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Contracts – Distribution – Consumer Law: Legal Watch

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Your contacts at Clifford Chance

Commercial Contracts:

Dessislava Savova:
01.44.05.54.83
Dessislava.savova@cliffordchance.com

Olivier Gaillard:
01.44.05.52.97
Olivier.gaillard@cliffordchance.com

Simonetta Giordano:
01.44.05.52.99
Simonetta.giordano@cliffordchance.com

Litigation:

Diego de Lammerville:
01 44 05 24 48
Diego.deLammerville@cliffordchance.com

Thibaud d'Alès: 0144.05.53.62
Thibaud.dales@cliffordchance.com

CONTRACTS – DISTRIBUTION

Directive on indemnification related to anti-competitive practices

A European Union directive was adopted on 26 November 2014 relating to certain rules governing actions for damages for offences against Competition Law provisions. The purpose is to harmonize national laws with respect to the principle of remedy as such as well as with regard to procedural rules.

The Directive establishes the principle of full and total reparation for loss, consisting in remedying losses suffered and lost earnings as well as in providing for the payment of interest. Potential losses caused by the injured party to his own customers are not taken into account.

The Directive also harmonizes the rules dealing with providing proof of the offence and of the loss as well as with the production of confidential documents. In particular, it establishes simple presumption of the existence of loss in the event of offences committed in a context of collusional working.

A time bar of five year as from discovery of the offence and of the identity of its perpetrator is provided for. This five-year term is suspended and re-starts at least one year following the Member State's competition authority's decision to prosecute in the event of its initiating proceedings. Similarly, the time bar is suspended for as long as the offending concern and the injured party are engaged in proceedings to resolve their differences by joint agreement.

Member States must transpose the provisions of this Directive into national law by 27 December 2016 at the latest.

Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014

Presentation of Growth and Business Activity Bill

The Bill "for Growth and Business Activity", known as "the Macron Bill", was adopted by the Council of Ministers on 10 December 2014.

Its provisions affect various sectors and change, in particular, the legislation relating to commercial urban planning, employment law and competition law. Of particular note are:

- the option for the Competition Authority to be consulted on urban planning documents (the PLU, SCOT and PLUI) in the course of their preparation in order to ensure that they do not contain provisions infringing total freedom of competition in the distributive trades sector;
- the option for the Competition Authority, under the structural injunction arrangements provided for in Article L. 752-26 of the Commercial Code, to undertake close examination of operators running one or more retail trading outlets holding market shares of more than 50% and raising competition concerns on account of high prices or margins as compared with the averages usually noted in the economic sector in question; and
- new exceptions to the Sunday-working and evening-work prohibitions via, in particular, the setting-up of geographical zones. These will be trading zones characterized by a particularly marked influx of tourists, international tourist zones as delimited by Ministers with responsibility for employment, tourism and commerce. An exception is also provided for retail-sale concerns located in certain stations and the option is extended to mayors to allow working on twelve and no longer five Sundays in retail-trading establishments in which Sunday in particular is not a working day.

Examination of the Bill by the Parliament will commence on 12 January 2015.

Growth and Business Activity Bill

Established commercial relations imply direct trading between parties

In the case in point, a printing company, UCI recruited in 1969 a typographer to publish the catalogue of its sole customer, Lapeyre.

In 1997, Lapeyre signed an agreement with UCI expressly stating that it had been concluded *intuitu personae* of the typographer, who had since become the director of UCI, and that an *intuitu personae* provision subordinated the agreement to the presence of the typographer. Mundocom, a subsidiary of the Publicis Group, subsequently bought UCI and took on the typographer as deputy general manager; the *intuitu personae* clause was thus met and relations between Lapeyre and Mundocom continued into the 2000s.

In 2005, Lapeyre launched an invitation to tender and chose Come Back Graphic Associés (“CBG”) to produce its catalogues for a term of

three years. On 16 July 2007, CBG concluded a technical assistance agreement with JCLD Print (“JCLD”), set up by the typographer, who had just left Mundocom. The services provided related exclusively to monitoring manufacture of the Lapeyre catalogues and the agreement specified that Lapeyre had asked CBG to use the services of their former typographer and that it would expire at the same time as the agreement concluded with Lapeyre. In 2009, Lapeyre gave CBG notice that it would put an end to their relations at the end of the then current year.

The typographer claimed that he had been working on the Lapeyre catalogue for 40 years and prosecuted Lapeyre for the sudden breaking-off of established commercial relations.

On 26 April 2013, the Paris Appeal Court recognized the sudden breaking-off of commercial relations, pointing out that Article L. 442-6,I, 5 referred only to *"an economic relation [...and] did not require a direct link to exist"* between Lapeyre and the typographer. The Court stated that Article L. 442-6,I,5 assumed only *"the existence of a flow of business"* such as the one existing between the typographer, who benefitted *"from renewed confidence in it on the part of Lapeyre"* regardless of the posts held throughout commercial relations with Lapeyre.

The Supreme Civil Court censured the judgment on the grounds that *"established commercial relations imply direct commercial relations between the parties"*. This detail is very important as, even though the typographer's presence was a requirement, *"direct"* relations did not exist with the typographer himself.

It should therefore be noted that established relations implies direct relations between the contracting parties.

Supreme Civil Court, Commercial Division, 7 October 2014, 13-20.390, Unpublished

Can the situation of dependency between two contracting parties affect the amount of notice to be given in the event of the breaking-off of relations?

Oxypharm, a pharmaceutical distributor, supplies pharmacists with medical equipment and has distributed for 25 years products manufactured by Laboratoires Escarius ("Escarius") which are billed to it by Laboratoires Polymédic ("Polymédic"), both of which are owned by the same holding company.

Oxypharm put an end to its commercial relations with Polymédic without notice before prolonging it by 10 months. Polymédic and Escarius prosecuted Oxypharm for the sudden breaking-off of established commercial relations.

The Paris Appeal Court found that, because of the term and intensity of their commercial relations, the period of notice to be given by the two companies to each other was 24 months.

Furthermore, it recognized the economic dependency between Oxypharm and Polymédic, which was in charge of billing deliveries made by Escarius. Conversely, it did not recognize any economic dependency between Oxypharm and Escarius on the grounds that the latter realized only 20% of its business with Oxypharm.

The Supreme Civil Court held that the Appeal Court's judgment was devoid of legal basis as it did not include any information pointing to the necessity of having the same notice period for each company even though they *"were not is the same state of economic dependency"* upon Oxypharm.

The Supreme Civil Court found that *"a satisfactory notice period is calculated taking into account the term of economic relations and of other circumstances, such as the state of economic dependency of the discarded partner at the time of giving notice of breaking off relations"*.

Consequently, each relationship should be considered separately as they are all very different. The length of the notice period for each should also therefore be motivated and not necessarily be the same just because the length of their relationship is.

In this way, Polymédic's dependency should not affect the notice period granted to Escarius and automatically give rise to the same notice period.

Supreme Civil Court, Commercial Division, 7 October 2014, 13-19.692, Unpublished

A new administrative order regarding the setting of selling prices

In a judgment handed down on 4 November 2014, the Commercial Division of the Supreme Civil Court upheld the lower-courts which placed on record serious and repeated shortcomings on the part of a supplier of snail meat in the performance of an exclusive supplier's agreement allowing the supplier to set the selling price unilaterally in return for a price change each calendar year of + or –

3%. As the agreement stipulated that the supplier was to use his best endeavours to determine prices so as to allow his contracting partner to face competition, it was deduced that this supplier had made unfair use of his right to set prices unilaterally, given that he sold to him at an average price 25% dearer than to his other customers, that his mean gross margin rate was 29% when it was 10% on sales to his other customers and that had granted to the injured party a marked reduction in selling price on renewal of the agreement, so demonstrating the excessive nature of the prices usually offered to him.

Supreme Civil Court, Commercial Division, 4 November 2014, 11-14026 Société Française de Gastronomie and Camargo versus Larzul

Defective products: joint liability shared by the component producer and the finished-product manufacturer

The finished-product manufacturer and the component producer are jointly and severally liable towards the injured party but, in the relations between them, determination of their respective contributions to the debt is not covered by the scope of Directive 85/374/EEC of 25 July 1985 and, in particular, of the provisions of Article 1386-11 of Code of Civil Law which transposes into domestic law Article 7 of the same Directive.

In accordance with Article 5 of Directive 85/374/EEC of 25 July 1985, when a number of persons are liable for the same loss, liability is joint and several without prejudice to provisions of domestic law relating to the right of appeal. In internal law, contributions to the debt, in the absence of fault, are the same for all the joint debtors.

In order to decide that the component producer was obliged to hold the finished-product manufacturer 100% harmless against judgments pronounced against them, the judgment criticized held that the exclusive cause of damage was the unexplained breaking of the ceramic femoral head sub-component of the prosthesis.

In so ruling, the Appeal Court breached Article 5 of Directive 85/374/EEC of 25 July 1985 and Article 1386-8 of the Code of Civil Law.

Supreme Civil Court, 1st Civil Division, 26 November 2014, 13-18.819

Intra-European conflict of jurisdiction relating to a dealer's agreement

In a judgment dated 19 November 2014, the first Civil Division of the Supreme Civil Court aligned its interpretation of Article 5-1 of Regulation 44/2001 of 22 December 2000, along with its definition of a dealer's agreement, with those adopted by the EUCJ. Having had referred to it a dispute between a dealer in France and its fellow German dealers, the Court was to rule on the claim of lack of jurisdiction submitted by the defending dealers pursuant to Article 5-1, a) of the Brussels I Regulation. Article 2 of this text provides, in theory, that in European cross-border disputes jurisdiction shall be granted to the Member State of the Union in which the defendant is legally domiciled. A jurisdiction option is, however, provided in the case of contractual matters. In accordance with Article 5-1 a), the plaintiff may also refer the matter to the court enjoying jurisdiction for the place in which the obligation at issue in the claim has or should be performed. In the case of a agreement for the sale of goods or for the provision of services, a specific rule is set forth in Article 5-1,b): *"except as otherwise provided, the place of performance of the obligation at issue in the claim shall be: in the case of sales of goods, the place in a Member State to which, pursuant to the contract, the goods were or should have been delivered; and, in the case of the provision of services, the place in a Member State in which the services were or should have been supplied"*.

Pursuant to the case law of the European Union Court of Justice (EUCJ, 19 December 2013, Matter c-9/12, Corman-Collins), the jurisdictional rule set forth in Article 5-1, b), second hyphenated paragraph of the Brussels I Regulation, relating to disputes connected with service provision agreements, is applicable to court proceedings through which the plaintiff, established in a Member State, asserts against a defendant established in another Member State rights arising from a dealer's agreement, implying that the agreement binding the parties contains particular conditions relating to distribution by the dealer chosen by the principal in accordance with a selection process of the goods sold by the latter. Pursuant to this case law, the characteristic service provided by the dealer consists in ensuring distribution of the principal's products and thereby participating in the development of their distribution.

Basing itself on this case law, the Supreme Civil Court decided that the rights claimed by the French company arose from a distributor's agreement concluded following a selection process and including particular conditions relating to distribution on

French territory of German-company "Brenneke" brand products, meaning that the jurisdictional rule set forth in Article 5-1, b), second hyphenated paragraph of the Brussels I Regulation must apply, so excluding application of the rule provided for in Article 5-1, a) of the same Regulations, put forward in argument by the German companies, and justify the jurisdiction of the French court to which the matter had been referred insofar as it was the court having jurisdiction for the place of performance of the distributor's characteristic service.

Supreme Civil Court, 1st Civil Division, 19 November 2014, 13-13405

CONSUMER LAW

The Unfair Clauses Commission notes unfair clauses in social-network agreements

On 3 December 2014, the Unfair Clauses Commission ("UCC") published a new guideline relating to contracts offered by social network service providers.

The UCC noted 46 unfair clauses in social network providers and issued its guidelines in this connection. The UCC strives to avoid any imbalance in agreements between professionals and consumers. This guideline thus contributes substantially to regulating relations between professionals and consumers and guides the *"the internet giants"* in drafting clauses.

One of the main contributions of this guideline concerns, for instance, the analysis carried out of the free nature of the social networking service that it unequivocally does away with. It pointed out the unfair character of clauses that state *"that social networking services are free"* whereas this is not at all the case.

Guidelines regarding personal data and their storage should also be noted.

Guideline no. 2014-02 relating to contracts offered by social network providers

NEW TECHNOLOGIES

No exemption for home video surveillance taking in the public domain

In a judgment handed down on 11 December 2014, the European Union Court of Justice ("EUCJ") pointed out that the exemption provided by Directive 95/46/EC regarding personal data in connection with data processing carried out by an individual in exercising exclusively personal or domestic activities should be interpreted strictly. Thus, home video surveillance that takes in the public domain cannot be considered as an exclusively personal or domestic activity and must comply with personal-data protection rules.

EUCJ, 4th Division, 11 December 2014, C-212/13 Frantisek Rynes/Urad pro ochranu osobnich udaju

Freedom of appraisal of electronic written text as factual proof

Pursuant to the provisions of Article 1316-1 of the Code of Civil Law *"computerized text is recognized as evidence in the same way as paper-based text provided that the person from whom it comes can be duly identified and that it is produced and stored under conditions likely to guarantee its continued existence in its entirety"*.

In a judgment handed down on 27 November 2014, the Supreme Civil Court held that an e-mail produced to provide proof of a fact need not meet the requirements of Article 1316-1 of the Code of Civil Law and that the existence of a fact may be appraised using evidence of any kind that the trial and appeal courts may examine at their unfettered discretion.

In the case in point, Mercury had been inspected by URSSAF, the French social security contributions encashment body, which had subsequently sent to it by registered letter formal notice to pay contributions and late-payment surcharges. URSSAF had then served final notice to pay, to which the company registered its opposition on the grounds that the final notice to pay had not been preceded by prior formal notice to pay. Mercury argued that the person who had signed the proof of delivery advice was unknown. It especially found fault with the appeal court for not having checked that the computerized copy submitted in evidence by URSSAF was a true and durable copy of the original and that its signatory had been properly identified. The Paris appeal court had admitted this exhibit on the grounds that it correctly showed the nature, the total amount of the contributions payable and the periods to which it referred, so allowing the debtor to know the nature, cause and extent of his debt.

Supreme Civil Court, 2nd Civil Division, 27 November 2014, no. 27.797, URSSAF Paris/Mercury Services

Editorial team:

Nassera Korichi-El Fedil

Alexis Ridray

Sophie Varisli

Clifford Chance, 9 Place Vendôme, CS 50018, 75038 Paris Cedex 01, France