

## Article 145 of the French Civil Procedure Code constitutes an effective weapon, provided you know how to wield it.

Litigation is under pressure and mediation is fashionable.

But there is at least one case where it is imperative to do battle: as a claimant, if you consider that a competitor has done you wrong; and as a defendant, if a competitor abuses Article 145 of the French Civil Procedure Code. In such case, companies must define a litigation strategy since their business is at stake. They cannot wait to initiate proceedings on the merits; it is too late for that.

According to Article 45, *“If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of summary proceedings”*. Let us examine the procedure by way of a petition.

### **A measure for defense or attack**

If you are requesting the measure, you must know that it is not adversarial. The element of surprise on the party undergoing the measure is guaranteed. In return, the derogation from the adversarial principle must be substantiated. Your counsel presents a petition to the judge, without the presence of the opposing party, usually to obtain the communication of documents or files held by the latter. A bailiff will obtain them at the opposing party's premises. Your reason must therefore be legitimate: your employees have constituted a competing company by plundering your files, a competitor has hired away several members of your team, or has disparaged you in front of clients or suppliers. To demonstrate the legitimacy of your petition, you must provide the judge with lawful exhibits. However, there is no need to produce proof of the acts, since you are seeking precisely such evidence. You must also be careful to request legally admissible measures. The bailiff cannot be given too broad of a mission, which would be deemed a fact-finding mission. The judge will respect the principle of proportionality and refuse measures with manifestly excessive consequences for the party undergoing them.

If you are undergoing the measure, be reactive as soon as the bailiff arrives. The latter is not a judicial police officer. He must ask you to give him the documents referenced in the order. Demand to read the order signed by the judge carefully. It must be served upon you unless you refuse to comply. Check that the order provides for the confiscation of the documents copied by the bailiff and not their delivery to the opposing party. This is not mandatory but it is customary. Otherwise, refer to the judge immediately to apply for such confiscation. You can also phone your counsel before the bailiff starts his investigations. Make sure that a person duly empowered to represent the company is present. If you refuse to comply, you run the risk of the judge (i) ordering a fine. - the bailiff will return to your premises with a completed order, maybe even accompanied by a law enforcement representative - or (ii) drawing conclusions therefrom.

### **React in time**

After copying the documents or files, the bailiff draws up a report. There is still time to react. You can introduce summary proceedings for retraction to contest the measure ordered and apply for its retraction. If the application is accepted, this will reduce the investigations to naught. If the documents have been confiscated, the opposing party will file a summons for summary proceedings for release to obtain their release. This a crucial step since very confidential documents may have been copied. You must then be assisted by a qualified legal practitioner who will demand a sort, in compliance with certain rules - refusing access to the claimant's lawyer - to deliver in the end only the exhibits falling within the bailiff's mission. Selecting files is often done using key words. Many are not connected to the subject matter of the

measure. Take advantage of the substantial case law on this subject with the judge. There are exceptions to the principle according to which privacy or secrecy (professional, banking...) do not constitute *per se* obstacles to the completion of the mission. Exchanges between lawyers and between a lawyer and his client cannot be copied. Remember to note in the subject of the emails with your lawyers the mention "Confidential lawyer" to avoid having them copied (or opened, if they are copied by the bailiff). Likewise, banking secrecy can be invoked unless the "seizing" party is the client, the beneficiary of the secret.

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