

Courts having jurisdiction to hear disputes related to restrictive trade practices: The Cour de Cassation departs from previous case-law

Appeals lodged in disputes based on Article L. 442-6 of the French Commercial Code (the “FCC”) on restrictive trade practices - including, but not limited to, significant imbalance in the rights and obligations of contractual parties and sudden breach of established business relationships - fall within the exclusive jurisdiction of the Paris Court of Appeals. This rule had been so far applied extensively by the *Cour de Cassation* (French Supreme Court).

In a decision dated March 29, 2017, confirmed by a second decision dated April 26, 2017, the *Cour de Cassation* reversed its case law and ruled that in certain circumstances such disputes can escape the exclusive jurisdiction of the Paris Court of Appeals and be validly brought before another court of appeals.

1/ Reminder of the exclusive jurisdiction rules laid down by the legislation on restrictive trade practices

As per Article D. 442-3 and D. 442-4, and Annexes 4-2-1 and 4-2-2 of the FCC (depending on whether the dispute is brought before a *tribunal de commerce* (commercial court) or a *tribunal de grande instance* (district court), a limited number of specialized courts have jurisdiction to hear disputes based on Article L. 442-6 of the FCC.

This article will focus only on Article D. 442-3 and its Annexes 4-2-1 that deal with business disputes and that have been addressed in a higher number of court decisions.

In first instance, there are eight specialized jurisdictions (i.e. the courts of Marseille, Bordeaux, Tourcoing, Fort-de-France, Lyon, Nancy, Paris and Rennes) and the Paris Court of Appeals has exclusive appellate jurisdiction to hear appeals lodged against judgments rendered by any of the aforementioned courts. These provisions are public policy provisions[1].

These exclusive jurisdiction rules laid down by Decree [2] came into force on December 1, 2009 and apply to legal proceedings initiated after said date.

As such, non-specialized courts before which disputes based on Article L. 442-6 of the FCC were brought prior to December 1, 2009 still have jurisdiction to adjudicate such disputes[3].

These provisions, which seem quite simple at first, gave rise to numerous disputes as defendants relied thereon to raise procedural arguments and challenge the jurisdiction of the court before which the dispute to which they were a party was brought.

But the legal discussions on these jurisdictional issues turn out to be fairly complex and lead to quite unforeseeable, if not contradictory, rulings, thereby creating legal uncertainty for litigants.

2/ These exclusive jurisdiction rules are applied extensively by French judges

In general, French judges tend to apply extensively the exclusive jurisdiction rules enacted by Article D. 442-3 of the FCC.

As such, according to case-law, the exclusive jurisdiction applies wherever Article L. 442-6 is invoked as a means of defense, even as an alternative claim or counterclaim[4] and even as a superfluous claim[5](!).

Further, the mere fact that a party invokes the suddenness of the breach of established business relationships is sufficient for the judges to apply Article L. 442-6 of the FCC and the associated jurisdiction rules[6], even if such party denies having based his claims on this Article insofar as the application of Article D. 442-3 of the FCC is not conditioned upon the assessment of the merits of the claims[7].

In light of this case-law, it is easy to imagine the strategies that could be conceived by parties acting as defendants in a contractual dispute, the mere fact of inserting a reference to Article L. 442-6 of the FCC in their submissions or briefs being sufficient to challenge the jurisdiction of the ordinary court before which such dispute has been brought...

3/ The position of the *Cour de Cassation* concerning in particular the exclusive jurisdiction of the Paris Court of Appeals

The *Cour de Cassation* - that also tends to extensively apply the jurisdiction rules provided for by Article D. 442-3 - has ruled that failure to observe these rules is sanctioned by a “*fin de non-recevoir*” (i.e. a ground for

dismissal) that must be raised automatically by the court, not by a lack of jurisdiction^[8].

Indeed, the *Cour de Cassation* considers that first instance and appellate courts that have not been specifically designated do not have the **jurisdictional authority** to rule on disputes related to restrictive trade practices.

It follows from the above that if an appeal is lodged before a court of appeals other than the Paris Court of Appeals, such appeal must be held **inadmissible**. It is then up to the appellant to lodge the appeal before the Paris Court of Appeals.... if the time-limit for lodging the appeal has not expired... Frequently, this leads the parties to lodge an appeal both before the Paris Court of Appeals and before another court of appeals that is potentially competent to hear the case.

This is because things are not always that simple.

Indeed, in practice, non-specialized courts of appeals may still have jurisdiction to hear a dispute based on Article L. 442-6 of the FCC

This is the case firstly if a judgement issued by a non-specialized first instance court, before which the dispute was brought prior to December 1, 2009 (date of entry into force of the Decree), is appealed against. As indicated previously^[9], in this situation the appeal can be validly brought before the court of appeals having jurisdiction over the territory where the adjudicating first instance court is located^[10].

The issue of the jurisdiction of the court of appeals also arises when a first instance court, even though not specialized, has ruled on a dispute related to Article L. 442-6 of the FCC and brought before it after December 1, 2009. In that case, should the appeal be lodged before the Paris Court of Appeals or before the court of appeals that “naturally” has jurisdiction over the territory where the adjudicating first instance court is located?

Article D. 442-3 of the FCC stipulates that “*the court of appeals that is competent to hear appeals against judgments rendered by these specialized courts is that of Paris*”, thereby merely referring to the eight first instance specialized courts.

Yet, the *Cour de Cassation* has first maintained its extensive application of Article D. 442-3 of the FCC and confirmed that the Paris Court of Appeals had exclusive appellate jurisdiction to hear appeals lodged against judgments rendered by non-specialized courts.

Indeed, the *Cour de Cassation* considered the non-specialized court of appeals before which an appeal had been lodged against a decision wrongly handed down by a non-specialized first instance court must “*raise the “fin de non-recevoir” derived from the failure to apply the public policy rules that grant to the Paris Court of Appeals the exclusive jurisdictional authority to rule on appeals lodged against judgments rendered in disputes concerning the application of Article L. 442-6 of the French Commercial code*”^[11].

4/ The reversal of the *Cour de Cassation*’s case-law

In the decision dated March 29, 2017^[12] commented herein, the *Cour de Cassation* reconsidered its position.

In the case at hand, the Bastia Commercial Court, a non-specialized court, had wrongly rendered a decision on the merits in a dispute concerning the sudden breach of an established business relationship (Article L. 442-6 I 5° of the FCC) that had been referred to it after December 1, 2009. An appeal was lodged before the Bastia Court of Appeals which also ruled on the merits.

The matter was then referred to the *Cour de Cassation*.

The Commercial Chamber of the *Cour de Cassation* firstly recalled, in accordance with its own case-law, that only the Paris Court of Appeals had jurisdiction to adjudicate disputes based on Article L. 442-6 of the FCC, that failure to comply with this rule is sanctioned by a “*fin de non-recevoir*” that must be raised automatically by the judge and that, consequently, the appeal ought to be held inadmissible. The *Cour de Cassation* also recalled that “*this rule has been applied to all judgments handed down in disputes concerning Article L. 442-6 of the French Commercial Code, even when such judgments have been issued by courts that had not been especially designated [by Article D. 442-3 of the FCC] to hear such disputes*”.

The *Cour de Cassation*, however, specified that the extensive application of the aforementioned exclusive jurisdiction rule is “*for the parties a source of legal uncertainty as to the determination of the court of appeals having jurisdiction to hear their appeal, because of the terms of Article D. 442-3 of the French Commercial Code*”.

As a result, the *Cour de Cassation* considered that it was necessary to “*alter this case-law while preserving the legislator’s objective to assign disputes concerning the application of Article L. 442-6 of the French Commercial Code to specialized courts*”.

Consequently, it held that “***only the appeals against judgments handed down by first instance courts that have been expressly designated [by Article D. 442-3 of the FCC] are lodged before the Paris Court of Appeals, which means that the other courts of appeals (...) can hear all the appeals lodged against judgments handed down by courts located within their jurisdiction that are not designated [by Article D. 442-3]***”, and this “*even supposing that these first instance courts have wrongly ruled on the application of [Article L. 442-6], in which case they should automatically hold that these courts have abused their power by hearing claims that were inadmissible as they did not fall within the scope of their jurisdictional authority.*”

In the relevant matter, the *Cour de Cassation* quashed the judgment of the Bastia Court of Appeals on the ground that this court – that did not have the jurisdictional authority to rule – should have held automatically that the claims based on Article L. 442-6 of the FCC brought before the Bastia Commercial Court, a non-specialized court, were inadmissible.

By ruling so, the *Cour de Cassation* attempts to provide some clarification and legal certainty to the parties who wish to bring their dispute before an appellate jurisdiction and who are in doubt as to the court before

which such dispute should be brought, in order to avoid such parties having to lodge an appeal before two courts of appeals to avoid the risk that their action becomes time-barred.

And the *Cour de Cassation* stayed this course by confirming less than one month later its new case-law in a decision dated April 26, 2017^[13] in which it reiterated that “*the exclusive jurisdictional authority granted to the Paris Court of Appeals to hear disputes related to the application of Article L. 442-6 of the French Commercial Code is limited to appeals lodged against decisions handed down by the courts designated in Article D. 442-3 of the French Commercial Code*”.

In that specific case, the *Cour de Cassation* considered that the Versailles Court of Appeals should have held admissible the jurisdictional objection filed against a judgment in which the Pontoise Commercial Court (a non-specialized court) had declined jurisdiction, instead of raising automatically that it lacked jurisdiction and that the case sought to be referred to the Paris Court of appeals. As per its new case-law, the *Cour de Cassation* considered that the Versailles Court of Appeals had in that case the jurisdictional authority to rule on a judgment handed down by a non-specialized first instance court located within the territory over which it has jurisdiction, and that it should, therefore, have held that this non-specialized first instance court had no jurisdictional authority to rule on the claims based Article L. 442-6 of the FCC.

The scope of this case-law reversal should, however, be balanced, in particular wherever a judgment on the merits has been wrongly issued by a non-specialized first instance court. Indeed, in such a situation, courts of appeals other than the Paris Court of Appeals have only the power to acknowledge that the first instance judges have abused their powers as they do not themselves have the jurisdictional authority to rule on the merits of disputes based on Article L. 442-6 of the FCC.

On the other hand, wherever a judgment in which a non-specialized first instance court has declined jurisdiction is appealed against (just like in the facts of the aforementioned April 26, 2017 decision) the new position adopted by the *Cour de Cassation* is interesting at it now enables the parties to validly bring the matter before a court of appeals other than the Paris Court of Appeals and such court of appeals may henceforth validly rule on the jurisdictional issue.

In short, this reversal of case-law does not put an end to the procedural complexities of disputes related to restrictive trade practices but it does offer more visibility to the parties and enables them, in certain circumstances, to avoid the clogging of the docket of the Paris Court of Appeals that hears this type of disputes...

^[1] Commercial Chamber of the *Cour de Cassation*, March 31, 2015, n°14-10016

^[2] Decree n°2009-1384 of November 11, 2009 on the specialization of courts in citizenship disputes and restrictive trade practices

^[3] Article 8 of the aforementioned Decree

^[4] Commercial Chamber of the Grenoble Court of Appeals, June 30, 2016, n° 13/04262

- [5] 2nd Chamber, 1st Section of the Douai Court of Appeals, April 4, 2012, n° 12/00259
- [6] 3rd Chamber A of the Lyon court of appeals, October 9, 2014, n° 13/00609
- [7] Commercial Chamber of the *Cour de Cassation*, March 26, 2013, n°12-12.685
- [8] Commercial Chamber of the *Cour de Cassation*, September 24, 2013, n°12-21089 ; Commercial Chamber of the *Cour de Cassation*, March 31, 2015, n°14-10016 as aforementioned
- [9] Article 8 of the aforementioned Decree
- [10] Commercial Chamber of the *Cour de Cassation*, September 24, 2013, n°12-24538
- [11] Commercial Chamber of the *Cour de Cassation*, March 31, 2015, n°14-10016 as aforementioned
- [12] Commercial Chamber of the *Cour de Cassation*, March 29, 2017, n°15-24241
- [13] Commercial Chamber of the *Cour de Cassation*, April 26, 2017, n°15-26780

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