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Maximum contractual payment terms effective since January 1, 2009: recent developments

The recent developments on the interpretation and application of the maximum contractual payment terms effective since January 1, 2009 can be found at the end of this article.

The Law for the Modernization of the Economy dated August 4, 2008 (known as the "LME Law" instituted a ceiling for contractual payment terms agreed between professionals : "45 days end of month" or "60 days as from the date of issuance of the invoice" (Article L.441-6 paragraph 9 of the French Commercial Code "FCC"), considering that professionals (clients and suppliers) operating in the same business field may decide to further reduce the payment terms through inter-professional agreements. As a temporary measure, certain inter-professional agreements (mandatorily entered into before March 1, 2009 and for a maximum duration of three years) may, under certain conditions, provide for longer payment terms that must gradually be aligned with the maximum payment terms set forth by law.

Because a large number of operators remained perplex on how to implement such new payment terms, the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (General Directorate for Competition, Consumer Protection and Frauds or "DGCCRF") issued several directions regarding notably the calculation of the "45 days end of month" payment term and the application of the LME Law to contracts in force and effect as of January 1, 2009 (1). However, the application of the new payment terms in relation to cross-border transactions remain an open issue (2).

Clarification by the DGCCRF on the new payment terms

First, the DGCCRF confirmed that the new payment terms apply to all professionals, i.e. producers, tradesmen,

industrials or craftsmen, and to all economic sectors (there remain, however, specific regulated payment terms applicable to the transportation industry and/or in relation to transactions concerning beverages and perishable food products).

1.1. How to calculate a payment term?

The starting point of the “45 days end of month” or “60 days from the date of issuance of the invoice” payment term is the date of issuance of the invoice (except in the DOM-TOM – French overseas department and overseas territory – where the starting point is the date of delivery of the ordered goods/products/services).

For the calculation of the “45 days end of month” payment term, the following method can be used alternatively:

- You can count 45 days from the date of issuance of the invoice (or, as the case may be, the date of delivery of the ordered goods/products/services) and the deadline for payment is the end of the month in which this 45-day period expires;
- Or you can count 45 days as from the end of the month during which the invoice is issued (or, as the case may be, the goods/products/services delivered).

1.2. Do these new payment terms apply to contracts entered into before January 1, 2009 for a period of several years? Do they apply to contracts tacitly renewed?

- Regarding multi-year contracts (entered into before January 1, 2009), the DGCCRF indicated that a distinction must be made between two types of contracts:
- contracts including an indexation clause that provides – during the whole duration of the contract – for an automatic adjustment of prices from one year to another; the new payment terms do not apply to these contracts which are considered as truly multi-year contracts;
- contracts including a price variation clause according to which the parties agree to renegotiate prices each year; in this situation, it must be considered that there is a succession of separate annual contracts (even if these contracts are in fact entered into as “implementation” contracts, within the framework of a single master contract) to which the new payment terms apply.
 - The new payment terms also apply to tacitly renewed contracts that, according to established case law, must be considered as new contracts.

1.3. What are the sanctions if a contractual party does not comply with the new payment terms?

“Imposing to a party payment terms that do not respect the ceiling set forth in the ninth paragraph of Article L.441-6 or that are manifestly abusive” (Article L.442-6 I-7° of the FCC) may be punished by a civil fine (theoretically up to 2 million Euros) according to Article L.442-6 III of the FCC.

Yet, pursuant to Article L.441-6 paragraph 14 of the FCC, the following practices can be sanctioned under French criminal law (in practice a criminal fine of 15,000 Euros for individuals and 75,000 Euros for companies):

- Failing to comply with the 30-day payment term that must be applied when the contractual parties have not fixed specific payment term (Article L.441-6 paragraph 8 of the FCC);
- Failing to comply with the mandatory “30-day from the date of issuance of the invoice” payment term in the transportation industry (Article L.441-6 paragraph 11 of the FCC);
- Failing to mention in the general terms of sale the payment terms that have been contractually agreed upon (as well as failing to appoint the penalty rate and/or the due date for payment as required) (Article L.441-6 paragraph 12 of the FCC).

In its recent advisory note, the DGCCRF implies that the payment terms apply to the foreign clients of French suppliers since Article L.442-6 of the FCC is described and referred to, in the case-law, as a “loi de police” (i.e. an overriding mandatory rule applicable regardless of the law governing the contract). Yet, the application of the new payment terms to cross-border transactions is still a controversial issue and deserves additional developments.

2. The applicability of maximum payment terms in international business transactions

As explained above, new payment terms indisputably apply to commercial transactions between France-based operators. But do they apply to transactions between a French supplier and its foreign clients and to transactions between a French client and its foreign supplier ?

2.1. Is a French supplier required to impose the new payment terms to its clients based abroad?

In this regard, the recent position adopted by the DGCCRF must be taken into account. The DGCCRF, on the basis of Article L.442-6 of the FCC, seems to consider that the payment terms should apply to the foreign clients of a French supplier because the latter must suffer from abnormally long payment terms by its clients even if such clients are based outside the national territory (it may indeed turn out that such clients have settled abroad to circumvent the application of French law on contractual payment terms).

Even if it is not a “texte de nature pénale”, Article L.442-6 of the FCC (imposing civil sanctions when a payment deadline is not met) is to be regarded under an established case-law as responding to a necessity to protect the economic public order and therefore as a “loi de police” overriding international legal order rules.

There is every reason to believe that French courts would adopt the same position as the DGCCRF and would therefore consider that Article L.441-6 paragraph 9 of the FCC (violation of which is civilly sanctioned under Article L.442-6 of the FCC) has been adopted to protect French suppliers who must require from their foreign

clients to comply with the maximum payment terms set forth by French law, even though this would eventually result in a distortion of competition to the detriment of the French supplier should its foreign competitors apply more flexible payment terms.

This analysis is further confirmed – as explained above in (§1-c) – by the fact that contractual parties must mention in the general terms of sale the payment terms (which, again, cannot exceed “45 days end of month” or “60 days from the date of issuance of the invoice”) they contractually agreed upon, failing which they would be exposed to criminal sanctions. French suppliers would consequently be required to ensure that their foreign clients comply with the legal payment terms.

Yet, does it mean that a foreign supplier is also required to apply the maximum legal payment terms to a French client? Or, in other words, is the French customer of a foreign supplier required to comply, in any case, with the new legal payment terms?

2.2. Is a French buyer required to comply with the new payment terms when doing business with a foreign supplier?

The new payment terms mainly aim at protecting French suppliers/creditors which often suffer from delayed payment. Articles L.441-6 and L.442-6 of the FCC are not meant and have no purpose to protect foreign suppliers which, thus, could be free to apply longer payment terms.

However, from another standpoint, is the French client not required to comply with maximum legal payment terms as set forth in French law vis-à-vis a foreign supplier?

Article L.441-6 of the FCC (former Article 33 of the 1986 Ordinance) was qualified by the DGCCRF in the past as a “texte de nature pénale” (i.e. a text, the violation of which is a criminal offense). In its circular 5955 on the application of the Law n°92-1442 dated December 31, 1992 regarding the payment terms applicable between companies, the DGCCRF considered that:

“Articles 31, 33 and 35 [of the 1986 Ordinance] are “textes de nature pénale”. French criminal law applies to offenses committed on the territory of the French Republic. In addition, pursuant to Article 693 of the French Code of Criminal Procedure, any offense, one of the component parts of which was committed on the French territory, shall be considered as committed on the territory of the French Republic (...). Buyers based on the national territory must comply with the payment terms set forth in Article 35 even when they buy products abroad”.

Even though the payment terms set forth in Article 35 refer to the regulated payment terms provided for by Article L.443-1 of the FCC, it is highly probable that the DGCCRF would invoke the above mentioned circular (describing Article L.441-6 – former Article 33 – as a “texte de nature pénale”) to consider that a French client who does not comply with the maximum payment terms (set forth in Article L.441-6 paragraph 14 of the FCC) would commit an offense on the French territory ; furthermore, this hypothesis is even more probable since, as it has been indicated previously, failing to refer the payment terms contractually agreed upon (which cannot

exceed the deadline referred to in article L.441-6 paragraph 9 of the FCC) is punishable by the criminal fine set forth in article L.441-6 paragraph 14 of the FCC).

As such, it seems that under both Article L.441-6 and Article L.442-6 of the FCC, the French Administrative Authorities would find legal grounds to prosecute both a French buyer failing to comply with the legal payment terms when doing business with a foreign supplier and a French supplier failing to impose such payment terms on its foreign clients.

These are all good reasons for strictly implementing the new payment terms set forth by law...

Recent developments

A recent trend in legal commentary, that is gaining more and more acceptance, is harming the position of the General Directorate for Competition, Consumer Protection and Frauds ("DGCCRF") and may effectively counter its possible actions against a French supplier/client for breach of the maximum contractual payment terms in a contract for the international sale of goods.

The basis of this thesis lies in the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (also called the "Vienna Convention"). By default, this Convention constitutes the applicable law to international sales under French law. Unless the parties to an international contract have expressly excluded it, the Vienna Convention automatically applies. Yet in its Article 59, the Vienna Convention addresses the issue of payment terms by stating that "the buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller".

As such, how do we reconcile Article 59 of the Vienna Convention (that states that payment terms are freely determined between the parties) with Article L. 441-6 of the French Commercial Code that states otherwise by requiring maximum payment terms?

Certain authors consider that, if one of the parties is located abroad and the contract is governed by the law of a contracting State or the conflicts of law rules lead to the application of the law of the contracting State (for example, French law), the substantive law on the international sale established by the Vienna Convention will govern the contract – including Article 59 on free payment terms – and exclude application of the payment terms introduced by the Law for the Modernization of the Economy.

This is an interesting thesis, but its limits should be addressed: First, from a theoretic point of view, the Vienna Convention can only be brought forth provided that the law chosen is that of a contracting State or if the conflicts of law rules require application of the law of a contracting State. From a practical point of view, it should be recalled that the Vienna Convention concerns the "sale" of goods and distribution agreements do not

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fall within its scope. Further, the parties to an international distribution agreement cannot a priori claim the benefit of the Vienna Convention as an attempt to preclude the application of Article L. 441-6, paragraph 9, of the French Commercial Code.

As there is no case law on the issue, the debate remains open...

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