Environmental Law

# THE PLIGHT OF THE LAST OPERATOR OF A POLLUTED INDUSTRIAL SITE: LIABLE EVEN IF NOT GUILTY!

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French Court decisions in environmental matters are obviously unfavorable to companies operating polluted industrial sites ("Operator(s)"). In a decision dated April 2, 2008, the 3rd civil chamber of the *Cour de Cassation* (French Supreme Court) ruled that the last Operator of an industrial site must alone bear the financial costs of clean-up works even if he is not directly liable for the pollution of the site.

In the matter adjudicated by the *Cour de Cassation*, the owner of the site (namely the company *SCI la Réal* or the "Owner") and the lessee (namely the company *Reno* which later became *Interfertil* or the "Lessee") indisputably agreed that the site leased to the Lessee in 1989 was polluted prior to the latter's entrance *in situ*. The Lessee, however, agreed - after it left the polluted site in 1994 - to perform clean-up works which eventually started only in 2001. The Owner initiated a legal action against the Lessee and sought damages (in the amount of EUR 2,500,000) as compensation for the loss caused by the delay in the performance of clean-up works and by the immobilization of the site during said period. The Lessee lodged a counterclaim and requested the court to order the reimbursement by the Owner of the sums incurred to clean-up the site.

In support of its counterclaim, the Lessee argued that he could not possibly be ordered to restore the site to a better condition than that in which he found it: he explained that he took possession of a site that was already polluted (no clean-up works had been scheduled at that time) and that consequently there were no reason why he should be ordered to pay the clean-up costs when leaving the site.

The Lessee's reasoning appeared to be correct since he was in no event liable for the pollution of the site. In its decision dated April 2, 2008, the *Cour de Cassation*, however, made a clear distinction between pollution liability and clean-up obligation, and ruled that the "last Operator" of a polluted site is fully and unreservedly liable for clean-up costs.

This decision was motivated essentially by two reasons resulting from the facts of the case: Firstly, the Lessee was indisputably the last Operator of the site and had therefore the obligation to perform clean-up works under applicable law (1); secondly, in the absence of any specific provision in the lease agreement, the Lessee could not require the Owner to bear all or part of clean-up costs.

## 1- The Lessee had to bear the clean-up costs because he was indisputably the "last Operator" of the site

In its decision of April 2, 2008, the *Cour de Cassation* specified that "*pursuant to the provisions set forth in the Law of July 19, 1976*[1], *the obligation to clean up a polluted industrial site is imposed on the last operator of said site, not on the owner*".

This approach is quite strict, especially when the last Operator is not liable for the pollution identified onsite and has not previously agreed to assume environmental liabilities in relation to the site.

The "last Operator" means the Operator who, as the last of the chain of Operators having successively operated the site, is substituted to the former Operator as he conducts onsite operations that are similar to that of the former Operator. The substitution causes the last Operator to automatically assume all rights and obligations of his predecessor, among which the obligation to clean-up the site, as defined in Article L. 512-17 of the French Environmental Code.

This transfer of rights and obligations, however, only occurs if the last Operator has indeed been effectively substituted to the former one. The last Operator-lessee can always claim that he has not been substituted to the former Operator (by claiming for instance that there is no connection between him and the former Operator and/or the latter's activities which polluted the site).

If the last Operator can prove that he has not been substituted to the former one, it seems that administrative courts are inclined to hold that he cannot be held liable for clean-up works since "*the purpose or effect of the clean-up obligation is not to require operators, in the framework of the rehabilitation of a polluted site, to remedy damages or nuisances which are disconnected from the operations conducted onsite*". In a recent case[2], the administrative court has considered that "*by exclusively relying on the fact that GDF was the last site operator to impose upon it measures to stop nuisances that had no direct connection with the operations GDF conducted onsite*", the *préfet* (local representative of the government) had committed an error of law.

To obtain such a decision from an administrative court, the last Operator must firmly dispute that he has been substituted to his predecessor. In the case at hand, the Lessee did not deem it necessary to raise this argument. As such, since it admitted being the successor and therefore the heir of the various former Operators of the polluted industrial site, the Lessee, as the substituted last Operator, was bound to be ordered to clean up the site.

[1] This Law deals with classified facilities and had been codified in Articles L.511-1 et seq. of the French Environmental Code.

[2] See decision rendered by the Versailles Court of Appeals dated January 22, 2008-

## 2- In the absence of any specific provision to the contrary in the lease agreement, the Lessee could not require the Owner to reimburse or to bear all or part of the clean-up costs

As indicated above, the Lessee lodged a counterclaim requesting reimbursement by the Owner of the clean-up costs because the latter had recovered possession of an entirely cleaned up site following the performance of clean-up works by the Lessee who was not liable for the site pollution.

The *Cour de Cassation* did not address this issue in details and simply seemed to confirm the decision of the Court of Appeals of Nîme which held that "*such a reimbursement claim could only be made under an agreement between the owner and the lessee*" and "*no amendment to the lease agreement specified that the clean-up obligation was transferred to the lessor*".

It emerges from the position adopted by both the Court of Appeals of Nîme and the *Cour de Cassation* that the Lessee would have been entitled to require the Owner to pay the clean-up costs only if a specific provision in this sense had been inserted in the lease agreement. There was, however, no such clause in the lease agreement.

The decision of April 2, 2008, while creating an unenviable situation for last Operators of leased industrial sites, should also lead lawyers to reflect on how to improve contractually the situation of industrial site Operators. In lease agreements, a specific attention should therefore be paid to clauses dealing with termination and/or effects of termination to increase the protection of Operators-lessees . Even if an Operator can hardly escape from the legal clean up obligation (unless they can prove that he has not been substituted to the former Operator), he can – at least contractually – reserve the possibility to recover from the lessor the costs to be incurred to clean up the site.



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