

Conciliation clause in a contract concluded with a consumer: such a clause is presumed to be unfair, unless the trader can prove otherwise, and it is up to the judge to examine the legality of such a clause ex officio.

19/01/2022



Ruling of 19 January 2022, appeal no. 21-11.095

Partial quashing

Pursuant to Articles L. 132-1, now L. 212-1; and R. 132-2, 10°, now R. 212-2, 10°; of the Consumer Protection Code, a clause which obliges the consumer, in the event of a dispute with a trader, to have compulsory recourse to an alternative dispute resolution method before going to court, is presumed to be unfair, unless the trader can prove otherwise. In accordance with Article R. 632-1 of the Consumer Protection Code, as amended by Act No. 2014-344 of 17 March 2014, it is up to the judge to examine the legality of such a clause ex officio.

COUR DE CASSATION (COURT OF CASSATION)

Public hearing of 19 January 2022

Partial quashing

Ms TEILLER, President

Ruling No. 49 FS-B

Appeal No. U 21-11.095

F R E N C H R E P U B L I C

IN THE NAME OF THE FRENCH PEOPLE

RULING OF THE *COUR DE CASSATION* (COURT OF CASSATION), THIRD CIVIL CHAMBER, OF 19 JANUARY 2022

Mr [K] [I], residing at [Address 3], lodged appeal no. U 21-11.095 against the ruling of the *cour d'appel* (Court of Appeal) (First Civil and Commercial Chamber) of Besançon of 24 November 2020 in the dispute between him and:

1°/ Mr [J] [C], residing at [Address 2],

2°/ Mr [U] [V], residing at [Address 1], operating under the name Electric Service,

3°/ Polygone Habitat Concept, a limited liability company, whose registered office is at [Address 4], respondents to the quashing.

In support of his appeal, the appellant relies on the single plea for quashing appended to this ruling.

The case file has been sent to the Prosecutor-General.

On the report of Mr Boyer, Judge; the observations of SCP Thouin-Palat et Boucard, lawyer for Mr [I]; and the opinion of Mr Burgaud, Advocate-General Referee; after the arguments at the public hearing of 30 November 2021, at which were present Ms Teiller, President; Mr Boyer, Reporting Judge; Mr Maunand, Elder Judge; Mr Nivôse, Mme Greff-Bohnert, Mr Jacques, Mr Bech and Ms Abgrall, Judges; Ms Djikpa, Mr Zedda and Ms Brun, Judge Referees; Mr Burgaud, Advocate-General Referee; and Ms Besse, Chamber Registrar; the Third Civil Chamber of the *Cour de cassation* (Court of cassation), composed, pursuant to Article R. 431-5 of the Judicial Code, of the aforementioned President and Judges, after having deliberated in accordance with the law, has delivered the present ruling.

Partial withdrawal

1. Mr [I] is hereby notified that his appeal against Mr [C] and Mr [V] has been withdrawn.

Facts and procedure

2. According to the ruling under appeal (Besançon, 24 November 2020), by contract dated 6 November 2012, Mr [I] entrusted the management of a project to renovate a dwelling partly fitted out in an old cellar to Polygone Habitat Concept, Mr [V] having been entrusted with the electricity and ventilation package.
3. Mr [I] leased the renovated flat to Mr [C].
4. Complaining about the high level of humidity in the dwelling, Mr [C] sued Mr [I] for performance of the work and compensation for his losses, who then sued the parties involved in the construction contract.
5. An expert opinion was ordered.

Reviewing plea

Statement of plea

6. Mr [I] objects to the ruling declaring him ineligible to take action against Polygone Habitat Concept whereas “the judge must examine ex officio the unfairness of the clauses invoked by a party as soon as the necessary legal and factual elements for this purpose are available. In its version applicable to the project management contract of 6 November 2012, Article R. 132-2 10° of the Consumer Protection Code presumes unfair, in contracts between professionals and consumers, clauses whose purpose or effect is to hinder the exercise of legal actions by obliging the consumer to have prior recourse to an alternative dispute resolution method. In order to declare Mr [I], the client, ineligible to take action against the SARL, the project manager, the *cour d'appel* (Court of Appeal) held that Article 3.13 of the contract of 6 November 2012 contained a clause under the terms of which the parties undertook, in the event of a dispute over the performance of this contract, to refer the matter to the conciliation commission of the *association Franche-Comté Consommateurs* (Franche-Comté consumers association) before any legal proceedings were instituted. In so determining, without investigating ex officio, as it was required to do, whether this clause, which it was able to examine in fact and in law, was not unfair, the *cour d'appel* (Court of Appeal) infringed Article L. 132-1 of the Consumer Protection Code in its wording resulting from Act No. 2010-737 of 1 July 2010, together with Article R. 132-2 10° of the said code in its wording resulting from Executive Order 2009-302 of 18 March 2009 and Article R. 632-1 of the same code.”

Court's response

In view of Articles L. 132-1, now L. 212-1 of the Consumer Protection Code; R. 132-2, 10°, now R. 212-2, 10°; and R. 632-1 of the same code:

7. According to the first of these texts, in contracts concluded between professionals and consumers, terms are unfair if their purpose or effect is to create a significant imbalance between the rights and obligations of the parties to the contract, to the detriment of the consumer.
8. The second provides that, in contracts concluded between traders and consumers, terms which have the aim or effect of excluding or hindering the exercise of legal actions or remedies by the consumer, in particular by obliging the consumer to bring the matter exclusively before an arbitration court not covered by legal provisions or to use exclusively an alternative dispute resolution method, are presumed to be unfair, unless the trader can prove otherwise.

9. It is held, in light of these texts, that a clause which obliges the consumer, in the event of a dispute, to have compulsory recourse to mediation before going to court, is presumed to be unfair, unless the trader proves otherwise, so that the ruling which, in the absence of such proof to the contrary, gives effect to such a clause must be quashed (First Civil Chamber, 16 May 2018, appeal no. 17-16.197).
10. According to the third text, in its wording resulting from Act No. 2014-344 of 17 March 2014 and applicable to the dispute, the judge shall dismiss ex officio, after having heard the observations of the parties, the application of a clause whose unfairness is apparent during arguments.
11. In order to uphold Polygone Habitat Concept's refusal to accept the client's claims, the ruling, which held that the project management contract includes a clause stating that 'in the event of a dispute concerning the performance of the contract, the parties agree to refer the matter to the conciliation commission of the Franche-Comté Consommateurs association before any legal proceedings, except for any precautionary measures. In the absence of an amicable settlement, the dispute will fall within the jurisdiction of relevant courts' and noting that Mr [I] did not reply to this procedural plea, holds that failure to comply with this clause is sanctioned by a dismissal.
12. In so determining, the *cour d'appel* (Court of Appeal) did not provide a legal basis to its decision, whereas the clause which obliges the consumer, in the event of a dispute with a trader, to have compulsory recourse to an alternative dispute resolution method before going to court, is presumed to be unfair, unless the trader can prove the contrary, so that it was up to the court to examine the legality of such a clause ex officio.

ON THESE GROUNDS, the Court:

QUASHES AND SETS ASIDE, but only insofar as it declares Mr [I] ineligible to take action against Polygone Habitat Concept, the ruling handed down on 24 November 2020, between the parties, by the *cour d'appel* (Court of Appeal) of Besançon;

Returns, except on this point, the case and the parties to the status existing prior to the said ruling and refers them to the *cour d'appel* (Court of Appeal) of Dijon;

Orders Polygone Habitat Concept to pay costs;

Pursuant to Article 700 of the Civil Procedure Code, orders Polygone Habitat Concept to pay Mr [I] the sum of EUR. 3,000;

Declares that according to the procedures of the Prosecutor-General at the *Cour de cassation* (Court of cassation), this ruling will be transmitted to be noted in the margin or at the end of the partially quashed ruling;

Thus decided by the *Cour de cassation* (Court of cassation), Third Civil Chamber, and pronounced by the president at the public hearing of the nineteenth of January, two thousand twenty-two.

President : Mr Teiller

Reporting Judge : Mr Boyer, Judge

Advocate-General Referee : Mr Maunand

Lawyer(s) : SCP Thouin-Palat et Boucard

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