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Contracts – Distribution – Consumer Law: Legal Watch

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CONTRACTS – DISTRIBUTION

Reform of Law of Contract, of the general scheme and of proof of obligations

The order reforming the Law of Contracts, the general scheme and the proof of obligations was published in the Official Journal of the French Republic on 11 February 2016.

It is the result of codification of case law laid down in these fields and has introduced a number of innovations into the Code of Civil Law.

It sets out three principles: the principle of contractual freedom (New Art. 1102), limited only by maintenance of public order, the binding force of contracts (New Art. 1103) and good faith (Art. 1104).

Amongst the important innovations, with regard to the contract conclusion process, the legislation strictly sanctions the pre-contractual obligation to inform, the proof system (Art. 1112-1) and the confidentiality obligation (Art. 1112-2).

New provisions affecting the unilateral promise to sell and the preference pact are brought in.

With regard to the contents of contracts, new Articles 1170 and 1171 establish two important doctrinal principles, firstly in prohibiting any clause that nullifies the effect the debtor's essential undertaking and, secondly, in the specific case of membership clauses, any clause creating significant imbalance between the parties' rights and obligations. Henceforth, such clauses shall be deemed null and void.

As regards the effects of contracts, the order introduces into the Code of Civil Law the doctrine of unforeseeability. This is seen as the option for the parties to renegotiate their contract in the event of an unforeseeable change of circumstances and in the event of the initiative's failure, the court's being recognized as having the power to revise or terminate the contract at the request of either of the parties (New Art. 1195).

The order also aims to modernize the general scheme of obligations by simplifying loan transfer of receivables and bringing in debt (Art. 1327) along with contract transfer (Art. 1216).

The date of effect of these provisions has been set at 1st October 2016 subject to certain provisions. Contracts concluded before the said date shall, however, remain subject to the earlier law

Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations

Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations

Darty found guilty of significant imbalance

Following legal action taken by the Minister for the Economy, Darty has been found guilty of significant imbalance on account of stock protection and product sales slowdown clauses included in contracts concluded by Darty with its audiovisual or household appliance equipment suppliers.

In the case in point, the "stock protection" clause provided that, in the event of a fall in the price of a product, the supplier could or had to, depending on the contracts, grant Darty a credit note representing the gap between the previous price and the new price multiplied by the number of products in stock. As for the "products sales slowdown" clauses, in the event of obsolescence, halting manufacture or sales slowdown of a product, the supplier could draft in favour of Darty a credit note representing the gap between the purchasing price paid by Darty and the price obtaining for the new situation of the product on the market, multiplied by the number of products in stock.

The question is thus posed whether selling price reduction clause stipulations in the event of a fall in prices in suppliers' contracts constitute a significant imbalance between the parties' rights and obligations.

The lower-courts found that these clauses, which appeared in all the contracts cited by the Minister for the Economy, in almost every case drafted in an identical manner and frequently contrary to the suppliers' interests, were tantamount to making the full weight of the commercial risk fall on the supplier.

This new verdict of guilty of significant imbalance strengthens an interpretation pointing to significant imbalance between parties' rights and obligations in commercial contracts.

It should be noted that Darty has contested the judgment handed down which is currently before the Supreme Civil Court.

CA Paris 25 novembre 2015 n° 12/14513, ch. 5-4, Etablissements Darty & Fils c/ Ministre de l'économie

Articulation of unilateral and contractual resolutions

The Commercial Division of the Supreme Civil Court on 20 0ctober 2015 handed down a judgment setting aside the matter and upholding the position of the lower-court judges that unilateral breaking-off of relations in the event of serious misconduct of a party may be put forward in argument notwithstanding the terms and conditions contractually provided in a termination clause.

In the case in point, a company offering voyages commissioned another company which marketed gift packs to seek customers. The gift-pack marketing company terminated the fixed-term contract without giving prior notice, following complaints from customers.

The question is thus posed whether the creditor is free to break off the contract unilaterally when serious misconduct on the part of its debtor has been evidenced where a termination clause expressly addresses the breaking-off of relations in the event of failure to perform.

The Commercial Division reminds us, in the established adage that "*the serious nature of the misconduct of a party to a contract may justify the other party's terminating the same unilaterally, at his own risk, regardless of the formal terms and conditions governing contractual termination.*"

Cass. com., 20 oct. 2015, n° 14-20.416, F-D, Sté Idées du monde c/ Sté Smart & co

Limits on the obligation to perform *bona fide*

The Commercial Division of the Supreme Civil Court on 24 November 2015 handed down a judgment setting aside the matter and upholding the position of the lower-court judges that appraisal of the obligation to perform *bona fide* cannot result in encroachment upon the rights and obligations legally agreed to by and between the parties.

In the case in point, a company commissioned two other companies to distribute its products. The supplier was responsible for choosing the service providers and for the design of the contents of the themed packs and provided a central reservation office specifically for these packs while the other two companies saw to the distribution and marketing of the products. Having learnt that these other two partner companies marketed packs similar to its own approaching other service providers and referring customers to another central reservation office, the supplier sued the two companies for damages for failing in their obligation to perform *bona fide.*

The question is thus posed whether marketing products similar to those named in the distributor's contract, without prior information about this, constitutes an unfair practice and a breach of the obligation to perform *bona fide.*

The Commercial Division upheld the judgment of the lower-court judges, stating that "*even though the rule that agreements must be performed* bona fide *allows the courts to penalize unfair use of contractual prerogative, it does not allow encroachment upon the very substance of the rights and obligations legally agreed by and between the parties.*

Cass. com. 24 novembre 2015 n°14-20512

Possibility of arbitration in cases of the sudden breaking-off of established commercial relations

In a judgment given on 21 October 2016, lthe Supreme Civil Court established the possibility of arbitration in cases of the sudden breaking-off of commercial relations when it decided that an application for reparation for loss caused by an unfair commercial practice can be made to an arbitration court.

In the particular case, the *Scamark* company, ordered under an arbitral award to compensate its contracting party pursuant to the arbitration clause stipulated in the distributor's branded product manufacturing contract concluded by and between them, found fault with the Appeal Court *(CA Paris, pôle 1, ch. 1, 1er juill. 2014, n° 13/09208)* for having dismissed its appeal for cancellation on the grounds that the tortious character of the liability provided for in Article L. 442-6 of the Commercial Code, a Public Order Act, excluded any application of an arbitration clause, regardless of the existence of the contractual framework given to the relationship.

This argument did not convince the Supreme Civil Court: "*the circumstance that Article L. 442-6 of the Commercial*

Code confers upon the Minister responsible for the Economy and to the State Prosecutor autonomous action to protect the market and competition does not result in excluding from application of this legislation recourse to arbitration to decide disputes arising between the economic operators", from which the Appeal Court *"correctly deduced that the action to compensate the loss claimedly resulting from the breaking-off of commercial relations was not one of those over which jurisdiction is reserved for the state courts"*.

The judgment thus confirms that neither the tortuous nature of the action for damages nor the Public Order Act character of Article 442-6, I, 5° prevent recourse to arbitration. As for the specific rules governing jurisdiction over matters involving restrictive competitive practices that arise from the Law of 4 August 2008 (*C. com., art. L. 442-6, D. 442-3 et D. 442-4*), these apply only insofar as the dispute is subject to state courts.

Cass. 1e civ. 21 octobre 2015 n° 14-25.080 (n° 1135 F-PB), Sté Scamark c/ Sté Conserveries des cinq océans

Competition Authority: constitutionality of monetary penalties

The Constitutional Council on 7 January 2006 handed down a decision in connection with a prior constitutionality question put for the "Expert-comptable média association" (Chartered Accountant Media Association) which disputed the constitutionality of Article L. 464-2, paragraph I, indent 4 of the Commercial Code in relation to monetary penalties susceptible of being inflicted by the Competition Authority on persons responsible for anti-competitive practices. The provisions at issue provide that, if the offender is not a corporate entity, the maximum amount of the penalty is three million euros whereas the maximum amount of the penalty for a corporate entity is 10% of its highest worldwide turnover less tax achieved in one of the financial years closed since the previous financial year preceding that in which the practices were employed.

The petitioner considered that the disputed provisions were contrary to the Constitution as they established an unjustified difference of treatment showing scant regard for the principle of equality before the law and *"the insufficient definition of 'corporate entity' within the meaning and for application of the disputed provisions would also infringe the principle of the equality of sanctions".*

The Constitutional Council firstly declared the appeal inadmissible as the provisions had already been examined and found to be in conformity with the Constitution in its decision no. 2015-489 QPC of 14 October 2015. However, it replied on the substance of the matter and it is established by its decision that:

- the principle of equality is not disregarded on account of the fact that the legislator, in referring to the notion of 'corporate entity', sought to distinguish persons found guilty on the basis of the nature of their respective contributive faculties and that the difference of treatment resulting from the disputed provisions was directly related to the purpose of the law establishing it;
- the principle of equality is not disregarded since, in differentiating, in order to fix the maximum penalty, offenders who are constituted under one of the legal statuses or forms appropriate for undertaking a gainful activity and the others, the legislator made reference to precise legal categories allowing determination of the penalty incurred with sufficient certitude.

Décision du Conseil constitutionnel 2015-510 QPC du 7 janvier 2016

Unfair competition by way of re-use of an advertising idea

In a judgment given on 24 November 2015, the Commercial Division of the Supreme Civil Court illustrated the criteria allowing to find guilty a company that re-used an advertising idea.

In the case in point, Pepsico France had been found guilty of showing a film, the last shot of which showed an orange on which the brand Tropicana was featured whereas the advertising idea of associating a fruit and the brand of the product's manufacturer to designate fruit juices or fruit desserts had already been employed for more than twenty years by Andros.

The Supreme Civil Court upheld the judgment handed down by the first-instance and appeal courts given that the latter had been able to establish that the advertising idea re-used was not banal but distinctive of the products of the said company by reason of its uninterrupted use since 1988, that the idea of combining the fruit and the brand suggests

the same thing, whether used by one or the other of these companies and that, employed at the close of the film, it played the role of signature that the public would keep in its memory. It was accordingly correctly found that the resemblances between the visuals under consideration would cause in the minds of reasonably attentive and intelligent consumers a risk of confusion that the difference in the brands displayed did not reduce.

Cour de cassation, Chambre commerciale, 24 novembre 2015, 14-16.806, société Pepsico France c. société Andros

CONSUMER LAW

Health product class actions

La loi n° 2016-41 du 26 janvier 2016 de modernisation de notre système de santé (Law no. 2016-41 for modernisation of our health system) set up a specific class-action procedure for health products, the legal scheme for which is set out in Articles L. 1143-1 *et seqq.* of the Code of Public Health Law.

Pursuant to the said article, an approved health system users' association will be able to go to law to seek reparation for harm or damage suffered by health system users placed in a similar or identical situation and having as their common cause a breach of legal or contractual obligations on the part of a producer or supplier of health products for human use or cosmetics or, again, of a service provider using one of such products. The action may only cover the reparation of loss resulting from bodily harm or damage suffered by users of the health system (Code of Public Health Law, Art. L 1143-1, indents 1 and 3).

Liability will extend only to bodily harm or damage caused by health products and cosmetics. Services provided (medical treatment, surgical procedures, beauty care) which would appear to cause bodily harm or damage unrelated to the use of a product cannot be the subject of a class action.

Enactment of the Law shall be mainly via decree. However, two stages may presently be distinguished.

- The first stage of the arrangements will consist in a judgment with regard to admissibility and liability. The judge must take into account three factors:
  - he first of all checks on the admissibility of the class action;
  - he then rules on the liability of the defendant in the light of the individual claims lodged by the plaintiffs. On this occasion he may proceed to undertake any necessary measures of examination, in particular an expert examination;
  - lastly, he will determine the size of the group of health users concerned, set the criteria for inclusion in the group and determine publicity measures to be paid for by the liable party after all means of appeal have been used.

Terms and conditions governing inclusion are set out in the Law. The system adopted is the opt-in system, whereby only plaintiffs who come forward are parties to the action.

The judge may, in the course of this stage, order payment of a provisional sum or the depositing of part of the monies owed by the defendant.

The Law provides, at this first stage, for the option of an out-of-court settlement via mediation. The judge to whom the class action has been allotted may thus, with the agreement of the parties, propose the appointment of a mediator.

The second stage relates to individual compensation of the health system users. Failing an out-of-court settlement, remedy will then be sought via litigation. If the professional operator refuses to compensate the patient, the latter may decide to act to seek compensation either directly from the party held guilty or along with the association that he appointed to represent him at the first stage.

NEW TECHNOLOGIES

A new agreement on transatlantic date transfers

The European Commission on 2 February announced that it had concluded an agreement with the United States on the transfer of data.

American companies that want to import personal data from Europe undertake to publish their undertakings with regard to the processing of such data and to guarantee individuals' rights, an act that will make them binding under American law and will allow the authorities to force companies to respect them. Furthermore, any company processing data

from Europe regarding human resources shall undertake to comply with the decisions of the European authorities tasked with data protection.

Access to personal data transferred to the United States by the American public authorities for mandatory and national security purposes will be subject to supervision of the limits and guarantees defined.

Any citizen who believes that the data relating to him have been misused under the new arrangements will enjoy recourse to a number of possible actions. Companies will have to answer complaints by set deadlines. The European authorities will be able to forward complaints to the American authorities. It is also envisaged that recourse to out-of-court dispute settlement mechanisms will be free and that a mediator will be appointed for complaints relating to possible access by national intelligence services.

Communiqué de presse de la Commission européenne sur le nouvel accord en matière de transfert de données transatlantique.

Digital Republic Bill given a first reading

The National Assembly on 26 January 2016 gave a first reading to the Digital Republic Bill. Amongst the innovations to the draft resulting from its consideration by MPs, we may mention:

- the details added to Article L. 111-7 of the Code of Consumer Law in order to clarify the persons concerned by the provisions of the Code of Consumer Law relating to professional operators' pre-contractual general information obligations;
- changes to the scheme applicable to on-line payment transactions for the purchase of digital contents, voice services or tickets or in the context of charitable activities in order to make it comply with the provisions of the European Directive on payment services of 16 November 2015;
- writing into the law the principle of keeping files resulting from processing which then constitute search data;
- the option for associations whose purpose is to protect intellectual property to exercise rights recognized as belonging to parties claiming damages in order to remove any obstacle to the free re-use of a work that is no longer copyright;
- the option for any association whose purpose is to protect personal data or private life to exercise rights recognized as belonging to parties claiming damages as regards offences relating to infringement of human rights resulting from computer files or processing;
- exemption from punishment for such persons as have attempted to access or remain, fraudulently, within all or part of an automatic data processing system, exemption from punishment if he immediately informed the administrative or judicial authority or the person in charge of the automatic data system in question of a risk of interference with data or with the working of the system;
- the obligation for the owners or tenants of dwelling premises who rent it on occasion to short-stay clients to certify their status or the owner's permission to the intermediation platform.

After its reading the Bill was sent to the Senate.

Projet de loi pour une République numérique adopté en première lecture par l'Assemblée nationale le 26 janvier 2016.

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