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Advantages without counterpart: The Paris Court of Appeal condemns a French distributor for obtaining unfair advantages from a foreign supplier, and considers that the expiry of a foreclosure period for challenge invoices for services shall not a loss of the right to bring a legal action (*Conforama France / Industria Conciaria Volturno, High Point Real Estate*)

DISTRIBUTION, FRANCE, DISTRIBUTION/RETAIL, DISTRIBUTION AGREEMENT, EXTRATERRITORIALITY, REBATES, PUBLIC ORDER, NULLITY / VOIDNESS, COOPERATION AGREEMENT, BUYER POWER, LIMITATION PERIOD / PRESCRIPTION, CONCURRENT JURISDICTIONS, APPLICABLE LAW, GROUP PURCHASING ORGANIZATION, SIGNIFICANT IMBALANCE, FORMALISATION OF THE COMMERCIAL RELATIONSHIP

Paris Court of Appeal, 30 March 2021, Conforama France / Industria Conciaria Volturno, High Point Real Estate, RG n° 19/15655

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Concurrences N° 3-2021 | Alerts | Distribution

Facts

An American company was a supplier to the French retailer Conforama and thus its creditor. This supplier was also a debtor of another American company and of an Italian company. In the context of a derivative action, these last two creditors asserted against Conforama the claim of their debtor, which was in bankruptcy in the United States. Conforama then set off against its two creditors the claim it claimed to have against them in 2005 and one in 2006, in respect of the provision of commercial cooperation services by Conforama (in particular "in-store product presence" services in 90% of the sales outlets or "market research and analysis" services) for the benefit of its former supplier. The judgment under review does not expressly state this, but we can guess from certain passages in the statement of facts a debate before the first judges on the validity or otherwise of Conforama's invoicing relating to its commercial cooperation. The Paris Commercial Court had in fact ruled that Conforama's claims for commercial cooperation were partly founded, while considering that certain invoices

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were not. On appeal, it was argued that the commercial cooperation agreements of 2005 and 2006 and the subsequent invoices did not comply with the provisions of Articles L. 441-3, L. 441-6 and L. 442-6 of the French Commercial Code, that Conforama did not provide any justification to verify the reality, nature and value of the services mentioned on the three aforementioned invoices, and that these invoices, which were not accompanied by any consideration, could not be set up against the supplier or the plaintiffs in order to compensate for mutual receivables and debts. The Court of Appeal dismissed Conforma's claims for compensation. We will focus on a few points of law that gave rise to debate before the appeal judges.

Problems

First, it was the law applicable to the relationship between Conforama and its American supplier (1). Then, in the case of an application of our law, the question arose of the burden of proof of the fulfilment of specific obligations and the reality of the services provided (2). In addition to the question of the scope of the supplier's failure to contest the invoices and thus the reality of the services invoiced (3), there is the interesting problem of combining the contractually agreed rules for contesting invoices within 15 days of receipt with those of the five-year limitation period in commercial matters (4). We will conclude with a few remarks concerning Conforama's lack of formalism in terms of transparency, or relating to the assessment of the price paid by the supplier for the disputed services, in light of their cost for the distributor who provides them (5). It should be noted that the solutions are given on the basis of the legal provisions prior to the amendments made by the Order of 24 April 2019.

Solutions

1. On the application of French law - " *Since the French court was seized of a dispute concerning invoices relating to contracts signed between a French company and an American company, it is up to the French court to determine the law applicable to the dispute on the basis of its own conflict rules governing contractual obligations, in this case the Rome Convention of June 19, 1980, taking into account the dates on which the contracts at issue were signed, notwithstanding the American nationality of its co-contractor, since the said Convention is universal in nature (...).) It was on the basis of this conflict rule and without referring to their character as public policy legislation that the first judges retained the application of Article L.441-3 and applied article L. 441-7 of the same code governing the commercial cooperation contract'* (paragraphs 146 and 152).

2. On the burden of proof of the fulfilment of the specific obligations and the reality of the services provided - " *It follows from these mandatory provisions that in matters of commercial cooperation contracts the burden of proof of the fulfilment of the specific obligations and the reality of the services provided lies with the distributor and that the mere production of invoices is not sufficient to justify their fulfilment (').) It is therefore rightly and in the light of the legal provisions applicable at the time of the facts that the first judges, by precise and relevant reasons which the court adopts, analysed the commercial cooperation contracts signed between Conforama France and Mab Ltd, as agreements subject to these mandatory provisions and considered that the invoices produced, as well as the supporting documents provided, did not comply with the said provisions and that Conforama did not provide proof of the services concerned (...) and that Conforama did not provide evidence of the services it invoiced to Mab Ltd, even though it is obliged to do so under Articles 1315 of the Civil Code and L.442-6, III of the Commercial Code'* (paragraphs 155, 156 and 157).

3. On the supplier's failure to dispute the invoices and therefore the reality of the services invoiced - " *The failure to dispute the invoices, like the foreclosure invoked to file a dispute, is part of the discussion of the merits of the oblique action brought by ICV, and is not a condition for the admissibility of the said action* . "(...) *Conforama vainly maintains that Mab Ltd accepted the said invoices, in particular by validating two credit notes on invoice no. 73943 of 24 March 2006 relating to commercial cooperation for the 3rd and 4th quarters of 2005, and by validating a payment of €300.* 300,000 *on 30 June*

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2006, or would have been precluded from contesting them for not having respected the 15-day time-limit set by the contract, whereas the applicable provisions are mandatory regulations that cannot be set aside, even by mutual agreement " (point 157).

4. On the combination of a time limit for contesting invoices within 15 days of their receipt with the rules of the five-year statute of limitations in commercial matters - " *The fifteen-day time limit resulting from the above-mentioned article 4.2 does not constitute a time limit. It concerns the time limit for contesting each of the invoices as from their receipt. It is distinct from the limitation period for obligations in commercial matters, provided for in Article L.110-4 of the Commercial Code, or that provided for in Article 2254 of the Civil Code, the period of which is five years since the law of 17 June 2008, used above against HPRE to declare its action oblique prescribed'* (point 119) and *' Consequently, the discussion on the conventional arrangement of the limitation period, whether or not it is admitted in view of the date of the facts, is irrelevant for the present dispute, and inoperative'* (point 121). Furthermore, *' the absence of any dispute over the invoices, like the time bar invoked to form a dispute, is part of the discussion of the merits of the action brought by ICV, and is not a condition for the admissibility of that action'* (paragraph 133).

5. On the lack of transparency and the assessment of the manifest disproportionality of the advantage obtained by way of services

- On the non-transparent formalism - " *In order to hold the disputed invoices unenforceable, the first judges applied Article L.442-6, II of the Commercial Code, in its wording applicable to the dispute, which provides that "s null and void are clauses or contracts providing for a producer, trader, industrialist or person registered in the trade register, the possibility: (a) To benefit retroactively from discounts, rebates or commercial cooperation agreements; (...) and that, moreover, in the present case, given the very late date of issue of the said invoices, which were clearly retroactive, and their imprecision as to the services concerned, these invoices could neither have a definite date nor be regularised a posteriori, these irregularities having been further confirmed by the DRCCRF's letter of 14 March 2008, which held that "the invoices for commercial cooperation for the years 2005 and 2006 do not comply with the rules of transparency imposed by Article L.441-3 of the Commercial Code and that the 2006 commercial cooperation contracts do not comply with the provisions of Article L.441-7 of the Commercial Code (lack of specification of the content of the services offered in the framework contract before 15 February, application contract drawn up a posteriori for the internet presence service)", (...)* " (point 157).

On the manifestly disproportionate nature of the advantage obtained for services - " *The first judges also noted that the services invoiced showed an average rate of commercial cooperation of 14%, even exceeding 20% for certain products, a particularly high rate which the first judges rightly considered to be manifestly disproportionate, particularly in view of the few references considered and the relative cost of these services for Conforama.* "(point 158).

Analysis

1. On the applicable law - No law was specifically designated in the agreement between the parties, beyond the conventional reference in Conforama's " *supplier contract* " to the " *general principles of law as applied to international commercial relations as well as by the practices in international trade* " or in its GTCs, which contained similar stipulations, and in particular by the Unidroit Principles. This reference is intended to be fairly universal and may prove to be uncertain in its outcome! The Court opposed Conforama, which did not wish to see French law applied, to another universality, that referred to in article 2 of the evocatively titled 1980 Rome Convention on the law applicable to contractual obligations, which was then applicable, providing that " *The law designated by this Convention shall apply even if that law is the law of a non-Contracting State* ". Was this universalist approach useful, moreover, when the parties had not even designated a given national law, because of the particular and superior nature of the texts to be applied *(see rec.* Com., 8 July 2020, 17-31.536: Lettre distrib. 09/2019,

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obs. F. Leclerc; Paris, Jan. 9, 2019, n° 18/09522 or T.com. Paris, Sept. 2, 2019, n°2017050625: Lettre distrib. 09/2019, obs. S. Chaudouet; CEPC Opinion No. 19-7), the measure of which the Court gives here when it recalls that " *failure to comply with the rules of transparency imposed by Articles L.441-3 et seq. of the Commercial Code in their version applicable to the facts of the dispute constitutes not only a criminal offence* " (point 154)? In the light of this Convention (Articles 3(1), 4(1) and (2)), the Court recalls that " *the Rome Convention attaches crucial importance to party autonomy, leaving the parties freedom of choice by virtue of the basic rule set out in Article 3(1)* ". However, as the Court pointed out, in the absence of a choice by the parties, the applicable law is determined on the basis of Article 4 of the Convention, which provides as a fundamental criterion the application of the law of the country with which the contract is most closely connected (paragraph 149). In application of that rule and according to the Court, the first judges had rightly held that French law applied to those commercial cooperation contracts, which were distinct from ' *supplier* ' contracts, stating that ' *the service in question is provided on French territory and that, in the absence of other contractual provisions, it is therefore governed by French law* ' (paragraph 150). In the Court's view, ' *it follows from the evidence in the file and in particular from the subject-matter of those contracts, namely commercial promotion by means of advertising or catalogues made available to customers or on the internet, and the visibility of products in shops throughout France, that the contracts at issue had the closest links with France* ' (paragraph 151). Finally, and even if the reported case deals with an action against a French distributor following the latter's obtaining abusive advantages from a foreign supplier, the subject refers to the topical issue of the application of French law to possible restrictive practices committed by foreign central offices with respect to French suppliers (Communiqués of the Ministry of the Economy of February 19, 2021, No. 689 and of July 22, 2019, No. 1354), whereas the new provisions of Article L. 441-3 resulting from the ASAP law of December 7, 2020, henceforth oblige to mention in the written agreement, the remuneration borne by the supplier under international agreements, thus facilitating the detection of abusive advantages during negotiations in an international context (Lettre distrib. 03/2021, our obs.).

2. On the burden of proof of the fulfilment of the specific obligations and the reality of the services provided - The burden of proof lies with the person who received the disputed benefit. The solution is classic and is in line with previous case law. There is no need to come back to it (Cass. com., March 3, 2021, n° 19-13.533 and 19-16.344; Paris, February 27, 2020, n° 17/14071, 07-08/2020, our comments and RLC sept. 2020, 3881, our comments).

3. On the supplier's failure to contest the invoices and therefore the reality of the services invoiced - The failure to contest the invoices for the disputed benefits is not such as to deprive their author of his right to contest them after the fact, contrary to what the beneficiary of the benefit maintained, who claimed that his supplier had " *waived his right to contest them and thus recognised himself as a debtor of the sums invoiced* " (paragraph 131). The solution is not new (Paris, Feb. 8, 2017, No. 15/02170) and is, in our view, only an impact of the solution referred to above in terms of the burden of proof, which could not be neutralized because of the non-contestation of the invoices or even their payment. A contrary solution would have the consequence of depriving the public policy rules on restrictive practices, and in particular those relating to abuse of negotiation, of all effectiveness.

4. On the combination of a time limit for contesting invoices within 15 days of receipt with the**rules of the five-year limitation period in commercial matters** - In view of the other, fairly common, issues addressed by the judgment, this point is probably the most interesting. The agreements examined included a clause under which the supplier had " *on pain of foreclosure* ", a period of 15 working days from receipt of each invoice to contest, if necessary, all or part of its elements. Under penalty of inadmissibility, disputes had to be made by registered letter (...). After the aforementioned time-limit and in the absence of a dispute, it was stipulated that the claim on the supplier in respect of the invoice would be deemed to be certain, liquid and payable and could give rise to payment by way of set-off (...) (paragraph 118). The Court held that the provision of such a clause to lock in the time-limit for contesting invoices does not lock in the legal action within such a time-limit, " *the said foreclosure not being a forfeiture of the right to bring legal proceedings, but a forfeiture*

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of the time-limit for contesting the nature of the services invoiced or their quantum, the validity of which is, moreover, debatable in the light of the law applicable to the contestation of invoices " (paragraph 120). The presence of this type of clause will therefore not provide immunity to abusers.

5. On the lack of formalism in terms of transparency, and the assessment of the manifest disproportionality of the advantage obtained by way of services

On the non-transparent formalism - The Court sanctioned the practice on the basis of Article L. 442-6 II, on the grounds of the retroactivity of the invoices issued for the services and their imprecise nature. It adopted the analysis made by the DGCCRF, which was not a party to the proceedings, in light of the articles relating to the formalism of invoicing (L. 441-3) and the written agreement (L. 441-7). In our view, the conviction could also have been based solely on Article L. 442-6 I, which underlies the Court's reasoning, in particular when it found that the distributor had not provided evidence that the services invoiced had been performed (see paragraph 157). The violation of formalism, as well as that of the substantive rules, thus converge towards the sanction.

The manifestly disproportionate nature of the advantage obtained in respect of the services - In view of the finding that Conforama had failed to justify the elements establishing that the services invoiced had been carried out, the Court could have considered it unnecessary to look at the price invoiced for the services concerned. However, it notes the excessive nature of their price in relation to their relative cost to Conforama (paragraph 158). Whether by "relative" cost is meant a cost that is in itself moderate, or a cost that is lower than the amount of the advantage granted in return for the service, it should be noted that the reference to the cost of the services giving rise to the advantage is quite frequently found in the criteria for assessing manifest disproportionality (on this criterion, see Paris, February 2, 2012, No. 12-21804: Lettre distrib. 03/2012, our obs. see the judgment; CEPC, Opinion No. 15-21; T. Com. Paris, February 22, 2021, n° 2016071676: Lettre distrib. 04/2021, obs. S. Chaudouet).

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