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Established business relationships – an elastic concept, on certain conditions

To assess the length of an established business relationship and determine the notice period that ought to be applied prior to the effective termination thereof, the length of the business relationship that preceded the sale of a business going concern must not be taken into account wherever it is not demonstrated that the purchaser of such going concern "*had the intent to pursue the business relationships initially developed*" between the seller and the terminated party.

This is the finding of the *Cour de Cassation* (French Supreme Court) in a decision rendered on September 15, 2015.

In a decision dated September 15, 2015, the Commercial Chamber of *the Cour de Cassation* upheld a judgment handed down on February 13, 2014 by the Paris Court of Appeals that had ruled that the purchaser of a business going concern (*fonds de commerce*) was not automatically substituted in the seller's rights and obligations in the contractual and business relationships that such seller used to have with its contractual partners prior to the sale[1].

The facts of this case are as follows.

The company Elidis, that operated a beverage trade business, had developed a business relationship with the company Vivien that had been in charge of the transport of Elidis' beverage supplies for many years.

On October 1, 2005, Elidis entered into a lease-management contract with the company Poitou Boissons, and the business was eventually sold to the later pursuant to a deed of sale dated March 30, 2006.

On April 14, 2006, Poitou Boissons informed Vivien of its decision to terminate their business relationship in order to use its own trucks to supply the beverages. The termination became effective in August 2006. As such, Poitou Boissons applied a four-month notice period prior to the effective termination of the business

relationship.

Invoking the length of the business relationship it had had with the predecessors of Poitou Boissons, Vivien initiated legal proceedings and sought the payment of damages for sudden breach of an established business relationships, on the basis of Article L.442-6, I, 5° of the French Commercial Code, pursuant to which:

"I.-The following acts committed by any producer, trader, manufacturer or person listed in the Trade Directory shall trigger the liability of their perpetrator and obligate said perpetrator to compensate the harm caused thereby:

[…]

5° (…) suddenly terminating, even partially, an established commercial relationship without prior written notice commensurate with the length of the business relationship and consistent with the minimum notice period determined by the multi-sector agreements in line with standard commercial practices ».

It follows from the above-cited Article that the notice period to be granted to the terminated party must take into account the length of the business relationship.

Consequently, wherever the duration of the notice period is held insufficient, the amount of damages to be awarded to the terminated party is primarily based on the length of the business relationship.

Before commercial courts, commercial partners often fight about the actual length of their business relationship and, more precisely, about the date to serve as a starting point to calculate such length.

In the commented case, Vivien argued that its business relationship with Poitou Boissons (lessee-manager and then purchaser of the business) dated back to the start of the relationship initially developed with Elidis (the seller of the business) and had thus lasted for several years, which made the four-month notice period insufficient and justified the award of 250,000 euros in damages.

On the other hand, Poitou Boissons (lessee-manager and then purchaser of the business) considered that its business relationship with Vivien started on October 1, 2005, i.e. the date on which the lease-management contract had been entered into, and had thus only lasted for six and a half months, which made the notice period amply sufficient.

Poitou Boissons' reasoning was followed by the trial courts and by the *Cour de Cassation* that dismissed the claims brought by Vivien.

By ruling so, the *Cour de Cassation* recalled that there is no imperative and automatic rule applicable to the assumption by the lessee-manager or purchaser of a business going concern of the business relationship initially developed by the seller of such going concern.

It stated that following the sale of the business going concern "*the purchaser has not* ***ipso jure*** *been substituted in seller with respect to the contractual and business relationships that this company used to have*

with Vivien".

In fact, what matters is the purchaser's intent to pursue, or not to pursue, the relationships, and how the terminating party perceived such intent.

As such, wherever one of the contracting parties has been replaced by another, the previously established business relationship must be taken into account only if there exists factual elements that may demonstrate that the successor had the intent of continuing the business relationship initially developed by its predecessor.

Courts must, therefore, decipher the "intent" of the successor and the elements that may help determine such intent.

In the commented case, the *Cour de Cassation* held that the mere fact that Poitou Boissons continued the business relationship – by outsourcing the transportation of its beverages to Vivien during the lease management period, i.e. from October 1, 2005 to March 30, 2006 (6 months), and then from April 1 to April 15, 2006 (15 days) following the acquisition of the business – was not a sufficient basis for "*considering that this company has had the intention to continue the business relationship initially developed between Elidis and Vivien*".

The *Cour de Cassation* would certainly have ruled otherwise if the relationship after the lease-management and/or after the acquisition of the business had lasted longer. It would have probably considered that Poitou Boissons had validly expressed its desire to maintain the continuity of the business relationship initially developed by Elidis.

The *Cour de cassation* thus recalled the significance of (i) the parties' intent to continue the business relationship, and (ii) the elements that may establish that the terminating party could legitimately expect that the business relationship would continue in the future.

In its 2008 annual report, the *Cour de cassation* already stated that the business relationship is to be considered as established wherever it is demonstrated that:

"[…] the business relationship was ongoing, stable and regular, on the one hand, and the terminated party could reasonably anticipate for the future a continued business flow with its trading partner, on the other hand".

As such, the existence of an established business relationship is based on the combination of two criteria: the stability of the relationship and the legitimate expectation that such relationship will continue.

Other decisions of the *Cour de Cassation* provide further insights into this analysis of the concept of business relationship.

In a decision dated September 25, 2012 concerning a case where a business relationship had started in 1991 between two trading partners and where one of said partners was replaced by a third party in 2003, the *Cour*

de Cassation ruled that 1991 was to be considered as the starting point of the relationship insofar as the parties had intended to maintain continuity with the previous relationship (Commercial Chamber of the *Cour de Cassation*, September 25, 2012, n° 11-24.301, Nestlé Maroc, Nestlé France c/ Sté Charles).

In a decision dated January 29, 2008, the *Cour de Cassation* held that:

"By ruling so, without examining – as it had been invited to do – whether the company BP France that had assumed, pursuant to an amendment to the contract entered into between the companies X. and Mobil Oil, some commitments of the latter, had not continued the business relationship initially developed, the Court of Appeals has rendered a decision that has no legal basis" (Commercial Chamber of the *Cour de Cassation*, January 29, 2008, Sté X c/ Sté BP France, n° 07-12.039 : JurisData n° 2008-02527).

In this respect, French legal writers explain that "*judges act pragmatically: it is not because one of the contractual partners has been replaced by another that the previously developed relationship may not be taken into account*" (JCl *Concurrence Consommation*, Fasc. 300 n°17 *Rupture brutale des relations commerciales établies* (C. COM., ART. L. 442-6, I, 5°).

The decision of September 15, 2015 is a further illustration of the fact that the concept of established business relationships – a concept that is more economic than legal – is more or less elastic.

This decision is particularly noteworthy because the judges' analysis of the situation and interpretation of the terminating party's intent were, this time, unfavorable to the terminated party.

[1] Commercial Chamber of the *Cour de Cassation*, September 15, 2015, n°14-17964