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Your contacts at Clifford Chance

Commercial Agreements:

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

Reform of Law of Contract: pilot draft subject to consultation

Article 8 of Law no. 2015-177 relating to the modernization and simplification of the law and procedures in the fields of justice and of domestic affairs, which was finally adopted and published on 17 February 2015, empowers the Government to proceed with the reform of the Law of Contract, of the general schedule and of the proof of obligations.

The Minister of Justice, Christiane Taubira, set out on 25 February the pilot draft of an order seeking to implement this long-awaited and launched far-reaching consultation on the legislation.

The draft reform has three main aims:

- making the law of obligations easier to read and to comprehend by modernizing its style and by introducing solutions that have largely been recognized by the case law while at the same time preserving the consensus principle;
- strengthening protection of the weaker party by, in particular, insisting on good faith at all stages in the life of the agreement (Draft order, Article 1111), the introduction of lack of consent related to economic violence (Draft order, Article 1142) or, again, the option of renegotiating an agreement when an unforeseeable change of circumstances makes performance thereof excessively costly (Draft order, Article 1196);
- making the law more attractive with a view to favouring the legal attraction of French law with the idea that predictable law is a factor of speed. Suggestions have thus been made for doing away with debt-assignment formalities undertaken to make them enforceable against third parties (by making it possible via registered letter with acknowledgement of receipt advice instead of via process-server's writ) or the introduction of transfer of agreement (Draft order, Article 1340 *et seqq.*), particularly in connection with company merger or scission transactions or, again, the widening of the means of proof (See, in particular, Draft order, Article 1320-8: "proof of payment may take any form").

The consultation may be accessed on the Ministry of Justice's website up until 30 April.

In compliance with Article 27-I, 3° of the Law, the Order must be promulgated within a period of twelve months as of publication of this law, i.e. by 17 February 2016.

Draft order

Law no. 2015-177, 16 February 2015, OJ of 17 February 2015

"Macron" Bill and Commerce aspect

The Draft Bill for Growth, Business Activity and Equality of Economic Opportunity has been adopted at its first reading by the National Assembly. It contains a number of provisions relating to commerce:

- **Consultation of the Competition Authority concerning urban planning documents**

(Article 10; Article L. 752-5-1 [*new*] of the Commercial Code)

The Bill inserts a new Article L. 752-5-1 into the Commercial Code in order to strengthen the Competition Authority's power to intervene in commercial urban planning. At the request of the minister with responsibility for Commerce or a *préfet*, the Competition Authority will be able to give an opinion on commercial urban planning documents, to check whether they contain conditions preventing new concerns from setting up within the market radius and so harming competition.

- **Affiliation agreements**

(Article 10 A [*new*]; Article L. 341-1 of the Commercial Code)

The legislation adopted provides for adding to the Commercial Code a provision providing that the set of agreements binding retail traders to a network shall have *"the same term"* and that *"termination of one of these agreements shall be tantamount to termination of the whole set of these agreements"*. Above all, such agreements may not *"be concluded for a term exceeding nine years"* or be renewed by tacit agreement. The legislation provides waivers below a certain turnover threshold (set by decree following consultation of the Competition Authority). It is not, however, stated whether it is the turnover of the trader itself or that of all the affiliated traders that will be taken into account.

- **Changing the scope of Article L. 441-7 of the Commercial Code and its obligation to formalise annual distribution agreements**

(Article 10 B [*new*]; Article L. 441-7 of the Commercial Code)

The legislation adopted provides for replacing the words “or the service provider” by the words “working in retail trading”. Consequently, only agreements concluded between a supplier and a “distributor working in retail trading” would fall within the scope of Article L. 441-7 of the Commercial Code.

In this connection, if the legislation is finally adopted, a new Article “1 bis” will be inserted to define the notion of “distributor working in retail trading”, as follows: *“1 bis. – Within the meaning of 1, the notion of distributor working in retail trading shall mean a distributor who makes more than half its turnover excluding tax via the sale of goods to consumers for domestic use or the said distributor’s purchasing or company listing unit.”*

Consequently, agreements which are not concluded between a supplier and a distributor working in retail trading and/or the said distributor’s purchasing or company listing unit shall not fall within the scope of Article L. 441-7 of the Commercial Code. They will thus not have to comply with the annual agreement formalization obligation.

- **Distributors’ trademarks included in the renegotiation clause**

(Article 10 C [*new*]; Article L. 441-8 of the Commercial Code)

The clause governing renegotiation in the event of substantial variation in the prices of raw materials had been adopted in the Hamon Law but DTs had escaped its provisions. The Member of Parliament Annick Le Loch tabled an amendment widening the Law's provisions to include *"agreements governing the design and production of products using methods meeting purchasers' specific needs and intended for sale under distributors' trademarks",* along with a requirement to draft a report on negotiation entered into even if unsuccessful.

- **The amount of the fine for restrictive competitive practices increased to 5% of turnover**

(Article 10 D [*new*]; Article L. 442-6, III, indent 2 of the Commercial Code)

Amendment no. 1148, which was voted on and passed, aims to raise the maximum threshold of the civil fine provided for by Article L. 442-6, III to a maximum of 5% of the turnover achieved in France by concerns guilty of undertaking illicit practices, subject to the Court's discretion.

- **Purchasing concentrations must be brought to the notice of the Competition Authority**

(Article 10 *quater* [new]; Article L. 462-10 of the Commercial Code)

The legislation adopted proposes to introduce a mechanism for informing the Competition Authority beforehand about agreements made in the retail trading sector between operators in the sector whose corporate purpose is grouped negotiation of the purchasing and/or listing of products or the selling of services to suppliers.

The aim of this measure is to enable the Competition Authority to intervene at the right time if such agreements pose competition problems likely to come within the ambit of Title II of Book IV of the Commercial Code (anti-competitive practices).

- **Structural injunction**

(Article 11; Article L. 752-26 of the Commercial Code)

Structural injunction allows direct action to be taken to structure a market and restore competitive conditions favouring consumers.

The Bill aims at forcing high-street names to have to sell their shops if they enjoy market dominance, i.e. possession of a market share exceeding 50% within a given market radius.

The Competition Authority may, pursuant to a reasoned decision taken after receipt of a concern's or group of concerns' comments, require it to change, complement or terminate within a specified term which may not exceed three months, any and all agreements and any and all deeds through which the economic power giving rise to the high prices or margins noted was set up. It may, similarly, require it to proceed, within a term that it will set, to dispose of assets, including land, whether developed or not, if such disposal represents the only means of guaranteeing true competition.

- **Renewal of atypical agreements relating to terms and conditions of payment in certain economic sectors**

(Article 11 *quinquies* [*new*]; Article L. 441-6 of the Commercial Code; Article 121 of Law no. 2012-387 of 22 March 2012)

The legislation adopted (Amendment 2945) aims to permit maintaining atypical terms and conditions of payment to help sectors in which seasonal work is particularly predominant. The legislation rewords Article L. 441-6 of the Commercial Code and Article 121 of the Law of 22 March 2012 relating to simplification

of the Law and to lightening the burden of administrative formalities and thereby completes the transposition into domestic law of the European Directive on terms and conditions of payment.

- **Sunday working**

The legislation provides for three categories of zone in which Sunday working is permitted every week. They will replace the current tourist areas and exceptional consumer use zones (PUCE).

1. **International tourist zones** (*Article 72;* Article L. 3132-24 of the Code of Employment Law*)*: these are zones which, given their international reputation, are visited by exceptionally high numbers of high-spending foreign tourists. They will be defined by decree and be located in Paris, Cannes, Nice and Deauville.
2. **Tourist zones** (*Article 73;* Article L. 3132-25 of the Code of Employment Law*)*: these are zones visited by particularly high numbers of tourists.
3. **Commercial zones** (*Article 74;* Article L. 3132-25-1 of the Code of Employment Law*)*: these follow on from PUCE and are characterized by particularly high potential supply and demand, taking account, as the case may be, of a cross-border zone in the immediate vicinity.
4. To this list must be added **certain stations** (*Article 78;* Article L. 3132-25-5 of the Code of Employment Law) when they are not already in one of the three atypical zones. In all, twelve stations will be concerned in France.

Within all these zones, the **compensation owed to employees** who work on Sundays shall be defined by agreements between employers' and employees' representatives. Failing agreement, businesses will not be allowed to open (*Article 76;* Article L. 3132-25-3 of the Code of Employment Law).

The legislation also changes regulations governing **Mayor's Sundays** (*Article 80;* Article L. 3132-26 of the Code of Employment Law). Their number of 5 maximum today will increase to 12. Above 5, the mayor must seek the agreement of the Public Intercommunal Co-operation Establishments (EPCI).

Bill for Growth, Business Activity and Equality of Economic Opportunities, AN 17 February 2015

Liability-limiting clauses and gross misconduct

In a judgment handed down on 29 October 2014, the First Civil Division of the Supreme Court has issued certain interesting reminders concerning gross misconduct in the performance of an agreement and its being held tantamount to deliberate misconduct with all the resulting consequences regarding remedy for damage or injury in contract.

A company was given by a group of individuals the task of effecting a removal from Ile de la Réunion to Montpellier. When the items were received, extensive mould and moisture damage was noted. The victims sought compensation but the removal concern advanced in argument against them a clause in the agreement limiting its liability. Pleadings followed relating to the haulier's faulty conduct and to the impact of this clause.

With regard, firstly, to the haulier's faulty conduct, the removal firm disputed the finding of gross misconduct pronounced by the lower court on the grounds that, in the case in point, all that was lacking was the failure to ensure the necessary ventilation inside the container and to place humidity absorbers in it. The appeal was dismissed because, far from restricting themselves to placing on record mere failure to perform the agreement, the lower-court judges showed that the fault resided in the professional operator's behaviour. This was because the latter flagrantly failed to reflect in preparing for the removal and then breached the fundamental rules of the removals business in implementing the agreement. As a specialist of removals in the tropics, he displayed behaviour judged to be inexcusable.

With regard, next, to the inclusion of the liability-limiting clause, the Appeal Court gave it full effect on the grounds that the limitation of foreseeable losses arising under Article 1150 of the Civil Code is indefeasible by gross misconduct. The Supreme Civil Court found fault with the lower courts, quoting a form of words used for the first time in 1932 (Req, 24 October 1932, DP 1932. 1. 76) under which "gross misconduct, tantamount to deliberate misconduct, shall prevent the contracting party guilty thereof from limiting remedy of the loss that he has caused to the loss specified or foreseeable at the time of concluding the agreement and from freeing himself from the effect thereof through a non-liability clause."

Supreme Civil Court, 1st Civil Division, 29 October 2014, no. 13-21.980

Non-competition clauses and co-operative concerns

In a judgment handed down on 4 November 2014, the Commercial Division of the Supreme Civil Court provided an illustration of the supervision of the proportional nature of non-competition clauses in connection with a co-operative transport concern.

Two partner concerns that had been excluded considered that they were not bound by a non-competition clause, claiming that the co-operative had no customers of its own and that the clause was not proportionate in nature with the co-operative concern's corporate purpose.

The Supreme Civil Court upheld the lower courts' verdicts that the customer base created by the co-operative was separate from that of its members given that the concern's purpose was to develop the lattes' transport activities, including, in particular, the taking of orders and conclusion of contracts with all and any customers as well as the shared performance of such activities.

Furthermore, it was held that the non-competition obligation at issue was in proportion to the legitimate interests of the co-operative as:

- the clause was time-limited to three years;
- the clause was limited in space to the administrative region of its registered office;
- the clause was limited to customers in existence at the time when the partner concerns left the co-operative;
- the clause preserved the customer base developed by the co-operative from the competing business of concerns likely to take advantage of relations entered into with these customers in their capacity of former co-operative members but without bearing the costs thereof.

Supreme Civil Court, Commercial Division, 4 November 2014, 13-23569, Alain Allard versus Ablo Coop

Liability-limiting clauses between professionals

The general terms and conditions of sale of a fuel supplier provided that all complaints by distributors regarding delivery must be made when the goods are received.

However, vehicles that used the fuel sold by the supplier subsequently malfunctioned.

The distributor took the matter to the Appeal Court, which held that the limiting clause was indefeasible against him since he was aware of it and had accepted it by signing the general terms and conditions of sale.

The Supreme Civil Court in due course had referred to it the issue of the validity of this clause and held, pursuant to Articles 1134 and 1603 of the Civil Code, that, in forcing the distributor to formulate any complaint at the time of actual delivery, the clause in question prevented him from actually exercising this right.

Consequently, such a clause, the effect of which is to deprive the distributor of any recourse in the event of delivery of poor-quality fuel, was stated by the Court to be null and void.

The case law therefore considers that it is impossible to include a clause avoiding liability for failure to perform an essential obligation of an agreement, in the case in point the obligation to deliver compliant goods pursuant to Article 1603 of the Civil Code.

Commercial Division, 4 November 2014, no. 13-13-576 (No. 959 FS-D), Transports Clot versus TD distribution Thévenin Ducrot distribution

Can the breaking-off of commercial relations be modified by the parties?

In a judgment dated 16 December 2014, the Supreme Civil Court set out that, even though Article 442-6, 5° of the Commercial Code sets out a statutory responsibility that the parties cannot waive in advance, it does not prohibit them from agreeing on a means to break off their commercial relations or settle compensation for the loss suffered as a result of the suddenness of the breaking-off of such relations.

In the case in point, a furniture manufacturer, the supplier of a distributor since 1993 had replied to an invitation to tender launched by the latter on 5 January 2009 for the production of a number of lines of furniture. Furthermore, the manufacturer had been informed by his distributor that, because of the current economic situation, he intended to reduce his procurements for the period 1 September 2009 to 31 August 2010. The parties had accordingly concluded on 13 July 2009 an outline agreement providing for payment of compensation by the distributor to the supplier.

As the latter's candidature was chosen at the close of the invitation to tender process, but for lower provisional sales volumes and turnover as the distributor had agreed

to put back application of the result of the invitation to tender and to carry on relations up until the end of August 2010, the date at which negotiations would be resumed. On 24 August 2010 the parties concluded an agreement providing for their collaborative venture to end on 31 December 2012 along with an undertaking for ever-decreasing re-stocking.

In a judgment dated 23 May 2013, the Paris Appeal Court found the distributor liable for the sudden breaking-off of commercial relations despite the agreement concluded between the parties for a gradual undoing of their relations. For the Appeal Court, this agreement was not an obstacle to court monitoring of compliance with the reality of the notice period via trading volumes during the term thereof.

The question is then one of determining whether the parties to the agreement can disregard the statutory nature of Article 442-6, I, 5° of the Commercial Code by defining contractually the means for breaking off their commercial relations.

The Supreme Civil Court set aside the appeal court judgment on the grounds of Article 1134, 2044 and 2046 of the Civil Code and 442-6, I, 5° of the COMMERCIAL Code; It specified that, even though the parties to the contract cannot waive in advance action under 442-6, I, 5° of the Commercial Code on account of its statutory nature, they can, conversely, agree on means for breaking off relations as also on compensation for the loss resulting from the sudden breaking-off of relations.

The Supreme Civil Court sets limits, however, referring to, in particular, Article 2046 of the Civil Code, which provides that *"settlement does not prevent prosecution by the public prosecutions service"*; the prime mover of the breaking-off of relations is not immune from possible prosecution despite the settlement.

Supreme Civil Court, Commercial Division, 16 December 2014, no. 13-21.363 (no. 1138 FS-PB), Ikea Supply AG versus Green Sofa, Dunkirk

CONSUMER LAW

Simplification Law: new consumer law provisions

Law no. 2014-1545 of 20 December 2014 relating to simplification of corporate concern life has been promulgated, having an impact on various fields of law including a number of provisions of the Code of Consumer Law, where there is, in particular, now provided:

- the possibility for the consumer to withdraw from a distance-selling agreement upon conclusion thereof, the term of 14 days allowed to exercise the same starting in all cases on the day of receipt of the goods;
- that the withdrawal term starts as of conclusion of the preliminary agreement provided for in Article L. 261-15 of the Code of Construction and Housing or as of the bilateral or unilateral undertaking to sell when the distance-selling agreement whose purpose is the acquisition or the transfer of real-estate property is preceded by such a preliminary agreement;
- for the legality of promotional lotteries provided only that they are not unfair within the meaning of Article L. 120-1 of the Code of Consumer Law, thus putting the Code of Consumer Law in compliance with European Union Court of Justice case law;
- for new sanctions in the event of failure to comply with the provisions specific to liquefied petrol gas supply agreements and to agreements concluded at shows and exhibitions.

Law no. 2014-1545 of 20 December 2014 relating to simplification of corporate concern life

Publication of awaited Administrative Order concerning legal warranty information

Article L. 133-3 1° of the Code of Consumer Law in its wording as issuing from the Law of 17 March 2014, known as the "Hamon Law", provides that general terms and conditions of sale applicable to consumer agreements should mention the existence, the conditions governing implementation and the contents of the legal compliance warranty and of the warranty covering defects in the item sold that are due from the seller pursuant to the conditions set forth in the order issued by the Minister with responsibility for the Economy.

The order in question was issued on 18 December 2014 and will come into force on 1 March 2015. It states that general terms and conditions must contain:

- the name and address of the seller guaranteeing the compliance of the goods covered by the agreement, allowing the consumer to formulate a claim under warranty;

- the information that the seller is responsible should the goods fail to be in compliance with the agreement, as set out in Article L. 211-4 *et seqq.* of the Code of Consumer Law, and should the item sold have hidden defects, as set out in Articles 1641 *et seqq.* of the Civil Code;
- a box featuring certain legal details on the legal compliance warranty.

Order of 18 December 2014 relating to information contained in general terms and conditions of sale with regard to legal warranty

Extrajudicial settlement of consumer affairs disputes: transposition into national law of Directive 201311/EU of 21 May 2013 via order

Law no. 2014-1662 of 30 December 2014 relating to various provisions adapting legislation to European Union law in the fields of economic and financial law permits, amongst other things, the Government to take via orders the measures necessary to transpose into national law the European Parliament and Council's Directive 2013/11/EU of 21 May 2013 governing extrajudicial settlement of consumer disputes (cf. Article 15 of the Law).

As from the date of promulgation of the Law, the order must be issued within a period of eight months. The Directive must be transposed into national law by 9 July 2015.

It should be remembered that this Directive covers extrajudicial procedures for the settlement of national and cross-border disputes connected with contractual obligations arising from sales or service agreements concluded between a professional operator and a consumer legally domiciled in the European Union who call upon an Extrajudicial Dispute Settlement Body to intervene in the matter.

Furthermore, Regulation no. 524/2013 of 21 May 2013 relating to on-line settlement of consumer disputes (RLLC) intends to set up an European On-line Dispute Settlement Platform facilitating the on-line independent extrajudicial settlement of disputes between consumers and professional operators. The main provision of these Regulations will apply from 9 January 2016.

Watch this space ...

Law no. 2014-1662 of 30 December 2014 relating to various provisions adapting legislation to European Union Law in the fields of economic and financial law

NEW TECHNOLOGIES

First delisting order for Google

In an interim order handed down on 19 December 2014 referring to an initial order dated 24 November 2014, the Paris Civil Court placed an injunction upon Google Inc. To delist or remove a link to a site accessible via a search from "Marie-France M." And "M." within 10 days as from the date of service of the said order.

Mrs Marie-France M. maintained that access to data relating to the sentence of guilty of fraud at issue simply via an enquiry using her surname and forename via Google's search engine prejudices her search for a job.

The Court held that the application was legitimate and preponderant over the right of information given the time that has elapsed, the sentence having been handed down more than eight years ago, and given the absence at the date of the proceedings of any entry concerning the said sentence on Bulletin no. 3 of the applicant's criminal record, the content of which is determined by the law determining in France the conditions under which third parties may consult other persons' criminal records.

Paris Civil Court, Interim Order of 19 December 2014 Marie-France M. versus Google France and Google Inc.

Editorial team:

Nassera Korichi-El Fedil - Alexis Ridray – Sophie Varisli

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