THE RISE OF ANGLO-SAXON PRINCIPLES IN DISTRIBUTION AND COMMERCIAL AGENCY LITIGATION


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Developments in distribution and commercial agency law have raised the issue of litigation and compliance to a crucial level for companies. Stéphanie De Giovanni, an attorney at the Paris and New York bars, has studied, for the French International Chamber of Commerce Journal "Echanges Internationaux", the tendencies in state courts and arbitration tribunals based on the recent caselaw.

Although largely governed by various French public order laws, distribution and commercial agency law is evolving to integrate new legal issues in international litigation trends.

State courts and arbitration tribunals strive to balance different interests, often oscillating between the protection of the parties' contractual commitments, respect for good faith and protection of public policy interests. Thus, the protective status of commercial agents under French law must take into account the rules of compliance. Similarly, distribution law is more and more concerned with the French-style *"mini-discovery"*, i.e the *in futurum measures*, granting more importance to the issue of right of evidence and respect for trade secrets met by suppliers and distributors.

The rise of compliance litigation in intermediary and consultancy contracts

The fight against corruption is now a global issue. As a result, anti-corruption standards have expanded. The Foreign Corrupt Practice Act (FCPA), a 1977 U.S. federal law, is certainly the best-known anti-corruption law in the world. Just like the UK Bribery Act of 2010, the FCPA is a formidable legislative weapon in the fight against international corruption, thanks to its extraterritorial effects. On its side, France has adopted an equivalent legislation with the introduction of Law no. 2016-1691 of 9 December 2016 on transparency, fight against corruption and modernization of economic life, known as the "Sapin 2 Law".

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The Sapin 2 Law has created an obligation to fight against the risks of corruption in France and abroad, requiring major companies to implement procedures to prevent and detect these risks under the supervision of the French Anti-Corruption Agency. This law has also allowed a new way of handling litigation against a legal entity for breach of probity, by introducing into French law the judicial public interest agreement ("CJIP"), an alternative measure to prosecution which enables a settlement to be reached with the public prosecutor and which is inspired by the American *"deferred prosecution agreement"*.

Intermediation and consulting contracts can be particularly exposed to corruption risks, especially when they are performed in countries considered "at risk". The Sapin 2 Law has therefore obliged companies governed by its provisions to carry out due diligence on these co-contractors, by submitting them to an evaluation process based on risk mapping (Art. 17, II, 4°).

Companies subject to these obligations may be held liable in the absence or inadequacy in the compliance program provided for under the Sapin 2 Law. Companies not covered by these legal obligations must also often be able to demonstrate that they apply compliance procedures in order to work for French or foreign clients who contractually impose these compliance procedures.

Commercial intermediaries must therefore also adhere to their principals' compliance rules. Certain case laws ruled that a proven failure to comply with contractual compliance obligations is a ground for terminating the contract. For example, the French Supreme (the "Cour de Cassation")[1] has explicitly recognized that a company is entitled to unilaterally terminate a sales agent's contract without notice if the agent has failed to comply with its compliance obligations. Distribution law is therefore facing an increase in disputes relating to anti-corruption obligations in international sales agent and consultant contracts.

How to balance the interests at stake in the event of a breach - or suspected breach - of a compliance obligation?

In matters of corruption, arbitral tribunals and national courts generally use the probatory method of "corruption indicators" or "*red* flags" method, initially developed in the United States, to establish a presumption of guilt in the presence of sufficiently serious, precise and concordant evidence. The Paris Court of Appeal frequently uses this method when controlling the compliance of arbitration awards with international public policy in cases of alleged corruption. Recently, French courts were asked to rule on the existence of corruption indicators between

[1] Cass. Com., 20 November 2019, no. 18-12.817.

the Chinese State and the company Alexander Brothers Ltd, a company appointed by Alstom as its consultant in connection with tenders in China[2]. In this long-running case, the Versailles Court of Appeal finally recently authorized the exequatur of the arbitration award on the grounds that there was no characterized contradiction with international public policy.

It is moreover accepted that although the court's review must be limited to verifying that the award complies with the French legal system, the judge is nevertheless entitled to rule on points that were never raised before the arbitral tribunal.[3]

Nevertheless, unsubstantiated arguments concerning a violation of compliance program must not block the normal performance of the contract and prevent, for example, the payment of commission or termination indemnities that would normally be due. Judges and arbitrators must therefore weigh up the interests of the various imperative rules involved before deciding whether the customer/principal is able to prove that there were material breaches of the contract and compliance obligations. When different imperative interests are involved, it is in the end a question of balance.

Litigation on trade secrets and *in futurum measures* in distribution

Because they ensure an element of surprise, the probatory measures called *in futurum* provided for in article 145 of the French Code of Civil Procedure are often used to provide proof of acts of unfair competition. *In futurum measures* enable any interested party to request the courts, prior to any legal proceedings, for an investigative measure ex parte, if there is a legitimate reason to preserve or establish proof of facts on which the outcome of a dispute may depend.

This probationary measure can be compared with the Discovery procedure in the USA. The latter allows a party to ask the defendant for documents relevant to the search for evidence that can be used in a trial, even if said documents would be unfavorable to the defendant. French *in futurum measures* are similar insofar as they allow seizure of the defendant's documents, on the basis of keywords as part of an electronic seizure procedure. However, *in futurum measures* remain the exception under French law, whereas this is the usual procedural rule under American law.

Litigation concerning *in futurum measures* is expanding, and is penetrating distribution contract litigation through, for example, arguments of unfair competition and/or non-compliance with a distribution exclusivity agreement. In concrete terms, this means that a distributor (French or foreign) can seize its supplier's electronic files and e-mails if said distributor can prove potential infringement of its rights at the motion stage. The other way round is also true: the supplier can take such action against a distributor suspected of dishonesty.

However, access to such powerful ex-parte measures does raise question:

- What is the cost to the defendant, who will have to defend himself once the measure has been completed, after the seizure of hundreds or thousands of documents? Discovery proceedings are extremely costly in the United States and is a major contributor to the soaring cost of litigation across the Atlantic. This is a fact to bear in mind when granting *in futurum* measures, and will need to be carefully circumscribed.
- How can we guarantee that the measure defined by the judge will be perfectly completed from a technical point of view? The bailiff is usually accompanied by an IT expert on whom he can rely. However, as is often the case, the devil is in the details - in this case, the computer settings.
- How can we effectively guarantee respect for trade secret if the seizure is very large and involves thousands of documents?
- And how can one effectively protects its most precious trade secrets when this kind of mini-Discovery can be put in place (a question that arises on both the legal and technical levels)?

Some answers already exist. The concept of trade secret now has a legal definition set forth in Article L.151-1 of the French Commercial Code and the seizure of information meeting this definition as part of an *in futurum measure* is strictly governed by articles R.153-1 et seq. of the same code. The law of 30 July 2018 offered the judge the possibility of limiting the communication or production of documents likely to infringe trade secret to certain persons and certain elements thereof. In addition, when this *in futurum measure* has been requested ex parte, the judge may order that the requested documents be placed in temporary escrow, until the defendant can request modification or withdrawal of the order within a period of one month. Therefore, as stated by the Paris Court of Appeal,[4] the protection of trade secrets must occur at the stage of the document selection procedure and cannot be invoked to challenge the measure.

The right to trade secret does not either prevent the communication of documents in their full version if they are necessary to the resolution of the dispute[5] . In such cases, the judge may limit the distribution of unredacted documents by designating the person or persons who shall be entitled to have access to the full version of the documents. The law also imposes an obligation of confidentiality on any person having access to a document or to the content of a document covered or likely to be covered by trade secret[6].

The notion of the proportionality of the measure to the objective pursued is also taken into account when authorizing *in futurum measures*. In a decision dated March 24 2022[7], the Cour de Cassation ruled that an *in futurum measure "circumscribed in time and which only concerns documents relating to acts of unfair competition alleged by the person requesting the measure"(informal translation)* does not constitute a disproportionate infringement of trade secret. Therefore, litigations on trade secret within the framework of *in futurum* measures is starting to take shape, but other questions are still pending, notably concerning the hidden costs of this long-term litigation for the suppliers or distributors involved. ■

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2. Paris Court of Appeal, May 28, 2019, no. 16-11.182; Cass. 1e civ., September 29, 2021, 19-19.769; Versailles Court of Appeal March 14, 2023.
3. Cass. 1e civ. 7 september 2022, n° 20-22.118, *Libye c. SORELEC*.
4. Paris Court of Appeal, Ch. 2, April 20, 2023, no. 22-17.157.
5. Ccom Art. R. 153-6.
6. Ccom Art. L.153-2.
7. Cass. 2e civ. 24 mars 2022 n° 20-21.925 F-B, Sté Matières c/ Sté Ad Lucem.