

## Behaving well while in police custody

The plan to reform French criminal procedure is making waves, especially as regards the conditions of detention of suspects in police custody. Faced with the increasing criminalization of business life, executives in large corporations fear this measure, the frequency of which represents an increasingly serious threat.

The time spent in police custody, even in the context of a regulated process with a limited duration, is a real test considering the restriction on liberty and freedom of movement, and is designed to be very destabilizing. Being prepared strongly reduces psychological vulnerability and better responding to police questioning.

Business executives are not accustomed to police stations or to courthouses, and are not familiar with the code of behavior in such places. Being prepared to be taken into custody can ensure that the person held has the right reflexes and more efficiently resists the different sorts of pressure that can be exerted during custody under the law.

First, it is important to prepare for the actual conditions, since the sordid and uncomfortable nature of police stations combined with an intentionally intrusive and arbitrary agenda are deeply disturbing.

Second, it is important to be familiar with the procedural process that must be followed during custody: duration, stages, rights, etc. Knowing the answers to these questions enables persons in custody to feel they have some control over the timeline. During custody detention, which in principle lasts 24 hours, certain rights must be respected (right to see an attorney after the first hour of custody, right to see a doctor, right to inform a family member).

Faced with the onslaught of questions to be expected, a few basic rules should be kept in mind so as to be better equipped to respond to the judicial police officer embodying authority. By way of example, a person being questioned:

- has the right not to remember the information requested or the facts brought up;
- has every interest in simply replying to the question put without going beyond the question or trying to give explanations that are likely to induce the police officer to ask other questions that he may not otherwise have thought of asking;
- has every interest in carefully reviewing any statements made and correcting any inaccuracies,
- has every interest in noting down, upon being released from custody, the questions asked and the answers given, since no copy of the signed statement will be provided.

This simple advice can change the outcome of being held in police custody.

The profoundly destabilizing environment created by the conditions in which persons are held in custody and its consequences on executives lacking any experience of the world of delinquency or police stations should not be neglected. Besides the fact that being held in custody can be a vexatious and humiliating experience for those enduring it, it can negatively impact any future trial and thus handicap the defense of the company during the investigation phase and before the criminal courts.

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## TABLE OF CONTENTS

Behaving well while in police custody	PAGE 1
"Preliminary" rulings on constitutionality: An opportunity to significantly advance democracy	PAGE 2
Judicial mediation, an alternative to litigation	PAGE 3
News and Events	PAGE 4

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## “PRELIMINARY” RULINGS ON CONSTITUTIONALITY: AN OPPORTUNITY TO SIGNIFICANTLY ADVANCE DEMOCRACY



Since March 1<sup>st</sup>, private citizens in France have been able to go before the *Conseil constitutionnel* by making an application for a “preliminary” ruling on constitutionality (“*question prioritaire de constitutionnalité*”). Hitherto, a private litigant could challenge the validity of a law before the French courts solely on the basis of European treaties.

This situation ended with the reform on July 23, 2008, which introduced an Article 61-1 into the French Constitution, providing that “if, during proceedings underway before a court of law, it is claimed that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred to the *Conseil constitutionnel* [Constitutional Committee] by the *Conseil d’Etat* [Council of State] or the *Cour de cassation* [Supreme Court], which shall issue a ruling within a specified period”.

The entire corpus of constitutional law can now be asserted.

The application must be made in the context of a lawsuit that is underway, at any time during the proceedings and before any court with the exception of the *Cour d’Assises* (criminal trial court having jurisdiction over major felonies with both original and appellate jurisdiction in some cases).

If raised during the first instance proceedings, the court is required to rule without delay on the referral of the application to the Supreme Court. In turn, the latter has three months from such referral in which to rule on the referral to the *Conseil constitutionnel*.

In making this adjudication, the satisfaction of the following three-pronged criterion will be considered:

- Existence of a link between the contested rule of law and the proceedings underway,
- No previous finding by the *Conseil constitutionnel* holding the same rule of law to be constitutional,
- Seriousness of the issue for which the ruling is requested.

If a referral of the application is ultimately made to the *Conseil constitutionnel*, the latter is required to inform the President of the Republic, the Prime Minister and the heads of the upper and lower houses of Parliament, so as to enable the latter to present any observations they may have. They should also invite the parties to a full and fair hearing of both sides, before ruling on the constitutionality of the challenged rule.

This reform could open up new prospects for private litigants so as to challenge the constitutionality of laws and regulations.

In a nutshell, it can only be hoped that this traditionally conservative institution will seize this opportunity of advancing our democratic system of government.

### IN A NUTSHELL

- 1 When a statute infringes rights and freedoms guaranteed by the Constitution, a citizen can apply for a preliminary ruling on constitutionality,
- 2 The application must go through several filters before being referred to the *Conseil constitutionnel*,
- 3 Certain statutory provisions (such as those relating to “*garde à vue*”) may be challenged on the basis of fundamental principles recognized by French law.

## JUDICIAL MEDIATION, AN ALTERNATIVE TO LITIGATION



The Paris Bar and the Civil Court of Paris signed off on an agreement on December 14, 2009 intended to facilitate the generalization of the judicial mediation system introduced by Act no. 95-125 dated February 8, 1995 that does not seem to have been used much in practice.

This method of alternative dispute resolution, inspired by common law practice, is no doubt not a necessity in order to reduce the costs associated with court proceedings, as it is in the U.S.A. It is nevertheless, as in the USA, an effective way of achieving the same commercial objectives : expedite the resolution process and preserve, or even develop, the business relationship.

Judicial mediation is a dispute resolution process whereby an agreement is sought between the parties after the dispute has already been referred to a court. Subject to the parties' consent to mediation (in cases where mediation attempts are not mandatory), the court will appoint a qualified, impartial third party who is under a duty of confidentiality: the mediator.

The introduction of judicial mediation meets a veritable public need to ease the burden on the courts in an increasingly litigious society. In our advisory capacity, we see mediation as an alternative dispute resolution mechanism based on a pragmatic and constructive approach: instead of enduring legal proceedings, the parties come together to jointly forge an agreement, assisted by the mediator.

In business life, this mechanism increases the responsibility of the parties to a dispute and by extension their willingness to find a solution. Accordingly, a settlement negotiation abandoned prior to the initiation of legal proceedings may be successfully resumed.

There are many advantages in advising mediation. In lawsuits with an inherently uncertain outcome, it enables the parties to renew dialogue under the guidance of an impartial and competent third party. It also represents a less costly resolution mechanism for the parties as well as a speedier mechanism than legal proceedings before the courts, which are by nature lengthy.

Reliance on mediation also presents the advantage of not losing too much time in case of failure since, besides the fact that the parties are given a maximum period of three months in which to reach agreement and the mediation process will remain confidential, they are also free to put an end to the mediation at any time during that period and go back before the court without any new referral of the claim being required.

SIBYLLE MAREAU

### IN A NUTSHELL

- 1 It is confidential,
- 2 it is binding on the parties, who give it *res judicata* effect,
- 3 if it fails, no new referral needs to be made to the court.

## LIFE AT THE FIRM



### Alérion strengthens its Intellectual Property/ Media department.

Joël Heslaut (age 47), specialist in IP law, joined Alérion as a partner on January 1, 2010. Joël began his career at Féral-Schuhl et Grégoire Sainte Marie law firm, accompanying the structure upon its merger with Salans in 1998. In 2000, he joined Ernst & Young as manager of the IT department. Joël co-founded Nove7 law firm in 2005. He is a member of AFDIT (French Computer and Telecommunications Law Association), APRAM (French Association of Practitioners in Trademark and Design Law), AIPPI (International Association for the Protection of Intellectual Property) and has taught IT law at the Universities of Pau and Versailles Saint-Quentin. He is bringing two team members with him, Coralie Morineaux and Loullig Bretel. With these arrivals, the Intellectual Property/Media department now counts two partners and three associates.



### A new Of Counsel joins the Banking and Finance Law department.

Jean-Louis Paturaud (age 55), previously head of the international legal department of Natixis, joined Alérion as Of Counsel on January 1st past. He will strengthen Alérion's banking and finance law team. The department now counts two partners, Dominique Doise and Philippe Mathurin, one Of Counsel, and six associates.

**New attorneys.** The firm has hired Edith Yapo as a senior attorney in the Employment Law department and Lucien Lacroix in the Real Estate and Construction department. Mathieu Le Rolle, in the Commercial Litigation department, has just been admitted to practice as a licensed attorney by the Paris Bar.

**Support function bolstered.** Christophe Preau has been brought in as general secretary and Maxime Maeght as head of marketing and communications.

## PUBLICATIONS



### *Le juge des référés peut ordonner la poursuite de la relation commerciale en cas de déférencement.*

Analysis of the November 10, 2009 ruling by the commercial division of the French Supreme Court in Carrefour Hypermarchés, Sté Interdis v Sté Legal Nicolas Mathey in CCC, April 2010, pp. 18 *et seq.*

### *Google books : selected excerpts*

Analysis of the December 18, 2009 ruling by the 3<sup>rd</sup> division of the Civil Court of Paris, by Asim Singh in RLDI 2010/57, no. 1877, pp. 6 *et seq.*

### *Les fraudes et dérives du crédit documentaire (Documentary Credit Frauds and Excesses)*

by Dominique Doise, in cahiers AEDBF / EVBFR – Belgium, mars 2010, Anthémis Sa / Intersentia – Louvain la Neuve / Antwerpen-Oxford

## PRESENTATIONS/SPEECHES/CONFERENCES



On March 30, 2010, Joël Heslaut was one of the speakers at a training session on "Valuing the intangible assets of a business: identification, valuation and exploitation of industrial property", organized by LexisNexis publishing house.

## RATINGS AND AWARDS



The firm received the "Firme Montante" ("Up and Coming Firm") award in the "Venture Capital" category, at the *Trophées du droit et de la finance* ceremony organized by Décideurs magazine. The firm was represented by partners Jacques Bouyssou and Pierre-Olivier Brouard.

## INTERNATIONAL ACTIVITIES



On December 4, 2009, Alérion organized, together with its Canadian partner law firm, Lette, a working breakfast meeting on legal and tax aspects of investments in the pharmaceutical/biotech sector. Julien Le Guyader, legal and tax advisor from LEEM (French research-based pharmaceutical association) and Dany Larochelle, from Investissement Québec, keynoted alongside André Begin from Lette. For its part, Alérion was represented by partners Jacques Bouyssou and Philippe Pescayre.

## TO BE CONTINUED...



Alérion will be continuing to hold working breakfasts on different topics during the second half of the 2010. By way of example, we will be holding a working breakfast on business criminal law in the month of June. For more information, please contact your customary contact at our firm.