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Anti-Corruption and Contractual Relations: Beyond Words, Legal Consequences

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Recently, the Court of Cassation had the opportunity to rule on the effectiveness of anti-corruption clauses in contracts and their consequences with regards to the termination of a business relationship between a French subsidiary of a U.S. company and a French company. This decision is rich in concrete lessons regarding the effects of such clauses, too often inserted without their scope being really measured in terms of the rights and obligations they generate for the contracting parties.

A relatively minor international arbitration, adopted about 15 years ago, became famous, through a simple *obiter dictum*, stating that corruption was now contrary to *'international public policy'.*[1]

Today, the fight against corruption and its implementing mechanisms have become an integral part of the law: many international conventions have been established and States have had to adapt their legal framework on several occasions to respond to these major developments in international economic law. In France, this was notably the case with the introduction of the offence of bribery of foreign public officials and, more recently, with the now famous *"Sapin II"* law.

However, there is one area which generally receives less attention but which is of primary importance for companies and other economic actors as it affects commercial and contractual relations. Thus, in recent years, a whole series of anti-corruption obligations have emerged, including through the insertion of "anti-corruption clauses" (or adherence to the overall policies of one's partner), which may vary in content and scope but are essentially aimed at a transfer of responsibility. For example, the practical anti-corruption guide drawn up by the French business confederation's ("MEDEF") following the Sapin II law encourages companies *"to include in the draft partnership agreement an anti-corruption clause* (e.g. *possibilities of auditing rights, certifications and other guarantees*) *that could enable it to be released from its commitments in the event of a third party's failure to prevent corruption".*[2]

A recent decision of the Court of Cassation has shed significant light on the legal consequences of anti-corruption commitments.

The Decision of the Court of Cassation

The facts are relatively simple and clear. A French company Equilibre Implant Chirurgical ("EIC"), which trades in medical, surgical, and orthopaedic articles, concluded in 2007 a "business agency contract" for an indefinite period of time with the French subsidiary of an American group ("Biomet"). In 2010, the French company adhered to the U.S. Group's Global Anti-Bribery Policy, which states that *"all Biomet employees will be required to sign a regular certification of adherence to the policy and to satisfactorily participate in training on applicable anti-corruption laws".*

In 2012, this American group, which was then prosecuted by the *Department of Justice* ("DOJ") and the *Securities and Exchange Commission* ("SEC") in the United States, concluded a Deferred Prosecution Agreement ("DPA") with these authorities. Under this DPA, the American group undertook to strengthen its anti-corruption policy, with regards to its employees and subsidiaries, but also with regards to its partners.

However, in 2013, the French company refused to renew its adherence to the certification of the American group's anti-corruption policy and to carry out online training in this respect, despite receiving three reminder emails. As a result, Biomet decided to terminate the agency agreement without prior notice, which led to the French company's recourse to the French courts on the classic grounds of an abrupt termination of the established commercial relationship (Article L 442-6 1 5° of the French Commercial Code, now Article L 442-1 in its latest version).

It was thus up to the courts to determine whether EIC's conduct constituted serious misconduct, allowing Biomet to dispense without any notice period in connection with the termination. First, the Paris Court of Appeal responded affirmatively and then the Court of Cassation confirmed that judgment.

On November 30, 2017, the Paris Court of Appeal dismissed the French company on the grounds that "*all of EIC's failures in terms of subscribing to the anti-corruption system and declaring its links of interest with healthcare professionals were sufficiently serious to authorize the termination of the contract without notice*".[3]

On November 20, 2019, the Court of Cassation approved the judges of appeal, ruling *"that, taking into account the rules set out in the compliance program and the agreement reached, EIC's failure to meet its contractual obligations, in that it was likely to engage Biomet's own liability, was sufficiently serious to justify the termination of the business relationship without notice"*.[4]

Lessons for Business

The November 20, 2019 ruling can be compared to a decision of the Paris Court of Appeal of October 24, 2013, which ruled in a dispute between a company organizing trade fairs and exhibitions and a service provider in charge of prospecting the Ukrainian market. In that case it was held that the breach of contract without notice could legitimately be based on a set of elements tending to prove that the service provider had asked several third parties for bribes in return for its intervention. The Court considered that the service provider failed to fulfil its contractual obligations not to harm the interests of its co-contractor, even in the absence of a court decision confirming the acts of corruption.[5]

Nevertheless, the judgment of November 20, 2019 clearly goes much further, since in this case, no act of corruption was reproached or even suspected, and the Court considered that the mere non-renewal of the U.S. group's anti-corruption policy certification was a serious misconduct.

Three major lessons can be drawn for companies from the ruling of November 20, 2019:

1. An initial lesson for all companies.

Beyond words, the fight against corruption requires compliance with standards of behavior from which the company and its managers cannot free themselves without exposing themselves to legal and judicial consequences in addition to possible criminal sanctions. In this respect, it is worth emphasizing the exponential increase in anti-corruption issues in international arbitration, whether it is between a company and a State or purely commercial between two companies.[6]

2. A second lesson for companies wishing to include anti-corruption obligations in their contracts.

Any company wishing to introduce anti-bribery clauses or obligations in its contractual relations should consider beforehand what purpose it really intends to pursue by contracting such commitments. Although standard clauses exist, it is recommended that such a clause should not be included only for display or policy reasons. The clause should be drafted in the light of a genuine risk map and be proportionate to the aim pursued. It is also essential that this clause should correspond to a clear willingness to implement it if necessary. Inserting an anti-corruption clause without a real willingness to implement it would be highly damaging.

3. A third lesson for companies that are asked to subscribe to such obligations.

Companies that may be asked (or even required?) by their partners to subscribe to contractual clauses or obligations in terms of anti-bribery will have to assess the full scope and possible consequences of such clauses and avoid committing themselves lightly (all the more so if their partner belongs to an American group). In this respect, it is important to ensure that all parties have the same understanding of what is concretely expected from the company targeted by the clause in question, particularly in the context of an international contract. Ideally, an implementation protocol should be agreed in advance to avoid future misunderstandings.

Very recently, Professor Marie-Anne Frison Roche clarified the scope of compliance law: *"A State or a public authority sets what I call a 'monumental goal', for example to combat child labour or corruption ('negative' goals) or to restore ecological balances ('positive' goals). These goals of a political nature, which the State is not in a position to achieve, particularly because of their global dimension, are imposed on certain companies, the "crucial operators": in other words, the political actor internalises within the companies the responsibility of achieving this goal"*.[7]

Contractual obligations in the field of anti-corruption, as established by the French Court of Cassation, make it possible to determine *who is responsible for what in this area*. This is not to be taken lightly.

Verba volant, scripta manent as the Latins used to say. The words fly away, the written word remains.

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[1] CIRDI, World Duty Free Company c. Kenya, n° ABR/00/7, sentence, October 4, 2006, § 157, where the tribunal concludes that « [i]n light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all States, in other words to transnational public policy ».

[2] https://www.ifaci.com/wp-content/uploads/Guide-pratique-dispositif-anticorruption-sapin-II.pdf.

[3] Paris Court of Appeal, November 30, 2017, chamber 5, RG:15/19388. The termination of the contract was also based on the non-implementation of the statement of relationship of interest with health professionals provided for under Article L.1453-1 of the Public Health Code.

[4] Commercial division of the French Court of cassation, November 20, 2019, decision reference: 18-12817 https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000039437948.

[5] Paris Court of Appeal, October 24, 2013, chamber 5, RG:11/13392. This ruling was confirmed by the Court of Cassation on May 24, 2016 (the grounds of cassation invoked, however, related only to procedural aspects and not to the debate we are discussing today).

[6] See, inter alia, the work of the Basel Institute of Governance on this issue: https://www.unibas.ch/dam/jcr:044a087d-367b-4310-b0be-8529d4908af8/arbcrime_2020_draft_agenda.pdf.

[7] In Actu-Juridique.fr, « Le droit de la Compliance peut contribuer à prévenir les crises mondiales ».