Kluwer Patent Blog

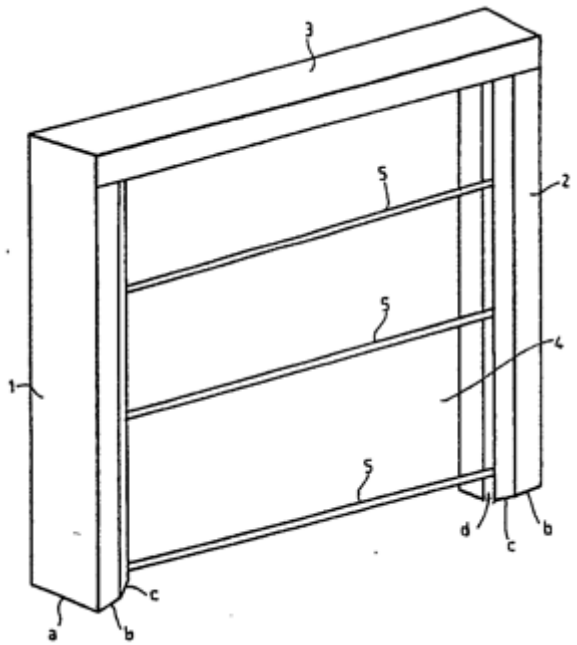
The estoppel recognised as a principle of French procedural law

Pierre Véron (Véron & Associés) · Monday, November 7th, 2011

On 20 September 2011, in a patent infringement case, the French *Cour de cassation* issued an important decision in which, for the first time, it refers to and relies on "*the principle according to which a person may not contradict themselves to the detriment of another person*", *i.e.* on the estoppel. With this decision, the French supreme court has certainly taken a decisive step. In the last few years, other decisions of the *Cour de cassation* have already mentioned the prohibition of contradicting oneself to the detriment of another person (*e.g.* Cass. Ass. plén., 27 February 2009, Docket No. 07-19841; D. 2009. Jur. 1245, note Houcieff; JCP 2009. II. 10073, note Callé) or even explicitly mentioned the "*estoppel*" (*e.g.* Cass. civ. 1re, 3 February 2010, Docket No. 08-21288; D. 2010. AJ 448, obs. Delpech, Pan. 2933, obs. Clay; D. 2011, Pan. 265, obs. Fricero; JCP 2010. 178, obs. Ortscheidt; JCP 2010. 626, note Houtcieff). But it is the very first time that this principle is directly referred to in the *visa* of such a decision. The opening *visa* is the part of a decision in which a French court quotes the relevant statutory provisions or legal principles on which its decision is based. It is therefore very significant and symbolic that the *visa* of the 20 September 2011 decision is nothing but "*the principle according to which a person may not contradict themselves to the detriment of another person*". This principle is as such explicitly and formally recognised by the supreme court of the French judicial system as a normative principle of French law (we should note that the *Conseil d'Etat*, the supreme court of the French administrative system, has refused to recognise such a principle, CE, avis, 1 April 2010, Docket No. 334465, SAS Marsadis, Juris-Data No. 2010-003067 ; Procédures 2010, comm. 256, obs. L. Ayrault).

More precisely, in the present case, the principle is recognised as a normative principle of French procedural law. The *Cour d'Appel* of Paris was wrong in accepting the plea of inadmissibility – according to which the action very soon, almost from the very beginning, has become flawed – raised by a litigant which has nevertheless, without protesting, taken part to this action and conducted its own defence for several years.

We should only note the essential steps of this long and very complex procedure which has already lasted 14 years and is not yet definitively closed:



The French company Nergeco SA is the holder of two European patents (No. EP 0 398 791 relating to "*a lifting curtain door reinforced by horizontal bars*", No. EP 0 476 788 relating to "*a flexible roll-up door*"). The French company Nergeco France SAS is the holder of a licence under the French designation of these patents.

Suspecting the French company Mavil (among others) of marketing in France infringing doors, the Nergeco companies (hereinafter referred to as Nergeco) served summonses before the *Tribunal de Grande Instance* of Lyon upon Mavil in 1997 and 1998.

But, as soon as 27 April 2000, Mavil was dissolved because of its merger with another company, Gewiss France. On 28 April 2000, Mavil was taken off the French trade and companies register (*Registre du commerce et des sociétés, RCS*).

On 21 December 2000 was issued the judgment of the *Tribunal de Grande Instance* of Lyon.

Nergeco then committed the mistake which will be at the centre of the dispute. Because Nergeco did not consult the *RCS*, the commercial advertising material used to communicate to the public information about corporate life, it ignored the Mavil's disappearance and lodged an appeal against this dissolved company, still mentioning the taken off trade and companies register number.

Nergeco did not realise that Mavil had no more legal existence and that it thus called before the court an entity devoid of legal existence and capacity in order to defend itself against any allegation.

It was impossible to bring such an action against a dissolved legal entity which had no more legal existence. Then, since January 2001, the procedure before the *Cour d'Appel* of Lyon has become flawed owing to the loss of legal personality of Mavil.

However, this irregularity has been obviously ignored by the litigants and the judges themselves. On 2 October 2003, the *Cour d'Appel* of Lyon rendered a decision between Nergeco and… Mavil. And even an appeal on points of law was lodged before the *Cour de cassation* against this 2 October 2003 decision by… Mavil. In the complex procedure which followed (the initial

procedure divided up in two, one procedure concerning the infringement of the first patent, the other procedure concerning the infringement of the second patent), the company Gewiss France took Mavil's place. That was this company, Gewiss France, which on 23 February 2006 lodged and pursued an appeal on points of law against a 15 December 2005 decision rendered by the *Cour d'Appel* of Lyon (in the procedure concerning the first patent). Before the *Cour d'Appel* of Paris (referral court in the procedure concerning the second patent), it was again this company, Gewiss France, which had compelled to join the proceedings as the successor in law further to the takeover of Mavil. And the 31 January 2007 decision of the *Cour d'Appel* of Paris was again rendered between Nergeco and… Mavil.

At last, this is obviously before the *Cour d'Appel* of Paris, in the proceedings which gave rise to its 2 June 2010 decision, that Gewiss France suddenly decided to raise a new legal argument : since January 2001 and the procedure before the *Cour d'Appel* of Lyon directed against the dissolved company Mavil, the procedure has become flawed.

Such an argument was a plea of inadmissibility within the meaning of Article 122 of the French Civil Procedure Code ("*A plea of inadmissibility is any ground whose purpose is to get the adversary's claim declared inadmissible, without entering into the merits of the case, for lack of a right of action, such as a not being the proper party, lack of interest, statute of limitations, fixed time-limit or res judicata*").

Nergeco's claim would be inadmissible because of such a "*lack of a right of action*". Mavil, having been dissolved on 27 April 2000, was devoid of legal existence and capacity and no action could be brought against it.

And such a plea of inadmissibility could be raised at any stage of the procedure pursuant to Article 123 of the French Civil Procedure Code ("*A plea of inadmissibility may be raised at any stage of the procedure, without prejudice to the judge's discretion to order payment of damages by those who abstained, with dilatory intent, from raising them earlier*").

Before the *Cour d'Appel* of Paris, Nergeco disputed neither the reality nor the date of the merger which marked the end of Mavil, nor that the procedure has become flawed before the *Cour d'Appel* of Lyon owing to the loss of legal personality of Mavil. However, it tried to argue that this irregularity would have been covered, pursuant to Article 126 of the French Civil Procedure Code ("*In the case where the situation giving rise to the plea of inadmissibility may be remedied, the inadmissibility will be set aside if its cause has disappeared by the time the judge rules upon the case*"). Gewiss France by lodging and pursuing itself an appeal on points of law against the 15 December 2005 decision of the *Cour d'Appel* of Paris, would have therefore continued for its own account and regularised the proceedings.

The *Cour d'Appel* of Paris in its 2 June 2010 decision did not agree : "*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 *Cour d'Appel* also did not admit a dilatory intention (not alleged by Nergeco) or a fraudulent conduct of Gewiss France (alleged but not demonstrated by Nergeco) : "*it was 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*". And the *Cour d'Appel* concluded : "*it results from the foregoing that the claims made by the appellants (Nergeco) against Gewiss France are not admissible*".

Against this reasoning, Nergeco in its appeal on points of law, lodged before the *Cour de cassation*, advanced several arguments and especially that in application of the principles of *fraus omnia corrumpit* and of fairness of the legal proceedings, a person may not contradict themselves to the detriment of another person. What Gewiss France would have precisely done to the detriment of Nergeco, by having lodged and pursued itself the appeal on points of law against the 15 December 2005 decision of the *Cour d'Appel* of Lyon.

This argument is finally accepted by the *Cour de cassation* : "*Whereas in ruling as it did, while Gewiss France, which had lodged and pursued the appeal 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 appeal court that it was without legal personality during the proceedings leading to those decisions, the* Cour d'Appel *violated the aforementioned principle*" (a person may not contradict themselves to the detriment of another person).

Despite a little misrepresentation (Gewiss France has never pretended that it had been itself deprived of legal personality ; it has only pretended that Mavil, against which was directed the procedure before the *Cour d'Appel* of Lyon, was deprived of legal existence since April 2000), the sentence of the *Cour de cassation* explains very clearly that the contradiction in its procedural behaviour (it pursued the appeal on points of law / it argued that the action was erroneously directed against a company which was already deprived of legal existence) prohibits Gewiss France from raising a plea of inadmissibility. The *Cour d'Appel* of Paris should not have accepted that plea of inadmissibility. The estoppel is then used as a procedural ground of defence.

Such a formal and symbolic recognition of a judicial estoppel by the French *Cour de cassation* is surely a decisive step . Some will probably criticise this evolution (see already N. Dupont, "*L'interdiction de se contredire au détriment d'autrui en procédure civile française*", RTD civ. 2010, p. 459 et seq.; M. Douchy-Oudot, "*La loyauté procédurale en matière civile*", Gaz. Pal. 17 November 2009, No. 321, p. 3 et seq.). Some others will approve. However, the said principle (a person may not contradict themselves to the detriment of another person) remains rather vague. What are precisely its exact meaning, its scope of application (is it just a procedural or rather a general principle?), its procedural nature (ground of defence?) and its possible consequences (procedural inadmissibility, damages?) and perhaps its links with the estoppel in Common law (which also seems to be a rather protean concept)? Despite this important decision, this principle still remains in French law a principle in gestation.

Original French decision.
English translation .

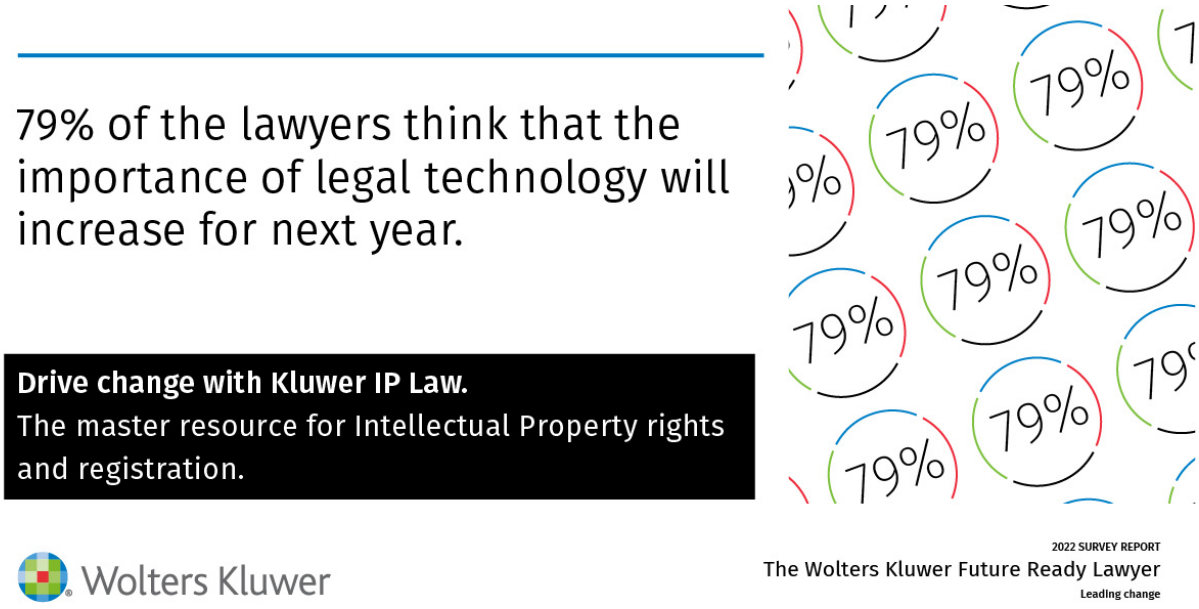
Author: Nicolas Bouche, Head Legal Research and Literature, Véron & Associés, Paris, France

---

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Monday, November 7th, 2011 at 8:00 am and is filed under (Indirect) infringement, France, Procedure
You can follow any responses to this entry through the Comments (RSS) feed. Both comments and pings are currently closed.