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General terms that have not been accepted are unenforceable

In a judgment dated May 3, 2016[1], the Court of Appeals of Versailles provided a new illustration of a long established case-law according to which the general terms of a party are contractually binding only if they have been accepted, at the time the contract was formed, by the party against whom such terms are intended to be enforced.

This judgment is reminiscent to a similar decision handed down by the Court of Appeals of Versailles on January 5, 2016[2] in a case where we represented the party against whom the enforcement of a jurisdiction clause set forth in its own general terms of purchase was sought.

These two decisions, both published by the global provider of content-enabled workflow solutions LexisNexis, provide several specific insights and recall the fundamental principles of French contract law.

Judgment handed down by the Court of Appeals of Versailles on May 3, 2016

ALTITUDE TÉLÉCOM was a supplier of telecom solutions for businesses.

ITS INTEGRA provides its clients with internet hosting and management solutions. As part of its business

activities, it entered on March 25, 2011 with ALTITUDE TÉLÉCOM into a hosting contract pertaining *inter alia* to the provision of a private storage facility and internet access for a minimum duration of three years.

On July 10, 2012, ITS INTEGRA sent to COMPLETEL, ALTITUDE TÉLÉCOM's successor, a letter in which it notified its desire to terminate the hosting services and related services, claiming that COMPLETEL had failed to meet its duty to provide advice and assistance.

COMPLETEL initiated proceedings before the Commercial Court of Nanterre to challenge the termination of the contract.

In support of its summons, COMPLETEL argued that the premature termination of the contract was not compliant with the terms of termination set forth in its general terms of sale as the three-month notice period required under Article 14.1.1 of such general terms had not been applied. Consequently, it requested the payment of the penalty provided for in Article 14.1.3 of its general terms.

To assert that ITS INTEGRA was necessarily aware of the general terms of sale, COMPLETEL explained that the "Definitions" Section of the contract stipulated that: "*In addition to the definitions set forth in the General Terms of Sale and Special Conditions for Hosting Services, the following terms used in these particular conditions shall have the following meaning (…)*".

On the contrary, to find that the general terms produced by COMPLETEL were unenforceable against ITS INTEGRA, the Court of Appeals of Versailles held that:

"These general terms, which are neither signed nor initialed by INTEGRA, are only incidentally referred to in the contract that does not specify anywhere that they have been delivered to it, that it has read them, accepted them, and that, therefore, they form an integral part of the contractual relationship, irrespective of whether this company is allegedly a knowledgeable professional."

In its May 3, 2006 judgment, the Court of Appeals of Versailles recalled that:

- For general terms to be enforceable, it must be established that they were made known to and accepted by the other contracting party, which will be the case , in particular, if they are signed, and which will not be the case if the main contract merely "incidentally refers" to such general terms;
- The fact that the party against whom the enforcement of the general terms is sought is a knowledgeable professional is irrelevant.

Judgement handed down by the Court of Appeals of Versailles on January 5, 2016

In that case, we represented the buyer of an industrial tool against whom was sought the enforcement of a jurisdiction clause set forth in its general terms of purchase in force at the time the contract was performed.

The seller claimed that it had accepted the general terms of purchase of the buyer at the time the contract was

formed, which made such terms enforceable against the buyer.

This was a singular case insofar as the seller tried to rely not on its own general terms of sale but on the general terms of purchase of the buyer.

The buyer, our client, argued in response that, on the contrary, as seller had not accepted the general terms of purchase, he could not possibly rely thereupon to derogate from the ordinary legal provisions governing jurisdiction, as set forth in Articles 42 and 46 of the French Code of Civil Procedure.

There were many contradictory contractual documents.

First, a cost-estimate issued by the seller on February 7, 2001 specified that any potential order would be processed according to its general terms of sale which are deemed to be known by the buyer.

Then, the buyer's order dated May 17, 2001 indicated that the order was placed "*according to the general terms of purchase*".

Said general terms of purchase specified that they "*form an integral part of the order placed by the buyer (the company) to the business (the supplier), that their acceptance is an essential term of the formation of the order, that they prevail over the supplier's general terms of sale*", and stipulated in Article 20 that "*any controversies or disputes arising between the company and the supplier from or in connection with the interpretation or performance of the order or any actions subsequent thereto shall be submitted to the jurisdiction of the Courts of Nanterre*".

Lastly, the order receipt dated May 28, 2001 specified– in certainly small but legible prints – at the bottom of the document that "*the order referred to in this document is governed by the general terms of sale (…), that were forwarded with the above-referenced cost-estimate, that you have accepted by virtue of your order and a copy of which is reproduced on the back of this document*".

The seller argued that only the general terms of purchase were applicable and that they had been accepted, in particular when a motion for the conduct of expert investigations had been subsequently filed with the Commercial Court of Nanterre, as per the terms of the jurisdiction clause that was included therein.

On the other hand, our client, the buyer, claimed that neither its general terms of purchase nor the seller's general terms of sale were applicable, because the seller had not accepted the buyer's general terms of purchase and the buyer had in no event accepted the seller's general terms of sale.

This last argument was approved by the Court of Appeals of Versailles that justified its January 5, 2006 decision by holding that:

- The reference to the general terms of sale in the seller's order receipt may not be seen as a "clause of style, as alleged by the seller";
- The knowledge and acceptance of the general terms must take place at the time the contract is formed,

and it is therefore irrelevant whether the seller has, after the contract had been formed, expressed its desired to be bound by the general terms of the purchaser;
- The buyer's order dated May 17, 2001 and the order receipt issued by the seller on May 28, 2001 include conflicting jurisdiction clauses which may not be enforced in the absence of any agreement by the parties on the application of one or the other clause.

The Court of Appeals of Versailles thus recalled the French case-law in relation to Article 48 of the French Code of Civil Procedure according to which a jurisdiction clause that departs from territorial jurisdiction rules *"is only enforceable against the party that has had knowledge of it and that had accepted it at the time the contract was formed"*[3].

It is fully in line with this case-law and through the exercise of its full discretion that another court of appeals also held that a jurisdiction clause set forth in unsigned printed papers considered as general terms of sales had not be accepted[4].

Lastly, the Court of Appeals of Versailles recalled that the irreconcilable clauses that appear on the parties' respective contractual documents cancel each other out and that jurisdiction is to be determined pursuant to Articles 42 and 46 of the French Code of Civil Procedure[5].

IN PRACTICE

To make one's general terms duly enforceable – even in case of a contract entered into between professionals – it is recommended to build evidence of the knowledge and acceptance of the general terms of sale or purchase by the other contracting party at the time the contract is formed.

Such evidence shall be established:

- If the general terms are expressly annexed to the main contract,
- If the general terms are signed and initialed by the party against whom enforcement of such terms is sought,
- If there is no other contractual document that refers to distinct general terms, the provisions of which would be contradictory, etc.

The impact of the reform of French contract law

Following the publication of Ordinance n°2016-131 of February 10, 2016 for the reform of contract law, the general regime of obligations and the proof of obligations, legal provisions on the enforceability of general terms shall be governed by new Article 1119 of the French Civil Code, effective as from October 1, 2006. This Article is reproduced below.

"Art. 1119.- The general terms invoked by one party are effective towards the other party only if they have

been made known to and accepted by such other party.

In case of discrepancies between general terms invoked by the two parties, provisions that are incompatible shall be ineffective.

In case of discrepancies between general terms and special terms, the latter shall prevail over the former".

As such, new Article 1119 of the French Civil Code will not alter the state of the aforementioned case-law.

[1] Court of Appeals of Versailles, May 3, 2016 RG 15/02478

[2] Court of Appeals of Versailles, January 5, 2016 RG 15/03359

[3] Commercial Chamber of the *Cour de Cassation*, February 28, 1983, n°78-10813

[4] Commercial Chamber of the *Cour de Cassation, October 4, 1988, n°86-18648*

[5] Commercial Chamber of the *Cour de Cassation*, November 20, 1984, n°83-15956 and First Civil Chamber of the *Cour de Cassation*, March 28, 1995, n°93-13.237