Recent developments

FRENCH LEGISLATIVE AND REGULATORY DEVELOPMENTS

• Preparation of a reform of civil liability in France

French civil law has been undergoing changes for years. After the reform of the regime of statutes of limitations, reorganised by Law no. 2008-561 of 17 June 2008, and the suggested reform of contracts law presented by the Ministry of Justice on 9 May 2011, the third chapter of this makeover concerns civil liability. This suggested reform is based on the works of a working group led by Professor François Terré, under the aegis of the Academy of Moral and Political Sciences. In addition to legal authors, practitioners participated, in this scope, in the establishment of a draft text. The Ministry of Justice organised a public consultation on this draft, which ended on 16 January 2012, and which results are not yet known.

The aim of this suggested reform is to clarify civil liability law to improve access to it as well as its efficiency. For this purpose, it is suggested to substantially amend the wording of Articles 1382 and following of the French Civil Code by carrying out a double codification covering case law developments (for instance, in matters relating to liability for damage caused by things and unusual neighbourhood disturbances) and the various texts having established special liability regimes (for instance, Law no. 85-677 of 5 July 1985, which created the special regime relating to compensation of traffic accidents). The working group notably adopted a comparative law approach, by following certain solutions of foreign law.

Among the numerous propositions giving rise to 69 Articles, the major themes of the reform shall hereafter be examined, starting with the trilogy that traditionally makes a civil tort: the fault, the loss and the causal link.

Firstly, pursuant to the suggested reform, illicitness would be the central point of the definition of a civil fault, which would now correspond to an "illicit fact", i.e. a breach of "a rule of conduct imposed by the law or by the general duty to be cautious and diligent". Adopting previous case law solutions, the suggested reform specifies the conditions to hold legal entities liable from a civil standpoint in the presence of a fault of one of the bodies of the company or a defect in its organisation or functioning. The document adds that "a company shall be liable for damage caused by the company it controls or on which it exercises significant influence only if, as a consequence of any participation in a body of this company, any instruction, interference or abstention in its management, it significantly contributed to the realisation of the damage. The same applies when a company creates or uses another company in its own interest and to the detriment of others". With respect to the notion of damage, defined as "any established harm to a personal interest that is recognised and protected by the law", the main innovation lies in the introduction of a new head of loss: harm to a collective interest, which particularly aims at compensating environmental losses. However, the suggested reform only creates this concept and refers to the law for more details on the conditions governing the compensation of this type of loss.

Secondly, causation is also affected by the suggested reform. On the one hand, the cause is defined as "any fact that may [...] produce [the damage] in the ordinary course of things and without which it would not have occurred" and a limit is defined in the chain of causes: only the immediate and direct consequences of the damage can be compensated pursuant to this text. On the other hand, the principle of joint and several liability of the authors of the tort is included in the law and clarified: each party involved shall be liable for the entire damage towards the victim and can subsequently file an action against the co-authors in proportion to the seriousness of their respective faults. Moreover, the suggested reform provides for an equal contribution in the event of collective liability without any fault. The inclusion of a general form of liability without fault in the French Civil Code would represent a significant change.

The suggested reform also innovates in terms of exclusion of, or exemption from, liability. The text tries to create a connection with criminal liability by providing for several cases where the harmful event would not give rise to liability, more specifically when the behaviour in question "resulted from legal and regulatory provisions, was imposed by the legitimate authority or required for purposes of self-defence or to protect a higher interest" or when the victim agreed to the breach of one of its rights insofar as the latter was available. The victim's fault could only partially be exonerating, unless it meets all the conditions of an event of Force Majeure (which is defined as "the event which occurrence or consequences could not be avoided by the defendant or the person for whom the defendant is responsible by using appropriate measures"). Moreover, the public policy nature of tort liability resulting from a fault would arise from the law that would explicitly prohibit any limitation of liability or exemption from liability clauses. Nevertheless, the suggested reform provides that such a possibility would be available for cases of liability which do not require a fault (except in the case of personal injury).

Furthermore, while keeping the principle of full compensation and specifying its scope, the reform would create a new large-scale exception in the presence of an intentional lucrative fault. In such a case, the court would be authorised "by a specially motivated decision" to punish the wrongful author by setting the amount of damages according to the profit generated by the latter from the fault and not according to the compensation of the sustained loss. The purpose of such decisions to punish can only make one think of punitive
The text also suggests departing from the traditional distinction between tort liability and contractual liability by providing that "damage to the physical and psychological integrity of the person are compensated [according to the tort regime] even though they would be caused at the time of the performance of a contract". On the other hand, to maintain this distinction, a contractual breach could only give rise to compensation pursuant to the rules relating to the implementation of contractual liability.

To conclude, this suggested reform would give rise to changes that may greatly modify French law on certain points. While more clarity could generally result from the adoption of such a reform, the modification of concepts such as the fault or the introduction of new heads of loss or new rules to compensate losses could be at the origin of legal insecurity. In this respect, it will be interesting to examine the results of the public consultation organised by the Ministry of Justice and follow the possible transformation of the current propositions into a bill.

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- Towards the criminal protection of business secrets under French law

Business secrets are an essential asset of companies. Yet, the protection of these secrets is currently impeded by the inability of French law to adapt to recent technological evolutions that give rise to the rapid dematerialisation of data and information held by companies. French companies are increasingly facing attempts of theft or appropriation of their business secrets through various means, in particular, judicial means. Thus, the determination of an appropriate protection of these secrets has become essential. It is all the more essential as foreign laws, including in particular US law, have already implemented a protective legal arsenal.

The French Government thus initiated a few years ago a policy of economic intelligence including, in particular, the implementation of the protection of business secrets. On 23 January 2012, the French Assemblée Nationale adopted, on its first reading, a bill aiming at sanctioning violations of business secrets, which is greatly inspired from the recommendations of the Interministerial Working Group on business secrets presided by Mr Claude Mathon, Advocate General before the French Supreme Court, in a report filed on 17 April 2009.

The bill arose from a mere observation: French law, whether criminal or civil law, does not enable to efficiently punish violations of business secrets.

Economically sensitive information of companies are criminally protected using disparate incriminations that do not form a coherent whole. Thus, while breach of trust, punished by Article 314-1 of the French Criminal Code, enables to punish certain violations of business secrets (with respect to the misappropriation of intangible property; see, in this edition, Customer poaching can now be punished by Criminal Courts on the ground of breach of trust by Christophe Garin), this incrimination, however, requires the prior transfer of a good, which often occurs in a contractual context and thus has an excessively restrictive scope of application. Another example is the disclosure of a trade secret, punished by Article L. 621-1 of the French Code of Intellectual Property, which only enables to punish the managers and employees of a company and excludes from its scope of application, pursuant to case law, the disclosure of trade or management processes.

From a civil standpoint, companies that are victims of a violation of their business secrets are entitled to initiate an action for unfair competition and subsequently obtain that their competitors be ordered to pay damages. However, civil actions only punish violations of business secrets a posteriori and are thus not necessarily dissuasive. The sustained loss is in fact difficult to assess as it often corresponds to a loss of chance or the loss of a competitive advantage.

One of the reasons of the inefficiency of French law also relates to the absence of any formal definition of "business secrets", even though this expression is found in a dozen recent legal provisions and is frequently used by case law, whether of Criminal and Civil Courts or of Administrative Courts.

The bill thus provides the following definition of the information subject to protection as business secrets: "regardless of the medium, the processes, objects, documents, data or files of a commercial, industrial, financial, scientific, technical or strategic nature that are not public and which unauthorised disclosure may seriously endanger the interests of the company by damaging its scientific and technical potential, its strategic positions, its commercial or financial interests or its competitive capacity and which have consequently been subject to specific protection measures aiming at informing of their confidential nature and ensuring such". The bill adds, in a second paragraph, that the specific protection measures shall be determined by a Decree adopted after having heard the Council of State.
Such a definition at least has the merit of covering all types of information, regardless of the medium. Yet, it is extremely broad and the decision to protect information as a business secret will first of all be taken by the company itself depending on the requirements that will be laid down by decree. However, the Criminal Court will, in the end, decide the extent to which information held by a company can be deemed as information subject to protection as business secrets within the meaning of this text, which may give rise to characterisation issues that will not reassure companies.

With respect to the incrimination, the bill provides that only the people holding the protected information or anyone having obtained knowledge of such information and related measures, if they disclose the information to a person not entitled to receive it, may be considered as the authors of the offence and incur as such a prison sentence of a maximum of 3 years and a fine of 375,000 Euros. The bill does, therefore, not punish the undue possession, the attempt to use or the use on one's own behalf, of the secret information or documents, which may be regretful. The incrimination is dismissed in several cases, notably when "the court orders or authorises the production of an exhibit subject to protection as business secrets in view of a party's exercise of its rights, unless another party brings forward a legitimate ground against such production".

Even though it is not complete, the bill enables, through a single incrimination, to better fight against attempts to inveigle documents or information held by companies representing a competitive advantage. The coming implementation of the criminal protection of business secrets shall thus represent an improvement of the French legal tools.

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