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Continuation of current contracts in insolvency/bankruptcy proceedings

"Any clause that amends *the conditions for the continuation of a current contract by diminishing the rights or increasing the obligations of the debtor merely because the latter has been placed in receivership is prohibited"*[1].

Making an **extensive interpretation of the principle of continuation of current contracts** enshrined in Article L.622-13 of the French Commercial Code (1), the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) held, in a judgment dated January 14, 2014, that **the conditions governing the continuation of a current contract may not be amended to the detriment of the debtor simply because the latter has been placed in receivership** (2).

1. Reminder of the principle of continuation of current contracts

Article L.622-13, I of the French Commercial Code stipulates as follows:

"***Notwithstanding any legal provision or contractual term*** *to the contrary, the indivisibility, termination or rescission of a current contract may not result from the commencement of* ***safeguard proceedings*** *alone*".

This principle is a public policy principle that also applies to receivership proceedings – by way of reference to the above-mentioned Article L.622-13, I[2], and **judicial liquidation proceedings**[3].

The corollary of this principle – that has been laid down to preserve distressed companies – is the option right provided for under Articles L.622-13, II[4] and L.641-11-1, II[5] of the French Commercial Code according to which (i) "***the receiver alone***"(or, as the case may be, the debtor) in case of safeguard or receivership proceedings, or (ii) "***the liquidator alone***" in case of judicial liquidation proceedings, "***is entitled to request***" **– or not – the performance of one current contract or another**.

An analysis of court decisions rendered on this issue shows that the concept of "current contracts" covers all contracts – whatever their nature and their terms and conditions (except, in particular, employment agreements and trust agreements that are governed by a specific set of rules and commercial lease agreements) – that **have entered into force before the judgment opening the receivership/judicial liquidation proceedings and that were not ended for any reason whatsoever before such judgment**. According to French legal writers, these contracts are mainly continuing performance contracts (*contrats à exécution successive*), the performance of which is underway, and contracts of instantaneous performance (*contrats à exécution instantanée*) that have not yet been performed.

2. Extension of the principle of continuation of current contracts

It is on the basis of this principle that the Commercial Chamber of the *Cour de Cassation* held, in a judgment dated January 14, 2014, that the conditions governing the continuation of current contracts may not be amended to the detriment of the debtor simply because the latter has been placed in receivership.

The facts of the case were as follows:

1. A company was placed in receivership in October 2008 and then in judicial liquidation in June 2009.
2. In the meantime, i.e. in February and April 2009, fires occurred in the company's premises.
3. The liquidator of the company requested the payment of an indemnity to compensate for the impairment of the on-going business concern caused by such fires.
4. The insurer, relying on a warranty exclusion clause stipulating that the insurer does not guarantee the impairment of the on-going business concern caused by a damage that occurs after the opening of receivership or judicial liquidation proceedings, refused to pay the requested indemnity.

The liquidator's claim for indemnification was dismissed both in first instance and appellate proceedings[6].

The *Cour de Cassation*, inferring from applicable legal texts that "*any clause that amends the conditions for the continuation of a current contract by diminishing the rights or increasing the obligations of the debtor merely because the latter has been placed in receivership is prohibited*", quashed and nullified all the findings of the appellate judgment.

We believe this solution should also apply to safeguard proceedings.

In practice, many contracts stipulate that the rights and obligations of the parties shall be modified following the commencement of insolvency/bankruptcy proceedings, or even provide for their automatic termination in such a case. The commented decision of the *Cour de Cassation* confirms that such provisions should be dealt with carefully, if not simply avoided.

[1] Commercial Chamber of the *Cour de Cassation*, January 14, 2014, n°12-22.909.

[2]. Pursuant to Article L.631-14 of the French Commercial Code: "*Articles L622-2 to L622-9, to the exception of Article L.622-6-1, and L622-13 to L622-33 shall apply to receivership proceedings, subject to the following provisions.*"

[3] Pursuant to Article L.641-11-1, I of the French Commercial Code: "*Notwithstanding any legal provision or contractual term to the contrary, the indivisibility, termination or rescission of a current contract may not result from the commencement of judicial liquidation proceedings or placement in judicial liquidation alone.*"

[4] Article L.622-13, II of the French Commercial Code: "*The receiver alone is entitled to request the performance of current contracts by providing the promised consideration to the debtor's co-contractors.*"

[5] Article L.641-11-1, II of the French Commercial Code: "*The liquidator alone is entitled to request the performance of current contracts by providing the promised consideration to the debtor's co-contractors.*"

[6] Commercial Court of Lille, September 29, 2010, and Court of Appeals of Douai, May 12, 2012.