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Insolvency proceedings, dismissed employees and tort action against a foreign parent company

Foreign parent companies whose French subsidiary is subject to insolvency/bankruptcy proceedings (judicial liquidation or receivership) can in certain instances be sued in tort by the employees of such subsidiary who have been dismissed. This type of claim in tort in the context of insolvency/bankruptcy proceedings is becoming an increasingly common practice in France.

As such, French Labor Courts may order foreign parent companies to pay damages in compensation for the loss suffered by employees dismissed in France as a result of a fault/negligence by such parent companies in the management of their French subsidiary. However, a decision handed down by the *Cour de Cassation* (French Supreme Court) on January 10, 2017 specified that, in the context of international insolvency proceedings, the French judge has not necessarily jurisdiction to adjudicate this type of case.

The commencement of insolvency/bankruptcy proceedings within a group of companies can imply risks for the other group entities, including primarily for the head company.

An employee who has been dismissed by the subsidiary of a group in the framework of insolvency/bankruptcy proceedings (judicial receivership or liquidation) can go to court and try to obtain money (salaries and/or damages) directly from the parent company.

To seek the liability of the parent company, the dismissed employee will typically allege the existence of a co-employment situation. According to an established case-law, this situation is characterized wherever (i) there exists between the parent company and the employees of the subsidiary a relationship of legal subordination, or (ii) there exists between the subsidiary and the parent company an intermingling of interests, activities and management. Under French law, a co-employer has the same obligations and the same responsibilities as the employer. As a result, a parent company that is found to be a co-employer can be ordered jointly with its subsidiary to pay the salaries that are due to the employees of the subsidiary or damages in compensation for the loss suffered by them of a result of their dismissal. The parent company may also even be ordered to reinstate the employees if their dismissal is held null and void, or to finance the lay-off plan implemented by its subsidiary.

However, the criteria that must be satisfied to establish the existence of a co-employment situation are strictly defined by case-law and it is not always easy to prove in practice that such criteria are met.

This is the reason why another way to seek the liability of a parent company has developed, i.e. a tort action – based on Article 1240 (previously Article 1382) of the French Civil Code – against the group's dominant company found to be at fault because it has poorly managed its subsidiary and thus liable for the loss suffered by the employees as a result of their dismissal.

If the dominant company is held liable in tort, it can also be ordered to reimburse to the Employee Wage Guarantee Scheme[1] the sums that the latter has advanced.

Yet, the following must be established: (i) a fault or reprehensible carelessness by the parent company (ii) that was at the origin of the damage, i.e. in the present case the elimination of the employee's position. As examples, parent companies have been found liable in tort in cases where[2]:

- The parent company had imposed on its subsidiary detrimental decisions that exacerbated the latter's difficult economic situation, that were useless and that were only beneficial to the subsidiary's sole shareholder; and
- The decisions of the parent company had contributed to the insolvency of its subsidiary, which resulted in job losses.

It has been established that the parent company had made "*detrimental decisions*" in the following cases:

- The conclusion between the subsidiary and the parent company of an agreement for the transfer, to its own benefit, of trademarks that belonged to its subsidiary, without any cash consideration, which contributed to the deterioration of the financial situation of the subsidiary and, several months later, to the commencement of insolvency proceedings;
- The conclusion between the subsidiary and a company indirectly held by the sole shareholder of a services agreement for the provision of assistance to the management, an agreement that was found to

be an obviously disproportionate and unjustified expenditure at a time when the subsidiary urgently needed a significant amount of cash;

- The conclusion between the subsidiary and a company that was indirectly held by the parent company of an agreement for the implementation of a cost reduction task force at the level of the subsidiary, an agreement that was found to be useless and for a disproportionate price;
- Invoices, made out by the subsidiary to other sister companies of the group for performed services, were only very partially paid, which was at the origin of the subsidiary's insolvency;
- A subsidiary that provided to the group a financial assistance that was incommensurate with its financial resources.

The Labor Chamber of the *Cour de Cassation* has quite recently issued a very interesting decision in a case concerning a claim for indemnification brought by a dismissed employee in an international context of judicial liquidation[3].

In that specific case, an employee had been hired by the French subsidiary of an English company that was itself part of an international group. Following the placement into administration of the English company by the High Court of Justice of England and Wales, the English administrators requested that secondary proceedings be initiated by French courts. The Commercial Court of Versailles then placed the French entity into judicial liquidation and approved a divestiture plan according to which a number of French employees were to be dismissed on economic grounds.

One of the dismissed employees challenged his dismissal before the French Labor Court and asked that the English company be found liable for mismanagement that had led, according to him, to the situation.

The question was to determine whether the French labor judge had jurisdiction to rule on the claims (that came in addition to the challenge of the dismissal) made by an employee of a French company placed in judicial liquidation in the framework of a tort action brought against the parent company placed into administration in the United Kingdom.

To find that French courts had jurisdiction to hear the case, the Court of Appeals based itself on Council Regulation (EC) No 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

According to the French trial judges, the jurisdiction of French courts was derived from Article 5 of said Regulation. Indeed Article 5 §3 thereof stipulates that "*a person domiciled in a Member State may, in another Member State, be sued*" in particular "*in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*". In the case commented herein, the employee was seeking the non-contractual liability of the English company for the role it had played in the loss of his job but had entered into an employment agreement only with the French subsidiary. As such, the rationale of the Court of Appeals appeared to be coherent since the harmful event – i.e. the loss of his job – had occurred in France.

The fact that the French Labor Court had jurisdiction to hear this non-contractual liability action was derived from Article 6 of the aforementioned Regulation according to which a person domiciled in a Member State may also be sued in another Member State, and wherever there is a number of defendants, in the courts for the place where any one of such defendants is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The Court of Appeals had noted that the claims brought by the employee against both the French entity and the English company concerned his employment agreement and that such claims ought therefore to be adjudicated together by the same Labor Court. To declare that it had jurisdiction, the Court of Appeals relied on the fact that the non-contractual liability action brought against the English company had no impact on the insolvency proceedings that had been initiated against it and that such action was a liability action under ordinary law that was completely unrelated to the proceedings in the UK.

The *Cour de Cassation* dismissed this line of arguments and quashed the judgment of the Court of Appeals. As a matter of fact, jurisdiction had to be determined on the basis of Council regulation (EC) No 1346/2000 of May 29, 2000 on insolvency proceedings insofar as the liability action had been brought in connection with insolvency proceedings. The main insolvency proceedings against the subsidiaries of the English company, including the French one, had been opened by the High Court of Justice in England pursuant to the aforementioned Regulation No 1346/2000. Consequently, French courts lacked jurisdiction.

As such, the *Cour de Cassation* held that a tort action for compensation of the loss suffered as a result of decisions that had contributed to the dismissal of the employee following business reorganizations carried out in the framework of insolvency proceedings is inseparable from such proceedings.

It should be noted that this decision has been handed down in the specific context of international insolvency proceedings. Of course, the French labor judge would have jurisdiction in the context of French insolvency/bankruptcy proceedings.

Yet, when one knows how tough a French labor judge can be with international groups, we can only be relieved by the fact that some actions fall outside the scope of his/her jurisdiction, especially when the parent company is itself subject to insolvency/bankruptcy proceedings in its own country.

On another note, we can also wonder how this type of issue will be dealt with after the Brexit, when Community Regulations will *a priori* no longer be enforceable against the United Kingdom…

[1] Basically, the so-called “Employee Wage Guarantee Scheme” (designated as “AGS” in French) is designed to ensure that employees are paid wages, holiday allowances and sums that are due but that cannot be paid by the employer because the latter has entered into insolvency/bankruptcy proceedings.

[2] Cf. for instance: Three decisions handed down by the Labor Chamber of the *Cour de Cassation* on July 8, 2014, n°13-15.470; Court of Appeals of Amiens, June 28, 2016, n°16/02344

[3] Labor Chamber of the *Cour de Cassation*, January 10, 2017 – n° 15-12.284