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Distribution / Competition / Consumer Law Update

June 2015

Sudden termination of a business relationship

With whom does jurisdiction lie? The CJEU is about to settle the issue.

The decision of the Cour d'Appel (court of appeal) in Paris on 07 April 2015 to refer **a twofold question to the Court of Justice of the European Union (CJEU) for a preliminary ruling** is good news. The Cour d'Appel wants to know whether it should apply the tortious jurisdiction rule (article 7 § 3 of Brussels I Recast) or the contractual jurisdiction rule (article 7 § 1 of Brussels I Recast) to determine whether it has jurisdiction over an action for damages following the sudden termination of an established business relationship (article L442-6-I of the French Commercial Code).

The Cour de Cassation (France's highest civil court) should probably have referred such a question a long time ago upon noting that the decisions of the French courts of appeal or even of its own civil and commercial divisions contradicted one another. For the time being, the courts are inclined to favour a quasi-delictual qualification while still acknowledging the efficacy of jurisdiction clauses (subject to checking their scope).

Network reorganisation and business relationship termination

If a supplier substantially alters how their distribution network is organised, they may be held liable on grounds of the sudden termination in all or part of the established business relationship they enjoy with their distributor. The Cour d'Appel (court of appeal) in Paris recently gave two examples (on 06 May 2015 and 13 May 2015 respectively).

In the first case, a supplier had **transformed a simple distribution network into a selective distribution network** and had thereby substantially increased the rates offered to its former distributors. In the other case, a foreign supplier had **introduced its own French subsidiary into the relationship with its exclusive distributor**, which had seen its purchasing terms take a major turn for the worse (price increases and stricter terms). The Cour d'Appel ruled in both cases, after analysing the impact the supplier-imposed changes had had on the distributor's business, that the change amounted to the sudden termination in part of the relationship.

Commercial agency

Contract non-performance and extinguishment of the right to commission

The ruling issued by the Cour de Cassation (France's highest civil court) on 31 March 2015 (no. 14-10.346) recalls the public policy rule contained in article L134-10 of the French Commercial Code, according to which the agent's right to commission is extinguished in just one case: where it is proven that the contract between the third party and the principal will not be performed and such non-performance is not due to circumstances for which the principal is liable. In the case at hand, the contract entered into by agent and principal (Telecom Italia) expressly provided that in order to comply with the evidence rule of article L134-10 of the French Commercial Code the principal simply had to send its agent computer files generated by the former as proof that contracts were not being performed. The court found the practice to be unlawful.

It is nonetheless still lawful for the parties to **agree on specific methods of proof**, even in the context of article L134-10 of the French Commercial Code, although such agreements may not in effect sidestep the article and moot the protection granted to the agent as regards compensation.

Restriction of competition on the internet

Online travel agencies: The end of the most-favoured-nation clause?

In a case about anti-competitive practices, the Autorité de la Concurrence (the French competition agency) acknowledged in a decision of 21 April 2015 (DC-15-D-06) **Booking.com's commitments to amend its most-favoured nation (MFN) clauses**, which were particularly restrictive as regards vacancies and pricing. From now on, a hotel working with Booking.com may for example grant better business terms to another online travel agency (OTA) or offer prices below those displayed on Booking.com's web site, though only within the framework of offline sales (i.e., sales that are not displayed on the hotel's own web site) or of a loyalty programme. Still, this is a bittersweet ruling for some hotel owners unions: in reality, Booking.com can continue to impose equal pricing terms on hotel owners' web sites and its own site.

However, on 07 May 2015, the Tribunal de Commerce (commercial court) in Paris, to which the question had been put by the French Minister for Economic Affairs (Expedia and Hotel.com case), found that **MFN clauses create a significant imbalance** and must therefore be voided on grounds of article L442-6-I 2° of the French Commercial Code. In fact, what the court found above all is that there is no quid pro quo for such clauses – whose purpose it is to ensure prices found on the internet are the lowest while still guaranteeing OTAs a minimum margin – that might justify such a significant advantage, such as a risk taken by the OTA or a minimum purchase commitment.

New technologies

E-canvassing

Although e-canvassing has become very common, the Conseil d'État (France's highest administrative court) recently recalled (in a ruling issued on 01 March 2004) that according to article L34-5 of the French Post Office and Electronic Communications Code e-canvassing **requires the person concerned to give its express consent** with full knowledge of the facts. As a consequence, the global approval of general terms and conditions of use does not fulfil that requirement.

However, article L34-5 of the French Post Office and Electronic Communications Code also provides that no prior consent is required for direct canvassing where **the person concerned is already a customer or client** having purchased similar products or services. The same goes for **professionals** (natural persons), who may be canvassed where the message is related to their business, although they must be given the opportunity to opt out.

The distribution of connected things

The DGCCRF (the French agency for competition, consumer affairs, and the repression of fraud) took on connected things in a memorandum of May 2015. In addition to the change in the balance of power from a competition law standpoint and the change in the nature of the contractual relationship (from sale to service), the commercialisation of connected things, according to the DGCCRF, is going to expose consumers chiefly to two types of risk: the **use of their personal information for commercial purposes** and the infringement of their right of privacy on the one hand, and **hacking** on the other hand. Therefore, manufacturers and distributors of connected things must anticipate both risks. In that regard, the DGCCRF recalls that from 2015 to 2019 an aggregate two billion connected things should be sold in France, covering all areas of activity (security, health, household electrical appliances, sports, ready-to-wear, etc.).

Consumer law

Product labelling and recycling

Under the French decree of 23 December 2014 on the common labelling of recyclable products subject to sorting, any business releasing **recyclable products** (except where they are subject to special regulations) onto the market (producers, importers, distributors) must give consumers sorting instructions according to a specific labelling system. The adjustment period and educational checks by the DGCCRF will terminate on 01 July 2015. **The "Triman" logo must be displayed** on the product, the instructions, or the packaging, or on any other, including digital, medium. Economic operators must therefore choose the medium that best suits their needs (e.g., the product page on a web site) to display the "Triman" logo and therefore comply with the provisions of articles R141-12-17 et seqq. of the French Environmental Code. It is worth noting that there are no penalties for failing to comply with this duty to inform consumers.

New markdown advertising regulations

After a months-long wait, the French ministerial order of 11 March 2015 has at last substantially amended the markdown advertising rules previously established by the ministerial order of 31 December 2008, which blatantly contravened Community law (directive 2005/29 of 11 May 2005 on unfair business practices).

In essence, advertisers are now pretty much free to advertise markdowns as they please: any markdown advertisement is lawful provided it does not amount to an unfair commercial practice in the meaning of article L120-1 of the French Consumer Code and it clearly specifies the **reference price which serves as the basis for the markdown and which is freely set by the advertiser**, whereby the advertiser must be able to prove the reality of the said reference price.

Therefore, the advertiser's freedom is "only" limited by the prohibition of **unfair commercial practices** – a criminal offence that carries two years' imprisonment and fines of up to 300,000 euros for natural persons and 1,500,000 euros for legal entities. An unfair commercial practice in the meaning of article L120-1 of the French Consumer Code is a commercial practice that fails professional diligence requirements and alters the economic behaviour of normally informed and reasonably attentive and sensible consumers towards a specific good or service.

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