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Unfair Competition - France

A year in review in 10 minutes

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Stefan Naumann

Unfair competition law

French competition law is based on article 1240 of the French Civil Code that provides since 1804:

> « *Any act by man that has caused damage to another obligates him by whose fault it was brought about to repair it.* »

French case law consistently requires a fault, a causal link and a damage for an unfair competition claim to succeed.

One of the issues is the settled principle that the damage can only be repaired, excluding punitive damages.

Unfair competition law

To modernize the law, a proposal of March 13, 2017 by the French Ministry of justice would replace article 1240 with articles 1241 and 1242 as follows:

« *A person is responsible for the damage caused by his/her fault.* »

« *Constitutes a fault the violation of a legal requirement or the breach of the general obligation of prudence or diligence.* »

Some commentators argue that this would not cover an abusive termination of a distribution contract except for a brutal termination.

The proposal would add an article 1266-1 that provides for a civil fine where the fault was deliberate for the purpose of a gain or savings. The fine can be up to ten times the profit or 5% of turnover for legal entities.

Unfair competition cases

In 2016/2017, the French Supreme Court **confirmed** that:

- Unfair competion does not require direct competition between the parties (builder of golf courses and designer of golf courses; Com. May 3, 2016);
- Unfair competition must be based on facts that are distinct of alleged acts of infringement (use of trademark on shoes that infringe a design tarnishes brand; Com. May 3, 2016);
- Absent any intellectual property rights, an imitation can constitute unfair competition where it creates a risk of confusion (packaging of chocolate treats and claim that chocolats are made by craftsman; Com. July 5, 2016);
- No disparagement where an advertisement refers to a widely discussed societal or policy issue (sale of OTC pharmaceuticals in supermarkets; Com. June 21, 2016).

Brutal termination of an established commercial relation

French commercial law prohibits the brutal termination of established commercial relations.

This heavily litigated provision regularly becomes a trap for foreign companies doing business in France, notably when terminating service suppliers (advertising agencies, logistics, storage).

Damages cover the brutality of the termination and are calculated as loss of profits during the notice period that should have been given.

The length of the notice period is calculated on the basis of the overall duration of the commercial relation.

Because this is a business tort, terms of contract are not controlling.

Brutal termination of an established commercial relation

In 2016, the French Supreme Court held:

- a change of company does not interrupt an established commercial relation where the supplier created a new company with the same legal representative without interruption of services (Com. September 6, 2016), but the sale of an on-going business (*fonds de commerce*) without more does (Com. May 3, 2016);
- Changes in personnel at the service provider and the client do not interrupt the duration of the commercial relation (Com. July 5, 2016);
- A termination can be brutal even if it was foreseeable (Com. September 6, 2016);
- While the excusive jurisdiction of certain courts pursuant to the French Intellectual Property Code extends to connected acts of unfair competition, it does not extend to a claim of brutal termination, which is subject to a separate exclusive jurisdiction rule (Com. September 6, 2016).

Non-compete clauses

Three Supreme Court cases are of note:

- A partner and salaried employee's non-compete clause must provide for financial consideration for the non-compete clause (Com. October 4, 2016);
- An employee non-compete clause without financial consideration does not necessarily create a damage where the employee starts a competing activity two days after leaving (Soc. May 25, 2016);
- A provision for a diminished financial consideration in case the employee leaves is not enforceable even if it is based on a collective bargaining agreement since the non-compete clause supercedes the rule in the collective agreement (Soc. April 14, 2016).

Thank you. Enjoy Lunch.

Stefan Naumann

Admitted Paris and California Bars

Hughes Hubbard & Reed LLP

8, rue de Presbourg

75116 Paris, France

Tel : +33 (0)1 44 05 80 00

stefan.naumann@hugheshubbard.com