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N° 1-2021

Abusive practices: The Paris Court of appeal upheld the avoidance of clauses by the victim and enlightens the previous regulation by the new regulation (*Institut de recherche biologique / La Poste*)

DISTRIBUTION, FRANCE, ALL BUSINESS SECTORS, PUBLIC ORDER, NULLITY / VOIDNESS, REFORM, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE

Paris Court of Appeal, Oct. 22nd, 2020, Institut de recherche biologique - IRB / La Poste, RG n° 18/02255

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This article was first published in the Lettre de la distribution published by the Centre du Droit de l'Entreprise of the University of Montpellier.

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Facts

The company Institut de Recherche Biologique (hereafter IRB) was linked with the company La Poste (hereafter La Poste) by a " *Colissimo Entreprise* " contract, the purpose of which was to take charge of, route and distribute parcels to its customers. This contract included the General Terms and Conditions of Sale of La Poste, which contained a number of clauses relating to the performance of its obligations by La Poste. On the one hand, delivery times were calculated on the basis of data from La Poste's information system, which was binding between the parties. Secondly, when La Poste carried out checks on the number of items sent on the basis of the data in its information system, which it could amend if necessary in the light of the inaccurate or incomplete content of the sender's parcel delivery note, the information in that system was authentic between the parties and took precedence over that in the note. Finally, in the event of liability on the part of La Poste, the information in its information system, as derived from the flashes of the parcels during their various stages of delivery, was still authoritative between the parties to determine the existence of a delay in delivery, loss or damage. In 2013, IRB sued La Poste for liability for the non-performance of its contractual obligations and compensation for damages. Its claims then came up against the existence of the abovementioned clauses, which could only be set aside by cancellation. By judgment of 22 October 2020, the Paris Court of Appeal annulled certain stipulations of these clauses on the basis of Article L. 442-6 I 2° on significant imbalance and committed an expert before ruling, on the claim tending to engage the contractual liability of La Poste.

Trouble

On the sanctioning of abusive practices of article L. 442-6 I C. com. Does this article authorise an action for nullity brought by the victim of a practice covered by this text? (First problem)

On the taking into account of the reform resulting from the order of 24 April 2019 in the treatment of situations that predate it: Can Article L. 442-6 I be applied in the light of its "new" wording, housed in Article L. 442-4 of the aforementioned Code? (Second problem)

On the existence of a significant imbalance in the particular case: Can clauses which, in terms of the burden and means of proof of the performance of its obligations by one of the parties, lead to conferring on the latter control of the evidentiary system established in the contract and binding on the parties, constitute a significant imbalance which can be sanctioned? (Third problem)

Solutions

On the first problem: " *If it is true that the article L.442-6 I of the commercial code Although this special provision refers only to the civil liability of the perpetrator of the practice, it does not prohibit the victim of a practice covered by this text from seeking the nullity of the clause or contract contrary to public policy. (...) Consequently, La Poste cannot maintain that IRB is not entitled to claim the annulment of the disputed clauses'*.

On the second problem: "(...) *Article L. 442-4 of the Commercial Code from the order no. 2019-359 of 24 April 2019 expressly opens the action for nullity of the clause creating a significant imbalance in favour of the party suffering from such imbalance and that this new text brings a retroactive light to the old provisions* ".

On the third problem: "(...) *the information system of the company La Poste prevails over any other evidence that its co-contractor might wish to provide and which might contradict the information contained therein, even though the contractual liability of the company La Poste and the resulting compensation depend on it. In addition, the criticized provisions make the starting point of the delivery time of a parcel depend exclusively on its registration in the information system of La Poste even though the company La Poste undertakes to respect minimum delivery times.* (...) Consequently, *it is appropriate to declare null and void the clauses (...)*".

Analysis

On the sanctioning of abusive practices of article L. 442-6 I C. com.: The Court recalls the solution, enshrined by the Cour de cassation, for which the party who is the victim of a significant imbalance within the meaning of Article L. 442-6, I, 2° is entitled to have the term of the contract which creates this imbalance declared null and void, in the case of an unlawful term which disregards the public policy provisions of this text. Such a power does not belong to the Minister of the Economy alone (Com., 30 Sept. 2020, No 18-11.644 and No 18-25.204 (2 judgments): Letter circ. 11/ 2020, M-P. Bonnet-Desplan. For one of the appeal judgments in these cases concerning nullity requested by a party, Paris, 11 Oct. 2017, n° 15/03313, Letter circ. 12/2017, S. Chaudouet. Rappr. en matière d'avantages sans contrepartie relevant de l'article L. 442-6, I, 1°, Com. 4 mars 2020, n° 17-17148: Lettre distrib. 04/2020, S. Brena et Paris, 24 mars 2011, n° 10/02616: Lettre distr. 04/2011 et RLDA n° 61, juin 2011, p. 35, nos obs, or, in terms of the nullity of agreements contravening the provisions of public order under the former Article L. 441-7, Saint-Denis, 5 July 2019, n°18/00110, Letter distributed 10/2019, nos obs.). It should be pointed out that in the present case it is not the entire article containing the clause which is annulled, but the only paragraphs within those articles which are problematic.

On the taking into account of the reform resulting from the order of 24 April 2019 in the treatment of the situations that preceded it: The answer is affirmative. Thus, the provisions of Article L. 442-6 I can be understood in the light of the new provisions contained in Article L. 442-4. It will be remembered that the reform introduced by the abovementioned order has expressly opened up to the victim of a significant imbalance, now provided for in article L. 442-1, in addition to the action for liability, the application for nullity (see Letter distributed 11/2020, cited above). While the principle of the non-retroactivity of the new law remains, the evolution of the law is taken into account here in order to understand past situations. Such a motivation is not new. One recalls, for example, two judgments of the Court of Cassation in social matters which, following the order of 10 February 2016 reforming the law of contract, had ruled for agreements prior to its entry into force, that ' *Having regard to articles 1134 of the Civil Code, in the wording applicable in the case, and L. 1221-1 of the Labour Code; Whereas the development of the law of obligations, resulting from Order No 2016-131 of 10 February 2016, leads to a different assessment, in employment relationships, of the scope of offers and promises of employment contracts;* " (Soc.., Sept. 21, 2017, No. 16-20.103 and Sept. 21, 2017, No. 16-20.104: RJDA, 12/17, p. 899, note D. Mainguy. Rappr. Com. 6 Dec. 2017, No. 16-19.615). In practice, therefore, it would seem that the disputes pending before the Paris Court of Appeal, as well as those that may be introduced on the basis of the former provisions of Article L. 442-6, are likely to be clarified by the new provisions of Article L. 442-4 as amended by the Order of 24 April 2019. Given this clarification on this *"retroactive* clarification of the *old provisions"* - which was not necessary to declare nullity in view of the solutions already given on this subject by the same Court and enshrined by the Court of Cassation (see *above*) - there is reason to believe that the Court of Appeal also wished to send a message to future litigants. It will be recalled that the objectives of the Order of 24 April 2019 included refocusing the list of restrictive commercial practices around three general practices and clarifying the definitions of the three restrictive commercial practices inherited from Article L. 442-6 and listed in the new Article L. 442-1 (cf. Report to the President of the Republic on the Order of 24 April 2019, p. 7). The judgment is in line with this logic (rappr. Paris, 31 July 2019, No. 16/11545; L.442-1 I 1°and 2° (e.g. L.442-6 I 1°and 2°): Letter circ. 09/2019, nos. obs.).

On the existence of a significant imbalance: Before turning to the disputed clauses themselves, let us note the interesting developments in the judgment on certain conditions for the application of Article L. 442-6 I 2°. As regards the element of submission or its attempt, this " *implies the demonstration of the absence of effective negotiation or the use of threats or retaliatory measures aimed at forcing acceptance implying this absence of effective negotiation* ". This is nothing very new, except to recall that the difficulty of proving a negative fact, i.e. the absence of effective negotiation, is mitigated by the demonstration of positive facts, i.e. the establishment of threats or retaliatory measures, from which the attempt to submit or, in the case of "forced submission", the submission will be inferred. However, it seems that this standard of proof is not really implemented here, since the bid will be characterised by the fact that the *"systematic reproduction of* the disputed" *clauses of* the GTCs from one contract to another, that they are " *almost identical in all the contracts concluded* " between 2006 and 2014 and "are to be *found without any possible modification in all the contracts concluded by companies with La Poste* ". The Court concludes from this that there was no actual negotiation and that the condition of applicability of the text had to be verified. The pre-eminence of La Poste in the parcel delivery sector may be a factor in that conclusion. It is indeed conceivable that it would be materially difficult for La Poste to engage in specific and tailor-made negotiations with the multitude of its business customers. It should be pointed out in this connection, as regards the characterisation of the imbalance between rights and obligations, that the existence of obligations creating a significant imbalance ' *may in particular be inferred from a total absence of reciprocity or consideration for* an obligation', from which it may be inferred that the possibility of an examination, by obligation, of the consideration relating thereto may be deduced (Com. rappr, 25 Jan. 2017, No. 15-23547: Lettre distribu. 02/2017, N. Eréséo), " *or of a significant disproportion between the respective obligations of the parties* ", thus referring to a more global approach. For the rest, it is useful to refer to the judgment.

As regards the disputed clauses in the agreement on evidence, the Court declares them null and void, while criticising the exclusive nature of the system of evidence admitted by La Poste for the control of its own obligations, which is clearly operated on the basis of its computer system, that is to say, in fact, on the basis of La Poste's own faith: ' *It will be noted in*

this respect that the large-scale processing of parcel distribution and the control of the costs incurred by such processing cannot justify that the information system allowing such processing alone can be used as evidence. Moreover, if such a system of proof were to be accepted, it would mean that the person on whom the obligations to achieve results in terms of punctuality and the delivery of parcels are imposed would be the sole person responsible for checking compliance with his own obligations . It should be stressed that, over and above the question of significant imbalance, such clauses may, where appropriate, run counter to the ordinary law of evidence, as is clear from a judgment holding that " *while contracts on evidence are valid when they relate to rights freely available to the parties, they cannot establish an irrebuttable presumption in favour of one of the parties* " (Com., 6 Dec. 2017, No 16-19.615). This solution, given in relation to agreements concluded prior to the reform of 2016, which also deals with the law of proof of obligations, which in the present case is inapplicable, has been taken up in identical terms as a rule in the new article 1356 of the Civil Code, which provides: ' *contracts on proof are valid when they relate to rights of which the parties have free disposal. Nevertheless, they cannot (...) establish an irrebuttable presumption in favour of one of the* parties. As noted by one author, " *by using these terms identically, in the context of a dispute subject to the law prior to the reform, the High Court once again shows its willingness to apply the new provisions in anticipation, even if it does not expressly refer to them* " (M. Vandevelde, La Quotidienne, January 19, 2018, ed. F. Lefebvre, M. Vandevelde, La Quotidienne, January 19, 2018. Adde. BRDA 2/18, No. 10). As a result, the " *retroactive lighting"* in the case reported here is also found, in other forms, in many other areas.