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The breakdown of negotiations for the sale of a business going concern is not abusive wherever the parties have not yet agreed on the sale price

On February 16, 2016, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) handed down an interesting decision[1] concerning the abusive breakdown of negotiations.

This decision, which is consistent with the line of decisions rendered on that subject, brings additional clarification about the breakdown of on-going negotiations for the sale of a business going concern.

In the commented case, the operator of a restaurant had broken off discussions with a potential purchaser of its business going concern whereas documents related to the sale had already been forwarded to the notary responsible for drafting the final deed of sale. The *Cour de Cassation* held that the parties had still the right, at this stage, to freely withdraw from negotiations and ruled that the breakdown could not be considered as abusive because the negotiations had not progressed sufficiently.

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The conclusion of a contract is frequently preceded by a negotiation period to determine the terms of the commitments of each party.

During that negotiation period, the parties usually act outside any contractual framework. They are, in principle, free to halt the negotiations at any time.

Yet, this freedom to break off negotiations is not absolute as it is subject to the overriding obligation, for both parties, to act in good faith. Indeed, wherever the breakdown of the negotiations is abusive given the surrounding circumstances, the terminating party may be sued in tort and ordered to pay damages.

In practice, when assessing whether the breakdown of the negotiations is abusive, judges may take into account several factors, such as the advanced stage of negotiations, the legitimate belief of the other party, the suddenness of the breakdown, malicious intent, the fact that the breakdown occurred too belatedly, etc.

While the parties are supposed to adopt an ethical behavior during the negotiation period, which is often quite long and may require substantial financial investments, the risk of being ordered to pay damages must not be seen as an obstacle to withdraw from negotiations.

The *Cour de Cassation* has recalled on several occasions that economic considerations, a due diligence review that reveals adversarial legal or financial information on the target[2], or the fact of abandoning a project that is not viable[3] constitute valid grounds for breaking off negotiations.

In addition, since the famous "*Manoukian*" decision rendered by the Commercial Chamber of the *Cour de Cassation* on November 26, 2003[4], the amount of damages that a party who abusively breaks off negotiations may be ordered to pay is limited to the expenses actually incurred in connection with the negotiations and the analysis of the feasibility of the contemplated transaction, the portion of the profits expected to be derived from the performance of the contract being excluded from the calculation of the damages.

In the commented decision rendered on February 16, 2016, the Commercial Chamber of the *Cour de Cassation* provided additional clarification on the concept of abusive breakdown of negotiations.

In that specific case, negotiations had been entered into for the sale of a business going concern. The seller broke off the negotiations before an agreement had been reached on the sale price. The potential purchaser then sued the seller in tort, considering that even though no agreement had been reached on the price, the negotiations were at a very advanced stage and that the breakdown was necessarily to be considered as abusive. He notably argued that he had already forwarded legal and accounting documents to the notary responsible for drafting the deed of sale.

According to the *Cour de Cassation*, the breakdown of the negotiations was not abusive since, in the absence of any agreement on all of the terms and conditions of the sale – including, in particular, on the price – the negotiations had insufficiently progressed for the breakdown to be considered as abusive.

By recalling that one of the main principles that prevail during pre-contractual periods is freedom, the *Cour de Cassation* has adopted a position that reassures potential investors. Indeed, it is more difficult to demonstrate that the breakdown of negotiations is abusive as long as the sale price has not been set, and the risk that the terminating party be ordered to pay damages therefore decreases.

This articulation of the freedom to break off negotiations with the duty to act in good faith, as set out by the *Cour de Cassation* in the commented decision, is worth keeping in mind. Indeed, Article 1112 of the French Civil Code, as derived from the reform of French contract law and expected to come into force on October 1, 2006, enshrines the same principles.

[1] Commercial chamber of the *Cour de Cassation*, February 16, 2016, n13-28.448

[2] Commercial chamber of the *Cour de Cassation*, November 20, 2007, n°06-20.332

[3] Commercial chamber of the *Cour de Cassation*, October 4, 1982, n°80-16.177

[4] Commercial chamber of the *Cour de Cassation*, November 26, 2003, n°00-10.243