

The French supreme court recognizes estoppel as a principle of french law

By decision rendered on September 20, 2011, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) recognized the rule according to which a person may not contradict himself/herself/itself to the detriment of another person as a general principle of French law and consequently sanctioned contradictory procedural behaviors, thereby triggering a fierce debate among French legal writers^[1].

Under the principle of estoppel, as applied in France, one who, by virtue of his/her/its actions or inactions, adopts a defined behavior may not subsequently rely on contradictory positions that would be detrimental to another person.

While estoppel is widespread in common law countries where it finds its origin and has admittedly been frequently relied upon by French courts, it had, however, never been recognized as a general principle of law.

This is now the case since the decision rendered on September 20, 2011 by the *Cour de Cassation* that upheld a ground of appeal solely on the basis that a person may not contradict himself/herself/itself to the detriment of another person.

In this specific dispute, company A initiated patent infringement proceedings against company B.

As its claim was dismissed by the Court of First Instance, company A lodged an appeal before the Lyon Court of Appeals against company B that had in the meantime been merged into company C.

The appeal against B was, therefore, “theoretically” inadmissible since company B had no longer any legal existence. The appeal should have indeed been lodged against company C.

Yet, this irregularity was not pointed out by company B during the appellate proceedings and the Lyon Court of Appeals, that also failed to note such irregularity, partially annulled the first instance judgment.

Company C lodged an appeal before the *Cour de Cassation* that quashed the judgment of the Lyon Court of Appeals and remanded the case to the Paris Court of Appeals.

During the proceedings before the Paris Court of Appeals, company C decided to raise, for the first time, a plea of inadmissibility against company A's claim, arguing that company B had no legal personality.

The Paris Court of Appeals recognized the existence of the irregularity. It recalled that it was impossible to conduct a legal action against a company deprived of the legal personality and specified that the irregularity at issue originated from company A's lack of vigilance.

An appeal was lodged before the *Cour de Cassation*.

In its decision dated September 20, 2011, the *Cour de Cassation*, relying on the principle according to which a person may not contradict himself/herself/itself to the detriment of another person, overturned the judgment of the Paris Court of Appeals and ruled that:

“the company (C), that had itself lodged and pursued the appeal against the December 15, 2005 judgment that led to the partial annulment of said judgment, could not, without contradicting itself to the detriment of company (A), argue before the remanding jurisdiction that it was deprived of legal personality during the proceedings leading to those decisions”.

The *Cour de Cassation* thus formally recognized estoppel, also sometimes referred to as principle of consistency, thereby making it an authoritative and powerful principle under French law and providing a normative basis to a well-established case-law framework.

Indeed, it should be recalled that estoppel has been applied by French courts on numerous occasions:

- **In arbitration matters**, estoppel has been relied upon to refuse a party's right to seek and subsequently reject the application of an arbitration clause^[2];
- **In corporate law**, estoppel has been relied upon to annul, on the basis of an abuse of majority power, the deliberation of a general meeting of shareholders resolving to increase the managers' remuneration, adopted in contradiction with a simultaneous deliberation resolving to decrease expenses and, notably, to terminate the trial period of an employee^[3];
- **In distribution law**, estoppel has been relied upon to prohibit a principal from unilaterally imposing on its distributors binding terms of sale without being itself subject to such terms of sale^[4];
- **In consumer law**, estoppel has been relied upon to refuse to grant the benefits of consumer protection to a person who presented himself as an informed professional^[5];
- **In insurance law**, estoppel has been relied upon to sanction the behavior of an insurance company that, after claiming that construction defects fell within the scope of the ten-year guarantee in order to invoice increased insurance premiums to the insured, refused to enforce such guarantee and argued that another insurance guarantee, less favorable for the insured, was applicable^[6].

As such, since estoppel has already a very broad – and sometimes disputable – scope of application, its recognition as a general principle of law and its implementation in French procedural law stirred an intense debate among French legal writers^[7].

There is indeed a concern about the risks of a too stringent application of the consistency principle in French procedural law, which would deprive litigants from the possibility of changing their procedural strategy or simply from the right to be wrong and to make mistakes.

Yet, is it not true that the very essence of the rights of a defendant lies in the possibility to adopt contradictory procedural behaviors?

In addition, one could legitimately call into question the necessity of recognizing a principle with unclear boundaries and source of legal uncertainty while other French law principles appear sufficient to sanction prejudicial contradictions.

In procedural law, such principles include the rule according to which a plaintiff is required to put forward all its arguments and claims in the first instance proceedings and the prohibition to introduce new claims during the appellate proceedings if it is not justified by the evolution of the dispute.

In contract and tort law, the principles of abuse of rights and good faith performance, the punishment of fraudulent conducts, the old adage of Roman law maxim “*Nemo auditor propriam turpitudinem allegans*” (literally no one shall be heard, who invokes his own guilt, meaning that one is not entitled to base a claim on his/her own wrongdoing), constitute as many principles that can be applied to sanction incompatible behaviors having prejudicial consequences on others.

While judges must certainly be attentive to the prejudicial consequences associated with inconsistent behaviors in procedural, contractual or corporate law – and the evolution of case-laws in this respect is welcome – they should not, however, judge in equity by engaging in subjective considerations that would constitute a source of legal uncertainty.

Forthcoming case law developments in this respect should therefore be treated with caution and vigilance.

[1] Commercial Chamber of the *Cour de Cassation*, September 20, 2011, n°10-22888

[2] 1st Civil Chamber of the *Cour de Cassation*, July 6, 2005, n°01-15.912; 1st Civil Chamber of the *Cour de Cassation*, October 26, 2011, n°10-17.708 for a more recent application of the estoppel principle.

[3] Paris Court of Appeals, May 24, 2011, n°10/09266.



[4] Commercial Chamber of the *Cour de Cassation*, January 15, 2002, RTD civ 2002. 294.

[5] Commercial Chamber of the *Cour de Cassation*, May 3, 1994, n°92-17273.

[6] 3rd Civil Chamber of the *Cour de Cassation*, January 28, 2009, RDC 2009, p.999.

[7] “Les deux visages de la contradiction”, Procédures n°12, December 2011, repère 11 - Hervé Croze; “La consécration de l’interdiction de se contredire”, Semaine juridique Edition Générale n°46, November 14, 2011, 1250, note Dimitri Houtcieff.

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