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Exclusivity clause: The Bordeaux Court of Appeal condemns a supplier for having carried out an equivalent activity in indirect breach of a valid exclusivity clause, regarding similar conditions of lawfulness of those for non-compete clauses *(Océano Loisirs / Baz Industries)*

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Bordeaux Court of Appeal, 24 Jan. 2024, RG n° 22/00268, Océano Loisirs / Baz Industries

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Jean-Michel Vertut | Jean-Michel Vertut - Avocat (Montpellier)

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Facts. Océano Loisirs ("Océano") operated a leisure and sports park in the Vendée department. In October 2013, it entered into a " *service provision contract* " with Baz Industries ("BAZ"), entrusting it with the design and management of installation work for an activity called " *Water Jump* ", which allows water jumps from springboards. The contract included an exclusivity clause in favor of Océano, prohibiting BAZ from setting up an equivalent project for five years in the Vendée département and five neighbouring départements. Océano then discovered on the Internet that BAZ had sold the same concept to a third party, the Lauchris company ("Lauchris") located within the exclusivity perimeter. A bailiff's report showed that Lauchris had developed the " *Water Jump* " activity in one of the departments under exclusivity, having entered into a contract with a company called Baz Innovation, run by the same people as BAZ Industries, under the title of " *trademark license contract* ". Océano sued BAZ for breach of the exclusivity clause. On appeal, the Bordeaux Court of Appeal upheld the judgment against BAZ.

Trouble.

1st problem: was the exclusivity clause valid?

Issue 2: If so, has the activity carried out by the exclusivity debtor for the benefit of the third party constituted a breach of the clause?

Issue 3: If so, has the breach of the clause caused an indemnifiable loss, and if so, how much?

Solutions.

1st issue: validity of the exclusivity clause - " *The clause in this contract provides for exclusivity of attraction for the benefit of the customer, for a limited period of 5 years and in a geographical area limited to 6 neighbouring départements. The disputed clause does not contravene any legal or regulatory provision, and in particular is not contrary to the freedom of trade and industry, nor does it prevent competition and the market, in that it is reasonably limited in time, purpose and geographical scope, and is necessary for* [Océano] *to protect its legitimate interests, the customer intending to protect its clientele and amortize its investment by guaranteeing it a temporary and local monopoly. It also includes exemptions for the debtor of the obligation, as well as an exclusivity consideration payable by the customer. The exclusivity clause in the contract is therefore perfectly valid (...)* ".

2nd issue: breach of the clause - " *The attraction at issue" is unquestionably equivalent within the meaning of the exclusivity clause to the one sold by* [BAZ] *to* [Océano]. *The fact that a few details in the operating conditions may differ from one site to the other does not call into question the equivalent nature of the two installations, the word equivalent meaning having the same value or being comparable, and not something identical. The different titles of the two contracts, or their choice of terminology, are equally irrelevant, since the purpose of both contracts is to install the "Water Jump" attraction in the customer's park and to enable the customer to operate it.*

3rd issue: on the damage that can be compensated - " *The breach of the exclusivity clause by* [BAZ], which *gave rise to a commercial disturbance, undoubtedly caused damage to* [Océano] *Loisirs, which found itself in competition with a similar park located in a neighbouring department, a situation which resulted in the loss of part of the clientele it could have hoped for, even though it was guaranteed by an exclusivity clause. (...)* [Océano] *can usefully point out that it paid the sum of 35,000 euros, plus variable remuneration, to* [BAZ], *and that the exclusivity was intended to enable it to recoup the material and financial investments made to install and develop the attraction* . On *the basis of these elements of loss, the court finds* that [Océano] should be *compensated* in the *sum of 30,000 euros, as requested by Océano* .

Comments.

Issue 1 - The clause whose validity was at issue was worded as follows: " *the supplier shall refrain from implementing a project equivalent to that covered by the present contract, for a period of 5 years from the date of signature of the present contract, either directly or indirectly, in the following departments: 85, 17, 79, 44, 49, 86, under penalty of damages and interest payable to the customer, without prejudice to the customer's right to put an end to this infringement (...)*". Beyond the questionable definition of the object of the prohibited conduct, i.e. the "implementation of *an equivalent project* " (see 2nd problem), it is interesting to consider the Court's responses to two of the defences put to it. Firstly, the defendant, claiming that the clause was unlawful, was not asking for it to be declared null and void or deemed unwritten, but only for the claim to be dismissed. The Court therefore specified that such developments on the unlawfulness of the clause did not constitute a plea of nullity, and that there was therefore no need to rule further on the possible prescription of the plea of nullity raised in its pleadings. Although the Court ultimately ruled that the clause was valid, this point underlines the importance of the drafting content of the operative clause submitted to the court. Secondly, according to the ruling, the defendant, in his criticism of the exclusivity clause, confused the exclusivity clause with a non-competition clause. The Court then went back over the boundaries of the two concepts. Recalling that an unlawful clause is one which contravenes legal or regulatory provisions, it noted that the appellant did not specify the text which the clause contravened, but confined himself to explanations of the conditions which a non-competition clause should meet, and a reminder of the general principle of freedom of trade and industry. According to the ruling, an exclusivity clause enables its creditor to obtain exclusivity in terms of goods or services, whereas a non-competition clause prohibits its debtor from competing with the beneficiary. In this case, the Court noted that the clause did not deal with competition between the parties to the dispute, who were not engaged in the same activity, but prohibited one of them, under

certain conditions, from setting up a project equivalent to that to which it had committed itself towards the other, and which guaranteed the latter limited exclusivity. Nevertheless, to declare the clause valid, the Court noted that it did not contravene any text, and used assessment parameters (" *the disputed clause does not contravene... temporary and local* ") reminiscent of those observed in case law when assessing the legality of non-competition clauses (Com., May 17 2023, no. 22-10.369 or Paris, May 10 2023, no. 21/01738, *obs.* M.-P. Bonnet Desplan, *Lettre distrib.* 06/2023; *for reference* in antitrust law : CJUE, Oct. 26, 2023, aff. C-331/21, *obs.* L. Bettoni, *Lettre distrib.* 12/2023; in litigation concerning post-contractual non-competition and/or non-reaffiliation clauses: Com., Jan. 17, 2024, no. 22-20.163 and 22-20.164, *obs.* A. Bories, *Lettre distrib.* 02/2024; Paris, Jan. 17, 2024, *Lettre distrib.* 02/2024, *obs.* A. Weil; Paris, March 15, 2023, no. 21/14111, *obs.* S. Destours, *Lettre distrib.* 04/2023; Paris, Feb. 8, 2023, no. 21/07804 and 20/14328, *obs.* M.-P. Bonnet Desplan, *Lettre distrib.* 03/2023), mentioning in addition the existence (we don't know if we should understand " *necessity* ") of an exclusivity consideration to be paid by the customer. As a reminder, the clause stipulated that, in return for the exclusivity, the customer undertook to solicit the supplier for any project of the same type during the period and within the jurisdiction of the exclusivity. The equivalence in the analysis of these two types of activity-restricting clauses, by borrowing in this case criteria relating to the validity of a type of clause which is not at issue according to the Court, invites drafters to question the economy and balance of their exclusivity clauses, in order to avoid seeing them exposed to the same criticisms as those sometimes incurred by non-competition clauses.

2nd problem - The clause prohibited " *the implementation of a project equivalent to that covered by the present contract* ". This implied first determining the project covered by the contract, and then comparing it with that found elsewhere, in order to determine whether they were equivalent projects within the meaning of the clause. On the basis of the contents of the contract's preliminary presentation, the Court identified the activity of the exclusivity debtor, namely the creation of modules for water jumping using springboards and slides, with or without equipment. It concluded that this was not "a *uniform attraction that is always strictly identical, but a diverse set of installations and equipment enabling customers to jump into the water from springboards or slides and with the aid of accessories, under the name 'Water Jump'* ". The Court considers that, despite some differences in the details of the operating conditions and the terminology used in the titles of the two agreements to designate the activity, " *this attraction is unquestionably equivalent within the meaning of the exclusivity clause to that sold by* [BAZ] *to* [Océano]. In reality, the activities in question had the same purpose. The clarification provided by the preliminary statement of the activity of the exclusivity debtor, the nature of the projects in question (to which the first judges had preferred the term " *concept* "), combined with the materiality of the project implemented in a location within the territory covered by the exclusivity, led to the unsurprising conclusion that the exclusivity clause had been breached. This ruling underscores the need for careful drafting of the clause in terms of the activity concerned, as the restriction placed on the exercise of an " *equivalent* " activity is intended to be more stringent for the exclusivity debtor than an " *identical* " activity. The parties' intention as expressed in the contract as to the nature of the prohibited activity explains this solution. It should be noted in passing that the exclusivity debtor's (BAZ) defense that it was not he who had contracted with the third party, but another company (Baz Innovation), was rejected. Considering that the exclusivity debtor had participated in the operation carried out with the third-party contractor within the perimeter covered by the exclusivity, the Court saw in the facts of the case (proximity of the companies' names, identity of the directors, same group to which they belonged and presentation in the documentation that Baz Innovation was involved in research and development and Baz Industries in production and marketing, awareness on the part of the directors of the breach of the exclusivity clause, which they intended to " *camouflage* " by recommending that the third party communicate with them at a personal address, whereas the first exchanges had taken place at the Baz Industries address, announcement of the opening of the competing park on the Baz Industries website), an indirect breach of the disputed clause, all the more so as the clause had taken care to prohibit " *directly or indirectly* " the setting up of an equivalent project in the departments concerned (*rappr.* Com., May 17 2023, no. 22-10.369, *obs.* M.-P. Bonnet Desplan, *Lettre distrib.* 06/2023).

Issue 3 - Compensation is awarded in the form of an indemnity payment of 30,000 euros, an amount claimed by the creditor of the breached obligation, who argued that he had paid his partner 35,000 euros under the contract (in addition to variable remuneration). The Court took into account the commercial disruption caused by the breach of the clause, the expected loss of clientele, and the lack of expected return on investment from the attraction, in determining the amount of compensation, although it did not undertake an item-by-item quantification. However, it does not appear from the judgment that the appellant

intended to debate this point. In the light of such a succinct statement of reasons, it remains to be seen whether the award of this amount is not also, indirectly, the sanction for a lack of good faith in the performance of the contract, or even for the questionable morality of one of the parties, by what could in fact suggest a restitution of the sums initially paid solely on account of the breach of the clause, even though the debtor's other obligations under the contract may have been properly performed, since it is not stated that they were not.