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Companies in the process of incorporation: Formality requirements governing the assumption of pre-incorporation contracts are abolished

In three rulings issued on November 29, 2023, published in the Information Bulletin and Annual Report of the *Cour de cassation* (French Supreme Court), the Commercial Chamber of said Court reversed its case law on the requirements governing the assumption of pre-incorporation contracts.

In so doing, the Commercial Chamber wished to put an end to the undesirable effects caused by parties wishing to evade their commitments, which results in the weakening of companies during the start phase of their business activities and of third-party contracting parties who have no debtor to turn to in the event of cancellation of the relevant contract(s).

Commercial companies have legal personality from the date of their registration in the Register of Trade and Companies.

Practically speaking, before a company is incorporated, its founders are required to sign a number of contracts in relation to the future operation of the company. Most common examples include bank account opening agreements, commercial lease agreements and equipment purchase contracts.

The individuals who contracted on behalf of the company in the process of incorporation, before it acquired legal personality, are jointly and severally liable (a creditor may sue any of them to recover the entire debt associated with the relevant contract) and have unlimited liability (all the assets of these individuals, including personal assets, can be used to satisfy the debt associated with the relevant contract).

In order to release the founders of the company in the process of incorporation from this liability, it is necessary for the company, once it has been incorporated and registered, to assume the contracts entered into and the commitments made. These contracts/commitments will then be deemed to have been entered into/made by the company from the outset.

In order for the company to be deemed bound from the outset by the relevant contracts, French case law required that the following cumulative conditions be met.

Requirements for the assumption of pre-incorporation contracts

The parties had to expressly specify in the relevant contracts that they were concluded *"in the name"* or *"on behalf"*, or even *"in the name and on behalf"* of the company in the process of incorporation.

Contracts concluded *"by"* the company, during the pre-incorporation phase, were null and void.

Procedures for the assumption of pre-incorporation contracts

Pre-incorporation contracts were then to be assumed by the company in accordance with the conditions laid down by applicable French regulations, the aim of which is to ensure that the shareholders are informed of the content and consequences of the commitments assumed by the company.

The assumption of pre-incorporation contracts by the company can be formalized by either:

- The signature by the shareholders of the by-laws that include an appendix listing the contract concluded on behalf of the company in the process of incorporation (assumption of contracts concluded prior to the signature of the by-laws);
- A power of attorney given by the shareholders to one of them, either in the by-laws or by separate deed, to enter into specific contracts, the terms and conditions of which must be specified, on behalf of the company in the process of incorporation, (assumption of contract concluded between the signature of the by-laws and the incorporation of the company); or
- A decision of the shareholders, after the incorporation of the company.

Reversal of case law

Three rulings issued on November 29, 2023 by the Commercial Chamber of the *Cour de cassation*^[1] have changed the requirements governing the assumption of pre-incorporation contracts, by giving the lower courts the power to assess, in their full discretion, by examining all the circumstances, both intrinsic and extrinsic to the relevant contract, whether the common intent of the parties was that (i) that the relevant contract should

be concluded in the name or on behalf of the company in the process of incorporation, and (ii) that this company could then, after acquiring legal personality, decide to assume the commitments made thereunder.

In these rulings, despite the fact that the future legal representative of the company in the process of incorporation had signed the pre-incorporation contract without the express particulars previously required by French case law, the common intention of the parties has been established, in particular, by correspondence proving that the contracting third party had been clearly informed before signing the contract that the legal representative was acting on behalf of the company in the process of incorporation (Appeal No. 22-21.623, see foot page 1), and by specific information in the relevant commercial lease agreement (Appeals No. 22-12.865 and No. 22-18.295, see foot page 1).

These decisions demonstrate a desire to increase the judge's power by giving precedence to the common intent of the parties over the formality requirements applicable to pre-incorporation contracts (with the words "in the name of" and/or "on behalf of").

Consequently, it is preferable for company founders and contracting parties to continue to expressly specify in a pre-incorporation contract that it has been concluded "*in the name of*" and/or "*on behalf of*" the company in the process of incorporation, in order to avoid any disputes and uncertainties by submitting to the judge's consideration the existence or the absence of a common intent by the parties that the relevant contract is entered into in the name or on behalf of the company in the process of incorporation, and that the company, once incorporated, may decide to assume the commitments made.

[1] Commercial Chamber of the *Cour de Cassation*, 29/11/2023, [No. 22-21.623](#), [No. 22-12.865](#), [No. 22-18.295](#) (in French only)

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