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Arbitration and claims for compensation for sudden breach of an established business relationship

Neither the public policy nature of the provisions set forth in Article L. 442-6 of the French Commercial Code nor the exclusive jurisdiction granted to judicial courts to hear restrictive trade practices related cases – including cases concerning the sudden breach of an established business relationship – precludes the use of arbitration to settle disputes in connection with this Article.

As such, insofar as it falls within the scope of application of the arbitration clause agreed upon by the parties, a claim for compensation for the loss suffered as a result of the sudden breach of an established business relationship can validly be brought before an arbitration tribunal.

This is the finding of the *Cour de Cassation* (French Supreme Court) in a decision rendered on October 21, 2015.

In the commented case[1], the company Conserveries des cinq océans ("CCO") initiated arbitration proceedings against the company Scamark in accordance with the arbitration clause set forth in the contract for the manufacture of private label products that had been entered into between these two companies.

The arbitral tribunal to which the dispute had been submitted held that it had jurisdiction to hear the claims brought by CCO under Article L. 442-6-I 5° of the French Commercial Code to seek compensation for the loss suffered as a result of the sudden breach of an established business relationship. It should be recalled that (i) this Article punishes the fact, for an economic operator, of breaching an established business relationship without a written notice period commensurate with the length of the relationship, and (ii) any and all disputes

concerning the application of this Article fall, in principle, under the exclusive jurisdiction of a number of civil and commercial courts listed in the French Commercial Code[2].

Ordered by the arbitral tribunal to pay to CCO, among others, the sum of 2,500,000 euros under Article L. 442-6-I 5° of the French Commercial Code, Scamark filed a motion for annulment of the award. This motion was dismissed by the Paris Court of Appeals[3].

In its decision dated October 21, 2015, the *Cour de Cassation* upheld the judgment of the Paris Court of Appeals, and provided a particularly instructive statement of grounds: "*Having recalled that the purpose of Articles L. 442-6 and D. 442-3 of the French Commercial Code is to adapt the jurisdiction of the courts and the judicial procedures to the technicity of disputes related to restrictive trade practices, and that the fact that the first of the above-mentioned legal texts grants to the Ministry of the Economy and the public prosecutor the power to act autonomously to protect the market and preserve competition do not have the effect of excluding the use of arbitration to settle the disputes arising between economic operators in connection with the application of Article L. 442-6*", from which the Paris Court of Appeals rightly inferred that *"the claim for compensation of the loss that allegedly resulted from the termination of the business relationship is not one of those that are the preserve of state courts".*

This decision thus recalls that the claim for compensation based on the sudden breach of an established business relationship is a dispute that may be submitted to arbitration. The *Cour de Cassation* had already adopted this view in a decision rendered on July 8, 2010[4] in connection with an international dispute. Asked to rule on the inapplicability of an arbitration clause, it notably held that the use of arbitration was not excluded "*simply because mandatory provisions, even if they are considered as public order provisions*," are applicable to the substance of the dispute.

By applying this solution to a domestic dispute and in the context of a motion for annulment of an arbitral award, the *Cour de Cassation* enshrines the arbitrability of disputes arising from or in connection with the sudden breach of an established business relationship.

In addition, in response to the argumentation developed by Scamark in the commented case, the *Cour de Cassation* confirmed in its decision that neither the public policy rules set forth in Article L. 442-6 of the French Commercial Code, the exclusive jurisdiction granted to certain courts, nor a possible action by the Ministry of the Economy or the public prosecutor, can challenge the implementation of the arbitration clause set forth in the contract.

In the commented case, the dismissal of the motion for annulment of the arbitral award was also justified by the fact that the scope of application of the arbitration clause was broad enough to cover any disputes arising from the breach of an established business relationship.

The arbitration clause in question stipulated that "*disputes arising in connection with the validity, interpretation, performance or non-performance, discontinuation or termination of this contract*" would be settled by way of arbitration.

In its decision, the *Cour de Cassation* stated that "*having noted that the general terms used in the arbitration clause reflected the parties' intent to submit to arbitration any disputes arising from the contract, without dwelling upon whether the action should be classified as a contractual claim or a tort claim, the Court of Appeals has, at its sole discretion, inferred that the arbitration tribunal had jurisdiction*".

The *Cour de Cassation* – having considered in the commented case that the arbitration clause did not preclude a tort action insofar as such action is derived from the contract in which the clause is incorporated – confirmed that the fact that the party suddenly terminating an established business relationship is liable in tort does not challenge the application of the arbitration clause set forth in the contract.

The commented decision also recalls that it is extremely important to carefully draft the arbitration clause to avoid any issue on its scope of application. In particular, such scope of application must be broad enough to cover the sudden breach of an established business relationship.

[1] First Civil Chamber of the *Cour de Cassation*, October 21, 2015, n°14-25.080

[2] As per Articles D. 442-3 and D. 442-4 of the French Commercial Code, a limited number of specialized courts has jurisdiction to hear disputes related to restrictive trade practices, i.e. the Commercial Courts and First Instance Courts of Marseilles, Bordeaux, Lille, Fort-de-France, Lyon, Nancy, Paris and Rennes. The Paris Court of Appeals has exclusive appellate jurisdiction to hear such disputes.

[3] Paris Court of Appeals, July 1, 2014, n°13/09208.

[4] First Civil Chamber of the Cour de Cassation, July 8, 2010, n°09-67.013.