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CONTRACTS – DISTRIBUTION

What can be done to remedy the sudden breaking-off of contractual relations that are only just at their beginning?

On 16 September 2014 the Supreme Civil Court pointed out that the sudden breaking-off of contractual relations in the course of a trial phase when the parties had not as yet undertaken to carry out the project envisaged could result in a tarnished image but was not the cause of the lost opportunity of completing the final project.

Two companies working in the ecological transition innovation sector executed an outline partnership agreement. The agreement was to comprise two phases consisting firstly in a project feasibility study and secondly in a project performance phase.

However, the Head of CDC Climat, one of the companies, learned that the Head of MyCO2, the other company, had done business with a third company accused of fraud.

CDC Climat went back on the agreement before the feasibility study had ended. MyCO2 took legal action against it for the sudden breaking off of commercial relations.

The Appeal Court held that the Head of MyCO2 was unaware of the illegal activities of the fraudulent company and that this situation had in no way affected the project. No contractual breach by MyCO2's had ever been shown to have been committed. It was accordingly decided to compensate it for the tarnished image resulting from the wrongful sudden breaking-off of the agreement and for the loss represented by the lost opportunity of undertaking the project.

The Supreme Civil Court, however, partially set aside this judgment. It approved remedy for tarnished image but not for the lost opportunity of completing the final project, on the grounds of Article 1147 of the Code of Civil Law.

It acknowledged the media vulnerability of the start-up caused by the negative repercussions of the wrongful sudden breaking-off of relations. Conversely, it held that both companies had expressed the shared wish to study the feasibility and viability of the project in good faith and the breaking-off of relations had occurred in the course of the study phase and could not therefore have been the cause of the lost opportunity of undertaking the final project.

Cass. Com. 16 September 2014 n° 12-16.524, CDC Climat versus MyCO2

Application of jurisdictional clauses in international relations

A company incorporated under English law had, pursuant to an agreement containing a jurisdictional clause, acquired all the shares in a French catering company. One of the former shareholders, who had given up his interests in the company, had set up with his son a company called *Saveurs et traditions du bocage*, the business of which was similar to that of the company that had been given up and the company that had acquired the latter then took legal action against them for unfair competition before the Paris Commercial Court, the court designated by the jurisdictional clause featured in the company disposal agreement. The defendants had objected that the court had no jurisdiction to hear the case *ratione loci* and argued that the court having jurisdiction for their legal domicile should enjoy jurisdiction, claiming that the jurisdiction clause was null and void as the agreement was not international in nature since the English company had a branch in France that was entered in the Commercial Register.

The Supreme Civil Court set aside this argument and awarded jurisdiction to the Paris Commercial Court.

The reason for this was that Article 23 of Regulation (EC) no. 44/2001 of 22 December 2000 (Brussels) acknowledges the validity of a jurisdictional clause only if at least one of the parties has its address for service within the territorial limits of a Member State and if the jurisdiction designated is that of a Member State. The fact that the parties were legally domiciled within the territorial limits of different Member States represented a factor of foreign origin strong enough to establish the agreement as international in nature.

Cass. Com. 23 September 2014 n° 12-26.585, FS-P+B+R,A. Versus Compass Group Holdings PLC

Contractual liability and the sudden breaking-off of commercial relations: scope of jurisdiction of special courts

In a judgment handed down on 7 October 2014, the Supreme Civil Court reviewed the jurisdiction of special courts working in the field of disputes concerning the sudden breaking-off of commercial relations. It issued a

reminder that the rules of jurisdiction specifically dedicated to application of Article L. 442-6 of the Commercial Code are not an obstacle to the option enjoyed by courts not specialising in disputes under Article L. 442-6, I, 5, of the Commercial Code to rule on disputes over contractual liability.

Société Européenne de Production de Plein Air (Seppa) supplied and packed various categories of egg for the wholesale trade. Pursuant to an agreement dated 19 October 2007, it concluded with Ovalis a distributor's and supplier's agreement under which it granted to it exclusive rights to sell directly or indirectly to mass distributors certain ranges of eggs and non-exclusive rights to sell to mass distributors other ranges of hen's eggs. On 26 January 2011, Ovalis terminated this agreement, giving the six months' notice provided for by the agreement; complaining in particular that Seppa had significantly reduced the volume of their orders starting in January 2011, Seppa prosecuted it for payment to it of various amounts of money.

Versailles Appeal Court ordered Ovalis to pay damages pursuant to Article 1134 of the Code of Civil Law for breach of the contractual notice period. This was because, despite the absence of any fixed order volume undertaking in the agreement, contractual balance required the parties to continue with the usual order volume even during the notice period even though Seppa was contractually obliged to ensure that it adapted production to the needs of its commercial partner.

Conversely, the Appeal Court dismissed Seppa's claims based principally on the provisions of Article L. 442-6 of the Commercial Code, which had not been put forward in argument at first instance. This was because Article D. 442-3 of the Commercial Code grants jurisdiction to eight commercial courts to hear cases involving application of Article L. 442-6 of the said Code. The Paris Appeal Court, furthermore, enjoys exclusive jurisdiction for appeals against judgments handed down by the said courts. Versailles Appeal Court accordingly held itself as lacking jurisdiction to hear cases grounded in the provisions of Article L. 442-6 of the Commercial Code.

This solution is confirmed by the Supreme Civil Court. This is because the Versailles Appeal Court's want of jurisdiction to decide cases grounded in the provisions of Article L. 442-6 of the Commercial Code does not prevent it from deciding matters involving the application of Article 1134 of the Code of Civil Law.

Cass. Com., 7 October 2014, n° 13-21.086, FS-P+B

Proportional nature of non-competition clause and freedom to exercise the profession of commercial agent

In a judgment given on 23 September 2014, the Commercial Division of the Supreme Civil Court reflected on the validity of a non-competition clause inserted into a commercial agency agreement.

The commercial agent had resigned from the first agency and was taken on by another, a direct competitor, in the same district of Paris.

Article L. 134-14 of the Commercial Code provides that, when a non-competition clause is provided for in a commercial agency agreement, it cannot exceed a maximum period of two years following the term of the agreement and must cover the geographical sector and, as the case may be, the group of persons granted to the commercial agent along with the type of goods or services for which he is a salesman.

The Supreme Civil Court therefore holds null and void any and all non-competition clauses that lack proportion, i.e. that are not justified by legitimate interests to be protected, given the scope of the agreement, or which are insufficiently limited in time and space and encroach excessively upon the freedom of exercise of the profession of the debtor of the obligation.

The clause at issue effectively prevented the commercial agent from working in the field of advertising-space selling and operational marketing transactions and sales furtherance for a period of two years within an undefined territory and without reference to the advertisers covered by this prohibition.

The principle of proportional nature previously applied in employment law was also able to be applied in commercial law in order to assess the validity of non-competition clauses. Conversely, in commercial-law matters the question of a financial counterpart does not always arise.

Cass. Com. 23 September 2014, n° 13-21.285

Nullity of franchising agreement and economic reality

In a judgment handed down on 10 September 2014, the Paris Appeal Court held null and void a franchising agreement in the beauty parlour sector. The franchisee asked for the decision to be retroactive and to restore him back to the situation in which he was prior to execution of the agreement.

The Court criticized the franchisor for not providing a local market information document since the pre-contractual information document (DIP) was three years old, and also for hiding the actual condition of the network (the DIP did not mention franchisees who had left the network in the course of the previous year).

IN this way, according to the Paris Court, "a truthful presentation of the local market is a determinant and essential obligation on the franchisor" and failure to bring such information to the attention of the franchisee is tantamount to cancelling his consent.

Even though the franchisor was ordered to repay money representing the joining fee and dues, advertising costs incurred by the franchisee and the cost of the network software were not refunded. The reason is clearly set out by the Paris Appeal Court: the franchisee did in fact benefit from these services to develop his customer base which he subsequently kept after he left the network.

Furthermore, the franchisee's claim for damages for lost opportunity to make better use of the money put in was dismissed since the business was carried on under the franchise at issue for three years, without financial loss.

Paris Appeal Court, 10 September 2014, RG n° 10/14533

New mechanism for appeals against decisions in the domain of business secrecy

Article R. 464-29 of the Commercial Code provides that the decisions to grant or to refuse disclosure of evidence with a view to business secrecy that are taken by the *Rapporteur Général de l'Autorité de la Concurrence* (Competition Authority Rapporteur) can only be appealed against if so decided by the Authority on the substance of the matter.

In its decision of 10 October 2014, the Council of State required the Prime Minister, within three months, to partially abrogate this provision in order to allow an appeal in the event of refusal or the lifting of business secrecy. The following two scenarios should be distinguished:

- the possibility of an appeal with the decision given on the substance of the matter is sufficient when it is a question of contesting, in the name of the *inter partes* principle, a decision refusing to disclose evidence made secret pursuant to business secrecy;
- on the contrary, as decisions under which the *Rapporteur Général* refuses to protect business secrecy or lifts such secrecy are likely, by themselves, to adversely affect the parties markedly and irreversibly, the Council of State considers that Article R. 464-29 of the Commercial Code infringes the right to an effective judicial appeal. It is specified that these decisions may be detached from proceedings before the Competition Authority and are matters for the Council of State at both first instance and at final appeal level.

Council of State, 10 October 2014, 367807, Syndicat national des fabricants d'isolants en laines minérales manufacturées

Approval to be given in good faith when one dealer succeeds another

In a judgment dated 23 September 2014, the Commercial Division of the Supreme Civil Court approved the trial and appeal court judges who found for damages against a principal who *"in the absence of any imperative need regarding the safeguarding of his commercial interests, rather than refuse his approval to candidates to take over the business, maliciously put them in the position of having to abandon their projects".* A principal had given one of his dealers eighteen months to present to him an *"acceptable"* successor. The principal's bad faith was noted when firstly, for one of the candidates, refused to accept the dealer's Head as a partner in the company to be set up to take over the dealership, then refused to guarantee two of the other candidates, *"who had both the skills and the financial resources enabling them to take over the dealership",* that they would be approved and finally he negotiated the take-over of the dealership with third-party companies even before the term granted had expired.

Supreme Civil Court, Commercial Division, 23 September 2014, 13-18938

CONSUMER LAW

A new administrative order extending the judge's powers in the field of unfair clauses

In connection with actions to strike out unfair clauses on the part of a consumers' association, a judgment given in 1 October 2014 by the First Civil Division of the Supreme Civil Court points out that the Appeal Court is not limited to considering the version of the agreement currently in force at the time of the first-instance judgment. In this way, even though a new version of the standard agreement may have been published at the time when the appeal court judgment is handed down, the judge must rule on the claim for unfair clauses to be struck out when the new agreement includes the clauses at issue that were in the former version.

Supreme Civil Court, First Civil Division, 1 October 2014, 13-21801

Supreme Civil Court, Employment Matters Division, 8 October 2014, 13-14991

NEW TECHNOLOGIES

Declaration to (he CNIL is a prior condition governing use of data on a trial basis

In a judgment dated 8 October 2014, the Employment Matters Division of the Supreme Civil Court declared, with reference to Articles 2 and 22 of the Law of 6 January 1978 and 9 of the Code of Civil Law, that information collected via an automatic personal data processing system prior to its being declared to the National Commission for Data-Processing and Liberties (CNIL) represents illicit evidence.

A female employee had been dismissed for excessive use of the electronic message system for personal purposes. The lower-court judges held that the employer had provided proof of such use via data from an individual monitoring device showing the extent of message system flows. They were criticized as, at the time of the facts of which the employee was accused, the device had not yet been declared to the CNIL and the data from it should have been ruled as inadmissible.

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