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Disparagement: Freedom of expression must be further taken into account

In a recent decision, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) has qualified the conditions for the application of disparagement by incorporating the right to freedom of expression in its reasoning.

This case-law development is not neutral for economic players likely to be confronted with situations of disparagement in the conduct of their business operations, particularly in case of unfair competition disputes.

This decision provides an opportunity to revisit the notion of disparagement and its application by French courts in recent years.

1/ Reminder of the concept of disparagement under French law

Disparagement is the act of discrediting a company by spreading malicious information about its products, services, work or person. It gives rise to a right to compensation when the targeted company is designated, expressly or implicitly, or identifiable by its customers.

Disparagement, which constitutes a case of quasi-tort liability, is frequently encountered in disputes concerning unfair competition[1].

This concept is not to be confused with defamation which is defined in Article 29 of the Law of July 29, 1881 on the freedom of the press as follows: "*all claims and allegations of fact which prejudice the honor or the consideration of a person or the body to whom/which it is imputed*".

The *Cour de Cassation* has recalled the distinction between the two concepts in the following terms:

*"assessments, even excessive ones, affecting **the goods or services** of an industrial and commercial company do not fall within the provisions of Article 29 of the Law of July 29, 1881, **provided that they do not affect the honor or consideration of the natural or legal person who operates it**"*[2].

2/ The application of disparagement as a matter of principle by French courts

Until recently, French courts considered that in the presence of statements likely to discredit a third-party, disparagement was established**, regardless of whether the information was accurate or inaccurate**.

Such comments were **as a matter of principle denigrating** and therefore wrong.

This is what the Commercial Chamber of the *Cour de Cassation* ruled in the following cases:

- a company that had sent a letter to distributors informing them that products manufactured by its competitor were not compliant with an EU Directive[3];
- the owner of a patent who had informed the customers of his former licensee that the products marketed by the latter implemented protected inventions and that selling such products entailed a risk of infringement[4];
- a company which had informed the customers of its competitor that a legal action had been brought or was about to be brought against the latter but said action had not given rise to any court decision[5].

3/ Recent case-law development: A more nuanced application of disparagement to further take into account freedom of expression

- ***A case-law development initiated by the First Civil Chamber of the Cour de Cassation***

In a first case adjudicated in July 2018[6], the First Civil Chamber of the *Cour de Cassation* amended its position on disparagement, by nuancing its application as a matter of principle and by taking into account freedom of expression, as defined in Article 10 of the European Convention on Human Rights (hereinafter the "ECHR").

In that specific case, a laboratory manufacturing a vitamin D supplement for babies (called *Uvestérol*) accused a news agency of having published an article on the website of a specialized journal published by it, first entitled "*Uvestérol: a poisoned supplement for your children*", then replaced by "*Uvestérol: a worrying supplement for your children*". The laboratory also criticized the agency for distributing an electronic newsletter to its subscribers entitled "*Uvestérol, a poison for your children*". The laboratory therefore summoned the news agency, seeking in particular compensation for the loss it claimed to have suffered as a result of such disparagement.

The First Civil Chamber of the *Cour de Cassation* overturned the decision of the Court of Appeals. The latter had granted the laboratory's requests on the grounds that it did not matter whether or not the news agency had a sufficient factual basis to express itself.

Relying on Article 10 of the ECHR, the First Civil Chamber of the *Cour de Cassation* set out the conditions under which freedom of expression, which includes the right to freely criticize, could hinder the application of disparagement:

"even in the absence of direct and effective competition between the persons concerned, the disclosure by one of information likely to bring discredit on a product marketed by the other may constitute an act of disparagement; however, where the information in question relates to a ***subject of general interest*** *and is based on a* ***sufficient factual basis****, such disclosure falls within the scope of the* ***right to freedom of expression****, which includes the right to freely criticize, and cannot therefore be regarded as misleading, provided that it is expressed with some moderation".* (emphasis added)

- ***A case-law development confirmed by the Commercial Chamber of the* Cour de Cassation**

In the January 9, 2019[7] decision commented herein, the Commercial Chamber of the *Cour de Cassation*, following the aforementioned position of the First Civil Chamber, qualified its reasoning on the application of disparagement as a matter of principle.

In that case, a manufacturer of garden furniture (hereinafter "Company X") that marketed its products through a commercial agent (hereinafter "Company Y"), had brought an action for infringement of its Community models against an Italian company specialized in the design, manufacture and distribution of garden furniture (hereinafter "Company Z").

Company Z considered that Company Y had organized a smear campaign against it by disclosing the existence of this legal action, which had led several of its customers to withdraw orders. Company Z then sued company Y and sought damages for unfair competition.

The appellate judges found that there was no disparagement because neither the non-objective, excessive or denigrating, or even misleading nature of the information communicated concerning company Z, nor the threatening nature of the comments made with regard to the distributors, which were the only likely characteristics of an unfair process in their view, were established.

Asked to rule on the appeal lodged by Company Z, the Commercial Chamber, relying *inter alia* on Article 10 of the ECHR and using the wording of the First Civil Chamber, set out the conditions under which freedom of expression, which includes the right to freely criticize, could hinder the application of disparagement:

"even in the absence of direct and effective competition between the persons concerned, the disclosure by one of information likely to bring discredit on a product marketed by the other may constitute an act of disparagement, unless the information in question relates to a ***subject of general interest*** *and is based on a* ***sufficient factual basis****, provided that it is expressed with* ***some moderation****".* (emphasis added)

It follows from the two above-mentioned decisions that while disparagement can be characterized even in the absence of a situation of direct and effective competition between the parties, **freedom of expression, including the right to freely criticize**, can hinder its application when the following three conditions are met:

- the disclosure must relate to information relating to a **subject of general interest**;
- this information must rely on a **sufficient factual basis**;
- the disclosure must be expressed **with some moderation**.

This case-law development indisputably opens the way for new developments in the (pre-)litigation debates on disparagement, in particular for the parties involved, who will certainly assert their freedom of expression as a reason for exonerating them from liability.

It will therefore now be up to the judges to **review the proportionality of the infringement of freedom of expression** in order to decide whether disparagement is established.

[1] Article 1240 (formerly 1382) of the French Civil Code on quasi-tort liability

[2] 1st Civil chamber of the Cour de Cassation, September 20, 2012, n°11-20963. Emphasis added

[3] Commercial Chamber of the *Cour of Cassation*, September 24, 2013, n°12-19790

[4] Commercial Chamber of the *Cour of Cassation*, May 27, 2015, n°14-10800

[5] Commercial Chamber of the *Cour de Cassation*, September 20, 2016, n°15-10939

[6] 1st Chamber of the *Cour de Cassation*, July 11, 2018, n°17-21457

[7] Commercial Chamber of the *Cour de Cassation*, January 9, 2019, n°17-18350

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