French Supreme Court ruling in the Lafarge case: the private international law side of transnational criminal litigations

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In the *Lafarge* case (Cass. Crim., 16 janvier 2024, n°22-83.681, available here), the French Cour de cassation (chambre criminelle) recently rendered a ruling on some criminal charges against the French major cement manufacturer for its activities in Syria during the civil war. The decision addresses several key aspects of private international law in transnational criminal lawsuits and labour law.

From 2012 to September 2014, through a local subsidiary it indirectly controlled, the French company kept a cement plant operating in a Syrian territory exposed to the civil war. During the operation, the local employees were at risk of extortion and kidnapping by armed groups, notably the Islamic State. On these facts, in 2016, two French NGOs and 11 former Syrian employees of *Lafarge*'s Syrian subsidiary pressed criminal charges in French courts against the French mother company. Charges contend financing a terrorist group, complicity in war crimes and crimes against humanity, abusive exploitation of the labour of others as well as endangering the lives of others.

After lengthy procedural contortions, the *chambre d'instruction* of the Cour d'appel de Paris (the investigating judge) confirmed the indictments in a ruling dated May 18th, 2022. Here, the part of the decision of most direct relevance to private international law concerns the last incrimination of endangering the lives of others. The charge, set out in Article 223-1 of the French Criminal Code,

implicates the act of directly exposing another person to an immediate risk of death or injury likely to result in permanent mutilation or infirmity through the manifestly deliberate violation of a particular obligation of prudence or safety imposed by law or regulation. The *chambre d'instruction* found that the relationship between *Lafarge* and the Syrian workers was subject to French law, which integrates the obligations of establishing a single risk assessment report for workers' health and safety (Articles R4121-1 and R4121-2 of the French Labour Code) and a mandatory safety training related to working conditions (Article R4141-13 of the French Labour Code). On this basis, it upheld the mother company's indictment for violating the aforementioned prudence and safety obligations of the French Labour Code. Following this ruling, the Defendants petitioned to the French Supreme Court to have the charges annulled, arguing that French law did not apply to the litigious employment relationship.

By its decision of January 16, 2024, the French Cour de cassation (chambre criminelle) ruled partly in favour of the petitioner. By applying Article 8 of the Rome I regulation, it decided that the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, so that, French law not being applicable, the conditions for application of Article 223-1 of the French Criminal Code were not met. Thus, the *Cour de cassation* quashed *Lafarge*'s indictment for endangering the lives of others, while upholding the remaining charges of complicity in war crimes and crimes against humanity.

The *Lafarge* case highlights the stakes of transnational criminal law and its interplay with private international law.

Interactions between criminal jurisdiction and conflict of laws.

Because of the solidarity between criminal jurisdiction and legislative competence, the field is in principle exclusive of conflict of laws. However, this clear-cut frontier is often blurred.

In *Lafarge*, a conflict appeared incidentally via the specific incrimination of endangering the lives of others. In a transnational context, the key legal issue concerns the scope of the legal and regulatory obligations covered by the incrimination. A flexible interpretation including foreign law would lead to a (too) broad extension of French courts' criminal jurisdiction. In the present decision,

the *Cour de cassation* logically ruled, notably on the basis of the principle of strict interpretation of criminal law, that an obligation of prudence or safety within the meaning of Article 223-1 "necessarily refers to provisions of French law".

Far from exhausting issues of private international law, this conclusion opens the door wide to conflict of laws. Indeed, the court then had to determine whether such French prudence or safety provisions applied to the case.

Under Article 8§2 of the Rome I regulation, absent a choice of law in an employment contract, the law applicable to the employment relationship between *Lafarge* and the Syrian workers should be the law of the country in which the employees habitually carry out their work –*i.e.* Syrian law. However, French law could be applicable in two situations: either if it appears that the employment relationships have a closer connection with France (article 8§4 Rome I), or because French law imposes overriding mandatory provisions (article 9 Rome I).

On the one hand, the *Cour de cassation* dismissed the argument that the employment relationship had a closer connection with France. Previously, the *chambre d'instruction* considered that the parent company's permanent interference ("*immixtion*") in the management of its Syrian subsidiary (based on a body of corroborating evidence, in particular, the subsidiary's financial and operational dependence on the parent company, from which it was deduced that the latter was responsible for the plant's safety) resulted in a closer connection between France and the employment contracts of the Syrian employees. Referring to the ECJ case law, which requires such connection to be assessed on the basis of the circumstances "as a whole", the Supreme Court conversely held that considerations relating solely to the relationship between the parent company and its subsidiary were not sufficient to rule out the application of Syrian law. Ultimately, the *Cour de cassation* found that none of the alleged facts was such as to characterize closer links with France than with Syria.

On the other hand, the *Cour de cassation* rejected the characterization of Articles R4121-1, R4121-2 and R4141-13 of the French Labour Code as overriding mandatory provisions ("*lois de police*"). Here, the Criminal division of the *Cour* is adopting the solution set out by the Labour disputes division (chambre sociale) in an opinion issued on the present Lafarge case. In its opinion, the Social division noted that, while the above-mentioned provisions do indeed pursue a public interest objective of protecting the health and safety of workers, the conflict of

laws rules set out in Article 8 Rome I are sufficient to ensure that the protection guaranteed by these provisions applies to workers whose contracts have enough connection with France -a questionable utterance in the light of the reasoning of the Cour de cassation in the decision under comment and its strict interpretation of the escape clause.

As a result, the employment relationship between *Lafarge* and the Syrian workers was governed by Syrian law, with French law not imposing any obligation of prudence or safety to the case. The Supreme court thereby concluded that the conditions for application of Article 223-1 of the French Criminal Code were not met.

Implications.

The *Lafarge* decision will have broad implications for transnational litigations.

Firstly, the *Cour de cassation* confirms the strict interpretation of the escape clause in Article 8§4 of the Rome I regulation. Making extensive reference to the ECJ case law, the Court recalled that when applying Article 8§4, courts must take account of all the elements which define the employment relationship and single out one or more as being, in its view, the most significant (among them: the country in which the employee pays taxes on the income from his activity; the country in which he is covered by a social security scheme and pension, sickness insurance and invalidity schemes; as well as the parameters relating to salary determination and other working conditions).

More importantly, the French Supreme Court limits the consequences of parent companies' interference (*immixtion*) in international labour relations and value chain governance. The criterion of interference is commonly used to try to lift the corporate veil for imputing obligations and liability directly to a parent company. By establishing that the parent company's interference was insufficient to characterize the existence of a closer connection with France, the *Cour de cassation* circumscribes the spatial scope of French labour law and maintains the territorial compartmentalization of global value chains. It is regrettable, in that respect, that the Supreme court did not precisely discuss the nature of the relationship between *Lafarge* and the Syrian workers. This solution is nevertheless consistent with the similarly restrictive approach to co-employment adopted by the French courts, which requires a "permanent interference" by the

parent company leading to a “total loss of autonomy of action” on the part of the subsidiary. Coincidentally, in the absence of overriding mandatory provisions, the ruling empties of all effectiveness similar transnational criminal actions based on Article 223-1 of the French Criminal Code.

While the *Cour de cassation* closed the door of criminal courts, French law on corporate duty of care (*Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*) offers an effective alternative in the field of civil liability. The aim of this text is precisely to impose on lead companies a series of obligations purported to identify risks and prevent serious violations of human rights and fundamental freedoms, human health and safety, and the environment, throughout the value chain. The facts of the *Lafarge* case are prior to the enactment of this law. Nevertheless, future litigations will likely prosper on this ground, all the more so with the forthcoming adoption of a European directive on mandatory corporate sustainability due diligence.