ARTICLE

COLLECTION OF EVIDENCE BEFORE TRIAL: THE FRENCH SUPREME COURT CONTINUES TO CLARIFY THE FRAMEWORK AND SCOPE OF §145 CODE OF CIVIL PROCEDURE

| 28/09/16 |

Recourse to §145 of the Code of Civil Procedure (CPC) partly alleviates the paucity of procedural mechanisms for obtaining evidence in France.

What is incorrectly referred to as French-style discovery has been the subject of abundant case law. The French Supreme Court has thus, as of September 1, 2016, consolidated a series of decisions made throughout 2016 setting out the conditions for implementation of CPC §145.

I. The practical value of investigative measures *in futurum* (CPC §145)

This procedure is mainly used to obtain court appointment of a bailiff who may then seize documents (paper or digital) from the premises of a company against which the applicant intends to bring an action. The typical application of this procedure is in unfair competition cases, but it is obviously possible to use it in many other circumstances.

The applicant must prove that the measures are justified on legitimate grounds and that there is a risk of loss of evidence. The application must also be submitted before any trial on the merits.

The first phase of the procedure is *ex parte*. The decision ordering the measure is granted on motion (rather than following a hearing). The company to which the measure applies is accordingly informed of the measure only at the time of the bailiff's arrival at their premises.

When going on site to carry out the investigative measures, the bailiff is accompanied by a computer expert and, if necessary, a locksmith and law enforcement officers.

The Commercial Court of Paris has also developed a practice of ordering the escrow of seized documents pending an *inter partes* hearing to take place before their transfer to the applicant.

II. The current status of investigative measures *in futurum*

The past months have resulted in several important rulings by the French Supreme Court in these matters.

▪ On territorial jurisdiction

In a ruling of February 16, 2016 (Appeal No. 14-25340), the Court clarified the rules on territorial jurisdiction vis-à-vis investigative measures *in futurum*:

(i) When investigative measures must be carried out within the jurisdiction of several courts (e.g. if acts of unfair competition have been committed by companies not having their registered office in the same city), the president of the court in whose jurisdiction the requested measures are even partially to be executed is competent to order all measures.

(ii) Moreover, the existence of a jurisdiction clause in a contract between the parties is not binding on the applicant when applying for investigative measures.

▪ On the grounds for the order

Succeeding in an *ex parte* motion is only possible if the applicant proves both the existence of a legitimate ground and that prior *inter partes* proceedings would undermine the effectiveness of the investigative measures. It is therefore necessary to establish the risk of losing evidence (risk of deletion of emails, destruction of paper documents, etc.) and the corresponding need for surprise.

In practice, the applicant must submit to the hearing judge, along with the motion, a draft order granting the measure. The objective is to get a written decision by the judge at the end of the hearing.

The validity of this practice was confirmed by the French Supreme Court in a ruling on June 23, 2016 (Appeal No. 15-15186) provided the order states that each of the necessary conditions is met, and refers to the grounds set out in the preliminary motion. In the case before it, the question was specifically about the risk of destruction of evidence.

▪ On the withdrawal of the order upon request

If an order has been granted *ex parte*, a withdrawal process for that decision is available. The purpose of this procedure is to bring the parties before the same judge for a hearing. If the order is withdrawn, the investigative measures are null and void, the documents seized must be returned, and any copies made cannot be produced in court.

The French Supreme Court recently issued several rulings about this procedure for withdrawal:

(i) In a decision dated September 1, 2016 (Appeal No. 15-19799), the Court has provided clarification on who can apply for withdrawal. According to the highest court in the land, it is available to all those who may be "potential defendants" to the underlying litigation, even those who have not directly experienced the execution of the investigative measures. In this case, a company impugned in its application two companies in a group and two former employees for the commission of acts of unfair competition. The bailiff went to the premises of only one of the two companies to seize documents. The Court nevertheless decided that the second company and two former employees have standing to apply for withdrawal or to intervene in the proceedings as they could potentially be defendants in the underlying action for unfair competition.

(ii) The French Supreme Court also set a clear limit on the scope of the withdrawal process in a decision of March 17, 2016 (Appeal No. 15-12456). In effect, this process only aims at requiring an *inter partes* hearing on the merits of the investigative measures. Conversely, the way in which the investigative measures were carried out by the bailiff is excluded from the scope of the withdrawal process. This is a separate litigation which may lead to the cancellation of seizure operations or to damages but not to the withdrawal of the order. Thus, in another decision of September 1, 2016 (Appeal No. 15-23326), the Court held that the findings in a report issued by the bailiff should be set aside when the bailiff fails to deliver it to the person against whom the measure is to be executed along with a copy of the application and the order ordering the measures.

In conclusion, although it is increasingly hemmed in by case law, the procedure for investigative measures *in futurum* remains a very useful tool for purposes both evidentiary and strategic.