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France: Trends & Developments

Julien Martinet
Hogan Lovells

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Trends and Developments

Contributed by:
Julien Martinet
Hogan Lovells ***see p.7***

ESG Litigation (Environment, Social and Governance)

A more restrictive framework

At international and European level, whereas at the beginning of 2000, UN, OECD and EU recommendations merely encouraged companies to publish non-financial reports, the Non-Financial Reporting Directive (NFRD), which is to be renewed by the end of 2021, requires companies above a certain size to publish an annual report on their non-financial performance, failing which they may be forced to do so by a judge. However, as things stand, no substantial civil penalties are incurred for failing to take into consideration the non-financial factors of a company's business, despite a Paris Court of Appeal judgment of 19 December 2013 (which has not been reaffirmed since) suggesting otherwise.

The offence of misleading commercial practices in domestic consumer law has penalised the greenwashing practices of companies who claim to comply with ESG criteria without any real substantive programme.

Moreover, the introduction of a duty of care has imposed an obligation on companies to draw up and publish a due diligence plan identifying their business risks in order to prevent serious breaches of human rights and fundamental freedoms, preserve personal health and safety and protect the environment. Companies may be held civilly liable for their failure to comply with the due diligence plan and for the non-compliance of any associated entities (including subsidiaries and subcontractors).

Recently, an oil company was summoned before the Paris Court of Justice for breaching its duty of care in Uganda, with the applicants asking the judge to order the company to draw up another, more consistent due diligence plan. The judge referred the case to the commercial court and the trial is still pending.

Shareholder activism's new favourite topic

Shareholder activism is not new – remember, for example, the campaign against the establishment of General Motors in South Africa during apartheid and against Kodak's discriminatory recruitment policy – but it has gained momentum in recent years with the growing awareness of environmental issues.

For example, in 2017, the Blackrock fund was forced to give up three of its seats on the board of the oil giant ExxonMobile to an ultra-minority activist fund (0.02%) which aimed at divesting the group from fossil fuels. More recently, the activist fund TCI Funds pushed the companies Vinci, Safran and Getlink to include a resolution on climate change on the agendas of their next general meetings.

This type of initiative traditionally takes various forms: questions to executives, requests for mandates and proposals for resolutions; but legal action must also be added to this list, such as when an executive is held liable by one or more shareholders for mismanagement, or as recently illustrated by summary proceedings unsuccessfully initiated by the Amber Capital fund in order to have an ad hoc representative appointed to dismiss the management of the Lagardère group a few weeks before its general meeting.

On this judicial ground, ultra-minority shareholders acting in place of the company have recently filed several lawsuits in the USA against the current and former directors of institutions that have been sanctioned by the relevant regulator or that have been the subject of a criminal conviction, in order to hold them accountable for the mismanagement that led to those sanctions.

These ut singuli actions are most often aimed at obtaining an out-of-court settlement with the liability insurer of the executives in question, thus allowing the shareholder and its counsel to recover significant sums on their own behalf and not on behalf of the company.

In 2018, HSBC agreed to pay a minority shareholder USD72 million to withdraw the ut singuli action brought in 2014 against the bank's executives following the bank being ordered to pay USD1.92 billion by the US DOJ for anti-money laundering violations. Several similar actions then followed and are pending against the executives of institutions such as Credit Suisse, Standard Chartered and Deutsche Bank.

There is a risk that such actions will be imported into France since French banks are not spared from US sanctions, nor from those of their regulators, and ultra-minority shareholders may take action before national courts.

Increased Use of the Law on Unfair Terms

The law on unfair terms existed in consumer and commercial law before being extended to ordinary law by order No 2016.131 of 10 February 2016 reforming contract law and which added Article 1171 to the Civil Code to penalise unfair terms in a "membership contract".

Nowadays, we are seeing increased use of the law on unfair terms, in particular because litigants are hoping that an action for an unfair term to be deemed unwritten will be held to be not subject to statutory limitations, where actions more traditionally based on an information obligation now have a clear limitation period restricting admissibility (Civ. 1, 13 March 2019, No 17-23169), as illustrated by the Helvet Immo case.

Recent case law reinforces a court's obligation to automatically examine a clause that it suspects is unfairly drafted, in accordance with Article L.212-1 of the Consumer Code (Civ. 2, 14 October 2021, No 19-11758), which is also contributing to this trend and gives judges significant power.

The problem is the subjectivity inherent in these disputes. First, a term relating to the main object of the contract is only unfair if it is not clear and understandable (see Article L.212-1(3) of the French Consumer Code; Civ. 1, 4 July 2019, No 18-10077). Second, the term must create a significant imbalance between the rights and obligations of the parties. The addition of adverbial standards, which are vague and indeterminate by nature, give a judge more scope for subjectivity. Although it allows the law to be highly adaptable to the circumstances of the dispute, such subjectivity is contrary to the objective of legal certainty pursued by the legislature.

Therefore, it must be borne in mind that deeming a clause unwritten, even though the parties agreed to the contract, is to deny contractual freedom transcending contract law and the binding force of any contract on the parties that agreed to it. In any event, the person agreeing to the contract was not obliged to do so.

Finally, a significant imbalance of control resembles covert control of adequate consideration, or even damage control. However, as a matter of principle, French law does not take these into account when assessing the validity of the contract.

From these perspectives, judges' rigour in their control of the classification of disputed clauses as unfair terms can be understood.

The clarity and comprehensibility of a clause is assessed formally and grammatically in relation to what any normally informed person would be able to understand. The subjectivity given to the assessment of the clarity of the clause was somewhat objected to in the Helvet Immo rulings of last June. The judges of the Court of Justice of the European Union (CJEU) give objective examples of what a clear and comprehensible indexation clause might be, such as when a loan agreement is accompanied by an explanatory note, an amortisation table with quantified examples, or if the circumstances can establish that the borrower was aware of the risks.

Then, the assessment of significant imbalance seems to move away from price control, focusing more on contract terms which confer an excessive and/or unilateral power on a party. In this sense, we are moving closer towards control of the potestative clauses of the contract (ie, those clauses the performance or annulment of which are within the power of a party to the agreement).

The judge acknowledges that there is significant imbalance in variable rate loan agreements which include a cap clause but not a floor clause; and in construction contracts where the project manager unilaterally and definitively waives any dispute, even prior to performance of the contract.

Although the law on unfair terms seems to have a rightful place in litigation, it must not be given disproportionate scope. Its primary interest is to overcome the limitation period of the right to take action, but applicants will likely face strict control in the classification of terms, in accordance with the main principles of contract law.

Fraud and Cybercrime

Strengthening the fight against cybercrime

The rise in remote working during the COVID-19 health crisis, which often required personal equipment and infrastructure with weak IT protection systems to be used for business purposes, has led to a sharp increase in cyber-attacks taking increasingly varied forms: theft and disclosure of confidential data, dissemination of false information, hacking or misappropriation of funds.

In 2020, nearly 978 million people worldwide were the victims of cyber-attacks and damage from cybercrime is expected to reach USD6,000 billion in 2021. This crime targets individuals as well as institutions and large corporations. In April and September 2020, the AP-HP and the public hospital in Düsseldorf were targeted respectively. Over 9 million EasyJet customers had their data stolen in May 2020.

In these circumstances, in recent years, the US authorities have tightened controls on the enforcement of companies' obligations, particularly financial, in relation to the prevention, detection and handling of cybercrime. These controls have resulted in significant financial penalties from the Securities and Exchange Commission (SEC): a USD20 million fine for Options Clearing Corporation in April 2019 and USD1.5 million fine in September 2019 for Virtu Americas LLC.

French regulators seem to want to follow this trend, with the *Autorité des marchés financiers* (AMF) conducting several spot checks on the cybersecurity systems of portfolio management companies in 2019 and 2020.

At European level, as the Cyber Risk Report published in 2020 by the European Systemic Risk Board (ESRB) revealed, there is a risk of systemic vulnerability in the financial sector. On 24 September 2020, the European Commission

published the draft Digital Operational Resilience Act (DORA) regulation to ensure digital operational resilience in the financial sector, which is accompanied by a draft directive.

That draft, which clarifies the supervisory and sanctioning powers of regulatory authorities in particular, will therefore have direct consequences on the activity and risk-taking of companies in the financial sector over the coming years.

Increase in liability actions by the victims of fraud

In a context where the returns offered by conventional investment channels are still low, bogus investment schemes are increasing, where scams propose that victims invest in alternative or innovative products (cryptocurrency, Forex, rare land, diamonds, etc) guaranteeing them risk-free high returns.

Thus, between 2017 and 2019, nearly 53% of French companies were the victims of fraud, with investment fraud representing more than EUR1 billion in losses over the same period.

As proceedings against the perpetrators are generally unsuccessful, there is a temptation to find a debtor from among the intermediaries who, in one way or another, was involved in the transaction (notaries, estate agents, banks) even though the latter are not always directly involved in their customers' affairs.

A wave of summons against banks initiated in 2019/2020 on the basis of breach of their duty of care is beginning to give rise to a general refusal of compensation in view of a bank's duty to not interfere in the affairs of its customers, but the flow of claims is continuing to increase.

Application of the European Blocking Regulation: a Real Conflict of Duties

The European Blocking Regulation lists certain US embargo laws, directed mainly against Cuba and Iran, and prohibits EU companies from applying them. Article 6 acknowledges that any person who feels aggrieved due to the application by an EU company of one of these foreign embargo laws is entitled to compensation.

This blocking regulation is topical because the CJEU was expected to rule on its fate by the end of the year in a preliminary ruling (in the case Telecom Deutschland v Bank Melli).

This legislation is the source of wide controversy because French companies are torn between conflicting obligations by being subject to both US embargo laws and the European Blocking Regulation that sanctions those who comply with US laws.

The European Commission is well aware of these tensions. On 23 March 2021, a public consultation was launched to gather contributions from companies, organisations and individuals in order to develop a new legal instrument to deter and counteract coercive action by non-EU countries as such action unduly interferes with the freedom of the EU and its member states to make policy choices.

There is little case law on this topic in France.

Some courts adopt a strict position and are protective of a member state's national sovereignty. For example, on 3 June 2020, the Paris Court of Appeal ruled in relation to a French company that had refused to perform an arbitral award of damages to its Iranian contractor (they had had a contract since 2002 for the construction of gas facilities) because it would breach the US sanctions programme, that "the unilateral sanctions adopted by the US authorities against Iran

cannot be regarded as an international consensus as the extraterritorial scope of the sanctions imposed by the US authorities are disputed by the French authorities and the European Union."

On the other hand, some courts adopt a more practical position. On 23 January 2020, the Paris Commercial Court approved the termination of a contract by the IT service provider of Bank Melli due to a risk of US sanctions (Paris Commercial Court, 23 January 2020, No 19/023091).

An agreement signed with a foreign regulator is a binding agreement for the company and any breach can lead to the application of sanctions. However such a settlement agreement is not an international convention pursuant to Article 55 of the Constitution and does not have the force of law or regulation. It is therefore not enforceable against third parties and is unlikely to invalidate any inconsistent law.

One can imagine the dilemma of a judge who is asked to hold a company accountable for not performing a contract when the tacit reason is the existence of such an agreement which the claimant states is not enforceable against it.

Tougher Regulatory Penalties and the Penalising of Conduct in the Distribution of Products

Tightening of regulatory control

In recent years, there has been a clear trend towards firmer control by French regulatory authorities: the *Autorité de contrôle prudentiel et de résolution* (ACPR), the AMF, the Competition Authority and the *Agence française anticorruption* (AFA).

The creation of the AFA in 2016 which, although it is still to impose penalties, initiated its first spot checks in 2018, which led to injunctions, as well as enhanced surveillance by the AMF of compliance by companies with their obligations to detect and combat cybercrime, are fully consistent with this trend.

The number of penalties imposed is also increasing with the sanctions committees of regulators, in particular the AMF, being generally less sensitive than civil courts to procedural issues and less demanding regarding evidentiary matters. In a decision issued on 9 July 2021, the AMF was thus able to order a director of Soitec to pay a fine of EUR500,000 for market abuse merely on the basis of circumstantial evidence.

The amount of penalties issued is also increasing, with the AMF in particular imposing a fine of EUR35 million on a French bank in 2017 (subsequently reduced to EUR20 million on appeal) and the ACPR imposing a fine of EUR50 million on another credit institution the year after.

As the European legislature continues to strengthen the supervisory and sanctioning powers of regulatory authorities, this trend is likely to increase in the coming years.

Increasing the scope of the criminal justice response

Traditionally, problems related to the distribution of products, in particular banking and financial, were dealt with by civil courts based on a distributor's obligation to provide information, advice and warnings and gave rise, where appropriate, to the payment of damages.

However, this type of litigation is increasingly the subject of criminal proceedings with claimants alleging misleading commercial practices to encourage the public prosecutor to take legal action.

The creation of a national financial prosecution service at the end of 2013 helped sustain this trend, with repeated prosecutions of credit institutions leading to criminal convictions.

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AUTHOR

Julien Martinet is a member of the Paris and Djibouti Bars, a member of the AEDBF (European Association of Banking and Financial Law) and a Litigation professor in the Master 2 of Banking and Financial Law at the University of Paris 1, Panthéon Sorbonne. He has written a number of articles, most recently about the litigation abuses relating to bank secrecy in France and the restrictive interpretation that must be given to it. He heads the Banking and Finance Litigation practice of the Paris office of Hogan Lovells, which works for the main French banks, preparing their defence in litigation involving their liability in various aspects of their activities.

Hogan Lovells

17 Avenue Matignon
CS 30027
75008 Paris
France

Tel: +33 1 53 67 48 54
Fax: +33 1 53 67 47 48
Email: julien.martinet@hoganlovells.com
Web: www.hoganlovells.com