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COMMERCIAL-DISTRIBUTION LAW NEWS FLASH

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News about payment periods in B2B transactions: much ado about nothing!

31 December 2011 being the expiry date for inter-professional agreements deviating from the statutory limits on payment periods, businesses were expecting a lot from the implementation of Directive 2011/7/EU of 16 February 2011 on combating late payment in commercial transactions (the "Directive"), and in particular from its Article 3.5, which left some hoping for a return to the possibility of negotiating payment periods exceeding the statutory maximum time limits of net 60 days or 45 days EOM, date of invoice.

Indeed, Article 3.5 of the Directive provides that "Member States shall ensure that the period for payment fixed in the contract does not exceed 60 calendar days, unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor within the meaning of Article 7."

The Directive was incorporated into French law by way of Act no. 2012-387 of March 22, 2012 (OJ March 23, p5226) - the 4th Act for the Simplification of French Law (the "Act") - and it is highly likely that this transposition of the European rules will be a great disappointment for many in terms of payment periods in B2B transactions.

Indeed, Article 121 III of the Act merely renews the possibility for businesses to negotiate new deviating inter-professional agreements on the condition that such agreements:
- cover sectors that have already been covered by previous inter-professional agreements and relate to the sale of products or services of a particularly seasonal nature making it difficult to comply with the statutory limit;
- set shorter payment periods than the payment periods applicable as of 31 December 2011, on the basis of prior applicable agreements;
- are entered into within the next 6 months and are validated by decree, following the opinion of the Competition Authority;
- have a maximum term of 3 years.

Therefore, an exception to the statutory time limits does indeed exist, but its regulation is such that its application will undoubtedly remain limited.

The Minister of the Economy's action under Article L. 442-6, III: sequel and end?

In a case brought by the company Galec, which had been ordered by the French courts to refund over 23 million euros to its suppliers (via the French Public Treasury), the European Court of Human Rights (ECHR) held in its ruling of 17 January 2012 that even though the Minister of the Economy's obligation to inform suppliers seems to be a requirement for the protection of such suppliers, a failure to inform such suppliers does not necessarily cause harm to the distributor by denying it a fair trial, insofar as the distributor is free to summon its co-contractors to join the proceedings.

Therefore, according to the ECHR, the Minister's action is consistent with the European Convention on Human Rights, even if the suppliers concerned are not informed.

Two decisions of 13 December 2011 handed down by the Créteil Commercial Court created a reversal, holding the action inadmissible because the Minister had not been able to demonstrate that it had informed the suppliers suffering the unfair practices of the filing of its lawsuit (in reference to the reservation made by the French Constitutional council on 13 May 2011).

This approach deviated from the decisions handed down previously by other commercial courts (Lille and Meaux, respectively, in September and December 2011), thereby creating diverging interpretations likely to create legal insecurity.
The ECHR's ruling and another decision of the Meaux Commercial Court of 24 January 2012, "validating" the Minister's action even when the suppliers concerned were not informed, provide new elements. But is this the end of the "saga" over the admissibility of the Minister's action when the suppliers are not informed? We'll have to wait and see…

Significant imbalance: new examples

In the abovementioned decision of the Meaux Commercial Court of 24 January 2012, the judges found that:

- Imposing on suppliers a clause requiring them to take back unsold stock, applicable indifferently to all products in stock, constitutes a significant imbalance in the relationship with the suppliers. The lawfulness of a requirement to take

back unsold stock is not undermined per se, but the act of systematically burdening the supplier with the risk related to unsold stock is considered unlawful;

- Although it is lawful to provide for the possibility of price changes by means of a price review clause, differential treatment between the terms under which the supplier's prices may rise and those under which they may fall creates a significant imbalance.

Article L.330-3 of the French Commercial Code: beware of assignments

According to Article L. 330-3 of the French Commercial Code, when someone makes a trade name, trade mark or business sign available to another person and requires such person to make an exclusivity or quasi-exclusivity commitment for the conduct of his business, he must provide the co-contractor with a document containing a certain amount of information, before the signature of any agreement.

This article, which defines a specific pre-contractual obligation to provide information under law and decree, is regularly applied in the case of franchise or dealership networks, when this obligation is placed upon the franchisor or the supplier.

A decision of the Cour de cassation of 21 February 2012 was handed down in the context of a franchise agreement. When a nautical franchisee sold its business, the franchisor approved the buyer of the business, which therefore became its new franchisee. The franchisor then terminated the franchise agreement on the grounds of some contractual breaches by the new franchisee. The franchisee then sued the franchisor seeking damages and claiming that the franchisor did not comply with the pre-contractual obligation to provide information under Article L. 330-3 of the French Commercial Code. The court ruling on the merits found that the pre-contractual obligation to provide information, set forth in Article L.330-3 of the French Commercial Code, is applicable to the franchisor before the conclusion of the franchise agreement and not during a transfer of an on-going contract, and rejected the new franchisee's claim.

For the Cour de cassation, however, insofar as the franchisor approved the new franchisee, the modification of the initial contract required the franchisor to provide its new co-contractor with the information mentioned in Article L. 330-3 of the French Commercial Code to allow this new franchisee to make a commitment to perform the franchise agreement in full knowledge of the facts. The Cour de cassation quashed the appeal decision in this respect and referred the parties back to the court ruling on the merits./.

Mahasti Razavi - Parner
Alexandra Berg-Moussa - Counsel