ALLEN & OVERY

Luxembourg Case Law Briefing – Corporate Law Highlights

2022 Edition

Introduction

We are very pleased to present our second Luxembourg corporate law focused case law briefing.

In this second edition, we have focused on those decisions published in 2020 and 2021 which we have identified as the most relevant for actors navigating the corporate sector. Topics as diverse as minority shareholder action, coexistence of an employment contract and corporate mandate, and directors' duties and liabilities are covered, always with the intention to inform and explain the practical scope rather than present a full academic analysis.

We believe it is essential for the Luxembourg legal community as well as international investors to gain a better understanding of key case law developments, and we look forward to any feedback with a view to further improving future editions.

We remain of course available if you wish to discuss any of the decisions in more detail.

On behalf of the Allen & Overy Luxembourg Corporate / M&A Team

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1. Registered office – The transfer of the registered office of a private limited liability company must be recorded in a notarial deed

Luxembourg Court of Appeal sitting in commercial matters, 19 February 2020, no 20/20 IV-COM, role number CAL-2020-00038

In 2004, a private limited liability company (the **Company**) transferred its registered office by notarial deed from the municipality of Luxembourg to Heisdorf. Fifteen years later, the Company decided to return to Luxembourg. The decision was taken under private deed and the Luxembourg Business Registers (the **LBR**) refused the filing on the ground that the transfer of the registered office to another municipality requires an amendment to the articles of association, which has to be done by notarial deed.

The Company initiated legal action to request the nullification of the LBR's refusal.

At first instance, the judge sitting in summary proceedings declared the claim to be unfounded.

The Company appealed the first instance decision but the Court of Appeal confirmed the verdict of the first judge.

The Court of Appeal recalled that pursuant to the Luxembourg law of 10 August 1915 on commercial companies, as amended (the **1915 Law**)[1]:

- a private limited liability company must be established by a special deed recorded by a notary;
- the deed of incorporation must indicate the registered office of the company; and
- any amendment to the articles of association must be recorded by a notary and the entire deed must be filed with the Luxembourg trade and companies register.

Considering that the provisions of the 1915 Law are clear and there is no need to interpret them by having recourse to the preparatory works, the Court of Appeal concluded that the transfer of the registered office to a municipality other than the one appearing in the articles of association constitutes a modification of the articles of association, which is to be recorded in a notarial deed.

The decision to transfer the registered office of the Company should therefore have been recorded in a notarial deed and the LBR did not commit an abuse of power or misinterpretation of the 1915 Law by refusing the filing.

It is worth noting that the facts took place before the 2016 update of the 1915 Law, which allowed a transfer of the registered office to another municipality by a simple resolution of the management body, which may be authorised to amend the articles of association to that effect. To do so, the articles of association must expressly provide for this possibility and the resolution must then be recorded in a record deed enacted by a notary. The Luxembourg legislator is about to expressly confirm that this possibility is also offered to companies which have a sole shareholder[2].

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[1] Please note that this definition shall apply throughout the entire document.

[2] Draft law 8007 amending 1° the 1915 Law; 2° the amended law of 19 December 2002 concerning the register of commerce and companies as well as the accounting and annual accounts of companies; 3° the amended law of 24 May 2011 concerning the exercise of certain rights of shareholders at general meetings of listed companies and transposing Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 concerning the exercise certain rights of shareholders of listed companies; 4° of the Civil Code.

2. Unlawful exercise of the activities of domiciliation agent and chartered accountant – Unlawful supplying of company management services – Failure to publish annual accounts

Luxembourg Court of Appeal sitting in correctional matters, 15 July 2020, no 259/20 X

The sole manager (the **Manager**) of a private limited liability company (the **Company**) and the Company were prosecuted for having committed a number of offences against company law, in particular from 1 January 2009 as regards the Manager and from 14 March 2010, being the date of entry into force of the law of 3 March 2010 introducing the liability of legal entities (the **2010 Law**), as regards the Company.

The following allegations were made against the Manager and the Company as perpetrators, co-perpetrators and accomplices:

- providing domiciliation services without proper authorisation;
- providing company management services by acting as a director or manager of certain companies without proper authorisation;
- carrying on activities as a chartered accountant, accountant, consultant and economic consultant without proper authorisation; and
- failure to publish annual accounts for the financial years 2013, 2014 and 2015.

At the first instance, the Luxembourg District Court sentenced the Manager to six months' imprisonment, suspended in its entirety, and a fine of EUR 15,000. The Luxembourg District Court noted that as a shareholder and sole manager of the Company, the Manager managed the Company and had control over it. Thus, all acts carried out by the Company were personally attributable to the Manager and he had to bear criminal liability for them in his capacity as *de jure* manager.

The Company was ordered to pay a fine of EUR 30,000 for having committed the same offences, except for the failure to publish the annual accounts. Since the entry into force of the 2010 Law, it is possible to seek criminal liability for legal persons. This criminal liability of legal persons does not however exclude that of natural persons who are perpetrators or accomplices in the same offences. This is why the Manager and the Company were prosecuted together in this case.

The Court of Appeal largely confirmed the decision of the District Court.

Providing domiciliation services without proper authorisation

The Court of Appeal recalled that, pursuant to the law of 31 May 1999 governing the domiciliation of companies (the **1999 Law**), only certain regulated professions (such as credit institutions, professionals in the financial or insurance sector, lawyers or auditors) may act as domiciliation agents.

According to the 1999 Law, domiciliation agents are natural or legal persons which allow one or more non-affiliated companies to establish their registered office at their address and provide related services.

Pursuant to the preparatory works of the 1999 Law, the existence of a domiciliation is a matter of fact.

The Court then recalled the criteria to be taken into account to determine whether there is a domiciliation (number of companies in relation to the number of offices, size of the premises, number of people actually working on the premises, activities of the companies concerned, etc.).

Another criterion is the provision of comparable services, offered simultaneously to companies located at the same address, with the same people assigned to the performance of these services.

The Court of Appeal established the following facts:

- neither the Manager nor the Company were registered members of one of the regulated professions authorised to act as a domiciliation agent;

- the Company had provided a *de facto* seat in Luxembourg to four companies having their registered office in Panama or the British Virgin Islands; and
- the Company had provided services far beyond those of a real estate lessor to five other companies.

As an experienced professional, the Manager could not have been unaware that he did not have the required authorisation to domicile third-party companies.

The domiciliation offence was therefore retained as from 1 January 2009 as regards the Manager and as from 14 March 2010 as regards the Company.

Providing company management services without the required authorisation

The Court recalled that, according to the law of 5 April 1993 on the financial sector (the **1993 Law**), no one may have as a profession an activity in the financial sector or an activity related or complementary to an activity in the financial sector without being in possession of a proper authorisation. This includes natural or legal persons providing services relating to the incorporation or management of one or more companies.

In the present case, the Manager and the Company had accepted numerous mandates as directors and managers in third-party companies. The Court concluded that the Company had provided company management services on a regular basis, noting that this activity was expressly covered by the corporate object of the Company set forth in its articles of association.

Following the District Court, the Court of Appeal considered that, in view of the number of companies managed by the defendants, this was a regular activity which, as such, was subject to approval by the competent minister. As the Manager had 30 years of experience in the business world, he was necessarily aware that the Company was not authorised to provide such services on a regular basis. The Court concluded that the Manager was guilty of the offence.

As the management services were invoiced and offered on behalf of the Company, the infringement was also held against the Company.

Carrying on activities as a chartered accountant, accountant, consultant and economic consultant without proper authorisation

According to the law of 2 September 2011 regulating access to the professions of craftsman, trader, industrial and certain liberal professions, no one may carry out a self-employed activity in any of these fields without holding a business license.

The Court considered that the Company regularly provided services as chartered accountant, accountant, consultant and economic consultant. This activity was, here again, foreseen by the corporate object of the Company and generated substantial income.

As noted by the first judges, the Manager was well aware that the activities carried out were subject to authorisation as the Manager received a letter from the minister reminding him of this requirement in 2003, confirming the fraudulent intent.

The offence was held against the Manager as well as against the Company since the infringements were committed in the Company's interest.

Failure to publish annual accounts

At first instance, the District Court recalled that managers that fail to submit the financial statements to the general meeting for approval within six months of the end of the financial year, or who have not had them published (within one month of their approval), are punished by a fine of EUR 500 to EUR 25,000. The breach is deemed to have been committed at the end of the one-month period provided for the completion of the publication.

In the case at hand, the annual accounts for 2013, 2014 and 2015 were never published and the material element of the offence was therefore established. The District Court indicated that the moral element of the offence consists of the material transgression of the legal provision being freely and consciously committed. The manager who has not had the financial statements published is presumed to be in breach of the law simply as a result of this omission. He/she may reverse this presumption by arguing that he/she did not act freely and consciously, ie by providing a credible justification.

The Court of Appeal confirmed that the Manager did not demonstrate his inability to draw up the defaulting financial statements. The difficulties in accessing documents, such as the slowness in obtaining copies of seized documents and the personal problems he invoked, did not constitute an insurmountable obstacle to fulfilling his legal obligations.

The Manager was therefore found guilty of failing to publish the financial statements for 2013, 2014 and 2015.

This decision illustrate a series of unlawful exercises of corporate services and lack of compliance with basic corporate processes and how such behaviour may lead to very serious criminal sanctions.

3. Misuse of company assets – A manager using company funds to the benefit of other companies of which he is the beneficial owner is liable for misuse of company assets

Luxembourg Court of Appeal sitting in correctional matters, 8 December 2020, no 409/20 V

A private limited liability company (the **Company**) had granted several loans to a number of companies of which its sole manager (the **Manager**) was the director and beneficial owner. Some of these companies had structural links with the Company while others had no shareholding links with the Company (together, the **Beneficiaries**).

Two phases could be distinguished in the granting of these loans:

- the first phase was from 2007 to the beginning of 2011, when the Company granted loans to the Beneficiaries, by using its own cash (**Phase 1**); and
- the second phase started in March 2011, when the Company borrowed a loan from a bank, the proceeds of which were intended to be used for the construction of an industrial hall, but were finally largely used to grant loans to the Beneficiaries (**Phase 2**).

Despite the inability of the Beneficiaries to repay their debts in full, the Company still continued to grant them new loans.

In 2013, the Company was declared bankrupt.

In the first instance, the public prosecutor (*ministère public*) accused the Manager of fraudulent bankruptcy (*banqueroute fraduleuse*) and misuse of company assets (*abus de biens sociaux*).

The Luxembourg District Court sentenced the Manager to 18 months' imprisonment suspended in its entirety and a fine of EUR 3,000 for misuse of company assets, but acquitted the Manager of the offence of fraudulent bankruptcy.

The Court of Appeal confirmed the first instance decision.

First, by reiterating the established case law, the Court of Appeal confirmed that because the alleged misuse by the Manager had taken place entirely before the date of cessation of payments (ie 22 March 2013), the Manager had been rightly acquitted of the offence of fraudulent bankruptcy.

With regard to the offence of misuse of company assets, the Court of Appeal referred to the legal arguments of the District Court on the conditions under which the act of the company executive (*dirigeant*) constitutes misuse of company assets in accordance with article 1500-11 of the 1915 Law (ie (i) status of executive (*dirigeant*), (ii) use of the company's assets or credit in a manner contrary to the company's corporate interest, for personal purposes or for the benefit of another company in which the executive is directly or indirectly interested ; and (iii) criminal intent).

To determine whether there was a conflict with the Company's corporate interest, the Court of Appeal followed the position of the District Court. The first judges considered that the granting of loans and advances to the Beneficiaries had to be divided into two phases (Phase 1 and Phase 2).

The Court of Appeal confirmed that the loans or advances granted during Phase 1 were not contrary to the corporate interest of the Company. The Company, having a lot of liquidity at that time, had more interest in granting loans to related companies (that were known to it) than in placing them with banking institutions which, at that particular time (during the financial crisis of 2007/2008), had an uncertain future ahead of them. The Court also noted that these loans had been honoured in accordance with the terms of the relevant contracts.

With regard to the loans granted during Phase 2, the Manager stated that they had all been granted in the interest of the group, meaning to maintain the liquidity of the group companies at a certain level. Referring to the established French case law on group interest resulting from the well-known Rozenblum judgment[3], the Court of Appeal ruled that the offence of misuse of company assets can be neutralised under the following conditions:

- the existence of a group must be established;
- the financial contribution must be driven by the interests of the group, assessed in the light of a common policy;
- the financial contribution must not be without consideration or impair the balance between the respective commitments of the various companies; and
- the financial contribution must not exceed the financial possibilities of the company bearing the cost.

In the present case, the Court of Appeal considered that the Beneficiaries did not constitute one single group of companies but rather two different groups:

- a first group formed by two companies, excluding the Company (**Group 1**), and
- a second group of companies, including the Company (**Group 2**).

The Court of Appeal concluded that the Manager could not legitimately invoke the group interest with regard to Group 1, since the Company did not belong to that group.

In addition, the Court of Appeal considered that, in any case, during Phase 2, the Company no longer had sufficient liquidity to finance new loans to companies, irrespective of their group, as evidenced by the need of the Company to take out a substantial loan from a third party. However, despite this lack of liquidity, the Manager continued to transfer significant funds belonging to the Company to various companies in which he was the *de jure* manager and the ultimate beneficial owner.

The Court of Appeal concluded that the Manager must have necessarily been aware that these loans were contrary to the interest of the Company. The Court finally ruled that the Manager had acted for personal reasons (at least indirectly).

All the elements of the offence being established, the Court of Appeal confirmed the sanctions of the District Court.

This decision provides a good illustration of how the misuse of corporate assets criteria (ie (i) status of executive (dirigeant); (ii) use of the company's assets or credit in a manner contrary to the company's corporate interest, for personal purposes or for the benefit of another company in which the executive is directly or indirectly interested; and (iii) criminal intent) can be met in practice.

[3] Ccass. (FR), 4 Sept. 1996; Ccass. (FR), 4 Feb. 1985, Rozenblum.

4. Company in formation – A company is bound by the commitments made on its behalf during its formation process only if the company expressly assumes these commitments after its incorporation

Luxembourg Court of Appeal sitting in commercial matters, 12 January 2021, no 7/21 IV-COM, role number CAL-2019-00115 and CAL-2019-00142

In 2005, a private limited liability company (the **Agent**) and a public limited liability company (the **Company**) entered into a real estate search mandate agreement (the **Agreement**) together with "*any other company directly or indirectly controlled by Mr X*".

Pursuant to the terms of the Agreement, the Agent was to seek out land plots in Luxembourg for a real estate project and to provide general assistance in the implementation of that project. In consideration for these services, the Agent was to receive a remuneration consisting of (i) an advance on a flat fee payable on the day of the signing of the sale agreement (the **Advances**) and (ii) the net flat fee amount payable on the day the building permit is granted (the **Final Flat Fees**).

A few months later, two preliminary sale agreements (*compromis de vente*) were signed by the Company. The Company paid the Agent part of the Advances.

In 2007, the Company set up two subsidiaries (together, the **Subsidiaries**) to hold the land plots.

In 2016, the Agent was declared bankrupt and the receiver brought a legal action against the Company and its Subsidiaries to recover the outstanding balance of the Advances as well as the Final Flat Fees.

In the first instance, the Luxembourg District Court ruled the claim time-barred as regards the payment of the outstanding balance of the Advances but ordered the Company to pay the Final Flat Fees on the grounds that the Company had obstructed the granting of the building permit.

With respect to the Subsidiaries, the District Court declared the claim to be unfounded on the grounds that the Subsidiaries had not been incorporated at the time the Agreement was signed. The District Court added that the mere fact of mentioning the possible creation of a company not otherwise defined is insufficient to make such a company liable for obligations undertaken in the past by a third person.

The Company appealed the first instance decision and the Luxembourg Court of Appeal amended the judgement, in that it ordered the Company to pay the Final Flat Fees. The Court considered that the Company had taken active steps to obtain the building permit and that the failure to obtain the building permit was not due to the Company.

For the other issues, the Court of Appeal confirmed the verdict of the District Court. The Court of Appeal recalled that the subsidiaries were incorporated on 25 January 2007, ie after the Agreement was signed. The Court added that, even if the Subsidiaries had already been in formation at the time of the signing of the Agreement (which was not the case), they would not have been committed at the time of their incorporation, except if the Subsidiaries had expressly agreed to assume the commitments previously made on their behalf.

The Court of Appeal further held that the District Court was right to qualify the commitment as a *promesse de porte-fort*, ie an undertaking by the Company to ensure that the Subsidiaries performed their obligations toward the Agent. According to article 1120 of the Civil Code, if the company, once incorporated, ratifies the transactions made by the bearer (*porte-fort*), this ratification removes any personal obligation for the bearer (*porte-fort*), with everything happening as if the company had initially contracted with the other contracting party. Refusal to ratify, on the other hand, has the consequence of depriving the contract of all effectiveness.

In the case at hand, there was no evidence that the Subsidiaries had taken over the obligations contracted by the Company. Therefore, the Court concluded that the claim was unfounded.

In summary, this Court of Appeal decision confirms that the assumption of commitments made on behalf of a company in formation is not automatic but requires an express assumption by the company. In order to avoid third parties remaining too long in a state of uncertainty, article 100-17 of the 1915 Law requires the assumption of commitments to take place within two months of the incorporation of the company. Where the commitments are assumed, they are deemed to have been entered into by the company from the outset. Where the commitments are not assumed, the persons who have entered into the commitments on behalf of the company in formation must personally assume the commitments they have entered into.

5. Bankruptcy filings with the Trade and Companies Register: no "right to be forgotten" for bankrupt companies even if the bankruptcy ruling is overturned

Luxembourg Court of Appeal sitting in commercial matters, 23 February 2021, no 28/21 IV-COM, role number CAL-2020-00640

A public limited liability company (the **Company**) initiated a legal proceeding to request the deletion of bankruptcy-related filings from its file with the Trade and Companies Register (the **RCS**).

The Company had been declared bankrupt in November 2019 due to the accumulation of debts with the tax authorities. The bankruptcy ruling was published in the RCS in accordance with the provisions of articles 13 and 14 of the law of 19 December 2002 concerning the RCS as well as the accounting and annual accounts of companies (the **2002 Law**). The Company challenged the bankruptcy decision and, following the settlement of the outstanding debts, the bankruptcy ruling was overturned in December 2019. This decision was filed with the RCS.

Considering that the declaration of bankruptcy was due only to a human error – the domiciliation agent not having delivered the writ of bankruptcy to the Company – that prevented the Company from being aware of the bankruptcy summons and from reacting adequately, the Company requested that the RCS delete the bankruptcy-related filings. The Company believed that these filings were harmful since everyone consulting its file with the RCS would be informed of this bankruptcy filing. The Company also invoked the "right to be forgotten" as set out in the EU General Data Protection Regulation.

The RCS refused the deletion on the grounds that the claim was not based on the erroneous nature of the filings but on the fact that the Company considered that these filings were detrimental to it. The RCS considered that the filings had been made in compliance with applicable legal provisions and that the regularisation of the Company's situation could not justify the cancellation of regularly made filings.

In the first instance, the Luxembourg District Court declared the Company's claim unfounded. The judge held that the RCS had properly enforced the provisions of the 2002 Law and that a filing can be cancelled only if a document has been filed erroneously, which was not the case in this instance.

With regard to the "right to be forgotten", the Luxembourg District Court found that the EU General Data Protection Regulation restricts its scope to individuals and that the Company could not therefore assert its "right to be forgotten" on the basis of this text.

The Court of Appeal confirmed the verdict of the Luxembourg District Court.

The Court held that, in the silence of the law as to the reasons justifying the modification or cancellation of a filing and the criteria according to which a court should assess such a request, it should be retained that the cancellation of a filing can be ordered only if a document has been erroneously filed.

The Court also pointed out that the Company had not been declared bankrupt because of a human error but because of its negligence in managing its affairs. According to the preparatory works of the 2002 Law, the publication of key legal and financial documents for companies is a public order function and it is in the public interest to ensure the accuracy, completeness and timeliness of the data. Creditors and more generally third parties who contract with a commercial company have a legitimate interest in having accurate and proper information on the evolution of the company's affairs.

With respect to the "right to be forgotten", the Court confirmed that the EU General Data Protection Regulation applies only to individuals. In addition, the Court ruled that the Company failed to demonstrate that "the right to be forgotten" is a general rule of law (*principe général du droit*) that should be applied beyond the context in which it is legally enshrined and which should prevail over the legitimate third-party right of information.

In summary, this Court of Appeal's decision confirms that there is no "right to be forgotten" for companies including in the event of a revocation of the bankruptcy ruling. More generally, any RCS filing validly made cannot be subsequently removed or modified. This case law is in line with the spirit of a previous decision[4] according to which RCS filing are only possible if there is a valid legal basis for such filing.

[4] CA Luxembourg, 14 January 2009, n°33771. This case law was subsequently confirmed by the legislator in the amended law of 19 December 2002 concerning the register of commerce and companies as well as the accounting and annual accounts of companies (see art.21 (2)).

6. Judicial dissolution of a company for just reasons – Serious disagreement between shareholders compromising the functioning of the company – Appointment of a provisional administrator (conditions)

Luxembourg Court of Appeal sitting in commercial matters, 23 March 2021, no 47/21 IV-COM, role number CAL-2019-00991

A public limited liability company (the **Company**) incorporated in 2005 was owned equally by two shareholders (**Shareholder A** and **Shareholder B**). In 2017, Shareholder B incorporated a company with the same corporate object of the Company, and one year later, Shareholder B resigned as a director of the Company.

In 2018, Shareholder B brought a legal claim requesting the judicial dissolution of the Company on the basis of a serious disagreement between both shareholders. He argued that the company's corporate bodies were in a state of deadlock, jeopardising its proper functioning and irremediably preventing any decision-making.

In the first instance, the Luxembourg District Court declared Shareholder B's request well founded and ordered the judicial dissolution of the Company. In particular, the judge ruled that the Company was in danger (*péril*) for the following reasons:

- the annual accounts for the financial years 2016 and 2017 were neither approved nor published, with each of the two shareholders presenting contradictory balance sheets proposals;
- no general shareholders meeting could be held; and
- the board of directors was irregularly composed.

The District Court considered that the situation was not likely to be resolved in the short term.

Shareholder A appealed such decision and requested the appointment of a provisional administrator.

The Court of Appeal reiterated the District Court's statement on the conditions for a dissolution for just reasons, ie a serious disagreement between shareholders leading to a paralysis of the company's operations, as well as on the notion of disagreement between shareholders, resulting in the disappearance of the *affectio societatis*.

The Court of Appeal then recalled that the disagreement between shareholders must be serious enough to paralyse the operation of the company, to prevent the regular holding of meetings or the functioning of the company's corporate bodies. On the contrary, the mere fact of the shareholders being in disagreement to the extent that their relationship may deteriorate is not sufficient to justify a dissolution. Judicial dissolution may only take place for serious reasons revealing a major issue, such as to put at risk the continuation of the company's activity.

The Court of Appeal added that the corporate interest of the company must be the key factor in the assessment of the facts. A serious and lasting disagreement between shareholders can only give rise to dissolution if it results in the impossibility for the company to properly pursue its activities.

The Court also confirmed the position of the District Court which considered that it only had to assess the existence of just cause without having to rule on the respective seriousness of the faulty behaviour invoked by each side. The Court added that in most cases it is difficult to determine which of the shareholders should be considered to be the origin of the disagreement, as faults are rarely purely unilateral.

Finally, the Court of Appeal considered that the *affectio societatis* no longer existed, as the annual accounts had not been approved since 2016, no decision of the shareholders could be taken by a majority and the board of directors was not validly constituted. In addition, the negotiations for the sale of the shares held by Shareholder B were also deadlocked. The Court further stated that there was no indication that the situation could change for the better in the future.

With respect to the appointment of a provisional administrator, the Court stated that the appointment of a provisional administrator is an exceptional measure intended to remedy an alarming situation of such a nature as to paralyse the functioning of the company and to seriously jeopardise the interests of the company. In the present case, in view of the permanent deadlock, the Court ruled that the appointment of a provisional administrator could not resolve the lasting irremediable disagreement between shareholders.

Considering that the conditions for judicial dissolution were met, the Court confirmed the Luxembourg District Court's first instance decision to dissolve the Company.

In summary, this Court of Appeal decision confirms the criteria for judicial dissolution of a company for just reasons and in particular the principle that this remedy is a last resort solution in the event of a permanent and irremediable deadlock jeopardising the proper functioning of the company.

7. Coexistence of employment contract and corporate mandate – The employee's functions must be clearly distinct and separate from the functions of a corporate officer

Luxembourg Court of Appeal sitting in labour matters, 17 June 2021, no 60/21 III-TRAV, role number CAL-2019-00361

The parties were bound by an *Anstellungsvertrag* (employment contract) (the **Contract**) signed in 2005 entrusting the appellant (the **Appellant**) with the "*representation of the company in the day-to-day management*" and "*the defence and promotion of the company's interests in all its aspects*".

In 2017, the respondent (the **Respondent**) delivered a letter to the Appellant enclosing the minutes of a board meeting, stating that the Contract would end in June without any further notice period.

Arguing that the Contract had been wrongfully terminated, the Appellant initiated judicial proceedings to obtain damages and compensation for the notice period.

The Labour Court declared itself incompetent to hear the claim on the grounds that the Appellant had failed to prove the existence of an employment contract.

The Court of Appeal confirmed the verdict of the Labour Court.

The Court of Appeal recalled that it is possible to combine the functions of a corporate officer with those of an employee provided that the latter are clearly distinct and dissociable from the functions of a corporate officer and that there is an element of subordination towards the company.

The Court of Appeal reiterated that the employee functions cannot be considered as deriving from the corporate mandate. Contrary to French case law, which holds that such coexistence can only be retained if the tasks performed by the employee are subject to specific remuneration, Luxembourg case law considers the absence of specific remuneration as an important but not decisive indicator.

With regard to the subordination, the Court recalled that it is characterised by the execution of precise instructions under the authority and control of a person who, where appropriate, may impose sanctions. Affiliation to the social security system is however not a determining factor.

In the case at hand, the Contract did not contain any provision relating to a mission other than that of a corporate officer, the duration or working hours of the Appellant or his submission to a hierarchical authority. Furthermore, the tasks that the Appellant claimed to have performed under the Contract did not correspond to specific technical functions that could be dissociated from the functions of a corporate officer. These tasks could therefore be considered as absorbed by the function of a corporate officer. Furthermore, the tasks in question did not give rise to any separate remuneration.

In addition, the Court of Appeal indicated that all corporate officers are subject to the control of the board and that, to this end, they must report on the execution of their mission and, if necessary, seek approval for planned actions or comply with certain directives. Similarly, the powers of the delegate for day-to-day management may be limited in scope and duration, without the delegate losing the status of corporate officer. This is only the case if a corporate officer, in the exercise of specific technical functions that cannot be absorbed by those arising from the corporate office, regularly receives precise instructions regarding the execution of his work, so that he has little freedom to act.

The Court of Appeal considered that it was not the case in this instance since the Appellant was free to take the initiative for the measures to be taken and limited himself to reporting on the measures taken to the vice-chairman of the board of directors or to seeking his approval for the planned measures. The fact that the Respondent had objectives to achieve and was evaluated annually by the vice-chairman was irrelevant to determining whether the Appellant was in a state of subordination.

In summary, the Court of Appeal's decision confirms the criteria for determining whether a corporate officer can also be considered as an employee.

For this to be the case:

- *the employee's functions must be clearly distinct and dissociable from those of a corporate officer, and*
- *the person concerned must be in a state of subordination towards the company.*

8. Minority shareholder action – A shareholder holding 50% of the voting rights in a public limited liability company can exercise the minority shareholder action

Luxembourg Court of Appeal sitting in commercial matters, 27 October 2021, no 143/21-VII-COM, role number CAL-2019-00826

A shareholder holding 50% of the shares and voting rights (the **50% Shareholder**) in a public limited liability company (the **Company**) claimed that the directors of the Company were liable for mismanagement and breaches of the **1915 Law**, in 2012 and 2013.

The claim was based on article 444-2 of the 1915 Law according to which "minority shareholders" (*actionnaires minoritaires*) holding at least 10% of the votes may bring an action against the directors on behalf of the company (the **Minority Shareholder Action**).

The Luxembourg District Court ruled the claim inadmissible on the grounds that the Minority Shareholder Action is only available to minority shareholders, considered to be shareholders holding less than 50% of the voting rights, meaning that the 50% Shareholder holding exactly 50% of the voting rights would not meet this requirement and would therefore not be entitled to use this recourse.

The 50% Shareholder appealed, arguing that the first instance decision would lead to an inconsistent situation in which only shareholders holding 50% of the voting rights would be deprived of any liability action against the directors, while majority shareholders could vote the *actio mandati* and minority shareholders could initiate the Minority Shareholder Action.

The 50% Shareholder also claimed that the concept of "minority shareholder" is unclear and that a teleological interpretation should prevail over the literal interpretation made by the District Court. He urged the Court of Appeal to take into account the purpose of the law, to hold that the legislator's objective was to foster the liability of directors by allowing shareholders who do not have a majority to take the place of the defaulting majority to defend the company's corporate interest. In light of this objective, the concept of "minority shareholder" should be interpreted as including the shareholder holding 50% of the voting rights.

Before addressing this issue, the Court of Appeal ruled that the 50% Shareholder could validly rely on article 444-2 of the 1915 Law to bring his action in 2018 notwithstanding the fact that it relates to facts that occurred in 2012 and 2013, ie prior to the adoption of this legal provision by the law dated 10 August 2016.

The Court of Appeal then considered that the concept of "minority shareholder" cannot be interpreted literally but had to be interpreted taking into account the overall context.

The Court of Appeal pointed out that article 444-2 was introduced in the 1915 Law to allow minority shareholders to challenge the liability of directors on behalf of the company in order to preserve the company's corporate interest, which implies the possibility for the liability of directors to be challenged in case of mismanagement or breach of the 1915 Law. To achieve this, shareholders can vote for the *actio mandati* or decide to discharge the directors from any further liability.

In the case at hand, the situation was blocked since a majority could not be obtained either to vote on the *action mandati* or on the discharge, resulting in a de facto immunity of the directors, which is likely to harm the company's corporate interest.

The Court concluded that both the objective pursued by the legislator (ie protection of the company's corporate interest) and the "*effet utile*" of the law (ie the ability, in the interest of the company, to hold directors liable in the event of mismanagement) should lead to the admission of the Minority Shareholder Action to the benefit of the shareholder holding 50% of the voting rights. In addition, it was pointed out that it would be illogical for shareholders holding less than 50% of the voting rights to be able to act on the basis of article 444-2, but not the shareholder holding exactly 50%.

In its decision, the Court further clarified that it is sufficient that a vote has been taken on the discharge regardless of the outcome of that vote for the minority shareholder action to be available.

In summary, this Court of Appeal decision clarifies a number of key points about article 444-2 of the 1915 Law:

- *a shareholder holding 50% of the voting rights can exercise the Minority Shareholder Action;*
- *the Minority Shareholder Action can be brought even if the general meeting of shareholders has not (by a majority vote) granted discharge; and*
- *the Minority Shareholder Action can be initiated even if the facts relate to a time when the law did not provide for this type of action (which was introduced in the 1915 law in 2016).*

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