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Case Law comments

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Reasonable notice in case of termination by subsidiaries of a group with the same supplier

Epilogue of a case which gave rise to several comments in 2015, after the partial reversal decision

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In a ruling on December 20, 2017, the Paris Court of Appeal reminded the criteria for assessing the damage in case of sudden termination of an established business relationship, while confirming the interpretation of the notion of action in concert made by case law. This ruling is thus, in a didactic manner, in keeping with the view continuously taken by case law.

CA Paris, 20 déc. 2017, n° 15/20154

Two subsidiaries of an international industrial group (hereinafter the "Subsidiaries"), producing handling trolleys in particular, used to purchase cast iron counterweights from the same company (hereinafter the "Supplier"), one since June 2004 and the other since September 2004. They both ended their contractual relationship with the Supplier, one in June 2009 and the other in October 2009, without actual notice. The Supplier then brought an action in order to be compensated for the damage suffered as a result of the sudden termination of each established business relationship.

The Paris Court of Appeal[1] initially determined that the prior notice that should have been given to the Supplier was one year, on the basis of the aggregate turnover of both business relationships, while stressing the autonomy of the two Subsidiaries.

On October 6, 2015[2], the Court of Cassation reversed and canceled the ruling of the Paris Court of Appeal "*but only to the extent that it [the ruling] states that the prior notice which should have been given to the [*Supplier*] from the [*Subsidiaries*] is one year*" and referred the case back to the Paris Court of Appeal, composed of a different bench.

The Court of Cassation found that, to assess the length of the notice period, the Court of Appeal had taken into account "*the global turnover achieved by the [*Subsidiaries*], insofar as they had a business relationship with [*the Supplier*], over the same period and in respect of identical products, with similar requirements in terms of quantities,*" whereas the Court of Cassation "*found that the [*Subsidiaries*], although they belonged to the same group and carried out the same activity, were two autonomous companies which had had distinct business relationships with [*the Supplier*].*" Hence, according to the Court of Cassation, "*the court of appeal, which has[had] not found that they had acted in concert, deprived its decision of legal basis.*"

1 CA Paris, January 30, 2014, No. 12/02755.
2 Cass. com., October 6, 2015, No. 14-19.499.

Ruling on referral, the Paris Court of Appeal, composed of a different bench, clarified, in a ruling of December 20, 2017[3], the notion of action in concert mentioned by the Court of Cassation (1) and usefully reminded the criteria for assessing the compensation due in case of sudden termination of an established business relationship (2).

1) Assessment of an action in concert of two companies belonging to the same group

Before the Court of appeal to which the case was referred, the Supplier argued that the Subsidiaries had acted in concert and that, as a consequence, the global turnover achieved by the two companies should be taken into account (which the Supplier claimed amounted to more than 10% of its own turnover), to assess the compensation due in respect of such termination. The Supplier also attempted to be granted a longer period of notice.

To establish the existence of an action in concert of the Subsidiaries, the Supplier put forward a body of evidence going beyond the mere existing financial and capital flows between the two companies: development of a joint environmental and communication policy; similar presentation of brochures and websites for the products of the group and indistinctively referring to the three production sites of the handling equipment; development of joint services; joint procurement policy; joint production constraints; joint research-development policy and near coincidence of termination dates.

Whereas the Court of Cassation had already alluded to the notion of action in concert in the past[4], the commentators of the October 6, 2015 ruling of the Court of Cassation questioned the legal basis of the notion of action in concert in this case. They identified four possible bases: (i) common language elements, (ii) a securities law concept, (iii) a corporate law concept, or (iv) a competition law concept[5].

Without making specific reference to one of these four concepts, the Court of appeal to which the case was referred, in its December 20, 2017 ruling, provided the (negative) definition of action in concert: "*the mere fact of two companies, that carry out the same activity, belonging to the same group and, thereafter, adopting joint policies, does not suffice to establish the existence of an action in concert in connection with the termination of a business relationship with a supplier insofar as they are two autonomous companies which had a distinct business relationship with [*the supplier*], each with distinct contracts, price requests, purchase orders, deliveries, invoices, correspondences and each having individually terminated such relationship. The requirement for a specific environmental certification and the fact that they nearly concomitantly started and then terminated the business relationship under identical conditions (without notice) are not sufficient to establish the existence of an action in concert between them.*"[6]

By its decision, the Paris Court of Appeal strictly applied the principle of autonomy of corporate entities whereby each company, even if it is owned by a group, has its own legal existence, regardless of the group to which it belongs and of the other companies in the group[7]. This principle thus prevents the addition of the turnovers achieved by two distinct companies with the same supplier.

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3 CA Paris, December 20, 2017, No. 15/20154.

4 See in particular Cass. com., December 2, 2008, No. 08-10.731.

5 Alain Couret, *La rupture simultanée par deux filiales d'un groupe de relations commerciales établies*, Bulletin Joly Sociétés, December 2, 2015, No. 12 p. 626.

6 CA Paris, December 20, 2017, No. 15/20154.

7 See in that respect, Jean-Brice Tap, *Les groupes de sociétés à l'épreuve de l'article L. 446-5, I, 5e, du code de commerce*, Dalloz, Revue des sociétés 2016, p. 519.

Therefore, the Paris Court of Appeal confirmed a position already adopted twice, in 2014.

In its first ruling, the Court of Appeal reminded that "*there is no reason to include the turnover made with Nobel Plastique Ibérica, which is an independent corporate entity, into that made with Nobel, since it has not been proven that these two companies have ever made grouped orders*"[8].

In a second decision, the Court ruled that the "*regrouping of capital cannot, in itself, frustrate the autonomy (of the) corporate entities and establish between [the] different companies a joint and several liability which dos not stem from the expression of their will or from their conduct that could make the [opposite party] wrongly believe that each represented all the others […]. The court was thus right in finding that the relationship at issue could not be examined globally and that the damage likely to result from the sudden termination thereof could not be attributed only to D and DR but that it should be examined in the light of the amounts invoiced to each of them […]*"[9]. In the same decision, the Court further found that "*considering the independence of each company of the D. group, previously established, I. cannot base its claim on the entire turnover achieved with all of them to estimate how much prior notice it should have been given"*[10].

Additionally, the Court of Cassation enshrined the relative nature of business relationships by deciding that "*the prior notice that should have been given to X did not have to be determined in the light of the relationship previously built with Y"*[11]. As a consequence, when two companies of the same group wish to enter into a single business relationship with the same co-contractor, they must express this will through an agreement aiming to adopt a similar conduct toward their joint co-contractor[12].

The commented decision forms part of this case law trend. Hence, the Supplier's claim which takes into account the global turnover achieved by the Subsidiaries was inadmissible according to the Paris Court of Appeal, since there was no action in concert in the case in point.

2) Reminders about the criteria for indemnifying damage caused by the sudden termination of established business relationships

Case law analysis allows for the determination of the different criteria for establishing how much prior notice should have been given to its partner by the initiator of the termination of the established business relationship. An author indicated that "*in practice, courts appraise each situation 'in concreto' (…)*"[13]. The same author states that "*to assess whether the notice period is sufficient, judges frequently rely on the following: the length of the relationship, the significance of the business volume, the product awareness, the level of economic dependence of the party affected by the termination, the investments made by the said party, the existence of an exclusivity agreement, the time required by the affected party to reorganise*"[14].

The main criteria that was relied on by case law in that respect is the length of the established business relationship suddenly terminated.

In the commented ruling, the Paris Court of Appeal indicated that "*considering all these elements and in particular the 5-year business relationship between the parties, […] the court believes that a 4-months' notice*

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8 CA Paris, May 22, 2014, No. 12/10054.
9 CA Paris, mars 20, 2014, No. 12/01371.
10 CA Paris, mars 20, 2014, No. 12/01371.
11 Cass. com., September 15, 2015, No. 14-17.964.
12 Nicolas Leblond, *Application du caractère relatif de la relation commerciale*, EDCO, November 6, 2015, No. 10, page 4.
13 P. Buisson and P. Delannay, *La rupture brutale des relations commerciales établies*, La Semaine Juridique Entreprise et Affaires n No. 30, July 23, 2015, 1374.
14 Idem.

is sufficient"[15] rather than one year, as initially granted. Indeed, it appears from case law that a one-year prior notice is generally given when the business relationship has lasted at least around a decade, more specifically between 10 and 13 years[16].

The length of the business relationship is not the only criterion relied on to assess the notice period, since said period generally depends on "*the other circumstances existing at the time the termination is notified. The legal provision expressly refers to the length of the business relationship and trade practices. In addition to these two legal criteria, the following parameters are also taken into account to appraise the notice period to be given: the economic dependence (understood as the share of turnover achieved by the party affected with the initiator of the termination as opposed to the competition law concept), the difficulty to find another partner of comparable rank on the market, the awareness of the traded product, the fact that it is difficult to substitute, the relevant market characteristics, the obstacles to restructuring, in terms of deadlines and costs of entry into a new relationship, the significance of the investments made with respect to the relationship, undepreciated and non-convertible*"[17] Case law takes into account whether exclusivity exists[18].

With specific respect to economic dependence, case law is generally quite rigorous, and economic dependence is set aside when the company putting forward such a situation "*fails to prove that it was in an economic position that prevented it from substituting, under reasonable economic conditions, other clients for those of D (its business partner)*"[19]. For instance, a case where the affected party conducted 20% of its activity with the initiator of the termination was not found to be a situation of economic dependence[20]. In the absence of a situation of economic dependence, the prior notice given is generally shorter[21].

These criteria (which the Court of appeal reminds that they should be appreciated "*at the time of termination*"), are repeated in detail in the commented ruling in which the Court indicates that "*the period of notice to be given depends on the time required by the partner to reorient its activity and potentially find new partners. It should be assessed in the light of the length of the established business relationship and trade practices, but also of all circumstances that render the affected party's restructuring difficult, that is namely its level of economic dependence vis-à-vis the initiator of the termination, understood as the share of its turnover achieved therewith (which can for example result from exclusivity of the relationship), the difficulty to find another partner of comparable rank on the market (awareness of the traded product, the fact that it is difficult to substitute), the relevant market characteristics, the obstacles to a restructuring (in terms of deadlines and costs of entry into a new relationship) and the significance of the investments made with respect to the relationship, undepreciated and non-convertible*"[22].

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15 CA Paris, December 20, 2017, No. 15/20154.

16 CA Douai, December 5, 2002, No. 02715; CA Lyon, January 24, 2013, No. 11/08787; CA Paris, September 24, 2014, No. 12/10589; CA Paris, September 25, 2014, No. 13/10758; CA Paris, April 9, 2014, n No. 12/01972; CA Paris, February 5, 2015, No. 13/11944; CA Paris, February 11, 2015, No. 12/22955; CA Versailles, October 14, 2004, No. 03/04512; CA Paris, September 11, 2014, No. 12/23105; CA Lyon, March 15, 2002, No. 2000/06309; CA Amiens, May 9, 2006, No. 05/01540; CA Paris, June 27, 2012, No. 11/10306; CA Montpellier, January 24, 2006, No. 04/05929; CA Paris, May 22, 2015, No. 13/05277; CA Paris, June 29, 2016, No. 14/02940; CA Angers, January 24, 2006, No. 05/00067; CA Paris, April 10, 2014, No. 12/01373; CA Paris, December 3, 2014, No. 14/11124; CA Paris, May 28, 2015, No. 14/00099; CA, Paris May 24, 2017, No. 14/18202; CA Paris, April 10, 2014, No. 12/0675 ; CA Rouen, November 3, 1998, No. 2187/98; CA Versailles, January 31, 2012, No. 10/08011; CA Orléans, June 5, 2014, No. 13/00257; CA Paris, June 6, 2014, No. 12/00816; CA, Paris, February 8, 2017, No. 14/15931.

17 CA Paris, November 22, 2017, No. 15/18782; see also on this subject CA Grenoble, April 3, 2014, No. 12/00208.

18 CA Versailles, March 6, 2003, No. 01/00623; Cass. com., May 12, 2004, No. 01-12.865.

19 CA Paris, March 20, 2014, No. 12/01371.

20 Cass. com., October 7, 2014, No. 13-19.692.

21 Cass. com., May 20, 2014, No. 13-16.398; Cass. com., September 19, 2006, No. 03-16.629; Cass. com., September 11, 2012, No. 11-14.620.

22 CA Paris, December 20, 2017, No. 15/20154.

Once the criteria were established, the Court of appeal ruled that "*considering all of these elements, and in particular the 5-year business relationship between the parties, the average annual turnover resulting from this business, the share of such turnover in the total turnover, the increase in turnover over the last two years (2007 and 2008), the absence of economic dependence, the relevant area of activity, the low technicality of the product (iron counterweights), the failure to establish the existence of specific investments*", the prior notice to be given to the Supplier was four months for each of the Subsidiaries[23].

Regarding dependence, the Court of appeal stressed that "*the average annual turnover resulting from this business appears to be 7.95% of its total turnover, so that regardless of the years taken into account, and given that the parties were not bound by any exclusivity agreement, no situation of economic dependence was characterised*"[24].

Finally, concerning the calculation of the compensation amount, the Court of appeal reminds[25], as it previously did, that "*it is well-established that the damage resulting from the suddenness of the termination is made up of the lost gross margin which the affected party could have earned during the period of notice which it should have benefited from*".

The Court of Appeal confirmed its prior position in a ruling on September 27, 2017[26], according to which the margin to be taken into consideration is the contribution margin, defined as "*the difference between the turnover of which the affected party was deprived, after deducting the charges which were not borne as a consequence of the decrease in activity resulting from the termination*".

The Court also clarified the calculation of the taxable base of the margin and indicated that one should "*determine the monthly average contribution margin over the two or three fiscal years prior to termination, which years may sometimes be discussed as some of them can be atypical, and multiply the amount obtained by the number of months of notice which should have been given to the party affected by the termination*". In so doing, it seems to temper recent case law that relied on the average turnover of the three last fiscal years[27], which choice is naturally at the trial judges' discretion.

23 CA Paris, December 20, 2017, No. 15/20154.
24 CA Paris, December 20, 2017, No. 15/20154.
25 CA Paris, September 27, 2017, No. 15/02824.
26 CA Paris, September 27, 2017, No. 15/02824.
27 See in particular CA Amiens, November 30, 2001, No. 00/00407; CA Paris, October 4, 2012, No. 11/17783; CA Paris, January 9, 2013, No. 11/11465; CA Paris, May 15, 2014, No. 12/10303; CA Paris, March 19, 2015, No. 13/14415; CA Paris, February 2, 2016, No. 14/00021.