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Advantages without counterpart: The Paris Court of Appeal condemns a Referencing Centre to return to a supplier the commissions received from it, failing to demonstrate the reality of the services allegedly rendered (*Label G2 / Centragroup Fareva*)

DISTRIBUTION, FRANCE, BURDEN OF PROOF, DAMAGES, ALL BUSINESS SECTORS, BUYER POWER, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

Paris Court of Appeal, Feb. 27th, 2020, Label G2 / Centragroup Fareva, RG n° 17/14071

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Facts. In 1998, the supplier Label G2 had entered into a commercial relationship with a customer, the company Excelvision, from which it sold its products. Following the acquisition of Excelvision by the Fareva Group, commercial negotiations were no longer to be conducted between Label G2 and Excelvision, but between Label G2 and a referencing centre, the company Centragroup Fareva, whose function was to negotiate the terms of purchases between suppliers and the companies of the Fareva Group. The intervention of the central purchasing office initially gave rise to a brokerage agreement concluded on 17 February 2005 and then, in a second phase, to a framework of Specific Purchasing Conditions taking effect from 1 February 2014. The power station was remunerated by the supplier by means of commissions on the amounts collected by the supplier. These commissions were equal to the difference between a gross purchase price, invoiced by the supplier to the customer, and a given net price. Considering that the commissions demanded by the power station had reached an exorbitant amount, the supplier had to announce in June 2015, the end of the collaboration with Excelvision for the following September 30 " *by denouncing commercial practices and the totally disproportionate amount of the retro-commission"* of the power station, then in a letter of the following September 11, *"untenable brokerage commission rates associated at the same time with the impossibility of producing profitably* ". The supplier refused to pay the last invoices issued by the power station for its commissions, and the power station assigned it as payment. By way of counterclaim, the supplier applied to the principal claiming that the central office should be condemned on the basis of the liability provided for in Article L. 442-6 I 1° in the version applicable at the time. He considered that the advantages granted to the central office, under both the first and second contracts, were without consideration, and sought restitution of the commissions paid for the last five years. In

the alternative, the supplier invoked Article 1131 of the Civil Code, in the version then applicable, and the cancellation of the "Brokerage Agreement" and "Special Purchase Terms and Conditions" contracts, with restitution of the sums paid. The Paris Commercial Court dismissed the central office's claim for payment and ordered it to make the restitution requested by the supplier. The Paris Court of Appeal confirmed the decision of the first judges.

Problems:

- Is the obligation subscribed to by a supplier to pay for the intervention of a referral centre, within the framework of a brokerage agreement, for the negotiation of commercial conditions between this supplier and a clientele that existed prior to the intervention of the said centre, and the payment of consequential commissions, such that the centre, creditor of the payment obligation, is liable on the basis of Article L. 442-6 I 1° anc. of the Commercial Code?

- On the same basis, is the obligation entered into by a supplier to remunerate a referral centre for services and actions such as those described in the present case and the consequent commission payments also such as to engage the liability of the centre, which is the creditor of the payment obligation?

- By finding fault on the above-mentioned basis, is the supplier's loss, reflected in the reduction in its turnover due to the payment of commissions without consideration, which exacerbates its financial difficulties, also such as to justify the condemnation of the central office on the basis of the above-mentioned text?

Solution. In the Court's view, it was clear from the documents submitted in the proceedings that the central office had required the supplier to pay it commissions on the turnover realised with it by its subsidiary, without it being possible to identify the actual services provided in return, whether under the first or the second contract. In the Court's view, the court had shown that there was no consideration for the commission paid. In so doing, the central office had incurred liability on the basis of Article 442-6 I° and the supplier suffered damage as a result, since its turnover had fallen by that amount and it had been forced to break off the relations it had entered into, on the grounds that it was experiencing financial difficulties, which had been accentuated by the payment of commissions without consideration.

The Court confirmed the judgment of the court, which had assessed the prejudice caused by this fault at the amount of commissions paid by the supplier and which were undue. Moreover, since the power station had incurred liability by charging commissions not corresponding to any services, its claim for payment of the unpaid invoices had logically to be rejected, since the sum claimed corresponded to the loss suffered by the supplier as a result of the performance of a contract for which it had no consideration.

Analysis. After analysis of the facts, the Court answers with a single solution to the first two questions, which are the most essential for the solution of the dispute. It should be noted that the first judges had proceeded in two stages, first analyzing the benefit attributed under the brokerage agreement, then the benefit attributed under the agreement formalized by the Special Purchase Terms and Conditions. We have known since the NRE of 2001 that it constitutes a fault within the meaning of Article L. 442-6 I 1°, in particular, the obtaining or attempt to obtain " *any advantage whatsoever not corresponding to any commercial service actually rendered* ". The reference to a " *commercial service* " followed by the attribute " *actually rendered* ", refers to a double requirement of reality: that of the real nature of the service in itself, in view of its nature, and that of the real nature of its performance. Both were lacking here.

With regard first to the advantage obtained under the brokerage agreement, the court had found that the power station could not rely on a relationship between the supplier and the customer to demand remuneration on all transactions made directly between them. In fact, the relations with the client pre-existed the intervention of the power station. Moreover, the

power station did not show what service it provided to the supplier, even though the court had noted that the turnover achieved from 2005, the year in which the power station had interfered in relations between the supplier and the customer, had not increased, which showed that the power station had not had a positive impact on the pre-existing business flow. With regard to prescription, it seems interesting to us to note that the court, in this not contradicted by the Court, had recalled, with regard to claims under this first agreement, that the five-year prescription regime of article 2224 of the Civil Code ran "from the *day when the holder of a right knew or should have known the facts enabling him to exercise it* ", without even mentioning article L. 110-4, I of the Commercial Code, which covers obligations arising in the course of trade between traders and which does not set a starting point for calculating the period of limitation, unlike the actions referred to in II of that article. In a recent commentary, Anouk Bories recalled on this subject that " *Law No. 2008-561 of 17 June 2008 reforming the statute of limitations in civil matters (...) reduced to 5 years the ten-year statute of limitations of the former Article L. 110-4 of the Commercial Code, harmonising the text with the new Article 2224 of the Civil Code, which is derived from the same law* " and indicated that "the *judges of the Commercial Chamber are rightly choosing not to abandon a fundamental civil law framework and are combining Articles L. 110-4 of the Commercial Code and 2224 of the Civil* Code" (Letter distributed 05/2020; JCP E, 2020, 1265. *A rappr.* Trib. com. Rennes, 22 Oct. 2019, no. 2017F00131, regarding the prescription of the action of the Minister of the Economy). In the case commented on here, since the action was filed in January 2016, the damage that the supplier could claim for undue commissions was equal to the total commissions paid by the supplier between February 2011 and January 2014 (i.e. until the special purchasing conditions came into force).

With regard to the advantage obtained under the "Special Purchasing Terms and Conditions" contract, the power plant did not establish " *what real service* " it provided to the supplier, nor did it show that the supplier's turnover from 2014 onwards would have increased thanks to its " *service role* " as explained in the special terms and conditions mentioned above (negotiation with suppliers of purchasing terms and conditions for all the companies in the group, thus enabling the supplier to sell its products, and management of purchasing operations). According to the same legal reasoning as for the benefit under the "Brokerage Agreement", the Court, in this case approved by the Court, had to consider that the prejudice suffered by the supplier was equal to the commissions paid to the power plant between February 2014 and June 2015. Although the provision was not expressly referred to by the first judges, it is apparent from the reasoning of the court and the Court, the evidentiary requirement of Article L. 442-6 III, § II, which provides that "in *all cases, it is for the service provider, the producer, the trader, the industrialist or the person registered in the trade register who claims to be released to justify the fact that his obligation has been extinguished* . ». This is, moreover, merely a reminder of the evidential requirements of article 1315 of the Civil Code, in the version applicable at the time, which provided, after the person claiming performance of an obligation had to prove it, that, conversely, the person claiming to be released from it must justify the payment or the fact which had brought about the extinction of his obligation (Civil Code, article 1353 new, containing an identical provision). As explained and effectively illustrated by some authors "it is for the *person who advances a claim to prove it: the person who invokes a contract must prove its existence and its content, the opponent who claims to have paid must in his turn provide proof of payment, etc.* " (article 1353, new, containing an identical provision). *In terms of proof, the trial is akin to a game of ping-pong where everyone throws the ball back and forth. And, just as the player who misses the ball loses the point, so the litigant who misses his evidence loses the case* " (Ph. Malinvaud, M. Mekki, J-B. Seube, Law of Obligations, 15th ed. 2019, No. 398). Although the new Articles L. 442-1 et seq. of the Commercial Code, which replaced the former Article L. 442-6 when the reform resulting from the Order of 24 April 2019 took place, no longer expressly refer to the burden of proof in discharge for a period of time contained in III of that Article, for reasons of simplification and clarification of the arsenal for combating abusive practices, the above evidentiary mechanism remains unchanged. In the present case, if the beneficiary of the advantage was unable to prove that the conditions of the aforementioned Article L. 442-6 I 1° were not met and to demonstrate " *what real service it was providing* " to the supplier, the central office, having failed to comply with this legal requirement, was considered to be at fault. The damage caused by this fault amounted to the amount of the commissions which were undue.

The flood of disputes on the basis of Article L. 442-6 I° 1° for the undue advantages obtained by the listing centres and favoured, precisely, by their "central" position in the commercial relationship, has never dried up *(rappr.* Com. 26 Sept. 2018, n° 17-10173: Letter of distribution 10/2018, nos obs ; Paris, 31 Jul. 2019, n° 16/11545: Letter of distribution 09/2019, nos obs ; " *Flexibility or rigour in the provision of services under Article L. 441-7 of the Commercial Code? Un enjeu à risques différés à l'heure de l'arrêt des relations commerciales* ", RLDA, n° 61, June 2011, nos obs.*)*. The issue of commercial negotiations between these intermediaries and suppliers will have shaped both the law of transparency and that of the practitioners. ues, and more generally that of practices restricting competition. The case reported here provides us with another example of this, without the judges even having to consider the problem of the proportionality of the advantage, since the compensation was not - already - real. The real or supposedly unavoidable intermediaries should learn some lessons from this case, in particular as regards their role, what they bring to the debtors of the obligation to pay, the usefulness for the latter of the tasks or services paid for and, beyond that, even if this was not the subject here, the valuation of the latter.