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COUR DE CASSATION

Public hearing of **20 September 2011**

Cassation

Ms FAVRE, Presiding Judge

Decision No. 852 F-P+B

Appeal No. K 10-22.888

F R E N C H R E P U B L I C

IN THE NAME OF THE FRENCH PEOPLE

THE *COUR DE CASSATION*, COMMERCIAL, FINANCIAL AND ECONOMIC CHAMBER, has handed down the following decision:

Ruling on the appeal on points of law lodged by Maviflex, a *société à responsabilité limitée*, whose registered office is located at 8/14 rue Vaucanson, 69150 Décines-Charpieu,

against the decision handed down by the *Cour d'Appel* of Paris (1st civil chamber) on 2 June 2010, in the dispute with:

1° Nergeco, a *société anonyme*, whose registered office is located at zone Bertholet, 43220 Dunières,

2° Nergeco France, a *société par actions simplifiée*, whose registered office is located at zone Bertholet, 43220 Dunières,

3° Mr Bernard Sabourin, domiciled at 219 rue Duguesclin, 69003 Lyon, acting in his capacity as administrator of Maviflex,

4°/ Mr Bruno Sapin, domiciled at 174 rue de Créqui, 69003 Lyon, acting as receiver of Maviflex,

5°/ Gewiss France, a *société anonyme*, whose registered office is at the place known as le Bouleau, 21430 Liernais, successor in law to Mavil,

defendants in the appeal;

Nergeco and Nergeco France lodged an appeal on points of law and an additional cross-appeal against the same decision;

In support of its action, the claimant in the main appeal raises the three arguments of annulment annexed to this decision;

In support of its action, the claimant in the provoked appeal raises the single argument of annulment annexed to this decision;

Having regard to the communication to the Public Prosecutor;

THE *COUR DE CASSATION*, at the public hearing of 5 July 2011, before: Ms Favre, Presiding Judge, Ms Pezard, Reporting Judge, Mr Petit, Senior Judge, Mr Mollard, Assistant Advocate General, Ms Molle-de Hédouville, Chamber Clerk;

Based on the report by Ms Pezard, Judge, on the observations from Mr Bertrand, Maviflex's attorney-at-law of the law firm Bénabent representing Gewiss France, from the attorney-at-law of the law firm Hémerly & Thomas-Raquin, representing Nergeco and Nergeco France, and after having deliberated in accordance with the law;

Holds that there is no reason to hold Gewiss France, at its request, non-liaible;

Acknowledges Nergeco France and Nergeco's withdrawal of their additional cross-appeal in so far as it is directed against Maviflex to challenge the operative part of the decision which set its financial claim against Maviflex at the main sum of €755,213 only;

Ruling both on the main appeal lodged by Maviflex and the provoked appeal brought by Nergeco and Nergeco France;

Whereas, according to the challenged decision, based upon the setting-aside of an earlier appeal decision (commercial, financial and economic chamber, 10 July 2007, appeal No. 06-12.056), Nergeco is

the holder of two European patents, granted respectively under No. EP 0 398 791, relating to “a lifting curtain door reinforced by horizontal bars”, and under No. EP 0 476 788 relating to a “flexible roll-up door”; the patentee and Nergeco France, holder of a licence under the French designation of these patents (Nergeco), brought infringement proceedings against Mavil and Maviflex; the *Cour d’Appel* of Lyon, in a decision of 2 October 2003 based upon the appeal brought by Nergeco on 16 January 2001 against the judgment handed down on 21 December 2000 in the proceedings it initiated, the *Cour d’Appel* granted the counterclaim seeking the revocation of patent No. EP 0 476 788, but dismissed the counterclaim relating to patent No. EP 0 389 791, considered that the “Fil’up” doors exploited by the defendants were infringing, and ordered expert proceedings before giving judgment on the amount of compensation; this decision was quashed only with respect to its operative parts holding claims 2 to 9 of patent No. EP 0 476 788 invalid; in a decision of 31 January 2007, rendered in the presence of Gewiss France, compelled to join the proceedings as the successor in law of Mavil, after a merger, the *Cour d’Appel* of Paris, referral appeal court, held that Nergeco France’s action for infringement of patent No. EP 0 476 788 was admissible, its licence agreement being nevertheless enforceable against third parties only as of 3 June 1998, and held claim 5 of patent No. EP 0 476 788 invalid; at the same time, the *Cour d’Appel* of Lyon ruled by way of a decision issued on 15 December 2005, stating, first, that among the Mavil and Maviflex “Fil’up” doors, only the “trafic” versions were infringing, then deciding that the doors manufactured and marketed by Mavil and Maviflex under the trade name “Mavitrafic” infringed patent No. EP 0 398 791, and lastly ordering expert proceedings to assess the damage sustained; since the proceedings before the *Cour d’Appel* continued after the court-appointed expert filed his report, Nergeco has claimed compensation for the damage suffered; Maviflex being under a safeguard procedure ordered by a judgment of 6 July 2006, Messrs Sabourin and Sapin were respectively appointed as administrator and receiver;

On the first annulment argument of the main appeal:

Whereas Maviflex criticises the decision for refusing to stay the action initiated by Nergeco France against it, seeking compensation for the damage suffered as a result of the infringement of its patent No. EP 0 398 791, whereas, according to the argument, *Article 4, subparagraph 3 of the French Criminal Procedure Code confers to the Judge in a civil court the power to stay the civil action pending his final decision on the civil action when the decision to be handed down in the criminal proceedings is likely to have some influence on the outcome of the civil trial; the Cour d’Appel, which moreover considered that the effective exploitation of the asserted patent No. EP 0 398 791, disputed by*

Maviflex, was established in particular by the advertisements and “other documents adduced by Nergeco and Nergeco France”, which included the bailiff’s report of 2 September 2005 wherein these companies sought to find evidence of this exploitation, could not, in order to refuse to stay the proceedings pending the outcome of the criminal proceedings for fraud and attempted fraud with respect to the judgment against Nergeco France for having tried to give false evidence of the exploitation of the patent by adducing this report, state that it was not established that the possible lack of probative value of this document was likely to have a direct influence on the outcome of the dispute without ignoring the scope of his own findings, thus violating Article 4, subparagraph 3, of the French Criminal Procedure Code;

But whereas the *Cour d’Appel*, which found that the claim brought before it was based on a court decision which had become irrevocable, did not violate the text referred to in the annulment argument when it refused to stay the action, since the ongoing criminal proceedings for fraud and attempted fraud with respect to the judgment are not likely to call into question the force of *res judicata* attached to this decision; the annulment argument is not founded;

But on the second annulment argument, taken in its second branch:

Having regard to Article 1351 of the French Civil Code;

Whereas to set aside Maviflex’s plea of inadmissibility alleging that Nergeco France has no capacity to bring proceedings, the court considers that the arguments relating to the nullity of the licence agreement and to its non-enforceability in the absence of a proper registration are inadmissible as they are intended to call into question what was definitively settled;

Whereas in ruling as it did, although the previous decisions of 2 October 2003 and of 15 December 2005 did not rule on the nullity of the licence agreement, the *Cour d’Appel* violated the aforementioned text;

And on the single argument of the provoked appeal, taken in its third branch:

Having regard to the principle according to which a person may not contradict themselves to the detriment of another person;

Whereas to state that Nergeco’s claims brought against Gewiss France are inadmissible, the decision considers that the fraud committed by that company is not proven and that the irregularity

consisting in bringing proceedings against an entity without legal personality derives from a lack of vigilance on Nergeco's part;

Whereas in ruling as it did, while Gewiss France, which had lodged and pursued the appeal on points of law against the 15 December 2005 decision ordering the partial annulment of that decision, could not, without contradicting itself to the detriment of Nergeco, argue before the referral appeal court that it was without legal personality during the proceedings leading to those decisions, the *Cour d'Appel* violated the aforementioned principle;

ON THESE GROUNDS, and without it being necessary to rule on the other objections of the main and the provoked appeals:

QUASHES AND ANNULS, in all its provisions, the decision handed down between the parties on 2 June 2010, by the *Cour d'Appel* of Paris; accordingly, returns the case and the parties to the position they were in before that ruling and, so that justice may be dispensed, refers them to the *Cour d'Appel* of Paris made up differently;

Leaves each of the companies Maviflex, Gewiss France Nergeco and Nergeco France pay the costs;

Having regard to Article 700 of the French Civil Procedure Code, dismisses the claims;

Holds that at the instance of the Public Prosecutor of the *Cour de Cassation*, this decision will be forwarded so as to be mentioned in the margin of the quashed decision or after it;

As drafted and decided by the *Cour de Cassation*, commercial, financial and economic chamber, and pronounced by the Presiding Judge at the public hearing on the twentieth of September two thousand and eleven.

ARGUMENTS ANNEXED to this decision

Arguments adduced in the main appeal by Mr Bertrand, attorney-at-law for Maviflex.

FIRST ANNULMENT ARGUMENT

The challenged decision is criticised for HAVING refused to rule on the action brought by NERGECO FRANCE against MAVIFLEX seeking compensation for the damage suffered as a result of the infringement of its patent No. EP 0 398 791;

ON THE GROUNDS THAT MAVIFLEX requests that the Court stay the proceedings, first, pending the final outcome of the proceedings brought before the *Tribunal de Grande Instance* of Lyon in which the validity of patent No. EP 0 398 791 is again contested, second, pending the investigation of a complaint with a request to become civil party, filed on 13 June 2008 for fraud and attempted fraud with respect to the judgment, referring in particular to the fraudulent acts which it alleges against NERGECO for having tried to give false evidence of the exploitation of its patent No. EP 0 398 791 by adducing a bailiff's report dated 2 September 2005; GEWISS FRANCE joins this request to which the appellants are opposed; as will be explained later, the principle of the infringement of patent No. EP 0 398 791 is definitively settled, only the determination of the damage resulting from the infringement remains at issue; MAVIFLEX does not demonstrate that the possible lack of probative value of the bailiff's report which it contests can have a direct influence on the outcome of this dispute; in addition, the action having been initiated in December 1997, the fair administration of justice does not require to postpone again the outcome of the proceedings (challenged decision, p. 3 last subparagraph and p. 4, subparagraphs 1 and 2) ;

WHEREAS, Article 4 subparagraph 3 of the French Criminal Procedure Code confers to the Judge in a civil court the power to stay the civil action pending his final decision on the civil action when the decision to be handed down in the criminal proceedings is likely to have some influence on the outcome of the civil trial; the *Cour d'Appel*, which moreover considered that the effective exploitation of the asserted patent EP 0 398 791, disputed by MAVIFLEX, was established in particular by the advertisements and "other documents adduced by NERGECO and NERGECO FRANCE", which included the bailiff's report of 2 September 2005 wherein these companies sought to find evidence of this exploitation, could not refuse to stay the proceedings pending the outcome of the criminal proceedings for fraud and attempted fraud with respect to the judgment against NERGECO FRANCE for having tried to give false evidence of the exploitation of the patent by adducing this

report, state that it was not established that the possible lack of probative value of this document was likely to have a direct influence on the outcome of the dispute without ignoring the scope of his own findings, thus violating Article 4, subparagraph 3, of the French Criminal Procedure Code.

SECOND ANNULMENT ARGUMENT

The challenged decision is criticised for HAVING rejected the plea of inadmissibility raised by MAVIFLEX alleging that NERGECO FRANCE has no capacity to bring proceedings, owing to the nullity of the licence agreement and to the non-enforceability of this agreement, in the absence of a proper registration, and for having set this company's financial claim against MAVILFEX at the sum of €766,213;

ON THE GROUNDS THAT in the 2 October 2003 decision, the *Cour d'Appel* of Lyon held that MAVIFLEX was liable for the infringement of patent No. EP 0 398 791, enjoined it from manufacturing, holding, marketing the "Fil'up" doors and any other equivalent device under a penalty of €10,000 per recorded infraction, ordered it to make an interim payment on account of damages to NERGECO and NERGECO FRANCE and ordered expert proceedings to assess the damage; these provisions have become irrevocable through the rejection of the appeal lodged against this decision by MAVIFLEX; the 15 December 2005 decision, handed down after the court-appointed expert filed his report, after having set aside the arguments of inadmissibility of NERGECO FRANCE's claims based on the absence of registration of its licence agreement in the French patent register because this argument was intended to call into question what had already been settled, the *Cour d'Appel* set the amount of the damage as previously indicated; the *Cour de Cassation*, in its decision of 10 July 2007, quashed and annulled partially the 15 December 2005 decision on the grounds that it had not replied to MAVIFLEX's pleading claiming that NERGECO FRANCE's licence agreement had not been published in the French patent register until 3 June 1998, this company could only claim compensation for the damage caused to it as of that date; it results from the foregoing that NERGECO's claims for compensation are well-founded and can no longer, in principle, be called into question, the validity of the management contract, as a licence agreement, dated 6 December 1990 and signed on 31 January 1991, whereby NERGECO assigned to NERGECO FRANCE the licence of the French designation of several European patents, among which patent No. EP 0 398 791 of 11 August 1990 relating to a lifting curtain door reinforced by horizontal bars, which are the necessary support thereof, can therefore no longer be usefully discussed; what only remains at issue, to assess the extent of the damage caused to NERGECO FRANCE, is the date at which this licence became enforceable against MAVIFLEX; it follows from this that MAVIFLEX develops in vain (pp. 19 to 34 of its latest

pleading) various arguments relating to the nullity of the licence agreement, or to its non-enforceability in the absence of a proper registration; such arguments are inadmissible since they are intended to call into question what is definitively settled; the only arguments which can be usefully examined are those it develops, in the alternative, according to which the licence can only be enforced against it as of the date of its registration, that is, on 3 June 1998, and not for the earlier period (challenged decision p. 5, subparagraphs 6 to 10 and p. 6 subparagraph 1);

WHEREAS, first, the Judge who decides to raise of its own motion the plea of inadmissibility relating to the principle of *res judicata* must reopen the discussion so that the parties can submit their observations; the *Cour d'Appel*, which held of its own motion that the argument relied upon by MAVIFLEX alleging that NERGECO FRANCE has no capacity to bring proceedings owing to the nullity of the licence agreement which contravenes Article L. 614-14 of the French Intellectual Property Code and constitutes an offence of forgery, came against the force of *res judicata* of the earlier decisions made in the course of the same proceedings without reopening the discussion and asking the parties to submit their observations, has violated Article 16 of the French Civil Procedure Code;

WHEREAS, second, the *Cour d'Appel* of LYON having not ruled, in its decision of 2 October 2003 and 15 December 2005, on the plea of inadmissibility relied upon by MAVIFLEX alleging that NERGECO FRANCE has no capacity to bring proceedings owing to the nullity of the licence agreement which contravenes the provisions of Article L. 614-14 of the French Intellectual Property Code and constitutes an offence of forgery, NERGECO FRANCE which was not entered in the trade and companies register at the date of that agreement, and owing to the non-enforceability of the licence not duly entered in the European patent register, the *Cour d'Appel* could not hold the arguments relating to the nullity of the licence agreement and to its non-enforceability for not being duly registered, inadmissible as they were intended to challenge what had been "definitively settled"; in ruling as it did, the *Cour d'Appel* violated Article 1351 of the French Civil Code;

WHEREAS, third, the *res judicata* only applies to the points definitively settled in the operative part of the judgment; in considering that the arguments relating to the nullity of the licence agreement and to its non-enforceability were intended to challenge what had been definitively settled by the Judge in the 2 October 2003 and 15 December 2005 decisions in which none of the operative parts ruled on those arguments, the *Cour d'Appel* has violated Articles 4 and 480 of the French Civil Procedure Code;

WHEREAS, finally and in any event, in the pleading remained unanswered, MAVIFLEX argued that the licence agreement, resulting from the management contract of 6 December 1990 and from the annex to this contract of 31 January 1991, was void as it constituted an offence of forgery, NERGECO FRANCE not being entered in the trade and companies register at the date of these agreements, and the decisions obtained by this company, on the basis of this agreement, as a licensee, had been so fraudulently (pleading filed on 23 March 2010, pp. 25 to 30); by denying MAVIFLEX the right to adduce this ground of nullity on the basis that a final ruling had been given on the validity of the licence agreement without replying to this determining pleading, it being impossible to rely upon the *res judicata* applying to a judgment obtained by fraud of one's rights, the *Cour d'Appel* deprived its decision of grounds in violation of Article 455 of French Civil Procedure Code.

THIRD ANNULMENT ARGUMENT

The challenged decision is criticised for HAVING set NERGECO FRANCE's financial claim against MAVIFLEX at the sum of €766,213 as the principal amount;

ON THE GROUNDS THAT in taking as a basis the conclusions of the expert appointed by the *Cour d'Appel* of Lyon, but in deducting from the overall infringing sales the products at issue distributed before the publication of the licence agreement, that is, a total amount of 490 "Fil'up" doors, the "Trafic" version, NERGECO FRANCE requests that the Court set its financial claim against MAVIFLEX at €766,213; to challenge this claim, MAVIFLEX argues that certain articles should be distinguished between the "Fil'up" doors, the "Trafic" version, as they are not infringing; but in its 2 October 2003 decision, not censored on this point, the *Cour d'Appel* of Lyon ruled, with no distinction or reservation, that the "Mavil and Maviflex's "Fil'up" door infringes patent No. EP 0 398 791"; the same Court, in its 15 December 2005 decision, which was not quashed on this subject, definitively held, after the expert's report was filed, that "the extent of the damage caused by the infringement committed by MAVIL and MAVIFLEX must be determined in relation to the number of "Fil'up" doors, the "Trafic" version"; therefore, MAVIFLEX attempts in vain to resume the discussion on the types of doors held to be infringing; it is also in vain that it further contends that patent No. EP 0 398 791 was not in reality exploited, so that the so-called licensee cannot claim the loss of a profit which it has not lost in the absence of exploitation; it is indeed established, in particular by the advertisements and other documents adduced by NERGECO and NERGECO FRANCE, that these companies do exploit, with the "Forum" model, which uses the same teachings, their patent No. EP 0 398 791 infringed by the "Trafic" version of the "Fil'up" doors; in fact, MAVIFLEX does not put forward any relevant argument to dispute the amount of the compensation claimed by NERGECO FRANCE, on the

basis of information gathered by the expert appointed by the *Cour d'Appel* de Lyon, for the damage suffered (appealed decision pp. 6 subparagraphs 6 to 9, p. 7 subparagraphs 1 to 3);

WHEREAS, first, in its 2 October 2003 and 15 December 2005 decisions, the *Cour d'Appel* of Lyon held that the "Trafic" version of the "Fil'up" doors, was infringing and reproduced the characteristics of the asserted patent No. EP 0 398 791, in particular the feature of the third bar of the door which is to recover its original shape, with no permanent loss of shape after having undergone the two successive processes of coming out of the sideways and of re-engagement into the same sideways; in considering that it has been definitively held, under these two decisions, that any door called "Fil'Up Trafic" was infringing and should be included in the overall infringing sales, the *Cour d'Appel* ignored the force of *res judicata* attaching to the 2 October 2003 and 15 December 2005 decisions in violation of Article 1351 of the French Civil Procedure Code and Article 480 of the French Civil Procedure Code;

WHEREAS, in merely stating that the effective exploitation of the asserted patent No. EP 0 398 791 was established "in particular by advertisements and other documents adduced by NERGECO and NERGECO FRANCE", the *Cour d'Appel*, which ruled by a simple reference to the document adduced without analysing those documents, deprived its decision of grounds, in violation of Article 455 of the French Civil Procedure Code;

WHEREAS, finally, in merely stating, thus ruling by means of a mere assertion, that the "Forum" door used the teachings of the asserted patent No. 0 398 791 without explaining, as it had been requested to do so by MAVIFLEX, the fact that this model corresponded to the implementation of another patent No. EP 0 320 350, teaching an ejection of the end piece in relation to the slideway into which it entered when the bar was subjected to a transversal magnitude, characteristics not mentioned by patent No. 0 398 791 wherein the tube, without an end piece, enters directly into the slideway, the *Cour d'Appel* deprived its decision of a legal basis with regard to Article L. 615-1 of the French Intellectual Property Code and Article 1382 of the French Civil Code.

Argument adduced in the provoked appeal lodged by Hémerly & Thomas-Raquin, attorneys-at-law for Nergeco and Nergeco France.

The challenged decision is criticised for having stated that the claims lodged by NERGECO FRANCE against GEWISS FRANCE were inadmissible;

ON THE GROUNDS THAT “it appears from the exhibits submitted in court that the initial judgment was issued on 21 December 2000 to the advantage of MAVIL whose registered office is located at the place known as “le Bouleau” 21430 Liernais; the proceedings had been brought by this company by way of summonses on 17 December 1997 and 22 December 1998; that same company, entered in the trade and company register of Beaune, under No. 957 525 843, had been dissolved on 27 April 2000 after being taken over by FIMA, entered in the trade and companies register of Corbeil-Essonnes under No. B 349 045 948, operation approved by the extraordinary general meeting on the same day and transferring to the acquiring company all the assets and liabilities of the company being acquired; as a consequence of this merger, MAVIL was taken off the trade and companies register of Beaune on 28 April 2000 as of 27 April 2000, the said register mentioning: “merger with S.A. GEWISS FRANCE trade and companies register No. B 318 762 325”; it results from the foregoing that the rights and obligations to arise from the legal action pending before the *Tribunal* became immediately part of the assets and liabilities of FIMA, successor of the dissolved legal entity MAVIL, and consequently the only one entitled to continue the proceedings, to lodge an appeal and therefore to defend itself against a possible appeal; in a statement of 16 January 2001, NERGECO and NERGECO FRANCE lodged an appeal against “MAVIL S.A. located at a place known as “le Bouleau 21430 Liernais, trade and companies register of Beaune No. B 957 525 843”, without having previously checked, by consulting the commercial advertising material used to communicate to the public information about corporate life, that the legal entity thus designated still had legal existence and therefore, without realising that they thus called before the Court an entity devoid of legal capacity in order to defend itself against the allegations made against it; NERGECO FRANCE disputes neither the reality nor the date of the merger which marked the end of MAVIL, nor that this situation was made enforceable against third parties when it was duly published in the trade and companies register before its appeal; it recognises (page 53 of its last pleading), that “ the procedure before the *Cour d’Appel* of Lyon has become flawed owing to the loss of legal personality of MAVIL, acquired by GEWISS FRANCE (GEWISS FRANCE is the successor in law to MAVIL under the transfer of all the assets and liabilities, which was recognised by the decision of the *Cour de Cassation* on 5 March 2009”); it argues, however, that the “proceedings were regularised when GEWISS

FRANCE itself lodged an appeal on points of law, on 23 February 2006, against the decision by the *Cour d'Appel* of Lyon of 15 December 2005 and therefore continued the action as of that date"; it also argues that GEWISS FRANCE knew about the proceedings since various legal documents relating thereto, such as the notice of appeal, the summons for the stay of the provisional enforcement of the judgment, the service of the order made by the Presiding Judge staying the provisional enforcement of the judgment and the 2 October 2003 decision, all notified to the address of the registered office of the former company MAVIL, had been accepted by an individual declaring being entitled to receive them; the pursuit of a legal action against an entity deprived of the legal personality and of the capacity to defend itself constitutes an irregularity which cannot be covered; the lodging of an appeal on points of law by GEWISS FRANCE on 23 February 2006, or its summons to appear in court in parallel proceedings cannot therefore regularise to its detriment the appeal procedure initially incorrectly directed by NERGECO FRANCE against MAVIL, dissolved and taken off the trade and companies register; GEWISS FRANCE, in contesting the admissibility of its opponent's claim, raises a plea of inadmissibility within the meaning of Article 122 of the French Civil Procedure Code, which it is entitled to do under Article 123 of the same code in any event; the appellants, which do not sustain that GEWISS FRANCE refrained, with a dilatory intention, from raising earlier this plea of inadmissibility and which do not claim any damages in compensation, nonetheless argue that this company's conduct was fraudulent since it had been informed of the proceedings; the alleged fraud is not established; it is not demonstrated that GEWISS FRANCE had any intention to cause harm or that it acted in bad faith, whereas it is established that the irregularity at issue originates from the lack of vigilance on the part of the appellants; it results from the foregoing that the claims made by the appellants against GEWISS FRANCE are not admissible";

WHEREAS, FIRST, GEWISS FRANCE, sole assignee, subsequently to a merger, to MAVIL, was not a party to the decision issued by the *Cour d'Appel* of Lyon on 15 December 2005, which was enforceable against it; having appealed against this decision, by declaring being "the successor in law further to the takeover of MAVIL", the claims made against it before the appeal court, further to the annulment of this decision, were admissible; in deciding otherwise, the *Cour d'Appel* has violated Article 32 of the French Civil Procedure Code;

WHEREAS, SECOND, when the situation giving rise to a plea of inadmissibility can be regularised, the inadmissibility will be set aside if the its case no longer exists at the time the judge gives his ruling; in lodging and pursuing an appeal on points of law against the decision of the *Cour d'Appel* of Lyon of 15 December 2005, by declaring being "the successor in law further to the takeover of MAVIL", and without contesting the

lawfulness of the challenged decision, GEWISS pursued the appeal proceedings initially commenced by MAVIL, and replaced that company; nonetheless, in accepting the plea of inadmissibility raised by GEWISS FRANCE and based on MAVIL's loss of legal personality, when the inadmissibility of the appeal proceedings against MAVIL no longer existed, since GEWISS FRANCE, further to its appeal, had voluntarily joined the appeal proceedings, so that the proceedings had thus been regularised before the outcome of the court's decision, the *Cour d'Appel* has violated Articles 32 and 126 of the French Civil Procedure Code;

WHEREAS, THIRD, AND IN ANY EVENT, in application of the principles of *fraus omnia corrumpit* and fairness of legal proceedings, a person may not contradict themselves to the detriment of another person; in admitting the plea of inadmissibility raised by GEWISS FRANCE, and in holding, consequently, the claims lodged by NERGECO FRANCE against GEWISS FRANCE inadmissible, although GEWISS FRANCE had lodged and pursued the appeal on points of law against the 15 December 2005 decision which had resulted in the decision being partially quashed and referred back to it, the *Cour d'Appel* admitted that GEWISS FRANCE could contradict itself to the detriment of NERGECO FRANCE, and, by doing so, violated the principles of *fraus omnia corrumpit* and of fairness of the legal proceedings, and Articles 2 and 3 of the French Civil Procedure Code.

WHEREAS, FINALLY, IN THE ALTERNATIVE, the service of acts of procedure, intended for a company being acquired, but accepted by someone representing the company being acquired, makes the proceedings effective and lawful with respect to that company; in ruling that the claims lodged by NERGECO FRANCE against GEWISS FRANCE are inadmissible, without replying to NERGECO FRANCE's appeal pleading (see pleading notified on 23 February 2010, pp. 56 to 58), which emphasised that all the legal documents relating to the appeal proceedings intended for MAVIL had been, in fact, received and accepted by individuals of GEWISS FRANCE entitled to do so, which made the appeal procedure lawful and effective towards it, the *Cour d'Appel* deprived its decision of grounds, in violation of Article 455 of the French Civil Procedure Code.