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Sudden breach of established business relationships: the contractual notice period may be held excessive as a result of an extensive interpretation of article l. 442-6 i §5 of the french commercial code

The number of court decisions concerning the sudden breach of established business relationships is continuously increasing... But the new rulings do not necessarily tally with what we would expect, as demonstrated by a decision recently rendered by the *Cour de Cassation* (French Supreme Court) and commented herein[1].

The facts of the case are as follows:

In April 2006, a car dealer (the "Dealer") and an approved workshop (the "Agent") entered into an agreement for the supply of spare parts and new motor vehicles.

In early December 2007, the Agent notified in writing the Dealer of his dissatisfaction regarding the performance of the agreement and his decision to terminate their contractual relationship.

The Agent then decided to sue the Dealer on the basis of Article 1134 of the French Civil Code. Specifically, it considered that the Dealer had abusively and unfairly terminated the agreement by creating a situation where the Agent was unable to do business as an accredited agent.

The Dealer filed a counterclaim on the basis of Articles 1134, 1135 and 1147 of the French Civil Code and L. 442-6-I §5 of the French Commercial Code (the "FCC") and argued that the Agent had terminated the contractual relationship on his own initiative and failed to comply with the 24-month notice period set forth in the agreement. The Dealer thus requested a compensation corresponding to the gross margin it would have earned during the aforementioned 24-month contractual notice period.

Appellate judges[2] held that the Agent had indeed terminated the contractual relationship on his own initiative and could not, therefore, claim that the Dealer had abusively and unfairly terminated the agreement.

They also noted that the Agent had failed to comply with the formalities required to terminate the agreement and to observe the duration of the notice period provided for by such agreement.

On the other hand – and this is the major interesting aspect of the case – the appellate judges found that the 24-month contractual notice period was too long in light of the length of the business relationships (less than 20 months) and, consequently, decided to reduce the notice period to 6 months.

The Dealer then lodged an appeal before the *Cour de Cassation*, complaining that the appellate judgment undermined the binding force of the agreement, in breach of Article 1134 of the French Civil Code.

Using what has now become a classic formula, the *Cour de Cassation* confirmed the appellate judges' analysis:

*"But **the existence of a contractual notice period does not prevent the court from examining whether this notice period takes into account the length of the business relationships and other circumstances existing at the time of the notification of the termination;** having acknowledged the **short length of the business relationships** between the companies JP Froment and Vista automobiles and noted that the fitting works within the latter's shop had not been implemented for the benefit of the company JP Froment, the Court of Appeals, that has not upheld the rationale challenged by the second and third parts of the plea, was justified in **limiting to six month the reasonable notice period** to which was entitled the company JP Froment;"*

It is on a similar ground that the *Cour de Cassation* had so far applied a longer notice period than that provided for under a contract[3] or even under applicable commercial practices or multi-sector agreements[4], when the length and characteristics of the business relationships so justified.

There was thus reason to believe that Article L. 442-6 I 5 of the FCC – which is a public policy rule – was applied only to protect the terminated party insofar as the contractual provisions were held by the judge as being unfavorable to the latter.

The commented decision clearly departs from the decisions previously rendered by the *Cour de Cassation* in relation to Article L. 442-6 I §5 of the FCC as it has the effect of penalizing the terminated party by reducing the contractual notice period.

By ruling so, the *Cour de Cassation* indicates that it intends to make an extensive application of Article L. 442-6 I §5of the FCC, the public policy provisions set forth therein allowing it to assess the reasonableness of the contractual notice period and to deviate therefrom, either by extending it or reducing it, irrespective of the party in whose favor this decision is *in fine* handed down.

It is interesting to note that the terminated party brought its claims on the basis of Article L. 442-6 I §5 of the

FCC but also under Article 1134 of the French Civil Code.

This second legal basis was rejected by the judges who confirmed that in case of a legal action for breach of established business relationships – which is a tort action, as recognized by the Commercial Chamber of the *Cour de Cassation*[5], the only thing that matters is the judges' sovereign power to assess the reasonableness of the notice period, contractual provisions being merely a clue that should be taken into account in their analysis.

As a result of the commented decision, parties that consider to be the victim of a sudden termination and that bring a legal action on the basis of Article L. 442-6 I §5 of the FCC face a higher degree of uncertainty as to the outcome of their action as judges may eventually decide to apply a notice period shorter than that provided for under the terminated contract.

It may also be expected that, when notifying the termination of the business relationships to its co-contractor, the terminating party may decide on his own to reduce the contractual notice period based on the short length of such business relationships…

Lastly, it is worth noting that in the commented case the appellate judges had ruled that a notice period of one year was applicable as the 6-month contractual notice period ought to be doubled, as per the provisions set forth in Article L. 442-6 I §5of the FCC, because the supplied products were distributed under the retailer's brand. This rule had been introduced in order to protect suppliers that act as sub-contractors of distributors.

The *Cour de Cassation*, however, reversed the appellate judgment on this specific point and remanded the case to a Court of Appeals. It held that, as per Article 16 of the French Code of Civil Procedure, the appellate judges had addressed this issue on their own initiative without having first asked the parties to elaborate on this, in breach of the principle of the right to be heard.

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[1] Commercial Chamber of the *Cour de Cassation*, October 22, 2013, n°12-19.500

[2] Court of Appeals of Reims, Civil Chamber, 1st Section, March 13, 2012, n°10/02407

[3] Cf. for instance: Commercial Chamber of the *Cour de Cassation*, May 12, 2004, n°01-12.865

[4] Cf. for instance: Commercial Chamber of the *Cour de Cassation*, February 2, 2008, n°08-10.731 and Commercial Chamber of the *Cour de Cassation*, May 3, 2012, n °11-10544

[5] Cf. for instance: Commercial Chamber of the *Cour de Cassation*, January 13, 2009, n°08-13.971

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