



Litigation Speed Read – RJ Gaito secures an important Luxembourg Court of Appeal judgment

Formation of commercial contracts and enforceability of Luxembourg agreements

Highlights:

Our client, a leader in the software industry, recently prevailed in the Luxembourg Court of Appeal and received a favorable judgment that tacitly reconfirms a Supreme Court (“Cour de Cassation”) judgment of January 24, 2019. The judgment is of particular importance since it touches upon the essential elements of Luxembourg commerce and contract law and we were gratified that the Luxembourg Court of Appeal followed our reasoning.

Legal issues at stake:

Article 109 of the Luxembourg Code of Commerce states, *inter alia*, that “purchases and sales are evidenced by way of an invoice”. Until recently, this provision of the Code of Commerce operated as an implied and irrebuttable provision whereby the failure of a business to contest, within a reasonable time frame, an invoice rendered gave rise to an immediate debt recovery claim and served as conclusive and final evidence of the existence of a due and uncontestable debt, as well as the existence of an underlying agreement among parties (a.k.a “*Facture Acceptée*”). In these circumstances, irrespective of overwhelming evidence to the contrary, the Luxembourg courts were reluctant to intervene and adjudicated that, once an invoice was delivered and not disputed promptly, an irrebuttable presumption was created. Consequently, it was often the case that draconian judgments were rendered.

On January 24, 2019, the Luxembourg Supreme Court had softened this notion of “*Facture Acceptée*” in contracts which are non-sale of goods contracts. The Supreme Court stated that, “in the context of non-sale of goods contracts the “*Facture Acceptée*” is no longer an irrebuttable presumption of the existence of an alleged debt”.

Facts of the case:

Our client had a written and explicit non-sale of goods contract with certain counterparties. The counterparties spuriously served on our client a baseless (high value) invoice which was disputed. In the first instance, the Luxembourg District Court found that the invoice was not disputed in due course and further found that the invoice was based on a separate agreement on the basis of the principle of “*Facture Acceptée*”. The Luxembourg District Court chose, erroneously, to ignore the written contract.

We referred the matter to the Court of Appeal citing the Supreme Court judgment in question and the basic principle of Civil Law known as “*Pacta Sunt Servanda*” i.e. the contract governs the parties’ rights and obligations. Without citing the Supreme Court’s judgment of January 24, 2019, the Court of Appeal reversed the District Court’s decision, arguing that, in the face of our client’s disputed invoice, the burden of proof rests with the creditor to prove (i) the existence of the alleged debt and (ii) the existence of an underlying agreement. Considering the written contract produced and the lack of proof on the side of the claimant, the court applied the terms of the written agreement.

Our Take and Practical Advice:

- **Clear and detailed written agreements are imperative for securing parties’ rights in Luxembourg. Note that, “boilerplate clauses”, such as an “Integration Clause”, can play a material role and will be enforced in accordance with their terms.**
- **The Luxembourg courts, de facto, reaffirmed their commitment to strict application of written agreements and enforcing agreements in accordance with their terms.**
- **Unlike courts in other Member States of the EU, the Luxembourg courts are reluctant to intervene in written contractual terms.**
- ***Facture Acceptée* remains a basic principle for sale of goods contracts. Therefore, contest your invoices promptly in a clear manner to avoid being trapped in a legal quagmire.**
- **If confronted with a debt claim regarding non-sale of goods contracts, we recommend to promptly and clearly dispute your invoice(s), however, bearing in mind that, if one fails to do so, and with a written agreement at hand, all is not lost in advance since the existence of a debt is no longer an irrebuttable presumption.**