

## Psychosocial risks in companies: a redefined priority

Psychosocial risks are splashing the headlines due to a wave of suicides that have taken place in the workplace. Concomitantly, interprofessional national agreements ("ANI") on stress, violence and harassment at the workplace have just been negotiated.

The notions of psychosocial risks that are stress, harassment and violence at the workplace are continually being broadened, thereby facilitating their recognition and sanctions against employers.

Another new development is the recognition that stress and moral harassment may also find their source in the very way a company is organized (ANI of July 2, 2008 and March 26, 2010). The ANI of March 26, 2010 also specified the nature of reiterated conduct characteristic of moral harassment, citing bullying without violence, threats or repeated and deliberate humiliations at the workplace. For its part, violence at the workplace spans disrespect to the manifestation of an intent to harm or destroy, incivility and physical assaults. The fact that incivilities have become commonplace serves as a spur to more serious acts of violence and harassment (ANI March 26, 2010).

In two rulings (February 3, 2010), the employment division of the French Supreme Court has made the system of proof as regards the employer's obligation to provide security and prevent psychosocial risks less stringent. A mere report ascertaining acts of harassment or violence at the workplace suffices to establish breach of the employer's obligation of security and thus to justify, for example, acknowledgement by an employee of the de facto termination of the contract of employment by the employer without the latter being able to exonerate itself by proving that it had taken the necessary measures to put an end to such conduct.

This transition to a strict obligation to ensure security results in employers running a higher risk of their civil and criminal liability being incurred with respect to employees claiming to be victims of psychosocial problems, arising in particular from an organization of work which they consider compromises their security.

In addition, breach of the security obligation also serves as the basis for claims seeking recognition of inexcusable negligence by the employer made by victims of workplace accidents and occupational illnesses. For the time being, the evidentiary system has not been modified as the burden is still with the employee to prove that the employer had or should reasonably have had knowledge of the danger but failed to take the necessary measures.

Training and prevention efforts conducted together with the occupational doctor and the Committee on Workplace Health, Hygiene, Security and Working Conditions and an analysis of the risks in view of implementation of remedial actions, in particular based on the unique risk assessment document are just some of the responsibilities weighing down on the employer. To sum up, care should be taken to choose appropriate stress assessment tools to ensure that they cannot come back to haunt their implementers.

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ALERION

## THE EVIDENTIARY VALUE OF AN SMS IS DUBIOUS



Last summer, the media reported on a ruling by the French Supreme Court (June 17, 2009) under the headline “SMSs now have the value of proof”. Recent celebrity news stories have spiced things up, with the development of an iPhone application called *TigerText* (by reference to a professional sportsman who was caught out last December with some explicit sexts). This application permits an SMS to ‘self-destruct’ after a certain lifespan upon being read by the recipient...

The June 17, 2009 decision involved, for its part, a divorce case where the wife had discovered, on the company cell phone mislaid by her husband, SMSs he had exchanged with his mistress. She had an official process-server draw up a report so as to obtain a divorce for fault.

The French Supreme Court, differing from the Court of Appeal, showed proof of a certain modernity by strictly applying the principles that receive application in the field of the secrecy of correspondence, and by specifying two points. First, it affirmed that in divorce cases, private correspondence can be produced without the consent of the interested parties if obtained without violence or fraud, before reiterating that an SMS is correspondence. Lastly, it specified that an SMS may be produced as proof in divorce cases.

But it seems a pity that the argument, which could only fail, that an SMS is covered by the inviolability of personal correspondence, did not hinge on the admissibility of SMS messages under §1316-1 of the Civil Code, which specifies the requirements in order for electronic writing to have evidentiary validity. How can an SMS be considered valid proof meeting the requirements under that section: how can the person from whom it originates be duly identified, and how can it be established and conserved under conditions of a nature to guarantee its integrity? How can one be sure of the authenticity of an SMS stored in the memory of a cell phone when there is no serious guarantee that the message was really addressed or received by the persons in question considering that websites exist explaining how to write files in the memory of cell phones, and that operators are unable to keep traces of the content of messages.

It would seem preferable to consider that SMS messages can only constitute valid proof provided all precautions have been taken, as with any electronic evidence, such that its authenticity cannot be called into doubt. By way of example, such precautions could take the form of a report drawn up and kept by an official process-server while waiting for adversarial debate to take place on the issue of confidentiality.

JOËL HESLAUT

### IN A NUTSHELL

- 1 The principle of the secrecy of correspondence applies to SMS messages,
- 2 An SMS message may be produced as evidence in a divorce case if obtained without violence or fraud,
- 3 a review of the integrity of the electronic evidence is indispensable if there is the slightest challenge.

## PROPERTY TRADERS CAN SEEK A REFUND OF VAT PAID ON THEIR MARGINS SINCE 2008



The recent reform of real estate VAT rules, which entered into force on March 11, 2010, aims at putting an end to the incompatibility between French and Community legislation, which allows property traders to obtain a refund of VAT paid on their margins.

This measure, taking the form of an administrative appeal, should enable a refund of VAT paid on margins since January 1, 2008 to be obtained, together with late payment interest, calculated at a rate of 4.80% per year.

In Community law, no systematic system of taxation of the margins of property traders exists, contrary to the case of France before the real estate VAT reform. Only an option is offered by the provisions of Article 137 of the VAT Directive of November 28, 2006.

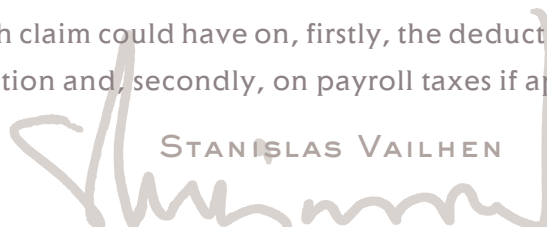
Also, Article 392 of the VAT Directive limits the application of the VAT margin scheme (option offered to Member States) to only those deliveries of buildings and building land purchased for the purpose of resale by a taxable person, when the VAT on the purchase was not deductible, irrespective of any reference to status as a property trader.

Accordingly, property traders carrying out purchase and resale transactions on buildings, other than building land or new buildings (completed within less than 5 years), which are by definition automatically liable for real estate VAT, are not automatically subject to VAT but only upon the exercise of an option.

Property traders wishing to obtain a refund of VAT paid under the margin scheme are required to file an administrative appeal (*réclamation contentieuse*) within the limitation period for claims, namely before December 31st of the second year following the payment (i.e., before December 31st, 2010 in the case of VAT paid in 2008).

The VAT under the margin scheme refunded for those years, plus late payment interest, will nonetheless be taxable income. Subject to tax losses, after payment of corporate income tax, the net amount of VAT under the margin scheme recovered by property traders will represent 2/3rds of the amount of the VAT paid under the margin scheme.

Prior to filing a refund claim, the amount recoverable should be weighed up against the adverse impact such claim could have on, firstly, the deductibility of the VAT on the basis of the transaction and, secondly, on payroll taxes if applicable.

  
STANISLAS VAILHEN

### IN A NUTSHELL

- 1 The revised finance act for 2010 brings the French rules applicable to property traders into compliance with Community law by now providing that purchase and resale transactions of old buildings are only subject to VAT if this option is exercised,
- 2 Property traders can claim a refund of the VAT paid under the margin system for the years 2008, 2009 and 2010,
- 3 Whether or not such a claim should be made should be assessed on a casebycase basis, depending on the specific circumstances of each transaction.

## FIRM NEWS



### The Banking and Finance Law Department has been strengthened.

Nelly Darmon has recently been named partner in the banking and finance law department, alongside Dominique Doise, one of the firm's founding partners. After having begun her career working for Bertrand Moreau in 1987, Nelly Darmon became a partner at Moreau Bernard Amigues Darmon et Associés law firm, where she stayed from 1993 to 2001 before co-founding Sigrist Darmon et Associés law firm. Nelly Darmon holds a postgraduate DESS degree in Legal Professions and International Trade from the University of Bourgogne. Her practice area encompasses internal banking law (bankers' liability, payment instruments, loans and warranties & col-



lateral) and international law (international arbitration, exequatur, documentary credits and standalone guarantees). As part of the Master 2 international business law program at the University of

Bourgogne, she lectures at seminars on documentary credits and standalone bank guarantees. She also serves as editor with responsibility for these topics for the legal publisher Editions Lamy Contrats Internationaux. The firm's banking and finance law department now counts two partners, three of counsel and three lawyers.

### The Competition/Distribution Department has grown.

Frédéric Saffroy has recently joined the competition/distribution department headed by Catherine Robin. He began his career at Dunlop France before joining Thomas et Associés law firm in 1993, and Hoche law firm in 1996. In 2000, he joined Hammonds Hausmann where he became a partner in 2002. Specializing in the industry and high technologies sector (defense, aerospace, power, life sciences). Frédéric Saffroy has acquired cross-expertise in the fields of intellectual property and competition law (R&D, joint-ventures, parallel imports etc.), as well as regulatory law (French data processing legislation, control of exports, product compliance etc.). A graduate from the Institut d'Etudes Politiques of Paris (in Economics and Finance), Frédéric Saffroy holds a postgraduate DEA degree in Community Law from the University of Paris II Panthéon Assas. He has brought along two lawyers with him, Sophie Guerrieri and Ronan



Kervadec. The competition/distribution department now counts two partners and four lawyers.

## PUBLICATIONS



### *Vers la remise en cause de la liberté du banquier en matière de crédit ?*

Article by Nicolas Mathey, in JCP EA issue of June 10, 2010.

### *Autour de la rupture brutale de relations commerciales : compétence et délais de préavis*

Article by Nicolas Mathey, in JCP E 21 issue of May 27, 2010, 1504.

### *Modification des contrats et rupture du contrat : conséquences*

Commentary by Nicolas Mathey on the ruling by the Paris Court of Appeal on December 17, 2009 in *Sté Laurice El Badry Rahme Limited v SA HJC* and by the Versailles Court of Appeal on January 7, 2010 in *SAS Sté Française d'équipement bureautique SOFEB v SAS Canon France*, in CCC issue dated May 2010, pp. 16 et seq.

### *Agent commercial et pouvoir de négociation*

Commentary by Nicolas Mathey on the ruling by the Paris Court of Appeal on January 28, 2010 in *Sté Exan Limited v Sté Cephalon France*, in CCC issue dated May 2010, pp. 15 et seq.

## INTERNATIONAL ACTIVITIES



Jacques Bouyssou, member of Alérion's Board, was in Washington between April 12th and the 16th, 2010, to represent Alérion at a conference of the International Bar Association.

Asim Singh, partner in the Intellectual Property/Media department, represented Alérion at the International Trademark Association (INTA) conference held between April 22nd and 26th, 2010. It was attended by attorneys specializing in trademark law from around the world.

On June 10, 2010, Alérion organized, together with its Canadian partner law firm, Lette, a working breakfast meeting on investing in the Canadian market. André Begin represented Lette while Catherine Robin (partner) represented Alérion.

## TO BE CONTINUED...



Alérion will be continuing its thematic working breakfast meetings after the summer holidays. A series of breakfasts on "intrusive" government measures will be organized. For further information, please contact your customary contact persons at our firm.