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Report

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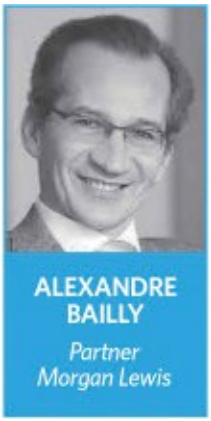
Affected party's fault and notice requirement in case of sudden termination of established business relationships: case law examples



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Although, according to Article L. 442-6, I, 5° of the French Commercial Code, a party can terminate an established business relationship without notice "in case of the other party's non-performance of its obligations", there are very few illustrations of the notion of non-performance. It appears from the handful of case law examples of sudden termination where the waiver of notice was considered that the seriousness of the breach allowing for such a waiver must be established.

The now famous Article L. 442-6, I, 5° of the French Commercial Code provides that "*the perpetrator shall be held liable and shall be bound to compensate for the loss suffered by the fact, for any manufacturer, trader, industrial or person registered with the trades register (…) of suddenly terminating, even partly, an established business relationship, without written notice taking into account the length of the business relationship (…)*".

However, the same Article states that "*the aforementioned provisions no not prevent the possibility to terminate without notice, in case of the other party's non-performance of its obligations or in case of force majeure*".

Case law and doctrine have strictly defined the notion of "*other party's non-performance of its obligations*", which has rarified cases where the terminating party is entitled to end the established business relationship without notice[1].

It will therefore be useful for the practitioner alternatively in charge of assessing the risks of a termination or of defending the party affected thereby, to submit a sample of the very few cases of sudden termination where the waiver of notice was analyzed.

It appears that, in the light of these illustrations, although termination without notice is rarely accepted in practice (I), it has sometimes been upheld (II).

[1] N. Mathey, *Manquement justifiant une rupture sans préavis*, Contrats conc. consom. 2017, comm. 200.

I. – The difficulty to accept a waiver of notice in case of sudden termination of established business relationships

While the letter of Article L. 442-6, I, 5° of the French Commercial Code, which simply mentions the "*other party's non-performance of its obligations*", does not provide any clarification as to the seriousness of the breach that may justify termination of the business relationship without notice, case law and doctrine have interpreted this notion is a very restrictive manner[2].

An author indicates that "*of course, the article does not mention any such* [seriousness] *criterion but, beyond the letter, its spirit easily justifies the same. Insofar as the existence of a notice period is the principle,* ***the lack thereof is only the exception*** *and the causes allowing it must be* ***strictly construed****. Yet, if one refers to the purpose of the protection in place, it should be admitted that only* ***the non-performance which prevents the continuation of the relationship****, and which is thus serious to a certain extent, justifies the waiver of notice*"[3] (emphasis added).

In similar terms, the Paris Court of Appeal stressed, in a ruling of 11 January 2017, that the last paragraph of Article L. 442-6, I, 5° of the French Commercial Code "*specifies neither the nature nor the extent of the contractual non-performance authorizing the waiver of notice. However, since it introduces a derogation from the notice requirement provided for in the first paragraph, its application requires the non-performance of the contractual obligations it refers to, to be* ***sufficiently serious in nature to justify immediate termination*** *considering the length of the business relationship*"[4] (emphasis added).

This restrictive interpretation, which makes derogations exceptional, is certainly due to the public policy nature of the provisions of Article L. 442-6, I, 5°[5].

Hence, if there is no serious breach, the infringement of the contractual provisions (I.1) or the loss of confidence in the business partner (I.2) do not suffice to authorize a party to terminate the established business relationship without notice.

A. – The infringement of the contractual provisions cannot alone exempt from giving notice

The commercial chamber of the Court of Cassation considers that a co-contractor's poor performance, even if contractually agreed as being a possible ground for immediate termination, does not bind the judge who is to define whether such fact can "*constitute a serious breach by the company* […] *of its contractual obligations justifying termination* […] *of their business relationship without notice*"[6].

In the case in point, a clause relating to termination of office for poor performance gave the principal the option of terminating the agent's office without compensation if the latter did not achieve at least 80 % of the annual objective. Although the company affected by the termination had only achieved 40 % or 65 % of its annual objective, the Court of Appeal found that this breach did not justify termination without notice.

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2 See for instance L. Vogel and J. Vogel, *La rupture brutale de relations commerciales établies,* Lawlex / Bruylant, 2016, page 20 and N. Mathey, *supra* note 1.

3 C. Mouly-Guillemaud, *L'absence d'emprise de la volonté dans la mise en œuvre de la rupture d'une relation commerciale*, D. 2008, p. 1115.

4 CA Paris, 11 January 2017, No. 14/07959.

5 See for instance Cass. com., 25 September 2007, No. 06-15.517 and Cass. com., 16 December 2014, No. 13-21.363, Bull. civ. VI, No. 186.

6 Cass. com., 9 July 2013, No. 12-21-001, Contrats conc. consom. 2013, comm. 239, note N. Mathey.

On the other hand, the failure to meet quotas (in this case, the quota required was 60 % of the objectives and the non-terminating party had only achieved 30 % of the said objectives) has sometimes been seen sufficiently serious as to authorize termination without notice when, during the five years preceding such lack of performance, the quotas had always been met (and even doubled at times)[7].

However, in its ruling, the Court of Appeal laid down the principle according to which "*the lack of contractual notice does not exempt the court from examining the need for a notice*".

Likewise, "*the public policy provisions of Article L. 442-6 I 5 of the Commercial Code cannot be derogated from by clauses allowing termination without notice if the non-performance of the contract is not serious enough in nature*"[8].

In this case, a licensor had terminated without notice its business relationship with a service agent pursuant to a termination clause which authorized it to terminate the contract if the said agent did not comply with the different contractual standards (which had been the case).

The Court of Cassation approved the Court of Appeal for having considered "*that it was not established that the noted breaches of the agreed commitments were of such seriousness as to justify an immediate termination considering the length of the business relationship and the agent's efforts to adapt*". The trial judges had found that the agent recognized that it needed to comply with five out of the twenty-two standards set by the licensor and that the breaches, which were old, had not prevented the entry into a new contract.

In another case, the Court of Cassation also ruled that "*the fact of not being up-to-date with payments did not constitute, given the circumstances of the case, a serious breach authorizing termination without notice*"[9].

It has also been judged that "*temporary difficulties related to the printer's work, did not allow, without prior warning or notice, terminating a longstanding business relationship without notice*" [10] or besides that termination without notice cannot be justified by (i) "*the alleged late deliveries*", which were "*totally marginal in nature considering the existing business flow between the parties*" and (ii) the "*quality issues*" which were only raised after the terminating party had decided to change supplier[11].

Here again, the simple infringement of the contractual provisions is not enough to constitute a sufficiently serious breach to justify the lack of notice.

B. – The loss of confidence in its business partner cannot alone justify termination without notice

To justify the lack of notice, the terminating party sometimes puts forward different facts entailing a loss of confidence in its business partner.

In such case, the trial judges analyze the facts to determine whether the circumstances of the case show breaches that are sufficiently serious to justify termination without notice.

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7 CA Paris, 11 January 2017, No. 14/07959, *supra* note 4.

8 Cass. com., 25 September 2007, No. 06-15.517, *supra* note 5. See C. Mouly-Guillemaud, *supra* note 3.

9 Cass. com., 20 September 2016, No. 13-15.935, published in the Bulletin.

10 Cass. com., 24 June 2014, No. 12-27.908, JCP E 2014, 1520, note N. Mathey.

11 CA Amiens, 30 November 2001, No. 00/00407.

Hence, in a case where the Paris Court of Appeal considered "*that the breaches* […] *do not seem sufficiently serious to justify termination of the business relationship without notice"*, a business relationship had been terminated due to the poor quality of the products and to the supplier's breach of its duty of loyalty due to its failure to disclose the relocation of its production in China[12].

Likewise, in an alleged case of breach of a duty of loyalty (described as a "*fundamental obligation governing the agreement*")[13] which entailed termination of the established business relationship without notice, the Paris Court of Appeal ruled that "*no part of the [affected party's] conduct constitute[d] a breach of the duty of loyalty in the performance of the contractual relationship and is[was] not serious enough in nature so as to justify termination without notice of the business relationship, since a simple loss of confidence could not suffice to establish such seriousness*"[14].

The Court of Cassation confirms that the existence of "*a relationship that had become conflictual*" between two partners (in particular following legal proceedings brought by the party affected by the termination) does not suffice to terminate an established business relationship without notice[15].

Nevertheless, the seriousness of contractual breaches may justify termination of the established business relationship without notice, as set out below.

II. – Examples of sufficiently serious breaches to justify termination without notice

The Paris Court of Appeal considered that "*the lack of notice was justified by the wrongful behavior*" of the business partner, which used an online sales platform to sell counterfeit products, in breach of the general terms and conditions of use of the platform (namely, the website Priceminister.com)[16].

The Paris Court of Appeal also listed the breaches of a transportation company (late deliveries, delivery of damaged products, lack of receipt of the signed delivery slips serving as proof of payment of the goods, non-payment by a sub-contractor) to justify the end of a business relationship without notice[17].

Hence, the Court noted that "*all of these pieces of evidence prove that the company X failed to comply with its contractual obligations on several occasions; that, contrary to its allegations, these breaches, in particular those relating to the signed delivery slips and the non-payment by a sub-contractor, making company Y [terminating party*] *subject to a direct action, are sufficiently serious to justify termination of their business relationship without notice*".

Likewise, it was found that a hotelier could terminate a maintenance and cleaning agreement without notice because the co-contractor had refused to implement a procedure for control of its staff after numerous

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12 CA Paris, 7 June 2017, No. 14/22627 commented in *Manquement justifiant une rupture sans préavis*, N. Mathey, *supra* note 1.

13 In particular, by telling "lies" in full knowledge of the facts during legal proceedings against the other party to the business relationship.

14 CA Paris, 17 May 2017 No. 16/17988, commented in *Manquement justifiant une rupture sans préavis*, N. Mathey, *supra* note 1.

15 Cass. com., 15 May 2007, No. 05-19.370, commented in Contrats conc. consom. 2007, comm. 203, note M. Malaurie-Vignal.

16 CA Paris, 23 June 2017, No. 15/14456, Contrats conc. consom. 2017, alert 59. Note that, in this case, the Court of Appeal had previously found that the business relationship, which lasted two months, was not deemed established.

17 CA Paris, 4 May 2016 No. 13/22971.

thefts without forced entry were committed within the establishment, since the seriousness of the breach was accounted for by the safety requirements that must be met by the hotelier vis-à-vis its clients[18].

In addition, the Court of Cassation, on the basis of Article L. 442-6 of the French Commercial Code, quashed a ruling of the Court of Appeal which had sentenced the initiator of a termination without notice, on the grounds "*that, in so ruling, without considering, as had been requested, whether the non-performance by company X [non-terminating party] of its contractual obligations might authorize company Y [terminating party] to terminate the maintenance agreement without notice, the court of appeal has*[had] *provided no legal basis to its decision*"[19].

It should be noted that, in this case, the second Court of Appeal ruled that the breaches claimed (breaches of maintenance obligations and dysfunctions) "*were not serious enough to justify termination*" without notice, provided that (i) the non-terminating party had subsequently complied with its maintenance obligations and (ii) the terminating party had itself breached its contractual obligations[20].

Finally, the Court of Cassation, without directly referring to the provisions of Article L. 442-6, I, 5° of the French Commercial Code, approved a Court of Appeal's rejection of a claim for damages of a party affected by a "*sudden termination*" on the grounds that its "*contractual breaches* […] *were sufficiently serious to exempt the* [terminating party] *from giving any prior notice*". In this case, the trial judges had noted "*various payment incidents*" which had caused a "*deterioration of the financial balance of the contract, which is a fundamental element thereof "*[21].

These decisions show that the lack of notice in case of termination of an established business relationship is assessed in a restrictive manner by case law, which focuses on establishing the seriousness of the alleged breach.

However, it is worth quoting a ruling of the Court of Appeal of Nîmes of 13 November 2003, where the judges proposed an alternative by considering that the provisions of Article L. 442-6, I, 5° of the French Commercial Code did not hinder "*the possibility to terminate without notice in case of non-performance by the other party, either if the non-performance at issue is serious, or if the breaches are less serious but repeated and persistent despite one or more advance warnings by the business partner, of such a nature as to justify termination of the business relationship*"[22].

Therefore, if it appears that case law takes into account breaches of such seriousness as to make it impossible to maintain the contractual relationship, this alternative could be used by litigants in charge of defending the interests of a party that is unsure whether the seriousness of the alleged breaches may authorize it to terminate the relationship without notice. This party could be encouraged to provide proof of the alleged breaches and to issue multiple warnings in order, if the breaches persist, to terminate the relationship without notice. However, this strategy comprises risks due to the restrictive nature of the notion of non-performance, since the opposing party can oppose that, if there have been many warnings spread out over time, it is precisely because the relationship could be maintained, since the alleged breaches did not make it

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18 CA Paris, Aix-en-Provence, 19 November 2004, No. 02/00148.

19 Cass. civ., 3rd, 7 November 2012, No. 11-11.813 et 11-13.005. Referred to in L. Vogel and J. Vogel, *supra* note 2, page 19.

20 CA Aix-en-Provence, 28 May 2014, No. 12/21638.

21 Cass, com., 14 October 1997 No. 95-10.374. Also quoted, a ruling of the Commercial Chamber of the Court of Cassation of 24 May 2011 (No. 10-17.844, Contrats conc. consom. 2011, comm. 161, note N. Mathey) in which a party's conduct is seen as sufficiently serious to justify cancellation of an order.

22 CA Nîmes, 13 November 2003, No. 03/03438.

impossible to maintain the contractual relationship.

Finally, there could be some questions about the parties' ability to contractually define, beforehand, a breach so serious as to justify a unilateral termination without notice[23]. In such circumstances, the contractual definition could be relied on to immediately terminate the contract and the business relationship and, on the other hand, in case of dispute, the terminating party would be entitled to rely on the contractual freedom of the parties.

This is the approach that the Court of Cassation seems to have taken, in a ruling of 11 September 2012, which did not concern a sudden termination of an established business relationship but which the litigants could be tempted to invoke in this case. Stating that "*under a clause freely agreed to between the parties*", the contract "*expressly provided that, in case of serious breach, the nature of which was specified therein, the contract could be terminated with immediate effect and without compensation*", the Court of Appeal had dismissed the non-terminating party's claim for damages. In its appeal, the latter blamed the court for not having considered whether the time taken by the terminating party to immediately terminate the contract might deprive the alleged breaches of the serious nature required for such a termination[24].

The commercial chamber dismissed the appeal on the grounds that the court, which had upheld that the claimant's conduct "*corresponded to the definition of a serious breach contained in the contract* […], *was not bound to conduct a search that these findings and opinions would render ineffective*".

It remains to be seen whether the judges will accept to leave it up to the parties to define a breach so serious as to waive notice in an area that falls within public policy and whether they will exercise control over the seriousness of the breaches contractually defined[25]. It can be noted, in agreement with an author[26], that, even in such circumstances, the contractual definition of a serious breach might be worth considering insofar as it would give the judge an additional element of appreciation to determine the seriousness of the non-performance.

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23 In that respect, see L. Vogel and J. Vogel, *supra* note 2, page 20.

24 Cass. com., 11 September 2012, No. 11-23.067; Contrats conc. consom. 2012, comm. 256, note N. Mathey.

25 See, for instance, note under Cass. com., 25 September 2007, No. 06-15.517; C. Mouly-Guillemaud, *L'absence d'emprise de la volonté dans la mise en œuvre de la rupture d'une relation commerciale*, *supra note 3*. See also in that respect the article from the same author entitled *Rupture brutale d'une relation contractuellement établie, quelle place pour l'anticipation des parties*, RLC 2013/37, No. 2435.

26 See note by N. Mathey under Cass. com., 9 July 2013, No. 12-21-001; Contrats conc. consom. 2013, comm. 239, *supra* note 6.