



Published on 28 April 2016 by **André Soulier**, Senior Member of the Lyon Bar
asoulier@soulierbunch.com

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Withdrawal of an order on ex parte motion: Recent clarification by the Cour de Cassation

SOULIER AARPI, represented by Mr. André Soulier assisted by Ms. Stéphanie Yavordios, recently received a favorable decision from the *Cour de Cassation* (French Supreme Court) in a dispute concerning, in particular, the conditions in which court bailiffs enforced an *ordonnance sur requête* (i.e. a court order on ex parte motion) issued on the basis of Article 145 of the French Code of Civil Procedure.

The *Cour de Cassation* was asked to determine (i) whether disputes over the enforcement of preparatory inquiries ordered as a result of an ex parte motion fell within the jurisdiction of the *juge de la rétractation* (i.e. the judge having jurisdiction to withdraw a court order or decision), and (ii) whether the presence of some agents of bailiff firms during the inquiries - whereas the presence of such persons had not been expressly authorized by the court order - was likely to affect the validity of the such inquiries.

By judgment dated March 17, 2016, the *Cour de Cassation* firstly

held that disputes over the enforcement of preparatory inquiries do not fall within the jurisdiction of the *juge de la rétractation*. It also held that the presence of agents of bailiff firms during the preparatory inquiries does not affect the validity of such inquiries insofar as the court bailiffs perform personally the assignments that have been entrusted to them by the court.

Ordonnances sur requête (i.e. court orders on ex parte motion) issued on the basis of Article 145 of the French Code of Civil Procedure are typically used in business disputes for breach of non-compete covenants, unfair competition or infringement of intellectual property.

Indeed, Article 145 of the French Code of Civil Procedure stipulates as follows: “*If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of an ex parte motion or by way of summary proceedings*”.

The preparatory inquiries *in futurum* (literally for the future) that the parties may request by way of an ex parte motion on the basis of the above Article 145 include requests for the designation of court bailiffs – accompanied, as the case may be, by experts or technicians – to record evidence and/or seize documents in order to prove the facts upon which the plaintiff will possibly rely in the context of subsequent proceedings on the merits.

An *ordonnance sur requête*, as opposed to summary proceedings, has the advantage of being a non-adversarial process and, therefore, helps preserve the “surprise effect” for the party that is suspected of wrongdoings, and thus prevents the risk of evidence being concealed.

However, the plaintiff must make sure to properly substantiate his motion, in particular to convince the judge that the requested preparatory inquiries are legitimate and justified and that they are really necessary needed so that the judge will agree to circumvent the sacrosanct adversarial principle.

In any event, the parties against which the preparatory inquiries are ordered are entitled, after such inquiries have been conducted, to seek the withdrawal of the *ordonnance sur requête* before the judge who has rendered it. In such case, the judge may decide to amend or to withdraw the order^[1].

In the case handled by Mr. André Soulier, one of the parties against which the preparatory inquiries had been ordered was blamed for having breached his non-compete covenants, and the other for having engaged into unfair competition practices by concurring to the breach of the abovementioned non-compete covenants.

Mr. André Soulier, still with the support of Ms. Stéphanie Yavordios, filed an ex parte motion with the

President of the Commercial Court of Lyon on the basis of Article 145 of the French Code of Civil Procedure and requested the designation of two court bailiffs, for the purpose of going simultaneously, together with two IT experts, to the domicile and registered office of the two supposed wrongdoers in order to establish the potential existence of documents evidencing the wrongful actions and get a copy thereof.

During the inquiries, bailiff's clerks and trainees from the two court-appointed bailiff firms were present, in addition to the two court bailiffs and IT experts who had been specifically designated by the *ordonnance sur requête*.

After the inquiries had been conducted, the investigated parties initiated summary proceedings to obtain the withdrawal of the *ordonnance sur requête*. During these proceedings, these parties challenged the validity of the inquiries carried out by the bailiffs on the ground that they were accompanied by other members of their respective firms who had not been authorized to attend the inquiries by the *ordonnance sur requête*. Specifically, they argued that while the *ordonnance sur requête* empowered the court bailiffs to be accompanied by IT technicians and any other knowledgeable parties, bailiff's clerks and trainees, who did not meet these qualification requirements, were not included in the scope of the *ordonnance sur requête* and, therefore, were not entitled to attend the inquiries.

The *Juge de la rétractation* accepted this argument and ordered the withdrawal of the *ordonnance sur requête*.

An appeal was immediately lodged against the decision of the *Juge de la rétractation*.

The Court of Appeals, however, upheld the withdrawal order for the same reasons, i.e. the conditions in which the inquiries had been conducted.

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

The *Cour de Cassation* was thus asked to recall the case-law according to which the monitoring of the enforcement of preparatory inquiries does not fall within the jurisdiction of the *Juge de la rétractation*, which means that the latter was not entitled to order the withdrawal of the order for reasons strictly related to the validity of such inquiries **(1)**.

The *Cour de Cassation* was also asked to determine whether the presence of some agents and other members of the designated bailiff firms during the inquiries – whereas the presence of such persons had not been expressly authorized by the *ordonnance sur requête* – was likely to affect the validity of all the inquiries that had been conducted to collect and seize evidence **(2)**.

In a decision dated March 17, 2016^[2], the *Cour de cassation* quashed the findings of the Court of Appeals on these two issues.

1. Disputes over the enforcement of preparatory inquiries do not fall within the jurisdiction of the *Juge de la rétractation*

The *Cour de Cassation* was first asked to rule that disputes over the enforcement of preparatory inquiries do not fall within the jurisdiction of the *Juge de la rétractation* and, consequently, to quash the appellate judgment in this respect.

Indeed, by supporting the contrary, the Court of Appeals had considered that the *Juge de la rétractation* ought to take into account facts that had occurred since the issuance of the challenged *ordonnance sur requête* and that he/she was empowered to examine whether the ordered preparatory inquiries complied with the terms of said *ordonnance sur requête* and with applicable legal provisions.

Yet, the *Cour de Cassation* has already ruled that the powers of the *Juge de la rétractation* are limited to examining, in the presence of all parties involved, the inquiries that have been initially ordered as a result of an ex parte motion[3]. It has also already specified that the preparatory inquiries do not fall within the scope of disputes relating to the withdrawal of a court decision but within the scope of disputes relating to the enforcement of the ordered inquiries[4] and may, therefore, only be raised in the context of a procedure on the merits concerning the ordered inquiries[5].

Following this line of decisions, the *Cour de Cassation*, in its decisions dated March 17, 2016, quashed the appellate judgment in this respect and clearly laid down the principle that “disputes over the enforcement of preparatory inquiries ordered on the basis of Article 145 of the French Code of Civil Procedure – that do not affect the decision that ordered such inquiries – do not fall within the jurisdiction of the *Juge de la rétractation*”.

2. Regarding the validity of the inquiries carried out by court bailiffs in the presence of their agents

The *Cour de Cassation* was also asked to determine whether the presence of some agents, bailiff’s clerks and trainees from the court-designated bailiff firms during the inquiries – whereas the presence of such persons had not been expressly authorized by the *ordonnance sur requête* – was likely to affect the validity of all the inquiries that had been conducted to collect and seize evidence.

The Court of Appeals had upheld the withdrawal order, after having noted that the terms of the *ordonnance sur requête* – which were restrictive by essence – authorized the bailiffs to be accompanied only by IT experts or other knowledgeable persons of their choice, and that bailiff’s clerks or trainee bailiffs – not being considered as knowledgeable persons within the meaning of the *ordonnance sur requête* – were not authorized to attend the inquiries.

The Court of Appeals’ rationale was primarily based on a *a contrario* reasoning according to which the legal

texts governing the profession of court bailiffs provide that the establishment of certified reports and the service of documents fall exclusively within the scope of competence of bailiffs and do not provide for the involvement of bailiff's clerks or trainee bailiffs.

However, no text specially prohibits a court-designated bailiff from carrying out inquiries with the assistance of a clerk or a trainee working at his/her office.

The *Cour de Cassation* quashed the appellate judgment on this point and held that *"it is not disputed that the court bailiff has personally performed the assignment that had been entrusted to him pursuant to the ordonnance [sur requête], irrespective of whether the agents that went along with him, whether clerks or trainees, were not knowledgeable persons within the meaning of said ordonnance [sur requête]"*.

The presence of such agents, such as clerks, alongside with court bailiffs during the inquiries carried out to record and seize evidence is a quite usual practice that enables bailiffs to benefit from an assistance, in particular a material assistance, for the purpose of carrying out their inquiries which can sometimes be lengthy and complex.

It follows from the March 17, 2016 decision that wherever the bailiff performs personally the preparatory inquiries, as evidenced in the case commented herein by the certified reports drawn up by the court-designated bailiffs, the presence of agents from their firm during the inquiries – even if not expressly authorized by the relevant court order – does not affect the validity of such inquiries.

This very important decision should reassure both the bailiffs – as they are not required to adapt their practice and avoid potential costly professional liability litigation – and plaintiffs seeking preparatory inquiries as they will not be exposed to the risk of seeing such inquiries be invalidated.

[1] cf. Articles 496 and 497 of the French Code of Civil Procedure

[2] Second Civil Chamber of the *Cour de Cassation*, March 17, 2016, n°15-12456

[3] Second Civil Chamber of the *Cour de Cassation*, September 9, 2010, n°09-69936

[4] Second Civil Chamber of the *Cour de Cassation*, February 8, 2006, n°05-14198

[5] Commercial Chamber of the *Cour de Cassation*, June 11, 2013, n°12-20925 ; Second Civil Chamber of the *Cour de Cassation*, December 2, 2004, n°02-20205

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