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Contracts – Distribution – Consumer Law: Legal Watch

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CONTRACTS – DISTRIBUTION

Significant lack of balance: the Minister's summonses to appear before the Supreme Civil Court

Article L. 442-6 I 2° of the Commercial Code prohibits submitting or attempting to submit a partner giving rise to a "significant lack of balance" in parties' rights and obligations. In a judgment handed down on 29 September 2015, the Commercial Division of the Supreme Civil Court has upheld the case law adumbrated by the Paris Appeal Court regarding the action taken by the General Directorate for Competition, Consumer Affairs and the Repression of Fraud ("**DGCCRF**") under the authority of the Minister responsible for the Economy in the mass-distribution sector.

The judgment establishes that:

- pursuant to Decision of the Constitutional Council 2011-126 of 13 May 2011, contractual parties must necessarily be informed of the summons to appear only if the action taken by the DGCCRF seeks to nullify illicit agreements, to return unduly received monies and to repair losses suffered ;
- the DGCCRF is admissible in its action to put an end to the practices in dispute for the future even if the distributor has already amended his contracts to comply therewith;
- significant lack of balance does not result from the clause at issue itself but from subjection or attempted subjection to the clause entailing lack of balance. In such circumstances it is possible for the distributor to prove that the lack of balance at issue results from actual negotiation. The Court shall evaluate the contractual relationship on a case by case basis and overall. In the case in point the distributor is accused of not having stressed advantages granted to the supplier that are likely to compensate for an unsold items return or, again, a price change clause. Attempted subjection results, in the lower courts' reasoning, upheld by the Supreme Civil Court, from the fact that, as these clauses appear in the contract entitled "National Brand Commercial Agreement 2009", they have "*the scope of a principle from which suppliers can depart only pursuant to negotiation which, in many cases, is not within their scope*".

Cour de cassation, Chambre commerciale, 29 September 2015, 13-25043, Ministre de l'Economie, des Finances et de l'Industrie versus EMC distribution

Anti-competitive practices: jurisdiction to determine jurisdictional procedure in the Appeal Court

In a judgment handed down on 20 October 2015, the Supreme Civil Court re-affirmed the exclusive jurisdiction of the Paris Appeal Court in deciding jurisdictional procedure for appeals against decisions given in disputes relating to application of Article L. 442-6 of the Code of Commercial Law (restrictive practices). Such jurisdiction is mandatory and constitutes an application to strike out which must be raised *ex-officio* by the judge.

In the case in point, alleging the breaking-off of relations in a business-leasing contract without legitimate cause and, accessorily, a sudden breaking-off of commercial relations pursuant to Article L. 442-6, I, 5° of the Code of Commercial Law, a certain company summoned another company to appear before the Lille Metropolitan Commercial Court; the jurisdiction of this court had been disputed by the latter in favour of the Agen Commercial Court, which had been designated by the jurisdiction clause stipulated in the contract but the Lille Metropolitain Commercial Court accepted jurisdiction; the company appealed against jurisdiction which was transferred to the Douai Appeal Court.

The latter rejected the appeal, stating that citing Article L. 442- 6, I, 5° of the Code of Commercial Law, even accessorily, alone governs the mandatory rules departing from territorial jurisdiction for specialized courts designating Lille Metropolitan Commercial Court.

The Supreme Civil Court set aside the appeal court judgment, with which it found fault for not having taken account of "the application to strike out based on non-compliance with the mandatory rule investing the Paris Appeal Court with exclusive jurisdictional power to decide appeals against decisions given in disputes relating to the application of Article L. 442-6 of the Code of Commercial Law".

For the Supreme Civil Court, the Douai court should have refused jurisdiction and refused to decide the appeal.

Cass. com. 20 Oct. 2015, FS-P+B, no. 14-15.851

Asymmetrical jurisdiction clause and anti-competitive practices

An Irish company and a French company concluded a contract containing a jurisdiction clause designating the Irish courts and, furthermore, allowing the first company to go before the French courts as well as the courts in any country in which it had suffered loss

Considering itself to be the victim of anti-competitive practices and unfair competition on the part of its contracting partner established in Ireland and of other distributors, the French company prosecuted them for damages before the Paris Commercial Court. A plea to the jurisdiction was then raised in favour of the Irish courts and was entertained. As the appeal was dismissed by the Appeal Court, an application to set aside was made.

The application complained that the appeal court judgment stated that the jurisdiction clause was devoid of any potestative character while the Irish company could refer matters to the courts of a number of States, contrary to the French company, which for its part could only refer matters to the Irish courts.

The Supreme Civil Court dismissed the application and held the clause valid in the light of Art. 23 of Brussels I Regulation of 22 December 2000 as it allowed "*identification of the courts which may be required to have referred to them a dispute between the parties arising in connection with performance or construal of the contract and therefore met the imperative condition of foreseeable nature which forum choice clauses must meet*".

The Appeal Court had also held that the jurisdiction clause was intended to apply to any dispute arising subsequent to performance thereof. However, in the case in point, he French company claimed the existence of anti-competitive practices and of instances of unfair competition.

On this particular point, the Supreme Civil Court censured the Appeal Court as, in this domain, the European Union Court of Justice recently laid down a specific principle that Article 23 §1 of the Brussels I Regulation should be construed as allowing, should damages be sought at law for an offence against Article 101 of the Treaty on the Operating of the European Union fighting anti-competitive practices, to take account of jurisdiction clauses contained in delivery contracts even if such consideration resulted in departing from international jurisdiction rules provided for in the Regulation, on condition that such clauses refer to disputes concerning liability incurred through an offence against Competition Law (EUCJ, 21 May 2015, matter C-352/13). However, in the case in point, the jurisdiction clause did not make reference to an offence against Competition Law and consequently did not apply to the dispute.

Cass. 1st Civ. Div. 7 Oct. 2015, FS-P+B, no. 14-15.851

Recent changes to the regulations governing payment terms

Article L.441-6 of the Code of Commercial Law prohibits any producer, service provider, wholesaler or importer from agreeing to payment terms exceeding sixty days as from the date of issue of the invoice or, as an exception, forty-five days as form the end of the month of issue of the invoice.

The Law of Modernisation of the Economy ("LME") of 4 August 2008 provided for the option of sector agreements departing from normal payment terms, facilitating gradual compliance with the lawful maximum term.

The Law no. 2012-387 of 22 March 2012 relating to the simplification of law and the lightening of administrative formalities allowed professional operators in certain sectors characterized by a particularly marked seasonal nature to negotiate a new agreement departing from the usual maximum period for payment terms.

In Ministerial Reply no. 84863 published on 6 October 2015 the Minister for the Economy, Industry and Digital Affairs, who was being questioned about difficulties encountered in the toy sector, stated that it had become clear that the specificities of certain sectors would not allow the professional operators concerned to meet the legal maximum period requirement on expiry of the agreements in question. It is for this reason that Law no. 2015-990 of 6 August 2015 henceforth allows these professional operators to keep the maximum term applicable in 2013 pursuant to a concluded sector agreement. Decree no. 2015-1484 of 16 November 2015 specifies the sectors in question and the applicable payment terms.

Lastly, we should mention publication of Decree no. 2015-1553 of 27 November 2015 specifying information regarding compliance with payment terms which should be presented by companies whose annual accounts are certified by an auditor along with the procedure used in drafting the certification delivered in this connection by the latter.

Decree no. 2015-1484 of 16 November 2015 setting out the list of sectors mentioned in Article L. 441-6 of the Code of Commercial Law

Ministerial reply no. 84863, JOAN Q 6 October 2015, p. 7613

Decree no. 2015-1553 of 27 November 2015 issued in enactment of Article L. 441-6-1 of the Code of Commercial Law

Are reference prices always relevant when products are sold off?

The French authorities have instituted proceedings against a major on-line distributor for non-indication of reference prices in connection with cut-price sales on its website. The European Union Court of Justice ("**EUCJ**") has issued a statement on the compliance of French regulations concerning price-reduction announcements with Directive 2005/29/EC of 11 May 2005 relating to unfair commercial practices.

In accordance with the administrative order of 31 December 2008 then applicable, prices were to be displayed showing, in addition to the announced lower price announced, the reference price. However, the electronic sales site operator had not, in the context of reduced-price purchase offers, shown the reference prices before reduction.

Brought before the Bordeaux Police Court, the operator claimed non-compliance of the administrative order of 31 December 2008 with the provisions of Directive 2005/29/EC on unfair commercial practices. His line of reasoning was however rejected at first instance and then on appeal before the Supreme Civil Court put a preliminary question to the EUCJ in order to discover whether the provisions of the Directive on unfair commercial practices opposed the prohibition of price reductions, which would not be calculated on the basis of a reference set by regulations, and this under all circumstances.

The EUCJ held that the general prohibition on price-reduction announcements which do not show the reference price when prices are displayed, without case-by-case examination allowing their unfair nature to be established, is contrary to the provisions of the Directive of unfair commercial practices. We should remember that Article 5 of this Directive makes reference to an exhaustive list of commercial practices considered as unfair under all circumstances and in which there appears no general prohibition on price-reduction announcements unaccompanied by a mention of the reference price. However, only the commercial practices referred to in the list in question may be regarded as unfair without being subject to case-by-case evaluation.

EUCJ, 6th Div. chambre, 8 September 2015, matter n° C-13/15, France versus Cdiscount

Pre-contractual franchise information

In the case in point, a franchisee stopped paying his franchise dues, citing a lack of profitability because of the opening of a competing outlet two months into his franchise agreement.

The franchisor decided to seek judicial termination of the contract and payment of the unpaid dues. The franchisee then claimed the nullity of the contract, arguing that his consent was invalid as the pre-contractual information document ("**DIP**") supplied well before signature of the contract had not been updated when consents were exchanged. It is in fact the case that, Article L.330-3 of the Code of Commercial Law provides: "*Whosoever puts at the disposal of another (…) a brand, requiring from the same an exclusivity or near-exclusivity undertaking for the carrying on of his business, shall, prior to executing any contract concluded in the common interest of both parties, supply the other party with a document providing true and honest information allowing the other to commit himself in full knowledge of the facts.*"

The franchisee's arguments did not convince the Supreme Civil Court, which set aside the application on the grounds that the franchisor could not be blamed for having misled his franchisee by not pointing out to him "*an event which occurred after execution of the contract, viz. the opening of a competing outlet*" and that the marketing zone study communicated by the franchisor had not hidden from the franchisee the attraction of the said zone for catering brands or the risk of market saturation.

Finally, the Court found that the franchisee had not provided proof that the pre-contractual information supplied by the franchisor was such as to deprive him of an enlightened judgment.

Consequently, the franchisor had not defaulted on his obligation to provide the franchisee with pre-contractual information insofar as the opening of a competing brand occurred after execution of the franchising contract.

Cass. com., 15 September 2015, no. 14-15.052

What is the situation regarding notice when commercial relations between two companies in the same group are broken off?

Two companies in the same group procured supplies of materials from the same supplier, the first since September 2004 and the second since June 2004. They decided to put an end to their respective commercial relations with their common supplier, the first in June 2009 and the second in October 2009. Their common supplier and contracting party sued them for damages to remedy the loss suffered on the grounds of the sudden breaking-off of their commercial relations (Art. L.442-6, I, 5° du Code de commerce).

Their commercial relations with the same supplier covered the same period, the same products and had similar requirements in terms of quantities. The Paris Appeal Court accordingly held that the notice period required should be based not only on the term of their commercial relations but also on the overall turnover generated by the two companies. The consequences of the breakings-off of relations were amplified by the by the cumulative effect of their concomitance and created a situation of economic dependency. The judges thus sanctioned the two companies in the same group which put an end to their commercial relations without notice and evaluated the necessary notice at one year.

The Supreme Civil Court did not adopt the same reasoning and censured the appeal court judgment on the grounds that the two companies that were the source of the breaking-off of relations remained legally autonomous and the commercial relations maintained by each one were completely separate, despite their belonging to the same group. Consequently, the Court held that their turnovers should be evaluated separately. We should observe that the Supreme Civil Court allows in its purview that an overall evaluation of the breaking-off be made provided that it is shown that the authors of the breaking-off had acted in concert.

Cass. com, 6 October 2015, no. 14-19.499

CONSUMER LAW

The new system for mediating consumer law disputes comes into force

Order no. 2015-1033 of 20 August 2015 relating to the extra-judicial settlement of consumer law disputes laid down the principle that in domestic or cross-border disputes between a consumer and a professional operator, consumers shall have the right of free recourse to a consumer law mediator with a view to resolving the dispute between them out of court. To this end, the professional operator shall guarantee the consumer actual recourse to mediation arrangements (Code of Consumer Law, Arts. L. 151-2 and L. 152-1). But implementation of the order was subject to publication of the Decree providing for the terms of its application (Code of Consumer Law, Art. L. 152-1). This was published in the Official Journal on 31 October 2015. Since 1 November 2015 professional operators consequently have two months to comply with the mediation arrangements brought in by the order, i.e. until 1 January 2016

The Decree of 30 October 2015 inserts a Title V devoted to consumer law dispute mediation in the regulatory part of the Code of Consumer Law. It specifies the rules relating to the consumer law mediation process (Code of Consumer Law, Arts. R. 152-1 to R. 152-5), the requirements for independence and impartiality attaching to the position of consumer law mediator (Code of Consumer Law, R. Arts. 153-1) and the information and communication requirements placed on the latter (Code of Consumer Law, Arts. R. 154-1 to R. 154-4).

The Decree details, in addition, the composition, organization, resources and operating conditions of the Consumer Law Mediation Assessment and Supervisory Committee (Code of Consumer Law, Arts. R. 155-1 to R. 155-8).

It also determines the arrangements for informing the consumer that he can in fact have recourse to a consumer law mediator (Code of Consumer Law, Arts. R. 156-1 and R. 156-2). Professional operators must, in this connection, communicate to consumers the names and addresses of the consumer mediator(s) upon whom he depends, writing this information in easily visible, legible script on his website, on him general terms and conditions of sale or service, on his order forms or on any other suitable medium.

Decree no. 2015-1382 of 30 October 2015 relating to Consumer Law dispute mediation

NEW TECHNOLOGIES

Publication of law relating to surveillance measures for international electronic communications

Law no. 2015-1556 of 30 November 2015 relating to surveillance measures for international electronic communications was published in the Official Journal of 1 December 2015. A chapter has been inserted into the Code of Internal Security which defines surveillance of international communications and describes the system for international communications monitoring permits. It provides that persons who work as members of parliament or as judges, lawyers or journalists cannot be the targets of surveillance on account of their work or profession. The conditions governing the interpretation and destruction of data and the way in which surveillance is traced are specified therein, along with the conditions governing the retention of data and the role of the National Commission for the Supervision of Information Gathering Techniques.

Constitutional Council decision no. 2015-713 DC of 23 July 2015 holding Law no. 2015-912 of 24 July 2015 relating to Information Gathering to be in compliance with the Constitution had censured the chapter of the Code of Internal Security dealing with international surveillance measures. Censure was motivated by the fact that in not defining in the law either the conditions governing operating, storage or destruction of information collected or the conditions under which the National Commission for the Supervision of Information Gathering Techniques checked the legality of the permits delivered and conditions under which they were implemented, the legislator had not determined the rules relating to fundamental guarantees granted to citizens for the exercise of public liberties. At the close of an accelerated adoption procedure, the Constitutional Council, in its decision no. 2015-722 DC of 26 November 2015 held in compliance with the Constitution Articles L. 854-1, L. 854-2, L. 854-5 and L. 854-9 of the Code of Internal Security arising from the recast legislative text.

Law no. 2015-1556 of 30 November 2015 relating to surveillance measures for international electronic communications, OJ of 1 December 2015

Decision of Constitutional Council no. 2015-722 DC of 26 November 2015

Close of public enquiry in connection with Digital Republic Bill

Following the public enquiry which took place from 26 September to 18 October 2015, the Bill for a Digital Republic was sent to the Council of State on 6 November 2015. The Bill contains 41 articles relating to data and knowledge circulation, protection in a digital society and internet access. Certain of the proposals put by contributors have been integrated into the Bill, in particular:

- the option for any person who is the subject of an administrative decision based on algorithmic processing to require the Administration to communicate to him the rules making up the said algorithm along with the main characteristics of its implementation;
- a prohibition on internet access suppliers from restraining or preventing recourse to self-hosting and the sharing of data so stored.

Bill for a Digital Republic

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