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# Significant imbalance: The French Cour de cassation provides useful insights for the assessment of the significant imbalance in view of the criterion of "good faith", the previous acceptance of unbalanced clauses and reminds the necessity of proportionate counterparties to the such clauses (*Document Concept 87-23 / Xerox*)

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Cass. com., 6 avr. 2022, Document Concept 87-23 c/ Xerox, n° 20-20.887, ECLI:FR:CCASS:2022:CO00244
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**Facts.** Xerox (hereinafter "Xerox" or the "licensor") and Document Concept 87-23 one of its dealers (hereinafter "Concept" or the "dealer"), had been bound since 2007, by successive three-year renewable fixed-term dealer agreements. The last renewal was on April 25, 2014, effective November 30, 2013, so that the contract expired on November 30, 2016. The purpose of these contracts, which were subscribed to online via a simple "click" by the dealer (judgment, pt 10.), was to have the dealer offer maintenance contracts for Xerox equipment, entered into directly between the dealer and its user customers. The maintenance operations were subsequently subcontracted to Xerox, which billed the dealer for them. In 2015, Xerox failed to pay some of its invoices and, referring to the contractual provisions, suspended its maintenance services under the exception of non-performance. The licensee, then in liquidation, accused the licensor of having implemented, in bad faith, the provisions of the general terms and conditions of the maintenance contracts and, in the alternative, of applying clauses creating a significant imbalance. In a confirmatory judgment (Paris, June 17, 2020, 18/23452), the Paris Court of Appeal dismissed its claims. However, the judgment rejecting Concept's claims for significant imbalance is reversed.

**First problem: significant imbalance and good faith**. Is the implementation by the grantor of clauses which, according to the grantee, had the effect of paralysing its commercial activity and led it into receivership, of such a nature, when these clauses fall within the scope of a significant imbalance, as to characterise the grantor's bad faith in the performance of the contract, in this case on the occasion of the exercise of the exception of non-performance?

**Solution.** "There *is no indivisible link between the existence of a significant imbalance in the rights and obligations of the parties, assuming it is characterized, and the failure to comply with an obligation of good faith"* (pt 9.).

**Observations.** The Court of Cassation denies the assumption, which it describes as erroneous, contained in the plea. There is no correlation between, on the one hand, the significant imbalance and, on the other hand, the obligation of good faith or, in other words, bad faith. The two concepts being foreign, it would be vain to associate them by essence and *ipso facto*. The reminder of the facts (pt. 6.), seems to show that the plea of bad faith was argued as the main one and the significant imbalance, assuming the existence of a submission, as the subsidiary one. The confusion of genres that then appears in the statement of the plea (pt. 8.), offers the Court the opportunity to clarify the absence of indivisibility. This clarification will avoid seeing the debates on the subject of significant imbalance disturbed by considerations which, in themselves, are foreign to them (rappr. S. Chaudouet, Le déséquilibre significatif, LGDJ, 2021, n° 753 and 754). However, in our view, there is nothing to prevent such considerations from being taken into account in the - aggravated - case of the performance in bad faith of contractual prerogatives falling within the prohibition of significant imbalance. This seems to be what the victim party was seeking to have recognized, but in a manner that was too fusional in the eyes of the Court.

**Second problem: submission and acceptance/previous adhesion.** Does the repeated renewal of a membership contract signed online, containing obligations likely to characterize a significant imbalance, without the victim having justified having tried in vain to negotiate the terms, *ipso facto* prevent the victim from subsequently invoking such an imbalance?

**Solution.** No, answers the Court, thus disapproving the Court of Appeal which, " *by determining on grounds that are not sufficient to rule out the characterization of a tender or attempted tender, in view of the conditions under which the contracts were signed and the impossibility of modifying the clauses that were invoked, (...) did not legally justify its decision.* (pt 13.).

**Observations.** In the circumstances and conditions under which the contracts were signed, did the victim have a reasonable and effective opportunity to negotiate the terms of the contract and, in particular, to modify its clauses? In this case, there were clauses in the general conditions of the licensor which, according to the licensee, allowed him to suspend maintenance services for all the contracts signed, even if the unpaid invoices only concerned some of them, and to suspend the execution of orders for new maintenance contracts, thus paralysing the commercial activity of the licensee, who was unable to sell his machines in stock for lack of a maintenance service. These clauses had certainly been accepted as they stood, without negotiation, which is not disputed. But could it reasonably have been otherwise by modifying their content in view of the circumstances of the subscription of the contract which contained them. The automaticity of the subscription process allows us to doubt this, as it still seems illusory nowadays to claim to negotiate with a "machine". In such a context, should the victim be considered to have failed to demonstrate that he or she did not, but in vain, try to negotiate, when, in fact, he or she cannot? Negative, the Court considers " *in the state of the conditions of subscription of the contracts and the impossibility of modifying the clauses which were invoked"* . This is a solution tinged with pragmatism at a time of " *click* " contracts and the multiplication of agreements accepted by electronic signatures, if the latter are not preceded by an effective negotiation. The legal argument based on the history of past acceptance of the disputed clauses was therefore not convincing. The habit, bad because *contra legem*, does not make the rule. *Nemo auditur*, some would say. By a rapid association of ideas, it also comes to mind that, when it is a question of assessing an imbalance on the basis of a reference to past behaviour in the light of a contractual habit, " *in the sense of a practice* [...] *established between two parties to a contract"*, this practice " *followed by the parties, whether it is past or present, cannot be used as a reference point from*

*which to examine a clause, for the simple reason that one cannot take what one appreciates as a reference to ... what one appreciates"* (S. Chaudouet, supra, no. 333). According to the judgment, a past acceptance is therefore not a relevant behavioural reference which would endorse the absence of submission, whether original or current. The finding of renewed acceptance of the disputed clauses, on the occasion of the renewal of the agreements containing them, does not therefore encircle the victim and cannot neutralize the subsequent application of article L. 442-6 I 2° (now L. 442-1 I 2°). The solution of the judgment which, like other decisions dealing with the acceptance of an obligatory situation (Paris, Feb. 23, 2022, n° 21/07731, Lettre distrib. 04/2022, *our obs.*), its reiteration or its permanence (on habituation: Trib. com. Paris, May 31, 2021, n° 2017025155 and n° 2017025159, Lettre distrib. 10/2021 or RLC, April 2022, n° 115, p. 34 et seq .), dictates the need for a pragmatic approach to the characterization of the submission.

**Third problem: disproportion between the intensity of the obligations and that of the consideration in exchange** . Assuming the existence of counterparts to non-reciprocal obligations, should the judge undertake a concrete examination of proportionality between, on the one hand, the rights of one party and, on the other hand, the counterparts received by the other party under the contract?

**Solution.** Yes, the Court of Cassation answers, while noting that this is not apparent from the analysis of the Court of Appeal, which limited itself to noting the existence of what it considered to be a consideration: " *By determining itself in this way, without examining concretely the proportion between, on the one hand, the suspension of all contracts in the event of unpaid invoices on only some of them and, on the other hand, the considerations it noted, the Court of Appeal deprived itself of a legal basis for its decision.* (pt 16.).

**Observations.** The debate was about the balance between, on the one hand, the rights of the licensor in the event of unpaid invoices (which would not have concerned all of the contracts signed) and its power to suspend both the maintenance services for all of the contracts signed and the execution of orders for new maintenance contracts, and on the other hand, the consideration that, according to the licensor, " *the margin freely set by the Concept company, the revenue generated by the maintenance services and the resulting cash flow advantage"* constituted for the concessionaire, and which, together, constituted the " *main asset of the concession"* . Three observations to this:

– First, the sequencing of the qualification implies an analytical approach to the content of the contract, clause by clause, which consists in identifying the imbalance created by a disputed clause, and then an overall approach to the contract which implies looking into the rest of its content and into its general economy if the imbalance created by this clause is usefully counterbalanced by other clauses found elsewhere (T. com. Paris, Sept. 2, 2019, No. 2017050625, Lettre distrib. 09/2019, S.C). The Court noted that the trial judges had noted the absence of reciprocity of the rights and obligations contained in the disputed clauses (pt. 15: " *To rule again as it does, the judgment holds that the disputed clauses (...) and without reciprocity"* ). On the basis of this finding and in order to assess whether the presence of the disputed clauses in the contract was otherwise balanced, the Court of Appeal therefore asked itself - albeit insufficiently - about the consideration that the beneficiary of the rights under this clause could give to its co-contractor. The Court of Cassation therefore reviews the method of assessment of the significant imbalance adopted by the trial judges and recalls the chronology of their office.

– Secondly, the requirement of a concrete examination of proportionality is neither surprising nor novel: Article L. 442-6 I 2° C. Com. promotes balance in commercial relations and sanctions non-compliance. This balance cannot be guaranteed by the mere fact that there is some apparent consideration, even if it does exist, but its density must be examined. This requirement of proportionality emerges from the decisions of the Paris Court of Appeal, which has already ruled that " *the existence of obligations creating a significant imbalance may be inferred in particular from a total absence of reciprocity or consideration for an obligation, or from a significant disproportion between the respective obligations of the parties* " (Paris,

June 12, 2019, No. 18/20323, Lettre distrib. 07-08/2019, S.C; Paris, May 16, 2018, No. 17/11187, Lettre distrib. 06/2018 or RLC, No. 74, July-August 2018, *our obs*; Paris, May 23, 2013, No. 12/01166, Lettre distrib. 07-08/2013). The judgment under comment sounds like a reminder to the Paris Court of its own solutions.

– Finally, the factors retained by the Court of Appeal, whose *proportion* it should have " *concretely examined*" according to the judgment of cassation, may be surprising as a counterpart. The first of these is " *the margin freely set by Concept*" . Unless there is an error or misunderstanding of the case, an independent operator cannot in principle be prohibited from determining the commercial margin that he intends to charge downstream and this is not a suppletive right, but a right of public order. It seems difficult to us to claim that the invocation of the enjoyment of this right, which is unavoidable, is a counterpart. The second and third factors that are " *the turnover realized as a result of the maintenance services and the resulting cash flow advantage*" , are they not simply the translation of the exercise of the economic activity provided for in the contract, even if it provides the co-contractor with a cash flow allowed by the incidental turnover realized. Nor does the reference to the material fact that " *maintenance services constitute the main asset of the concession*" fail to surprise, whereas once the imbalance under a given clause has been identified and as already mentioned, the " *overall approach to the contract (...) implies looking into the rest of its content and its general economy to see whether the imbalance created by this clause is usefully counterbalanced by other clauses found elsewhere*" (see T. com. Paris, Sept. 2, 2019, aforementioned).

The reported decision, although not disruptive in our view, reminds us of the need to check the proportionality of the consideration at the end of the sequencing of the analysis of the significant imbalance. The judge's duty stops at this stage and not before. The effectiveness of the system can only be strengthened. Ultimately, the solution prevents the invocation of one or more compensatory measures - assuming they exist - from being sufficient in itself to justify the disputed clauses. We see this as further evidence of the convergence of the analysis of consideration on the basis of the prohibition of significant imbalance with that carried out on the basis of the prohibition of advantages without consideration or with a manifestly disproportionate consideration under former article L. 442-6 I 1° C. Com (see T. com. Paris, July 6, 2021, n° 2016064825, Lettre distrib. 09/2021, *our observations*).