INSIDE STORY – MARCH 2016

The Principle of Confidentiality

On one hand, in the field of the pre-insolvency proceedings (either *mandat ad hoc* or "conciliation" proceedings), confidentiality is a key partner of a successful restructuring, especially to negotiate and reach a reorganization plan or an assignment plan from which all or part of the employees and/or all or part of the assets of the restructured company will be preserved.

On the other hand, in a democratic society, public and fundamental liberties are strongly preserved and protected by national and/or international law (such as the Convention for the Protection of Human Rights and Fundamental Freedoms) to prevent any breaches of these liberties in any matters, including the insolvency proceedings. The freedom of speech, part of the freedom of the press, is among these civil liberties well protected.

In a recent French case law related to a company facing a "conciliation" proceedings, the French Supreme Court (the "*Cour de cassation"*) has been confronted to a conflict between, in one part, the confidentiality principle governing the pre-insolvency proceedings and mentioned in the Act (Article L 611-15 of the Commercial code) and, on the other part, civil liberties as such the freedom of the press and the freedom of speech.

Which one should prevail on the other?

Confidentiality should prevail said the Commercial chamber of the French Supreme Court (hereafter the "Court") in its decision rendered on December 15, 2015 [Cass. Com. 15 décembre 2015 – pourvoi n° 14-11500].

Facts:

During the *mandat ad hoc,* then the "conciliation" proceedings of a French company, both submitted to confidentiality pursuant to Article L 611-15 of the Commercial code, an editor company, running a website of financial news and specialized in the follow-up of the indebtedness of companies, had published articles on the implementation of the said *mandat ad hoc,* then information of the follow up of the proceedings and negotiations during the conciliation proceedings.

Considering that these publications were constituting a breach of the principle of confidentiality, the French company and the conciliator summoned the editor company before the *Juge des référés* (judge in charge of temporary injunction) in order (i) to obtain the withdrawal of the articles published containing confidential information and (ii) to obtain a general prohibition to publish any other articles.

The case raised three questions for which the Court answered by a decision of principle:

Based on the provisions of Article L 611-15 of the Commercial code and of Article 10§2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court decided that some restrictions could be made by

an Act on the freedom of speech, as far as it is necessary in a democratic society to protect others parties' rights and to prevent any disclosure of confidential information (this position is hereafter mentioned as the "Principle").

Then, the Court answered to the three questions raised by the specific case as follows:

1. To whom the obligation of confidentially does apply?

   The Court, reminding the Principle, considers that such obligation applies to the person submitted to a duty of confidentiality, under Article L 611-15, as well as a third party, whatever its statute or its role played in the pre-insolvency proceedings.

   Therefore, the Court adopted an extensive interpretation of the criteria provided in the Article L 611-15 to avoid limiting the implementation of the obligation of confidentiality to only persons involved directly in *mandat ad hoc* or a conciliation proceedings. The confidentiality is efficient when it applies to information coming from the proceedings whatever the person who discloses the information (an actor of the proceedings or a third party; in this case, an editor company of financial news).

   The reason of the *mandat ad hoc* and the conciliation proceedings is that the company and its representatives are covered by confidentiality and are able to reveal some keys information on the indebtedness of the company without fearing any disclosure to their competitors, clients, suppliers which might make worse the management of the company and might affect the transparency needed to negotiate in such pre-insolvency proceedings.

2. What is the scope of this obligation of confidentiality?

   As a result of the Principle, the Court considers that the confidentiality attached to the pre-insolvency proceedings prevents any broadcasting through the press, unless it contributes to the necessity to inform the public on a question of public interest.

   Therefore, the Court allows, in an extremely narrow scope, the broadcasting of confidential information when this is necessary within the context of a debate of public interest. The possibility to legally "breach" the obligation of confidentiality becomes extremely limited as it imposes to the disclosing party to be able to prove that the information contributes to the information of the public in a debate of public interest.

3. Should any damage be proved to justify the breach of the obligation of confidentiality?

   The Court decides that any broadcasting of confidential information related to a pre-insolvency proceedings constitutes, by itself, a serious infringement except if this information contributes to the information of the public on a debate of public interest.

   In other words, no need to justify and to prove the existence of any damages of any kind. The only breach of the obligation of confidentiality is enough to condemn the infringement.

What is the echo of this decision?

As the decision has been published on the website of the Court the same day as it has been rendered, we therefore may expect a great celebrity of this decision. The Court has also clearly demonstrated its will to protect the confidentiality within the context of the pre-insolvency proceedings.

Although confidentiality remains an issue in practice, the Court has probably sent a message to all the actors of the pre-insolvency proceedings, which intervene directly or indirectly, on the efficiency of the principle of confidentiality.

In any case, we can be grateful that the philosophy of the pre-insolvency proceedings is preserved, as the practical side of such proceedings. Without such decision and such Principle, the future of the pre-insolvency proceedings would have been compromised.

This INSIDE story is written by Georges-Louis Harang (harang@hocheavocats.com)
of HOCHE SOCIETE D'AVOCATS, Paris (France)