FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16
International Commercial Chamber

(No 02/2020, 10 pages)

JUDGMENT OF 7 JANUARY 2020

General Directory Entry Number **: RG 19/12209 - No Portalis 35L7-V-B7D-CAENO**

Decision referred to the Court: Judgment of 24 June 2019 - Paris Commercial Court - RG No 2017029118

APPELLANT:
SARL SPORT ONE
Having its registered office at 91 Rue du Faubourg Saint-Honoré - 75008 PARIS
Registered in the trade and companies registry of Paris under the number: 489397 661

Represented by its legal representatives

Represented by..., member of the Paris Bar : […]

RESPONDENT:
SARL NIKE EUROPE OPERATIONS NETHERLANDS (NEON), a company incorporated under Dutch law
Having its registered offic at Colosseum- 1213 HILVERSUM (NETHERLANDS)
Registered at the commercial chamber under the number 32057998
Represented by its legal representatives

Represented by..., member of the Paris Bar : […]

COURT COMPOSITION
The case was heard on 12 November 2019 in open court, before the Court composed of:
Mr François ANCEL, President
Ms Laure ALDEBERT, Judge
Ms Fabienne SCHALLER, Judge

who ruled on the case, a report was presented at the hearing by Mr François ANCEL in accordance with Article 785 of the Code of Civil Procedure.

Clerk at the hearing: Clémentine GLEMET

JUDGMENT

- ☐ Adversarial
- ☐ judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- ☐ signed by François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I — FACTS AND PROCEEDINGS

Facts :

1. Sport One is a company incorporated under French law, set up in 2006 by Ms [A], its manager, and specialized in the purchase and sale of sportswear and footwear, in particular of Nike brand products. This activity has been carried on since 2012 via sales platforms on the internet. Other companies (in particular Jeans Fetish) have the same activity and are managed by Mr [B], Mrs [A]'s husband.

2. Nike Europe Operations Netherlands (hereinafter 'NEON') is a company incorporated under Dutch law, a subsidiary of the NIKE group specialized in the design, manufacture and distribution of sporting goods under the Nike brand. It is responsible for the distribution of Nike branded products in Europe.

3. Sport One has been one of the authorised distributors of Nike products since 2006 and, as such, has had a distributor account on the "Nike.net" site on which it placed its orders, which are governed by general terms and conditions of sale, Article 12 of which contains a jurisdiction clause in favour of the Amsterdam Court (Netherlands).

4. On May 20, 2013, Nike France informed the manager of Sport One that an authorized Nike distributor was not allowed to present Nike products intended for sale to consumers on the websites of non-authorized companies (such as www.amazon.com, www.ebay.fr, www.rueducommerce.fr or www.cdiscount.com).

5. By letter of 25 February 2015, NEON, arguing that, in view of the new distribution strategy, Sport One's 'commercial positioning was no longer 'in line with NEON's strategy and commercial needs', terminated the commercial relations established with Jeans Fetish, whose manager was Mr [B], with 11 months' notice specifying that it would therefore no longer accept new orders from 30 June 2015, a period which was extended by letter of 25 June 2015 for a further six months. Notification of this termination was sent more specifically to Sport One on 18 May 2015.

6. By letter of 25 June 2015, NEON granted an extension of the notice period until 1 December 2015 for future orders and until 30 June 2016 for restocking orders.

Proceedings :

7. This is under these circumstances that Sport One sued NEON by a writ of 9 May 2017 before the Commercial Court of Paris to contest the termination of commercial relations and order it to pursue them subject to penalty payment, and in the alternative, to order it to pay a sum of EUR 1,517,950 for the abrupt termination of established commercial relations, arguing that the notice period should have been 30 months from May 18, 2015.

8. NEON, relying on Article 12 of the general terms and conditions of sale, raised the lack of jurisdiction of the Paris Commercial Court in favour of the Amsterdam Court.

9. By judgment of 1 October 2018, the Paris Commercial Court has :
- DISMISSED Sport One SARL's application for the nullity of the jurisdiction clause;
- PENDING the CJEU's decision on the preliminary question referred by the Court of Cassation on 11 October 2017 concerning the interpretation of Article 23 of Regulation 44/2001, in particular whether it allows a national court hearing an action for damages brought by a distributor against its supplier on the basis of Article 102 of the Treaty on the Functioning of the European Union, to apply a jurisdiction clause contained in the contract binding the parties.

10. By judgment dated June 24, 2019, the Paris Commercial Court, taking note of the Court of Cassation's decision dated January 30, 2019 following the Court of Justice of the European Union's judgment dated October 24, 2018 (case C-595/17 Apple Sales v. eBizcuss.com) declined jurisdiction and referred Sport One to better provide itself and ordered it to pay NEON the sum of EUR 10,000 under Article 700 of the Code of Civil Procedure and to pay the costs.

11. By notice of 8 July 2019, Sport One appealed that decision.

12. By order of 11 July 2019, Sport One was authorised to sue NEON on a fixed date for the today's hearing of 9 September 2019 at 2 p.m., on which the case was referred postponed to the hearing of 12 November 2019.

II — CLAIMS OF THE PARTIES

13. **According to its latest submissions sent electronically on 15 October 2019**, Sport One asks the court the following:

- DECLARE the appeal filed by Sport One admissible and well-founded,
- OVERTURN the judgment handed down on June 24, 2019 by the Paris Commercial Court in all its provisions,

RULING again,

- FIND AND HELD that the clause of choice of court and applicable law of Article 12 of the General Terms and Conditions of Sale is not applicable to this dispute.
- DECLARE that the Paris Commercial Court has jurisdiction to hear the case brought by Sport One.
- FIND AND HELD French law applicable to the present dispute.
- DISMISS NEON of all its requests, ends and conclusions.

- ORDER NEON to pay Sport One the sum of EUR 20,000 under Article 700 of the Code of Civil Procedure, as well as the costs of first instance and appeal, which may be recovered by Patricia HARDOUIN of 2H Avocats, in accordance with the provisions of Article 699 of the Code of Civil Procedure.

14. According to its latest submissions sent electronically on 31 October 2019, NEON asks the court, in particular under the (EU) Regulation of 12 December 2012 and the former Article L. 442-6 I-5° of the French Commercial Code (now Article L. 442-1 of the same code), to:
- UPHOLD the judgment handed down by the Paris Commercial Court on June 24, 2019 in all its provisions;
- ORDER Sport One to pay NEON the sum of EUR 20,000 under Article 700 and to pay all costs.

III — PLEAS OF THE PARTIES

15. Sport One argues that the jurisdiction clause relied on by NEON is inapplicable in that it does not apply to the claims brought in the present proceedings so that the determination of the competent court must be made pursuant to Article 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter referred to as the Brussels I Regulation (recast)) designating the court of the place of the harmful event.

16. Sport One argues in the first place that the judgment must be reversed since it considered that it had presented a claim based on two pleas, one relating to anti-competitive practices (Article L.420-1 et seq. of the Commercial Code and 102 TFEU) and the other relating to the abrupt termination of commercial relations (Article L.442-6-I-5° of the French Commercial Code (in its version in force prior to Order 2019-359 of 24 April 2019)) when it had made one main application and the other subsidiary, which was to lead the Court to examine these two applications.

17. It adds that the Commercial Court's judgment must be reversed since it did not rule on the jurisdiction clause's applicability concerning its claim based on the abrupt termination of commercial relations, and that it could not refer to the case law of the CJEU (CJEU, 3rd Chamber, 24 October 2018, *Apple Sales International v. ebizcuss*) as a basis for its lack of jurisdiction, whereas unlike that decision, which concerned an action for compensation following an abuse of a dominant position (Art. 102 TFEU), its action is based primarily on a vertical restraint prohibited by Article 101 TFEU and that pursuant to the case law of the Court of Justice of the European Union *Cartel Damage Claims* of 21 May 2015 (Case C-352/13) such a clause, which may concern only disputes which have arisen or may arise in connection with a particular legal relationship, is applicable only if it refers to disputes concerning liability incurred as a result of a competition law infringement, which is not the case here.

18. It stresses that in the present case the clause is clearly circumscribed since it is intended to apply only to disputes arising out of orders and the performance of the general terms and conditions of sale and not to disputes concerning the general framework of the commercial relations between the parties, and in any event not to

the conditions of termination and their consequences. It argues in this respect that the clause's scope must be interpreted strictly as the disputed clause is deemed "designed in favour of NIKE" and to its disadvantage.

19. Sport One adds that the clause does not refer in any way to matters relating to tort or delict, so that it must also be set aside in the context of the action brought in the alternative based on the abrupt termination of the commercial relations, since it is not drafted in sufficiently broad terms to cover the dispute arising from the termination of the established commercial relations.

20. It stresses that if each order constitutes a contract, there is no reason why the scope of the general terms and conditions of sale should go beyond the contract and, in the absence of a framework contract, apply to the entire contractual relationship at the risk of distorting the clear terms of the clause, contradicting the objective of predictability established by Article 25 of the Brussels I Regulation (recast).

21. Sport One argues that although the ECJ held in its *Granarolo* judgment that an established commercial relationship may be contractual in nature as a whole, this does not make it possible to infer jurisdiction uniformly by type of contract or relationship, even though the scope of a jurisdiction extension clause must be strict and that what applies to an isolated sale does not apply to the commercial relationship as a whole, the two constituting two different legal relationships.

22. Sport One thus supports that its claims are of a tortious nature and that the determination of the competent court must be made by application of Article 7 § 2 of the Brussels I Regulation (recast), which designates the court of the place where the harmful event occured, which means the place of the event giving rise to the damage or the place where the damage occurs, here the place of its registered office, and that in application of Articles R 420-3, Annex 4-2 and D 442-3 of the Commercial Code, the Paris Commercial Court shall have jurisdiction.

23. **As a response**, NEON argues that the jurisdiction clause applies to all claims of Sport One. It recalls in this respect that there can be no strict interpretation of the clause, whereas such interpretation must be made according to Dutch law, as applicable law to the contract. It adds that such a clause may apply irrespective of the tortious or contractual basis of the claim and that the only relevant criterion is to ascertain which 'specified legal relationship' the parties wished to submit to the jurisdiction of the designated court. Being specified that if the intention of the parties was to submit all disputes arising from a contract, the clause will apply to any type of claim which is not foreign or is connected with the contractual relationship.

24. NEON stresses that the jurisdiction clause applies to claims from a distributor against its supplier based on an alleged competition law infringement, even if it was not expressly covered by that clause, since the anti-competitive practices alleged by Sport One, which claims in its writ of summons that Article 9.4 of the general conditions of sale constitutes a hardcore vertical restraint prohibited by competition law, are not foreign to the contractual relationship between the parties.

25. It argues that there is no need to distinguish between claims based on anti-

competitive agreements and those based on abuses of a dominant position and that, irrespective of the nature of the alleged anti-competitive practice, only the connection to the contractual relationship is relevant.

26. NEON argues that the action for rescission of trade relations is an autonomous concept interpreted by the CJEU as contractual where there is a long-standing tacit contractual relationship between the parties based on a bundle of corroborating evidence, which is the case here with regard to the nine years of commercial relations between the parties and the general terms and sale conditions applicable to each order.

27. It stresses that if there was no framework contract between NEON and Sport One, the contract between those two companies was formed by NEON's general terms and conditions and its distribution policy, Article 4 of which expressly refers to the general terms and conditions. It considers that those two documents (general terms and conditions of sale and distribution policy) therefore constituted the only applicable overall contractual framework governing the entire commercial relationship between NEON and Sport One since 2006, i.e. for almost 10 years, without any dispute on the part of Sport One.

28. NEON adds that the jurisdiction clause provided by these general conditions is drafted broadly enough to cover all disputes related to the commercial relationship between the parties since this clause broadly refers to “any legal action or legal proceedings” provided that it is “related to an order and / or these conditions.”

IV — REASONS FOR THE DECISION

On the plea based on the court's error of qualification;

29. It is admitted that, under the terms of its initial summons before the Commercial Court, Sport One applied to that court, mainly, for a declaration that NEON's decision of 18 May 2015 be deemed to be null and void and, in the alternative, for a declaration that NEON had abruptly severed its commercial relations.

30. While the court considered that the annulment of the decision of 18 May 2015 was in fact based on two grounds, one based on competition law and the other on the abrupt termination of commercial relations, two applications had in fact been made, it is clear from the judgment grounds that the court nevertheless assessed the application of the disputed clause both in terms of competition law and in terms of the abrupt termination of relations, so that the court's initial qualification did not have the effect of depriving Sport One of an answer on the two heads of claim that they had brought and that the judgment may not therefore be reversed on this ground.

On the jurisdiction of the Paris Commercial Court;

31. Since the present action for damages was brought in 2017 by a company governed by French law with its registered office in France against a company governed by Dutch law with its registered office in the Netherlands, the Court is dealing with a dispute which falls within the scope in time and space of the Brussels I Regulation (recast).

32. Pursuant to Article 4(1) of that Regulation, '*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*'.

33. However, pursuant to Article 5(1) of the Brussels I Regulation (recast), persons domiciled in a Member State may also be sued in the courts of another Member State under the rules set out in Sections 2 to 7 of the Chapter on "*Jurisdiction*", i.e. Articles 7 to 26 of that Regulation.

34. Under Article 25(1) of the Brussels I Regulation (recast), if the parties, regardless of their domicile, have agreed on a court or courts of a Member State to have jurisdiction to settle any disputes which have arisen or which may arise in relation with a particular legal relationship, those courts shall have jurisdiction unless the validity of the agreement conferring jurisdiction is rendered null and void as to the substance by the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

35. It should be recalled that the interpretation of a jurisdiction clause, in order to determine the disputes falling within its scope, is a matter for the national court before which it is relied on (see CJEU judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C - 352/13, paragraph 67).

36. In the present case, it is admitted that, under the terms of its initial writ of summons, Sport One sought, mainly, annulment of NEON's decision to break off commercial relations in so far as that decision was motivated by an anti-competitive practice characterised by a vertical restriction of competition and, in the alternative, the abrupt nature of the termination of the commercial relations established between the companies for almost 10 years.

On the jurisdiction of the Paris Commercial Court to rule on the competition law infringement;

37. It was held in the abovementioned judgment C-352/13 of 21 May 2015 (paragraph 68) that Article 23(1) of Regulation No 44/2001 (now Article 25 of the Brussels I Regulation (recast)) is to be interpreted as permitting, where damages are claimed before a court on the ground of an infringement of Article 101 TFEU and Article 53 of the Agreement on the European Economic Area, a claim for damages, of 2 May 1992 to take account of clauses conferring jurisdiction contained in contracts for the delivery of goods, even if such taking into account has the effect of derogating from the rules on international jurisdiction laid down in Article 5(3) and/or Article 6(1) of that Regulation, provided that those clauses refer to disputes concerning liability incurred as a result of an competition law infringement. The CJEU thus held that "*In the light of that purpose, the referring court must, in particular, regard a clause which abstractly refers to all disputes arising from contractual relationships as not extending to a dispute relating to the tortious liability that one party allegedly incurred as a result of its participation in an unlawful cartel.*" (paragraph 69) ; "*Given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking*

had no knowledge of the unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship. Such a clause would not therefore have validly derogated from the referring court's jurisdiction." (paragraph 70)

38. Moreover, under the terms of a decision handed down on 24 October 2018 (C-595/17 *Apples Sales Vs eBizcuss.com*), and in the light of the abovementioned decision (C-352/13), the CJEU found that *"it is appropriate to examine whether that interpretation of Article 23 of Regulation No 44/2001 and the grounds on which it is based are also valid with regard to a jurisdiction clause invoked during a dispute that relates to the tortious liability allegedly incurred by one contracting party as a result of a breach of Article 102 TFEU"*.

39. Having found that "*However, while the anti-competitive conduct covered by Article 101 TFEU, namely an unlawful cartel, is in principle not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel, the anti-competitive conduct covered by Article 102 TFEU, namely the abuse of a dominant position, can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms."*, and that *"It must therefore be stated that, in the context of an action based on Article 102 TFEU, taking account of a jurisdiction clause that refers to a contract and 'the corresponding relationship' cannot be regarded as surprising one of the parties within the meaning of the case-law mentioned at paragraph 22 of the present judgment."*, the CJEU ruled that *"Article 23 of Regulation No 44/2001 must be interpreted as meaning that the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law"*.

40.Regarding these two decisions of the Court of Justice of the European Union, the application of a jurisdiction clause in the context of a liability claim based on anti-competitive practices varies, not according to the nature of the alleged conduct, but in consideration of the link between that conduct and the contract containing the jurisdiction clause.

41. It is necessary in this regard to assess whether the dispute concerns practices which cannot be regarded as unrelated to the contractual relationship in the context of which the jurisdiction clause was concluded, and in order to do so to ascertain whether the anti-competitive practices allegedly engaged in by the respondent have materialised in the contractual relationship between the parties by means of the agreed contractual conditions.

42. In this case, Sport One states in its writ of summons that the decision to cease commercial relations dated 18 May 2015 was motivated by "*the alleged inadequacy of its commercial positioning with NEON's commercial strategy and needs, following a recent review of NEON's commercial strategy" and the provisions "relating to online sales via the Internet*" contained in Article 9.4 of its general terms and conditions of sale prohibiting in particular the buyer from using "*a Nike brand on a*

website without the prior written consent of Nike", the conduct of NEON is "*constituting a hardcore vertical restraint prohibited by competition law*".

43. Sport One thus adds that '*the decision notified to the applicant by NEON on 18 May 2015 to terminate commercial relations with Sport One SARL, in so far as it is based on a prohibited vertical restriction, is void as of right*'.

44. It follows from the foregoing that, in the context of the present dispute, Sport One's main claim expressly concerns the assessment, in the light of the rules of competition law, of the lawfulness of clause 9.4 of the general terms and conditions of sale, which also contain the jurisdiction clause, worded as follows:

> *"Article 12 - Applicable Law and Jurisdiction"*
>
> *12.1 Any order shall be considered as a contract concluded in the Netherlands and subject in all respects to Dutch law, including the Convention on the Law Applicable to Contracts for the International Sale of Goods.*
>
> *12.2 The Buyer irrevocably submits to the jurisdiction of the courts of Amsterdam (The Netherlands) for any legal action or proceedings in connection with an Order and/or these Conditions.*
>
> *12.3 Clause 12.2 is for the benefit of NIKE and does not affect NIKE's right to bring proceedings in any other jurisdiction."*

45. Whilst this clause refers to "any legal action or proceeding in connection with an Order" and clause 1.2 of the same terms and conditions provides that "Each accepted Order shall constitute (...) a binding contract between NIKE and the Customer, an autonomous agreement concluded between NIKE and the Buyer", this same clause also indicates that it is intended to apply cumulatively or alternatively (" and/or ") " to the present Conditions", so that it also covers any action relating to the general conditions of sale, and in particular Article 9.4, the illegality of which Sport One maintains to justify the nullity of the decision by which NEON has terminated the commercial relationship.

46. In addition, Article 13 of the same general terms of sale also relates to the "rules applicable to selective distribution" and provides that "the Buyer shall at all times comply with NIKE's rules applicable to selective distribution (…)".

47. Since the main claim relating to the nullity of the decision of 18 May 2015 is based on the alleged unlawfulness of Article 9.4 of the general terms and conditions of sale with regard to the rules on competition law, it must be held that the alleged anti-competitive conduct is linked to those general terms and conditions of sale containing the jurisdiction clause and that the practices complained of are clearly not unrelated to the contractual relationship under which the jurisdiction clause was concluded.

48. Consequently, Sport One's is not entitled to consider that the jurisdiction clause

inserted in these general conditions is not intended to apply to determine the competent jurisdiction.

49. It is appropriate in these conditions to uphold the judgment of the Paris Commercial Court.

On the jurisdiction of the Paris Commercial Court to hear the claim for damages based on the abrupt termination of commercial relations ;

50. It should be recalled that Article 25 of the Brussels I Regulation (recast) does not in any way limit the scope of a jurisdiction clause to disputes of a contractual nature only, but refers more specifically to the parties' right to choose the competent court "*to hear disputes which have arisen or may arise in connection with a particular legal relationship*".

51. Consequently, the application of such a clause does not depend on the contractual or tortious nature of the action in respect of liability brought, but solely on the extent to which the parties intended that the clause should be applied.

52. It is therefore for the court to determine in the present case whether the disputed clause is drafted in sufficiently broad terms to encompass the action brought by Sport One for compensation of the damage caused by the allegedly brutal termination of the commercial relations entered into with NEON.

53. In this respect, as mentioned above, if the disputed clause does not expressly refer to this type of action, its terms are however sufficiently general to include it since it refers not only to "*any legal action or legal proceedings related to an Order*" but also to any legal action or legal proceedings related to "*these Conditions*", i.e. the general terms and conditions of sale, to which, on the one hand, Article 4 of the document relating to the distribution policy of the NEON company expressly refers, and of which, on the other hand, certain Articles have a scope which clearly exceeds that of the isolated order and govern the commercial relations between the parties.

54. Thus, Article 9 entitled "intellectual property rights" provides that "*Nike reserves all rights and subject of intellectual property rights relating to its products (...). The purchaser shall not use these rights and subjects of intellectual property rights, register them or make them available to third parties without the express prior written consent of Nike (...)" and prohibits in particular the purchaser from using "a Nike trademark on a website without the prior written consent of Nike*".

55. This is also the case of Article 10 entitled "Confidentiality", according to which "*Nike and Buyer shall keep confidential and shall not disclose to any third party, without the prior written consent of the other party, any technical or commercial information acquired from the other party as a result of discussions, negotiations and other communications between them relating to the products or the order*".

56. Finally, this is the case of Article 13 entitled "rules applicable to selective distribution" according to which "*the Buyer shall at all times comply with NIKE's rules applicable to selective distribution (…)*".

57. It is clear from these Articles, inserted in the general terms and conditions of sale, that the purpose of the general terms and conditions is clearly not only to govern each individual order, but also '*discussions', 'negotiations' and other 'communications between them relating to the products*' in general or Nike's rules *'applicable to selective distribution'*, all of which relate to the commercial relations established between the parties.

58. In these circumstances, it is found that the jurisdiction clause may include an claim for damages related to the termination of those commercial relations, so that only the Amsterdam Courts (Netherlands) designated by that clause have jurisdiction and that the judgment of the Paris Commercial Court, which has declined jurisdiction, shall therefore be upheld.

Costs and expenses ;

59. Costs and expenses and procedural compensation have been settled precisely by the Commercial Court.

60. The court should order Sport One, the losing party, to pay the costs which will be recovered in accordance with the provisions of Article 699 of the Code of Civil Procedure.

61. In addition, Sport One shall be ordered to pay NEON, which had to incur irrecoverable costs in order to assert its rights, compensation under Article 700 of the Code of Civil Procedure which it is equitable to fix at the sum of EUR 10 000.

V — ON THOSE GROUNDS, HEREBY

1. UPHOLDS the judgment of the Paris Commercial Court handed down on 24 June 2019 ;

And ruling additionaly :

2. ORDERS Sport One to pay to NEON the sum of EUR 10 000 under Article 700 of the Code of Civil Procedure ;

3. ORDERS Sport One to pay the costs of the appeal proceedings.

Clerk ***President***
G. GLEMET ***F. ANCEL***