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Mandatory character of French payment terms in an international contract

Is it possible to set aside the application of the provisions set forth in Article L. 441-6 of the French Commercial Code that limits payment terms in contracts for the international sale of goods entered into between French suppliers and foreign clients (based in one of the EU Member States) when such contract is governed by the law and subject to the jurisdiction of a court of the State where the clients are established? In such a case, is it possible for the French administrative authorities to sue the contractual parties before a French court on the basis of the provisions of the French Commercial Code?

These were the questions asked to the *Commission d'examen des pratiques commerciales* (Commercial Practices Review Committee, hereinafter the "CEPC")[1] by a lawyer in a letter dated December 10, 2013 and to which it provided some answers in its opinion n°16-1 issued on January 14, 2016[2].

The opinion of the CEPC provides an opportunity of harking back to the tricky issue of the application of French payment term provisions in a contractual relationship between a French seller and a foreign buyer: Is it possible to set aside the application of these rules by stipulating in the contract that the governing law is that of the country where the buyer is established?

Payment terms are a fundamental concern both in the European Union and in France as they impact the competitiveness of businesses[3]. In addition to distortions of competition and abuses of dominant market positions that they may bring about, the systematic use of payments terms can be viewed as a "suppliers'

credit" that has become the primary source of short-term funding for businesses, in particular distribution companies.

Since the entry into force of Law n° 2015-990 of August 6, 2015 on growth, economic activity and equality of economic opportunities, commonly known as the "Macron" Law, French law provides that the timeline agreed between the parties to settle sums that are due may not exceed 60 days as from the date of issuance of the invoice. By way of derogation, the parties may agree on a payment term of 45 days end of month from the date of issuance of the invoice provided that such period is expressly provided for in the contract and that it is not grossly unfair to the creditor (Article L. 441-6, I, 9° of the French Commercial Code)[4].

For periodic or summary invoices, i.e. invoices issued monthly for several separate deliveries of goods or services provided to the same person during a calendar month, the payment term of 45 days from the date of issuance of the invoice is mandatory.

Professionals operating in the same business sector may, in certain circumstances, agree to reduce or extend the maximum payment term set by law and amend the method of calculation of the payment term.

Non-compliance with the payment terms laid down by law is punishable by "*an administrative fine, the amount of which may not exceed 75,000 euros for natural persons and 375,000 euros for legal entities*" [5]. The fine is imposed in the conditions set forth in Article L. 465-2 of the French commercial code. The above amounts may be doubled in case of repetition of the breach within a period of 2 years from the date on which the first decision imposing a penalty became final.

Until Law n°2014-344 of March 17, 2014, "*Imposing to a contractual partner payment terms that do not respect the ceiling set forth in the ninth paragraph of Article L.441-6 or that are manifestly abusive*" weas punishable by a civil fine up to 2 million euros(Article L.442-6 I-7° and III of the French Commercial Code).

Non-compliance, which is henceforth punishable "only" by an administrative fine, is assessed and sanctioned by the agents of the *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes* (General Directorate for Competition, Consumer Protection and Frauds, hereinafter "DGCCRF"), a Directorate of the Ministry of Economy, Industry and the Digital Sector, who have the power and authority to search professional premises and request the disclosure of materials.

The Minister of Economy announced that the reduction of the payment terms was one of the priorities of his policy to improve competitiveness, in particular through tighter controls and tougher penalties[6]. He has posted on the website of the DGCCRF the name of the five companies that, following the controls performed in 2015, were imposed the largest fines for having implemented a repeated late payment policy[7]. The DGCCRF also announced that in 2015 it has controlled 2,249 companies, launched 186 procedures and sanctioned 110 entities for a total amount of fine of 3.5 million euros.

In this context, the question of the applicability of payment terms, and, as the case may be, the penalty that may be imposed in case of non-compliance in the context of an international business transaction, is essential but complex. Hence the questions asked to the CEPC by a lawyer.

Yet, the CEPC faced a first challenge, and not the least important one: Examining in January 2015 questions that were asked to it in December 2013. In the meantime, the penalty rules applicable in case of non-compliance with payment terms have been significantly amended.

As non-compliance with the provisions set forth in the aforementioned Article L. 441-6, I, 9° of the French Commercial Code is henceforth punishable only by "an administrative fine" as per Article L. 441-6, VI of the same Code, aren't we dealing here with an administrative matter[8], it being specified that administrative matters are expressly excluded from the scope of application of European rules governing conflicts of jurisdictions[9] and conflicts of laws[10]?

The CEPC does not exclude the possibility that the penalty applicable in case of non-compliance with payment terms will escape those rules, just like, for instance, the penalties imposed by the French Competition Authority.

The CEPC, following its reasoning – i.e. examining whether the analysis of the conditions in which the administrative fine can be imposed first requires to examine the conditions in which a foreign buyer can be bound by these payment terms – faced another challenge: Applying the European rules governing conflicts of jurisdictions and conflicts of laws that make a distinction between contractual matters and tort matters, whereas such a distinction is precisely unclear with respect to payment terms.

In a multi-step reasoning, the starting point of which being the distinction between contractual and non-contractual matters, that is too lengthy to detail here, the CEPC concluded as follows:

"In the current state of positive law, it could be expected that the administrative penalties that apply wherever mandatory payment terms are exceeded could be implemented in the context of a relationship between a French seller and a foreign buyer even if the contract is governed by the law of a foreign state, in particular when the entire business relationship takes place in France.

However, wherever the contract includes a jurisdiction clause that confers jurisdiction to a foreign court and a choice of law clause that stipulates that the governing law is a foreign law, the foreign court before which a civil action is brought has quite a free hand to refuse to draw the civil consequences of a breach of French law.

It could only be otherwise if – despite the fact that the buyer is based in a foreign country – the entire business relationship takes place in France".

In short, in contractual matters, and notwithstanding the existence of a clause providing for the application of a foreign law, French provisions would apply:

- as "*provisions of the law of that other country [where all other elements relevant to the situation are located, other than the country whose law has been chosen by the parties] which cannot be derogated from by agreement*" (Article 3.3 of the Rome I Regulation), or
- as "*overriding mandatory provisions [provisions the respect for which is regarded as crucial by a*

country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation] of the law of the forum" (Article 9 of the Rome I Regulation).

In tort matters, European rules also provide as follows:

- "*Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement*" (Article 14.2 of the Rome II Regulation), and
- "*Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation*" (Article 16 of the Rome II Regulation).

In the first case, as the entire business relationship takes place in France, French provisions on payment terms would apply even if the contract includes a choice of law clause to the contrary. The CPEC has already stated in the past that "*it follows from these texts [Article 3.3 of the Rome I Regulation and Article 14.2 of the Rome II Regulation] that wherever the contractual relationship is performed in France, the choice of a foreign law only enables to set aside suppletive provision of French law but may not affect the other provision of the law that are public policy rules, even if these are considered public policy rules only in France*".[11]

In the second case, if a dispute is brought before a French court, French provisions on payment terms would be considered as international public policy rules by the French judge. To date, no French judge has ever ruled on this issue.

As a matter of fact, we believe that the opinion of the CEPC does not provide enough clarification on this question of the applicability of payment terms in the context of an international business transaction. Yet, there is obviously a number of arguments that support an extensive application of these provisions, even if the contract includes a choice of law clause that provides for the application of a foreign law.

[1] The CEPC issues opinions and formulates recommendations on questions, commercial or advertising materials, including invoices and contracts covered by industrial and commercial secrecy, and practices that concern commercial relationships between producers, suppliers and resellers and that are submitted to it for review (*Cf*. Article L. 440-1 of the French Commercial Code).

[2] http://www.economie.gouv.fr/cepc/avis-ndeg-16-1-relatif-a-demande-davis-dun-avocat-sur-caractere-imperatif-des-delais-paiement

[3] The French legislation is the transposition of Directive 2011/7/UE of February 16, 2011 on combating late payment in commercial transactions.

[4] As such, a French company is obliged to impose on its contractual partner a payment term capped by law, i.e. 45 days end of month as from the date of issuance of the invoice or 60 days as from the date of issuance of the invoice, while Directive 2011/7/UE envisaged that the payment term set forth in the contract should be limited to 60 calendar days "*unless otherwise expressly agreed in the contract and provided it is not grossly unfair to the creditor*".

[5] Previously (specifically until March 19, 2014), imposing to a contractual partner payment terms that did not comply with Article L. 441-6, I, 9° triggered the liability of the perpetrator thereof and was punishable by a civil fine (former Article L. 442-6, I, 7° of the French Commercial Code).

[6] http://www.economie.gouv.fr/files/files/directions_services/dgccrf/presse/DP_delais_paiement23112015.pdf

[7] http://www.economie.gouv.fr/dgccrf/sanctions-delais-paiement

[8] Article of the Brussels I bis, Rome I and Rome II Regulations.

[9] Regulation (EU) no 1215/2012 of the European Parliament and of the Council of December 12, 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter the "Brussels I bis Regulation").

[10] In contractual matters: Regulation (EC) no 593/2008 of the European Parliament and of the Council of June 17, 2008 on the law applicable to contractual obligations (hereinafter the "Rome I Regulation"); in non-contractual matters: Regulation (EC) no 864/2007 of the European Parliament and of The Council of July 11, 2007 on the law applicable to non-contractual obligations (hereinafter the "Rome II Regulation")

[11] CEPC Opinion n° 09-06 that supplements the Q/A sequences relating to the implementation of the Law for the modernization of the Economy dated January 1, 2009; CEPC 2009/2010 annual activity report, pp. 57-59.