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Commercial negotiation: The Paris Court of Appeal rules that the use of the term “habillage" does not mean that an advantage granted is unlawful, constituting an advantage without consideration under the provision of former Article L. 442-6, I, 1° of the French Commercial Code (*Laboratoires Prodene Klint / Orapi*)

FRANCE, UNFAIR PRACTICES, PRICES, ALL BUSINESS SECTORS, JUDICIAL REVIEW, BUYER POWER, LIMITATION PERIOD / PRESCRIPTION, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS

Paris Court of Appeal, 24 April 2024, RG n° 22/11109, Laboratoires Prodene Klint / Orapi

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Facts. Laboratoires Prodene Klint (hereafter "LPK") manufactures soaps, detergents and cleaning products for professional use, under its own brands and private labels. It has entered into a commercial relationship with Orapi (hereafter "Orapi"), itself a supplier whose business is the manufacture and marketing of hygiene and cleaning products for professional use, under its own brands and distributor brands. The commercial relationship between these companies spanned many years. Initially, it was formalized in February 2010 by a referencing contract, under the terms of which the latter referred the former " *for the supply of the products and/or equipment* " contractually designated. This contract was terminated on December 13, 2012 at LPK’s initiative. The relationship then continued in the form of successive orders. From 2015 to 2017 (the period covered by LPK’s claims for the return of a number of advantages received by Orapi, which LPK considered to be without consideration), the parties entered into a number of specific commercial conditions each year, formalized in " *supplier agreement sheets* ", providing for invoice discounts entitled, depending on the year, " *RFA* ", " *services* " or " *agreements* ". The ruling states that the unconditional discounts were calculated and invoiced quarterly by Orapi on the basis of the volume of purchases made over a reference period. In December 2019, Orapi sued LPK for payment of several invoices. As a counterclaim, LPK then sought repayment of discounts unduly received by Orapi for the years 2015 to 2018, in addition to an order against Orapi for the partial brutal breach of established commercial relations. On May 11, 2022, the Paris Commercial Court ruled that the restitution claims

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for 2015 were time-barred, but ordered Orapi to reimburse LPK for the financial benefits received from 2016 to 2018. The ruling was upheld on appeal. The second head of claim concerning the partial brutal severance of an established commercial relationship, which was unsuccessful both in the first instance and on appeal, will not be addressed below.

Problem. The judgment deals with a number of issues frequently encountered in this type of restitution litigation, which we will confine ourselves to outlining at the start of our observations, in order to focus on the impact of certain jargon used during commercial negotiations. More specifically, does the term " *habillage* " (or its derivatives such as "habiller", "rhabiller", "déshabiller") used in messages exchanged between a supplier and a buyer during commercial negotiations, in itself mean that the resulting pricing advantages are unlawful and constitute an advantage without consideration within the meaning of article L. 442-6 I 1° of the French Commercial Code (currently L. 442-1 I 1° of said Code)?

Solution. The Court of Appeal held that " *while the use of the term 'dressing' does not in itself mean that these were unlawful discounts constituting an unrequited advantage within the meaning of the provisions* of[*article L. 442-6*, I, 1° of the French Commercial Code, it cannot be deduced from the exchanges produced that the disputed discounts, which invariably resulted, as of July 1, 2015, in 13% of the price list, were negotiated with reference to specific identified services distinct from the sales transaction ".

Observations. Let's skip over a few subjects that we must point out, without commenting on them. These include the application of article L. 442-6 I 1° aux relations de « *référencement* », celui du rappel de la mécanique probatoire applicable selon laquelle, en réponse aux demandes de celui qui s'estime victime pour s'être acquittée d'un avantage sans contrepartie, le bénéficiaire de l'avantage se doit de « *justifier la spécificité des services qu'elle a rendus au titre de ces remises ou ristournes (...)* ", of the qualification of lawful advantages "in that *they entitle the supplier to a particular advantage by stimulating the resale of its products, these services therefore having to go beyond the simple obligations resulting from purchase-sale operations* "*(rappr.* Paris, Nov. 29, 2023, no. 22/03166: Lettre distrib. 01/2024 *nos obs.* and RLC 4600, February 2024, no. 135, p. 41, *obs.* C. Mouly Guillemaud and JM. Vertut; Paris, Sept. 6, 2023, no. 21/19954: Lettre distrib. 11/2023 *nos obs.*) and " *to demonstrate the reality of these services, which cannot result from the mere fact that the invoices have been paid without reservation* ". We would also mention the requirement to specify, in this case through material elements such as appendices or exchanges between the parties, the content of the consideration for the benefits received beyond the generic terms designating them*(rappr.* on the requirement for precision in terms of pricing transparency: RLC 3226, July-August 2017, n°63, p. 43 et seq, *our obs.*), as well as the starting point of the 5-year statute of limitations for the victim's action for restitution of undue advantages or, lastly, the need for the party claiming to be the other party's creditor in respect of an end-of-year rebate to prove the existence of its claim for the year in question, rather than relying on agreements for the previous year.

Getting back to the question at hand, let's say it straight away: evoking a " *dressing-up* " is generally not the happiest thing in law, and not the best thing in the eyes of the judge. It is even less so in the field of restrictive practices law, where it is a scourge, particularly when it comes to checking the reality and proportionality of the advantages granted during commercial negotiations to achieve the " *3 x net* ". Paradoxically, the way in which commercial negotiation is " *dressed up* " puts on such an old-fashioned show that it could almost appear to be brand new when the judge takes a closer look at it in his ruling. As a reminder of the stigmatization of such cosmetics, the same Court of Appeal ruled in the context of a dispute in the world of mass retailing, that " *The first judges rightly held that all the services analyzed above constitute no more than window dressing covering no economic reality, other than the desire to distort transaction prices and the resale-at-loss threshold* " (Paris, Feb. 2, 2012, no. 09/22350, and Com, Sept. 10, 2013, n°12-21804; *rappr.*, Crim. June 25, 2008, n° 07-80.261). We note in passing that the dispute reported here arose in a universe other than that of relations between suppliers and major retailers, which bears witness, if proof were needed, to the implementation of regulations governing the control of abusive advantages well beyond this universe.

This solution can be divided into two parts. The first is of a general nature: the use of the term " *packaging* " does not mean that we are *ipso facto* in the presence of unlawful rebates within the meaning of *article L. 442-6*I, 1° (it should be noted that the judgment sometimes refers to " *on-invoice* " discounts, and sometimes to unconditional discounts calculated and " *invoiced* "

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quarterly by Orapi on the basis of the volume of purchases made over a reference period. Although this information may make it difficult for either the supplier or the purchaser to properly understand how the advantage is treated, it does not appear to be a major obstacle when it comes to analyzing the case on the basis of the aforementioned article). The second branch sets out the solution applied in this particular case, from which it emerges that " *dressing up* " is not lawful in this instance. The exchanges reproduced in the judgment, insofar as they related to 2015 (although covered by the statute of limitations), 2017 and 2018, appear explicit enough to consider that it was not simply a question of formalizing the conditions of commercial negotiation in the rules of the art, but rather of inventing a form for them. To script them, as it were. By way of example, consider a message from February 2015, the subject of which was " *Orapi Hygiène price list* ", sent by the supplier to its customer " *(...) It is easy to see that Argos* [Orapi] *benefits from very competitive conditions. I would be grateful if you could confirm the desired packaging for these rates, as well as their implementation date. As far as I'm concerned, validity from May would be ideal (...)*". We also note a message, some three months later, " *Re: Tarif Orapi Hygiène* ", " *(...) I need to validate our Orapi Hygiène agreements as soon as possible, which will cancel and replace our current PHS and Argos agreements: From the enclosed tariff I retain column F as our 3 x net. We need to re-dress by 13%, which will correspond to our tariff applicable from July 1st. 3% remains at the head office and 10% is paid back to affiliates. Enclosed is the 2015 OH 07 to 12 agreement corresponding to this rate to be re-dressed starting July 2. Please sign and return it to me. (...)* ". Similarly, a June 2018 message from Orapi to a third-party company stated " *Hello, is the price you confirm to us dressed by 13%. Cordially* " and is accompanied by the following comment " *How do you want me to respond knowing that we don't have a 2018 agreement at the moment with the 13% discount* ". So many illustrations suggesting that the *ratio legis* of the legal framework for commercial negotiation had been somewhat lost sight of. The " *3net* " price - in law at any rate - is the culmination of the commercial negotiation of reciprocal obligations, and not a reference price agreed by mutual agreement, onto which are then projected or even sent backwards, artificially and contrary to the regulatory framework of the negotiation, as many counterparties and corresponding advantages to explain the said price. We will refrain from drawing any further conclusions about the negotiations reported in this case, of which only certain exchanges are recounted, although a proposal formulated in December 2017 by one of the parties for the attention of the other, on the occasion of the 2018 negotiations, seems at the very least to underline a certain propensity for certain "shortcuts" in terms of tariff degradation, or even some liberties in terms of formalization (" *(...) For 2018, I propose that we strip our tariffs of agreements so that we return to a 3 x net and avoid the administrative flow of invoices* "). The fact that most of the products concerned are private-label products, as the ruling shows, may have something to do with this, given the singularity of the negotiation of this type of goods. In any case, although not bound by the "clothing" terminology used, the Court considers that it cannot be deduced from the exchanges that the disputed discounts - which, as of July 1, 2015, invariably amounted to 13% of the price list *(Rappr.* Com., Sept. 11, 2012, no. 11-14620) - were negotiated " *with reference* " to specific identified services distinct from the sales transaction. Its analysis is also based on the imprecision of the stated compensations *(rappr.* CEPC opinion no. 04-04 concerning certain clauses contained in purchase conditions; Paris, Jan. 28, 2009, no. 07/11329, issued on the basis of the former article L. 441-7 but transposable; Paris, March 24, 2011, no. 10/02616; Com., Sept. 11, 2012, *aforementioned*; Com., March 3, 2021, no. 19-13.353). The Court of Appeal then approved the lower court's finding that "there is *no relevant appendix or exchange between the parties in the proceedings that specifies what the partners meant by the terms 'information', 'training', 'strategy', 'MEA', 'trade' or 'animation', and that in particular there is nothing to suggest that there was a range of services offered by Orapi from which LPK would have been led to choose or negotiate* ". So, despite the apparent leniency of the principle that the term " *dressing* " does not in itself imply an illicit discount, this practice is nonetheless a very serious indication. Besides, what's the point of evoking such a " *dressing up* " (or re-dressing) if the situation to be dressed up doesn't have to be? Here's some practical advice for negotiators: when it comes to form, beware of abusive language. It's better to " *formalize* " a negotiation that's been conducted regularly, than to " *dress up* " a negotiation that's been conducted irregularly. When it comes to substance, beware of forbidden " *dressing up*" , as form and substance are likely to meet at the crossroads of illegality. So it's best to focus on substance, without neglecting form.

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