RESTRICTIVE COMPETITIVE PRACTICES AND OVERRIDING MANDATORY PROVISIONS

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SIGNIFICANT IMBALANCE, ADVANTAGE WITHOUT CONSIDERATION, ABRUPT TERMINATION: ARE THESE ABUSES PUNISHABLE WHEN THE CONTRACT IS SUBJECT TO FOREIGN LAW?

Introduced into the French Commercial Code (hereinafter the "FCC") with the Economic Modernisation Law of 2008, restrictive competitive practices, found in Article L.442-1 and seq. of this code, quickly raised the question of their application to legal situations including international elements (1).

In other words, can such abuses be sanctioned even if the contract has been submitted by the parties to a foreign law?

The issue at stake here is the impact of the choice of law on the contractual relations of business partners. Indeed, private international law rules give the possibility for parties to an international contract to choose the law that will govern their contractual relations. Thus, when a foreign law has been chosen, the rules of the French Commercial Code shall be disregarded, notably those that are of particular interest to us regarding the significant imbalance, advantage without consideration and abrupt termination of established commercial relations.

Nevertheless, French jurisdictions may disregard the law chosen by the parties to the contract when French provisions are considered as overriding mandatory provisions.

Since 2008, the question of whether these texts should be classified as overriding mandatory provisions lead to a fluctuating case law: sometimes admitted, sometimes excluded. Judges seem to struggle in adopting a clear and unanimous position.

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests such as its politic, social, and economic organisation. That is why they impede the application of the foreign law chosen by the parties to the contract.

These questions are particularly topical at a time when particular attention is being paid to the contracts concluded with international buying alliances with the ASAP law (2) and with the fact that the Minister assigned Intermarché, a French distributor, and its international buying alliance, for a civil fine of 150 million of Euros. We are going to focus on a few recent decisions relating to significant imbalance and the abrupt termination of established commercial relations.

Case law analysis and the decisive nature of the intervention of the Minister of the Economy.

[1] Monster Cable decision, Court of Cassation, First civil Chamber Case law n°1003, 22 October 2008, n°07-15.823
[2] The ASAP Law (2020-1525 of 7 December 2020) includes in Article L. 441-3 of the French Commercial Code the obligation to describe in the French agreement any service or obligation regarding a concluded agreement with a legal entity located outside the French territory with which the distributor is directly or indirectly linked.

FOCUS ON THE EXPÉDIA DECISION TAKEN BY THE COURT OF CASSATION ON 8 JULY 2020

The admission by the Court of Cassation of the qualification of overriding mandatory provisions for significant imbalance and automatic granting of more advantageous conditions

In a decision of 8 July 2020, known as "Expedia"[3], the Court of Cassation approved the decision of Paris' Court of Appeal [4] which stated that will be considered as French overriding mandatory provisions [5]:

- Article L. 442-6, I, 2 relating to the submission or the attempt to submit the other party to a significant imbalance; and
- Article L. 442-6, II, d) relating to the automatic granting of more advantageous conditions to companies competing with the contracting party.

The Court of Cassation held that the specific regime of the two offences, provided in articles L. 442-1, I, 2° and L. 442-3, b) of the French Commercial Code are "imperative provisions compliance with which is considered crucial for the preservation of a certain equality of arms and loyalty between economic partners and seems to be indispensable for economic and social organisation".

The Court adds these provisions are characterised by the intervention of the Economic' Minister for public order defence. It relies on legal instruments at the Minister disposal to justify the importance that public authorities attached to these provisions to qualify the rule as overriding mandatory provision.

The rule sanctioning the submission or the attempt to submit the other party to a significant imbalance and the one relating to the automatic granting of more advantageous conditions constitute overriding mandatory provisions, which application "is binding on the referral court, without any need to seek the conflict of laws rules leading to the determination of the applicable law".

One might ask whether an extensive interpretation of this case law is permissible and whether it is possible to consider that the whole rules stated in Articles L. 442-1 to L. 442-3 of the FCC may be considered as overriding mandatory provisions.

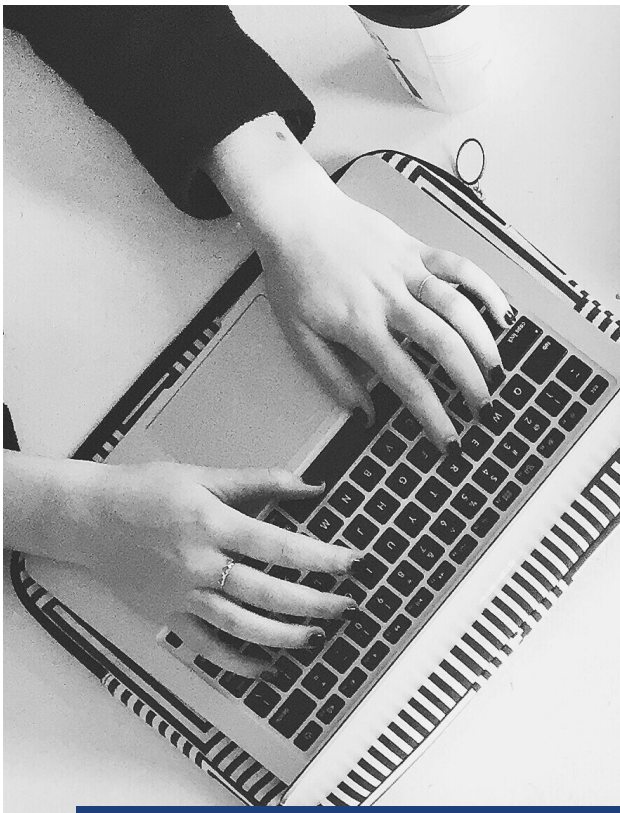
Regarding the type of abuse, we believe that all the abuses sanctioned by these articles could be qualified as overriding mandatory provisions.

However, caution should be exercised in this regard since the absence of publication of the decision Expedia tends to curb any attempt to overextend the scope of this decision.

Furthermore, one might ask whether overriding mandatory provisions apply regardless of the applicant 'quality. Indeed, in the decision Expedia, the qualification as overriding mandatory provisions is justified by the powers granted to the Minister of Economy in this area. The judgement does not say whether the solution would have been the same if the action had been brough by a co-contracting party. A doubt is allowed when reading this sentence: "on a superabundant basis, assuming the conflict rule would lead to the designation of a foreign law, from the moment the action of the Minister is brough before a French court, the overriding mandatory provisions apply", but also when reading the decisions delivered by the Court of Appeal of Paris, ruling on an action in the matter of an abrupt termination of established commercial relation brought by a co-contracting party.

[3] Expedia decision, Court of Cassation, Civil, Commercial Chamber, 8 July 2020, n° 17-31.533
[4] Paris Court of Appeal, 4th Chamber, 21 June 2017, n° 15/18784
[5] In their prior version to 26 April 2019

The refusal by the Court of Appeal of the qualification of overriding mandatory provisions for abrupt termination of established business relationship



FOCUS ON THE DECISION RENDERED BY THE PARIS COURT OF APPEAL ON 8 OCTOBER 2020

The question of the qualification as "overriding mandatory provisions" for provisions related to abrupt termination of established commercial relationship has been raised in a decision of the Court of Appeal of Paris dated 8 October 2020 [6].

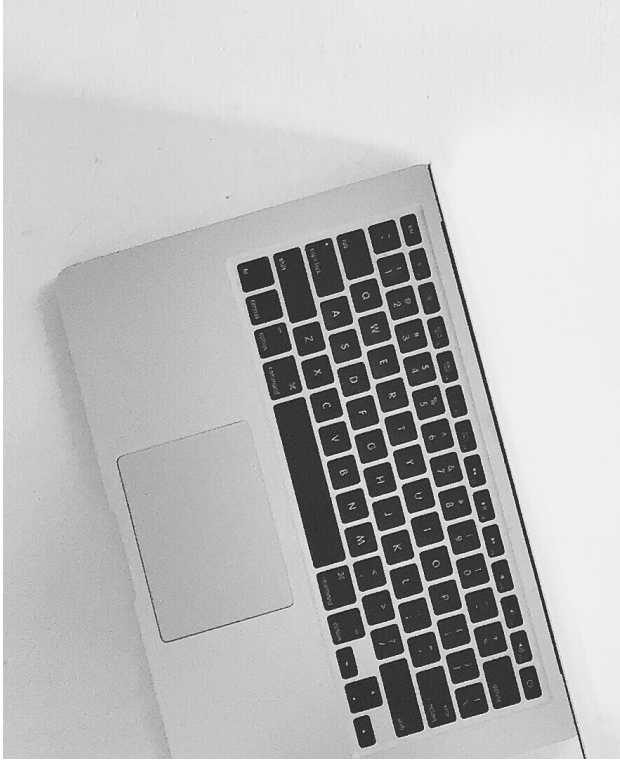
In this decision, the contractual liability [7] of a French company is sought based on abrupt termination of established commercial relations. As the applicable law was not determine in the contract, the court reminds EU Rome I Regulation designates the applicable law to a contractual relation in the absence of choice by the parties. Nevertheless, this process only applies in the absence of overriding mandatory provisions (Article 9) and therefore the court will seek whether the former Article L.442-6 I 5° [8] of the FCC may obtain qualification.

However, in the decision under review, the judges considered that in reality, “these provisions aimed at safeguarding the private interest of one party, the victim of an abrupt termination of established commercial relations...Therefore, these provisions cannot be considered as crucial for the safeguarding of the economic organisation of the country to the point of requiring their application of any situation falling within its scope, whatever the law applicable to the contract”.

Thus, according to the Court of Appeal the provisions related to the abrupt termination covers a “certain public interest of moralisation of business life” [9] . The purpose of this provision is indeed to ensure a certain degree of predictability for economic actors while promoting good faith in business relations. However, this is not enough for the Court of appeal to considerate is an overriding mandatory rule.

The Paris Court of Appeal took the same position in a decision dated 11th March 2021 [10], considering that provisions related to abrupt termination of established commercial relations cannot be seen as "crucial for the safeguarding of the economic organisation of the country to the point of requiring their application of any situation falling within its scope" and this, regardless of the law applicable to the contract, which confirmed the Court of Appeal position on this subject.

One can see a kind of contradiction between the decisions of the Court of Cassation and Paris Court of Appeal. Is there a resistance from the Paris Court of Appeal or can we find any coherence among these decisions?



[6]Cour d’Appel de Paris, Pôle 5, Chambre 5 du 8 Octobre 2020, n° 17/ 19893
[7]Cour de cassation, Ch. Commerciale, 20 septembre 2017 n° 16-14.812 : « une action indemnitaire fondée sur une rupture brutale de relations commerciales établies de longue date ne relève pas de la matière délictuelle ou quasi délictuelle, au sens de ce règlement, s’il existait, entre les parties, une relation contractuelle tacite reposant sur un faisceau d’éléments concordants »
[8] Désormais L. 442-1 II du Code de commerce
9] Cour d’Appel de Paris, Pôle 5 chambre 5 8 octobre 2020, n° 17/19893.
[10] Cour d'Appel de Paris, Pôle 5 chambre 5, 11 Mars 2021 n°18/03112.

THE DECISIVE CRITERION: THE QUALITY OF THE APPLICANT?

Regarding the qualification of the rules relating to an abrupt termination as overriding mandatory rules, it should be noted that there is no unanimous position between the various chambers of the Paris Court of Appeal. Despite the fact Pole 5 Chamber 4 of the Court of Appeal already accepted such qualification where an action is brought by a co-contractor [11], Pole 5 Chamber 5 and the International Chamber refuse to recognize such qualification for identical actions [12].

Actually, beyond a disagreement between the chambers of Paris Court of Appeal, some argue the apparent discrepancies between the Expedia decision and the position of the Paris Court of Appeal may be explained by the quality of the party bringing the action [13]. What is it really like ?

Article L. 442-4, I of the FCC is the basis for the Economic Minister's action [14] to sanction restrictive practices falling under Article L. 442-1 of the same code.

In the Expedia's decision in 2017, the Paris Court of Appeal [15] had the opportunity to specify that "the action which has been attributed to these public authorities within their mission as guardians of economic public order, and which is aimed to protect the functioning of the market and competition and not the immediate interests of the injured contractor is an autonomous action which the exercise is not submitted to the agreement of the victims of restrictive practices or their questioning before the judge, but only on their prior information".

Both the Paris Court of Appeal [16] and the Court of Cassation [17] considered that "even supposing the conflict rule would result to the designation of a foreign law, from the moment the Minister's action is brought before a French jurisdiction, overriding mandatory provisions apply, according to Article 16 of Rome II Regulation which provides: Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation".

Therefore, the qualification as overriding mandatory provisions may be justified by the applicant's quality. Indeed, it may be noticed that in an action brought by the Minister for the Economy raising the question of the application of the jurisdiction clauses, the Paris Court of Appeal stated in 2017 that "As the Minister is neither acting as a party to the contract nor on its basis, the jurisdiction clause designing the UK Courts is obviously unenforceable against the Minister and inapplicable to the present dispute". As a result, jurisdiction clauses are not enforceable against him.

[11] See in particular on this subject: Court of Appeal of Paris, Pole 5, Chamber 4, 19 September 2018, n° 16/05579 and Court of Appeal of Paris, Pole 5, Chamber 4, 9 January 2019, n° 18/09522
[12] See in particular on this subject: Court of Appeal of Paris, Pole 5, Chamber 16, 3 June 2020, n° 19/03758
[13] Lamyline Competition Law Review, n° 99, 1 November 2020, A targeted recognition of overriding mandatory rules of Article L. 442-6 of the French Commercial Code, Gaëlle LEROY et Sylvain BEAUMONT, advocates in economic law LEXT
[14] We specify that this article also provides that the action may be brought by the Public Prosecutor or by the President of the Competition Authority where the latter notes, on the occasion of cases falling within its jurisdiction, a practice stated in the previous articles. To our knowledge, no action has been brought on these grounds by these two authorities.
[15] Court of Appeal of Paris, Pole 5, Chamber 4, 21 June 2017, n° 15/18784
[16] Court of Appeal of Paris, Pole 5, Chamber 4, 21 June 2017, n° 15/18784
[17] Expedia decision, Court of Cassation, Civil, Commercial Chamber, 8 July 2020, n° 17-31.535 Inedit

As this theory is supported by various authors, it may be confirmed in the future. However, it would be surprising that the qualification of overriding mandatory provisions depends on the applicant's quality, since according to us, the qualification seems to depend on the law 'objectives. Overriding mandatory provisions are those pursuing an objective considered to be crucial in the legal order as they aim to protect political, social, and economic order of the State.

If the theory would be confirmed, it would mean that in two identical situations French law would supersede the foreign law chosen by the parties only if the Minister acts. In this case, what would happen for actions brought by a contracting party subsequently joined by the Minister? This question may appear relatively theoretical insofar as once the action is brought before a French court, there is an important likelihood that French law has been chosen by the parties. At the same time, if the parties choose to apply a foreign law, most of the time the jurisdiction clause designate a foreign jurisdiction as well. In such a case the Minister can still bring a parallel action in France.

In this respect, we shall pay particular attention to future litigation and to additional justification' elements that could be provided by French high courts which may confirm or invalidate the present theory. In any case, we think the Court of Cassation shall rule on whether provisions of Article L. 442-1 and L. 442-3 of the FCC shall be considered as overriding mandatory provisions when the action is brough by the contracting parties.

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