THE PROTECTION OF THE WEAKER PARTY IN BUSINESS CONTRACTS

Camara Tenemakan
Phd Candidate
Anhui Normal University, Law school
Email : ducourage@live.fr

Abstract

The general theory of contracts, as presented in the French Civil Code of 1804, is governed by the principle of freedom of contract. As the parties to the contract freely expressed their wishes, the legislator had not envisaged the protection of one party more than that of another. There is a weak part when a contractual relationship is unbalanced. To do this, one party must be in a position of strength in relation to the other. A situation of strength, morally requires protection of the weak part of the law, which must ensure, as far as possible, equality between the contracting parties.

The weaker party in business contracts enjoys dual-trigger protection. A first protection endeavor to fit him out so that he can negotiate fairly with his partner and a second protection seeking to sanction the other party after the conclusion.

Key words : protection ; weaker party ; business contracts

Introduction

"Who says contractual, says right."¹ “Between the strong and the weak, it is freedom that oppresses and it is the law that liberates” ². The different position adopted by these authors on the question of freedom in the contract left to the will of the parties shows the difficult nature of the work of reconciling the autonomy of the will with the legislative intervention. The asymmetry of the forces present suggests that the contract is more advantageous for one of the parties to the detriment of the other and carries within itself the potential germ of imbalance which should be considered to correct its effects.

Yet certain categories of contracts, due to the long-presumed equality of the various protagonists, did not attract much attention, at least for the protection of one of the parties : business contracts. Business contracts are "contracts whose particularity resides in the fact that they are exclusively made by the companies between themselves to organize their economic and financial relations"³. The technological evolution and the increasing complexity of business relations prove more that the contract is the expression of the power of one of the parties and reduces the other in a situation of weakness. The idea of a situation of weakness certainly refers not only to the idea of economic power, of which the part which is lacking would be in a situation of weakness but above all it refers to a disproportionate control of the contractual tools making one of the parties technically is not in a position to assess effectively and precisely the scope of the commitments which may arise from the contracts. Economic inequality and the disparity of knowledge (technical, legal) mean that one of the parties is able to "impose one's will on another, even against the resistance of the other"⁴.

The interest of studying such a subject can be seen at two levels. From the theoretical point of view, it shows the attempt to reconcile contractual freedom with respect for the rules imposed by the law and to

¹ Formula attributed to FOUILLEE and corresponding to the era of the sovereignty of the will that was given the power to assume the title of source and measurement of subjective rights and also attributing to this will a binding force to the Image of the law.
² Lacordaire
³ M. THIOYE, Business Law Course
⁴ M.THIOYE ? Aforesaid.
see beyond in which direction to direct economic dirigisme. In practical terms, the search for a contractual balance in business relations has become a necessity which, beyond the private interests, is of interest to the community. The majority of business contracts are long-term contracts and involve enormous economic and wage costs, and it is therefore in the interest of the parties that "the commitment to such contractual relations be surrounded by maximum precautions". The law can therefore remain indifferent and abandon the parties to their own fate. But the question that can not fail to be asked is: what legal mechanism can be ensured effective protection for the party in a situation of weakness in business contracts?

Since the conclusion of business contracts is often gradual following important negotiation steps, with enormous economic and financial stakes and conflicting interests, it would be wise to start from the negotiation stage to ensure effective protection. To the party in a situation of weakness. In so doing, protection can be sought through the institution of an a priori protection device on the one hand and, on the other hand, by the institution of an a posteriori protection device.

1. The institution of a prior legal mechanism for the protection of the weak party.

The protection of the party in a situation of weakness can be sought through an established balance between contractual freedom and limits imposed by law and a pre-contractual obligation of information.

1.1 A balance reseached between contractual freedom and limits imposed by law.

The theory of the autonomy of the will, constructed under the impulse of liberalism and individualist philosophy, proclaimed the power of the will to create, make and undo. Its excessive developments quickly attracted the attention of the legislator, who, far from paralyzing or neutralizing it, endeavored to find limits for its expression in accordance with the rules imposed by law. Very quickly, from a recognition of the freedom of the will has imposed a corpus of rules of which the parties are not entitled to override them. Indeed, the COCC recognizes the freedom of the will in article 42. The text recognizes the parties the freedom "to contract or not to contract, to adopt any kind of clauses of modalities ..." and to add to the article 41 that "no form is required for the formation of the contract", recognizing by that provision freedom of choice in the form of the contract. But to limit oneself there would be synonymous with a recognition of will capable of destroying itself because of the human propensity to abuse the freedom that is recognized. Recognizing this reality and the potential danger that contractual relations may despise rules of public order and good morals in all its scope and certain provisions designed to protect certain categories of contractors, the legislator limits the freedom of the parties who can not, by virtue of the recognized freedom of contract, be prejudiced by conventions specific to public order and morality, on the understanding that public order has become more diversified and its content expanded. In relation to the freedom accorded to the parties to choose the form of the contract, the legislator consecrates this freedom "subject to provisions requiring written or other formalities for the validity of a particular contract". The same applies to insurance law. The CIMA Code Annex 1 in its Article 2 lays down mandatory rules binding on the parties. Under French contract law, the Civil Code recognizes the force of agreements but only on the condition that they are "legally formed".

The search for balance to protect the weaker party in business contracts also involves clauses freely decided by the parties but whose content is legally fixed or better with a limited legal framework. In the negotiating procedure, the parties are free to insert clauses of their choice but can not cause it to produce effects contrary to those recognized by law. This is the case with certain clauses, the examination of which will enable us to account for the reality which the legislator endeavors to impress on contracts. First, the parties are free to insert in the business contract a retention of title clause...

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5 M.Thioye, aforesaid.

6 In French law we can cite among the rules intended for the protection of certain categories of contractors Article 11 of the law of 22 June 1982 which confers a right of preemption to the tenant in case of sale of housing.

7 Art 42 of COCC (Code of Civil and Commercial Obligations of Sénégal)

8 Art 41 of COCC

9 ART 1134 OF French civil code
under which the transfer of ownership of the property is deferred until full payment of the price.

It is important because its objective is to serve as a guarantee against the risk of non-payment of the price by the buyer and in the event of the opening of a collective proceedings against the latter, the retention of title clause offers effective protection to the seller divesting of his property without having received in return the counter-claim. An action in opposability allows him to claim ownership of the property. But the reservation of title clause, however important, to produce valid legal effects, must respect the legal requirements. The clause must be written at the latest at the time of delivery. The clause must also be accepted by the other party. Secondly, in the case of a non-compete clause, the parties are also free to decide to include in the contract clauses requiring one of them not to carry on a particular activity or activities. The non-compete clause is very often encountered in the employment contract, commercial lease, transfer of business, franchise, lease-management of business ...

This clause, because it protects the seller from potential competition and misappropriation of customers for the benefit of the new purchaser, preserves the seller's efforts which may be lost with the sale of a goodwill for example. The non-compete clause is lawful but can not undermine the principle of freedom of trade. It may also prohibit the pursuit of an activity. The prohibition can not be general and absolute. It must be limited in time and space. The case-law adds that the duration must not exceed two years and the author of the clause must justify a legitimate interest. Finally, in distribution law, the exclusivity clause is frequently inserted in these contracts, but to protect the weaker party, Article 5 of the 1970 decree and the French legislation of 14 October 1943 limit for a maximum period of ten years. The validity of any exclusivity clause by which the buyer, assignee or lessee of movable property undertakes, with respect to his seller, assignor or lessor, not to use similar or complementary objects coming from From another supplier. The ten-year period allows the economically dependent party to legally leave the contractual relationship every ten years without having to pay severance payments.

1.2 Pré-contractual information obligation

Under Malian law, the obligation to provide information is consecrated in Article 3 and following of Order N° 92-021 / P-CTSP instituting price freedom and competition in Mali. In Senegal, Article 35 of Law N° 94-63 of 22 August 1994 on prices, competition and economic litigation is contained. The information to be provided prior to the conclusion of a contract is essential to enable the party that does not have information to get an idea of the proposed transaction and to measure the scope of its commitments.

Under French law, the pre-contractual obligation to provide information is regulated in Article 1 of law N° 89-1008 of 31 December 1989 known as the "Doubin Law". This text imposes a pre-contractual obligation of information on "any person who places at the disposal of another person a trade name, a trade mark or a sign, by requiring it to be bound by exclusivity or quasi-exclusivity".

The regulation of the continuation of the obligation to provide information and the granting of a cooling-off period are in fact intended to enable the operator who is preparing to subscribe to an obligation of exclusivity, "a situation of future dependency" to act knowingly. A judgment of the commercial chamber of the supreme court of appeal of 10 February 1998 reveals the intention to protect the operator placed in a situation of economic dependence. The franchisor may be...

See on this point Jacques DELGA, Law of contracts under the collective work Lamy right of the company-the essential to understand, p.429

Decree 70-1335 of 7 December 1993. According to article 1 of the decree of 1970 "the contract of reciprocal exclusivity of sale and purchase is that by which a merchant called general dealer undertakes to buy exclusively certain products to a supplier who promises in return to sell them to him exclusively. The two parties also undertake not to buy or sell competing products to third parties".

12 Art. L. 330-1 Commercial Code
14 Muriel CHARGNY, op. Cit. P.792 and s.
15 Com. 10 Feb. 1998, D.1999. Chr. P.431 .See Com. Feb. 25 1986, Sté Automobile Peugeot c / Sté Turco, Bull. Civ. IV, p.28, n° 33. This is a cassation for lack of a legal basis for a judgment which did not specify how the concessionaire, a professional in the automobile market, did not Have the necessary elements to check the reliability of the
required to provide the franchisor with a prior record of at least 20 days before the conclusion of the franchise agreement, including information on the franchisor's business, the franchise network with its history, Members, the state of competition and the market, prospects for development and the future ...

Failure to provide prior information may lead to the invalidity of the franchise agreement when it has the effect of vitiating the consent of the franchisee. The prospective study carried out by the franchisor must be serious: the lightness of the franchisor may lead to his condemnation to repair the damage suffered by the franchisee who committed himself on unrealistic grounds.

In the case of insurance, the obligation to provide information also plays an important role in protecting the party in a situation of weakness. Prior to the conclusion of the contract, the insurer is obliged to inform its contractor of the insurance products. The submission of a questionnaire is intended to give the subscriber more information to assess the conditions set for the conclusion of the contract and to act with full knowledge of the facts. The majority of the business contracts due to the economic stakes are accompanied by an insurance contract. The obligation to provide information is therefore of fundamental importance.

A priori protection is necessary because it is a downstream protection and in order to be effective it must be backed up by upstream protection, sanctioning possible violations of the rules imposed by law.

2. A posteriori legal mechanism for the protection of the party in a situation of weakness

Two categories of provisions are concerned: the sanction of the violation of the rules imposed by the law and the right of withdrawal.

2.1 The sanction of the violation of rules imposed by law

forward operating account established by the transferor.

The contractor in a situation of weakness is also protected through the sanction of the violation of the rules imposed by the law. These may be sanctions, the implementation rules of which are contained in the texts or are the result of jurisprudence. It is in this context that the legislator intervenes to correct or punish what could not be avoided by a preventive mechanism designed to persuade contractors. This is intervention after the conclusion of the contract or after the failure of the negotiations.

This may include, for example, intervention in case of abuse of weakness which is manifested through unfair terms. In the relations between professional and non-professional one is almost always in the presence of contracts of adhesion materialized by standard contracts. The legislator wished to intervene since 1978 to sanction the practices of unfair terms. The law of 10 January 1978 prohibited them without defining them precisely. Article L132-1 of the Consumer Code defines abusive clauses as "clauses, the object or effect of which is to create to the detriment of the non-professional or the consumer a significant imbalance between the rights and obligations of the parties to the contract ". The law specifies that this character is assessed by referring to all the circumstances surrounding the conclusion of the contract and its various clauses. The question arose as to whether a professional could be equated with a consumer who was not of the same specialty as his contracting party. The case law had initially adopted a broad concept by granting protection against unfair clauses professional who, for the good or service in question, "is in the same state of ignorance as any other consumer". However, this protection is excluded if the contract has a direct bearing on the contractor's professional activity. The protection through the regulation of unfair terms is only incidental since, by definition, business contracts remain in the domain of business activity. But the abuse of information can be punished when the contacting in a situation of power took advantage of it to abuse the situation of weakness of its contractor.

Violations of the rules imposed by law, such as the communication of general conditions of sale, price

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18 See CIMA code
19 Brigette Hess Fallou, Business Law, Paris Dalloz 2001, p.327
20 Cass. Civ. 28 Feb. 1984
lists, and rebates, are punishable \(^{21}\) by fines or rules governing the distribution contract. It is in this sense that the licensor who invokes a violation of the integrity of the system by a third party can do so only if the concession contract has been approved by the Minister of Commerce. Once the contract is approved of what means the licensor has to sanction the incursion of a third in the system. It should be noted that during the period covered by the contract, exclusivity clauses are binding on the parties and their assigns. Any agreement to the contrary is absolutely null and void (article 274 of the COCC).

The infringement of the obligation to provide information is also sanctioned, but it was sanctioned on the basis of the theory of defects in consent reinforced by the rules of civil liability. "As regards civil liability, the Commercial Chamber of the French Court of Cassation recalled, on 11 January 1984, that" the victim of a fault committed during the period preceding the conclusion of a contract is right to seek reparation for the damage it considers to have suffered before the court of the place of the damage on the basis of tort liability ". The damage may refer to expenses incurred in negations or a loss of chance to conclude an advantageous contract. According to the case-law, "The element of harm constituted by the loss of an opportunity may in itself be of a certain and direct character whenever the disappearance by the effect of the offense of the probability of an event Favorable to the fact that, by definition, the realization of an opportunity is never certain"\(^ {22}\)

But in order to produce all its effects, the obligation to provide information, the infringement of which is sanctioned, must be distinguished from the general guarantee obligation inserted in the contract but whose minimum duration may not be less than one year.

2.2 The practice of the right of withdrawal

The right of withdrawal constitutes a right for one of the parties to come back to his act of will, to withdraw his participation in the consent which establishes the contract. Jean Marc Mousseron explains his exercise on the basis of consent: "it can be assumed that consent is gradually formed; the formation of consent commences from the day of the initial agreement and extends to the expiry of the period for the exercise of the right of withdrawal. It would be enlightening to admit that in this case the formation of consent is engaged at the moment of the meeting of wills but not completed. If one wishes to compare the consent to two rings, it will be said that the second ring is well engaged in the first ring but is not yet closed, the beneficiary of the right of withdrawal still having the power to withdraw his own act of will And to dissociate the consent and hence the contract "\(^ {23}\).

The practice of the right of withdrawal is regulated in article 98 of the COCC and can be expensive. Act 1590 c.civ provides: "If the promise to sell has been made with a deposit, each of the contractors is entitled to dispose of it, the one who gave them by losing them and the one who received them by returning the double . "

Article L.121-4 of the Intellectual Property Code recognizes "the right of the assignor to reverse a contract of assignment of copyright, even after the publication of his work, has a right of repentance or Of withdrawal from the transferee."

In the case of non-conformity, a clause providing for such a possibility will always be possible, and that, by its very nature, the return does not analyze itself to a right of cancellation but rather a penalty for the poor performance of the obligation the issuance of the seller\(^ {24}\).

In the event of non-compliance by the trial sale mechanism (conditional contract (art. 1588 c.civ) the withdrawal is possible but should not present itself as a purely potestative condition without threatening the validity of the contract.

**Conclusion**

The risk of imbalance resulting from or deriving from a disparity of economic, legal, technical or financial power remains potential and which the law tries to correct. But since business contract law is the privileged domain of large-scale enterprises, they must be well prepared by a skilful drafting of the contractual clauses to avoid the difficulties which may arise from the execution because such agreements are not easily cancellable in view of the

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\(^{21}\) Art 34 and next of the law of 22 August 1994

\(^{22}\) Crim. 10 July 1977, GP. 1980. Summit. 259

\(^{23}\) Jean Marc Mousseron, Contractual Technique, Editions François Lefebvre, 1999, 2nd ed, p.266 and next

\(^{24}\) Art.1147. civil code
economic and financial stakes involved. The protection of the economically less favored party must receive attention, but above all it must be ensured by the obligation to provide information.

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