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Automatic application of late penalties In the absence of a contractual clause

Arrêt de la Cour de Cassation du 3 mars 2009

As a continuation of the article on the new maximum payment terms applicable as of January 1, 2009 (see our [January 2009 e-newsletter](#)), a recent decision of the French Supreme Court^[1] established the principle that a supplier can automatically require payment of late penalties even if, in its General Conditions of Sale ("GCS"), there is no clause providing for such.

The law on new economic regulations dated May 15, 2001 ("NER") established that *"late penalties are due without the need for any formality"*. Nevertheless, until the annotated decision, the issue that late penalties can apply even in the absence of a specific clause in the GSC was still debated.

In fact, pursuant to Article L.441-6 paragraph 12 of the French Commercial Code, a supplier is required to include in the GSC *"the payment terms and conditions [that] specify the conditions of application and the interest rate for late payments due the day following the payment date appearing on the invoice, if these amounts owed are paid after such date"*; case law and divided legal commentary interpreted this obligation, breach of which results in a criminal sanction,^[2] as the condition *sine qua non* for a supplier to be able to claim late penalties, penalties which were therefore presumed available and enforceable if contractually provided for.

The decision of the French Supreme Court dated March 3, 2009 holds differently, choosing to follow one trend of the legal commentary, and establishes the legal, not contractual, nature of late penalties. By virtue of the provisions of Article L.441-6 of the French Commercial Code, which must respect *"mandatory public policy considerations"*, late penalties are automatically owed, without having to be mentioned in the general conditions or any other contractual document.

As from the day following the due date of the unpaid invoice, the supplier now has a basis to automatically claim late penalties (at the minimum rate set forth in Article L.441-6 paragraph 12) even if there is no express reference to them in its general conditions.

Nevertheless, the supplier may be reluctant to exercise this right insofar as its failure to set forth the payment conditions in the GCS may result in the aforementioned criminal liability. As such, by exercising this “new” right, the supplier guilty of not respecting the commercial code provisions would be, in a way, self-incriminating itself.

Yet, there are cases where automatic late penalties accruing over a period of years on a significant amount may render the exercise of such right financially attractive, even if, in parallel, the supplier could be liable for a fine for breach of the provisions of Article L.441-6 paragraph 12 of the French Commercial Code.

There is no uncertainty that the outcome resulting from this decision in light of the NER law will also have an effect on the application of the Law for the Modernization of the Economy dated August 4, 2008, which entered into force on January 1, 2009. This Law calls for maximum payment terms, on the one hand, and the doubling of the minimum rate for late penalties (from 1.5 to 3 times the legal interest rate) between professionals, on the other hand.

[1] Cass.com March 3, 2009, company Eurovia Bourgogne / company Sophora – FIT

[2] Pursuant to Article L.441-6 paragraph 14 of the French Commercial Code, individuals are liable for a criminal fine of 15,000 Euros (for legal entities, the criminal fine is 75,000 Euros) if, in the general conditions of sale, the rate and conditions of application of late penalties are not set forth, or the rate indicated does not conform to the law.

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