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Employment contract under foreign law performed and terminated in France: How to manage the conflict of laws?

In a decision dated December 8, 2021, the *Cour de Cassation* (French Supreme Court) confirmed that when the mandatory provisions of French law regarding the termination of an employment contract are more favorable, they apply to employment contracts under foreign law performed in France.

In a judgment handed down on November 27, 2019, the Paris Court of Appeals ruled that an employee who had been working in France for 40 years under a Moroccan law employment contract ought to benefit from French law provisions relating to the mechanism known as "*prise d'acte*" (i.e., theacknowledgment of the contract termination by the employee due to serious breaches by the employer) and the calculation of his termination indemnities.

These findings have been upheld by the *Cour de Cassation*[1]that made a strict application of the Rome Convention of June 19, 1980 on the law applicable to contractual obligations. For contracts entered into after December 17, 1980, the law remains constant in this matter with the entry into force of the Rome I Regulation of June 17, 2008[2]. The decision of *the Cour de cassation* is thus indeed intended to apply to international contracts currently in force.

The Rome Convention and the Rome I Regulation both provide that "*a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice*", the appliable law in the absence of choice meaning the "*the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country or [...] the law of the country in which the place of business through which [the employee] was engaged is situated*".

As such, even if the employer chooses to have the employment contract governed by the law applicable to its place of establishment, this choice cannot deprive the employee of the benefit of the legal, regulatory or collective bargaining agreement provisions applicable in terms of termination at the place of performance of the contract whenever such provisions are favorable.

More precisely, the employee will be entitled to have the termination of his/her employment contract under a "*prise d'acte*" reclassified as a dismissal without real and serious cause if he/she can demonstrate the existence of a sufficiently serious breach by his employer to prevent the continuation of said contract[3].

In the case at hand, Moroccan law applicable to the employment contract provided that said contract could only be terminated as a result of a resignation or dismissal. It also limited the characterization of unfair dismissal to certain faults listed by the Moroccan Labor Code such as "*serious insult, any form of violence or assault against the employee, sexual harassment, incitement to hire…"*. Moroccan law was therefore less favorable than French law, since it did not allow the employee to terminate his/her employment contract under a "*prise d'acte"*.

The same applies to the calculation of indemnities for dismissal without real and serious cause. The employer, applying Moroccan law, deducted from the basis for calculating the indemnities sums withheld from the reference salary for Moroccan income tax purposes. French law, on the other hand, provides that the reference salary must be determined on the basis of the average gross salary calculated over three months, "*without there being any need to add back the sum corresponding to the income tax directly deducted by the employer just like the other contributions*", as per the *Cour de Cassation*. Here again, the system of dismissal indemnities provided for under French law ought to be applied, so as not to deprive the employee of the French provisions that were more favorable for him.

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[1] Labor Chamber of the *Cour de Cassation,* December 8, 2021, No. 20-11.738

[2] Regulation (EC) No. 593/2008

[3] *Labor Chamber of the Cour de Cassation, June 25, 2003, No. 01-42.335*