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Procedural consequences related to the impossibility to enforce a judgment

No one can be expected to do the impossible.

By judgment dated September 7, 2015, provisionally enforceable, the Commercial Court of Lyon ordered one of our clients - an asset manager - to produce a number of accounting and financial documents to one of its former clients, subject to a daily penalty of 5,000 euros. Yet, the documents in question had been placed under seizure pursuant to a judicial order, pending a final decision of trial judges on what should be done with these documents.

The opposing counsels claimed that the order of the Commercial Court of Lyon implied for our client the obligation to authorize the lift of the seizure. As our client did not do so, the opponent sued it before the Enforcement Judge to seek the payment of the penalty - more than 1 million euros - and the removal from the list of cases of the appellate proceedings that we had initiated. The request filed by the opposing counsels was dismissed both by the Enforcement Judge and the Case Management Judge of the Court

of Appeals of Lyon.

1. Consequences that the non-enforcement of a judgment has on appellate proceedings

Pursuant to Article 526 of the French Code of Civil Procedure:

“Where provisional enforcement is automatic or has been ordered, the first president or, the case management judge as soon as such a request is made to him/her, may, in the event of an appeal, at the request of the respondent and after having obtained the opinion of the parties, order the withdrawal of the case from the list of cases wherever the appellant fails to prove that he has enforced the appealed decision or made the authorized deposit in the conditions set forth in Article 521 [of the French Code of Civil Procedure], unless it appears to him/her that performance may entail manifestly excessive consequences or that the appellant is unable to enforce the decision.”

Relying on this Article 526, the opposing counsels requested the removal of the main appeal and incidental appeal that our client had lodged, on the ground that the latter had reportedly failed to enforce the appealed judgment that ordered it to produce various documents *“within a period of 30 days, at the expiry of which a daily penalty in the amount of 5,000 euros will be applied”*.

But after the issuance of the first instance judgment, both our client and the opposing party had lodged an appeal, and then an incidental appeal. As such, two appellate proceedings were initiated in relation to the same judgment.

It is because of the existence of these two appellate proceedings that the Case Management Judge dismissed the request for removal made by the opposing party, and explained that the removal from the list of cases based on the aforementioned Article 526:

“is likely to impact only the appellate proceedings initiated by the party against which the judgment was entered and that was ordered to provisionally enforce it, not the main appellate proceedings initiated by its opponent;

such removal is only ordered to strike off from the list of cases the appeal lodged by the party that did not comply with the terms of the judgment against which it has lodged a main appeal, and cannot concern a party to another appellate proceedings in which it does not act as main appellant;

two decisions handed down by the European Court of Human Rights on the basis of Article 6§ 1 of the European Convention on Human Rights in relation to the application of the aforementioned Article of the

[French] Code of Civil Procedure must lead the Case Management Judge to perform a strict review of the relationship of proportionality between the purpose of the text and the potential deprivation of the right to access to the appellate judge that may result from such text;

the removal from the list of cases requested in the main appeal lodged by the company X [our client] is in no event likely to achieve the assigned purpose, insofar as the existence of another pending appellate proceedings initiated following an appeal lodged by its opponent cannot be affected by the absence of provisional enforcement of the appealed judgment;

the request for removal from the list of cases should, therefore, be dismissed, without it being necessary to assess whether the impossibility to enforce the judgment or the existence of manifestly excessive consequences is established.”

2. Non-enforcement of the judgment and payment of the penalty

Pursuant to Article L. 131-4§3 of the French Code of Civil Enforcement Procedures:

“The provisional or definitive penalty is cancelled in whole or in part wherever it is established that the non-enforcement or the delay in the enforcement of the judge’s injunction results, in whole or in part, from an extraneous cause.”

An extraneous cause can explain the fact that a person liable to the provisional penalty did not comply with the judge’s injunction.

The notion of “extraneous cause” covers various cases, including in particular *force majeure* or fortuitous events but also an action by a third party or by the party to which the penalty must be paid. According to the *Cour de Cassation* (French Supreme Court), for an extraneous cause to be established, it must be demonstrated that enforcement is impossible, a fact that trial judges determine at their own discretion.

As such, the existence of an extraneous cause can be raised by a person who has been ordered to produce certain documents, including bank statements, but can prove that he does not have such documents in his possession and that the bank has refused to give him copy thereof^[1].

The existence of an extraneous cause is also established where the seizure of documents by judicial authorities makes it impossible to return such documents, even where the documents have been placed in the custody of a court officer at the request of the party subject to the obligation to return them^[2].

In the case at hand, our client could invoke an extraneous cause that prevented it from enforcing the judgment that ordered it to produce the documents since it was unable to authorize the lift of the seizure and to produce

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the contentious documents until the issuance of a final court decision on what should be done with these documents (the appellate proceedings are still pending).

In their request for the seizure of documents, the opposing party had itself expressly asked that the seizure be maintained until the issuance of a final decision on the merits.

The Enforcement Judge with whom the opposing party had filed its request for payment of the penalty that amounted to more than 1M euros, approved our line of defense and dismissed such request on the ground that the performance by our client of the obligation imposed on it under the September 7, 2015 order was precluded by an extraneous cause.

[1] Second Civil Chamber of the Cour de Cassation, April 8, avril 2004, n°02-14.631

[2] Second Civil Chamber of the Cour de Cassation, July 5, 2000, n°98-19.854

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