulty will be to find and elect a sufficiently brave, inspiring and credible leader and government who would undertake such an in-depth transformation of the country.

In the meantime, while waiting for the "big bang" to occur, foreign and other European models can help France.

Right at the top of the pyramid of norms, a very important judgment from the European Court of Justice of the European Communities has recently been handed down in relation to international insolvency law (Eurofood IFSC Ltd, 2 May 2006).

It concerns the interpretation of certain provisions of Regulation 1346/ 2000 on Insolvency Proceedings. This Regulation allows insolvency proceedings to be opened in a forum which is not necessarily the debtor's registered office, as long as it is the debtor's "*centre of main interests*" (the latter not being necessarily the same as the former).

The Court clarifies the concept of "*centre of main interests*" and confirms that recognition of judgements delivered by the courts of the member states should be based on the principle of mutual trust.

This decision is particularly dear to us because it marks the end of a three-year legal battle led by the firm (the Paris office together with our Leeds Finance Law colleagues) in favour of applying the Regulation (against the restrictive interpretation of a French Public Prosecutor), and which has given rise to two very publicised judgments by the Court of Appeal of Versailles (Isa-Daisytek case, 4 September 2003, and Rover case, 15 December 2006). The decision of the Cour de Cassation (the highest French civil law court) in the Isa-Daisytek case is expected in June 2006.

This ECJ judgment should help to limit doctrinal arguments and allow for construction of a trans-national jurisprudential definition of the "*centre of principal interests*". However this will take time and we will unfortunately not be able to avoid a certain degree of legal uncertainty.

With regard to the "decline in the law" (without going as far as the law of decline) I shall once again turn to Chamfort for the final word:

"It's a well-known fact that at the time when Mr de Guibert was named Governor of Invalides [a famous military hospital in Paris], they found 600 alleged soldiers who were hardly injured and who, nearly all, had never taken part in any siege or battle, but who managed to be there by way of recompense, having been coachmen or footmen of lords or influential people".

That was 250 years ago. That was under the "Ancien régime" – at least five constitutions and as many Republics ago. Nonetheless, facts are stubborn and good habits die-hard. Could there be a French curse of governance?!

I do not want to conclude on such a sad note; at the end of the day the proof of the pudding (or the brioche) is in the eating (or the drinking); a country which remains the fifth economic power, a country which produces "Petrus" and "Romanée Conti", and a country in which Kristin Scott Thomas has elected residence for some 26 years cannot have it all wrong....!

Antoine ADELINÉ

OFFICE LIFE

■ HAMMONDS NEWS

- ✚ **Antoine ADELINÉ, Frédéric SAFFROY, Ariane DOSSIER** and **Ryan TOOLEY** recently hosted a group from the Boston University MBA course. They made a presentation to the students on doing business in France.
- ✚ European Legal Experts 2006 and Practical Law recommended **Jean-Marc SAINSARD** as a labour law specialist in France.
- ✚ **Antoine ADELINÉ** and **John ALDERTON** (Hammonds, Leeds) co-authored an article entitled "*EU Regulation on Insolvency Proceedings: Streamlining Cross-Border Insolvency? The Contrasting Approaches of the Courts in England and France*", which appeared in the review *International Corporate Rescue* (Kluwer), Vol. X, Issue X.
- ✚ Corporate partner **Philippe de SAINT-BAUZEL** recently took part in a business programme on French TV channel *Direct 8*. He was among journalists and civil servants commenting on new legal provisions passed by the French Budget Minister on the subject of pre-completed income tax returns.
- ✚ **Antoine ADELINÉ** passed the CEDR (Centre for Effective Dispute Resolution) exam in London last April. He is very happy, although he commented that it was "*hard work, but a great learning experience*".



MIPIM 2006

As in recent years, various Hammonds European offices were present at the MIPIM conference (*Marché International des Professionnels de l'Immobilier*) from 14 – 17 March, 2006 at the Palais des Festivals in Cannes. Hammonds Hausmann was represented by Christian HAUSMANN and Pierre Le BRETON, who heads up the Construction and Real Estate Department.

Hammonds, had a clear place within the wide range of international real estate projects represented by 74 different countries, notably because of its important activities in the construction and real estate sectors, and in the financing of real estate projects.

The MIPIM is the annual *rendez-vous* of choice for more than 18,000 decision-makers and is an unmissable event for nearly 5,000 investors and end users, including many repeat clients of the firm such as real estate promoters, banks, public investors, construction companies.

This year the MIPIM honoured the expanding hotel and tourist sectors within international real estate.

■ PORTRAIT

AVENUE VELASQUEZ'S FRANCO-GERMAN TEAM

"In England, everything is permitted, except what's prohibited. In Germany, everything is prohibited, except what's permitted. In France, everything is permitted, even what's prohibited. In the USSR, everything is prohibited, even what's permitted."

Winston Churchill

If you think about this quote it proves why our German desk is so important!

Bilateral economic relations are essential for businesses spanning the Rhine, opening a unique opportunity for smaller businesses to market themselves across its banks.

For many years, we have guided our clients through their trans-Rhine business, following in the footsteps of Adenauer and Charles the Great, thanks to a Franco-German team of lawyers skilled in both French and German law. This cultural melange is essential to understanding the positions and mentalities of economic partners beyond the Rhine area.

With the benefit of hindsight, we've learned that it's important for our clients to be able to speak their own language to their lawyers, who can also understand the cultural differences.

We are able to use our privileged relationship with clients to answer their legal and tax concerns. Our Franco-German team is versatile and capable of handling any bilateral business question. For instance, the German Desk handles arbitration and judicial procedures, overseas creation of groups of companies, operates a company secretarial role in both countries, and deals with tax optimisation matters. If necessary, our team can always call upon the support of our offices in Berlin and Munich.

Everyone at our German Desk speaks French, German and English and can give advice in these languages for French, German or European law. It's not unusual to lend a hand to a German client beyond the Rhine, for example, on an acquisition elsewhere in Europe, be it England, Italy or Belgium.

If we may introduce our Paris Franco-German team:

Christian HAUSMANN, our managing partner, leads the team. Having grown up in Germany (Palatinate), he has assimilated the culture of the "Franks" and the "Germans," speaking the language of Goethe and the dialect of the Rhine. He is involved in business acquisitions and in industrial restructuring. He also participates in arbitrations and all forms of alternative dispute resolution, in particular the field of mediation.

Florian LUMMERT holds two German qualifications, is a Rechtsanwalt and is admitted to the bars of Düsseldorf and Paris. His double qualification allows him latitude in advising clients on Franco-German relations. Before joining us, Florian worked in various French and German firms, working in particular on mergers and in commercial law.

Camilla CLERE holds a degree from the *Institut Supérieur d'Interprétation et de Traduction* and is the trilingual German Desk assistant, involved in all the team's Franco-German activities. Her German origins and shared French and German culture ensure she is the person to talk to for clients moving into the Franco-German zone.

Claire BENIER has done a training program with the HEC group and holds a degree in German law from the Sorbonne. Claire previously worked in an international business law firm in close contact with that firm's Düsseldorf office, where she was assigned before joining the Corporate Finance team (M&A, Private Equity) at Hammonds Hausmann. Her understanding of the economic context means she is a port of call for German companies assessing French operations.

Ariane DOSSIER works in the CDR and Arbitration department. She studied in Marburg and has worked at Daimler Benz Aerospace in Munich as well as at a Marburg law firm. Thanks to her familiarity with French and German law and her degree from the *Institut Supérieur d'Interprétation et de Traduction* in German and in English, she is in a position to understand and to defend the interests of German companies installed in France and the interests of French companies in Germany before the French courts.

Guillaume TAILLANDIER learned about German legal culture during a six-month spell at the University of Saarland in Saarbrücken. Here at Avenue Velasquez, Guillaume divides his time between the Corporate Department, participating in mergers and business restructuring for the Franco-German group, and the Commercial & IP Department, notably in the area of distribution law. However, Guillaume's particular specialisation is national and European competition and labour law, for which he works closely with our Brussels office and German competition law team.

COMMERCIAL DISPUTE RESOLUTION

Antoine Adeline

Commercial litigation in France

(Everything you always wanted to know about....)

1 - Who?

- Lawyers: there is no split profession and 'French avocats' undertake the advocacy;
- Judges: lay judges before commercial courts and employment tribunals; professional judges (civil servants) before civil courts and courts of appeal;

2 - How?

- French judges mainly rely on written submissions and evidence;
- There is no disclosure process (each party discloses the evidence it wishes to disclose) ;
- There is no sophisticated system of affidavits or witness statements;
- The trial itself is much shorter than in the UK (only one to two hours for a big commercial case);

3 - Where?

- The first instance courts are either commercial courts (*Tribunal de Commerce*) for commercial disputes or civil courts (*Tribunal d'Instance* or *Tribunal de Grande Instance*) for disputes involving a non-business persons;
- There is a special court for employment disputes (called the *Conseil des Prud'hommes*);
- Appeal is a right granted to every litigant (no leave to appeal required);
- The highest French court for private law is the *Cour de Cassation*. It's a second appeal degree. (It only rules on legal issues and does not re-examine facts);

4 - How much and how long?

- The cost will vary depending on how big and complex the case is. In broad terms it is fair to say that litigating in France is less expensive than it is in the UK or the US;
- There is no system of costs (the loser can get away with token costs payable to the winner);
- There is no equivalent of the English Part 36 offer;
- It takes roughly 12 to 18 months to obtain a first instance judgment and another 18 to 24 months for an appeal judgment;
- Mediation is slowly developing in France as an alternative to litigation, although it is not as developed as in the UK. At Hammonds Hausmann we are trying to develop it.

One last piece of advice. Whenever you're contemplating or facing litigation in France, or involved in a dispute where one of the parties is French, do give the Paris CDR people a call for preliminary advice - it's quick and can save you a lot of time and money!

COMPETITION LAW

Guillaume Taillandier

The French Competition Council intends to be more lenient

Five years after the introduction into French law of a leniency scheme directed at encouraging companies that have taken part in anti-competitive practices to end and denounce those practices, the Competition Council has, for the first time, applied the scheme to a cartel (Decision 06-D-09 of 11th April 2006). On the very same day, the Council issued guidelines in which it clarified the procedure as well as the benefits that repenting companies can expect from the scheme.

The leniency scheme accords a total or partial exoneration from pecuniary sanctions incurred by companies or entities participating in vertical (for example, among manufacturers and distributors) or horizontal (among competitors) collusion to set prices, to establish production or sales quotas, or to organize a repartition of the market. This exoneration is available whether collusion has occurred at local, national or European level. Since 2002, the maximum sanction under French competition law has increased to 10% of the company's highest worldwide gross turnover during the period in which the collusive practices took place.

The Council's guidelines are intended to provide real guidance and to offer companies a guarantee of relative uniformity in relation to the application of the leniency procedures with European Commission practice, thereby providing a certain degree of judicial security.

The Council has confirmed that it will grant a total exoneration from pecuniary sanctions incurred by any company that demands leniency and satisfies the following conditions: (1) the company commits itself to cooperate fully with the DGCCRF's¹ agents during investigations; (2) it has not put pressure on other companies to participate in the infractions; (3) it has not informed other companies of its leniency request; and (4) it commits itself to ceasing, without delay, its participation in illegal practices or at least suspending those practices until the leniency decision is rendered. In this regard, the Council seems to display more pragmatism than the European Commission by accepting a company's continued participation in the collusive practices in order to maintain confidentiality and to preserve the effectiveness of the inquiry. It should be noted that companies that have actively participated in collusive practices through the use of pressure cannot benefit from the leniency scheme.

In addition, in order for the repenting company to obtain a total exoneration from sanctions, neither the Council nor the DGCCRF should already hold information about the practices in question, unless that information is insufficient to implicate the company.

If it is only possible to grant total immunity from sanction to the first company denouncing the collusion, the Council can always permit partial exonerations to any and all other companies that provide the Council with additional elements of proof that add significant value to the information already acquired. Even if only in principle, the reduction of the fine (calculated by virtue of the date and the company's rank in the order of leniency requests presented) cannot exceed 50% of the amount of the sanction that would have been imposed upon this company if it had not benefited from leniency. However, the Council has retained the ability to grant more substantial immunity from fines.

The Council has received fewer than 20 leniency requests since 2002 and the majority of these requests have been received from subsidiaries of American companies. A certain number of questions remain among companies that are considering presenting a leniency request, in particular the increasing demands of consumer associations seeking damages collectively. The companies have a legitimate fear that victims (consumers or other competitors) may use their cooperation with competition authorities in relation to the leniency program to subsequently seek damages through the civil courts. The Council makes it clear in its statement that total or partial exoneration from pecuniary sanctions does not insulate a company from civil consequences arising from its participation in collusion. However, the Council wanted to send companies a strong signal by committing itself, as much as possible, to the confidentiality of the process (subject to the Council's obligations, notably in regard to the European competition network) and by not turning cases over to the prosecutor's office, which is authorised by the Commercial Code, if at the time of

¹ Direction générale de la concurrence, de la consommation et de la répression des fraudes

the inquiry, it appears that a physical person from the company (a director for example) has repented from having actively participated in putting the incriminating practices into action.

All that remains, is for the DGCCRF to convince companies, for whom providing this kind of information has not yet necessarily become standard practice, to make use of this leniency instrument.

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CONTRACTS

Antoine Adeline, Sian Lewis and Claudia Pickering

The Notion of Contractual Good Faith: Perspectives from Comparative Law

French Law

In French Law, despite the fact that Articles 1134 and 1135 of the Civil Code specify that agreements must be executed in good faith, it is difficult to grasp precisely what is meant by, and the scope of the notion of good faith and contractual loyalty.

Good faith in the execution of the contract is classically defined as the expression of the duty of loyalty by each co-contractor so as not to offend the confidence that gave rise to the contract. The parties must act towards one another with loyalty, without fraud or malice.

Professor Le Tourneau reminds us that "*this disposition, by its form, seems to be a general maxim of law, of ethical inspiration, long dormant but rich in potential.*" Professor Cadiet specifies that "*from the legal demand of good faith, jurisprudence has inferred a duty of loyalty in execution of contracts.*"

Some authors consider that, besides the duty to cooperate placed upon the parties to facilitate the execution of the contract, a duty of transparency and of contractual honesty exists in those agreements where the "*affectio contractus*" is strong.

In theory, contractual loyalty can come in a multitude of agreements:

- Vigilance and the duty to be active;
- Fidelity to the spirit of the agreement;
- Respecting the interests of partners, proportionality and equilibrium.

Ideally, a contract motivated by the ideal of good faith ought to be just, that's to say that there exists an equilibrium where each of the parties obtains a comparable advantage.

Yet in practice, it is with difficulty that we are able to defend the idea that contractual good faith constitutes a linchpin of French contract law. Along with contractual equilibrium, good faith acts in certain situations as a "*moderating element*," a valve of commutative justice or of "*contractual solidarity*."

At its core, the theory is a matter of agreement formation, based upon consensual agreement, which itself is founded upon the theory of the autonomy of will.

The axiomatic principle of the obligatory force of agreements (*Pacta sunt servanda*) is responsible for the principle of contractual security, a cornerstone of contract law that makes extensive application of good faith and contractual equilibrium difficult, not to say impossible.

We know that judges, confronted with flagrant abuses, have recourse to "*creative interpretations*" or to the discovery of "*contractual consequences*," for example, based upon Article 1135 of the French Civil Code (like the duty of security or information).

Moreover, there are specific equitable rules, such as the well-known case of "*lésion*" (a very specific type of recourse), the notion of proportionality in matters of security guarantees, certain abusive clauses sanctionable by the Consumption Code, the abuse of economic dependency and a few other means of jurisprudential contract annulment when the *cause* is judged to be profoundly imbalanced.

Finally it appears that recent decisions of the Cour de Cassation (Commercial Chamber on 3 November 1992 and 24 November 1998) and the Second Civil Chamber from 17 Mars 2004 seem to impose a duty to renegotiate contracts that have become profoundly imbalanced in the course of their execution due to a change in circumstances.

It is best to approach these decisions in a prudent manner. A respected commentary from Professor Ghestin published in the Dalloz review in September 2004 confirms the view backed in last summer's La Revue, i.e. that the theory of unpredictability rests upon the principle of *persona non grata* in private law.

English Law

In the same way as French law, English law does not set out good faith as an essential condition for the conclusion of a contract.

Yet in a general way the doctrine of equity is a tool by which legislators can protect the weaker party in contractual relations.

In interpreting agreements, English law favours literal interpretation over examining the psychology and the real intentions of the parties (French methodology).

Also, unlike in French law, liability (pre-contractual) for ending negotiations in an abusive manner is rarely encountered in England. This makes sense because parties who make commercial contracts are supposed to be conscious of the risks involved.

However good faith recourse is available for contract resolution in the case of inexecution of an agreement, or when a co-contractor refuses to divulge important information about his or her co-contractor.

A good faith notion does exist in certain types of contracts, notably in Trust Law. In the context of a trust, the agent must act with good faith towards the principal. The Trustees Act of 1925 s.23(1) specifies that so long as the trustee acts in good faith, he cannot be held responsible for the subsequent losses from the agent's assignment.

The Unfair Contract Terms Act of 1977 and the Marine Insurance Act of 1906 also both make reference to good faith.

The notion of good faith appears again when a party invokes the principle of equity. The old English maxim is that "*he who comes to equity must come with clean hands*", applying the old Roman adage of *nemo auditur*.

Finally, the UK has introduced good faith principle laws implementing European directives:

- Directive 86/653/EEC of 18 December 1986 on self-employed commercial agents,
- Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Looking to the future, in 1999 the Law Commission announced the possible creation of an English commercial code. If this project is ever realised, it is possible to foresee the inclusion of clear and general provisions relating to good faith.

German Law

German law sets out the superior ethical principle of *treu und glauben* ("sincerity and faith"). This principle applies both to the execution and to the formation of the contract.

Paragraph § 242 of the German Civil Code (BGB) establishes the obligation to execute contracts in good faith.

According to paragraph § 157, contract interpretation should be made in light of good faith.

Furthermore, paragraph § 138 considers null "*any legal act contrary to accepted standards of good behaviour. Also null is any legal act by which a person exploits the neediness, the weakness or the inexperience of another to get that person to promise or agree to confer upon him or a third person, in exchange for what is given, proprietary interests that exceed the value of what is given to such a degree these proprietary interests are shockingly disproportionate to what is given.*"

The principal of *treu und glauben* is equally found in certain special contracts, but German judges have a tendency to apply the fundamental paragraphs of § 242 directly.

However, in practice, German judges cannot judge in equity using § 242. This paragraph does not constitute a legal basis upon which to act nor does it have direct legal effect.

For almost a century now, the jurisprudence has attempted to define the function of paragraph § 242. This paragraph notably permits the completion, limitation, and concretisation of existing agreements. In addition, the text served a “correcting function” in unforeseeable matters before being codified in 2002 (§ 313).

In German law, the principal of good faith does not therefore constitute, a general autonomous legal basis.

And looking to the future?

After shedding light on these recent developments, we can understand the difficulties awaiting the drafters of an eventual “Eurocode” (a Civil Code or a European Contract Code) that may one day be in the works.

Just by taking the example of good faith, we can see that it is a single concept with a multitude of interpretations across different legal systems.

Opponents to European codification of the law of obligations justifiably maintain that each phrase recorded in a semantic and semiotic network can only be accessed from the inside by those who speak the same language at the same time and place.

Indeed the debate that raged between supporters (for example M. Von Bar) and the opponents (including Professor Lequette) of such codification is reminiscent of a famous Franco-German legal controversy between Savigny and Thibait (in favour of codifying the civil law). That was in 1812!

FOREIGN INVESTMENTS

Aurélie Musset

French Protectionism from Brussels' Perspective

The décret n° 2005-1739 of 30 December (corrections published in the Official Journal on 4 January 2006)

Highly anticipated for several months, an “anti-takeover” *décret* (a French executive decision taken by either the President or the Prime Minister) was published on 30 December 2005.

Following rumour of a takeover of Danone by an American company, the French Economy Minister announced the publication of a *décret* allowing French authorities to control foreign investments that are carried out in France.

From now on, the Economy Minister can ask for certain guarantees from foreign investors wanting to takeover French companies in “sensitive” sectors.

The *décret* aims to apply the provisions of the Finance and Monetary Code, requiring authorisation of the Economy Minister for foreign investments in France that, even occasionally, involve public activities or varied areas such as:

- Activities which threaten the public order, public security or national defence;
- Activities involving research, production, or sales of arms, munitions, explosive powders or substances.

The *décret* defines the nature of the protected activities and the conditions in which authorisation would be granted by the Economy Minister.

A Streamlined Authorisation Regime for European Businesses

The new *décret* allows for different treatment for EU countries and non-EU countries, the EU countries benefiting from streamlined authorisation procedures.

The *décret* specifically defines the notion of an investment, which is more widely defined for non-EU countries.

The following will be considered as an “investment”:

- any takeover of a company headquartered in France,

- the direct or indirect acquisition of all or part of a branch of a company headquartered in France; and
- crossing a 33.33% threshold of direct or indirect stock holdings or voting rights of a company headquartered in France.

These different types of investment must have pre-authorisation if they are made by individuals who are non-French nationals, or by companies headquartered outside of France or by a French national, resident outside of France, in the domains listed in the *décret*.

11 sectors involving defence and gambling are listed. It was the initial aim of the French authorities to include other areas, in addition to defence and gambling.

The sectors concerned and deemed sensitive are:

- Gambling,
- Private security activities,
- Research, development, and production activities in relation to methods with potential illegal uses for terrorist activities, pathogen or toxic agents and/or the clean up consequences of such methods,
- Communication interception equipment and listening devices,
- Information technology systems,
- Computer security,
- Goods and technologies with dual uses (civil and military),
- Cryptology and any industry supplying the Defence Ministry,
- Activities exercised by depository companies of national secrets,
- Research, development, and production or commercial activities involving arms, munitions, powders and explosive substances for military ends,
- Activities carried out by companies who have concluded a research contract or an equipment supply contract for profit with the Ministry of Defence.

Conversely, an "investment", where other EU Member States are concerned, only involves the takeover of a French company or the direct or indirect acquisition of a branch of a French company. Thus, a European company wishing to make foreign investment in France does not have to seek pre-authorisation of the Economy Minister in the event that its direct or indirect holdings, or its voting rights in a French company cross the 33,33% threshold.

However the *décret* states that European investments must have pre-authorisation when the activity concerned involves cryptology or a company possessing national defence secrets, or if the activity involves research, production or commercial activities involving arms, munitions, powders, and activities carried out by companies who have concluded a research contract or equipment supply contract for profit with the Ministry of Defence.

On the other hand, only the direct or indirect acquisition of the whole part of a branch of an activity requires a company to follow the authorisation procedure set out for non-EU countries concerning activities listed in the *décret* - that is all takeovers of a French company exercising the same activities are not required to seek authorisation.

The difference in treatment between EU and non-EU investors have been eased by certain provisions in the *décret* which are applicable to both. For instance, authorisation by the Minister is considered to have been given when companies in the same group make the investment.

Guarantees that the Economy Minister can seek

The authorisation granted can be accompanied by conditions that ensure the projected investment does not threaten national interests.

In any event, such conditions are fixed so as to respect the principle of proportionality.

The Economy Minister can also require an investor to safeguard the continuity of its activities, industrial capacity, research and development, or the maintenance of a steady level of supply to the French company.

Sanctions

If the Economy Minister believes that a foreign investment is or was made without taking the above mentioned rules into account, he has the power to enjoin the investor from further pursuing the operation, to modify it, or to remedy the situation at its own cost.

This injunction can only take place 15 days from formal notice of the Minister's observations being given to the investor.

If the injunction is ignored, the Economy Minister, after allowing the investor to offer his own interpretations, without prejudicing the possibility to restore the situation, can impose a sanction, the maximum amount being double the amount of the irregular investment. The amount of the pecuniary sanction must be proportional to the gravity of the non-respect of the rules.

Brussels' Reaction: The Free movement of Capital

It was not long before the EU Commission demanded that France make certain modifications to the *décret* in the name of the free movement of capital. The government amended the *décret* in a correction published in the French Official Journal on 4 January 2006.

According to the EU Commission, the *décret*, as it was initially drafted, created too great a disparity between EU member states and non-members.

The Commission, therefore, demanded that the government include the European Economic Area, allowing Norway, Switzerland, and Lichtenstein to benefit from the relaxed procedure for Member States.

Since then, Brussels has expressed doubts as to the compatibility of the text of the *décret* with EU Law as well as concerns that the scope of *décret* is disproportional to the goal pursued. An infringement procedure was opened at the beginning of April this year, and France now has two months to respond to the Commission.

In Brief: A Look at Other Approaches

European Legislation

Article 296 of the European Communities Treaty provides that the rules governing investments in the defence sector are left to Member States.

National legislation must, however, respect EU law concerning the control of competition and exports.

United Kingdom : There are no specific regulations for foreign investment

Provisions in the Enterprise Act of 2002 relate to the control of mergers

Germany: Pre-declaration required

Law and executive order (*décret*) published 28 July 2004: The list of activities concerned does not cover the arms industry. Thus, the list is less extensive than in France.

The law establishes that the ability to conclude legal acts involving German companies that produce or develop armed weapons, registered cryptology systems, or other arms can be withheld in order to guarantee German security interests.

The acquisition of a German company must be pre-declared, such as the direct or indirect holding of a German company by a foreign company or by a German company where more than 25% of the rights to vote are held by a foreign company, if the direct or indirect share of the vote of the purchaser is going to go beyond a 25% threshold.

France and Italy: Pre-authorisation required

France:

Article L. 151-3 of the Finance and Monetary Code relative to foreign investment in strategic sectors (modified by Article 30 of the law 2004-1243 of 9 December 2004).

Décret n°2005-1739 of 30 December 2005: List of strategic sectors

Italy:

Law of 10 October 1990 relative to merger operations

Law n°474 of 30 July 1994 and the *décret* of the President of the Council of 12 May 1999: the Economy Minister has the power to authorise the acquisition of the capital of companies once the operation concerns more than 5% of the company's capital.

(Source: *Information report of the Assemblée Nationale on the foreign holdings in the European arms industry, n°2202 of 23 March 2005*).

CIVIL PROCEDURE

Gautier de La Rochebrochard and Stéphane Flichy

Regulation (EC) n° 805/2004 instituting a European Enforcement Order

The European Enforcement Order, which has been in force since 21 October 2005, allows recovery of uncontested claims within the European Union at a minimum cost.

Suppose that you hold a claim you would like to execute against someone who lives in another EU country, the European Enforcement Order offers you a procedure through which you can execute a judgment, for example, in France, the country of origin of the claim, in order to obtain payment in the country of residence of the debtor.

The apparent simplicity of this procedure seems tempting, yet it still requires fulfilment of numerous conditions:

1 – Nature of the Claim

Your claim must be of a civil or commercial nature and must not belong to the following excluded categories:

- The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession.
- Bankruptcy, judicial arrangements, and other analogous collective proceedings;
- Social security; or
- Arbitration.

The claim must come from a legal decision obtained against your debtor without being contested on his part, or from a transaction or an authentic legal instrument concluded with him or her.

2 – Certification of the Claim as a European Enforcement Order (Originating Country)

In order for your claim to be executed as a European Enforcement Order, as the claim holder, you must request certification.

The request is made by completing a form annexed to the above-mentioned regulation, which you can find on the Internet at: <http://www.europa.eu.int/eur-lex/>.

This form is presented either in the jurisdiction in which the claim was recognized or, in the case of an authentic instrument, before an authority designated by the country.

Once the EEO is obtained, the decision or its certification will no longer be able to be re-examined in the country of execution.

3 – Debtor's Procedural Guarantees for a Claim Related to a Legal Decision

If your claim is subsequent to a legal decision, the debtor should have been duly informed and summoned to the legal proceedings by the document instituting the proceeding.

This document must state the amount of the debt, the names and addresses of the parties as well as the possibility of interest being claimed.

To guarantee your debtor's rights, this act must provide relevant information about the debt in dispute and contain the legal consequences that could result from the debtor's non-appearance at the proceedings, or his or her choice not to object to the claim.

4 – Execution (Country of Execution)

In order to execute the European Enforcement Order, you should adhere to the execution procedures of the country in which the decision is to be executed.

It is necessary to provide the executing authority with a copy of the legal decision and the notarial deed or settlement agreement, and that you promptly send the certificate of the EEO.

You should complete the certificate of the European Enforcement Order in French and should supply the executing authorities with a translation in the executing country's official language or in another language (if that country accepts multiple languages in its dealings with the European Commission).

The country of execution is not permitted to ask you to pay any deposit.

Only incompatibility with a previously certified decision rendered by the Member State can stand in the way of execution.

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This procedure represents an advance for European legal harmonization, accelerating the debt recovery process in Europe. However, the process still relies on the debtor not contesting his debt or attempting to oppose execution by way of a stalling tactic.

We will certainly be following this legal development closely and watching what happens as the EEO is put into action across the EU.

INTELLECTUAL PROPERTY

Fleur Allain

Protection of scent under French Copyright Law

Court of Appeal of Paris

28 January 2006, *Bellure v L'Oréal et al.*

15 February 2006, *Bellure v Beauté Prestige International*

The Court of Appeal of Paris recently handed down two judgments confirming that scent is protected under French Copyright Law. The claimants in this case, **L'Oréal** and **Beauté Prestige International**, both perfume distributors, brought an action for copyright infringement against the Bellure Company. Allegedly, Bellure initially imitated the packaging, bottles and brand names of famous scents but then branched out into copying the scents themselves.

The claimants said that their scents were being infringed by the defendant's scent.

The defendant argued that a scent could not be protected under Copyright Law since Article L.112-2 of the French Intellectual Property Code only protects works that can be heard or viewed. The defendant claimed that a scent or taste cannot be described objectively and cannot therefore qualify for protection under French law. Moreover, the defendant argued that because a scent is a technical invention it cannot be protected by copyright even if it did have an aesthetic result.

The Court of Appeal of Paris, like the first instance judges, rejected all of the defendant's arguments. It considered that Article L. 112-2 of the French Intellectual Property Code does not provide an exhaustive list of works that can be protected by copyright. It also considered that the ability of a work to be fixed is not a condition for protection under the law. The condition required is that the work is merely perceptible.

After examining the contents of the scents at issue, the Court thought that two points were particularly persuasive. First, it considered that there was a real "effort of creation" by the creator of the scent. Secondly, survey evidence indicated that a majority of women asked thought that the scents were similar. The Court therefore decided that Bellure had infringed the claimants' copyrights.

Bellure Company was ordered to pay 1,380,000 euros in damages.

Though not entirely new, this is an important decision because it confirms that French copyright law may protect scents, flavours, and perhaps even the recipes of famous chefs. This copyright protection will be added to the body of Trademarks, Design and Unfair Competition Law which protects the overall design of the container of a product but not the contents of such a container.

Shannon Yavorsky

French club sports and stock markets

France has been asked by the European Commission to amend legislation preventing football and other club sports from being listed on stock markets. The Commission took the view that this is an unjustified barrier to the free movement of capital and therefore in breach of Article 56 of the EC Treaty. The request took the form of a "reasoned opinion", the second stage of the infringement procedure under Article 226 of the EC Treaty. If a Member State that has received a reasoned opinion fails to give a satisfactory reply within the deadline, typically two months, the Commission may refer the matter to the European Court of Justice.

The infringing French legislation is found in Act No 84-610 of 16 July 1984 on the organisation and promotion of physical and sports activities. Article 13 of that Act states that limited companies in the sports sector shall not raise capital from the public. Professional sports clubs and notably football clubs are thereby prevented from being listed on the stock market. The initial complaint about the Act was lodged with the European Commission in 2002 by eight professional French football clubs.

Admission to stock exchanges and the issue of securities on capital markets are considered movements of capital for the purposes of Article 56 of the EC Treaty. To appreciate the scope of Article 56 one can consult Directive 88/361/EEC (OJ No L178, 8.7.1988, p.5.), which, adopted before the introduction of Article 56, is a useful source for interpretation. Annex I of the Directive contains a list of transactions that are to be considered as capital movements. Rulings of the ECJ have consistently held that restrictions on the movement of capital must:

- be applied in a non-discriminatory manner;
- be required for overriding reasons of general interest;
- be such as to guarantee the achievement of the objective pursued; and
- not go beyond what is necessary to achieve that objective.

According to *Le Monde*, the French minister for sport, Jean-Francois Lamour (a former Olympic fencing champion and the same minister who said that London didn't have the sporting "know-how" to host the 2012 Olympics) reacted by saying that discussions would be taking place to find a solution in line with both EU law and the "specificity of French sport". Mr Lamour is of the view that allowing French clubs to raise capital from the public is not a miracle solution that will secure the economic development of the clubs.

Lamour proposes instead that clubs focus on building and exploiting their stadiums such that their balance sheets do not solely reflect income from media rights. This is of particular relevance in view of the fact that two major channels, Canal + and TPS, are due to merge and thus reduce possible income streams from television rights. It may be that Lamour's stadium proposition will be amenable to the "specificity of French sport" and the Commission. However, in view of the ECJ's decisions on provisions that restrict the movement of capital, it may be that the French Act doesn't have a sporting chance.