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CURRENT DEVELOPMENTS IN INTERNATIONAL CONTRACT LAW

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PANEL on jurisdiction and “rupture brutale”

Can your distributor bring an action for *rupture brutale* before its own courts although the contract contains a jurisdiction or arbitration clause?

Principle of "*rupture brutale*" under French Law

Article L. 442-6 I 5° of the French Commercial Code sanctions:

- the sudden break-off of an established commercial relationship, even partially,
- without prior written notice,
- which must be proportionate with the duration of the business relationship and consistent with standard commercial practices.

The duration of the notice period depends on several criteria which are determined from case to case. Those criteria are in particular:

- the duration of the commercial relationship;
- the nature of the relation (e.g. very specific products);
- the dependency situation of the contractual partners;
- the exclusiveness of the relation;
- the time necessary to find a new contractual partner.

Depending of the respective business relation, the notice period may range in general between 3 month and 2 years.

Irrespective the notice period agreed upon by the parties, the judge determines the appropriate duration of the notice period, according to the duration of the business relationship and other criteria.

Jurisdiction clauses and rupture brutale: Case law example

Court of Cassation, Commercial Chamber, January 18, 2011 (Safic-Alcan vs. Comercio de Primeras Materias SL)

- Commercial relationship between Spanish and French Company;
- The Terms and Conditions underlying the commercial relationship stipulated jurisdiction of **Spanish Courts**;
- The Spanish company terminated the contract with the French company;
- Irrespective of the jurisdiction clause, the French Company brought a claim before the Commercial Court of Nanterre in **France**;
- The Spanish Company objected the lack of jurisdiction of the French Court.

Different solutions of French Courts in the example case

Commercial Court (Nanterre):

The jurisdiction clause does **not apply** when a claim is based on article L. 442-6 I 5° Commercial Code since the liability would be **tortious under French law** and thus not allow the application of a jurisdiction clause

→ jurisdiction of French court

Court of Appeal (Versailles):

The jurisdiction clause must be observed since the liability would be **contractual under the Regulation 44/2001** (article 5-1), irrespective of the qualification under French law

→ jurisdiction of Spanish court

Court of Cassation (Paris):

The jurisdiction clause must be set aside if a claim is based on article L. 442-6 I 5° since the liability would be **tortious under the Regulation 44/2001** (article 5-3) (no further explanation given)

→ in principle jurisdiction of Spanish court (but the clause was not held valid for other reasons)

Rupture brutale: Tortious or contractual?

Concerning the legal nature as tortious or contractual, it has to be distinguished between domestic French law and international business relationships since the definition of contractual or tortious in EU law is not identical to the definitions of contractual/tortious matters that might exist in the laws of a Member State.

Domestic French law: the legal nature of article L. 442-6 I 5° is not set by the provision itself but has been specified by the Jurisprudence

International relations (only EU law): The regulation 44/2001 distinguishes between contractual (article 5-1) and tortious (article 5-3) claims. These terms have been defined by the Court of Justice of the European Union.

Tortious or contractual? French domestic law

The Court of Cassation seems to be divided as regards the legal nature of article L. 442-6 I 5°:

Commercial Chamber	Civil Chamber
The conclusion of a jurisdiction clause is not possible since the responsibility is tortious (prevailing case law).	Jurisdiction clauses are valid also when claims are based on article L. 442-6 I 5° (Cases: Blaser Jagdwaffen, Monster Cable)

Wording of the jurisdiction clauses in the cases ruled by the Civil Chamber:

Court of Cass., 1st Civil Chamber, March 6, 2007, case no. 06-10.946, Nemrod Frankonia vs. Blaser Jagdwaffen GmbH: "*all disputes arising from the termination of the contractual relationship*"

Court of Cass., 1st Civil Chamber, October 22, 2008, case no. 07-15.823, Monster Cable Products Inc. vs. Audio Marketing Services: "*The validity, the interpretation and execution of the present contract shall be governed by the laws of the State of California. The Courts of the State of California of the USA, district of San Francisco, shall have jurisdiction to hear the disputes arising from the present contract.*" (Clause provided in the decision of the Appeal Court Paris, September 28, 2006, case no. 04/04462)

Tortious or contractual – The position of the Civil Chamber

The position of the Civil Chamber is disputed in French doctrine and interpreted in 3 different manners:

- (1) Some authors conclude that, admitting the validity of a jurisdiction clause, the Civil Chamber would recognize the contractual character of the responsibility under article L. 442-6 I 5° Commercial Code.

- (2) Other authors note that the cases decided by the Civil Chamber concern an international situation and that it can thus not be concluded that the Civil Chamber decided on the character of article L. 442-6 I 5° under French Law.

- (3) Other authors think that the Civil Chamber held the jurisdiction clauses valid irrespective of their contractual or tortious legal character but because of their comprehensive scope.

Tortious or contractual? Interpretation under the Regulation 44/2001

Article 23 of the 44/2001 Regulation stipulates:

"If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

Article 5-1: "in matters relating to a contract"
Article 5-3: "in matters relating to tort, delict or quasi-delict"

Tortious or contractual? Interpretation under the Regulation 44/2001

The definition of contractual or tortious in the Regulation is not identical to the definitions of contractual/tortious matters that might exist in the laws of a Member State.

This principle of independent interpretation is consistent jurisprudence of the ECJ:

- ECJ, September 27, 1988, Kalfelis vs. Schröder, case no. 189/87;
- ECJ, September 17, 2002, Fonderie Officine Meccaniche Tacconi vs. Heinrich Wagner Sinto Maschinenfabrik, case no. 334/00, points 19 to 21;
- ECJ, October 1, 2002, Verein für Konsumenteninformation vs. Henkel, case no. 167/00, points 35 and 36;
- ECJ, March 22, 1983, Peters vs. Zuid Nederlandse Aannemers Vereniging, case no. 34/82, points 9 and 10;
- ECJ, March 8, 1988, Arcado vs. SA Haviland, case no. 9/87, points 10 and 11.

« *Having regard to the objectives and general scheme of the Convention, it is important that, in order to ensure as far as possible the equality and uniformity of the rights and obligations arising out of the Convention, that concept should not be interpreted simply as referring to the national law of one or other State concerned* »

Tortious or contractual? Interpretation under the Regulation 44/2001

Definition of tort claims under article 5-3 of the Regulation 44/2001:

"Matters relating to tort, delict and quasi-delict cover all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5-1" (*toute demande qui vise à mettre en jeu la responsabilité d'un défendeur et qui ne se rattache pas à la « matière contractuelle » au sens de l'article 5, paragraphe 1 du Règlement*)

- ECJ September 27, 1988, Athanasios Kalfelis vs. Bankhaus Schröder, Münchmeyer, Hengst and Co. and others, case no. 189/87;
- ECJ October 1, 2002, Verein für Konsumenteninformation vs. Henkel, case no.167/00, point 36).

Definition of contractual claims under article 5-1 of the Regulation 44/2001:

The jurisprudence provides a negative definition:

"if the liability does not derive from obligations freely assumed by one party towards another, it is a matter relating to tort, delict or quasi-delict" ([si la responsabilité] *ne trouve pas son origine dans des engagements librement assumés d'une partie envers une autre, elle relève de la matière délictuelle ou quasi délictuelle*)

- ECJ, September 17, 2002, Fonderie Officine Meccaniche Tacconi vs. Heinrich Wagner Sinto Maschinenfabrik, case no. 334/00, point 23 ;
- ECJ June 17, 1992, Handtke vs. Traitements mécano-chimiques des surfaces, case no. 26/91, point 15.

Tortious or contractual? Termination as contractual responsibility under the Regulation 44/2001

According to the jurisprudence of the ECJ, the termination of a contract without a prior notice period is a contractual responsibility:

ECJ, October 6, 1976, case no. 14/76, De Bloos
ECJ, March 8, 1988, case no. 9/87, Arcado

Court of Cassation: article L. 442-6 I 5° is tortious under the Regulation 44/2001

Other cases in which the Court of Cassation held a claim based on article L. 442-6 I 5° Commercial Code as tortious under the Regulation:

- Cass. Com. September 15, 2009, Cap Sud vs. Replex Fashion GmbH, case no. A 07-10.493

« *Le fait pour tout producteur, commerçant, industriel ou personne immatriculée au Répertoire des Métiers, de rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte de la durée de la relation commerciale et respectant la durée minimale de préavis déterminée, en référence aux usages du commerce, par des accords interprofessionnels,* ***engage la responsabilité délictuelle de son auteur*** *; qu'ainsi, en décidant que l'action de la SOCIETE CAP SUD, qui tendait à la réparation du préjudice causé par la brusque rupture de relations commerciales établies était de nature contractuelle, et ne relevait donc pas des dispositions de l'article 5-3° du règlement no. 44-2001 du 22 décembre 2000, la Cour d'Appel a* ***violé ledit article, ensemble l'article L. 442-6-1-5° du Code de Commerce*** »

- Court of Cass. January 13, 2009 case no. 08-13.971, Delor Vincent vs. Claas Tractor (same wording)
- Court of Cass. February 6, 2007 case no. 04-13.178, Idéal France vs. Guiot (same wording)

Criticism:

The Court of Cassation does not provide an explanation why the responsibility based on article L. 442-6 I 5° should be tortious under the Regulation 44/2001 but refers to the definition under domestic French law.

The Court of Cassation states moreover that the Appeal Court, which had stated that the termination of the contract would be contractual under the Regulation 44/2001 (article 5-1) and not tortious (article 5-3) would violate article L. 442-6 I 5° of the Commercial Code. The Court of Cassation misconceives however that the definitions of the Regulation 44/2001 are independent from domestic law.

Can a jurisdiction clause be set aside if article L. 442-6 I 5° is considered an overriding mandatory provision ("loi de police")?

Even if a claim based on article L. 442-6 I 5° is considered as contractual under the Regulation 44/2001 (article 5-1), can a jurisdiction clause be set aside if article L. 442-6 I 5° Commercial Code were to be considered an overriding mandatory provision (« loi de police »)?

Definition of overriding mandatory provisions: : article 9 Rome I (Regulation EC 593/2008 dated June 17, 2008 on the law applicable to contractual obligations)

"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

(« *Une loi de police est une disposition impérative dont le respect est jugé crucial par un pays pour la sauvegarde de ses intérêts publics, tels que son organisation politique, sociale ou économique, au point d'en exiger l'application à toute situation entrant dans son champ d'application, quelle que soit par ailleurs la loi applicable au contrat d'après le présent règlement*. »)

Can a jurisdiction clause be set aside if article L. 442-6 I 5° is considered an overriding mandatory provision ("loi de police")?

Argumentation of the Court of Appeal in the Monster Cable case: article L. 442-6 I 5° being an overriding mandatory provision, Monster Cable should not be allowed to evade the strict rules of French Law by choosing a less stringent jurisdiction (here San Francisco). The Court of Appeal thus ruled that the French Court had jurisdiction due to the nature of article L. 442-6 I 5° as overriding mandatory provision.

This position has been rejected by the Court of Cassation in the Monster Cable/AMS case (October 22, 2008) :

"… *the jurisdiction clause contained in this contract concerns all disputes arising from the contract and should therefore be applied; whereas overriding mandatory rules might be applicable to the merits of the dispute.* "

(« … *la clause attributive de juridiction contenue dans ce contrat visait tout litige né du contrat, et devait en conséquence être mise en œuvre, des dispositions impératives constitutives de lois de police fussent-elles applicables au fond du litige* »).

The question whether article L. 442-6 I 5° Commercial Code is to be considered as "loi de police" can thus remain unanswered since this qualification only concerns the applicable law, but not the place of jurisdiction.

Arbitration – Is article L. 442-6 I 5° arbitrable?

Article L. 442-6 I 5° Commercial Code is considered a public policy provision (« ordre public ») which means that the parties cannot evade the rules of this article by agreement. This legal character of article L. 442-6 I 5° Commercial Code raises thus the question if it can be subject to arbitration.

Article 2059 of the French Civil Code states that "all persons may submit to arbitration those rights which they are free to dispose of"

Article 2060, paragraph 1 of the French Civil Code provides that "one may not submit to arbitration questions of personal status and capacity, or those relating to divorce or to judicial separation or disputes ... and more generally in all areas which concern **public policy**."

It is recognized under French law that a dispute is not *per se* inarbitrable only because it is governed by public order stipulations. If public policy (fraud, antitrust) is concerned, the subject matter remains available to arbitration, whether or not the main contract containing the arbitration agreement actually contravenes public policy. The review of compliance with the requirements of French public policy is exercised in the context of an action to set aside or to enforce the award (but decree of January 13, 2011 allows waiver to the annulment of the award).

Arbitration – If article L. 442-6 I 5° is considered a “loi de police”, is it still available for arbitration?

Appeal Court Lyon September 9, 2004, case no. 04-108, SARL KTM Group GmbH vs. SAS MCC Motos:

The Court qualifies article L. 442-6 I 5° as “loi de police” and states that the arbitration clause must therefore be set aside

(« *Attendu que les dispositions législatives fondant la demande tendent à la protection des entreprises subissant un préjudice du fait des pratiques qu'elles répriment ; qu'elles* ***constituent une loi de police*** *au sens du droit international privé ayant vocation à s'appliquer à l'ensemble des pratiques dommageables, aux effet économiques et/ou concurrentiels défavorables, constatés sur le territoire national ;*

Qu'elles donnent de plus au Ministre de l'Economie, dont la position est comparable à celle du Ministère Public, une mission de protection générale d'un ordre public économique lié au respect des règles de concurrence ;

Qu'il ***apparaît donc que la clause d'arbitrage*** *figurant au contrat exclusif de vente signé par la société MCC MOTOS, et dont se prévaut la société KTM GROUP GMBH,* ***est sans application dans le cas où la demande repose sur la violation des dispositions d'ordre public de l'article L 442-6 du Code de commerce****, dont les finalités échappent en tout état de cause aux prévisions contractuelles […]* »)

This case has not been ruled by the Court of Cassation.

Arbitration – If article L. 442-6 I 5° is considered a “loi de police”, is it still available for arbitration?

Position of the Court of Cassation: same position as for jurisdiction clauses: character as “loi de police” concerns only the applicable law but not the place of jurisdiction

Court of Cass., 1st Civil Chamber, July 8, 2010, no, 09-67013, HTC vs. Doga

« Aux motifs que « *la société DOGA a introduit le présent litige sur le fondement des dispositions de l'article L.442-6-1-5° en faisant valoir que HTC avait rompu de manière brutale les relations commerciales établies ; […] ; que certes, DOGA fait à juste titre valoir que le fait pour tout producteur, commerçant, industriel ou personne immatriculée au répertoire des métiers de rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte de la durée de la relation commerciale et respectant la durée minimale de préavis déterminée, en référence aux usages du commerce, par des accords interprofessionnels, engage la responsabilité délictuelle de son auteur ;*

que la clause compromissoire contenue dans le contrat visant tout litige ou différent né du contrat ou en relation avec le contrat, ***le caractère délictuel de la responsabilité imputée à HTC, ne suffit pas à rendre cette clause manifestement inapplicable****, dès lors que la demande de DOGA présente un lien avec le contrat puisqu'elle se rapporte notamment aux conditions dans lesquelles il a été mis fin à ce contrat et aux conséquences en ayant résulté pour DOGA,* ***peu important que des dispositions d'ordre public soient applicables au fond du litige dans la mesure où le recours à l'arbitrage d'un litige n'est pas exclu du seul fait qu'une réglementation d'ordre public est applicable*** *; que par voie de conséquence la société THC doit être déclarée mal fondée en son contredit et le jugement confirmé en ce qu'il a invité les parties à se pourvoir devant le tribunal arbitral à constituer*»)

Enforcement of a judgment rendered by a foreign court in France

The foreign judge will probably not apply the French “loi de police”

Court of Cass., Civil Chamber, February 20, 2007, Cornelissen vs. Avianca:

- The judge deciding on the exequatur has not to verify whether the foreign judge has applied the law designated by the rule of conflict according to French law.
- If there is no exclusive territorial jurisdiction of the French courts, a foreign court may have jurisdiction (also if a “loi de police” is concerned), unless the choice of forum can be considered as fraude.

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