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Specialized courts: The Paris Tribunal of Commerce as specialized jurisdiction, declines its jurisdiction due to a jurisdiction clause in favour of the Nanterre's Tribunal of Commerce, despite arguments of restrictive practices (*Canal Plus / Technicolor Delivery Technologies*)

FRANCE, AGREEMENT (NOTION), DAMAGES, AUDIOVISUAL , MANUFACTURING, ALL BUSINESS SECTORS, ADMISSIBILITY (COMPLAINT), PUBLIC ORDER, TERMINATION OF SUPPLY, CONCURRENT JURISDICTIONS, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, SIGNIFICANT IMBALANCE

Trib. com. Paris, Sept. 1st, 2020, Canal Plus / Technicolor Delivery Technologies, RG n° 19/049985

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Facts.

Following a call for tenders, Canal+ Group (hereinafter "Canal") selected Technicolor Delivery Technologies (hereinafter "Technicolor") in December 2016 as the supplier of its new "G9" set-top boxes. These two companies signed a letter of intent setting out the terms and conditions for the performance of Technicolor's services and providing for the formal reiteration of the agreement, which must include the legal prerequisites included in the call for tenders, as well as any modifications not contradictory to these prerequisites that may have been accepted by the parties. The latter executed the contract materialised by the prerequisites and the letter of intent. Canal ordered decoders, which were delivered to it under the agreed terms between January and July 2017. Canal included in the "prerequisites" the firm and final nature of the prices. For reasons not indicated in the decision, Technicolor requested, on several occasions after the first deliveries, the renegotiation of the price, which Canal refused, before being led to accept the increase imposed by Technicolor for reasons that were again not reported. However, it would appear that Canal was in the process of launching its new decoders. We can imagine that it would then be essential for it to obtain these devices at all costs, both literally and figuratively. Technicolor terminated its commitment on 19 October 2017.

Under the terms of an unsuccessful summary proceedings initiated by Canal against Technicolor before the Commercial Court of Nanterre, Technicolor will see the Versailles Court of Appeal suspend the effects of the termination by a decision dated December 6, 2018. Technicolor's appeal against the decision was then rejected on June 24, 2020 by the French Supreme Court.

In September 2019, Canal brought an action against Technicolor, this time on the merits, before the Paris Commercial Court, seeking a ruling on the termination of the contract with Canal and on the unenforceability against Canal of Technicolor's price increase. One month later, Technicolor brought an action against Canal before the Nanterre Commercial Court, seeking payment of its claim corresponding to the price increase. Two territorial courts, therefore, for two proceedings on the merits, in which the plaintiff in one case is the defendant in the other and vice versa.

*In limine litis*in the first proceedings on the merits, which are of interest to us here, Technicolor challenged the jurisdiction of the Commercial Court of Paris, holding that the competent Commercial Court was the Commercial Court of Nanterre pursuant to a clause conferring jurisdiction in favor of that court.

Trouble.

At first sight, the immediate difficulty was that of determining the territorial jurisdiction between the two commercial courts, Paris or Nanterre, to decide on the merits of the dispute. However, on closer examination, the background was the problem of the exercise by the Tribunal de Tribunal de Commerce de Paris of the jurisdictional power conferred on it, as a specialised court, to rule on disputes relating to practices restricting competition, whereas such power is not conferred on the Tribunal de Commerce de Nanterre, as designated by the jurisdiction clause, in respect of disputes also relating to the abovementioned practices. All of this is based on the existence - or otherwise - of the jurisdiction clause and, where appropriate, its consideration.

Solution.

The Commercial Court of Paris is going to declare itself incompetent. According to the terms of the decision of the Parisian judges, the dispute between the parties is circumscribed around the lawfulness of the unilateral termination of the contract by Technicolor and the validity of the price increase imposed by it on CDG. For the Court of First Instance, since the basis of the application is contractual, the plea of lack of jurisdiction is admissible and well founded. It refers the case back to the Tribunal de commerce de Nanterre.

Analysis.

It will now be up to Canal - since it seems that this decision has not been appealed - to take its case to the Nanterre Commercial Court. The latter, which will therefore have to hear two proceedings in the same case, could move towards joining them, unless in its procedural choice Canal, a former Parisian plaintiff and defendant in the proceedings already pending in Nanterre, prefers to formulate counterclaims which, because of the specialization of the courts, can no longer be based - in Nanterre - on PRC grounds (see below).

But we are more interested in the reasons why the Paris Commercial Court says it has no jurisdiction. First of all, let us recall that the public policy nature of the rules of specialised jurisdiction precludes the validity or effectiveness of the jurisdiction clause in internal relations (Paris, 25 Jan. 2018, No. 17/20673; Paris, 6 Sept. 2018, No. 17/23306; Paris, 11 Oct. 2018, n° 18/00427; cf. Bilan des décisions judiciaires civiles et pénales pour la période du 1er janvier au 31 décembre 2018, drawn up by the Centre du droit de l'entreprise of the Faculty of Law of Montpellier, in Annex 16 of the CEPC

Activity Report 2019, p. 269). Canal, which had the option to bring Technicolor before the Court of the place of its registered office, namely the Commercial Court of Paris, which is both the competent court for any dispute between merchants and a court specialized in PRC matters for matters within its jurisdiction, requested in the operative part of its conclusions, as recalled by the Court, to find Technicolor's contractual breaches consisting in the termination of the contract governing its relations with Canal. As it was also entitled to do so before this specialized court for the application of the articles of the French Commercial Code relating to the PRC, Canal also cited Article L. 442-1 of the French Commercial Code, immediately after those referred to in the French Civil Code in contractual matters. In response to Technicolor's argument that the parties were bound by a jurisdictional clause in favour of the Commercial Court of Nanterre, contained in the purchase orders issued by Canal, and that the execution of the orders issued by Canal and the price charged were at the heart of the dispute, Canal replied that the dispute did not concern the sale of decoders, but rather the enforceability or otherwise of the termination of the letter of intent, which did not itself contain such a clause. In the absence of such a clause, since Technicolor's registered office was located in Paris, the summons had to be issued before the Commercial Court of that city. As this court has the jurisdictional power to rule on PRC disputes, Canal was also entitled to invoke the violation of the rules sanctioning PRCs (in this case, significant imbalance and abrupt termination).

Initially, the Tribunal considers, in a sovereign assessment, that " *the dispute between the parties is circumscribed around the lawfulness of the unilateral termination of the contract by TDT* [Technicolor] and the *validity of the price increase imposed by it"* and that *"the validity of the purchase orders issued by GCP* [Canal] *is not disputed* ". Secondly, the Court recalls that it has jurisdiction pursuant to Article D 442-3 of the French Commercial Code, which reserves jurisdiction over disputes relating to Article L 442-1 to the specialized courts cited in Annex 4-2-1 of the regulatory part of the said Code, of which the Commercial Court of Nanterre is not a part, it being recalled that the courts are required to apply these public policy provisions. The Court thus refers to its jurisdictional power in these matters, with the exception of the Commercial Court of Nanterre. However, it also notes that Canal *argued* " *in the same main argument that TDT had breached its contractual commitments and prohibited practices restricting competition, which constitutes a breach of the principle of non-cumulation of contractual and extra-contractual liability. It is admittedly admitted by the Cour de cassation that this principle, which "only prohibits the creditor of a contractual obligation from invoking against the debtor of this obligation, the rules of tort liability" does not prevent the creditor from invoking, in the alternative, the rules of tort liability (Com. 13 July 2010, No. 09-14.985; Com. 8 July 2014, No. 13-11.208), but this is not the case here* ". Such a reminder could have suggested, at other times for a claim formulated cumulatively on a contractual and tortious basis, its inadmissibility in the light of a certain reading of the rule of non-cumulation, as given by the Paris Court of Appeal (cf. Bilan des décisions judiciaires civiles et pénales pour la période du 1er janvier au 31 décembre 2018, cited above, p. 192 et seq.) and vigorously discussed in the columns of the Letter by one of our colleagues (to be rappr. Paris, 19 January 2018, No. 15/21628, C. Mouly-Guillemaud, Letter circ. 02/2018 and 07/2018). In the end, such a reading was invalidated by the Court of Cassation (Com., 24 Oct. 2018 : Letter of distribution 12/2018, C. Mouly-Guillemaud. *Adde*. Com. 4 Dec. 2019, No. 17-20032: Letter of distribution 01/2020). Practitioners using the CEPC activity report for 2019, which was put online at the end of September, will have to take into account the evolution of the case law on this issue). However, the Court of First Instance will not go down the above-mentioned path, which is now subject to censorship and, judging in the context of its office that "the *basis of the application is contractual* ", will rule that the objection of lack of jurisdiction is admissible and will refer the case to the Commercial Court of Nanterre.

This verdict, delivered without excessive explanations, perhaps on the basis of the implementation of Article 12 CPC (Com., 4 Dec. 2019, no. 17-20032 , cited above or Lettre distribu. 12/2019, C. Mouly-Guillemaud), underlines in any case the impact of the choice of means and their presentation, in disputes in contractual and PRC matters, would the court seised, including as a specialised court, be that of the defendant's registered office *(to be recalled*. Saint-Denis de la Réunion, 5 July 2019, No. 18/00110, Letter of distribution 10/2019, nos. obs.). The decision also recalls that, although *a priori* without effect in the case of PRC, the clauses attributing territorial jurisdiction may, in the internal order, sometimes become applicable again according to the judge's analysis of the means.