

Sudden termination of an established business relationship and international arbitration: continuation of the debate on the characterization of liability under article L. 442-6, I, 5° of the French Commercial Code

According to a case-law principle established by the Commercial Chamber of the *Cour de Cassation* (French Supreme Court of hereinafter “FSC”), a party that suddenly terminates, even partially, an established commercial 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, is liable in tort^[1] under Article L. 442-6, I, 5° of the French Commercial Code.

In the wake of this case-law, the Commercial Chamber of the FSC confirmed that the competent court is that having jurisdiction over the territory where the harmful event occurred, as per the French and EU jurisdictional rules^[2] applicable to tort actions, and consequently set aside the application of a jurisdiction clause^[3].

However, the First Civil Chamber of the FSC^[4] seems to adopt a conflicting position by applying contractual liability rules in case of a liability claim based on Article L. 442-6, I, 5° of the French Commercial Code.

As such, the First Civil Chamber of the FSC ruled that an arbitration clause set forth in an international distribution contract was applicable because only a nullity of such arbitration clause could challenge the arbitrators’ competence, and, consequently excluded the jurisdiction of the French Commercial Court before

which the matter had been brought by the terminated party^[5].

Similarly, in another case, the First Civil Chamber of the FSC ruled that the provisions of jurisdiction clauses set forth in international contracts should prevail, thereby excluding the jurisdiction of French courts before which the case had been brought under jurisdictional rules applicable to tort actions^[6].

In the commented decision, the First Civil Chamber of the FSC pursued its reasoning and confirmed that the provisions of an arbitration clause set forth in an international distribution contract should prevail over the jurisdictional rules applicable to tort cases.^[7]

In this matter, a Swedish corporation terminated a distribution contract entered into with a French company. The contract included an arbitration clause. Yet, the French company initiated proceedings before the Commercial Court and claimed damages for sudden termination of the contractual relationship on the basis of Article L442-6, I, 5° of the French Commercial Code.

The Court of Appeals held that French courts were not competent to hear the dispute.

The French company lodged an appeal before the FSC and argued that the arbitration clause set forth in the contract was manifestly inapplicable because (i) the claim was based in tort and relied on the provisions of Article L442-6, I, 5° that was allegedly to be considered as a “*loi de police*” (i.e. a category of overriding mandatory rules of French law that apply in France regardless of the law applicable to the contract and notwithstanding any contractual provision to the contrary), which therefore excluded arbitration and (ii) a contractual party’s failure to comply with a legal obligation was itself independent from the contract.

The FSC dismissed the appeal and upheld the findings of the Court of Appeals. It ruled that “*an arbitration clause covering any dispute or controversy arising out of or in connection with the contract is not manifestly inapplicable insofar as the plaintiff’s claim is sufficiently connected to the contract since it relates to the circumstances in which the contract has been terminated and to the consequences of the termination for the Plaintiff, regardless of whether public policy provisions apply to the merits of the case insofar as arbitration cannot be excluded just because public policy provisions – even if such public policy provisions constitute “loi de police” – are applicable*”.

This decision is important for two reasons.

Firstly, it fuels the debate between the Commercial Chamber and the Civil Chamber of the FSC on the contractual or tort nature of liability claims brought on the basis of Article L. 442-6 I 5° of the French Commercial Code when the relevant contract includes a jurisdiction or arbitration clause.

The position of the Commercial Chamber of the FSC – according to which a claim for termination of an established business relationship is a tort action – makes it easier for an economically weak party to initiate proceedings since, pursuant to French and EU rules on tort actions, the competent court is the court having jurisdiction over the territory where the harmful event occurred and, as such, most of the time, the court

having jurisdiction over the territory where the plaintiff's domicile or registered office is established^[8].

Yet, it is important to note that in the two above-referred cases in which the Commercial Chamber of the FSC excluded the application of jurisdiction clauses, the termination of the business relationship itself was not addressed in the contract^[9].

It seems that the Commercial Chamber of the FSC has primarily tried to ascertain the exact intention of the parties in light of the drafting of the jurisdiction clause and, consequently, refused to apply such clause in the absence of any reference therein to the termination of the commercial relationship.

Whatever the adjudicating Chamber, this decision is a further reminder of the FSC on the necessity to pay the utmost attention to the drafting of jurisdiction and arbitration clauses.

Secondly, even if it gave precedence over the parties' intention, the First Civil Chamber of the FSC implicitly admitted that the provisions of Article L. 442-6 of the French Commercial code are to be considered as "*lois de polices*" and treated as such in international relationships.

In any event, Article L. 442-6 III 5° of the French Commercial Code, as modified by the Law on the Modernization of the Economy of August 4, 2008, now provides that any and all disputes concerning the application of this Article shall be exclusively referred to eight jurisdictions, the seat and geographical jurisdiction of which are fixed by Decree^[10].

[1] Commercial Chamber of the Cour de Cassation, February 6, 2007, n°04-13.178; Commercial Chamber of the Cour de Cassation, January 13, 2009, n° 08-13.971; Commercial Chamber of the Cour de Cassation, October 21, 2008, n° 07-12.336.

[2] Commercial Chamber of the Cour de Cassation, *September 15, 2009, n°07-10.493*, see our [July-August 2010 e-newsletter](#).

[3] Commercial Chamber of the Cour de Cassation, *October 13, 2009, n°08-20.411*; Commercial Chamber of the Cour de Cassation, March 9, 2010, n°09-10.216, see our [July-August 2010 e-newsletter](#).

[4] In principle, the First Civil Chamber of the FSC hears transnational disputes while the Commercial Chamber of the FSC hears domestic disputes.

[5] First Civil Chamber of the Cour de Cassation, November 12, 2009, n°09-10575.

[6] First Civil Chamber of the Cour de Cassation, March 6, 2007, n° 06-10.946; First Civil Chamber of the Cour de Cassation, October 22, 2008, n°07-15.823.

[7] Commercial Chamber of the *Cour de Cassation*, July 8, 2010, n°09-67.013.

[8] Article 46 of the French Code of Civil Procedure; Article 5 of Council Regulation (EC) No 44/2001 of December 22, 2000.

[9] Commercial Chamber of the *Cour de Cassation*, October 13, 2010 and March 9, 2010, *ibid*.

[10] Decree n°2009-1384 of November 11, 2009 (Article 2) codified in Article D. 442-3 of the French Commercial Code that refers to Annex 4-2-1 of said Code. Pursuant to such Annex the Commercial Courts of Marseilles, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes have exclusive jurisdiction to hear any and all disputes based on Article L. 442-6 of the French Commercial Code. In addition, the Paris Court of Appeals has now exclusive appellate jurisdiction to hear appeals against decisions concerning the application of Article L. 442-6 of the French Commercial Code rendered by any of the aforementioned Commercial Courts.

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