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A clause providing for the payment of a termination indemnity included in a void contract is inapplicable while the jurisdiction clause included in a void contract survives.

In two decisions dated July 12, 2017, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) ruled that wherever two contracts are interdependent, "*the termination of one entails the voidness of the other, thereby excluding the application of the clause of the void contract that provides for the payment of a termination indemnity*".

On the other hand, in a decision dated July 5, 2017, the Commercial Chamber held that "*a jurisdiction clause, because of its autonomy from the main contract in which it is inserted, is not affected by the ineffectiveness of the legal instrument*", i.e., in the matter at hand, the jurisdiction clause was not affected by the voidness of the contract in which it was included.

1. **Inapplicability of the clause of a void contract that provides for the payment of a termination indemnity:**

- Codification of a well-established case law:

Several contracts are deemed interdependent if they contribute to an overall economic transaction and if one cannot exist without the other. Since one contract is the *cause*[1] of the other, they are interdependent.

As a consequence, it has been ruled that "*concurrent or successive contracts entered into with various contracting partners in the framework of a transaction that includes a financial lease are interdependent*"[2].

Whenever two contracts are held interdependent, it is settled case-law that the destruction of one entails the voidness of the other[3].

This line of decisions that were so far rendered on the basis of Article 1134 of the French Civil Code (in its version that was in force prior to the Ordinance of February 10, 2016 for the reform of contract law, the general regime of obligations and proof of obligations) was codified, as it stood, by said Ordinance that entered into force on October 1, 2016.

New Article 1186 of the French Civil Code, which enshrined this case-law, reads as follows:

"A contract which has been validly formed becomes void if one of its essential components disappears.

If the performance of several contracts is necessary for the consummation of the same transaction and one of such contracts disappears, those contracts, the performance of which is rendered impossible by this disappearance, as well as all those for which the performance of the contract which disappeared was a determining condition of the consent of a party, become void.

Voidness does not occur however if the contracting party against which such voidness is invoked was aware of the existence of the overall transaction when it consented to the contract to which it is a party."

The two decisions commented in this article, even though rendered after October 1, 2016, were not issued on the basis of the aforementioned new Article 1186 which does not apply to contracts entered into before October 1, 2016. In any event, if they were issued on the basis of this Article, the outcome would have been the same.

- Backgrounds and lessons to be learned from the decisions handed down by the *Cour de Cassation* on July 12, 2017:

In the case that led to the first decision dated July 12, 2017[4], a notary office had, on the same day, entered into a financial lease agreement and a contract for the supply and maintenance of photocopiers. The services contract contained a clause that provided for the payment of an indemnity in case of early termination.

The notary office terminated the financial lease agreement and claimed that the contract for the supply and maintenance of photocopiers had become void, thereby trying to escape the application of the clause that provided for the payment of an indemnity in case of early termination.

In this first case, the trial judges did not consider that the contracts were interdependent and that the second contract had become void. They held that "*the two contracts, which were self-existent, were likely to be performed independently from each other*" and ruled that the clause providing for the payment of an indemnity in case of early termination was enforceable against the notary office.

In the other case that led to a second decision rendered on the very same day[5], a financial lease agreement had been entered into ten days after the conclusion of an electronic monitoring services contract. Here again,

the services contract included a clause that provided for the payment of an indemnity in case of early termination.

In that second case, the trial judges also applied said clause and held that "*the non-severability of the contracts allowed to be considered that the early termination of the lease agreement had necessarily entailed the termination of the services contract*".

The *Cour de Cassation* reversed both decisions and made four fundamental findings:

> -"*Concurrent or successive contracts that contribute to a transaction that includes a financial lease are* ***interdependent***";
>
> -Whenever two contacts are interdependent, "*the termination of either one entails, as a consequence, the* ***voidness*** *of the other*", not its termination;
>
> -"*Thus excluding the application of the clause providing for the payment of a termination indemnity included in the void contract";*
>
> -"*The party which initiated the destruction of this contractual framework [must] indemnify the loss caused by his fault*".

- What remedy for the injured party?

The outcome can appear harsh for a contractor faced with the inapplicability of its contract that has become void as a result of a unilateral decision of a third party to the contract or of its contractual partner. This is a serious breach of the legal certainty principle that governs contract law but a fair application of the principle set forth in the aforementioned Article 1186 of the French Civil Code.

The *Cour de Cassation* dampened this harshness and added a clarification that is not derived from the provisions of the French Civil Code. It held that the co-contractor who suffers a loss can seek the liability of the party who "*initiated the destruction of this contractual framework*" and whose fault is established.

The injured party shall be compensated through the award of damages that will be assessed on the basis of the loss actually suffered[6], irrespective of the amount of the indemnity provided for under the termination clause.

- No hierarchy between interdependent contracts

Lastly, it should be underlined that the two cases are noteworthy insofar as the financial lease agreement was terminated first.

Usually, it is the services contract that is terminated first, thereby entailing the voidness of the agreement that provided funding for the transaction.

The *Cour de Cassation* confirmed, however, that the second contract ought to be considered void. As such, there is no "hierarchy" between contracts. There is no prime contract and accessory contract.

The termination of either contract entails the voidness of the other.

2. **The jurisdiction clause set forth in a void contract:**

A shareholders' agreement included a commitment by the shareholders to sell their shares and a unilateral commitment by the company to purchase such shares. The shareholders' agreement also contained a non-compete and confidentiality clause binding on the selling shareholders as well as a jurisdictional clause according to which disputes were to be submitted to the Commercial Court of Paris.

Following a dispute on the sale price of the shares, the parties to the shareholders' agreement signed a settlement that included a clause stipulating that the shareholders' agreement had become void.

One of the parties to the shareholders' agreement that had become void was sued for unfair competition before the Commercial Court of Paris, as per the provisions of the jurisdiction clause included in the shareholders agreement that had yet been voided.

The defendant challenged the jurisdiction of the Commercial Court of Paris and argued that the jurisdiction clause could not apply since the shareholders' agreement had become void.

The *Cour de Cassation* dismissed the appeal lodged against the appellate judgment on jurisdiction and held that "*a jurisdiction clause, because of its autonomy from the main agreement in which it is inserted, is not affected by the ineffectiveness of the legal instrument*".

This solution is fully consistent with the case-law of the *Cour de Cassation* which is extremely protective of jurisdiction and arbitration clauses[7].

As such, in a decision dated July 8, 2010[8], the Commercial Chamber of the *Cour de Cassation* had applied a jurisdiction clause included in an agreement that had been declared null.

The reform of French contract law does not challenge this case-law. It even confirms it in case of rescission of the contract.

Indeed, Article 1230 of the French Civil Code (in its version derived from the aforementioned Order dated February 10, 2016 that came into force on October 1, 2016) stipulates that:

"Rescission does not affect contract terms relating to the settlement of dispute, nor those intended to take effect even in case of termination, such as confidentiality or non-compete clauses."

On the other hand, the French Civil Code remains silent concerning a jurisdiction clause that is inserted in a contract that has become void or null. This is the reason why the decision commented herein is quite valuable in this respect.

The mere termination, nullity or voidness of a contract that contains a jurisdiction clause is not sufficient to make such clause unenforceable. However, as contracts lawfully entered into have the force of law for those who have made them, contractual parties are free to conclude a specific agreement to waive the application of the jurisdiction clause.

[1] The concept of *cause* means at the same time the consideration and the reason why a party enters into a contract.

[2] Mixed Chamber of the *Cour de Cassation*, May 17, 2013, n°11-22768

[3] Commercial Chamber of the *Cour de Cassation*, November 4, 2014, n°13-24270

[4] Commercial Chamber of the *Cour de Cassation,* July 12, 2017, n°15-277703

[5] Commercial Chamber of the *Cour de Cassation*, July 12, 2017, n°15-23552

[6] Commercial Chamber of the *Cour de Cassation*, March 26, 2013, n°12-11688

[7] Commercial Chamber of the *Cour de Cassation*, November 25, 2008, n°07-21888

[8] Commercial Chamber of the *Cour de Cassation*, July 8, 2010, n°07-17788