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Significant imbalance: Bringing the proof of the lack of effective negotiation of abusive clauses

In a judgment dated February 16, 2018, the Paris Court of Appeals recalled that the party which suffers from a significant imbalance in the rights and obligations of the contractual parties, within the meaning of Article L. 442-6, I, 2° of the French Commercial Code, must be able to demonstrate that it had no real power to negotiate the contentious clauses, in particular in case of a model contract or standard-form agreement. If it is not able to do so, any claims brought on that basis will be dismissed.

As a reminder, Article L. 442-6, I, 2° of the French Commercial Code punishes the fact, for any economic operator, *"of subjecting or attempting to subject a business partner to obligations that create a significant imbalance in the rights and obligations of the parties"*.

The first constituent element of this restrictive trade practice is thus the fact of *"subjecting"* or *"trying to subject"* one's contractual partner to obligations that create a significant imbalance. In the decision commented herein, the Paris Court of Appeals of Paris has clarified the conditions in which such subjection or attempted subjection can be characterized^[1].

In the case at hand, the plaintiff argued that the insertion of abusive clauses in a standard-form agreement could be considered as an attempted subjection within the meaning of Article 442-6, I, 2° of the French Commercial Code.

The defendant contended that:

- It had never constrained its co-contractor and had not refused to negotiate the contractual clauses;
- Their contractual relationship did not result in any economic power balance to its benefit as it was not an indispensable business partner for its co-contractor; and
- Its co-contractor had never expressed its desire to negotiate the terms of the agreement.

After having pointed out that the plaintiff's allegations were not substantiated by any exhibit or element, the Paris Court of Appeals expressly held that the plaintiff *"did not demonstrate that the agreement had been imposed on it and that it did not have the opportunity to negotiate, as claimed [by the plaintiff], whereas it is an informed professional trader familiar with online sales and was free to use other platforms in the absence of any exclusivity clause"*.

As a result, the Paris Court of Appeals dismissed the claims brought on the basis of Article L. 442-6, I, 2° of the French Commercial Code.

Through this decision, the Paris Court of Appeals recalled that the burden of proof regarding the subjection or attempted subjection of a contractual partner to obligations that create a significant imbalance lies on the party that claims to be the victim of such subjection or attempted subjection. The absence of effective negotiation of the contentious clauses must be substantiated with sufficiently strong evidence.

This decision also serves as a reminder that the mere existence of a standard-form agreement is not sufficient to prove the lack of real power to negotiate abusive clauses. It must be demonstrated that the contentious clauses have not been negotiated because a party was denied any and all possibilities to negotiate.

Applying more stringent rules for the production of the proof that a party has subjected or tried to subject its contractual partner to obligations that create a significant imbalance is a position already adopted by the Paris Court of Appeals in another recent judgment rendered in a case between companies operating in the mass retail sector.

Specifically, in a judgment dated December 20, 2017[2], the Paris Court of Appeals held that *"the insertion of 'imbalanced' clauses in a standard-form agreement may not alone establish this element [the subjection]; only the proof of lack of effective negotiation can establish it, as the subjection may not be inferred in abstracto solely from the distributor's negotiating power"*.

The appellate judges took care to specify earlier in the decision that the mere consideration of the significantly imbalanced overall structure of the mass retail market was not sufficient to establish the existence of a subjection or attempted subjection of a party to a clause of an agreement, even when such agreement is a standard-form agreement, and that this indicator must be supplemented by other factors.

These decisions obviously confirm that contractual relationships between business partners must be assessed *in concreto* by the judge.

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[1] Paris Court of Appeals, February 16, 2018, n°16/05737

[2] Paris Court of Appeals, December 20, 2017, n°13/04879

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