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Contracts – Distribution – Consumer Law: Legal Watch

Contracts - Distribution

Consumer Law

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Miscellaneous

CONTRACTS – DISTRIBUTION

Publication of a decree covering consumer information and right to retract

Decree no. 2014-1061 of 17 September 2014 terminates the transposition into domestic law of Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 dealing with consumer's rights.

It details general information that professionals, sellers of goods or service providers must give to consumers on sales premises not only prior to concluding an agreement or finalizing a purchase but also prior to concluding an agreement using a distance communication system or off the premises of a commercial establishment. This information relates to their identity, their business, legal and commercial warranties, the functionalities and interoperability of digital contents and certain contractual conditions.

Additionally, following re-codification by Law no. 2014-344 of 17 March 2014 ("the Hamon Law") legislative provisions relating to agreements covering distance-supplied financial services, the Decree proceeds in the same manner for the regulatory provisions applicable to this type of agreement, particularly as regards pre-contractual information obligations, in the Code of Consumer Law, the Code of Insurance Law, the Code of Monetary and Financial Law and the Code of Social Security Law.

It thus proposes a retraction form, a compulsory document to be contained in distance-concluded agreements or agreements concluded off the premises of a commercial establishment, along with a standard information notice relating to the consumer's exercising of his right to retract.

The main measures also relate to a 30-day maximum delivery date starting on the day on which the agreement is concluded (unless another delivery date is specifically stated by the professional operator in question), a 14-day retraction period for distance-concluded agreements or, in the case of door-to-door selling, a maximum of 14 days to be refunded in the event of cancellation of the agreement for failure to deliver or following the exercising of the right to retract and a ban on the advance ticking of boxes corresponding to chargeable options.

Furthermore, this Decree abrogates the provisions of the Code of Consumer Law setting up a threshold above which the consumer may terminate the agreement binding him to a professional who has not honoured his delivery obligation (Article R. 114-1) and those determining exceptions to the principle of a ban on sales campaigns featuring free gifts and the list of exceptions to the principle of a ban on such operations.

The Decree came into force on 22 September 2014.

Decree no. 2014-1061 of 17 September 2014 concerning pre-contractual and contractual information obligations towards consumers with regard to retraction rights

Stipulation of an arbitration clause removes special courts' right of jurisdiction

A company responsible for designing and developing the distributor brands of a major name and an operator specializing in the processing and marketing of hermetically-packed fish products maintained commercial relations in relation to the manufacture of canned tuna under the brand name "Pêche Océan". A dispute arose and the processor invoked the arbitration clause stipulated in the manufacturing agreement in order, in particular, to obtain, pursuant to Article L. 442-6, I, 5 of the Code of Commerce, compensation for the loss it alleged to have incurred because of the insufficient nature of the notice

period granted to it given that commercial relations had been established in 1993.

The Arbitration Court accepted jurisdiction for the claim relating to the breaking-off of commercial relations and ordered the company responsible for designing and developing the distributor brands to pay 2,500,000 Euros in damages. The company appealed against the award, claiming that the Arbitration Court lacked jurisdiction to decide the issue of the breaking-off of relations (Article 1492, 1 of the Code of Civil Law Procedure).

It maintained that the Arbitration Court wrongly claimed jurisdiction for the claim regarding the breaking-off of commercial relations even though, firstly, application of the mandatory provisions of Article L. 442-6 of the Commercial Code are matters exclusively for the courts designated by Article D. 442-3 of the same Code, secondly, the action is tortuous in nature and not included within the scope of the arbitration clause and, finally, the clause is concerned with termination of the agreement and not the breaking-off of contractual relations.

The Appeal Court dismissed all these arguments. It Held that it was for the arbitrators, under the supervision of the judge concerned with cancellation matters, to apply mandatory rules. The mere circumstance that such provisions govern the substance of the dispute does not exclude recourse to arbitration given that, by their nature, the parties' claims can be the subject of arbitration. Articles L. 442-6 and D. 442-3 imperatively allocate to certain courts and, at appeal, to the Paris court alone, matters dealing with restrictive competitive practices in order to adapt judicial competence and procedures to the technicity of such disputes without in any way reserving them for state courts. The rules of court specialization only therefore apply if the parties refer a matter to a state court without excluding the option of referring it to arbitration pursuant to a valid arbitration clause.

In the case in point the clause provided for recourse to arbitration to decide "*disputes possibly arising in connection with the validity, construal performance or non-performance, interruption or termination hereof*". The Court construed this clause as covering all disputes arising from the agreement in the course of its performance or following its termination. It therefore covers the sudden breaking-off of established relations.

In conclusion, the Court held that application of the clause should not be withheld on the grounds that the action was tortuous in nature.

CA Paris, Pôle 1, ch. 1, 1st July 2014, RG 13/09208, S.A.S.U. SCAMARK versus S.A.S. CONSERVERIES DES CINQ OCEANS

Continuing post-succession commercial relations

A company was successor to another company, whose medical equipment manufacturing business it took over pursuant to an asset-disposal plan decided by a commercial court. Despite this, the principal continued placing orders with the assignee of the concern before informing the latter of his decision to terminate their relations. This decision led the assignee to take out an action for damages for the sudden breaking-off of commercial relations.

In a judgment handed down on 20 May 2014**,** the Supreme Civil Court set aside the appeal against the judgment of the lower-court which had allowed the assignee's application.

The Supreme Civil Court held, firstly, that the asset-disposal plan expressly covered, amongst the items taken over, "the customers" and, secondly, that the assignee, who formed part of the transferred customers, had placed various orders following transfer, so suggesting that the existing commercial relations would continue as before.

Cass. com., 20 May 2014, no. 12-20.313, F-D, SAS Vilgo versus SARL Medilindustry

Law applicable to the sudden breaking-off of established commercial relations in an international dispute

In a judgment given on 20 May 2014, the Commercial Division of the Supreme Civil Court re-stated that the sudden breaking-off of commercial relations can result in an action in tort against its perpetrator and that the requirement for notice is a substantive and not a procedural rule. It deduced from this that the business of the supplier – a Dutch company which had concluded a long-term glass-strands supplier agreement with two French companies – was located in France, the location of the loss resulting from the suddenness of the termination of the supplier

agreement, with the result that the French companies were well-founded in seeking application of French law to govern the consequences of termination.

In the case in point, the Dutch company claimed that the requirement for a reasonable period of written notice was a procedural rule, in order to make the dispute subject to Dutch law as the decision to terminate was taken in the Netherlands.

Cass. com. 20 May 2014, no. 12-26.705

Significant imbalance – a Commercial Court sanctions a clause in the E. Leclerc standard agreement

Galec's outline agreements feature a clause entitled "Parties' statement and undertaking", worded as follows:

"*At the close of their negotiations the parties hereby state that all of the clauses, terms and conditions summarized herein and in the appendices hereto are equitable in nature, both parties having participated in the contractual balance desired by both, without which no agreement would have been reached.*

The parties state that they have negotiated in good faith and then executed the agreement freely and without any subjection on either part.

Either party undertakes to participate in any proceedings or action that may be instituted by a third party to the agreement, with a view to asserting his position hereon as negotiated and concluded."

Considering that Galec hereby subjected or attempted to subject its suppliers to obligations causing significant imbalance between the parties' rights and duties, the Minister for the Economy summoned the distributor before the Paris Commercial Court.

In a judgment dated 20 May 2014, the Court held that the first two indents of the clause were simply statements which did not give rise to any obligations on the parties and could not therefore fall under the practices prohibited by Article L.442-6 I 2 of the Commercial Code. This notwithstanding, it pointed out in this connection that, as this provision was mandatory, the statements in the first two indents of the contractual clause would not prevent suppliers from claiming, when appropriate, significant imbalance.

Conversely, the Court recognized that, through their general and unlimited character, the obligations arising out of the third indent of the clause entitled "Parties' statement and undertaking" in the outline agreement gave rise to significant imbalance between the rights and duties of the parties within the meaning of Article L. 442-6 I 2 of the Commercial Code. The Court considered, in particular, that the simple fact that a party participated in proceedings instituted against the other to assert his position could be against his interests and that, additionally, this obligation was a restraint on the fundamental freedom to go to law.

The Court accordingly stated the third indent to be null and void and ordered Galec not to include this provision in future commercial agreements. Conversely, it refused to levy the civil fine sought by the Minister.

Trib. com. Paris, 20 May 2014, Min. de l'éco. et des fin. Versus Galec , RG 2013070793

Can a penalty clause be considered as constituting significant imbalance?

In a judgment of 11 March 2014, Bordeaux Appeal Court stated that the fact that a penalty clause included in an exclusive purchasing agreement did not necessarily constitute significant imbalance.

Two SARL companies concluded an agreement under which the customer was free to refuse any change whatsoever in the prices envisaged by the supplier. A penalty clause was also included in the agreement, providing for a fixed 20% compensatory one-off payment in the event of non-performance of the agreement or failure to comply with the exclusivity provision.

In the case in point, after noting a non-negotiated price rise, the customer ceased re-stocking from the exclusive supplier four months prior to the end of the agreement and refused to pay the increases, and this instead of placing before the Commercial Court an application for an expert to be appointed, as provided in the agreement. The supplier then sued his customer for payment of the invoices and of the penalty clause compensation; the customer, for his part, found this clause to be inequitable as it limited itself to a failure to perform obligations on the part of the customer alone.

The Appeal Court held that the clause providing for a one-off compensatory payment in the event of failure to perform obligations on the part of the customer alone was not an inequitable clause within the meaning of Article L. 442-6, I,

2 of the Commercial Code. Furthermore, it did not require the customer to pay the new prices on pain, in the breach, of suspending deliveries.

Bordeaux Appeal Court, 11 March 2014, no. 11/04944

A franchisor must impart tried-and-tested expertise to his franchisee

In a judgment dated 19 March 2014, the Paris Appeal Court re-stated the importance of imparting expertise in a franchise agreement.

A franchisor had sought termination of an agreement on the grounds of unpaid dues; for its part, the franchisee had pleaded non-performance, considering that his franchisor had defaulted on his obligations of assistance, information and, especially, transfer of expertise, all of which were necessary for the perennity of the franchise. The Paris Commercial Court had acceded to his application for termination of the agreement and the Appeal Court has recently upheld this decision.

This was because the judges held that "the franchisor must impart expertise likely to ensure the franchisee's commercial success; that, even though the franchisor, an independent trader, is responsible for his own success, the expertise imparted must be profitable under normal operating conditions; that such profitability is, in the normal order of things, guaranteed by testing performed by the franchisor itself and by a certain number of its franchisees which certifies that the expertise is tried-and-tested."

In the case in point, the expertise, which was understood in accordance with the agreement as "control of the network's sourcing logistics in order to facilitate purchasing term competitiveness, is not held to have been imparted since the franchisor did not facilitate any possibility of forecasting the prices of the products distributed. Furthermore, sourcing was limited to 80% for the franchisor, a fact which prevented the franchisee from being competitive. In conclusion, the courts held that the franchisor failed in his duty to assist when the franchisee found itself in an economic impasse.

The Appeal Court thus accepted the plea of non-performance and authorized termination of the franchise agreement, not its nullity, as the transfer of expertise had been incomplete and inexistent. The judges found the parent company and the franchisor subsidiary jointly and severally and exclusively responsible, as the first had interfered in the management of its subsidiary.

Cour d'appel de Paris, 19 March 2014, no. 12/12035

Can a central referring unit be paid commission for services rendered?

In a decision handed down on 17 June 2014, the Paris Commercial Court confirmed the principle whereby referring and centralised management services provided by a central referring unit merit remuneration that is distinct from that paid by its subsidiaries.

In the case in point, the central referring unit of a group notified the breaking-off of relations to one of the suppliers that it had listed up to that time. The supplier claimed that the commission that he paid to the central unit corresponded to nothing really in return and would appear to be in breach of the provisions of Article L.442-6, I, 1 of the Commercial Code. He consequently sought a refund of commission paid out by him.

For its part, the central referring unit pointed out that it was not subject to the provisions of Article L. 442-6, I, 1 of the Commercial Code and specified that services rendered were really and effectively provided.

The judges stated first of all that this article applies to "*any and all commercial partners"* and therefore to central referring units as it is not limited only to relations between suppliers and distributors. Next, it appears that the central referring unit did indeed provide its supplier with services which allowed it to improve its trading results. And although the services were provided for all the subsidiaries, they represented something in return for each one, such as the referral service, price negotiation, placing orders and centralized payment.

The courts recognized the reality and usefulness of the services provided by the central unit, so justifying payment of commission. This decision seems appropriate, even more so as the central unit "*was not a distributor and so could not cover its costs with a trading margin and so its services must necessarily be paid for."*

Tribunal de commerce de Paris, 17 June 2014

Business-secret protection

On 16 July last, the socialist Members of Parliament lodged at the National Assembly a Bill for the protection of business secrets. The aim is to protect companies' strategic capital and their information that is non-patentable but nevertheless essential for their operating and development.

Distinguishing itself from the previous Bill sponsored by Bernard Carayon, the legislation aims to extend such protection via a civil-law and no longer criminal-law approach while at the same time anticipating the transposition into national law of the future Directive on the subject. Creating a Title V "On business secrecy" in the Commercial Code, it proposes a general definition aligned with the non-public or unpublished nature of information, its economic value and "reasonable protective measures" to preserve its secrecy. Its divulgation constitutes fault within the meaning of civil liability. Provisional or precautionary measures and the powers of a judge deciding on the substantive issues are provided for along with methods for remedy. Preservation of secrecy is also organized in connection with disputes and may justify hearings *in camera*. This latter measure is not intended to interfere with the *inter partes* principle but only, when circumstances so ordain, to limit publicity of the proceedings so as not to worsen the consequences of breaching business secrets.

Bill sponsored by Mssrs. Bruno LE ROUX et Jean-Jacques URVOAS and several of their colleagues relating to the protection of business secrets, no. 2139, lodged on 16 July 2014

A new administrative order regarding on-line advertising

Bosch accused Oscaro.com of excessive use of its trademark on the home page of its site and in a radio advertisement. In a judgment handed down on 18 June 2014, the Paris Appeal Court held that the trademark was used in conformity with its essential function of showing the origin of products whose distribution is ensured by the site. Oscaro.com copied the trademark only in reference to an article offered for sale at a reduced price in connection with a promotional exercise Bosch products.

Cour d'Appel de Paris, Pôle 5, ch. 1, 18 June 2014, Robert Bosch Gmbh and France versus Oscaro.com

Ministerial reply regarding payment terms in connection with international sales of goods

The Law Modernising the Economy of 4 August 2008 ("**LME**") prohibits any producer, service provider, wholesaler or importer from agreeing to payment terms exceeding 45 days as from the end of the month or 60 days as from the date of issue of the invoice. The question of the territorial domain of this prohibition is posed when payment terms are a factor of competitiveness. In a ministerial reply published on 1 July 2014, the Minister for Foreign Trade restated that the agreement on international sales of goods of 11 April 1980 makes reference to application of contractual provisions and sets no upper limit on payment terms. Parties may, however, expressly exclude application of this agreement and, in particular, decide to apply the national domestic law of one or other of the parties

Ministerial reply no. 22749 of 1 July 2014

What is the determinant condition causing an operator to incur liability in connection with the playground of a restaurant?

In a judgment dated 10 July 2014, the judges of the First Civil Division of the Supreme Civil Court stated that the essential condition causing an operator to incur liability in connection with a playground in the event of an accident was a failure in his duty to ensure safety.

In the case in point, a young girl aged 7 was hurt when she fell from a structure erected on the playground of a restaurant. The victim's mother took legal action, availing herself of a failure in the duty to ensure safety that the establishment had towards its customers and asked that the victim's negligence should be recognized as grounds for partial exoneration from liability only.

The Supreme Civil Court judges dismissed her claims and exonerated the operator, who complied with his duty to ensure safety. The judges recognized that an additional sign was not necessary as use of the playground was allowed subject to the obligatory supervision of the parents, which had not been the case in the case in point. Furthermore, the case in point established that the victim's fall was due to abnormal wear of the item , despite the fitting of protective devices and adaptations so as to prevent falls.

It should be noted in this matter that the judges of the First Civil Division reversed the *onus probandi* as it was for the restaurant owner to prove that he had not failed in his obligation to ensure safety. The stronger obligation to use

one's best endeavours could be mentioned.

Cass 1ère civ. 10 July 2014 no. 12-29637

Extension of a commercial complex

In a judgment dated 30 April 2014, the Council of State states that it is for the National Commission for Commercial Development (CNAC) to assess the compliance of a commercial operating project subject to authorization in the light of the assessment criteria mentioned in Article L. 752-6 of the Commercial Code.

The Commission can only withhold authorization if the project or its effects compromise achievement of the aims set out in Articles L.752-1, L.750-1 and L.752-6 of the Commercial Code or Article 1 of the Law of 27 December 1973.

In the case in point, the authorization granted by the Departmental Commission for Commercial Development (CDAC) regarding transfer and extension of a commercial complex intended for do-it-yourself and gardening was legal. This was because the authorization did not disregard any of the demanding conditions set out above; the commercial complex complied with the region's building needs as well as environmental and sustainable development norms.

The Council of State judges in this case effected a flexible application of the criteria in Article L.752-6 of the Commercial Code in that they are adapted to the field of activity concerned. The same is true of taking into account the fact that the site was served by public transport.

In conclusion, it is important to note that Article L.122-1-9 of the Code of Urban Development Law was recently revised (arising from the Law for Access to Housing and Renewed Urban Development of 24 March 2014 and Law no. 2014-626 of 18 June 2014 relative to craftwork, trade and very small companies) which is intended to better contain commercial developments through territorial cohesion plans (SCOT).

Conseil d'Etat, 30 April 2014, Bricorama France SAS, no. 362462

CONSUMER LAW

Publication of a decree relating to class actions

Taken in application of Articles L. 423-1 *et seqq.* of the Code of Consumer Law brought in by Article 1 of Law no. 2014-344 of 17 March 2014 relative to consumer affairs, known as the "Hamon Law", this Decree, dated 24 September 2014 aims to organize consumer affair class action proceedings. Article 1 makes reference to the Code of Civil Procedure failing any provision to the contrary and specifies that, at first instance, ordinary procedure applies and, at appeal, the fast-track procedure referred to in Article 905 of the Code of Civil Procedure.

It provides a rule for specific territorial jurisdiction to avoid splitting disputes. The Civil Court enjoying jurisdiction *ratione loci* is that in the locality in which the defendant lives. The Paris Civil Court has jurisdiction when the defendant lives abroad or has neither known home address nor known residence. *(*C. consom., Art. R. 423-2*).*

The Decree specifies means of informing consumers, in ordinary or simplified class actions, as well as the consequences of their membership of the group, in particular on the mandate that will bind them to the association or to consumer defence associations who will represent them for the remainder of the proceedings and right up to civil-law enforcement procedures.

It provides for the operating procedure for the deposit accounts opened at the Caisse des Dépots et Consignations by the associations with a view to compensating wronged consumers.

prévoit les modalités de fonctionnement des comptes de dépôt ouverts à la Caisse des dépôts et consignations par les associations en vue de l'indemnisation des consommateurs lésés.

It establishes a list of regulated professions whose members may help the association upon authorization by the court in the enforcement phase of the judgment regarding liability.

The text comes into force on 1 October 2014.

Décret n° 2014-1081 of 24 September 2014 relatif à l'action de groupe en matière de consommation

A new judgment regarding changes to internet subscriber agreements

Article L 121-84 of the Code of Consumer Law allows the electronic communication operator to change its service terms and conditions without receiving the consumer's agreement provided that it informs him about the changes in explicit terms at least one month before, as also of the option that he has to put an end to the agreement without charge for up to four months after they come into effect.

In a judgment dated 2 July 2014, the First Civil Division of the Supreme Civil Court held that it was insufficient to inform the consumer as follows: *"You will find under heading " My subscription" of you management interface the contractual terms and conditions applicable to your all-in formula as from the date hereof. A document details the changes made."* It was held that this way of informing does not allow the subscriber – unless he searches on his management interface – to understand the changes which will be made to his original agreement and the option that he has of refusing them by putting an end to the contractual relations within four months.

Cour de Cassation, 1st Chambre Civile, 2 July 2014, 13-18062

MISCELLANEOUS

A new law to fight unfair employment competition

Law 2014-790 of 10 July 2014 strengthens supervision of and sanctions on companies which have unreasonably excessive recourse to posted workers. It increases the liability and obligations of prime contractors, principals and companies that post salaried employees, in particular by requiring vigilance over employees' accommodation and working conditions.

Loi 2014-790 du 10 July 2014

New electronic identification regulations

Regulation (EU) 910/2014 of 23 July 2014 on electronic identification and services offering confidence regarding electronic transactions within the internal market and repealing Directive 1999/93/EC, is aimed at mutual recognition of electronic identification.

It creates, in particular, a legal framework for the "confidence services", which are the electronic services dealing with electronic signatures, electronic seals, electronic date and time stamps, electronic documents, electronic registered communication services and internet site authentication certificate services.

Regulation (EU) 910/2014 du 23 July 2014

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