Concurrences
Competition Laws Review

Concurrences
Antitrust Publications & Events

N° 3-2024

Commercial negotiation: The Paris Court of Appeal rules out the application of a clause reducing the statute of limitations for actions for payment of invoices for services, damages for sudden breach of commercial relationship and reimbursement of end-of-year rebates deemed undue, while ruling on the justification of these rebates *(NPS / Achats Marchandises Casino ; Distribution Casino France)*

DISTRIBUTION, FRANCE, DISTRIBUTION/RETAIL, DAMAGES, PRICES, REBATES, ALL BUSINESS SECTORS, OBJECTIVE JUSTIFICATION, ADMISSIBILITY (COMPLAINT), PUBLIC ORDER, NULLITY / VOIDNESS, BUYER POWER, LIMITATION PERIOD / PRESCRIPTION, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS, FORMALISATION OF THE COMMERCIAL RELATIONSHIP

Paris Court of Appeal, 29 May 2024, RG n° 21/18408, NPS / Achats Marchandises Casino ; Distribution Casino France

**This article is an automatic translation of the original article, provided here for your convenience.* Read the original article [fr].

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.

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

Concurrences N° 3-2024 | Alertes | Distribution

Facts. During 2015, NPS ("NPS"), whose business is the supply of security system installations, approached the Casino group's central purchasing agency, AMC ("AMC"), which negotiated the pricing terms for the purchase of products or services from suppliers on behalf of Casino group subsidiaries, including Distribution Casino France ("DCF"), in order to supply the Casino group with video surveillance system installations for its stores (together referred to as "Casino"). A master listing agreement was signed on June 1, 2015 with NPS for an initial period of one year. Orders were placed by DCF with NPS for the aforementioned systems and ancillary products, which NPS installed in nearly 200 stores. Orders ceased in September 2016. Pursuant to the master listing agreement, end-of-year rebates (RFA) were paid to DCF in the amount of 199,148.75 euros (including tax) for 2015 and 108,505.84 euros for 2016. Following the termination of the commercial relationship between Casino and NPS, in February 2020 NPS brought an action against AMC and DCF, seeking an order to pay unpaid invoices for technical services rendered, damages for the abrupt termination of the commercial relationship, and restitution of the sums paid in respect of RFA, which NPS considered to be unrequited benefits. NPS appealed to the Paris Court of Appeal, which handed down a largely confirmatory judgment.

Problems and solutions. In our view, the main subject of this ruling is the repeated dismissal of Casino's claim, based on a clause in the listing contract providing for a shorter limitation period than the 5-year period applicable in commercial matters. A few comments will nevertheless be made on whether or not the RFAs are justified on the basis of article L. 442-6 I 1° and 3° in the version applicable at the time.

Problem 1: The limitation of legal actions due to a contractual limitation period clause.

– According to Casino, **the claim for payment of the supplier's invoices** was barred by a clause in the master listing agreement stipulating that " *The parties agree that, notwithstanding the provisions of Article L.110-4 of the French Commercial Code, any claim not asserted within two years of its due date shall be barred by the statute of limitations* " (article 4.4 of the listing agreement entitled "Payment" under the heading "Article 4 Pricing conditions-invoicing-payment"). Casino argued that the claim for payment was time-barred, as NPS had not interrupted the running of the statute of limitations by issuing a writ of summons. NPS argued that this clause did not require the delivery of a writ of summons to interrupt the running of the statute of limitations, but only that the claim be " *asserted* ", which had been undertaken within two years of the claim becoming due by means of e-mails and registered mail.

Solution. The Court approved NPS in the following terms: " *This clause, as argued by NPS in application of article 2254 paragraph 2* [, which states that "the parties may (...) by mutual agreement, add to the causes of suspension or interruption of the statute of limitations provided for by law"], *also adds to the cause of interruption of the statute of limitations provided for in article 2241 of the French Civil Code, by using the term 'any unclaimed claim' to determine the starting point of the statute of limitations reduced to 2 years. In fact, by referring to the assertion of the claim, this clause covers a broader concept than the document initiating proceedings, and may therefore cover a formal request such as that made by counsel for NPS by registered letter dated October 22, 2018 with acknowledgement of receipt from Casino Service dated October 25, 2018 (NPS exhibits no. 7 and 12) in the following terms: (...). Accordingly, this letter received on October 25, 2018 by Distribution Casino France must be analyzed as a 'claim for debt' from NPS within the meaning of the disputed clause and therefore constitutes a cause interrupting the statute of limitations for having occurred within the two-year period from the due date (45 days, end of month, invoice date) of invoices issued between November 22, 2017 and March 21, 2018. It follows that the action for payment of these invoices (...) brought before the Commercial Court by bailiff's deed delivered on February 17 and 20, 2020, is not time-barred pursuant to article 4.4 of the referencing contract* ".

– **In** Casino's view, **the liability action for breach of an established commercial relationship** once again came up against the content of the aforementioned clause. NPS argued, among other things, that the basis of its action was not the contract, but the application of tort liability under article L. 442-6, I, 5°, so that the contractual limitation clause was inapplicable.

Solution. The Court ruled that the action was not time-barred. In the first branch of its solution, it considers that: " *The purpose of article 4.4 reproduced above is to organize the terms and deadlines for payment of the supplier's services and to settle any difficulties linked to late payment or payment in the event of poor performance of the service provided by NPS. The "any claim" referred to in the last paragraph of this article therefore covers only claims relating to payment for services rendered, so that an action for payment of compensation for sudden termination of an established commercial relationship is not covered by this article. In any event, the starting point of the limitation period referred to in article 4.4 is the due date of the claim, and the claim for compensation 'asserted' by NPS is neither certain nor liquidated* . Then, in a second branch, after dismissing the application of the clause, it recalls the rule concerning the running of the statute of limitations, and in particular its starting point in actions for breach of an established commercial relationship: " *According to article 2224 of the French Civil Code, the statute of limitations for an action in tort runs from the date on which the damage occurs, or from the date on which it is revealed to the victim, if the latter establishes that he or she had no prior knowledge of it. The starting point for the statute of limitations for an action based on the brutal termination of an established commercial relationship is the notification of the termination to the party claiming to be the victim, provided the latter is aware, at that date, of the absence of notice and of the resulting damage, and without any need to take into account the possibility of fault on its part, which may have justified the termination of the relationship without notice*

(in this sense Com., July 8, 2020, pourvoi n° 18-24.441 published). Since, according to NPS, the commercial relationship was terminated when orders ceased in September 2016, the action for damages brought by bailiffs on February 17 and 20, 2020, less than five years from the date of termination, is not time-barred ".

– **With regard to the claim for restitution of the RFA** received by Casino on the grounds that they were unjustified, the latter again raised the issue of non-receivability, again on the grounds of prescription under the aforementioned clause. Once again, NPS argued in particular that its claim for restitution of the RFA was not based on the contract, but on the provisions of article L. 442-6, I, 1° of the old law, which provides for a tort liability regime, so that the conventional prescription clause was not applicable to its claim.

Solution. Taking up the first part of the previous solution, the Court noted that NPS based its " *claim for 'reimbursement' on both article L. 442-6 of the French Commercial Code and articles 1169 and 1302-1 of the French Civil Code* ". It therefore considered that NPS's claim, whether for compensation or for the recovery of undue payments, was not covered by the aforementioned article 4.4, and that in any event, the starting point for the limitation period referred to in article 4.4 was the due date of the claim, which was lacking in this case, since the claim for compensation "asserted" by NPS was neither certain nor liquidated.

Analysis. Clauses modifying the duration of the limitation period are frequently encountered in practice, usually in order to shorten it. Shortening the limitation period, which may not be reduced to less than one year, provided that it has been agreed and not imposed (see on this subject the plea of significant imbalance put forward by the claimant for the reduction of the limitation period to two years), has the advantage of allowing the parties to be exposed for a shorter period to legal action in respect of their past business, than is provided for under article L. 110-4 of the French Commercial Code, which sets out a five-year limitation period. However, such an arrangement can have deleterious effects for the person who, although in a position to take legal action to recover his or her rights, will often not take the initiative to interrupt the course of the shortened prescription period as long as he or she remains in a commercial relationship with the person who caused the damage. Unfortunately, once the initiative has been taken, once the business relationship has been terminated - i.e. beyond the reach of any retaliatory measures, and although within the ordinary five-year time limit - it is sometimes too late to assert all or part of one's rights under the agreed shortened time limit. Because, like a purgatory, the shortened statute of limitations acts as a *"reset" of* the rights in question, so that the financial risk for the perpetrator of the abusive practice is much more contained than would be the case, according to the same mechanism, with the statute of limitations under ordinary law. When signing agreements containing a contractual arrangement for abbreviated limitation periods, parties who are not familiar with abusive practice litigation tend not to worry about subtlety, unlike those who are more familiar with it, and for whom the fin de non-recevoir drawn from the limitation period constitutes an effective shield against claims on the merits that are justified, but submitted out of time. The question of contractual arrangements for limitation periods in the case of actions based on rules derived from the law of restrictive practices, of public order, may give rise to debate, with the key issue being whether or not the contractual arrangement is binding, and thus whether the limitation period is shorter or longer. A recent ruling by the Paris Court of Appeal addressed this question of the effectiveness of clauses governing limitation periods, including in tort actions, although the debates did not appear to be totally closed and it seemed necessary to " *wait for the rebound* ", as part of a " *trampoline* " effect (Paris, Apr. 3, 2024, no. 21/14643, Lettre distrib. 05/2024, *obs.* A. Louvet; *on* the delictual nature of compensation for brutal termination, Paris, June 12, 2024, no. 21/18306). This rebound has indeed occurred here, but it is not the right one. In the judgment under review, the discussions on the issue of the statute of limitations did not focus on the lawfulness or otherwise of the contractual arrangement in relation to the matter in question. Consequently, the Court, which was not directly seized of the issue, did not openly take up the subject again, focusing only on the material scope of the clause providing for such an arrangement, to rule that the actions brought were not time-barred, since they did not fall within the shortened limitation period. The *"trampoline"* effect thus continues. In the case of payment of the supplier's invoices, it is supplemented by a *"boomerang"* effect for the debtor, due to the judge's recognition of the claim as an additional cause of interruption of the limitation period, in addition to the legal action. The author of the clause was wrong to consider that it did not expressly qualify the assertion of the claim as a cause of interruption of the statute of limitations, and that

its sole purpose was to derogate from article L. 110-4 of the French Commercial Code with regard to the duration of the statute of limitations, and not with regard to the causes of interruption as provided for by law, and in particular article 2241 of the French Civil Code. A different wording might perhaps have avoided this outcome.

Issue 2: whether or not EFRs are justified on the basis of volumes rather than sales.

NPS argued that the RFA provided for in the referencing contract, the rate of which was calculated on the basis of the number of sites on which its systems had been installed and not on the basis of sales achieved, was not a quantitative discount, since no sales threshold was mentioned for its attribution, and that it was therefore a simple referencing bonus prohibited by articles L. 442-6, I 3° and L. 442-6 II b in the version applicable to the dispute. This was perhaps too quick to forget that, by equivalence, sales were deducted from volumes, which in turn depended on the number of sites installed, and that in the end the judgment notes that sales amounted to €2.59 million exclusive of tax between June 2015 and August 2016. NPS added that this RFA was unrequited, as no specific legitimate service had been rendered to NPS to justify the payment of a discount of 10% of annual sales, and that moreover it was disproportionate.

Solutions. On the first point, the Court ruled that " *end-of-year rebates as defined in the referencing contract were not required prior to the placing of any order, but were conditional on the volume of video surveillance system installations and based on the sales generated by these installations. It can be deduced from this that the bonuses at issue are not pre-order advantages or referral bonuses prohibited by article L.442-6 I, 3° and II b)* ". With regard to the legality of the RFAs under the former article L. 442-6 I 1°, the Court ruled that " *the rebates agreed between the parties are price reductions conditional on sales volume levels, i.e. a certain number of surveillance system installations at Casino sites, and based on actual sales at the end of the year. These rebates are therefore not without a quid pro quo and constitute an incentive for Casino sites to purchase equipment from NPS, given that the latter generated sales of €2.59 million excluding VAT with the Casino group between June 2015 and August 2016. NPS has not demonstrated how the various levels of rebates and the amount actually paid for them, totalling €256,379 excluding VAT, constitute a manifestly disproportionate advantage for Casino group companies* .

Analysis. These solutions call for little comment. On the one hand, the former practice sanctioned *per se* on the basis of 3° of *ex-Article* L. 442-6 I which, until its repeal on the occasion of the Order of April 24, 2019, was referred to as a " *referencing bonus* "*(rappr.* Versailles, May 18, 2006, no. 04-8829, Lettre distrib. 10/2006; Paris, July 6, 2011, no. 10/08832; CEPC, Opinion no. 16-8, Lettre distrib. 03/2016, *obs.* S. Chaudouet; Paris, Apr. 19, 2017, no. 15/24221, *obs.* N. Eréséo, Lettre distrib. 05/2017; Trib. com. Paris, Oct. 10, 2022, n° 2021000304, Lettre distrib. 12/2022, *nos obs.*), would have implied the payment of a benefit prior to any order. This was not the case here.

On the other hand, as regards the examination of the practice of RFA on the basis of 1° of the *former* article L. 442-6 I°, the Cour once again confirms the broad application of this provision, in line with the solution given by the Cour de cassation (Com, Jan. 11, 2023, n° 21-11.163, Lettre distrib. 02/2023 and RLC 4399, n° 125, 2023, p. 31 et seq., *our comments*) and, in this case, its application to the rebates at issue. As the practice thus falls fully within the scope of Article L. 442-6 I 1°, it remained to examine it from the angle of this provision, which is currently set out in Article L. 442-1 I 1°, albeit in a more open formulation. The Court ruled that these rebates were conditional on the achievement of certain business volume thresholds, i.e. a certain number of surveillance system installations at Casino sites, and that they were calculated on the basis of actual year-end sales generated by the volumes in question. The provision of these rebates, provided that the conditions for their granting were met, constituted an " *incentive* " for Casino sites to purchase equipment from NPS, enabling the latter to increase its sales on this occasion. This is the essence of a conditional RFA. The solution, insofar as it targets sales volumes, recalls that of the same Court in a certain " *Gelco* " ruling (Paris, Sept. 13, 2017, no. 15/24117, Lettre distrib. 11/2017, *obs.* N. Eréséo*; rappr.* Paris, March 22, 2017, no. 14/26103, *our obs.* in Lettre distrib. 05/2017; CEPC Opinion no. 18-2 or CEPC Opinion no. 16-8, *aforementioned*), despite having been abused for some time by the same Court, until the welcome correction made by the "sages du Quai de l'horloge" in January 2023 (Com., Jan. 11, 2023, *aforementioned*). Although justified in this case, care must be taken to ensure that the

identification of an " *incentive* " does not in itself open up a Pandora's box for certain other advantages, if we consider that, as a general rule, the purpose of tariff concessions is to provide various incentives to the beneficiary *(rappr.* Paris, Oct. 25, 2023, no. 21/11927, Lettre distrib. 12/2023 and RLC 4575, no. 134, 2024, p. 18 et seq .*)*

At the end of the day, while these last substantive solutions are always interesting to keep in mind, as the next trade negotiations for 2025 are about to get underway, the essential contribution of this ruling lies, in our view, more in the lessons it teaches on the question of contractual arrangements of the right to act, which should lead the parties to carefully weigh up the future impact of such arrangements.