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Sudden breach of an established business relationship: the fact that Article L. 442-6 of the French Commercial Code is a public policy rule does not prevent the parties from agreeing on the terms and conditions of the breach and the related compensation.

Article L. 442-6 I 5^{e} of the French Commercial Code (the "FCC") punishes the sudden breach of an established business relationship and sets forth the public policy principle that the terminating party is liable in tort, a principle from which the contractual parties may not derogate.

Yet, nothing prevents the parties from contractually agreeing on the terms and conditions that will apply to the breach of their business relationship and finding an agreement on the compensation for the loss suffered as a result of such breach.

This is the principle laid out by the *Cour de Cassation* (French Supreme Court) in a decision dated December 16, 2014.

It is needless to recall that pursuant to public policy provisions, a party that suddenly terminates an established business relationship, a tortious act defined and punished under Article L. 442-6 I 5e of the FCC, is liable in tort.

Because these are public policy provisions, the parties may not contractually derogate therefrom under any

circumstances.

Yet, the parties may agree on the terms and conditions that will apply to the breach of their business relationship and on the conditions of the indemnification that will be paid to compensate for the loss suffered as a result of such breach. This is the clarification made by the *Cour de Cassation* in a recent decision dated December 16, 2014[1] and commented below.

1. Reminder of the facts of the case

A manufacturer of furniture had been doing business with a distributor since 1993. In early 2009, the distributor launched a call for tenders for the manufacture of its ranges of furniture and invited the manufacturer to make a bid. The distributor also informed its manufacturer that the volume of its purchases would decline between September 2009 and August 2010. In July 2009, the parties signed an agreement according to which the distributor would pay an indemnity to the manufacturer to compensate for the decline in the purchase volume. The manufacturer eventually won the tender but the forecasted volumes and revenues were inferior to the then-current ones. The parties then agreed in December 2009 to postpone the implementation of the subject-matter of the tender process and to continue their business relationship according to the same pricing terms and purchase volumes until the end of August 2010. At the end of August 2010, the parties finally entered into an agreement that provided for the termination of their business relationship between September 1, 2010 and December 31, 2012 and for a gradual decrease in purchase commitments over said period.

The manufacturer then initiated legal proceedings against the distributor and claimed damages for sudden breach of their established business relationship.

A noteworthy development was that the Minister of the Economy had joined the proceedings and requested the Court to impose a civil fine on the distributor, as permitted under Article L. 442-6 III of the FCC.

On appeal, the distributor was held liable in tort under Article L .442-6 I 5^{e} of the FCC and ordered to pay damages and a civil fine.

2. The decision of December 16, 2014

Contrary to what had been held by the appellate judges, the *Cour de Cassation* considered that the fact that the distributor had gradually reduced its purchases with the manufacturer during the notice periods notified first in January 2009[2] and then in August 2010 was not constitutive of a wrongful breach of the business relationship.

Indeed, according to the *Cour de Cassation*, the appellate judges were not supposed to check due compliance with the notice periods with reference to the volumes traded during such periods insofar as the parties had agreed on (i) the amount of the indemnification that would be paid to the manufacturer to compensate for the partial breach of the business relationship, and (ii) the gradual phasing-out of such relationship.

3. The magnitude of the decision dated December 16, 2014

In this decision, the *Cour de Cassation* delineates the scope of application of Article L. 442-6 I 5e of the FCC.

Indeed, it should be recalled that this Article punishes the **suddenness** of the termination, i.e. a termination that is ***« unpredictable, abrupt and brutal »***[3] and that is not preceded by a written notification providing for a sufficient notice period given the length of the business relationship or applicable commercial practices acknowledged by multi-sector agreements.

On the basis of this Article, French Courts sanction the **partial** sudden breach of an established business relationship, which can take the form of an interruption of deliveries[4], the removal of several products from the product list, or the change of an essential element of the contract unilaterally imposed by one of the contractual parties without a sufficient notice period.

Even when a notice period is contractually provided for by the parties, the judge may, under Article L.442-6 I 5e of the FCC, disregard said notice period if he/she deems that it is insufficient given the length of and the circumstances surrounding the business relationship[5]. In that case, the public policy rules set forth in Article L.442-6 I 5e of the FCC prevail over the "law of the parties".

Except in case of gross negligence or force majeure[6], the parties may not exclude in advance the fact that the breaching party will be liable in tort.

On the other hand, it appears from the commented decision that the parties may, by common agreement, elect to put an end to their business relationship and jointly determine the terms and conditions of such termination, by providing, in particular, for a gradual decrease of the trade flows and the payment of an indemnification. The existence of such an agreement goes against the very notion of suddenness of the breach.

Contractual freedom must here overcome Article L. 442-6 I 5e of the FCC and, in this case, judges may not interfere with the "law of the parties" – unless of course if it can be established that either party has, during the negotiations, pressured the other into entering into such an agreement, which would allow the judge to reject the enforcement of said agreement on the basis, for examples, of applicable legal provisions governing lack of consent (duress)[7], or other public policy provisions set forth in Article L. 442-6 I of the FCC that punish abusive commercial practices (such as imposing on a business partner obligations that create a significant

imbalance in the parties' rights and obligations[8], or obtaining, under threat, the full or partial termination of the business relationship or the implementation of commercial conditions that are manifestly abusive[9]).

As such, caution remains the watchword when it comes to drafting agreements providing for the termination of an established business relationship.

[1] Commercial Chamber of the *Cour de Cassation*, December 16, 2014, n°13-21363.

[2] Notification by a party to its contractual partner of the launch of a tender process to select its future business partners indicates the notifying party's intention no to continue the business relationship in the same conditions as before, and thus marks the starting point of the notice period : Commercial Chamber of the *Cour de Cassation*, June 6, 2001, n°99-20831.

[3] Court of Appeals of Montpellier, August 11, 1999: D. 2001. Somm. 298, obs. Ferrier.

[4] Commercial Chamber of the *Cour de Cassation*, September 11, 2012, n°11-14620.

[5] Commercial Chamber of the *Cour de Cassation*, May 20, 2014, n°13-16398.

[6] Article L. 442-6 I 5° of the FCC provides only two instances in which termination without notice is justified: (i) if the other party culpably fails to perform one of its obligations, it being specified that the default of that party must be sufficiently serious to justify termination without notice, and (ii) in case of a force majeure event, i.e. an event that is unforeseeable, unavoidable and beyond the parties' control.

[7] Articles 1111 *et seq.* of the French Civil Code.

[8] Article L. 442-6 I[2] of the FCC.

[9] Article L. 442-6 I[9] of the FCC.

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