Read this post online

The Cour de Cassation issued its first decisions on the application of the concept of significant imbalance between business partners

In two decisions dated March 3, 2015, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) ruled for the first time on the application by the trial judges of the concept of significant imbalance in the parties' rights and obligations under Article L. 442-6, I, 2° of the French Commercial Code.

It results from these decisions that the significant imbalance must be assessed on the basis of a concrete and comprehensive analysis of the contract governing the relationships between the parties, without being limited to the sole contentious contractual clauses.

These decisions also provide the opportunity to recall some of the criteria applied by judges to assess whether contractual clauses are likely to create a significant imbalance between the parties.

It should preliminarily be recalled that Article L. 442-6, I, 2° of the French Commercial Code sets forth that the fact for any business operator to *"subject or attempt to subject a business partner under obligations creating a significant imbalance in the parties' rights and obligations"* shall trigger its liability and shall obligate it to compensate the harm caused. Such a practice may also be sanctioned by civil fine up to EUR 2 million (which can instead be set at three times the amount that was unduly paid) upon request of the French Minister of Economy or the Public Prosecutor[1].

This provision, which does not precisely define the concept of significant imbalance, has been a hotly debated

© 2024 - **SOULIER Avocats** All rights reserved

topic since its adoption through the Law for the Modernization of the Economy dated August 4, 2008 (known as the "LME Law"). The Constitutional Council was moreover led to declare this text compliant with the French Constitution[2].

Considering the absence of any definition given by the French legislator, it should be relied on the decision-making practice of the courts in order to be enlightened on the contours of the concept of significant imbalance and on how it should be assessed.

In two decisions dated March 3, 2015, the *Cour de Cassation* had to rule on the application of the concept of significant imbalance in the mass retail sector:

- The first case concerned a price revision clause and a "minimum service level" clause provided for in an agreement entered into between Eurauchan, the central purchasing entity of the Auchan group, and its suppliers[3];
- The second case concerned a termination clause for "products' under-performance" and a clause on payment terms under an agreement entered into between Provera, the central purchasing entity of the Cora group, and its suppliers[4].

1. The agreement between the parties must be subject to a concrete and comprehensive analysis

It appears that the *Cour de Cassation* has put an end to the uncertainty as to whether notably the significant imbalance had to be assessed on the basis of a clause-by-clause analysis or of an analysis of the contract in its entirety.

In both decisions dated March 3, 2015, the *Cour de Cassation* indeed approved the analysis adopted by the Paris Court of Appeals in its decisions[5]: the significant imbalance must be assessed on the basis of a concrete and comprehensive analysis of the agreement governing the relationships between the parties.

The *Cour de Cassation* held that the Court of Appeals had duly met the requirements of Article L. 442-6, I, 2° of the French Commercial Code by stating, in the "Eurauchan" case, that this legal provision "*invites to assess the context in which the contract is concluded and its economy*" and that the Court of Appeals "*reviewed the business relationships governed by the disputed agreement*".

This method of analysis was also confirmed in the second case, where the *Cour de Cassation* noted that the Court of Appeals had conducted "*a comprehensive and concrete analysis of the contract and assessed the context in which it was entered into or offered for negotiation*".

Applying this comprehensive approach, the *Cour de Cassation* observed that the Court of Appeals did not "*rule in consideration of the sole contentious clauses*" and that Eurauchan did not evidence the existence of other clauses to "*rebalance the contract*". The lack of rebalancing effect was also criticized in the "Provera" case:

© 2024 - **SOULIER Avocats** All rights reserved

"*no other provision made it possible to correct*" the significant imbalance resulting from the disputed clauses.

It appears therefore from these decisions that the assessment of the significant imbalance should require a comprehensive review of the contract entered into between the parties, without being limited to the sole contentious clauses. The context in which the contract was entered into should also be taken into consideration.

The *Cour de Cassation* also confirmed that it should be possible that the significant imbalance created by a clause be compensated or corrected by one or more other provisions, subject to the evidence of such rebalancing situation.

2. Concerning the criteria applied to establish the existence of a significant imbalance

Both decisions of the *Cour de Cassation* dated March 3, 2015 provides the opportunity to recall certain criteria to be considered when reviewing contractual clauses likely to subject a business partner to significantly imbalanced obligations.

In these decisions, the *Cour de Cassation* confirmed that the Paris Court of Appeals legally justified its respective decisions by holding that the following clauses constituted a significant imbalance under Article L. 442-6, I, 2° of the French Commercial Code:

- **Price revision clause**

  In the "Eurauchan" case, the price revision clause – according to which the central purchasing entity required a minimum notice period and justifications in case of increase of the supplier prices, while in case of decrease of the costs, it could unilaterally terminate at any time the agreement if the supplier did not decrease its prices – was considered abusive.

  The judges notably noted the lack of reciprocity in the implementation conditions of this clause: the price decrease initiated by the central purchasing entity made the termination of the agreement "*systematic and immediate*" and implied the obligation to renegotiate while the suppliers had to produce "*objective elements on which they intend to increase their prices*", any modification requiring the consent of the central purchasing entity "*without the content of these objective elements being known.*"

  The judges also considered the lack of negotiability of this clause by specifying that any modification thereto was "*always refused*."

- **« Minimum service level rate » clause**

© 2024 - **SOULIER Avocats** All rights reserved

Still in this case, the clause subject to the judges' review required the supplier to achieve a performance level for supply conditions (i.e. a rate, expressed in percentage, to assess the delivery quality by measuring the difference of quantities between orders and deliveries) amounting to 98.5 %, subject to high penalties.

In this case, the *Cour de Cassation* noted the "potestative" nature of the clause (i.e. the clause was drafted in such a way as to leave its application to the sole discretion of one party): as its "*application criteria being unknown*", such clause depended "*on the sole will*" of Eurauchan which thus kept the "*control over the performance of the contract*".

In addition, judges underlined the *"broad and imprecise" nature* of this provision, insofar as it " *specified neither whether the service level was referring to a rate per store, warehouse or nationally, nor the concept of "missing turnover" on the basis of which the penalty was calculated*."

They also held that this clause, "*providing for a penalty system in case of non-compliance with a minimum service level of 98.5% by the suppliers*", had "*an automatic nature, source of disproportion between the breach and the sanction*" and that it was "*devoid of reciprocity and consideration*."

Finally, the lack of negotiability of this clause resulted from the fact that "*this standard pre-formulated appendix has no free space to modify its content, unlike other appendices, and is not subject to real negotiations, considering the uniformity of the service level which does not distinguish between the nature of the activity and the existing relationship*".

- **Termination clause for "products' under-performance"**

In its decision concerning Provera, the *Cour de Cassation* confirmed the significant imbalance created by a clause according to which the contract could be terminated by the distributor due to the "under-performance" of a product (compared to the objectives fixed by common agreement between the parties and/or the results announced by the supplier), eight days after the dispatch of a registered letter, return receipt requested, that remained unsuccessful.

The judges particularly criticized the potestative nature of this clause, which allowed to "*unilaterally remove a supplier* [*from the list of suppliers*]*, without any notice or compensation*", due to the under-performance of the product "*which is directly related to the conditions under which the distributor presents it for sale*".

- **Clause on payment terms**

The second clause in issue in this case specified that suppliers had to pay the services provided by the distributor within a non-negotiable term of 30 days and by monthly advance payments, and that the products were paid to them within a negotiable term between 30 and 60 days.

The judges noted in this case the lack of reciprocity by indicating that "*the clause on payment terms*

© 2024 - **SOULIER Avocats** All rights reserved

allows it to charge its services before their performance whereas its purchases are paid within thirty to sixty days after receipt of the products, the payment terms for the settlement of the supplier's products being negotiable while those for the payment of the distributor's services remain intangible."

The lack of negotiability of the clauses contained by the disputed contracts was also observed insofar as "*the contracts were performed without any consideration being given to formulated objections or proposed amendments*" so that these contracts "*were real pre-formulated standard contracts which did not offer the possibility to effectively negotiate the contentious clauses*".

These judgments confirm that the criteria to characterize a significant imbalance are multiple: It is necessary to assess whether or not the disputed obligations are reciprocal, *potestative*, disproportionate and/or precise. It is also necessary to ensure the negotiability of the concerned contractual provisions.

The position adopted by the *Cour de Cassation* in the commented decisions helps better understand the conditions in which the significant imbalance concept provided for under Article L. 442-6, I, 2° of the French Commercial Code is to be applied. They do not, however, answer all the questions raised by this legal provision, which seems to be applicable to a very large number of practices.

[1]According to Article L. 442-6, III of the French Commercial Code, the French Minister of Economy or the Public Prosecutor may request the judge to order the cessation of the practices in question, to declare the invalidation ("*nullité*") of the relevant clauses or agreements, order the recovery of the undue payments, the payment of a civil fine as well as damages.

[2] Constitutional Council, January 13, 2011, n°2010-85 QPC https://www.soulier-avocats.com/en/blog/significant-imbalance-in-the-parties-rights-and-obligations/

[3] Commercial Chamber of the *Cour de Cassation*, Mars 3, 2015, n°13-27.525

[4] Commercial Chamber of the *Cour de Cassation*, Mars 3, 2015, n°14-10.907

[5]Paris Court of Appeals, September 11, 2013, n° 11/17941 and Paris Court of Appeals, November 20. 2013, n° 12/04791

Soulier Avocats is an independent full-service law firm that offers key players in the economic, industrial and financial world comprehensive legal services.

We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

© 2024 - **SOULIER Avocats** All rights reserved

For more information, please visit us at www.soulier-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.

© 2024 - **SOULIER Avocats** All rights reserved