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# Termination of a business relationship without suddenness: Recent case law illustrations

## In two decisions issued on the same day, the Commercial Chamber of the *Cour de Cassation*(French Supreme Court) provided two illustrations of situations in which it can dismiss a claim for sudden breach of an established business relationship.

## These two decisions are worth noting in a case law landscape where this concept defined by Article L. 442-6 I 5e of the French Commercial Code and relied upon on a recurrent basis before the courts, frequently results in a judgment being entered against the breaching party.

### 1/ Reminder of the concept of sudden breach of an established business relationship

Article L. 442-6 I 5e of the French Commercial Code 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 (…)"*.

According to the numerous court decisions rendered on this issue, the party who relies upon this Article must be able to prove the following elements:

- The existence of a **business**relationship with the breaching party,
- The **stable and established**nature of this business relationship: this is characterized in particular by the terminated party's legitimate belief that the relationship would continue,
- The **suddenness**of the termination: this is characterized by the absence of written notice period or a

notice period deemed insufficient, primarily with regard to the length of the relationship and its essential characteristics (exclusivity, the non-breaching party's economic dependence, the volume and development of turnover between the parties, the investments made by the non-breaching party, etc.), or professional practices or agreements.

It should also be recalled that the presence of one or more written contracts is not essential to establish the existence of a business relationship as it may be oral and result from business practice.

Similarly, the fact that the breaching party complies with the notice period provided for in the contract does not allow it to escape the application of Article L. 442-6 I 5e of the French Commercial Code. Indeed, the judge takes into consideration the business relationship as a whole (length, essential characteristics, professional practices, etc.) to assess the suddenness of the termination.

While many court decisions are entered against breaching parties, it remains that the very fact of terminating a business relationship is perfectly lawful, as the parties are free to trade with the partner of their choice and to separate from it at their convenience.

It is, therefore, the sudden nature of the termination that is sanctioned, i.e. the absence of notice period or an insufficient notice period. On the other hand, if the breaching party proves that it has given sufficient notice, it cannot be held liable in this respect.

In addition, in certain situations, the fact of putting a rapid, or even immediate, end to a business relationship, even a long-standing one, may prove justified and be exclusive of any suddenness within the meaning of Article L. 442-6 I 5e of the French Commercial Code. The two decisions of the *Cour de Cassation*commented herein provide recent illustrations of these situations.

**2/ The variability of orders specific to a business sector may be invoked to challenge the established nature of the business relationship and legitimize a termination without notice**

As indicated above, one of the criteria for the application of Article L. 442-6 I 5e of the French Commercial Code is the stable and established nature of the business relationship.

However, the lack of sustainability in the relationship deprives Article L. 442-6 I 5e of effect and allows the breaching party to escape liability under this Article.

It is in these circumstances that the *Cour de Cassation*issued the first judgment commented herein. In that specific case[1], a supplier complained to his customer, a ready-to-wear brand with which he had been in business for seventeen years, that the latter had first reduced his orders for two years and then stopped them.

The supplier's claim based on Article L. 442-6 I 5e of the French Commercial Code was dismissed by the trial judges on the ground that "*the fluctuation in orders reflects the characteristics of the clothing sales industry and the commonly established professional practices, from which it must be deducted the absence of stability in the relationship, which excludes any legitimate belief in the continuation of such orders*".

The Court of Appeals had also noted the absence of a framework agreement with a commitment to place a minimum number of orders, a limited number of orders and the fluctuating and irregular nature of turnover between the parties between 2003 and 2012, and zero in 2008.

The *Cour de Cassation*confirmed the analysis of the trial judges.

Thus, despite the existence of a long-standing relationship (seventeen years), the supplier was legitimately able to stop its orders without notice period because of the **fluctuating nature of orders inherent in the clothing sales industry, which deprived the business relationship of any established character.**

**3/ Non-payment of invoices may constitute a serious default and justify termination without notice**

Article L. 442-6 I 5e stipulates that the provisions prohibiting the termination of a business relationship without notice (cf. **1/**above) "*shall not prevent the right of termination without notice, in the event of non-performance by the other party of its obligations or in case of force majeure*."

On this basis, French courts accept that the default of one of the trading partners may justify the termination of the business relationship without notice by the other contracting party, even if such relationship is an established one. The breaching party must nevertheless demonstrate that this default is sufficiently serious to justify an immediate termination of the relationship.

The second judgment of the *Cour de Cassation*[2]commented herein provides an illustration of what it considers as a serious default likely to exclude the application of Article L. 442-6 I 5e of the French Commercial Code.

In that specific case, the dispute was between a service provider ("X") specialized in the provision of digital content for the general public and a company ("Y") offering paid access to various online services. The parties, who had been doing business together since 2005, had entered into several three-party agreements that also included France Telecom as a contracting party.

At the expiry of the last three-party agreement in 2012, a six-month exclusive representation agreement was concluded between X and Y, under which Y entrusted X with the task of negotiating new contractual terms with France Telecom.

Y finally terminated the representation agreement **with immediate effect**because of X's failure to pay its invoices issued since 2010, despite e-mails, formal notices, summonses to pay and judgments. X then sued Y on the basis of Article L. 442-6 I 5e of the French Commercial Code.

In particular, X argued that the fact that it was in payment default, a situation that had been, according to it, tolerated for years, did not constitute a serious default allowing a termination without notice.

This argument did not convince the appellate judges who considered that X's failure to pay invoices constituted a **breach of its essential obligations**, and that this breach was therefore **sufficiently serious to justify the termination of the business relationship without notice**.

The *Cour de Cassation*then upheld the position of the Court of Appeals.

[1]Commercial Chamber of the *Cour de Cassation*, March 27, 2019, n°17-18047

[2]Commercial Chamber of the *Cour de Cassation*, March 27, 2019, n°17-16548