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Contracts – Distribution – Consumer Law: Legal Watch

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CONTRACTS – DISTRIBUTION

Sapin II Act – commercial relations provisions

Law no .2016-1691 of 9 December 2016 relating to transparency, to the fight against corruption and to the modernization of economic life was published in the French Official Journal legal gazette of 10 December 2016.

The legislation provides for numerous measures in the commercial domain.

Option of concluding a written agreement for a term of one year, two years or three years (Articles L. 441-7 and L. 441-7-1 of the Code of Commercial Law)

As part of their holding of commercial negotiations, suppliers will, as from 1st January 2017, be able to sign with their distributors, service providers or wholesalers, a price agreement lasting more than one year (two or three years). The document must be concluded by, at the latest, the first day of March of the year in which the agreement will take effect. For products subject to a special production cycle, the agreement must be signed within two months of the start of their marketing period.

Such multi-annual agreements shall set out price review terms and conditions. These may include public indices relating to production factor price changes.

The Law introduces various other provisions in the foodstuffs domain with regard to agricultural product prices:

- the requirement to set out in the General Terms and Conditions of Sale covering foodstuff products comprising one or more unprocessed agricultural products that must be the subject of a written agreement pursuant to Article L. 631-24 of the Code of Rural Law and Sea Fishing, the scheduled average price put forward by the seller to the producer of these agricultural products throughout the term for which such General Terms and Conditions apply (Article L. 441-6, indent 6, Code of Commercial Law);

- the requirement, in certain agreements lasting less than one year and dealing with the conception and production of foodstuffs on terms and conditions meeting the particular needs of the buyer, to mention the price or the criteria and procedure for determining the purchasing price of unprocessed agricultural products used as ingredients in the said foodstuff products, when such agricultural products must be the subject of a written agreement pursuant to Article L. 631-24 of the Code of Rural Law and Sea Fishing (Article L. 441-10, New Code of Commercial Law);

- limitation of the total value of promotional benefits – set in connection with agency agreements awarded to the distributor – 30% of the value of the unit price list, management costs included, for milk, dairy products and the agricultural products referred to in Article L. 441-2-1, Code of Commercial Law.

Lengthening payment dates

The Law intends to introduce a specific maximum agreed payment date of 90 days as from the date of issue of the invoice for VAT-free (Article 275, General Code of Tax Law) purchases "of goods intended for delivery as they are to outside the European Union", an increase of 30 days over the original payment date (60 days). As the measure is intended to aid small and medium-sized companies which export to outside the European Union, this new maximum of 90 days does not apply to purchases made by large companies.

New restrictive practices and sanctions

The Law introduces two new competition-restricting practices (Article L. 442-6 of the Code of Commercial Law):

- a prohibition on "subjecting or attempting to subject a commercial partner to late-payment penalties for late delivery in circumstances over which the latter has no control" (Article L. 442-6, I,13°, Code of Commercial Law); and

- a prohibition on *"imposing a price review clause* [Articles L. 441-7 and L. 441-7-1, Code of Commercial Law] *or price renegotiation clause* [Article L. 441-8, Code of Commercial Law] *taking as its reference one or more public indices not directly connected with the products or services covered by the agreement".*

With regard to sanctions, the Law provides:

- increasing the maximum amount of the civil-law fine, in the event of unfair practice, to 5 million Euros (as against 2 million Euros currently) (Article L. 441-6, VI indent 1 and L. 443-1, Code of Commercial Law);

- systematic publication of sanction decisions;

- removal of the highest legal maximum in the event of administrative sanctions ordered against the same

perpetrator of competition breaches (Article L. 465-2, VII, Code of Commercial Law).

Law no. 2016-1691 of 9 December 2016

Changes made by the XXIst Century Justice Modernization Act in the contractual field

- **Clarification of the rules applying to compromise settlements (Articles 2044 and 2052 of the Code of Civil Law)**

Law no. 2016-1547 of 18 November 2016 gives a new definition of compromise settlement, **adding to it** the condition *sine qua non* of a compromise settlement, namely the existence of **mutual concessions** which must be granted by the parties in order to lead to an agreed settlement. A compromise settlement is therefore now defined in Article 2044 of the Code of Civil Law as *"an agreement under which the parties, through mutual concessions, terminate an existing dispute or forestall a future dispute."*

The Law proposes to **completely rewrite Article 2052**. Firstly, **the reference to *res judicata* no longer appears** in the new Article 2052, which now provides: *"a compromise settlement constitutes a hindrance to the institution or continuation by or between the parties of legal action to the same end".* As regards the cause of action, the solution does not alter positive law as the subject of the compromise settlement cannot be re-judged and contrary action will in every case be sanctioned on the grounds of no case to answer, being of the same nature as the defence of *res judicata.*

The Law has also **deleted** a number of articles in the Code of Civil Law relating to compromise settlements which in reality were of the nature of provisions affecting the general law of contract and were therefore held to be irrelevant. The articles in question were the old Article 2047 (possibility of providing for a penalty clause) and Articles 2052, indent. 2 and 2053 to 2058 covering grounds of nullity.

- **Extension of field of applicability of compromise settlements**

The Law has reformed the rules governing arbitration clauses (Article 11). Henceforth, an arbitration clause will be valid in **any** agreement, including such as are concluded between two private individuals or between a professional operator and a private individual provided always that the parties have **agreed to** the said clause.

An arbitration clause must thus have been agreed to by the party whom it is claimed to bind unless the latter comes in privity to the party that initially agreed to it. This notwithstanding, when one of the parties did not contract in connection with his professional activity, he cannot be deemed bound by the clause. The party may choose between recourse to an arbitrator and going to law (Code of Civil Law, new Article 2061).

Jurisdiction of French Courts over issues of entirety of losses caused by instances of unfair competition committed outside France

A company designing and distributing ready-to-wear items had sought damages for unfair and parasitic competition from its former artistic director, the French subsidiary and the parent company of the group for which he had produced a collection.

In an initial judgment handed down on 26 February 2013, the Commercial Chamber of the Supreme Civil Court had held that the Paris Appeal Court enjoyed jurisdiction to judge the facts relating to all the joint defendants even though only the French subsidiary had its registered office in France. As each of the companies was accused separately of the same deeds of unfair and parasitic competition and as unfair competition law was not the same throughout the European Union, the Supreme Civil Court had applied Article 6 of Regulation (EC) 44/2001 of 22 December 2000. This legislation provides that it is preferable to judge together all claims brought against various different defendants when it is important to avoid solutions which could be mutually irreconcilable if the cases were judged separately in different Member States.

In a new judgment handed down on 20 September 2016, the Commercial Division of the Supreme Civil Court quashed the Paris Appeal Court's decision on the basis of the very same legislation, considering that the latter Court had wrongly refused jurisdiction over such acts of unfair and parasitic competition as resulted from prejudicial deeds perpetrated abroad, whether or not the French subsidiary had itself committed any prejudicial deed abroad.

Supreme Civil Court, Commercial Division, 20 September 2016, Pucci versus H&M AB, H&M Hennes and Mauritz

Three new judgments relating to the sudden breaking-off of commercial relations

In a judgment dated 4 October 2016, the Commercial Division of the Supreme Civil Court has pointed out that **the concept of the partial breaking-off of commercial relations** cannot be merely the consequence of changes in the annually-negotiated commercial terms and conditions: in the case in point the lower-court judges had been able to hold, on the basis of sales made by the distributor in 2009, that the changes in calculating reductions and advances against inventory negotiated at the close of 2008 could not be considered as a partial breaking-off of commercial relations.

In another matter, a party claimed 48,000 Euros in damages on the grounds of a sudden breaking-off of established commercial relations, so arguing from the absence of any notice following relations lasting twelve years. The Paris Appeal Court, in a judgment dated 7 October 2016, calculated the annual margin to be 18,000 Euros and awarded 9,000 Euros in damages, considering that **a six-month notice period would have been sufficient given, in particular, the fact that the contracting party that broke off relations bought only one product from the other.**

In a decision dated 7 November 2016, the Paris Appeal Court pointed out: *"If the concept of established commercial relations is to be considered as being economic, a point which allows it to be recognized notwithstanding the conclusion between the parties of a number of successive agreements, it implies that the parties so arguing are the same or that proof of transfer of the rights delineating such commercial relations between two parties that have succeed one another can be provided".* In the case in point, the appellant, who held himself to be the victim of the sudden breaking-off of established commercial relations, believed that relations went back to 1966 since it was at this date that he started to be trained in the distribution of the brand of agricultural machinery that he could no longer distribute because of the breaking-off of relations. The Paris Appeal Court held that the starting date to be taken into account was the date at which the contracting party had actually started to be the distributor, namely, according to the affidavit of the company's accountant, 1988. The judgment mentions, additionally, that the mutual abandonment of exclusivity throughout the notice period pursuant to the contractual provisions that bound the parties constituted contractual arrangements for performance of notice in the event of the breaking-off of the contract and cannot be likened to the sudden breaking-off of commercial relations.

Supreme Civil Court, Commercial Division, 4 October 2016, 15-14685, Iglecar *versus* Microcar
Paris Appeal Court, 7 October 2016, RG no. 13/20572
Paris Appeal Court, 7 October 2016, RG no. 15/10249

Fair performance of franchising agreements

In a judgment handed down on 12 October 2016, the Paris Appeal Court allowed an application for damages of a franchisee who asserted that, contrary to the contract, which provided that the franchisee was to select, with the assistance of the franchisor, products suited to the clientele frequenting the sales territory of his shop, in particular in connection with visits to the group's head office in Denmark, the franchisor unilaterally decided to make a selection of products for France and make up a proposed order of products suited to the franchisor's shop, mentioning discussion at a later date only in connection with possible changes. The Court thus found against the franchisor for having imposed a change in the product supply methods by deciding alone on the quantities and models of products to be ordered, leaving the franchisee with a limited choice to be made within a very short time, with the result that the franchisor no longer simply assisted the franchisee as was provided in the contract *"but in fact unilaterally replaced him by imposing demanding product supply terms and conditions and his own commercial strategy."*

Paris Appeal Court, 7 November 2016, RG no. 14/07276

A new decision on significant imbalance

Article L. 442-6 I 2° of the Code of Commercial Law prohibits subjecting or attempting to subject a partner to obligations creating "significant imbalance" in the rights and obligations of the parties. In a judgment handed down on 4 October 2016, the Commercial Division of the Supreme Civil Court upheld the decision of the Paris Appeal Court with regard to action by the Minister with responsibility for the Economy seeking to sanction significant imbalance represented by certain clauses included in a standard form

partnership contract used by franchisees in the mass-distribution sector.

The judgment establishes, in particular that:

- the appeal court was able to recognise liability on the part of the franchisor even if he was not a party to the partnership agreements since he had systematically had recourse to the provisions of the agreement in question, which he had prepared to ensure that franchisees were supplied;
- the appeal court was able to refer to the foodstuff distribution sector structure employed in France with a view to evidencing the existence of subjection to significant imbalance but without concretely analysing the situation created by the clauses at issue given that the franchisor did not allege that certain suppliers seemed to have succeeded in having the disputed clauses cancelled through negotiations because of their economic power, the sizeable number of items that they offered or their key importance, prohibition being applicable to a standard form contract;
- significant imbalance may result from the clause which confers on the distributor the option *"of cancelling the order, refusing delivery in full or in part, leaving all costs to be borne by the supplier and seeking reparation for the loss suffered in the event of one hour's lateness in delivery or even half-an-hour's lateness in the case of fresh produce and "just-in-time" products, this provision being combined with financial penalties"*, whereas the distributor for his part is subjected only to the obligation "to take all measures to comply with times defined when appointments are made, plus a maximum of one hour after the time fixed. The principle of compensation for extra costs resulting from their own action will be based on prior negotiation with the supplier";
- significant imbalance is created by a clause which permits the distributor to refuse goods whose use-by date or best-before date is the same as on products previously delivered by the supplier;
- significant imbalance also has as its source a clause which provides that commercial co-operation services supplied by the distributor are paid for by the suppliers, not when they are performed but to a monthly payment timetable and that invoices related to such services are payable 30 days after issue whereas suppliers are paid 45 days after issue for non-foodstuff products.

Supreme Civil Court,4 October 2016, 14/28.013

Term of performance of a work and services contract failing specification in the estimate

In a decision dated 29 September 2016, the Supreme Civil Court issued a reminder that failure to state a delivery date in an estimate does not dispense the contractor from undertaking the works within a reasonable time, the start date for which is the date of the estimate.

Works for which a downpayment had been paid had not been undertaken. After giving notice that was not acted upon, the client applied to a local court for cancellation of the contract and return of the downpayment. The court granted the client's application but the contractor filed an appeal before the Supreme Civil Court. The appeal was rejected by the Court, which noted that the lower-court, having seen that the estimate mentioned no delivery date and noted that the words "after 15 May" written in by one of the parties could not be recognised as proof of an agreement on the date for starting the works, correctly held that the starting date for the performance of works covered by an estimate devoid of information regarding a delivery date is the date of the estimate. The Supreme Civil Court upheld the decision of the local court, which was thus able to conclude without possibility of any appeal that the three-month period that passed between the date of the estimate and that of the cancellation of the contract was a reasonable period within which the contractor was able to perform the works or at least commence them.

Supreme Civil Court, Third Civil Division, 29 September 2016, no. 15-18.238, FS-P+B+I

Branch management: self-employed managers of retail food branches to enjoy benefit of protective provisions of Code of Employment Law

The joint legal manager of a mini-market had gone to law seeking compensation from the distributor whom he accused, firstly, of having wrongfully terminated his joint manager's contract and having defaulted on his obligation to redeploy him and, secondly, having failed to pay him financial compensation on the grounds of the non-competition clause stipulated in his contract.

The Supreme Civil Court censured the lower-court for having dismissed his claims. Its reasoning was as follows:

- pursuant to Article L. 7322-1 of the Code of Employment Law, "the provisions of this Code that cover salaried employees shall in principle apply to self-employed legal managers of retail foodstuff trade branches", such provisions to include "the provisions of Articles L. 1226-10 and L. 1226-12 of the Code of Employment Law" relating to the redeployment obligation incumbent upon the employer"; and
- "a non-competition clause stipulated in a self-employed retail foodstuff trade branch legal manager's contract is lawful only if it comprises the obligation for the distribution company to pay the legal manager financial compensation."

Supreme Civil Court, Employment Division, 5 October 2016, appeal no.15-22730

CONSUMER LAW

Supreme Civil Court's opinion on consumer protection relating to credit for the purchase of a vehicle

The Supreme Civil Court has held to be unfair, and consequently null and void, three clauses frequently found in consumer credit agreements:

- the following must be deemed null and void since unfair within the meaning of Article L.132-1 of the Code of Consumer Law as worded prior to Administrative Order no. 2016-301 of 14 March 2016: any clause, as construed by a court, providing for subrogation of the lender to the seller's retention-of-title pursuant to the provisions of Article 1250, 1° of the Code of Civil Law as worded prior to Administrative Order no. 2016-131 of 10 February 2016;
- the following must be deemed null and void since unfair, except as otherwise evidenced, within the meaning of Article L. 132-1 of the Code of Consumer Law as worded prior to Administrative Order no. 2016-301 of 14 March 2016: any clause, as construed by a court, providing for the lender's waiving benefit of the retention-of-title encumbering the financed item and the option of unilaterally substituting for the same a pledge on the said property. Furthermore, it must be deemed null and void, within the meaning of the same legislation, should it not provide for informing the borrower of such waiver; and
- the following must be deemed null and void since unfair within the meaning of Article L.132-1 of the Code of Consumer Law as worded prior to Administrative Order no. 2016-301 of 14 March 2016: any clause, as construed by a court, not providing, in the event of resale by the lender of the financed item encumbered by a retention-of-title, for the borrower's option to present in his own person a purchaser tending an offer.

Supreme Civil Court, opinion 28 November. 2016, no. 16-70009

NEW TECHNOLOGIES

Personal data class actions

Article 91 of Law no. 2016-1547 of 18 November 2016 for the XXIst Century Justice Modernization Act complements Law no. 78-17 of a January 1978 relating to computing, files and liberties with a new Article 43 *ter* defining the legal framework surrounding personal data protection class actions.

Class actions can be undertaken *"when a number of individuals placed in a similar situation suffer loss, damage or harm the common cause of which is a breach of identical nature of the provisions of the computing and liberties law by a personal data processing manager or sub-contractor."*

Only (i) associations that were regularly and properly declared at least five years previously and whose purpose as stated in their articles of association is the protection of privacy and personal data, (ii) approved consumer defence associations, when personal data processing affects consumers and (iii) employee or civil servant representative union organizations, when data processing affects the interests of person that the articles of association of such organizations charge them with defending, are qualified to act.

Personal data class actions have the particularity of being directed only at putting an end to breaches committed and not making good loss, damage or harm suffered, as is the case, for instance, with discrimination or environmental issues. In other words, victims cannot seek any

compensation for loos, harm or damage suffered but only act to put an end to the breach and that only if they are represented by a duly approved organization that is entitled to act.

Prior to the introduction of the class action before the relevant court, the association or organization entitled to act must put on notice the person against whom it is intended to bring the class action to put an end to or cause an end to be put to the breach of his obligations. Once warned, the person put on notice has four months to comply and, failing such, it is only after such term that the class action can be started. Only then does the court to which the matter has been referred, after placing on record the breach, order the operator to put an end to or cause an end to be put to the said breach and take, by a date that it sets, all relevant measures to this end – if necessary with a third party that it appoints – on pain of civil-law fines.

Law no. 2016-1547 of 18 November 2016 for the Modernisation of XXIst Century Justice

The Supreme Civil Court considers an IP address as personal data

Three companies in the Logisneuf group noted a connection to their intranet by computers outside the group but using internal access codes and obtained a court order ordering internet access providers to communicate the identity of the owners of the IP addresses used for the connections at issue. Maintaining that storage of the IP addresses as files should have been the subject of a declaration to the National Commission for Computing and Liberties (CNIL), Cabinet Peterson, an indelicate competitor of the Logisneuf group, claimed that the investigation sought was unlawful.

Countering this claim, the Rennes Appeal Court held that the IP address is made up of a series of numbers which correspond to a computer and not a user and which accordingly does not constitute even an indirectly nominative datum. The Court deduced from this that the fact of storing the computers' IP addresses that had been used to connect, without permission, to the computer network of the concern did not represent personal data processing.

The Supreme Civil Court invalidated such reasoning, considering, in the light of Articles 2 and 22 of Law no. 78-17 of 6 January 1978 relating to computing, computer files and liberties, that *the IP addresses, which allow indirect identification of individuals, are personal data, with the result that their collection represents personal data processing and must be the subject of a prior declaration to the CNIL",* so quashing the appeal court judgment.

It thus followed the line of the case law of the European Union Court of Justice (CJUE), which recently held in a judgment of 19 October 2016 (Matter: C-582/14) that an IP address represents personal data only if it allows identification of an individual. The CJUE (EUCJ) has pointed out that an internet site could keep certain personal data relating to visitors, in the case in point, in order to defend itself in the event of cyber attack and trigger criminal proceedings.

Supreme Civil Court, 3 November 2016, no. 15-22595, Cabinet Peterson *versus* SAS Logisneuf group *et al*.

The Privacy Shield attacked from all quarters

European Commission Decision 2016/1250 relating to the "EU-United States data protection shield" adopted on 12 July 2016 has been the subject of an application to set aside before the European Union Court (TUE) submitted by internet rights defence associations (the Associations).

The Decision, which aims to protect the fundamental rights of all European Union (EU) citizens whose personal data are transferred to the United States, was adopted as a result of demands set forth by the European Union Court of Justice (EUCJ) in its "Schrems" decision of 6 October 2015 (Matter: C-362), by which the old "Safe Harbour" scheme was invalidated.

The first appeal was entered on 16 September 2016 by Digital Rights Ireland (T-670/16) and the second on 25 October 2016 by La Quadratude du Net, French Data Network and FDN Federation (T-738/16).

Taking up for their own interests the lessons learned from the Schrems decision, the Associations dispute the European Commission's assessment as regards an adequate degree of protection offered by the Privacy Shield within the meaning of Directive 95/46/EC in relation to the protection of individuals with reference to personal data processing and the free circulation of such data. According to the plaintiffs, the decision runs counter to certain provisions of the EU's Charter of Fundamental Rights (the Charter).

The generalised character of the collections, known as "bulked" as opposed to "targeted" allowed by the United

States regulations would jeopardisethe respect of privacy as provided for in Article 7 of the Charter.

Similarly, the absence of any objective criterion with regard to the finality of collecting data and the absence of any limitation to what is strictly necessary as regards the interpretation of the data collected, in particular as to their later use, would breach Article 8 of the Charter, which guarantees personal data protection.

Furthermore, the channels of appeal and means of action in the event of breach of the personal data rules would be more limited and more restricted than those offered within the European context. Again, the introduction of a mediator whose impartiality vis-à-vis the American executive would have to be proved, could not replace an independent court within the meaning of the principles set forth in Article 47 of the Charter concerning the right to effective recourse and of access to an impartial court.

Consequently, the Associations believe that the Commission's analysis that the United States' protection mechanism ensures protection that is "substantially equivalent" to that guaranteed within the EU is wrong. In support of their claim, the Associations repeat the series of reserves issued in particular by the G29 and by the European mediator on the adequacy of the protection afforded by the Privacy Shield.

Appeal entered on 25 October 2016, Matter: T-738/16, La Quadratude du Net *et al.* / Commission (*not yet published in the Official Legal Gazette of the European Union)*

Appeal entered on 16 September 2016 — Digital Rights Ireland/Commission (Matter: T-670/16), Official Legal Gazette of the European Union C-410 of 7 November 2016

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