

CASE UPDATES



FRANCE

French Supreme Court, Cass com, 27 April 2011, decision 09-13524

Virginie A Colaiuta and Clotilde Lemarié
Pinsent Masons

The legal landscape for construction projects located in France was fundamentally changed in 2007, when the French Supreme Court ('Cour de Cassation') held that, for construction projects located in France, the law of 31 December 1975 applicable to subcontract agreements (the '1975 Law'), insofar as it protects sub-contractors, is a 'mandatory rule' within the meaning of Articles 3 and 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the 'Rome Convention').

Accordingly, if a construction project is located in France, French or foreign subcontractors can rely on the mandatory provisions of the 1975 Law to commence judicial proceedings before French national courts in order to claim direct payment from the owner, regardless of any choice of law made in the main contract or the subcontract (30 November 2007, *Ch Mixte*, decision 06-14.006). The Cour de Cassation confirmed this position in several cases (Cass Civ 3, 30 January 2008, decision 06-14641; Cass Civ 3, 8 April 2008, decision 07-10763; Cass Civ 3, 25 February 2009, decision 07-20096).

In a decision rendered on 27 April 2011, the Cour de Cassation examined the mandatory character of the 1975 Law in the context of a sub-contract for the provision of

industrial equipment, rather than in the context of a construction contract involving a project physically located in France (Cass com, 27 April 2011, decision 09-13524). This decision clearly indicates that French courts will only accept the mandatory application of the 1975 Law under the Rome Convention in circumstances where the connection with France is sufficiently close.

The circumstances of the 27 April 2011 case were as follows. Telecom Italia (an Italian company) had contracted with a French company, CS Telecom (the 'main contractor'), to buy IT equipment (the 'main contract'). The main contractor assigned its right to payment under the main contract to a bank. The main contractor then entered into a subcontract with another Italian company (the 'subcontractor') for the manufacture of the equipment (the 'subcontract'). The subcontract was governed by Swiss law.

The main contractor failed to pay the subcontractor. The main contractor was then put under administration and the bank sought to obtain payment on the basis of the assignment. The subcontractor relied on the 1975 Law to seek a declaration that it ought to be paid directly by Telecom Italia for the amounts owed under the main contract, regardless of the assignment to the bank. Article 13-1 of the 1975 Law provides:

'The main contractor may only assign or guarantee claims arising from the contract concluded with the client for the sum due to them for work carried out by them personally. They shall, however, be able to assign or guarantee the claims in their entirety provided that they obtain, in advance and in writing, the personal joint guarantee cited in Article 14 of this Law, with regard to the subcontractors.'

The Cour de Cassation found that the 1975 Law could not be applied as a mandatory rule in this particular case, on the basis of a lack of connection of the operation with France, 'having regard to the objective of the 1975 Law', that is, the protection of subcontractors.

Future case law will tell whether this position is confirmed under Articles 3 and 9 of Regulation EC No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), applicable to contracts concluded after 17 December 2009.

Even though the 27 April 2011 decision related to a subcontract concerning the supply of industrial equipment, it may affect how the French 1975 Law is to apply to subcontracts relating to construction and infrastructure projects.

Virginie Colaiuta, Avocat à la Cour, Partner, Pinsent Masons. Clotilde Lemarié, Avocat à la Cour, Senior Associate, Pinsent Masons.



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