CONTRACTS – DISTRIBUTION – CONSUMER LAW: LEGAL WATCH

February 2018

Key Points

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CONTRACTS – DISTRIBUTION

States-General on Food: Bill out soon

After several months of work, the States-General on Food is going to bring in a law to introduce balance into commercial relationships between farmers, industrialists and distributors.

The Bill, which will comprise a number of significant measures, will be put before the Council of Ministers at the end of January and adopted at the end of the first quarter.

Amongst these measures, which will be implemented in 2018, we may mention:

- the 10% rise in the below-cost selling threshold, i.e. the obligation on distributors to sell a food product at a rate increased by at least 10% as compared with the price of purchasing it from the supplier;
- limitation both in value and in volume of promotions now limited to 34% of the price of the products and to 25% of the annual volume of, sales;
- reform of the rules of contracting between farmers and processors on the one hand and between suppliers and mass distributors on the other: henceforth it will be the producers that put forward contractual terms and conditions on the basis of their production costs;
- price re-negotiation in the event of extensive fluctuation in raw material and energy prices; and
- action directed against unjustifiiably low prices: dissuading buyers from purchasing agricultural or food products at prices that do not reflect the cost of their production.

In addition to this Bill, a large number of announcements have been made including one concerning a new organic farming development plan aiming to increase organic production from 6.5% to 15% of the land devoted to agricultural use in France.

Additionally, in order to make quality food available to all, the government intends to achieve a target figure of 50% organic or local products in mass catering by 2022.

Discours de M. Edouard Philippe, Premier ministre - Conclusion des États généraux de l'alimentation (PDF, 193.72 Ko)
http://agriculture.gouv.fr/telecharger/88209?token=12b83ae70490ff07d75f484690ea36f3

Contractual law reform – ratifying Bill is under consideration

After the Senate, the National Assembly adopted the text after its first reading on 11 December 2017.

The original text, which comprised only one article simply ratifying the Order, underwent extensive amendmentin the course of examination by both Assemblies.

Amongst the provisions giving rise to differences of opinion, we may note that:

- membership agreements are the subject of a new definition: the general terms and conditions that are a feature of the membership agreement are henceforth defined as "*a non-negotiable set of stipulations that is determined beforehand by one of the parties and intended to apply to a multiplicity of persons or agreements*" (New Article 1119);
- the power granted to the courts to revise the agreement in the event of the absence of any provision has been restored. The Senate had limited the courts' powers to merely terminating the agreement (the exception for transactions pertaining to financial securities or financial agreements is maintained).

The Members of Parliament approved certain adjustments made by the Senate, in particular:

- precisely defining the domain of loss subject to reparation that is referred to in Article 1112 of the Code of Civil Law in the event of fault committed in the course of pre-contractual negotiations;
- introduction of an option to refer matters to court with aview to seeking termination of a service agreement the cost of which was fixed unilaterally by the provider pursuant to Article 1165 of the Code of Civil Law; and

- definition of the rules regarding enforced specific performance of the agreement that are referred to in Article 1221 of the Code of Civil Law.

National Assembly, 11 December 2017, TA n° 46

Dossier législatif

Agreements regarding proof: the impossibility of establishing indefeasible presumption benefitting a party

In a judgment handed down on 6 December 2017, the Supfreme Civil Court held that "*even if agreements regarding proof are valid when they cover rights over which the parties have free disposal, they cannot establish indefeasible presumption benefitting a party*".

The Supreme Civil Court thus restated, with respect to an agreement concluded prior to 1st October 2016 and in identical terms, the ionterpretation embodied in Article 1356 of the Code of Civil Law deriving from Order no. 2016-131 of 10 February 2016. Pursuant to this provision, *"agreements regarding proof are valid when they cover rights over which the parties have free disposal. Neverrtheless, they cannot gainsay indefeasible presumptions established by law or change the faith attaching to an avowal or oath. Nor, furthermore, can they establish indefeasible presumption benefitting a party".*

Cass. com. 6 déc. 2017, F-P+B+I, 16-19.615

Selective distribution – a luxury-product supplier can forbid its approved stockists to sell its products on third-party platforms

Having had referred to it a preliminary question from a German court in connection with a dispute between a supplier of luxury cosmetics established in Germany and an approved distributor of these products, the European Union Court of Justice has clarified its case law regarding selective distribution and market places.

Concerning the legality of the distribution system introduced

Referring to its unbroken line of decided cases, the Court of Justice held that a selective luxury-product distribution system aiming principally to preserve the *de luxe* image of these products did not infringe the prohibition on cartels provided for in Union law (Article 101§1 of the EUFT), provided always that *"the choice of re-sellers is made on the basis of objective criteria of a qualitative nature that are set in a uniform manner with regard to all potential re-sellers and applied in a non-discriminatory manner and that such criteria do not go beyond what is necessary."*

The Court issued a reminder in this context that luxury-product quality is not merely the result of their material characteristics but also of the allure and of the prestigious image that endow them with a feeling of luxury. This feeling represents an essential constituent of these products insofar as they can thus be distinguished by consumers from other, similar products. Spoiling this feeling of luxury is then likely to affect the very quality of these products.

Concerning the legality of a contractual clause prohibiting recourse to market places

The Court noted that yhe prohibition placed on members of a selective luxury-product distribution network "*aiming principally to preserve the de luxe image of these products, to have recourse to third-party platforms for the sale via Internet of contractual products*" is in compliance with Article 101§1 of the EUFT "*provided always that the clause in question aims to preserve the de luxe image, that it is set in a uniform manner and applied non-discriminately and that it is in proportion to the aim sought*". It wwill be for the domestic courts to check whether such is the case.

The Court emphasized that "*this prohibition does not seem to stray beyond what is necessary to preserve the de luxe image of the products. In particular, given the absence of any contractual relations between the supplier and the third-party platforms allowing it to demand from these platforms compliance with quality terms and conditions that it imposed on its approved distributors, authorizing distributors to have recourse to such-and-such a platform on condition that they meet pre-defined quality requirements cannot be deemed as being as efficient as the prohibition at issue.*"

Finally, on the assumption that the German court would conclude that the clause at issue is in theory covered by the prohibition on cartels provided for in Union law, the Court observed that it was not excluded that this clause could enjoy the benefit of categorial exemption.

This was because, under circumstances such as those involved in the case in point, the prohibition at issue to have recourse visibly to third-party concerns for sales via Internet does not amount to restriction of the customer base or a restriction of passive sales to the final users, restrictions which, on account of the fact that they are likely to produce serious anti-competitive effects, are from the outset excluded from benefitting from a categprial exemption.

CJUE, 6 déc. 2017, aff. C 230/16, Coty Germany GmbH c. Parfümerie Akzente GmbH,

Conclusions of the Solicitor-General

Communiqué 132/2017, 6 décembre 2017 - Arrêt de la Cour de justice dans l'affaire C-230/16

Doctipharma, an on-line medicinal product sales site for pharmacists, held to be legal

In a judgment handed down on 12 December 2017, the Versailles Appeal Court held that dispensing pharmacists can sell their medicinal products without prescriptions via the Doctipharma platform, a subsidiary of Doctissimo.

It thus set aside the judgment of Nanterre Commercial Court on 31 May 2016, which had held that Doctipharma was a commercial undertaking and not a dispensing pharmacy, none of the managers of which was a pharmacist registered with the Order of Pharmacists, that it exercised a major role of intermediary between customers and dispensing pharmacies listed on its site, exhibiting the character of an e-commerce remote sales undertaking selling to the general public medicinal products not subject to obligatory prescription and that it thus breached the provisions relating to the sale of medicinal products and to medicinal product e-commerce that are intended to protect public health.

The Court based itself on the example of a Marseille pharmacist authorized by the Regional Health Authority to set up and run a site via the address pharmacie-st-barthelemy-arseille.doctipharma.fr, which had a personalized home page showing a photograph of the pharmacist on which were entered his particulars and a contact tab. Judged on the basis of the general terms and conditions of the platform, the pharmacist was alone responsible for the conditions under which he carried on on-line sales of medicinal products on his site. The Court concluded that *"the doctipharma.fr site does not infringe the provisions of Article L.5121-33 of the Code of Public Health Law, which restricts setting up and running Internet sites to dispensing pharmacists only and from these dispensaries provided always that it does not prohibit them from having access to a shared platform as technical support for their sites."*

The Court considered, furthermore, that Doctipharma did not act as intermediary in medicinal product sales, an activity prohibited by the Code of Public Health Law. The platform did not undertake marketing exercises on the medicinal products or undertake commercial sales-furtherance. This role of intermediary was not characterized either by the single payment system, a simple technical service placed at the disposal of pharmacists.

CA Versailles, 12e ch., 12 déc. 2017, Doctipharma / Union des Groupements de Pharmaciens d'Officine (UDGPO)

A supermarket's general duty of care vis-à-vis its customers

A shop owes to its customers an absolute general duty of care based on the principle of general product and service safety provided for in Article L. 221-1 (now L. 421-3) of the Code of Gonsumer Law.

Having fallen on an anti-slip mat placed in front of a supermarket, a customer of the establishment had sued the owning company for damages for harm suffered.

The Court of Appeal dismissed the claim on the grounds that Article L. 221-1 of the Code of Consumer Law as then worded contained no scheme of independent liability allowing a victim to obtain reparation for loss or harm on the grounds of a professional operator's breach of a duty of care.

The Supreme Civil Court censured this decision, stating that a distributive undertaking owes to its customers an absolute general duty of care.or eBay.

Cass. ch. civile 1, 20 septembre 2017, 16-19.109, Inédit

Hepatitis B vaccine and multiple sclerosis: sovereign discretion of assessment of causal link and of product defect

In two decisions handed down on the same day, The Supreme Civil Court confirmed the dismissal of compensation claims submitted by persons suffering from multiple sclerosis that they ascribed to the hepatitis B vaccine.

In the first, a male patient had been vaccinated against hepatitis B and then diagnosed as suffering from multiple sclerosis two years later. In the second, a female patient had undergone multiple hepatitis B vaccine injections and then reported the same illness. Each one had sued the vaccine manufacturer for damages pursuant to Articles 1246 *et seqq.* Of the Code of Civil Law (deriving from the Directiveof 25 July 1985 relating to bringing into closer similarity Member States' legislative, regulatory and administrative provisions in the area of liability for defective products, transposed into Frenc law by Law no. 98-389 of 19 May 1998).

Both cases were dismissed by the lower courts on the grounds that no sufficiently strong presumption existed that the vaccine was defective and that there was a causal link between it and the illness.

An appeal was made to the Supreme Civil Court, which deferred a decision and referred the matter to the European Union Court of Justice, to which it put a number of questions on the construal of Article 4 of the Directive of 25 July 1985, which places *onus probandi* relating to harm or damage, lack of product safety and the causal link between the defect and the harm or damage. More precisely, it asked the EUCJ for a ruling on the judge's freedom of interpretation of the evidence submitted considering the lack of scientific certainty (Cass. 1st Civil Division, 12 November 2015, no. 14-18.118, no.1243 P + B + I).

In its judgment of 21 June 2017, the European Union Court of Justice held that it was possible for the judge to conclude, in the absence of sure and irrefutable evidence, that the vaccine had been defective and that there was a causal link between it and an illness on the basis of a set of serious, precise and concordant pieces of circumstantial evidence provided always that the set of evidence allowed him to consider, with a high enough degree of probability, that such a conclusion was consonant with reality (EUCJ, 21 June 2017, Matter C 621/15).

It was in the light of this decision that the Supreme Civil Court delivered its verdicts. It dismissed both appeals, considering that with regard to the facts examined by the lower courts, the evidence submitted as proof of a defect in the vaccine and of the causal link between this defect and the illness did not constitute sufficiently strong presumptions for the manufacturers to bear liability.

The First Division re-stated that Article 1245-8 of the Code of Civil Law requires the claimant to establish harm or damage, the product defect and the causal link between this and the harm or damage. It added that mere proof of the ascribability of harm or damage to the product is not enough and that the proof of a defect in the latter is essential. Such proof may result from simple presumptions on condition that they are serious, precise and concordant.

The Supreme Civil Court also pointed out that the lower-courts have sovereign discretion to assess evidence submitted by the victim and to note the existence of presumptions. They are thus bound to examine the victim's personal situation and the particular circumstances surrounding the vaccination and to check all the evidence submitted.

Cass. 1re civ., 18 oct. 2017, n° 14-18.118, FS-P+B+I

Cass. 1re civ., 18 oct. 2017, n° 15-20.791, FS-P+B+I

Ministerial clarification on regulations applicable to a fast-food drive-in

Pursuant to Article L. 725-1, 7° of the Code of Commercial Law, "*the setting-up or extension of a permanent point at which customers collect retail purchases ordered telematically and organized so as to allow automobile access*" is subject to commercial operating licensing.

Replying to a question from a Member of Parliament about the application of this provision to fast-food drive-ins, the Minister of the Economy stated that fast-food drive-ins are not subject to commercial operating licensing.

He specified that:

- fhe catering business, fast-food or not, does not, save rare exceptions, fall within the field of application of commercial town-planning regulations. It is in fact regarded, not as a commercial activity within the meaning of these regulations which are aimed at *"retail trading",* but as a service activity;
- the commercial operating licensing needed for setting up a permanent point at which goods are collected is granted "*per supply track and per square metre of the floor employed for goods collection purposes*" (Code of Commercial Law, Article L. 752-16); a fast-food drive-in, however, does not meet these criteria;
- in submitting drives to commercial operating licensing, the legislator saw the activity "*developed by the leading food-shopping names, which, for consumers, consists in ordering and paying for their purchases on Internet and going to get them with a car at a delivery zone located near to a storage area*" (Account of reasons for Law 2014-366 of 24 March 2014).

Rép. min. Chassaigne, AN 31 31 oct. 2017, n°980

Information sheets on making good economic loss

On 20 October last, the Paris Appeal Court published a collection of twelve methodological information sheets on making good economic loss caused in particular by anti-competitive practices.

These information sheets, prepared by a working party composed of judicial figures, professors, lawyers and chartered accountants are intended to help practitioners facing difficulties in assessing compensation figures.

List of the twleve methodological information sheets on making loss good:

Sheet no.1 How to make good economic loss?

Sheet no.2 How to evaluate causal link?

Sheet no.3 What are the relevant economic methods for evaluating economic loss?

Sheet no.4 How to make good economic loss resulting from lost opportunity?

Sheet no.5 How to make good non-material harm or damage?

Sheet no.6 What margin concept?

Sheet no.7 How to make good harm or loss related to passing time?

Sheet no.8 How to make good loss resulting from unfair competition?

Sheet no.9 How to make good loss resulting from the sudden breaking-off of established commercial relations?

Sheet no.10 How to make good loss resulting from termination of a commercial agent agreement?

Sheet no.11-a How to act for reparation of loss caused by an anti-competitive practice?

Sheet no.11-b How to make good loss caused by an anti-competitive practice?

Site de la cour d'appel de Paris.

CONSUMER LAW

Inadmissibility of a class action for a dispute between tenants and landlord

Article L. 623-1 of the Code of Consumer Law, deriving from Law no. 2014-344 of 17 March 2014 relating to consumer matters makes admissibility of a class action dependent upon the existence of individual losses arising from breaches committed at the time of sale of goods or provision of services or anti-competitive practices.

In a judgment handed down on 9 November 2017, the Paris Appeal Court held the action brought by a consumer association to be inadmissible as a tenancy agreement is not an agreement for the provision of services and is not governed by the Code of Consumer Law.

This is because, according to the Appeal Court, an agreement for the provision of services that could be the subject of a class action is one which allows the provision of services to be undertaken. It includes an obligation to perform as an essential obligation, the debtor of the said obligation undertaking principally to perform a determined activity that creates economic utility. The leasing of a building constitutes an agreement to rent out an item within the meaning of Article 1709 of the Code of Civil Law. By virtue of the said agreement, the owner of the real rights over the building procures for a certain time for his contracting partner enjoyment of it in return for the payment of rent. The landlord does not therefore undertake, as an essential obligation, to perform a determined activity creating economic utility. Placing the building at the tenant's disposal cannot then be described as the provision of services and correspond, for the tenant, to enjoyment of a service.

A tenancy agreement, governed by the Law of 1989, therefore follows exclusive specific rules of consumer law. The rules applicable to a tenancy agreement are to be found in the Code of Civil Law or in uncodified legislation; they are not included in the Code of Consumer Law and this Code makes no reference to them.

CA Paris, 9 novembre 2017, no. 16/05321, Confédération nationale du logement c/ SA Immobilière 3F

On-line commerce and consumer protection: the European Parliament adopts regulations

The Members of the European Parliament on 12 December 2017 adopted regulations aiming to provide consumers with better protection against fraud. The new legislation abrogates the provisions of the regulations relating to co-operation in the field of consumer protection *(Regulation (EU) 2006/2004, 27 October 2004)*, which have been considered as insufficient.

The new regulations thus provides for widening the powers of national authorities responsible for applying consumer protection law to detect and stop on-line breaches of consumer protection legislation and better co-ordinate their actions throughout the Union.

It contains the following provisions:

- the legally-competent authorities and their prerogatives (co-operation, role of designated bodies, minimum powers legally-competent authorities);
- the mechanisms of mutual assistance (requests for information, requests for enforcement measures, requests for mutual assistance);
- the mechanisms of co-ordinated enquiries and enforcement concerning "*offences on a grand scale*" and "*offences on a grand scale at Union level*" (procedure, general co-operative principles, launching of co-ordinated action and appointment of co-ordinator, reasons for refusal to take part, undertakings and enforcement measures in connection with co-ordinated exercises, closure of co-ordinated exercises);
- activities at Union level (alerts, exchange of other information relevant to detecting offences, "*clean-up*" campaigns, co-ordination of other activities contributing to enquiries and to application of the legislation, such as agent-training or collection, classification and exchange of data from consumer complaints).

These regulations come into force on the twentieth day following the date of its publication in the Official Journal of the European Union. It is applicable from 17 January 2020.

Règlement (UE) 2017/2394 du 12 décembre 2017 sur la coopération entre les autorités nationales chargées de veiller à l'application de la législation en matière de protection des consommateurs et abrogeant le règlement (CE) n° 2006/2004

OJEU 27 December 2017

Order transposing the European Directive relating to package holidays and related travel services

Order no. 2017-1717 of 20 December 2017 transposing Directive (EU) 2015/2302 of 25 November 2015 relating to package holidays and related travel services was published in the OJ of 21 December.

This order:

- defines the scope of the holiday and short-stay sales scheme and the purchasing of other services linked to the first service sold;
- strengthens, at the contract constitution phase and prior to the start of its performance, protection of the traveler who buys a package or travel service through an intermediary (single service or related travel service);
- defines the liability scheme. Article L. 211-16 of the Code of Tourism Law preserves, as the Directive allows, shared liability between the travel agency and the trip organizer. Furthermore, the Directive did not define the liability scheme incurred, which is attached to the general terms and conditions of contractual law provided for nationally. The choice was made to keep the liability scheme already in force as of right as provided by the Law of 13 July 1992 which transposed Directive 90/314/EEC of 13 June 1990. As far as related travel services are concerned, each professional operator bears responsibility for the travel service that he sold. A duty of assistance by the professional operator towards the traveler is also introduced in Article L. 211-17-1 of the same Code;
- contains the provisions relating to the financial guarantee against insolvency. These remain unchanged as they are all-inclusive amounts and services sold by an intermediary. A financial guarantee has been brought in for related travel services; and
- simplifies formalities to be undertaken by European concerns wishing to offer their services on a free service provision basis in France.

The provisions of the Order will come into force on 1st July 2018. For the sake of clarity, it is confirmed in this Article that contracts concluded prior to this date remain subject to the old law.

Ord. n° 2017-1717, 20 déc. 2017, JO, 21 déc. 2017

Calculation of compensation for cancellation of or extensive delay of a connecting flight

In a judgment handed down on 7 September 2017, the European Union Court of Justice gave details relating to the method for calculating compensation for delays exceeding three hours for intra-community flights with connecting flights.

In this matter, three passengers had gone from Rome to Hamburg via Brussels on a flight operated by Brussels Airlines. Their flight arrived at Hamburg three hours fifty minutes later than originally estimated. They referred the matter to the Hamburg District Court seeking the compensation provided for by Regulation 261/2004 of 11 February 2004 on airline-passenger compensation.

These Regulations as construed by the EUCJ provides in particular that, in the event of lateness of three hours or more, passengers are entitled to compensation of 250 € for flights of 1,500 km or less and 400 € for flights exceeding 1500 km linking two Member States.

The German Court questioned the EUCJ to find out whether, in the case of a flight involving a connecting flight, the total distance of the flight corresponds to the distance between the airport left and the airport arrived at or whether it should be calculated on the basis of the distance actually covered.

The Court noted, firstly, that in connection with the right to compensation, the Regulations did not make a distinction on the basis of whether the passengers in question reach their final destination on a direct flight or on a connecting flight.

The Court concluded from this that, in both cases, passengers should be treated in the same manner as regards calculation of compensation.

Secondly, the EUCJ noted that the different compensation brackets reflect differences in the extent of the inconvenience suffered by passengers. In this respect, the Court held that the nature of the flight (direct flight or connecting flight) has no impact on the extent of the inconvenience suffered. Thus, when determining the amount of compensation in the case of a flight with a connecting flight, only the distance covered as the bird flies that a direct flight covered between the airport left and the airport arrived at should be considered.The fact that the distance actually covered is, because of the connection, greater than the distance between the airport left and the airport arrived at has no impact on calculation of compensation.

CJUE, 7 sept. 2017, aff. C-559/16, Bossen et a

Labelling foodstuffs: option of displaying new logo stating a product's food value

Since 4 November 2017, manufacturers and distributors in the food sector have enjoyed the option of placing on food packaging a five-colour logo named *"Nutri-score"* displaying the nutritional quality of the product. The logo is a graphic reference chart classifying foods from A to E based on a colour code and with reference to the product's nutritional quality. To establish this classification, operators must follow specifications showing in particular how to calculate the nutritional score.

Arrêté du 31 octobre 2017 fixant la forme de présentation complémentaire à la déclaration nutritionnelle recommandée par l'Etat, JORF du 2017

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