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French Supreme Court: Unfairly Obtained Evidence Can Be Admissible in Civil Litigation

Amid the continued expansion of the right to evidence, the court reversed its previous position that evidence obtained through unfair methods was inadmissible.

When asked to re-examine the relationship between the right to evidence and the principle of fair proof, the French Supreme Court (Cour de cassation) reversed the position in its case law on 22 December 2023 (no. 20-20.648). The court accepted that, in civil litigation, a party can use evidence obtained unfairly (in this case, recordings of comments made without the commenter's knowledge) to assert its rights.

This ruling clearly establishes that the principle of fair proof is not absolute and may yield to the imperative of truth under certain conditions.

The Emergence of a Right to Evidence

In civil matters, each party must prove the facts necessary for the success of their claim, pursuant to Article 9 of the Civil Procedure Code. In line with the case law of the European Court of Human Rights,¹ the French Supreme Court established a subjective right to evidence in a leading case ruled by the Commercial Chamber on 5 April 2012.² This right can take two forms: the right to produce evidence and the right to obtain evidence through investigative measures or compulsory production ordered by a judge.

In applying this right — which derives from the fundamental right to a fair trial guaranteed by Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms — the various chambers of the French Supreme Court, except the criminal chamber, no longer dismiss evidence considered illicit a priori. Rather, they allow it to be produced during arguments, provided that such production is essential to the exercise of the right to evidence, and that the infringement of any competing rights is proportionate to the aim pursued.³

Consequently, fundamental rights or legally protected secrets that may hinder the admissibility of evidence (such as the right to privacy, business secrecy,⁴ or banking secrecy⁵) must be reconciled with the right to evidence, through a balancing act performed by the judge.

Establishing the Principle of Loyalty in the Administration of Evidence

In parallel with the emergence of a right to evidence, the plenary assembly of the French Supreme Court solemnly established the principle of loyalty in the administration of evidence in a ruling dated 7 January 2011.⁶ Under this principle, a judge cannot consider evidence gathered without a person's knowledge or obtained through a manoeuvre or stratagem. For example:

- recordings of conversations intended to capture comments without the commenter's knowledge, which are traditionally deemed unfair and excluded from the proceedings by the various civil chambers of the French Supreme Court;⁷ or
- staging visits by fake customers to trap the adversary,⁸ or using decoy letters designed to expose the fraudulent activities of staff members.⁹

According to the plenary assembly, this stance is based on the grounds that justice must be administered fairly, based on evidence gathered and produced in a manner that does not undermine its dignity and credibility. However, this position differs in criminal case law, in which evidence obtained unfairly (or illegally) is not automatically disregarded by the judge,¹⁰ provided that the public authorities are not involved in the administration of such evidence.¹¹

Contrary to the case law on illegal evidence, no decision of the French Supreme Court appeared to have ruled on the question of unfair evidence in the strict sense and submitted it to the proportionality test prior to the 22 December ruling.

The French Supreme Court's Reversal in the 22 December Ruling

In this case, the plenary assembly of the French Supreme Court was asked to reconsider its 7 January 2011 ruling,¹² in which it had ruled that recordings made without the speaker's knowledge are inadmissible as evidence in a civil trial. (Specifically, the production before the labour court of audio recordings that an employer made without an employee's knowledge to establish misconduct that justified the employee's dismissal).

The plenary assembly of the French Supreme Court executed a turnaround by aligning the treatment of unfair evidence with that of illegal evidence:

"It should now be considered that, in a civil trial, the illegality or unfairness in the obtainment or production of a piece of evidence does not necessarily lead to its exclusion from the proceedings. When requested to do so, the judge must assess whether such evidence compromises the fairness of the proceedings as a whole, based on a balance between the right to evidence and the conflicting rights involved. The right to evidence may justify the production of elements that infringe upon other rights, provided that such production is essential to its exercise and that the infringement is strictly proportionate to the aim pursued".

The Social Chamber of the French Supreme Court already reiterated this position in a 17 January 2024 ruling.¹³

Among the elements identified by the rapporteur in favour of changing the positive law regarding the admissibility of unfair evidence (and mostly, repeated by the plenary assembly), the following points were highlighted:

- The need to consider the difficulties that parties may face in proving their rights. Indeed, declaring unfair evidence as inadmissible may deprive litigants of any means of proving their rights.

- Aligning French law with the case law of the European Court of Human Rights, which does not distinguish between illegal and unfair evidence and does not exclude its admissibility in principle.¹⁴
- Harmonising civil case law with criminal case law, as the disparity in treatment could encourage litigants to initiate criminal proceedings to bypass the more restrictive civil treatment. The Social Chamber considers that the authority of *res judicata* in the criminal trial prevents an employee from contesting in labour court the legality of evidence deemed probative by the criminal judge.¹⁵
- Standardising the treatment of illegal evidence and unfair evidence, necessitated, in particular, by the difficulty in drawing a clear line between these two concepts, since unfair evidence is always likely to infringe a principle or right expressly protected by law.
- The need to bring the judicial truth closer to the factual reality, and to foster greater acceptance of legal decisions.

What Is at Stake?

A number of academics and the Advocate General called for this outcome, which was not surprising in the context of the expansion of the right to evidence, in which the aspiration for truth and transparency tend to prevail. The preeminence, under certain conditions, of the right to evidence is, therefore, no longer limited to situations involving the right to privacy or legally protected secrets; it now also applies to the imperative of fair proof.

This further erosion of the principle of fair proof could pave the way for increased use of unfair methods (e.g., using surveillance devices or clandestine recordings), with a growing risk of violations of fundamental rights or legally protected secrets. Indeed, while the principle of inadmissibility of unfair evidence could have deterred litigants from using unfair methods to pre-construct evidence, this turnaround could encourage such behaviour in the establishment and administration of evidence.

However, as a safeguard, there is still the scrutiny of trial judges, who will have the delicate task of reconciling the right to evidence with other competing rights, applying the methodology outlined by the plenary assembly in the ruling under review. A trial judge, when requested to do so, must conduct a double examination to determine whether the evidence is admissible:

1. On the one hand, the judge must ensure that the production of the evidence is indispensable to the exercise of the right to evidence; thus, if other evidence that is less prejudicial to a party's competing rights is available, the disputed evidence should be excluded.
2. On the other hand, the judge must verify that the infringement is strictly proportionate to the aim pursued.

This extension of the role of trial judges could, however, lead to unpredictability and legal uncertainty, given the unclear contours of the right to evidence and the flexibility left to the judge in assessing proportionality.

If you have any questions about this article, please contact one of the authors below or the Latham & Watkins lawyer who usually advises you:

Fabrice Fages

fabrice.fages@lw.com
+33.1.4062.2000
Paris

Myria Saarinen

myria.saarinen@lw.com
+33.1.4062.2000
Paris

Pauline Gilli

pauline.gilli@lw.com
+33.1.4062.2000
Paris

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Endnotes

¹ See, ECHR, Oct. 10, 2006, no. 7508/02, L.L. v/ France.

² Civ. 1st, April 5, 2012, no. 11-14.177; in this case, the trial judges had excluded from the debates a letter produced in an inheritance case on the grounds of a violation of the privacy of the deceased and the secrecy of correspondence. The French Supreme Court overturned the appeal ruling, pursuant to Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, on the grounds that "in so ruling, without investigating whether the disputed production was indispensable to the exercise of the right to evidence, and proportionate to the conflicting interests involved, the Court of Appeal failed to provide a legal basis to its decision".

The recognition of a right to evidence had already appeared in previous case law (See, for example, Com., May 15, 2007, no. 06-10.606; Soc., May 23, 2007, no. 05-17.818).

³ Civ. 1st, April 5, 2012, no. 11-14.177; Civ. 1st, Feb. 25, 2016, no. 15-12.403; Civ. 1st, July 5, 2017, no. 16-22.183; Soc., Dec. 11, 2019, no. 18-16.516; Soc., Sept. 30, 2020, no. 19-12.058; Soc., Nov. 25, 2020, no. 17-19.523; Soc., Dec. 16, 2020, no. 19-17.648; Soc., March 8, 2023, no. 21-12.492, no. 21-20.797, no. 21-20.798, no. 21-17.802, and no. 20-21.848; Soc., June 1, 2023, no. 22-13.238 to 22-13.268.

Notably, previous case law from the Social Chamber required that evidence only "necessary" for the exercise of the right to evidence (Soc., Nov. 9, 2016, no. 15-10.203).

⁴ Civ. 2nd, Feb. 8, 2006, no. 05-14.198.

⁵ Com. Nov. 29, 2017, no. 16-22.060; Com. May 24, 2018, no. 17-27.969.

⁶ Plenary assembly, Jan. 7, 2011, no. 09-14.316 and 09-14.667: "Pursuant to Article 9 of the Civil Procedure Code, together with Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the principle of fairness in the administration of evidence;

Whereas, unless expressly provided otherwise in the Commercial Code, the rules of the Civil Procedure Code apply to litigation concerning anti-competitive practices under the jurisdiction of the Competition Authority; whereas the recording of a telephone conversation made without the knowledge of the person on the call constitutes an unfair methods, rendering its submission as evidence inadmissible".

⁷ Plenary assembly, Jan. 7, 2011, no. 09-14.316 and 09-14.667; Soc., Feb. 6, 2013, no. 11-23.738; Com., Oct. 13, 2009, no. 08-19.525; Civ. 2nd, Oct. 7, 2004, no. 03-12.653.

⁸ Com., Nov. 10, 2021, no. 20-14.670; Soc., March 18, 2008, no. 06-45.093, and no. 06-40.852.

⁹ Soc., July 4, 2012, no. 11-30.266.

¹⁰ Crim., June 11, 2002, no. 01-85.559; Crim., Jan. 27, 2010, no. 09-83.395.

¹¹ Crim., Sept. 20, 2016, no. 16-80.820; Plenary assembly, Nov. 10, 2017, no. 17- 82.028.

¹² Plenary assembly, Jan. 7, 2011, no. 09-14.667.

¹³ Soc., Jan. 17, 2024, no. 22-17.474.

¹⁴ ECHR, May 13, 2008, no. 65087/01; ECHR, Sept. 5, 2017, no. 61496/08; ECHR, Oct. 17, 2019, no. 8567/13.

¹⁵ Soc., Sept. 21, 2022, no. 20-16.841.