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Newsletter June 2014

Contracts – Distribution – Consumer Law: Legal Watch

Contracts - Distribution

Obligations reform: joint negotiating committee fails to reach agreement

A jurisdictional clause can be advanced in argument against a third party to an agreement

Actions for damages by victims of anti-competitive practices – the European Parliament approves the draft Directive

Concluding an agreement with a third party is not tantamount to breaking off commercial relations

Applicable law in the event of sudden breaking-off of established commercial relations abroad

Sudden breaking-off of relations and group of companies

Compensating a directly-affected sub-contractor for sudden breaking-off of relations to which it was not party

Unfair competition and parasitism

Perfume case: fine imposed on Nocibé upheld

A selective distribution network that has not proved that its network is legal cannot prevent the marketing of its products by an unapproved third party

Hamon Law: what are its effects on distance selling?

Consumer Law

Does a "pyramidal sales-promotion system" constitute unfair commercial practice?

The marked change in consumer behaviour

Publication of the annual business report of the Unfair Clauses Commission

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Presentation of the CNIL's annual business report

AGREEMENTS - DISTRIBUTION

Obligations reform: joint negotiating committee fails to reach agreement

The disagreement between the Senate and the National Assembly regarding granting the Government the power to proceed via orders-in-council to reform contract law and the obligations regime that was abolished by the Senate and subsequently reintroduced by the Assembly on the occasion of the first reading of the draft law led to the failure of the joint negotiating committee to reach agreement on 13 May last. The text has been transferred to the National Assembly, which has the last word. No date has for the time being been set for a fresh examination by the Law Commission.

Draft law concerning the modernisation and simplification of the law and procedure in the fields of justice and domestic affairs, **legislative file**

A jurisdictional clause can be advanced in argument against a third party to an agreement

The Supreme Civil Court has recognized that a jurisdictional clause that has been stipulated by and between two companies can apply in a different legal relationship involving a third party provided that the latter knows about and has accepted the clause in question.

In the case in point, in connection with a project to develop a professional software programme, Creno on 25 February 2004 concluded with Microsoft France an agreement to buy a certain number of licences. As difficulties arose in carrying forward the project, Creno on 23 July 2008 concluded with Microsoft Ireland a new agreement for new licences. As the difficulties persisted, it summoned Microsoft France to appear before the Paris Commercial Court, seeking essentially the setting aside of the agreements in question. Availing itself of the jurisdictional clause appearing in the second agreement, Microsoft France argued lack of jurisdiction on the part of the Paris court and sought transfer for judgment in the Irish courts. This claim dismissed, it then entered an action concerning jurisdiction before the Paris Appeal Court, which dismissed it as the jurisdiction clause awarding jurisdiction to the Irish courts was included in the agreement executed by Microsoft Ireland, which was not party to the dispute, and not by Microsoft France; this clause cannot therefore be advanced in argument against by latter by Creno. Judgment was given for lack of legal basis. The appeal-court judges were criticized for not having sought to establish whether Creno " based its claims against Microsoft France on the second agreement, dated 23 July 2008, to which it was not party [and which included the *forum convenience* clause], and whether, at the time when the said agreement was concluded, Microsoft France was unaware of the clause at issue and had not accepted it in the connect of its relations with Creno ".

Cass. com. 4 March 2014, F-P+B, n° 13-15.846

Actions for damages by victims of anti-competitive practices – the European Parliament approves the draft Directive

The draft Directive aiming to facilitate actions for damages on the part of victims of anti-competitive practices was approved in a vote of the European Parliament on 17 April 2014. The text has been transferred to the EU Council of Ministers with a view to final approval. The main additions are as follows:

- National courts shall have the power to require concerns to disclose evidence when victims exercise their right to reparation. The courts will ensure that these disclosure

orders are reasonable in their effect and that confidential information is duly protected.

- A final decision by a national competition authority pointing to an offence shall automatically constitute proof of the existence of the offence before the courts of the Member State concerned.

- Victims shall have at least one year within which to bring proceedings for damages as from the date at which the competition authority's decision pointing to the offence became a final decision.

- If an offence has caused price increases and these have been "passed on" along the whole of the distribution chain, entities or individuals that have actually suffered loss will be those entitled to reparation.

- Procedures for consensual resolution of disputes between concerns and their victims will be facilitated through the clarification of their interaction with the legal proceedings. This will allow speedier and cheaper resolution of disputes.

European Commission, release PI/14/455, 17 April 2014

Concluding an agreement with a third party is not tantamount to breaking off commercial relations

In the case in point, JVC France, the distributor of JVC brand products, in 1999 opened a client account for TF Inter, a wholesaler of electronic products. In 2008, JVC France opened an account for C Discount, an internet retailer of electronic products and a customer of TF Inter at that time. Considering itself a victim of the breaking-off of established commercial relations and of unfair competition at the hands of JVC France, TF Inter sued it for damages;

Its claim was dismissed.

The Supreme Civil Court has stated that Article L. 442-6, I , 5°, of the Commercial Code only covers cases in which commercial relations are broken off and cannot be advanced in argument to find fault with a partner for an agreement executed with a third party, which cannot be interpreted as a covert desire to break off relations.

The lower-court judges and the Supreme Civil Court noted in addition that the contractual terms, in particular prices, had remained the same and that JVC France not only at no time closed the account that it had opened for TF Inter but did not otherwise behave in a manner consistent with an attempt to break off relations.

Cass. com. 11 March 2014, n°13-13.578, Trading French International versus JVC France

Applicable law in the event of sudden breaking-off of established commercial relations abroad

A Chilean company that had been distributing a French manufacturer's products for eight years in Chile had concluded with the latter a distribution agreement with a renewable term of three years. Four years later the manufacturer terminated the agreement. The distributor had then sued it for damages on the grounds of the sudden breaking-off of established commercial relations (C. com. art L 442-6, I-5°). The French manufacturer had claimed that this legislation was not applicable given that the loss suffered had occurred in Chile.

The Supreme Civil Court, on the contrary, held that the law applicable to the claim for damages submitted by was indeed French law, basing its verdict on the following argumentation. The law applicable to extra-contractual liability is that of the State of the place where the damage was caused; this place also means that where the act causing the damage or loss occurred and that where the damage or loss took place; in the event of a complex offence, it is necessary to determine which country has the closest links with the deed causing the damage or loss. In the particular case, these links were the result of the pre-existing commercial relations that had lasted more than twelve years between the parties, and the fact that these had been formalized by an agreement concluded in Paris specifying French law as the applicable law and the Paris Commercial Court as the court enjoying jurisdiction.

Cass. com., 25 March 2014, n° 12-29.534, FS-P+B, Guerlain versus FGM

Sudden breaking-off of relations and group of companies

In a judgment given on 30 January 2014, the Paris Appeal Court gave details regarding assessment of the breaking-off of relations when this can be ascribed to companies belonging to the same group of companies.

In the case in point, two French companies forming part of a Japanese conglomerate mainly building automobiles had had commercial relations with a French company producing counterweights employed in public works and the handling industry. Complaining of a sudden breaking-off of established commercial relations, the supplier sued both companies for reparation for the loss suffered.

The court held that, although belonging to the same group and having the same business, the initiators of the breaking-off of relations were two independent companies that had always had separate commercial relations with the plaintiff, each placing its own orders and each having individually put an end to its commercial relations. Consequently, the breaking-off of commercial relations must be examined in the light of relations with either of the two companies which broke off commercial relations.

CA Paris, Pôle 5, ch. 5, 30 Jan. 2014, n° 12/02755, Fonderie G.M. Bouhyer versus Toyota Industrial Equipment, Cesab Carreli Elevatorl SPA

Compensating a directly-affected sub-contractor for sudden breaking-off of relations to which it was not party

A publishing company had contracted with a printing company to print some of its books. The latter subcontracted some of its work to another company. The publishing company decided to change printer and, without written notice, stopped placing orders with the printing company, resulting in the immediate cessation of orders for the sub-contracting company. Even though the sub-contracting company did not have direct commercial relations with the publishing company, it did perform the printing of part of the orders for which the latter had contracted with the printing company. The result was that by stopping placing orders with the printing company and so putting an end to its commercial relations with it, the publishing company caused a loss to the sub-contracting company.

It is also established that the halting of orders constituted fault as it was not preceded by the written notice period within the meaning of Article L. 442-6 of the Commercial Code, a fact which made it impossible for the printing company to give its sub-contractor time to reorganize and caused the latter a *de facto* interruption in its business resulting from such sub-contracting. This being the case, the publishing company incurred liability pursuant to Article 1382 of the Civil Code towards the sub-contracting company and it was obliged to make good the loss that it had caused. The loss was to be made good by the granting of damages to be calculated on the basis of the gross margin that the sub-contracting company would have made if it had had enough time to reorganize..

CA Paris, Pôle 5, ch. 5, 27 Feb. 2014, RG 12/04804

Unfair competition and parasitism

In a judgment given on 4 February 2014, the Supreme Civil Court approved the Appeal Court's having sanctioned Ferragamo for parasitism arising from the Miss Dior perfume bottle model:

"*unlike unfair competition, which can only result from a body of presumptions, parasitism, which consists for an economic operator in placing himself in the wake of an undertaking while unduly profiting from the investments made or from its notoriety, results from a whole set of factors apprehended in their totality; that after noting that the perfume "Signorina" showed, both in its packaging , its bottle and its advertising, striking resemblances, that he details with the perfume "Miss Dior";, in particular a stylized knot stopper, never before used by Ferragamo parfums for its other perfumes, the judgment recognizes that these similarities, through the repetition of characteristic features strongly reminding one of the perfume "Miss Dior", contribute to an overall resemblance with the latter and that it creates confusion in the minds of the customers precisely targeted, i.e. young women; that he deduces that in this way is characterized the approach of Ferragamo parfums in placing itself in the wake of Parfums Christian Dior and profiting from its expertise, notoriety and its investments to market its perfume, such behaviour constituting parasitic practices consequently giving rise to clearly illicit trespass that must be ceased ".*

Cass. com., 4 Feb. 2014, n° 13-11.044, F-D, Ferragamo parfums versus Sté parfums Christian Dior

Perfume case: fine imposed on Nocibé upheld

Following the adverse verdicts of the Competition Council in 2006 pronounced against thirteen perfume manufacturers and three distributors for setting up a price cartel between 1997 and 2000 (Cons. conc., Declaration. n° 06-D-04 bis, 13 March 2006) and the confirmation of this

analysis by the Paris Court of Appeal on 26 January 2012 (CA Paris, pôle 5, ch. 7, n° RG : 2010/23945, Beauté Prestige International et al.), the Supreme Civil Court had partially censured the appeal judgment but only in that it had set at 3,150,000 euros the fine sanction inflicted on Nocibé, without having precisely identified participation by the latter in the cartel (Cass. com., 11 June 2013, n° 12-13.961, P+B).

On the case being sent back by the Supreme Civil Court before the Paris Appeal Court, the plaintiff sought cancellation of the fined inflicted upon it, denouncing not only its amount, out of all proportion with the seriousness of the accusations made and damage to the economy but also the setting of the amount of the fine on the basis of a uniform rate, a fact which is not satisfactory with regard to the principle of individualization of sanctions.

This sanction was, nevertheless, confirmed by the Paris Appeal Court, which did not therefore follow the position adopted by the Supreme Civil Court. The reason for this was that the appeal judges considered that damage to the economy is constituted by the case in point and that the facts are serious enough to justify such a sanction against Nocibé, without taking account of the length of the proceedings, the sanctions pronounced against the other companies or the difficulties suffered by the sector.

CA Paris, pôle 5, ch. 7, 10 Apr. 2014, n° RG : 2013/12458

A selective distribution network that has not proved that its network is legal cannot prevent the marketing of its products by an unapproved third party

Wishing to hold exclusive distribution rights for Eastpak luggage items for France and Switzerland, Cosimo sued Carrefour France for unfair competition, reproaching it for having sold Eastpak backpacks in a number of hypermarkets without being approved in the selective distribution network set up by it. Unsuccessful before the Commercial Court, it appealed. It asked the Court to hold that, in marketing Eastpak luggage items in France in an irregular fashion outside its selective distribution network, Carrefour France was guilty of unfair competition by breaching the provisions of Article 1382 of the Civil Code. For its part, Carrefour asked the court to consider as illicit the selective distribution network set up by Cosimo and to regard as null and void the selective distribution agreements put forward in argument against it. According to Carrefour, the nature of the products at issue would not justify having recourse to selective distribution and the organizer of the network would appear to hold a market share of more than 30%. In addition, the criteria put in place would not seem to be objective, would exclude certain forms of distribution and would go beyond what is necessary for safeguarding the interests of the brand.

In its judgment given on 27 March 2014, the Appeal Court decided that the selective distribution network set up by Cosimo for the distribution of Eastpak brand products was illicit pursuant to the provisions of Articles 101 of the EUFT and L. 420-1 of the Commercial Code. The reason for this was that Cosimo provided no proof that it met the conditions specified in Exemption Regulation n°330-2010 of 20 April 2010 and provided no data facilitating delineation of the relevant market and its position therein. The setting-up of a selective distribution system should be justified by the particular nature of the product and by the need to preserve its quality and ensure its use. According to the Court, the extensive reputation that the product enjoys is not enough to meet these conditions. The Court added, furthermore, that the marketing of backpacks, which does not require any particular guidance, is free from any regulation in the rest of Europe.

Additionally, the Court emphasized that the qualitative criteria governing approval within the network were too general and systematically ended with the abbreviation "etc.", a factor which deprived them of any objective nature and left the field open to subjectivity on the part of the agents appointed to appraise candidates. This being so, the network organizer failed to specify the qualities and parameters used by him in assessing the criteria governing the siting's location and environment.

In conclusion, Cosimo, which failed to produce any evidence of the licit nature of its network, cannot prevent its products from being marketed by an unapproved third party. This conclusion is even more justified in that, in the case in point, Cosimo procured its stocks in Germany, where the products are not marketed via a selective distribution network.

CA Paris, , Pôle 5, ch. 5, 27 mars 2014, Société Cosimo c/Carrefour France, RG 10-19766

Hamon Law: what are its effects on distance selling?

The consumer law known as the "Hamon Law" was passed

on 17 March 2014 and transposes certain provisions relating to agreements concluded remotely and outside the company (via canvassing) contained in Directive n°2011/83/EU of 25 October 2011 relating to consumers' rights.

The Hamon Law seeks to bring into balance relations between consumers and professionals by strengthening consumer protection vis-à-vis professionals in the context of sales and, in particular, distance selling.

The enabling legislation regarding agreements concluded remotely and outside the company is scheduled for the next few days. Pending this decree, the main measures are as follows:

- the consumer has 14 days to cancel his order. This time allowance starts on the day on which the agreement is concluded or on the day on which the goods are received. Furthermore, the time allowance can be increased to 12 months if the information relating to the right to cancel has not been supplied by the professional (Article L. 121-21-1 of the Code of Consumer Law);
- the consumer may return the goods, sending back the cancellation form supplied by the professional, the onus of proof being borne by the consumer (Article L. 121-21-1 of the Code of Consumer Law) ;
- the professional must inform the consumer that he will bear return expenses in the event of cancellation;
- the professional has 14 days to refund monies paid after being informed by the consumer that he has cancelled;
- the professional shall inform consumers regarding the terms, time limits and conditions of exercise governing the right to cancel in legible and comprehensible terms when the agreement is concluded.

CONSUMER AFFAIRS

Does a "pyramidal sales-promotion system" constitute unfair commercial practice?

A Lithuanian company that granted modest postal loans at short notice was fined for infringing a provision of Lithuanian law relating to unfair commercial practice. The company led an advertising campaign through which it was alleged to have set up "a pyramid system for distributing goods giving consumers the chance to receive something essentially for having got other consumers to participate in the system rather than for selling or purchasing products".

The EUCJ decided as follows:

Appendix I, Point 14 of Directive 2005/29/EC of 11 May 2005, relating to unfair commercial practices by concerns vis-à-vis consumers on the Internal Market should be construed as follows: a pyramid sales promotional system does not under all circumstances constitute an unfair commercial practice. It does so only when a system of this kind requires a financial contribution from the consumer, regardless of the amount, in return for the latter's enjoying a chance to receive something originating essentially from others entering into the system rather than from the sale or purchase of products.

EUCJ, 2e ch., 3 Apr. 2014, aff. C-515/12, « 4finance » UAB

The marked change in consumer behaviour

In the case in point, a company that owned a European patent for a shoe sole that was transversally extensible via an elastic insert to adapt itself to foot deformations and the company holding the exclusive operating licence took legal action for misleading advertising against a Spanish company that used the words "sole fitted with bands of variable width". Even though expert examination by the technical centre for leather established that these allegations were false, the Appeal Court dismissed the claim of unfair commercial practice. As the advertising was on a very small scale, it could not have "substantially" affected consumers' economic behaviour.

The Supreme Civil Court, on an appeal, set aside the judgment in the light of Articles 1382 of the Civil Code and L. 121-1 of the Code of Consumer Affairs, interpreted in the light of Directive 2005/ 29/ EC of 11 May 2005 relating to unfair commercial practice. A commercial practice is deemed misleading and unfair when it contains false information and substantially alters or is likely to alter the economic behaviour of the average consumer by leading him to take a commercial decision that he otherwise would not have taken.

Cass. com. 11 March 2014, n°12-29.434, Eram versus Fluchos

Publication of the annual business report of the Unfair Clauses Commission

The Unfair Clauses Commission ("**CCA**") has recently published its annual business report. In 2013, the Commission adopted two opinions relating, respectively, to an automobile rental agreement and to a consumer credit agreement. It was also restated that the CCA wished to see a change in the legislation allowing "*vols secs*" supply agreements concluded on Internet to be subject to the automatic liability provided for in Article L. 211-17 of the Tourism Code. The CCA also seeks clarification of Article L. 121-26 of the Code of Consumer Law, which speaks of a permanent right of termination regarding subscriptions to a daily publication and similar.

CCA's 2013 business report

PERSONAL DATA

Presentation of the CNIL's annual business report

The National Commission for Data Processing and Liberties ("**CNIL**") on 19 May 2014 presented its 34th business report. In particular:

- in 99% of the 5640 complaints received in 2013 by the CNIL, the complainant received satisfaction;
- only 14 sanctions, including 7 of a financial nature, were pronounced, the CNIL's intervention in the other cases having resulted in compliance on the part of the organization;
- there was seen confirmation of the visible increase since 2011 in the number of individual applications relating to *e-reputation* problems;
- these was a large increase in the number of applications for indirect right of access to the national bank account and comparable account file ("**FICOBA**");
- a label was created for digital safe services;
- "compliance packs" were prepared in various sectors of activity and of three recommendations concerning cookies and other tracers, the keeping of cards by traders and digital safes;
- there took place the three-year review of supervision of compliance with video protection legislation;
- the CNIL's proposals were made regarding changes to be made to the Law of 6 January 1978 relating to data processing, files and liberties (the **"Data Processing and Liberties Law"**).

Press file relating to CNIL's business report in 2013

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