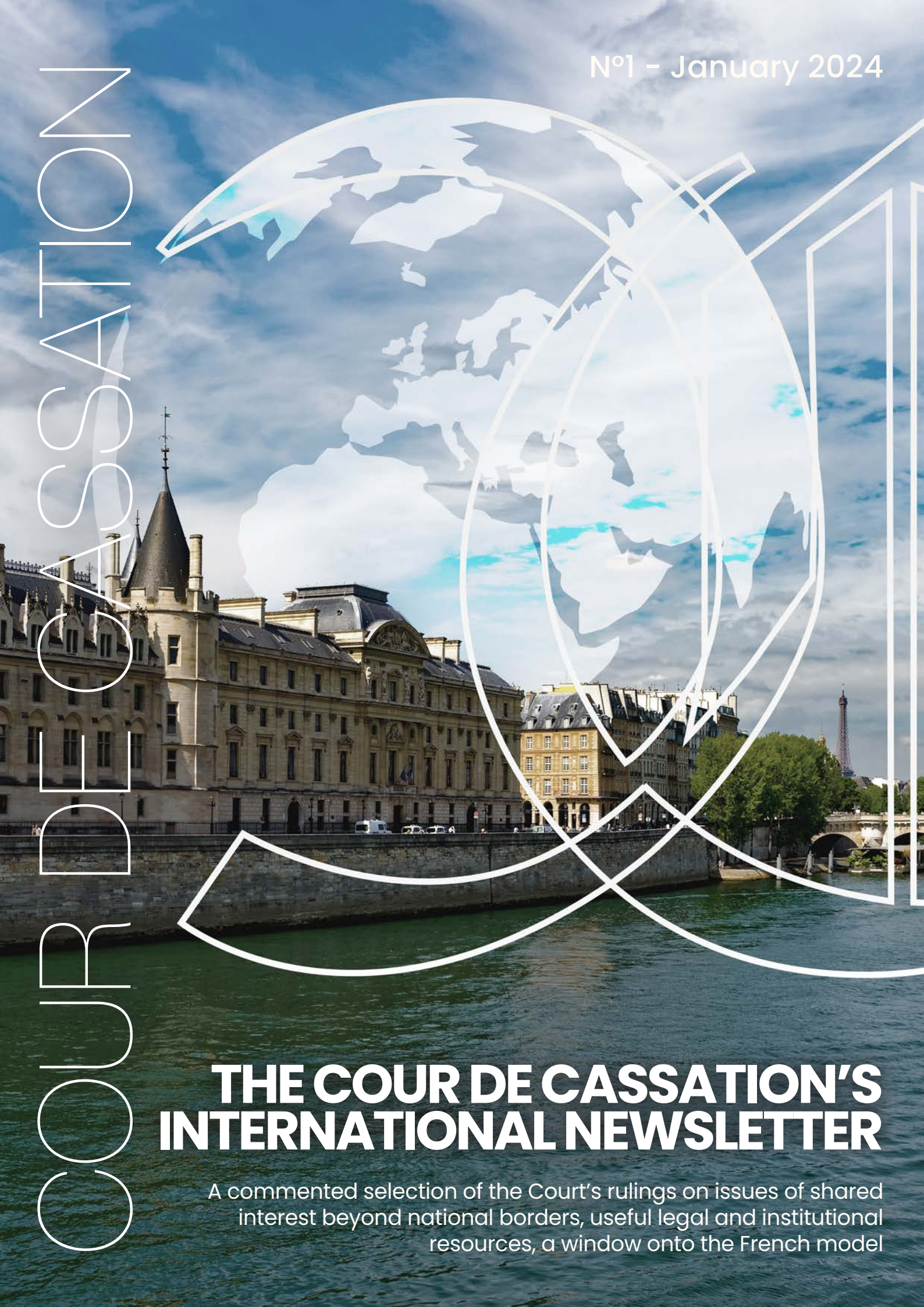
COUR DE CASSATION

N°1 - January 2024



THE COUR DE CASSATION'S INTERNATIONAL NEWSLETTER

A commented selection of the Court's rulings on issues of shared interest beyond national borders, useful legal and institutional resources, a window onto the French model

A message from Christophe Soulard

First president of the Cour de cassation

Dear readers,

I am pleased to present the first issue of the International Newsletter of the Cour de cassation. This Newsletter complements the chambers' and the Court's communications on both judicial and case law developments. During my first presidency, it has been our aim and priority to promote the work and practices of the Court, and to raise awareness about its various professions. Beyond improving access to our case law, I find it especially important to disseminate the values of the judicial system to which our Court belongs.

In this age of internationalisation of the law, a supreme court cannot afford to remain inward-looking. Comparative law is a legal discipline that has become an essential tool for Supreme Court judges. It strengthens their ability to lay out the motivations behind their reasoning.

In this sense, we have maintained a long tradition of openness and dialogue between judges. I am convinced of the great significance of these exchanges. Lessons that emerge from comparing competing ideas, judicial systems and practices will enable us to face common challenges. The Cour de cassation is reaching out to its partners abroad in this important endeavour, whether they be partners in common law or continental law. Thus, broadening its own horizon to cultivate and identify new interests and pinpoint common disputes and litigation.

This newsletter is a new way of reaching out to legal practitioners, academics, and citizens beyond our borders and is in line with both my international and communication strategies for the Cour de cassation. It pursues the steps taken to better display our work methods and improve the intelligibility of our decisions.

"In this age of internationalisation of the law, a supreme court cannot afford to remain inward-looking. Comparative law is a legal discipline that has become an essential tool for Supreme Court judges. It strengthens their ability to lay out the motivations behind their reasoning."

The year 2023 was punctuated by multi-faceted crises and threats to the security of peoples and goods. Armed conflicts and the rise of political discourse undermining the independence of the judiciary and separation of powers have shaken the fragile peace of our democratic institutions.

While the supreme courts stand as a bulwark of moderation, stability and protection of rights, it is also everyone's duty to work daily to protect these values. This work involves exchanges, writing, and debating. Hence, it gives me great satisfaction to see that this first international newsletter contains topics that should nurture useful reflection in France and abroad on key issues of current interest.

You will also find in this newsletter a selection of commented rulings fully available in English and French. The focus is on shared issues with our international counterparts, the newsletter explains certain concepts pertaining to our judicial system, as well as excerpts of publications, educational contents on our professions and working methods and news from the Court.

I hope you enjoy this newsletter.

Christophe Soulard

Presentation of the Newsletter
by Clémence Bourillon, judge and
head of the International Relations Department >

The French Cour de cassation
in a few words, pictures, and numbers

First president Christophe Soulard, presents the French Cour de cassation:

- The jurisdiction's missions
- Its organizational role in society
- Its mode of organization
- The duties of the first president of the Cour de cassation
- The Cour de cassation, beyond its jurisdictional functions

Watch the video >

Coming soon: *In* International NewsLetter No. 2, *the Prosecutor-General Rémy Heitz presents the public prosecutor's office at the Cour de cassation.*

6 chambers

- **First civil chamber**
  - Personal and family law
  - Consumer protections
  - Law of obligations
  - Property rights
  - Intellectual property
  - International private law...

- **Second civil chamber**
  - Civil procedure
  - Social security
  - Personal insolvency
  - Lawyers' fees disputes
  - Elections

- **Third civil chamber**
  - Real estate law
  - Construction
  - Joint ownership
  - Residential leases
  - Environmental law and pollution

- **Commercial, financial and economic chamber**
  - Banking, stock exchange, credit insurance
  - Competition
  - Business leases
  - Transportation of goods
  - Collective insolvency proceedings
  - Patents and trademarks

- **Social chamber**
  - Labour and Employment law
  - Employment and vocational training
  - Collective labour relations
  - Staff representation
  - Dismissals...

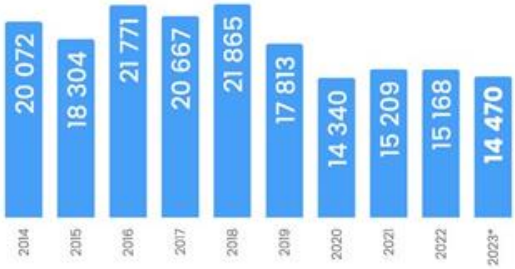
- **Criminal chamber**
  - Crimes
  - Offenses
  - Misdemeanors
  - Criminal procedure
  - Enforcement of sentences

Each chamber is headed by a president.
The Prosecutor-General of the Cour de cassation assigns a First Advocate General to each chamber.

Learn more

22,010
rulings handed down in 2023

Cases decided and removed
In civil matters

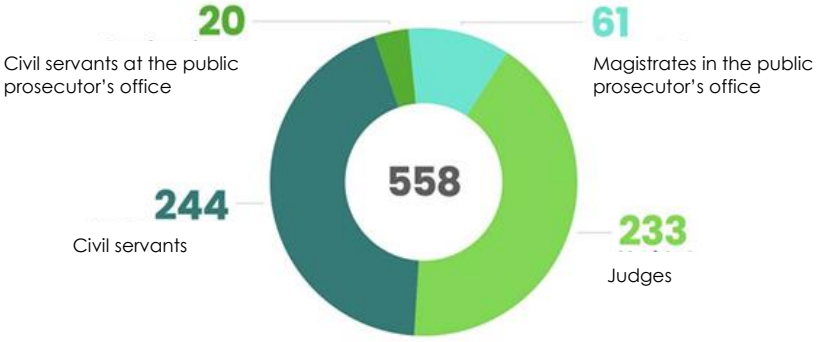


In criminal matters

294 magistrates

264 civil servants

Human resources in 2023



Early 2024: Solemn hearing of the start of the judicial year at the Cour de cassation

Watch the solemn hearing and read the speeches >

Heritage: history in the walls

The Cour de cassation is located in the heart of Paris, on the Ile de la Cité, where the very first palace of the kings of France was built.

Learn more >

Plenary Assembly
Rulings

What is a Plenary Assembly?

The Plenary Assembly is the most solemn judicial formation of the Cour de cassation. All the chambers of the Court are represented at the Plenary Assembly or full court. Referral to the full court is decided when a case raises a question of principle or if a divergence between the lower courts and the Cour de cassation occurs. In particular when a case has been quashed and the court of appeal responsible for retrying the case issues a decision that is again challenged before the Cour de cassation, on the basis of the same legal arguments as those put forward at the time of the first appeal. The decision handed down by the full court will be binding on the referring court.

Universal jurisdiction of the French criminal judges and courts to prosecute crimes committed in Syria

May 12, 2023 – Ruling n°1 / Ruling n°2 / Press release / Video of the hearing

In principle, the French judicial authorities have jurisdiction over crimes committed in France and, under certain conditions, over crimes committed abroad, in particular when the perpetrator or the victim is French. Nevertheless, in certain cases, the French authorities have jurisdiction over crimes committed abroad by a foreign person on a foreign victim. This is known as "*universal*" jurisdiction. For its application, some requirements must be met.

Under Article 689-11 of the Criminal Procedure Code, if a foreign person usually resides on the territory of the French Republic, he or she may be prosecuted and tried by the French courts if he or she is suspected of having committed one of the following offenses abroad: the crime of genocide defined in the Criminal code (Code pénal); other crimes against humanity defined in the Criminal code, if the facts are criminalized by the legislation of the State where they were committed or if that State or the State of nationality of the suspect is a party to the 1998 Rome Convention; war crimes and offenses defined in the Criminal code, if the acts are criminalized under the law of the State where they were committed or if that State or the State of nationality of the suspect is a party to the 1998 Rome Convention. The requirement of habitual residence is evaluated against a wide body of evidence such as the duration of the stay on the territory, the reasons of stay, the conditions under which they happened, the outward expression of a desire to stay in France, the evidence of family or social ties and professional or operational connections.

Under this same text, a foreign national can be brought before French courts provided that the facts constituting under French law a crime against humanity or a war crime are punished by the State where they were committed. This is a double criminality requirement. It is not necessary for the acts covered in France by the offences of crimes against humanity or war crimes to be classified in the same way by the laws of the foreign country: it is sufficient for the foreign legislation to criminalize these acts as ordinary offences such as murder, rape or torture.

Under Article 689-2 of the Criminal Procedure Code, in application of the 1984 New York Convention against Torture, any person who has committed acts of torture may be prosecuted and tried by the French courts. The universal jurisdiction of French courts to try acts of torture committed abroad applies when neither the perpetrator nor the victim is French, it concerns only acts committed by public officials and persons acting in an official capacity. However, the concept of a person who has acted in an official capacity also includes a person acting on behalf of or in the name of a non-governmental entity, where the non-governmental entity occupies a territory and exercises quasi-governmental authority over it.

Watch the next live broadcast hearing

- **Friday, March 1, 2024**
  Mixed-chamber hearing
  Question put the Court: "*What powers of inquiry do customs officers who are not judicial customs officers have?*"

Past filmed hearings >

Office of the exequatur judge and invocation of immunity from jurisdiction by a foreign State

June 28, 2023 – 1st civil chamber – Ruling

After ruling that a Middle Eastern State could not invoke its jurisdictional immunity, an American court ordered it and some of its leaders to pay damages to an individual for the loss of his daughter following an attack in Israel for which a terrorist organisation had claimed responsibility.

The victim's father sued the Middle Eastern state before the French courts to enforce the judgment pronounced in America. The Cour de cassation seized this opportunity to clarify the role of the French exequatur judge with regard to the principle of prohibition of review of the merits of a foreign judgment when jurisdictional immunity has been set aside by that judgment, as well as the fate of jurisdictional immunity in the event of a violation of fundamental rights.

The Court's response, first, is that pursuant to Article 509 of the Civil Procedure Code (Code de procédure civile), in order to grant exequatur, outside of any international convention, the French judge must verify the admissibility of the action and ensure that it meets three conditions: the indirect jurisdiction of the foreign judge based on the connection of the dispute to the court receiving the referral, compliance with substantial and procedural international public policy, and the absence of fraud. The Court rules that immunity from jurisdiction is a ground for dismissal of the exequatur action, the examination of which under French law falls within the remit of the exequatur judge. This is neither a review of the merits of the foreign judgment nor the review of the international regularity of that judgment. The First civil chamber (première chambre civile), thus, approves the court of appeal's statement that, in such proceedings, the French judge must abstain from any review of the merits of the judgement given by the foreign court, of which the international regularity has been recognised. It also approves the court of appeal's statement that, when jurisdictional immunity is claimed by a foreign State, it is incumbent on the French judge to rule on its admissibility. The First civil chamber further states that foreign States enjoy jurisdictional immunity when the act giving rise to the dispute participates, by its nature or purpose, in the exercise of their sovereignty and is not an administrative action or act of management. The chamber also point out that the European Court of Human Rights has held that the right of access to a court, as guaranteed by Article 6 of the European Convention on Human Rights, and of which the enforcement of a judicial decision is a necessary extension, does not preclude a limitation on this right of access, arising from the immunity of foreign States, provided that this limitation is enshrined in international law and does not go beyond the generally recognized rules on State immunity (ECHR, , 21st of November 2001, Al-Adsani v. The United Kingdom, Application n°35763/97; ECHR, 12th of October 2021, J.C. and others v. Belgium, Application n°11625/17). Thereafter, the International Court of Justice considers that a violation of jus cogens is never a ground for derogation from the principle of jurisdictional immunity (ICJ, 3rd of February 2012, Jurisdictional Immunities of the State, Germany v. Italy: Greece intervening, I.C.J. Reports 2012, p. 99). Subsequently, the Court ruled that, even supposing that the prohibition of acts of terrorism could be raised to the level of a jus cogens norm of international law, which takes precedence over other rules of international law and may constitute a legitimate restriction on jurisdictional immunity, such a restriction would be disproportionate in relation to the aim pursued, given that the challenge of the foreign State is not based on the commission of acts of terrorism, but on its moral responsibility (1st Civ., 9th of March 2011, appeal n° 09-14.743, Bull. 2011, I, n° 49). The First civil chamber, thus, approved the decision of the court of appeal. The latter had held that the acts at issue, insofar as they had consisted of financial support given to a terrorist group that had committed a suicide attack, did not fall within the scope of acts of management by that State. It also held that, even supposing that the prohibition of acts of terrorism could constitute a jus cogens norm of international law capable of constituting a legitimate restriction on immunity from jurisdiction, which is not apparent from the current state of international law, the circumstances of the case did not permit an exception to be made to that immunity. An exception could not be made to immunity because the award of damages against the State by the American court was not based on a demonstration of direct involvement, but only on the basis of the civil liability that the State would have to bear for the aid or material resources provided to the group that claimed responsibility for the attack.

Under certain conditions, the execution judge is obliged to examine the unfairness of a clause ex officio, even in the presence of a res judicata decision

April 13, 2023 – 2nd civil chamber – Ruling

The question brought before the Cour de cassation in this appeal was whether, in the light of the case law of the Court of Justice of the European Union, an execution judge hearing a dispute relating to a claim is obliged to examine the unfairness of a clause inserted in a contract between a professional and a consumer, even though the claim has been ruled on by a trial judge, in a ruling which has the force of res judicata.

The principle of precedence of European Union law means that a national court must have the power to set aside, on its own authority, any national rule that is contrary to Union law in the context of a dispute brought before it. The purpose of this principle is to guarantee the effectiveness of European Union law. Since the Simmenthal ruling (ECJ, 9th of March 1978, case 106/77), guaranteeing the effectiveness of the rule of European Union law has been the responsibility of member States' national courts.

The conflict of norms brought before the Cour de cassation, in the case, involved a judgment of the Court of Justice of the European Union from the 26th of January 2017 (ECJ, 26th of January 2017, Banco Primus, case C-421/14). The case established:

- The Directive 93/13/EEC of the 5th of April 1993 on unfair terms in consumer contracts, must be interpreted as not precluding national legislation that does not authorise a national court, acting on its own motion or at the consumer's request, to examine the potentially unfair nature of contractual clauses where it is apparent from the entirety of an earlier decision having the authority of res judicata that the court has carried out said examination.

- However, the Court of Justice has ruled that if, in the course of a previous examination of a disputed contract which led to the adoption of a decision having the authority of res judicata, the national court has limited itself to examining, of its own motion, in the light of Directive 93/13, only one or some of the clauses of said contract, said directive requires a national court duly seized by the consumer to assess the potentially unfair nature of the other clauses of said contract, at the request of the parties or ex officio, provided that it has the legal and factual elements necessary for said purpose.

It follows from the above that, when a dispute relating to a claim whose recovery is pursued on the basis of a writ of enforcement relating to a contract is brought before the execution court, said court is obliged, even in the presence of a previous decision having the authority of res judicata on the amount of the claim, except where it is apparent from the entirety of the decision having the authority of res judicata that the court has carried out said examination, and provided that it has the legal and factual elements necessary for said purpose, to examine of its own motion whether or not the clauses included in the contract signed by and between the professional and the non-professional or consumer are unfair. The Court thus redefines the role of the execution judge, who must examine ex officio whether a clause is unfair if it is clear from the res judicata decision on which the execution proceedings measure is based that the trial judge did not carry out such an examination. It should be noted, however, that this new role of the execution judge is determined by the terms of the dispute itself. The court must have the legal and factual elements for said purpose. In other words, the unfairness of the clause must be reviewed ex officio as soon as the execution judge has the necessary elements to do so.

In the case referred to it, the Cour de cassation censured the decision, as the trial judges had not examined, ex officio, the unfairness of the clauses of a loan denominated in foreign currencies. In this respect, the Court followed a ruling by the First civil chamber of the Cour de cassation (1st Civ., 20th of April 2022, appeal nº 19-11.600).

The destruction of the lesser kestrels, a protected species, by collision with wind turbines, despite the implementation of distancing systems and in the absence of an exemption provided for by law, makes it possible to hold operators liable before the civil courts.

November 30, 2022 – 3rd civil chamber – Ruling

Between 2006 and 2013, thirty-one wind turbines were built and commissioned in the Hérault department, on sites classified as special protection areas under the directive 2009/147/EC of the 30th of November 2009 of the European Parliament and of the Council, on the protection of wild birds (the Birds Directive). In 2011 and 2012, the discovery of several lesser kestrel's carcasses at the foot of the installations, the protection of which fall under this directive, was reported.

Despite the installation of bird detection and actions to mitigate bird collision risks, such as scaring devices (DT-Bird) prescribed by the prefect, new lesser kestrel carcasses were discovered, leading the France Nature and Environment association to hold the site operators and their site manager, EDF, liable for compensation for the non-material damage (or moral prejudice) caused by the destruction of specimens of a protected species. The first question that arose before the Court de cassation was whether the action brought before it was admissible. It was argued that an association could not bring an action before a civil court under article L. 142-2 of the French Environmental Code (Code de l'environnement) without having established that a criminal offence linked to the environment had been recognised.

The judgment, rejecting this analysis, holds that such an action is contingent upon the existence of facts likely to be qualified as criminal and falling within the scope of the legislative provisions relating to the protection of the environment and nature, without depending on the prior recognition of an offence. Secondly, the appeal contended that the separation of powers between the administrative and judicial authorities had been infringed, arguing that there had been prefectorial orders (arrêtés préfectoraux) authorising the operation of the wind farm with the aforementioned devices.

Recalling that these prefectorial orders had been issued under the special autonomous police governing the operation of installations classified for environmental protection (ICPE), the Court held that it did not infringe the principle of the separation of powers for the judicial judge (juge judiciaire), hearing a civil liability case, to find that the operators of the wind farm had breached the provisions of Article L. 411-2, 1° of the Environmental Code (Code de l'environnement) prohibiting the destruction of protected wild species where not covered by the exemption provided for by the aforementioned law. The question then arose as to the constituent elements of the offence of harming the conservation of a non-domesticated animal species, as provided for in article L. 415-3 of the Environmental Code (Code de l'environnement).

The operators and managers of the wind farm argued that this offence required, in addition to the destruction of one or more specimens of a protected species, the demonstration of harm to the conservation of the protected species.

The Cour de cassation held that such a demonstration of harm was not necessary, as the material element of the offence of harming the conservation of non-domesticated animal species was constituted by the violation of the prohibitions on the destruction of protected species set out in articles L.411-1 and L.411-2 of the Environmental Code (Code de l'environnement) and its implementing regulations. The Court added that negligence was sufficient to establish the mental element of the offence. Lastly, it points out that article L. 411-1 of the Environment Code (Code de l'environnement) applies to all protected species, including birds, the strict protection measures set out in European Directive 92/43/EEC of the 21st of May 1992 (the Habitats Directive), article 12 of which was interpreted by the CJEU in a ruling of the 4th of March 2021 (cases C-6473/19 and C-474/19).

Consequently, the Court approves the court of appeal's finding that the offence had been constituted and that the offenders were liable, since it had noted that twenty-eight lesser kestrels, a non-domestic animal species protected under Article L. 411-1, 1°, of the French Environment Code, had been killed between 2011 and 2016 as a result of collisions with wind turbines. This destruction had continued despite the installation of the DT-Bird system, and the owners (also operators of the systems) did not provide evidence of a derogation from the prohibitions set out in this article, constituting a justifying fact that exonerated them from liability.

Has "*Brexit*" had an impact on the applicability of the Lugano Convention in the UK?

September 13, 2023 – Commercial, financial and economic chamber – Ruling

The United Kingdom remained bound by the Lugano Convention until the 31st of December 2020, when the transitional period ended. The application of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of the 30th of October 2007 (the Lugano Convention) is subject to at least one of the parties being domiciled in a State bound by that Convention, to the designation of a court within the jurisdiction of a State bound by that Convention and to the recognition of the international character of the dispute. The United Kingdom, as a member State of the European Union, was bound by the Lugano Convention.

The terms of the United Kingdom's withdrawal from the European Union were set out in the Agreement of 24 January 2020 on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (the Agreement). Pursuant to this Agreement, which entered into force on the 1st of February 2020, the United Kingdom's withdrawal from the Union became effective on the 1st of January 2021. Articles 126 and 127 of the Agreement provided for a transition period until the 31st of December 2020, during which, unless otherwise provided, European Union law continued to apply in the United Kingdom and on its territory, so that the United Kingdom remained bound during that period by the obligations arising from the international agreements concluded by the Union.

In the absence of any evidence to the contrary, it follows that the United Kingdom remained bound by the Lugano Convention until the 31st of December 2020, when the transitional period ended. In this case, the dispute was between a French company and a Swiss company. The latter argued that the French courts did not have jurisdiction, relying on a jurisdiction clause designating the High Court of Justice of London (United Kingdom). The decision of the court of appeal noted that the United Kingdom, on whose territory the court designated by the clause is located, was still a member of the European Union at the time the proceedings were brought on the 18th of April 2019. The court of appeal, thus, correctly deduced that the United Kingdom's withdrawal from the European Union had no effect on the application of the Lugano Convention to the dispute. The validity of the jurisdiction clause should be subject to the formal requirements set out in Article 23 of that Convention and not to the rules arising from the provisions of national law.

Clarification of the enforceability of a jurisdiction clause against consignees bringing a contractual liability action against the maritime carrier

December 14, 2022 – Commercial, financial and economic chamber – Ruling

The admissibility of the action for contractual liability against a sea carrier is assessed independently of the statements of the bill of lading issued in order to constitute, in particular, the evidence of the contract of carriage, since these statements are not intended exclusively to attribute to the persons they indicate the status of party to that contract, such that the contractual action may be initiated by the consignee who claims damage as a result of the carriage. However, the consignee is bound by this document only insofar as it defines and specifies the conditions of transport itself, from acceptance to delivery. Therefore, the choice-of-jurisdiction clause contained in the bill of lading may not be invoked against them unless they have specially accepted it or the international jurisdiction it institutes is imposed by virtue of a treaty or European Union law. The acceptance of this choice-of-jurisdiction clause cannot be deduced from the existence of a practice in international transport, nor from the sole prior commercial relations between the parties, nor from the presence of a mention on the front of the bill of lading referring to the general conditions appearing on the reverse of said document.

In this ruling, the Commercial chamber of the Cour de cassation (la chambre commerciale de la Cour de cassation) rules on the enforceability of a jurisdiction clause in non-EU international law where consignees make a contractual liability claim against the maritime carrier. Often presented as a tripartite contract involving the shipper, the carrier and the consignee, the contract of carriage by sea, embodied in a bill of lading, is in fact initially concluded between the shipper and the carrier

alone, and it is only on receipt of the goods that the consignee "adheres" to it, becoming a party to the contract by "completing the bill of lading", i.e., by signing the back of the bill of lading. The general conditions in these bills of lading appear in a paragraph at the top of the bill of lading, indicating that signing it was equivalent to accepting all the provisions appearing on the reverse, or the availability of the same general conditions. This raises the question of the enforceability of clauses against the addressee of such clauses where the addressee did not negotiate or accept such clauses and of which it was not necessarily aware. These include jurisdiction clauses, which place the person who invokes them in a very favourable procedural position, depriving the person against whom they are invoked of his natural judge and the French courts of a large volume of litigation. In a famous Nagasak judgment, the Commercial chamber laid down the principle that, "in order to be enforceable against either the shipper or the consignee, [such a clause] must have been accepted at the latest, in the case of the former, at the time of conclusion of the contract of carriage and, in the case of the latter, at the time when, on receiving delivery of the goods, he acceded to the contract [of carriage]", subsequently specifying in Chang Ping (Com., 16th of January 1996, Appeal no. 94-12.542.170) and Sylver Sky (Com., 8th of December 1998, Appeal no. 96-17.913) that, the choice-of-jurisdiction clause contained in the bill of lading may not be invoked against them unless they have specially accepted it or the international jurisdiction it institutes is imposed by virtue of a treaty or European Union law. The acceptance of this choice-of-jurisdiction clause cannot be deduced from the existence of a practice in international transport, nor from the sole prior commercial relations between the parties, nor from the presence of a mention on the front of the bill of lading referring to the general conditions appearing on the reverse of said document. The Court of Justice of the European Communities ruled in the Tilly Russ judgment of the 19th of June 1984 (case C-71/83) and then in a judgment of the 9th of November 2000 (Coreck Maritime, case C-387/98) that "as regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by article 17 of the convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations. If this is not the case, consent to the said clause must be verified in the light of the requirements of the first paragraph of Article 17 of the said Convention [Brussels Convention of 27 September 1968], as amended".

Putting an end to divergences, in two rulings handed down simultaneously on the 16th of December 2008, (Com., 16th of December 2008, Appeal no 08-10.460, Bull. 2008, IV, no 215, published in the annual report and 1st Civ., 16th of December 2008, Appeal no 07-18.834, Bull. 2008, I, no 283, published in the annual report), the First Civil chamber and the Commercial chamber of the Cour de Cassation adopted the same solution by laying down in identical terms the rule that "*a jurisdiction clause agreed between a carrier and a shipper and inserted in a bill of lading produces its effects with regard to the third party holder of the bill of lading insofar as, by acquiring it, he has succeeded to the rights and obligations of the shipper under the applicable national law*". The Commercial chamber has also ruled, again in European Union law (Com., 16th of December 2008, Appeal no. 08-10.460, Bull. 2008, IV, no. 215, published in the Annual Report; Com., 27th of September 2017, Appeal no. 15-25.927, Bull. 2017, IV, no. 132; Com., 20th of October 2021, Appeal no. 20-14.275, published in the Bulletin), on the status of the actual consignee of the goods as a third-party holder. It stated that "the actual consignee of the goods, who does not appear in any capacity on a maritime bill of lading issued to a named person, cannot be considered as a third-party holder of that bill of lading, so that the jurisdiction clause contained therein is not enforceable against him" (Com, 27th of September 2017, Appeal no. 15-25.927, Bull. 2017, IV, no. 132), a solution that has been transposed in sea carriage (Com., 20th of October 2021, Appeal no. 20-14.275, published in the Bulletin).

▲ Court room of the Commercial, financial and economic chamber

However, it had not yet had the opportunity to rule on non-European Community private international law, which represents a higher volume of cases than European Community Law-related litigation. In the ruling of the court of appeal under review, the principle of such a clause had been validated but rejected in the present case on the grounds that it was illegible, appearing in very small print on the back of the bill of lading. The decision was criticized for having applied French law in assessing the conditions for the enforceability of the clause and not taking into account the special acceptance of the choice-of-jurisdiction clause on a bill of lading that may be tacit and result from the usual stipulation of that clause in the context of established business relations between the parties, or result from usual practices in the international carriage of goods.

Having approved the use of a rule of substantive law to determine whether the disputed clause fulfilled the conditions of enforceability arising from the general principles concerning the material drafting and presentation of such clauses, the Commercial chamber rejected the application of the case law arising from the Coreck judgment and upheld the Nagasaki

case law, to stipulate that, once the bill of lading has been completed, the addressee, who is not a party to the bill of lading, can only rely on the clauses relating to the rights and obligations of the parties and not on the clauses relating to the dispute, and that acceptance of the jurisdiction clause cannot be inferred from the existence of maritime transport practice or from the parties' prior commercial relations alone.

Clarification of the conditions under which a travelling employee's travel time can be considered as effective working time

November 23, 2022 – Commercial, financial and economic chamber – Ruling / Press release

The question that was brought before the Cour de cassation: Should the travelling employee's travel time between his home and his first customer, and then between his last customer and his home, be taken into account in the payment of his salary and in the calculation of his overtime, when the planning of his appointments is made by the employer? The decision of the Cour de cassation reviews and align its case law with regard to European Union law.

Key points in French law:

According to Article L. 3121-1 of the French Labour Code (Code du travail), the effective working time is the time during which the employee is at the employer's disposal and complies with the latter's instructions without being able to carry out personal activities. Under the terms of Article L. 3121-4 of the same code, the professional travel time to the place of performance of the employment contract is not effective working time. However, if the journey exceeds the normal time spent travelling between home and the usual place of work, consideration shall be given either in the form of rest or monetary compensation.

The Cour de cassation has ruled that the method of remuneration of workers in a situation in which the workers have no fixed or usual workplace and make daily journeys between their home and the sites of the first and last customers indicated by their employer falls within the scope of the relevant provisions of national law and that, pursuant to Article L. 3121-4 of the Labour Code, the travel time that exceeds normal travel time, which is not effective working time, must be subject to consideration either in the form of rest or monetary compensation. Taking European Union law into account, the Cour de cassation now looks at the constraints employees face when determining whether or not the travelling time of travelling workers constitutes effective working time.

In the event of a dispute, the French judge will have to look at whether, during the time spent travelling between his home and the first and last customers, the employee had to remain at the employer's disposal and follow its instructions without being able to carry out personal activities. If such is the case, it must rightly be decided that this time should be integrated into his effective working time and remunerated accordingly, i.e., paid as overtime. Otherwise, under the terms of Article L. 3121-4 of the same code, where the professional travel time to the place of performance of the employment contract is not effective working time, if the journey exceeds the normal time spent travelling between home and the usual place of work, consideration shall be given either in the form of rest or in monetary compensation. In this case, the employee only went to the company's headquarters for work purposes occasionally, and had a company vehicle to work with the company's customers which were spread out over a large area. During the time spent travelling between his home and the first and last customers, the employee had to remain at the employer's disposal and follow its instructions without being able to carry out personal activities. The Court confirmed that the court of appeal rightly decided that this time should be integrated into his effective working time and remunerated accordingly.

Application of the principle > Soc., October 25, 2023, pourvoi n°20-22.800

La Sociale Le Mag' Podcast

The right to trial within reasonable time and consequences of the excessive duration of proceedings

November 9, 2022 – Criminal chamber – Ruling / Press release

The excessive duration of criminal proceedings cannot lead to the proceedings being nullified when each individual part of said proceedings is intrinsically regular. First of all, it is the court's role to assess the value of the evidence submitted to it and debated before it during the adversarial proceedings. It must, in that regard, take into account the possible deterioration of the evidence as a result of the passage of time. The court may also determine the nature and severity of the sentence it imposes, taking into account the possible consequences of the proceedings having lasted for an unreasonable amount of time and, where appropriate, decide that no sentence need be imposed. The court of appeal's decision (in the case "*de la chaufferie de La Défense*") is censored.

Article 6, § 1 of the European Convention on Human Rights provides for the right of every accused to have his case tried by a court within a reasonable time after the judicial proceedings have begun. This right is rooted in the need to ensure that an accused does not remain for too long in a state of uncertainty regarding the resolution of the criminal charge to be brought against him. The Cour de cassation has consistently held that exceeding the reasonable time defined in Article 6, § 1 of the European Convention on Human Rights does not affect the validity of the proceedings.

In 2021 and 2022, a few jurisdictions considered that the excessive duration of criminal proceedings made nullifying criminal proceedings necessary.

One of these decisions concerns the so-called "*boiler of La Défense*" ("*de la chaufferie de la Défense*") case, which had been going on for twenty years. The court of appeal decided to quash the corruption proceedings, finding that the right to a fair trial, the adversarial principle and the balance of the rights of both parties had been violated.

The Public Prosecutor's Office appealed the decision. The Criminal chamber of the Cour de cassation met in its most solemn formation in order to re-examine the relevance of its case law.

The Cour de cassation confirms its case law, quashes and sets aside the above-mentioned ruling of the court of appeal: the excessive duration of criminal proceedings cannot lead to the proceedings being nullified when each individual part of said proceedings is intrinsically regular.

- The failure to be tried within a reasonable time did not constitute a breach of due process (droits de la défense). This analysis is shared by the European Court of Human Rights.

The parties have guarantees:

- They have an influence on the length of proceedings: the parties, under certain conditions, as well as the President of the investigating chamber of the court of appeals (chambre de l'instruction), who, under Article 220 of the Code, endeavours to ensure that proceedings are not unreasonably delayed, to refer the matter to that court, which may then continue the investigation, close it or entrust it to another investigating judge (juge d'instruction).
- The aggrieved parties have the right to seek compensation from the State for the defective operation of the judicial system, notably when a case takes an unreasonable amount of time to be concluded.

Consequently, a trial court which finds that the duration of the proceedings is excessive cannot dispense with examining the merits of the case. In doing so, there are several legal ways to take this situation into account.

- First of all, it is the court's role to assess the value of the evidence submitted to it. It must, in that regard, take into account the possible deterioration of the evidence as a result of the passage of time since the date of the facts, including the fact that the parties might no longer be able to challenge the value of, or consequences to be drawn from, said evidence.
- Next, according to the last paragraph of Article 10 of the Criminal Procedure Code, in the presence of civil parties, where the court finds that the mental or physical state of the accused makes it impossible for him to appear in court and present a defence for an extended period of time, the court may, of its own motion or at the request of the parties, decide, after having requested an expert opinion to establish that this is indeed the case, that a hearing will be held to decide only on the civil action, the criminal case itself (action publique) being stayed in the meantime.

- Finally, the court may determine the nature and severity of the sentence it imposes, taking into account the possible consequences of the proceedings having lasted for an unreasonable amount of time.

European Union: Clarification of the possibility of sanctioning an illegal immigrant who obstructs a removal order on the basis of article L.824-9 of the CESEDA (Code governing the entry and residence of foreigners and the right of asylum)

April 13, 2023 – Criminal chamber – Ruling n°1 / Ruling n°2 / Ruling n°3

Under French criminal law, it is an offence for an illegal immigrant to obstruct deportation to his or her country of origin by refusing, for example, to go to the consulate to obtain travel documents or to take a mandated test for covid-19 before boarding a plane. However, the European "*Return Directive*", which aims to ensure an effective policy for removing illegal third-country nationals, prevents them from being prosecuted for these offences as long as the administrative detention or house arrest measure taken by the authorities to organise their removal has not reached its maximum duration, or has not been lifted due to a lack of reasonable prospects of removal. These offences are punishable by imprisonment: the aim is therefore to avoid imposing a prison sentence that would delay the foreign national's return to his or her country.

It must be noted that the procedure for "*return*" to the country of origin is not the same as that for the "readmission" to another EU country. When a foreign national is "*readmitted*" or returned to the country through which he or she entered the European Union, the "*Return Directive*" does not apply and French law does not punish refusal to submit to a screening test.

Concepts
of French positive law

Labour law

What is effective working time?

The concept of working time is an essential one in that it determines, in particular, the remuneration received by the employee.

The European Union shares competence with the Member States in the area of social policy. In that way, in directive (93/104/EC), the European Union considers that working time (article 2-1) "*shall mean any period during which the worker is working, at the employer's disposal and carrying out his activity or duties, inaccordance with national laws and/or practice*". This text is still in force.

French law enshrines this European definition in Article L3121-1 of the Labour Code. This article defines effective working time as "*any period during which the employee is at the employer's disposal and complies with the employer's instructions without being free to pursue personal interests*". Thus, three cumulative requirements must be fulfilled for the article to apply:

1. the employee is at his employer's disposal (he is not obliged to carry out a productive activity continuously. However, the employer must be able to ask the employee to intervene at any time);
2. the employee must comply with his employer's instructions;
3. the employee cannot freely go about his personal interests. This definition, which is a matter of public policy, confirms that it is no longer the nature of the activity carried out that determines whether or not it is working time, but rather the subordinate position in which the employee is placed, in other words, as soon as the employee is at the employer's disposal.

The concept of effective working time has been the source of a number of questions which the Cour de cassation has had to answer. For example, the Court had to rule on the question of whether periods of duty time, under certain conditions, could be classified as effective working time (Social chamber, 26 October, 2022, appeal no. 21-14.178). Recently, the Cour de Cassation was required to answer the following question: Should the travelling employee's travel time between his home and his first customer, and then between his last customer and his home, be taken into account in the payment of his salary and in the calculation of his overtime, when the planning of his appointments is made by the employer? The social chamber of the Cour de cassation has reviewed its case law and its interpretation of Article L3121-4 of the Labour Code to bring it into line with that of the Court of Justice of the European Union on this issue*. Take a look: Soc., 25 October 2023, appeal no. 20-22.800.

* *Court of Justice of the European Union, Judgment of the Court (Third Chamber) of 10 September 2015, Case C-266/14; EUR-Lex - 62014CJ0266 - EN - EUR-Lex (europa.eu)*

Criminal law

Theft by deceit

The offence of theft may be aggravated by the fact that the perpetrator entered the premises by "ruse", or by deceit (under article 311-5 of the Criminal Code). Deceit is not defined in the text of the article. It is therefore left to the discretion of the trial judges to determine whether it exists. In practice, deception or deceit refers to cases where the agent uses a false capacity or some form of artifice to gain entry to the premises. However, it can also be inferred from the modus operandi.

Does the access gained through deceit presuppose the use of a scheme or ploy? Not necessarily. It is sufficient, for example, that the employee entered his employer's premises using the alarm deactivation code assigned to him for professional purposes (Crim., 5th of September 2023, Appeal no. 22-86.256, published in the Bulletin).

A look at environmental case law

Jean-François Zedda, judge referee at the Third civil chamber

Jean-François Zedda, judge referee (Conseiller référendaire) at the Third civil chamber (troisième chambre civile), published an editorial that looks at the intersection between climate change and the construction sector. Particularly in the context of real estate litigation and the legal challenges and responsibilities arising therefrom, thus, at the role and office of the judge in these matters. The editorial explores a number of issues:

The vulnerability of buildings to climate change

The introduction highlights the increased vulnerability of buildings to natural disasters such as floods and storms resulting from climate change. It stresses the importance of complying with building standards to ensure durability of structures and safety of occupants.

The legal and insurance implications of climate change

The editorial looks at the legal and insurance implications of damage to buildings caused by climate change. It mentions recent changes to the Insurance Code (Code des assurances) and highlights the increase in litigation linked to natural disasters and the effects of climate change.

The role of buildings in mitigating climate change

The article goes on to highlight the important role played by the construction sector in the fight against climate change. It discusses the EU's goal to be climate-neutral by 2050 and the need for the construction industry to reduce its greenhouse gas emissions.

Environmental regulations and litigation

The implementation of environmental regulations such as the Environmental Regulations 2020 (RE 2020) and laws promoting the re-use of construction materials is examined. The editorial makes the conjecture that these regulations will lead to new forms of litigation, particularly around compliance issues.

Energy renovation and the French property market

The article accordingly examines the challenges involved in improving the energy efficiency of existing buildings, including the financial and technical obstacles. It also looks at the impact of new regulations on the property market, such as the progressive ban on letting poorly insulated or energy inefficient properties.

Balancing individual rights and collective interests

The editorial then raises the issue of re-evaluating the principle of proportionality in court decisions, taking into account the environmental costs of construction and demolition, just as financial costs are taken into account (3rd Civ., 17th of November 2021, Appeal no. 20-17.218). The resulting conflict between individual property rights and collective environmental interests is clearly emphasised.

Litigation relating to wind energy and renewable energies

The article also discusses legal disputes relating to the development of renewable energy infrastructures, such as wind farms, and their impact on local communities and the natural environment. For example, the depreciation of a property caused by the proximity of a wind turbine (3e Civ., 17th of September 2020, Appeal no. 19-16.937), the harmful consequences for biodiversity, particularly protected bird species (3e Civ., 30th of November 2022, Appeal no. 21-16.404), and the judicial treatment of the obligation to carry out a study for wildlife protection (3e Civ., 11th of January 2023, Appeal no. 21-19.778).

The role of the courts in climate change

In conclusion, the editorial stresses the essential role of the courts in supporting the energy transition and balancing fundamental rights with the preservation of common interests.

Read the full article >

Observatory of judicial litigation: test launch

Three experimental courts of appeal are working with the Cour de cassation to try out an innovative system that reflects a vision of the future for the role of judges and the handling of emerging, complex or serial cases.

The *"Cour de cassation 2030 Commission"* report noted that the very large volume of cases handled by the judicial courts makes it difficult to identify the major trends driving the flow of litigation and to systematically identify cases involving issues of significant public interest.

The "*Cour de cassation 2030 Commission*" report therefore recommended the creation of an Observatory of judicial litigation, a mechanism that would encourage a global and coordinated approach to the handling of litigation, whether emerging, serial or involving new and complex issues. This recommendation caught the attention of the First president Christophe Soulard, as its implementation is likely, on the one hand, to guarantee litigants greater efficiency in the justice system and improved predictability of the law. On the other hand, it is likely to provide an answer to the need for support experienced by the judicial courts.

OBSERVATOIRE DES LITIGES JUDICIAIRES

Accordingly, the First president has tasked the President Sandrine Zientara, Director of the Documentation, Studies and Report Department, with setting up this Observatory with a one-year trial period, after numerous consultations that have helped define a collective and pragmatic project. These consultations included discussions with foreign courts, some of which have a specialised observatory mechanism (Italy has an observatory on civil justice, Norway has the "*Counsel's Forum*" and Spain set up an observatory on gender violence attached to the CSM). In practice the Observatory will aim to:

- identify targeted litigation through an information feedback mechanism;
- support the handling of litigation by identifying similar cases from one jurisdiction to another, reporting on their progress, while devoting in-depth research and analysis to them;
- provide professionals with secure access to the legal and procedural information collected.

All the courts will be able to take part in this process via dedicated pages on the Court's intranet site, foreshadowing a future dedicated platform. In addition, legal and judicial partners are closely involved in this project and their representatives at a national level are the members of the Observatory's steering committee.

Documentation, Research and Reporting Department

This department carries out legal research on specific points of law, at the request of judges. It prepares the Annual Report of the Cour de cassation, which informs the public of the court's activity. It is responsible for making court decisions available in open data format on the Cour de cassation website.

President Zientara presents the "OLJ" >

International events

Italy: Meeting with the First President of the Italian Supreme Court of cassation

On 27 June 2023, First President Christophe Soulard held a videoconference with the First President of the Italian Supreme Court, Margherita Cassano, to ensure the launch of a joint working group on the team around the judge.

Discussions at the meeting focused in particular on the issue of the team around the judge and the professional role of the legal assistant, which represents a major challenge for the development of the Court de cassation's working methods. Read...

Germany: Meeting between the First President and the President of the Federal Court of Justice

On September 19, 2023, First President Christophe Soulard received the President of the German Federal Court of Justice, Bettina Limperg, at the Cour de cassation, to discuss topics of common interest in the context of enhanced cooperation between the two courts.

Discussions at the meeting focused on a number of important issues, such as strengthening the team around the judge through the recruitment of assistant magistrates in Germany and legal assistants at the Cour de cassation.
The meeting also dealt with the admissibility of appeals, the formation and composition of chambers within the courts, and organizational arrangements to encourage fruitful debate between judges during deliberations. It also provided an opportunity to exchange views on methods of drafting judgments. Read...

United Kingdom: Study visit for the opening of the Judicial Year

First President Christophe Soulard travelled to London, accompanied by a delegation from the Cour de cassation, on 2 and 3 October 2023, to attend the Opening of the Legal Year Ceremony and to set up a programme of enhanced cooperation with the Supreme Court of the United Kingdom.

Despite the fact that the two courts operate in very different ways and have very different legal cultures, the work carried out together enabled the community to identify the challenges facing the supreme courts in terms of accessibility of justice, public understanding and confidence and, more specifically, the advantages and dangers of artificial intelligence in the field of justice. Read...

European Court of Human Rights: Seminar on Protocol No.16

On 13 October 2023 in Strasbourg, the Cour de cassation took part in a seminar on "*Judicial dialogue through the advisory opinion mechanism under Protocol No. 16*" organised by the European Court of Human Rights.

The First President of the Cour de cassation spoke about France's experience of implementing the Protocol, as the Court de cassation was the first court to make use of Protocol No. 16 in a case concerning the legal situation of children born from surrogate motherhood abroad. Read...

Court of Justice of the European Union: Visit of the Prosecutor-General

On 18 October 2023, the Prosecutor-General visited the Court of Justice of the European Union in Luxembourg.

On this occasion, he had a discussion with the President Koen Lenaerts, the French Judge Jean-Claude Bonichot and the French Advocate-general Jean Richard de la Tour. Read...

World Bank: Meeting with the Senior Vice President

On November 3, 2023, First President Christophe Soulard met with Christopher Stephens, Senior Vice President and General Counsel of the World Bank Group at the Cour de cassation. The two institutions signed a memorandum of understanding on their cooperation.

This cooperation is part of the First President's international strategy to disseminate the Court's jurisprudence, promote its expertise and mobilize institutional resources for the benefit of the rule of law and the work of judges beyond our borders. Read...

Algeria: Study visit of the Supreme Court

The Cour de cassation welcomed a very high-level delegation from the Supreme Court of Algeria from 11 to 13 December 2023.

This visit was a continuation of the activities carried out by the Cour de cassation as part of the Programme of Support for the Justice Sector in Algeria (PASJA) run by Expertise France and the French Embassy in Algiers, and following the missions carried out in Algeria in 2023. First President Tahar Mamouni requested this visit in order to deepen the reforms conducted at the Supreme Court on the management of case inventories. Read...

Council of europe and the ECHR: Visit of the prosecutor-general

On 18 January 2024, the Prosecutor-General travelled to Strasbourg to strengthen the rich dialogue between the Cour de cassation (Court of cassation) and the bodies of the Council of Europe and the European Court of Human Rights (ECHR), which are pillars of our rule of law.

The Prosecutor-General had a meeting with Ms Siofra O'Leary, President of the ECHR, the French lawyers from the ECHR registry, then with the Department for the Execution of Judgments of the ECHR, before visiting the headquarters of the European Commission for the Efficiency of Justice (CEPEJ), where he met the members of the Secretariat. Finally, the Prosecutor-General had talks with Mr Pap Ndiaye, Ambassador and Permanent Representative of France to the Council of Europe. Read...

All international news

- **31st of January 2024**

  Seminar between the Cour de cassation and the Supreme Court of Singapore on artificial intelligence as an object of justice and a means of justice

Publications

The "*Cour de cassation 2030*": Cooperation fuelled by judicial dialogue

The "*Cour de cassation 2030 Commission*" Report (Rapport Cour de cassation 2030) refers at length to the idea of a dialogue between judges at an international level: "*The relationship between the Cour de cassation and the European and international courts should not be seen as a classic hierarchical relationship but as a conversation between peers, driven by a concern for mutual respect and preserving the proper functioning of international instruments*".

Accordingly, in recommendation 9, and in line with the common desire to harmonise law at the European level and to contribute to the development and maintenance of the area of freedom, security and justice, the report encourages "*Consideration of the opportunity for foreign judges sitting in the Cour de cassation in an advisory capacity*".

"*The Cour de cassation 2030*" Report

The Cour de cassation's commitment to promoting cooperation

In every Newsletter, discover a new network to which the Court belongs.

AHJUCAF:

Association of francophone judicial supreme courts

The AHJUCAF was created in 2001 on the initiative of 34 French-speaking Supreme Jurisdictions and the Organisation internationale de la Francophonie.

It has 49 members. The Association, which has its headquarters at the French Cour de cassation, aims to foster mutual assistance, solidarity, cooperation and exchanges of ideas and experience between member judicial institutions on matters falling within their remit or concerning their organisation and operation; to promote the role of the High Courts in consolidating the rule of law, strengthening legal certainty, regulating judicial decisions and harmonising the law within Member States.

Its President is Victor Dassi Adossou, President of the Supreme Court of Benin; its Vice-President is Christophe Soulard, First President of the French Cour de cassation; and its Secretary General is Jean-Paul Jean, Honorary chamber president of the Chamber of the Cour de cassation.

Visit the AHJUCAF's website >

118 translated rulings

Translation
of the Court's rulings

Each quarter, the Cour de cassation publishes a new series of rulings translated into English. These decisions are particularly illustrative of the Court's case law in that they raise a point of law relating to the application of European standards, because they illustrate a change in the role of the judicial judge or because they form the basis of important new case law.

Read translated rulings >

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