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Action for damages for breach of an established business relationship brought in the context of an intra-EU dispute: Action in tort or action in contract?

The action for damages for breach of an established business relationship brought in the context of an intra-EU dispute is not an action in tort if a tacit contractual relationship existed between the parties.

This is the principle laid down by the *Cour de Cassation* (French Supreme Court) in a decision dated September 20, 2017. By ruling so, the *Cour de Cassation* followed the findings of a recent judgment handed down by the Court of Justice of the European Union, and departs from the case-law it traditionally applies in domestic disputes.

1/ The Commercial Chamber of the *Cour de Cassation* has traditionally held that a claim for damages for breach of an established business relationships is a tort action

Under French law, a claim for damages for sudden breach of an established business relationship is governed by Article L. 442-6 I §5 of the French Commercial Code (hereinafter the "FCC"). This Article stipulates as follows: "*The following acts committed by any producer, trader, manufacturer or person listed in the trade register shall trigger the liability of their perpetrator and obligate said perpetrator to compensate the harm caused thereby: (...) Suddenly terminating, even partially, an established business relationship without prior written notice commensurate with the duration of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices*".

These provisions are public policy provisions.

The Commercial Chamber of the *Cour de Cassation* has ruled on several occasions that a claim for damages for sudden breach of an established business relationship is a tort claim, not a contractual claim [1]. Indeed, it considers that a business relationship can exist independently of whether a contract has been entered into between the parties.

The classification of such type of claim as a tort claim allows judges *inter alia* to set aside contractual provisions – wherever a contract has been entered into – such as jurisdiction or arbitration clauses and is relied upon to determine the competent courts in case of a dispute. Indeed, under French law, applicable jurisdiction rules depend on whether a claim is in tort or in contract.

As such, the plaintiff may, at its election and besides the court having jurisdiction over the territory where the defendant is domiciled, initiate proceedings:

-in contractual matters, before the court having jurisdiction over the territory where the thing was actually delivered or the service actually provided;

-in tort matters, before the court having jurisdiction over the territory where the harmful event occurred or where the damage was suffered.[2]

2/ The stance of the First Civil Chamber of the *Cour de Cassation* in international disputes

The First Civil Chamber of the *Cour de Cassation*, which traditionally hears private international law disputes, has repeatedly ruled that the public policy provisions set forth in Article L. 442-6 of the FCC do no prevent the application of contractual clauses, such as jurisdiction or arbitration clauses. As such, it confirmed the applicability of an arbitration clause that covered "*any dispute or controversy arising out of or in connection with the contract*" and the applicability of an arbitration clause that applied "*to all disputes arising from the breach of the contractual relationships*"[3] because the scope of application of such clauses was broad enough to cover the breach of the established business relationship.

However, based on the findings of these decisions, it appears that the stance adopted by the First Civil Chamber was driven by the drafting of the relevant clauses rather than by the nature of the claim brought under Article L. 442-6 of the FCC.

3/ The judgment handed down by the Court of Justice of the European Union dated July 14, 2016

Wherever there is a dispute between companies based in at least two different EU Member States, the competent court is determined pursuant to Regulation (EU) No 1215/2012 of December 12, 2012, known as the "Brussels I recast" Regulation[4]. Article 7 of this Regulation also makes a distinction between matters related to contract and matters related to tort, delict or quasi-delict.

Specifically, according to Article 7(1) of the Regulation, a person domiciled in a Member State may be sued in another Member State, in the courts having jurisdiction over the place where the obligation in question has been, or is to be, performed, either:

- in the case of the sale of goods: The place where the goods were delivered or should have been delivered;
- in the case of the provision of services: The place where the services were provided or should have been provided.

In addition, Article 7(2) of the Regulation stipulates that in matters relating to tort, delict or quasi-delict, the defendant must be sued before the courts having jurisdiction over the place where the harmful event occurred or may occur.

The Court of Justice of the European Union (hereinafter the "CJEU") has recently ruled on the nature of the action for damages for sudden breach of an established business relationship in an intra-EU dispute between an Italian supplier and a French distributor[5]. The parties had been doing business together for approximately 25 years without a framework contract being in place. Following the termination of the business relationship, the French distributor brought an action for damages against the Italian supplier before the Commercial Court of Marseille (France) on the basis of Article L. 442-6 I §5 of the FCC. The Italian supplier challenged the jurisdiction of the Commercial Court of Marseille and argued that the dispute ought to be heard by Italian courts because its general terms of sale stipulated that the goods were delivered "*Ex works*" at its plant in Italy, not at the distributor's head office in France. The Court of Appeals of Paris then made a request for a preliminary ruling and asked the CJEU whether the action for damages for breach of an established business relationship was a matter related to tort within the meaning of Regulation (EC) n°44/2001[6].

In a judgment dated July 14, 2016, the CJEU ruled that an action for damages for sudden breach of an established business relationship is not a matter relating to tort or delict within the meaning of the "Brussels I recast" Regulation if a **tacit contractual relationship** existed between the parties.

According to the CJEU, the existence of a tacit relationship **cannot be presumed** and must be demonstrated by a **body of consistent evidence** that must be ascertained by the trial judges, such as:

- the existence of a long-standing business relationship;
- the good faith between the parties;
- the regularity of the transactions and their development over time expressed in terms of quantity and value;
- any agreements as to prices charged and/or discounts granted; and
- the correspondence exchanged.

It follows from this judgment that trial judges must carry out a global and factual assessment of the relationship to decide whether, even in the absence of a written contract, a tacit contractual relationship exists between the parties.

4/ In a decision handed down on September 20, 2017, the Commercial Chamber of the *Cour de Cassation* endorsed the position of the CJEU

In that specific case[7], the dispute was between a Belgian company specialized in the manufacture of agricultural equipment and its former French distributor. The business relationship was terminated after several years of collaboration, without a contract having ever been signed. The French distributor summoned the Belgian manufacturer before the Commercial Court of Paris on the basis of Article L. 442-6 I §5 of the FCC. The manufacturer challenged the jurisdiction of the Commercial Court of Paris and argued that the case ought to be heard by Belgian courts since its general terms of sale stipulated that the goods were supposed to be delivered from its stores located in Belgium.

The *Cour de Cassation*, relying on the aforementioned reasoning of the CJEU (cf. 3/ above), ruled that the business relationship between the parties could be regarded as a tacit contractual relationship, after having noted that in the matter at hand:

- the Belgian supplier had supplied the French distributor from 2003 to 2010, and
- the Belgian supplier's general terms of sale specified that the goods were supposed to be delivered from its stores located in Belgium.

As such, the *Cour de Cassation* confirmed that the action for damages brought by the French distributor was a matter related to contract, and consequently held that the Commercial Court of Paris had no jurisdiction and that the case ought to be referred to the Belgian courts as per Article 5(1) of Regulation n°44/2001, which had become in the meantime Article 7 (1) of the "Brussels I recast" Regulation[8].

Even though this decision relates to intra-EU disputes, one may wonder whether this could be an early sign that the Commercial Chamber of the *Cour de Cassation* – which traditionally classifies an action based on Article L. 442-6 of the FCC as an action in tort – will depart from previous case-law when adjudicating purely French disputes. Indeed, it will have to confirm in the future whether it intends to apply Community case law in a domestic context.

In its judgment dated July 14, 2016, the CJEU has, for its part, clearly indicated that the concepts of matters "relating to contract" and "relating to tort or delict", within the meaning of the "Brussels I recast" Regulation, are autonomous concepts of EU law, which means that they could co-exist with the classification of the action for damages under L. 442-6 of the FCC as an action in tort, as usually applied by the Commercial Chamber of the *Cour de Cassation*.

[1] Cf. for instance decision of the Commercial Chamber of the *Cour de Cassation*, January 13, 2009, n°08-13971.

[2] Article 46 of the French Code of Civil Procedure.

[3] First Civil Chamber of the *Cour de Cassation*, July 8, 2010, n°09-67013; First Civil Chamber of the *Cour de Cassation*, October 22, 2008, n°07-15823; First Civil Chamber of the *Cour de Cassation*, March 6, 2007, n°06-10946; First Civil Chamber of the *Cour de Cassation*, January 18, 2017, n°15-26105.

[4] This Regulation repealed Regulation (EC) n°44/2001 of December 22, 2000 known as the "Brussels I" Regulation.

[5] CJEU, July 14, 2016, C-196/15, Granoloro SpA vs. Ambrosi Emmi France SA.

[6] In that matter, reference was made to Article 5(3) of Regulation (EC) n°44/2001 because the dispute was born before January 10, 2015, date on which the "Brussels I recast" Regulation became effective. However,

Article 7(2) of the “Brussels I recast” Regulation which replaced and superseded Article 5 (3) of Regulation n°44/2001 is couched in identical terms.

[7] Commercial Chamber of the *Cour de Cassation*, September 20, 2017, n°16-14812.

[8] In this case, the dispute was born before January 10, 21015, date on which the “Brussels I recast” Regulation became effective.