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Distribution / Competition / Consumer Law newsletter
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The pre-contractual duty to inform of suppliers and franchisors

Last July, the French court of appeal in Paris, ruling in the specific context of an international master distribution contract between a French company (master supplier) and a Russian company for the development of the Tara Jarmon brand in Russia, recalled the rules for implementing the statutory pre-contractual obligation to inform provided for in article L330-3 of the French commercial code (CA Paris, 15/054050, Tara Jarmon).

Under the said article, any person making a trading name, trademark, or trade sign available to another person and demanding therefor that they give an undertaking of exclusivity or quasi-exclusivity to carry out the covenanted activity must, before any contract in the common interest of both parties is signed, supply the other party with a document providing honest information so that they may commit themselves with full knowledge of the facts.

Scope: Contracts

According to case law, article L330-3 of the French commercial code targets franchise contracts – by far the most common type of contract concerned – but also distribution contracts, master franchise and master distribution contracts (such as in the case at hand), as well as affiliation and business leasing contracts; in fact, any contract that fulfils the two requirements set out by the law is subject to the obligation set out therein. Those two requirements are intended to identify cases where one of the contracting partners is dependent on the other, commercially, financially, and/or marketing-wise.

Firstly, the contract must involve the **making available of a trading name, trademark, or trade sign**, whereby neither statutory nor case law differentiate according to the manner in which they are made available (licensing for a consideration or free-of-charge commodatum). The law does not target cases where a company name, family name, or domain name are made available.

Secondly, the party to whom the industrial property right is being made available must subscribe to an **exclusivity or quasi-exclusivity undertaking**. Exclusivity can derive indirectly from the party's contractual obligations (including minimum purchase commitments and non-compete obligations). When determining whether the obligation of the franchisee or distributor is (quasi-)exclusive or not, one must not take the obligor's entire business but solely the activity concerned by the contract into account; such is the solution recalled by the court in the Tara Jarmon case referred to above. As a result, article L330-3 of the French commercial code applies even where the distributor or franchisee pursues other activities, irrespective of their weight. Of course, the crucial issue here is how to define quasi-exclusivity, which relies on a factual appreciation that is not only uncertain (where to draw the line? at 70 % or 80 % of turnover?) but that will also likely evolve over time (as performance of the contract progresses), thereby creating legal uncertainty post factum.

The law does provide a third requirement – that the **contract be in the "common interest"** of the parties – but it does not appear to be decisive insofar as it is generally deemed to be fulfilled by synallagmatic contracts as they create reciprocal obligations for the parties.

Scope: Contents

According to the law, the obligor (supplier or franchisor) must submit a **pre-contractual information document** ("DIP" in French, for "document d'information précontractuelle") as well as a **draft of the contract** at least 20 days prior to the contract's signature (or to the payment of any sum required prior to signature).

The information to be submitted is set out in article R330-1 of the French commercial code which focusses on (i) the business (capital, managers, annual accounts, trademarks), (ii) the market targeted by the contract (global and local state of the market and development prospects – a local market survey is not mandatory), (iii) the network (list and history of franchisees, number of franchisees who have left and why, etc.), and (iv) the contract and its financial terms (term, exclusivity, investments at the start of and throughout the contract, renewal and termination, etc.). Of course, there is nothing forbidding the supplier or franchisor from submitting additional information to their future contracting partner (such as the operating statement forecast).

Sanctions

A breach of the pre-contractual duty to inform incurs **criminal penalties** in the form of a fine: 1,500 EUR, 3,000 EUR for repeat violations (article R330-2 of the French commercial code). Additionally, the failure to deliver a compliant pre-contractual information document might amount to an act of fraud punishable by 5 years' imprisonment and a 350,000 EUR fine, or even to abuse of the contracting partner's vulnerability.

However, the failure to supply pre-contractual information mostly has **civil law consequences**. Because the law does not provide for any formal sanction, the relevant penalty and its regime have been set by the courts: avoidance of the contract, but only where **vitiated consent** (mistake or dol) can be proven following the rule of ordinary contract law. In other words, even though the failure to provide pre-contractual information contravenes French public policy, that is not enough to result ipso facto in the contract's invalidity: the obligee (distributor or franchisee) must prove that their consent was vitiated by the omitted or incorrect information.

In concrete terms, determining whether consent was vitiated requires examining the nature of the contractual relationship and the respective qualifications of the parties. For instance, in the Tara Jarmon case, the court of appeal noted that the parties already had carried on a business relationship before entering into the contract at issue and that the obligee of the pre-contractual duty to inform (here the master distributor) already had sufficient knowledge of the contract's financial terms. The court's solution here is all the more striking as the master supplier had not even submitted the pre-contractual information document.

Impact on international contracts

For domestic contracts, article L330-3 of the French commercial code and its duty to inform is public policy. For international contracts, it will necessarily apply **where the contract is governed by French law** either because it is the law expressly chosen by the parties or because the conflict-of-laws rules of the court to which a dispute has been referred to point to French law.

If the contract is governed by a foreign law, whether article L330-3 of the French commercial code applies depends on the court to which the dispute is referred to. **If a French court**, the question is whether that article contains an overriding mandatory provision. Up until now, the courts have tended not to accept such a qualification, but this solution is by no means set in stone. In any event, if we refer to the definition of an overriding mandatory rule included in the Rome I Regulation (possibly combined with the Rome II Regulation), it is unlikely that article L330-3 of the French commercial code fulfils the definition's requirements. Even supposing it did, the sole purpose of the article is to protect the "vulnerable" party (i.e., the distributor or franchisee) where that party is established in France. **If a foreign court**, that court will apply its own private international law rules to determine the extent to which it can take French overriding mandatory provisions into account. Lastly, as a general rule, **arbitration tribunals** are not bound by overriding mandatory provisions of the type contained in article L330-3 of the French commercial code, irrespective of the country in which the tribunal sits.

As a consequence, an arbitration or jurisdiction clause in favour of a foreign tribunal or court combined with a foreign governing law can be a good way of avoiding the civil implications of article L330-3 of the French commercial code (subject however to the application of such transnational rules as the European Code of Ethics for Franchising or the IFA's Code of Ethics).

Wait, there's more…

Nowadays, other French legal provisions also sanction the failure to deliver pre-contractual information, whether directly or indirectly. For instance, under the new contract law rules introduced by French decree no. 2016-131 of 10 February 2016, each contracting partner has a **general pre-contractual duty to inform** (new article 1112-1 of the French civil code). Likewise, the regulations pertaining to **misleading commercial practices** might be used to sanction acts of **deception by action or omission** between businesses (articles L121-2 and L121-3 of the French consumer code). The penalties incurred for misleading commercial practices are civil as well as criminal in nature (damages v. a 1.5 million EUR fine for legal persons or a 300,000 EUR fine and 2 years' imprisonment for natural persons).

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