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CHANCE

Newsletter June 2017

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CONTRACTS – DISTRIBUTION

Failure by a party to perform a contract does not in itself constitute tort vis-à-vis a third party

In a judgment handed down on 18 May 2017, the Third Civil Division of the Court of Final Appeal held that mere failure to fulfil an obligation of specific performance in delivering compliant and defect-free works does not constitute tortuous intent.

In the case in point, a company that was tenant of a co-ownership plot and the association of co-owners of the building had heating, air-conditioning and water-treatment work done. Claiming extensive condensation within their premises, a joint owner had an expert report drawn up and sued the association of co-owners and landlord company for compensation. The latter took out third-party proceedings against the company that had carried out the work.

The Appeal Court recognized this claim, declaring the company liable for the abnormal condensation, dismissing its claims for warranty and ordering it to pay on the grounds that the contract for the work that the latter had undertaken to deliver works that were in compliance with the contractual forecasts and that were free of defects, that, in failing in this obligation, it had perpetrated a fault that which caused abnormal condensation and that this fault caused it to incur tortious liability.

This judgment was set aside by the Court of Final Appeal, which gave judgment that in so ruling: "*on grounds which, based only on the failure to meet a contractual obligation of specific performance consisting in delivering works that were compliant and defect-free, were unsuited to characterizing tortious intent*", the Appeal Court had breached 1382, now 1240, of the Code of Civil Law.

Cass. 3e civ., 18 mai 2017, n° 16-11.203, FS-P+B+R+I, Sté Dalkia France c/ Synd. des copropriétaires de la clinique Axium, et a.

N.B.: Shortly after this decision, the First Civil Division of the Court of Final Appeal seemed to take a different view in re-affirming that the third-party to a contract may claim, on the basis of tortious liability, provided always that such failure has caused it loss.

(Cass. 1ère civ., 24 mai 2017, n° 16-14.371).

A distributor found guilty of subjecting its suppliers to significant imbalance

The Court of Final Appeal approved the Appeal Court's guilty verdict on a distributor who had subjected suppliers to significant imbalance by inserting into the annual agreement two clauses marked by a lack of balance that were not compensated for by other clauses.

The two clauses in question were the following:

– a "*protection of stock*" clause, providing for, in the event of a fall in the price of a product, issue of a credit note by the supplier representing the gap between the previous price and the new price multiplied by the number of products in stock at the distributor's;
– a clause providing, in the event of the obsolescence of a product, for discontinuation of manufacture or of poor sales, issue of a credit note by the supplier representing the gap between the price at which the product was bought by the distributor and a price consistent with the new purchasing market situation multiplied by the number of products in stock at the distributor's.

The Court of Final Appeal firstly noted the absence of any negotiation margin between the suppliers and the distributor. The latter, given its position as leader, was an *unavoidable intermediary for suppliers* and accordingly enjoyed the advantage of *indisputable negotiating power.*

The *"stock protection"* clause inserted into all the contracts was in practice executed by the suppliers even though no discussions had taken place between the parties to define the terms and conditions of its application.

The case was the same with the "*poor product sales*" clause, which had been inserted into all the contracts in the same wording. No evidence produced in the course of the proceedings pointed to any real discussion between the distributor and its suppliers regarding the insertion of this clause, whereas, on the contrary, one of the suppliers honoured it even though it did not appear in his contract.

Cass. com. 26 avril 2017, n° 15-27.865, Sté Etablissement Darty et fils c/ Ministre de l'éco.

Decree relating to procedure for challenging decisions made by the Competition Authority and by the Rapporteur General

Decree no.2017-823 of 5 May 2017 amends Articles R464-12 et seqq. of the Code of Commercial Law with regard to the procedure for appeals to the Paris Appeal Court against decisions made by the Competition Authority, amendments that will come into force on 1 September 2017.

The following may be noted, in particular:

- on pain of nullity and no longer automatic inadmissibility, a period of 5 days following the lodging of the appeal during which the applicant will prove to the court office that it has, via registered letter with proof of delivery advice, brought copies of the application to the attention of parties to which the Competition Authorities' decision has been intimated as well as to the Competition Authority and to the Minister responsible for the Economy;
- on pain of automatic nullity, a period of two months following the lodging of the appeal during which the applicant must lodge with the court office written observations containing a summary of its arguments along with a numbered list of exhibits and documents. Within this same period, the applicant must prove to the court office that it has, via registered letter with proof of delivery advice, brought copies of its observations along with a list of exhibits to the attention of parties to which the Competition Authorities' decision has been intimated as well as to the Competition Authority and to the Minister responsible for the Economy. To the latter two the applicant must also communicate copies of exhibits within the same period of time;
- a period of two months in the event of a cross-appeal or application to be joined to the proceedings in which the applicant will be subject to the same obligations to communicate its observations and exhibits as previously set forth.

Furthermore, Decree no. 2017-823 of 5 May 2017 has also enacted Article 96 of the Law of 8 November 2016, known as the "XXI Century Justice Modernization Law" allowing appeals to be made before the First President of the Paris Appeal Court to partially or totally set aside the Competition Authority's Rapporteur General's decisions to refuse to protect business secrecy or to lift such protection. These immediately applicable provisions are set forth in Articles R464-24-1 et seqq. of the Code of Commercial Law. It will be noted in particular that the appeal does not suspend proceedings and is entered within ten days of notification of the Rapporteur General's decision before the First President of the Appeal Court via summons to appear at a hearing previously intimated by the latter. On pain of nullity, the summons to appear must contain the scope of the appeal along with a summary of the arguments and a copy of the decision challenged is to be appended. On pain of automatic nullity, the summons is to be delivered to the Rapporteur General as well as, as the case may be, to the accused party within the time allowed by the First President's Order, with a copy of the summons to appear being lodged in triplicate at the Appeal Court office within not more than five days of the date of service.

Décret n° 2017-823 du 5 mai 2017

Publication of decree relating to setting up the discussion body in franchising networks

The Law of 8 August 2016 relating to Work, Modernization of Social Dialogue and Career Securitization has introduced a social dialogue body in networks of operators with at least 00 salaried employees bound by a franchising agreement containing clauses affecting the organization and conditions of work in franchise concerns.

Article 64 of the law instituting this new body conferred to enacting legislation the task of detailing the terms and conditions of setting up and the characteristics of the body's composition and operating. This decree has just been published in the Official Journal of 6 May 2017 and came into force on 7 May 2017.

The dialogue body was set up following negotiations between the franchisor at the request of a trade union organization that was representative at branch level or at the level of one of the branches on which the network depends or that had set up a union section within a concern in the network.

Its main objective was to be the recipient of a certain number of decisions of importance to the concerns in the network as a whole and of information. These were, first of all, decisions made by the franchisor that were likely to affect franchisees' employee' staff numbers and structure, working hours or conditions of employment, of work and of in-service training. Next, the body was to be informed of concerns entering or leaving the network, information likely to indicate the state of health of the network. Finally, it could make proposals likely to improve working conditions throughout the whole of the network.

Décret n°2017 -773 du 4 mai 2017 relatif à l'instance de

dialogue social mise en place dans les réseaux d'exploitants d'au moins trois cents salariés en France liés par un contrat de franchise

Sudden breaking-off of relations and no loss

In a judgment handed down on 1 March 2017, the Court of Final Appeal held that a distributor had not suffered loss in the event of a sudden breaking-off of commercial relations with its supplier if, in the course of the notice period, the relationship had remained as before through sales of goods ordered prior to the breaking-off.

In the case in point, Bricodeal was, as from 2000 and on an exclusive basis, responsible for the distribution in France of products manufactured by Ricomaster, a Taiwan company. 20 November 2008, the latter announced the setting-up, at the end the same year, of a subsidiary, Raco France, which would have sole responsibility for marketing and distributing its products in France. Considering itself the victim of a sudden breaking-off of established commercial relations and of unfair competition, Bricodeal sued Ricomaster and Raco France for damages to remedy its losses.

The Appeal Court dismissed its claims. It held, firstly, that Bricodeal (distributor) should enjoy the benefit of six months' notice as from 20 November 2008, the date at which Ricomaster had informed it of its intention to hand over distribution of its products in France to its own subsidiary.Next, it noted that Bricodeal had received between January and June 2009, deliveries from Ricomaster representing orders placed between September and December 2008 and that the overall value of these deliveries exceeded 105 million Euros. The margin gained on these sales in the course of serving out notice was to be deducted from compensation for the sudden breaking-off. However, applying a margin rate of 42% yielded a margin exceeding the compensation sought by Bricodeal.

The Court of Final Appeal upheld this decision. As commercial relations had been maintained under the earlier conditions throughout the notice period, the Appeal Court was able to judge that the plaintiff had not suffered any loss and consequently to dismiss its claim for damages.

Cass. com., 1er mars 2017, n° 15-20.848, F-D, Sté Bricodeal solutions c/ Sté Raco France et a

Restrictive practices disputes - Jurisdiction: an about-turn

In a number of judgments handed down in March and April 2017, the Court of Final Appeal did an about-turn with regard to established case law, considering henceforth that appeals entered against judgments given on the grounds of Article L. 442-6 of the Code of Commercial Law by courts not specially designated by Article D. 442-3 should be, on pain of inadmissibility, be brought before the Appeal Court enjoying jurisdiction over the courts that gave judgment and no longer before the Paris Appeal Court (Cass. com. 29 mars 2017 final appeals n° 15-17.659, n° 15-24.241 et n° 15-15.337, Cass. com, 26 avril 2017, n° 15-26.780 (objection to jurisdiction).

The Court of Final Appeal upheld its new position, judging that "*only appeals entered against decisions handed down by courts specially designated by Article D. 442-3 of the Code of Commercial Law are to be brought before the Paris Appeal Court, as appeals against decisions given by courts not specially designated, including in the event that they have, wrongly ruled on the application of Article L. 442-6 of the came Code, are matters for Appeal Courts within whose jurisdictional territory such courts are located."* It deduced from this *"that it is for the Appeal Courts to automatically, as the case may be, state the appeal's inadmissibility grounded in the lower-court's lack of jurisdiction to decide a case relating to the application of Article L. 442-6 of the Code of Commercial Law and the inadmissibility of claims put before the court resulting from this*."

Cass. com., 11 mai 2017, n° 16-10.738

Government's 3 May 2017 instruction regarding commercial development legislation

The Minister for the Economy and Finances on 10 May 2017 published an instruction dated 3 May 2017 aimed at reminding the Departmental Commissions for Commercial Development (CDAC) of a number of points essential to the proper implementation of legislation relating to commercial development with a view to ensuring legal security in relation to decisions or opinions issued.

The goal was to improve the conditions under which CDAC-subject dossiers are dealt with.

The firs part of this document reminded prefects of their power of intervention in the various stages of the commercial authorization procedure (monitoring the legality of the Territorial Coherence Schemas, ensuring compliance in the legal field and with dossier evaluation criteria, using

their right of appeal to the CNAC, etc.). The second part encourages the CDAC to improve supervision of dossiers and to improve relations with the CNAC, in particular as regards projects involving more than 20,000m² of sales space which can be the subject of self-initiated referral by the Commission.

Circ. 3 mai 2017, NOR : ECFI1713905C

Three new opinions from the CEPC

Opinion 17-3 issued on 19 January 2017 by the Commission for the Examination of Commercial Practices ("CEPC") states that for a distributor to obtain every year at the time when the contract of a distributor's brand product supplier ("MDD") is renewed advantages in the form of credit notes may be sanctioned under the provisions of Article L442-6-I, 1 and 2 of the Code of Commercial Law? In the application for an opinion submitted by a firm of lawyers to the CEPC there was mentioned the case in which the distributor justified these claims through promotional events putting products to the fore and the case where these credit notes were justified by failures ascribable to the manufacturer. With regard to the promotion of MDD products, the CEPC issued a reminder that it did not constitute an actual service rendered: "*such a claim does not prove to be suited to the case of MDDs, products to build customer loyalty to the store and not to the manufacturer.*" In the event that the advantage is justified by a failure ascribable to the manufacturer that is duly established, the CEPC holds that it is a practice subject to sanction if it is particularly out of proportion in comparison with the failure in question. And even in this case the CEPC specifies that it is still possible for the distributor to establish an absence of significant imbalance, in particular by proving proof that the imbalance is compensated by other contractual provisions or by advantages granted to the supplier.

By virtue of its Opinion 17-4 issued on 2 March 2017; the CEPC held, notwithstanding a contrary opinion on the part of the courts as to the concept "realization of sale," that the parties to the international sales agreement could provide for the invoice to be raised at the date of "delivery" defined by Incoterm FOB, i.e. at the date of embarkation of the goods aboard the ship at the port of exit. However, with regard to tax legislation, it must be provided for the invoice to be raised within one month of the date stipulated in the contract relating to the transfer of entitlement to the goods in the capacity as owner if the actual handing over of the goods (in the case in point, delivery aboard) is not effected within this time.

By virtue of its Opinion 17-5 issued on 2 March 2017; the CEPC stated that the raising of an invoice represents in theory the point of commencement of the agreed payment terms and that substituting in its stead the date of receipt of the invoice is illegal.

It distinguished three scenarios:

- if the invoice is raised on conclusion of the sales contract, issue of the invoice representing the point of commencement of the agreed payment terms, the 60-day period starts at the said date and before receipt of the goods;
- where the invoice is issued later pursuant to a tax exemption relating to deferred invoicing for sales the amount billed for which was not determined at the time of sale but is determined by factors no longer dependent on the parties' wishes, the 60-day period starts on delivery of the goods;
- where the invoice is issued on the date of delivery of the goods in compliance with a tax tolerance limited to the assumption that the client receives the goods, the 60-day period starts on issue of the invoice, which is concomitant with delivery of the goods.

CEPC, avis 17-3 du 19 janvier 2017

CEPC, avis 17-4 du 2 mars 2017

CEPC, avis 17-5 du 2 mars 2017

Link between France and sub-contracting

A foreign sub-contractor that has contracted with a French company enjoys the benefit of the protective measures in the French Law of 31 December 1975, applied mandatorily provided that there is seen to exist a link attaching the transaction to France with regard to the aim of sub-contractor protection sought by the Law.

In a judgment dated 20 April 2017 the Commercial Division of the Court of Final Appeal upheld a judgment of the Paris Appeal Court which held that a link attaching a transaction to France was not seen to exist where Italy was the country benefitting economically from the sub-contracting transaction since the transaction had been carried out by an Italian concern on Italian soil, within the Italian networks of the client, an Italian telecommunications company.

In the case in point, the parties to the sub-contracting agreement had opted for Swiss law and the sub-contractor wished, through mandatory application of Article 13-1 of the Law of 31 December 1975, for a transfer of receivables effected by the main contractor to his bank to be held non-

binding on it. The fact that the sub-contracting transaction allowed the main contractor, a French company whose registered office is located in Paris, to honour performance of the main contract and to receive in return payment of its invoices as well as the circumstance that the financing of this concern was undertaken by French banks was not enough to prove the existence of such a link. The Court of Final Appeal pointed out that, in the absence of any other criterion of attachment to France that was linked to the objective sought, such as the sub-contractor's place of business but also the place of performance of the service or the final destination of the sub-contracted products, the link was insufficient.

Cass. com. 20 avril 2017, 15-16922

Time limitations on actions between defective product producers

In a judgment handed down on 15 March 2017, the First Civil Division of the Court of Final Appeal detailed the scheme relating to liability claims brought against the producer of a defective product by a professional supplier where the latter also enjoys the capacity of producer.

In the case in point, a manufacturer and suppliers of a defective hip prosthesis had sued the manufacturer of the manufacturer of a particular component of the product after compensating the victim and his employer. The lower-courts had stated that, more than one year having passed, the prosthesis supplier's claim was time-barred pursuant to Article 1245-6 of the Code of Civil Law, indent 2, which states that "*action against the supplier follows the same rules as a claim coming from the direct victim of the defect. This notwithstanding, he must act within one year following the date of his summons to appear.*"

The Court of Final Appeal found fault with the lower-courts on the grounds that Article 1245-6 of the Code of Civil Law provides for liability of the supplier and for his taking action against the producer when the victim cannot identify the producer. In the case in point, the unsuccessful supplier was manufacturer within the naming of Articles 1245 and 1245-5, indent 1 of the Code of Civil Law since it had manufactured the prosthesis. The action provided for in Article 1245-6 could not be employed in the case in point and the time-barring provided for in the legislation could not be argued against the supplier of the prosthesis in his action for liability against the supplier of a component part.

Cass. 1ère ch. civ., 15 mars 2017, 15-27740

CONSUMER LAW

Class action: publication of enabling legislation

Law no. 2016-1547 of 18 November 2016 for XXIst Century Justice Modernization set up a common hub for class actions for discrimination, workplace, environment, personal data discrimination and in the field of health. Pursuant to this legislation, the Decree of 6 May 2017 defines procedural rules applicable as from 11 May 2017 before judicial and administrative judges.

The legislation comprises provisions that are specific to class action in relation to discrimination ascribable to an employer. With regard to class action in the sphere of the environment, it determines the conditions for approval of associations whose purpose under their by-laws comprises the defence of victims of bodily harm or the defence of economic interests of their members. It proceeds to deal with the necessary co-ordinations in the Code of Public Health Law. The Decree also defines the procedural rules applicable to actions seeking recognition of rights before the administrative courts

Décret n° 2017-888, 6 mai 2017, JO du 10 Mai 2017

Decree relating to procedures for dealing with cases of over-indebted individuals

The Law for XXIst Century Justice Modernization (Article 58) has provided for the elimination of the judicial approval procedure for measures recommended by the over-indebtedness commission. This measure was taken in order to re-centre the judge on essential work and accelerate the over-indebtedness procedure.

Decree no. 2017-896 of 9 May 2017 has adapted regulatory provisions pursuant to this Law. It will come into force on 1 January 2018 and will apply to procedures for dealing with individuals' over-indebtedness situations then pending except where a case has been referred to a Civil Court judge by the over-indebtedness commission for confirmation. In this case, the matter will be continued and judged in accordance with Book VII of the Code of Consumer Law in its version predating this Decree.

Décret n° 2017-896 du 9 mai 2017, JO, 10 mai 2017

A new decision regarding unfair clauses

In a judgement handed down on 26 April 2017, the First Civil Division of the Court of Final Appeal confirmed most of the provisions of the judgment given on 17 October 2014

by the Paris Appeal Court, which, at the request of a consumers' association, had had to judge the unfair or illegal nature of clauses appearing among the general terms and conditions of transport of an airline company.

The Court of Final Appeal firstly issued a reminder that the consumers' association was entitled, in the exercising of its preventative action to eliminate unfair clauses before the civil courts, to seek reparation, in particular via the granting of damages, for any direct or indirect loss caused to the collective interests of consumers, the stipulation of unfair clauses constituting in itself a fault likely to jeopardize the collective interests of consumers.

It then held that, even if certain clauses complained of had no longer appeared in the general terms and conditions since 23 March 2012, the consumers' association was admissible in acting on the grounds of Article L 421-6 of the Code of Consumer Law against these clauses given that contracts could have been entered into with consumers on the basis of these general terms and conditions and that Article L 421-6 of the Code of Consumer Law allowed action to be taken against such clauses.

The Court of Final Appeal furthermore upheld the lower-court judges who judged the following clauses unfair:

- clauses making reference to the billing of "service charges" for, in particular, the issue of a new ticket where, in the absence of any other details, the clause gave the professional operator the power to freely determine the charges in question, without the consumer's having any knowledge of previously determined rules of principle allowing them to be set;
- a clause which in the event of payment of a surcharge related to the cancellation or reduction of costs, taxes or dues did not provide for automatic re-imbursement or indicate the existence and characteristics of a procedure allowing re-imbursements of monies paid unduly to be had;
- a clause which provides that the transporter shall not be liable if necessities related to operating, security and safety did not allow it to supply suitable services, even if these were confirmed on reservation. In the case in point, the lower-court judged had noted that the airline company offered the option of ordering a meal à la carte or a special menu and that thus the consumer, who had been able to contract because of the existence of this service, could not be deprived of it for reasons connected with mere operating considerations on the part of the transporter;
- a clause which provided that the transporter or his accredited agent would supply passengers with the necessary information concerning latest check-in time for the first flight on its lines. But that, in the event of later journeys, it was for the passenger to seek information regarding latest check-in times for these journeys? Such as clause is unfair in that it dispenses the air carrier from informing the passenger about check-in times for journeys other than the first flight.

En revanche la Cour de cassation a confirmé la validité des clauses suivantes :

- a clause exempting the carrier from liability for all the other goods and services described on its site and supplied by its partners, such as hotel reservation or car rental. This option to reserve other services cannot be analysed as a contribution to production transactions or sale of tourist all-in packages which would have automatically caused the airline to incur full liability, as the clause at issue clearly states that the goods and services to which it refers are those offered by other companies, which are designated on the website of this company as being its partners;
- a clause providing that the consumer will benefit from no right of re-imbursement of his ticket if he is not able to take his flight for good reason or even force majeure. Such a clause does not create significant imbalance between the rights and obligations of the parties to the contract provided that the mechanism of force majeure does not come into application since in such a case the passenger is prevented from travelling and not from performing his own obligation to pay;
- clauses unreservedly prohibiting transferability of the ticket to another passenger whereas the company could transfer the contract to another carrier, does not create significant imbalance between the right s and obligations of the parties to the contract given that the non-transferability of the ticket meets security necessities and that, furthermore, certain fares were related to the consumer intuitu personae;
- a clause allowing the carrier to change the cost of a ticket comprising several flight coupons that the passenger has already bough, if the latter does not use one of them. The transport contract was concluded on the basis of a specific fare policy applied on condition that the flight coupons are used in a certain order and it can be considered that such a clause allows the professional operator to change the price unilaterally.

Finally, the lower-court judges were criticized all the same on the grounds that they should have checked before ordering judicial publication and diffusion of the judicial release on the carrier's website that it was not likely to confuse the consumer in that the publication related to clauses that no longer existed since 23 March 2012.

Cass. 1ère ch. civ., 26 avril 2017, 15-18970, UFC c. Air France

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