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Contracts – Distribution – Consumer Law: Legal Watch

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CONTRACTS - DISTRIBUTION

Scope of a letter of intent

The holding companies of two groups of companies in the works sector had come together to set up an industrial demolition hub grouping together the activities of certain of each group's companies and operated by a shared subsidiary. Their representatives had executed a "letter of intent" containing an evaluation of their respective asset contributions. Article 1 of the letter, entitled "scope of this letter of intent", specified that the terms and conditions of the letter constituted "a firm undertaking for its signatories and had binding effect" and that its signatories undertook "to negotiate in good faith the terms and conditions of the operation that had not as yet been defined", which could not "call into question the principles defined by this letter". One month after execution of the letter of intent the first holding company interrupted the operation after learning that the financial situation of one of the companies whose activity had been contributed as an asset by the other group was irremediably compromised. As the second holding company had invoked its liability for failure to perform the agreement, it argued that the letter of intent was simply an agreement to engage in preliminary talks and merely bound the signatories to negotiate in good faith with a view to carrying out the operation but not to carry it out on any terms and conditions whatsoever. It considered that it was well-founded in interrupting the preliminary talks and that it had not incurred liability.

In a judgment handed down on 8 April 2014, the Versailles Appeal Court held that the unilateral breaking-off of the operation was tortious given that the letter of intent at issue contained no reservation or condition and reflected the agreement reached between the Parties and did not represent a mere agreement to engage in preliminary talks but an unequivocal undertaking to carry out the operation. It held that the letter of intent was the outcome of a long period of discussion and that the parties had reached an agreement on the essential and determinant conditions governing the operation (the nature and value of the parties' respective assets contributed, the percentages of the company's share capital allocated to the parties, the legal form of the shared company, organization of its governance, the name of its chairman, the list of decisions requiring the supervisory board's authorization, the terms and conditions governing the crediting of partners' current accounts, etc.).

The Appeal Court consequently ordered the first holding company to pay the second 400,000 Euros for having lost the opportunity of achieving the profits expected from the operation.

CA Versailles 8 April 2014, no. 13/03008, 12th Chamber, Senechal in such capacity versus SA d'explosifs et de produits chimiques

A new decision concerning leasing and significant imbalance

In a judgment handed down on 20 March 2014, the Lyon Appeal Court held that the penalty clause of a leasing agreement is not excessive and cannot be made more moderate if it provides that, in the event of termination for default, *"the lessee undertakes in particular to pay to the lessor forthwith the total sum due under the agreement (rents, subscriptions, late-payment penalties, etc.) and compensation for termination that is equal to the total amount, excluding VAT, of the rents not yet fallen due plus 10%;".*

Furthermore, it reminded the parties that the party wishing to avail itself of the prohibition on subjecting a commercial partner to significant imbalance that is provided for in Article L442-6 I 2 of the Commercial Code must provide proof of the "significant" nature of the imbalance and cannot limit itself to *"vaguely criticizing certain clauses in the agreement without establishing contractual unfairness."*

CA Lyon, 3rd Chamber, 20 March 2014, 12-00427, A.T. versus SAS LOCAM

Seller's obligation to warn: providing the instructions for use is not always enough...

In a judgment dated 18 June 2014 the Supreme Civil Court issued a reminder that providing the buyer with the instructions for use is not enough to demonstrate that the selling company has satisfied its obligation to warn.

In the case in point, a company sold an "insert" chimney piece to an individual who proceeded to install it himself. Five years after installation, a fire broke out inside the insert and partially destroyed the individual's building. It was established that the cause of the fire was incorrect installation of the insert in question. The seller and his insurer were ordered to pay damages to the individual for the loss caused. They appealed on the grounds that the seller is not obliged to inform and warn the purchaser with regard to the procedure for installation of and the dangers presented by the goods bought when this procedure and these dangers are clearly stated in the instructions for use. And, it is true, the instructions for use enclosed with the item at issue did indeed contain a clear warning as to compliance with standards currently in force and installation of the item by a qualified professional.

But the Supreme Civil Court nevertheless dismissed the appeal and recognized that the seller was liable on the basis of Article 1147 of the Civil Code, which specifies that, in the case of a dangerous piece of apparatus, mere provision of the instructions for use is not enough to demonstrate that the seller has properly satisfied its obligation to warn about compliance with the technical rules regarding installation of the insert and the need to call in a professional or a qualified person.

Cour de Cassation, Civil Division, Civil Chamber 1, 18 June 2014, 13-16.585, Published in the Bulletin

Liability for defective products: is a parallel importer a producer?

A judgment of the Supreme Civil Court of 4 June 2014 specifies the definition of parallel importer in a Member State. Let us recall that, in the health field, a parallel importer has a simplified licence which allows him to import into France on a parallel basis products whose circulation has already been authorized within the initial Member State and this outside the manufacturer's distribution network. The importer may thus repackage the product under a different brand and sell it at a price lower than the internal market price.

In the case in point, a company holding a simplified licence allowing it to engage in the parallel importation into France of a product of another brand had sold a phyto-pharmaceutical product to two other companies. The product was used on parcels of land growing potatoes and destroyed the crops. Following the losses, the growers were compensated and the seller's insurer took legal action against the wholesaler and his insurer, who sued the successive suppliers, citing the provisions of Articles 1386-1 *et seqq.* Of the Civil Code.

The parallel importer disputed being described as a producer. He explained that the status of producer was related to importation of products into Europe and not to intra-community exchanges and reminded the court that he did not market any product coming from a third State and so could not be answer for the assimilation provided for in Article 1386-6,2 under which the status of producer is conferred upon any person acting on a professional basis who imports a product into the European Community with a view to selling, renting, with or without a sale promise, or any other form of distribution. Furthermore, the legal text under which he appeared as a producer issued from Decree no. 2001-317 of 4th April 2001, with the result that he had not opted to put himself forward as a producer, thus excluding being so considered pursuant to Article 1386-6,1, which for purposes of the application of the defective products liability regime, provides that any person acting on a professional basis who puts himself forward as a producer by placing on a product his name, his brand or another distinctive sign, without making any distinction with regard to the professional's activity, is considered to be a producer.

This argumentation did not convince the Supreme Civil Court, which held that the producer is the person who places on a product his name, brand or other distinctive sign, regardless whether the product packaging is optional or required by the legislation of the Member State in which the product is marketed. Consequently, it assimilates to the producer the importer of a product holding a simplified product licence which authorizes him to proceed with parallel importation of it into France, marketed under another name, if the labelling presents him as such.

Cour de Cassation, Civil Division, Civil Chamber 1, 4 June 2014, 13-13.548, Published in the Bulletin

New provisions regarding direct home selling of books

The law relating to remote selling of books was published on 9 July 2014. This law allows, for home delivery, application of a discount of 5% of the selling price of the books off delivery costs but excludes free delivery. For this

it completes the fourth indent of Article 1 of Law no. 81-766 of 10 August 1981 relating to book prices.

In fact it should be remembered that, up until the present time, the situation was vague regarding delivery costs and for this reason customers who ordered from internet platforms could enjoy the advantage of the legal discount of 5% and of free delivery.

Henceforth, the Government is authorized to amend by administrative order the Code of Intellectual Property in order to transpose the outline agreement of 21 March 2013 between the *Conseil Permanent des Ecrivains* and the *Syndicat National de l'Edition* regarding the publishing agreement in the book sector in the digital age. It will thus be possible for it, amongst other things, to extend and adapt the general provisions relating to the publishing agreement to digital publishing. It will also be able, for instance, to specify the particular rules applicable to publishing a book in print and in digital form.

A ratifying Bill will be put before parliament within six months of publication of the administrative order.

Law no. 2014-779 of 8 July 2014 limiting remote selling terms and conditions for books and empowering the Government to amend by administrative order the provisions of the Code of Intellectual Property relating to the publishing agreement (1)

How should the advertising posters and signs reform be applied?

Posters and signs regulations have been the subject of deep-rooted reform, the main part of which came into force on 1st July 2012, with the aim of improving everyday life while at the same time limiting and restricting advertising hoardings, a new sharing-out of powers and simplification of procedures between the local communities and the State and development of new advertising media.

Since then, the Ministry of Ecology, Sustainable Development and Energy has drafted instructions relating to the national regulation of advertisements, signs and pre-signs. These instructions specify how Decree no. 2012-118 of 30 January 2012 is to be applied and provides details on changes brought in by the new regulations. To the instructions is appended a user's manual as well as a technical memorandum to explain the new regulations on outside advertising.

The technical memorandum details and illustrates major changes introduced by the new regulations and for this it takes great care to give clear definitions of the terms used and explain the various notions and recommendations already introduced by the Decree of 30 January 2012. The manual contains, amongst other things, drawings in order to better explain requirements relating to the size and placing of, for instance, posters. It contains the forms necessary for formalities such as declaration or application for permission to install an advertising device. The manual also contains summarising tables and a table showing concordances between the old and new texts.

The memorandum and manual are very useful for local community departments and to concerns and are available free-of-charge on the internet site of the Ministry of Ecology, Sustainable Development and Energy.

Government instructions of 25 March 2014 relating to the national regulation of advertisements, signs and pre-signs (put on-line on 1 April 2014

Manual on regulation of outside advertising

Gradual generalization of electronic billing

Administrative Order no. 2014-697 of 26 June 2014 relating to the development of electronic billing creates an obligation for entitled parties and sub-contractors enjoying the benefit of direct payment for State contract work, local communities and their respective public institutions, to transmit their bills electronically. This provision furthermore widens the obligation on the State to accept electronic bills to include local communities and all public institutions (Article 1).

A timetable for dematerialising bills has been prepared on the basis of the size of concerns to allow suppliers and administrations to adapt to their new obligation. Thus, the electronic billing obligation will apply:

- from 1st January 2017, to major concerns and public suppliers;

- from 1st January 2018, to intermediate-sized concerns;

- from 1st January 2019, to small and medium-sized concerns;

- from 1st January 2020, to micro-concerns.

As for public entities, these must be in a position to accept

dematerialized billing as from 1st January 2017.

Transmission will be effected exclusively via a mutualised tool made available by the State and known as "billing gate". A Council of State decree will explain how this administrative order is to be applied.

Administrative Order no. 2014-697 of 26 June 2014, OJ of 27 June

CONSUMER LAW

Publication of Decree relating to introduction of qualification "home-made"

Decree no. 2014-797 of 11 July 2014 issued to enable application of Article 7 of the Hamon Law relating to consumer affairs relates to the qualification "home-made" in commercial eating establishments or take-away food selling outlets. It aims to define the qualification "home-made " and the terms and conditions governing its use.

New Article D. 121-13-1 of the Code of Consumer Law defines an unprocessed product as a *"foodstuff that has undergone no substantial change, including through heating, steeping, incorporation or a combination of these processes"* and lists products that can be incorporated into a "home-made" dish.

Article D. 121-13-2 defines a dish prepared on-site as a dish *"prepared on the premises of the establishment in which it is offered for sale or consumption".* It specifies further that *"a 'home-made' dish may be prepared by a professional in a place different from the place of sale or of consumption only:*

- in the context of the activity of a caterer who organises receptions; and

- in the context of a non-sedentary commercial activity, in particular on fairs, markets and at open-air and outdoor sales functions".

In fact, new Article D. 121-13-3 relates to enhancing the qualification "home-made". "Home-made" dishes will stand out on bills of fare, menus and other information media via a logo defined by an administrative order published on 11 July 2014.

The Decree came into force on 15 July 2014.

Decree no. 2014-797, 11 July 2014, OJ of 13 July

"Home-made" qualification user guide

Abolition of "floating sales"

As from 1st January 2015, "floating sales" sales periods will be abolished and traditional sales periods lengthened.

Introduced by the Law for Modernization of the Economy of 4 August 2008, this measure allowed traders to hold sales for a period of a fortnight at freely-chosen dates (Article L. 310-3, I, indent 3 of the Commercial Code). Its purpose was to increase consumers' purchasing power and bring about lower prices. Six years after its introduction the measure has not enjoyed the success that was expected: multiplication of sales reduction periods (fixed-date and floating sales, promotions, product clearance through liquidation sales) caused consumers to lose their references regarding the proper price of a product; traders are not in favour of it as it gives rise to an increase in their operating costs (extra window dressing and labelling of products with new prices).

So as not to penalize consumers, the two traditional sales periods will each be lengthened by one week, increasing from five to six weeks.

Law no. 2014-626 of 18 June 2014 relating to arts and crafts, commerce and very small concerns (Articles 60 and 62), OJ of 19 June 2014

Inadmissibility of action to abolish unfair clauses

In a judgment given on 4 June 2014, the Supreme Civil Court ruled on preventative action to abolish unfair or illicit clauses referred to in Article L. 421-6 of the Code of Consumer Law in which empowered consumers' associations can engage.

In the case in point, a consumers' association had, pursuant to Article L. 421-6 of the Code of Consumer Law, taken preventative action to abolish illicit or unfair clauses contained in the co-ownership manager's contract that an estate agent proposed to co-owners' associations.

The Grenoble Appeal Court had considered this action admissible. In its view, whenever a non-professional is considered comparable to a consumer by Article L. 132-1 of the Code of Consumer Law relating to unfair clauses, the empowered associations could, pursuant to Article L. 142-6 of the same Code, take preventative action to abolish clauses contained in a contract proposed by a professional to a non-professional, who may be a corporate entity such as a co-owners' association.

This decision was censured by the Supreme Civil Court. Action to abolish illicit or unfair clauses by consumers' associations is limited to contracts intended for or proposed to consumers alone.

Cass. 1st Civil 4 June 2014 no. 13-13.779, UFC versus Foncia Alpes-Dauphiné

Two new clauses held to be illicit in consumer credit law

In a judgment dated 30 April 2014, the First Civil Chamber of the Supreme Civil Court held two clauses to be illicit with regard to consumer credit legislation:

- the clause which imposes two months' notice when repaying a loan early is illicit as the Code of Consumer Law offers the borrower the opportunity of early repayment of a loan at all times and without compensation; and

- a clause allowing the lender to demand early repayment except in the case of borrower's default is illicit in that it does not satisfy the regulations regarding the obligatory preliminary offer.

Cour de Cassation, 1st Civil Division, 30 April 2014, 13-13641

Report on mediation and the out-of-court settlement of consumer disputes

A report has recently been issued by the working party formed by the General Directorate for Competition, Consumer Affairs and the Elimination of Fraud ("DGCCRF"), the purpose of which was not only to paint a picture of mediation in France and to heighten the awareness of the professional sectors concerned but also to find a certain number of possible orientations with regard to the requirements of Directive 2013/11/EU of 21 May 2013 relating to the extrajudicial settlement of disputes.

The working party accompanied its ideas with thirteen recommendations, amongst which we will consider in particular the widening of existing mediation solutions to all sectors, free-of-charge for consumers, better information for consumers about the existence of mediation, the introduction of company mediators and the absence of any minimum value of a dispute to be able to take it to mediation.

Report on mediation and the out-of-court settlement of consumer disputes

MISCELLANEOUS

Reform of commercial leases via the "Pinel Law"

The Law of 18 June 2014 relating to Arts and Crafts, Commerce and Very Small Concerns, the "Pinel Law", which is tending to promote local commerce, also changes certain provisions in the commercial leases statute in order to strengthen the context and improve the rental situation of companies.

The main measures are the following:

- Amount of rent: as from 1st September 2014, in the event of rent-limitation abolition, commercial rent increases is limited to 10% per annum in order to protect tenant traders from large increases in rent.

- Inventory of fixtures and fittings: henceforth, an inventory on entry into and on leaving the premises must be drawn up by the lessor, a measure that was optional up to now.

- Breakdown of charges: as from 1st September 2014, a precise breakdown of charges, taxes, duties and dues payable by the lessee must be included in the lease agreement.

- Right of pre-emption: as from 1st December 2014, in the event of the sale of commercial premises, the lessor shall grant the lessee right of first refusal to buy the commerce.

- Term of short-term lease: as from 1st September 2014, non-standard lease, known as "short-term lease", rights have been extended. A new trader can thus execute a non-standard 3-year lease instead of a 2-year one in order to test his business activity without committing himself over a longer period.

The short-term lease or non-standard lease allows a tenant to lease the premises before the term of the lease, departing from the terms of the class commercial lease under which the tenant can only give notice after 3, 6 or 9 years. Its maximum term is increased from 2 to 3 years.

- Notice via registered letter authorized: the law now authorizes parties to give notice by registered letter with proof of delivery advice whereas previously only notice served by extra-judicial deed was valid. A renewal request must in all cases served by extra-judicial deed.

Law no. 2014-626 of 18 June 2014 relating to Arts and Crafts, Commerce and Very Small Concerns (1)

An inter-ministerial report on the fight against computer crime

An inter-ministerial report on the fight against computer crime has recently been published in order to better prevent and punish these offences to strengthen protection of internet users. The working party that drafted the report proposes in it to define computer crime as *"the subject bringing together all criminal offences attempted or committed against or using a system of information and communication, principally internet".*

The report formulates 55 recommendations aiming to achieve a response eliminating the new methods used by computer delinquents while complying with requirements connected with the protection of basic liberties. The following is recommended, in particular:

- the setting-up of an inter-ministerial delegation to fight computer crime that is placed directly under the authority of the Prime Minister;

- greater involvement of internet users in order to identify the risks;

- better training of investigators and judges;

- centralization of processing of mass disputes represented by deceitful practices and bank card fraud and with specialization on the part of the Paris court as also specialized inter-regional courts for the most serious cases;

- the setting up of a mediation body between internet users and internet providers.

Report on computer crime issued 30 June 2014

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