The introduction of the ruling issued by the Paris Court of Appeal on 14 January 2016 regarding sudden termination of an established business relationship

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- Alexandre Bailly, attorney-at-law, Paris bar, partner, Morgan, Lewis & Bockius UK LLP
- Xavier Haranger, attorney-at-law, Paris bar, Morgan, Lewis & Bockius UK LLP

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By a ruling of 14 January 2016, the Court of Appeal of Paris confirms a well-established case law according to which a partial sudden termination of the established business relationship cannot be held against a business partner which passed on to its contractor a decrease in orders that it suffered itself due to the current economic conditions. In addition, the introduction of this ruling ensues from the fact that a total sudden termination of the established business relationship is not characterized when the business relationship is transferred to another party with the express or implied agreement of the initial business partner.

CA Paris, 14 Jan. 2016, No. 14/16799, SAS Abbax France vs. SA Sullair Europe (dismissal of appeal vs. T. com, 11 Jul. 2014), Mrs. Perrin and Mr. Dabosville, Pres.; Me Grappotte-Benetreau, Me Vahramian, Me Boccon Gibod and Me Haranger, att.

In the present case, in which the authors of this note represented the defendant, a business relationship between an industrialist, manufacturer of specialized equipment, and one of its suppliers, was materialized by a contract in 2007, before the economic crisis started.

In 2009, these two actors' turnovers fell substantially due to this crisis. The manufacturer's difficulties were such that it was compelled to shut down its factory in France, late 2010. It is then the manufacturer's U.S. parent company that maintained the business relationship with the supplier, while continuing to order products from said supplier.

After that, the supplier served the French subsidiary with notice to compensate, on the one hand, for the partial termination of the business relationship due to the drastic fall in turnover generated with it between 2007 and 2010, and, on the other hand, for the total termination of the established business relationship since the French subsidiary of the equipment manufacturer had totally ceased its purchases from its supplier following the shutdown of its factory in France.

In its defence, the manufacturer asserted that the decrease in its orders to the supplier could be accounted for by the decrease in its own orders as a consequence of the economic

circumstances. No partial termination of the business relationship could thus be held against it. Concerning the claim related to the total termination of the established business relationship, the manufacturer's French subsidiary emphasised the lack of termination since the U.S. parent company continued to place orders with the supplier.

By a ruling of 14 January 2016, the Court of Appeal of Paris dismissed the supplier's claims, following the defendant's arguments.

In doing so, the Court of Appeal confirms the well-established case law on the lack of partial termination in case of decrease in orders due to objective economic difficulties (I) and is innovative on the issue of the transfer of an established business relationship to a company that was initially not a party to the relationship (II).

I – Passing-on of the decrease in its own orders: no partial termination of the established business relationship

The Court of Appeal of Paris recalls the principle whereby "*the sudden termination cannot be established as a result of an industrialist passing on the decrease in its own orders to its contractor*". This is not a new concept. According to recent case law, which developed since the economic crisis, a reduction in orders caused by a drop in activity cannot be qualified as a sudden termination of the business relationship within the meaning of Article L. 442-6, I, 5°, of the Commercial Code. On the basis of a legal ground of principle set forth in a ruling of 12 February 2013[1], the commercial chamber of the Court of cassation already judged that: "*But considering, (…) that the ruling finds that the actual termination of the established business relationship between CMI and each of the Caterpillar companies cannot be demonstrated, since the volume of the latter's orders with their subcontractor significantly dropped, but as a consequence of the reduction in their own orders and therefore not deliberately; that in view of these findings and appreciations which show that the decrease in the Caterpillar companies' orders was not attributable to them, the Court of Appeal legally grounded its decision*". This case law is not an isolated one, quite the opposite[2]. For instance, the Court of Appeal of Versailles, in a ruling of 18 May 2006[3], states that the decrease in the orders placed by HS, a company specialized in aeronautics, with one of its suppliers, did not characterize a termination of the established business relationship because this decrease was itself due to a decrease in the orders received by HS as a result of the aeronautical market crisis. On this topic, the *Commission d'examen des pratiques commerciales* (French Commercial practices study commission) had noted, in its 2007/2008 report, that the "*sudden termination (…) cannot be established due to an industrialist's passing-on the decrease in its orders to its subcontractor – Commercial Court of Nanterre, 8 April 2005 confirmed by Court of Appeal of Versailles, 18 May 2006, No. 05/03952, mentioned above*"[4]. For that matter, doctrine embraces this principle of lack of sudden termination in case the client passes on the fall in activity to its supplier. Hence, it considers that "*no one can be bound to constantly maintain its level of business which may be altered by external circumstances (reduced*

[1] Cass. com., 12 Feb. 2013, No. 12-11709

[2] CA Douai, 29 June 2006, No. 04/05152; CA Douai, 15 Feb. 2012, No. 10/07622; CA Paris, 4 Apr. 2013, No. 10/02735; CA Paris, 16 Oct. 2014, No. 13/06196; CA Paris, 22 Oct. 2014, No. 14/11427; CA Paris, 12 Nov. 2014, No. 12/13678; CA Paris, 20 Nov. 2014, No. 13/12620.

[3] CA Versailles, 18 May 2006, No. 05/03952.

[4] *Commission d'examen des pratiques*, business report 2007/2008, p. 122.

competitiveness, fad, general market evolution …)"[5]. Doctrine makes a specific distinction between, for the implementation of Article L. 442-6, I, 5°, of the Commercial Code, a mere decrease in orders and the discontinuation of certain products, some authors rightly recalling on this subject that "*at the time of the 2001 reform, the aim was mainly to penalise the discontinuation of suppliers' products by large-scale distributors*"[6] and that "*the legislator intended to avoid abusive discontinuation of products and more broadly sudden terminations of business relationships that often occur in favour of a higher bidding competitor*"[7]. Hence, "*if the decrease in orders is justified by the consumer's lack of interest in the product sold, there is not partial termination. However, such termination occurs if this decrease reflects an intent to discontinue the supplier's products without any economic justification*"[8]. In the end, "*the solution makes evident sense. Indeed, it seems difficult to compel a company to maintain its orders whereas the activity does not meet the market requirements. This would amount to binding it to an obligation to store production pending resumption of the market activity and to admitting that the company's economic liability would be based neither on its fault nor on the objective rationality of its own interests*"[9]. In that respect, the Court of Appeal of Paris ruled, concerning several partial discontinuations held against certain companies, "*that a distributor cannot be denied the right to slow up or modulate the orders and it cannot be bound to make its purchases, notwithstanding the market conditions, at the previous paces*"[10]. It is clear that the purpose of Article L. 442-6, I, 5° is to ensure a balance between the parties and not to allow suppliers to obtain a surplus that is disconnected from the economic reality. On the contrary, the termination will be sudden if it consists of a voluntary discontinuation[11] or if it results from "*a change in the purchasing policy and strategy*"[12] that must be proven by the applicant. This was not the case here, since the claimant "*did not prove that the decrease in orders suffered was not caused by the economic conditions or that it resulted from a change in the purchasing policy and strategy from the* [client] *company and can therefore not be analysed as a sudden termination of the established business relationship*". The decision of the Court of Appeal of Paris of 14 January 2016, which for the rest borrows formulas from the commercial chamber, is in keeping with case law concerning the lack of partial termination in case of decrease in orders due to the economic circumstances. However, it seems to innovate in terms of transfer of an established business relationship.

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[5] Augagneur L.-M., "*La répercussion d'une baisse d'activité sur les fournisseurs et sous-traitants constitue-t-elle une rupture partielle des relations commerciales établies ? Ou comment la crise révèle un cas d'imprévision*" (Does the passing-on of a decrease in activity to the suppliers and subcontractors constitute a partial termination of the established business relationship? Or how does the crisis reveal a case of unforeseeability?) JCP E 2009, 1446, spec. No. 18, quoting Fourgoux J.-L., in JCl. Commercial, fasc. 281, No. 37.

[6] Mathey N., "*Rupture partielle de relations commerciales et modification du contrat*", (Partial termination of a business relationship and modification of the contract) JCP E 2013, 1004.

[7] Barbier H., "*Le poids de la crise dans l'appréciation de la rupture des relations commerciales ou l'irruption du contexte économique dans l'article L. 442-6*", (The impact of the crisis in the appreciation of the termination of the business relationship or the incorporation of the economic context into Article L. 442-6) RTD civ. 2013, p. 375.

[8] Augagneur L.-M., previous art., quoting Béhar-Touchais M., in RLC 2004/1, No. 41.

[9] Ibid.

[10] CA Paris, 13 Dec. 1995, No. 95/4818.

[11] Cass. com., 7 Jul. 2004, No. 03-11472.

[12] CA Paris, 20 Nov. 2014, No. 13/12620.

II – No total sudden termination of the established business relationship in case of transfer of the business relationship

As set out above, the French subsidiary of the equipment manufacturer, faced with significant economic difficulties, was compelled to shut down its factory in France and to stop placing orders with the supplier. Consequently, the supplier drew an argument therefrom, putting forward a sudden termination of the established business relationship, and the manufacturer replied that the orders it places had been transferred to the U.S. parent company, which took over the business relationship. Based on factual elements, in particular orders and letter exchanges between the supplier and the U.S. parent company, the Court of Appeal considered that "*the activities of the* [manufacturer's French subsidiary] *were transferred to another company of the group, the parent company (…)*" and that the supplier "*continued to fully perform the contract*" with the parent company. The supplier could therefore not invoke any termination of the business relationship. Admittedly, the courts have already had to assess the continuation of a business relationship by another party than the initial one. This issue was principally raised to determine the length of the relationship, which one knows is the fundamental determinant of the length of the notice period. Hence, the commercial chamber of the Court of Cassation found, in a ruling of 2 November 2011, that a company which had acquired a business activity from a company having a business relationship with a third party pursued the said relationship, since the new contract entered into, "*which was the mere resumption, apart from minor modifications*" of the former contracts, "*adopted the same lines as the previous ones*"[13]. Case law provides other examples of business relationships being taken over by another company, for instance in case of assumption of the contractual undertakings of the company which initially built the existing business relationship or deal flow between the initial parties[14] or otherwise in case of a business relationship between a company and, successively, two distinct corporate entities belonging to one and the same group[15]. In this instance, which resembles the present case, the Court of Cassation approved the Court of Appeal's decision to consider that a third company and Nestlé France had "*intended to place themselves in the continuation of the* [existing] *previous relationship*", for the same product, with Nestlé Maroc, a company of the same group. On the contrary, the commercial chamber of the Court of Cassation recently approved a decision by the Court of Appeal that found that the sole fact that a company, lessee manager and subsequently purchaser of a business, has built a business relationship, during the term of the management lease, with one of the assignor's former partners, before terminating the same shortly after the acquisition of the business, does not allow considering that this company was intending to continue the business relationship that was initially built between the assignor and this partner and as a result, the notice period the latter should be granted does not have to be determined in the light of the business relationship it had previously built with the assignor[16]. The ruling issued on 14 January 2016 by the Court of Appeal of Paris is in keeping with this analysis but, this time, covers the transfer of the established business relationship, not from the perspective of the length of the business relationship, but from that of the termination of said relationship. In this case, it was a matter for the equipment manufacturer/ defendant/ respondent to oppose the alleged termination, by replying that it was non-existent since the relationship was transferred to a new partner. Considering the aforementioned case law, the issue that is raised concerns the acceptance

[13] Cass. com., 2 Nov. 2011, No. 10-25323. See equal. CA Paris, 24 Sept. 2014, No. 12/10589.

[14] Cass. com., 29 Jan. 2008, No. 07-12039 and CA Paris, 10 Sept. 2014, No. 12/11809.

[15] Cass. com., 25 Sept. 2012, No. 11-24301.

[16] Cass. com., 15 Sept. 2015, No. 14-17964.

of the said transfer by the business partner (which was a transfer of both a contract and a business relationship). Indeed, had the parties "*intended to place themselves in the continuation of the previous relationship*"? In the case in point, the party putting forward the termination alleged that the partnership agreement (which was the contractual basis of the business relationship) "*could only have been transferred to the [U.S. parent company] with its express consent in its capacity as transferred contractor, which would not have been the case*". The Court of Appeal rejected this argumentation by stating that the formalities under Article 1690 of the Civil Code (which were invoked by the manufacturer/ defendant/ respondent) were inapplicable to contract transfers, the court finding, in addition, that the party invoking termination "*continued to fully perform the contract*" after the transfer. The argument relating to the formalities of Article 1690 of the Civil Code was unlikely to be upheld since, as indicated by its author, "*It is now acknowledged (…) that the formalities under Article 1690 of the Civil Code do not apply to contract transfers (See for example: Cass. 3rd civ., 1st Apr. 1987, No. 86-15838: Bull. civ. III, No. 68; D. 1987, p. 454, note Aynès L.)*"[17]. Especially, the continued performance of the contract or business relationship by the manufacturer should have caused the dismissal of its claim, insofar as the commercial chamber of the Court of Cassation has ruled that a party which "*continued to fully perform the contract*, whereas it knew that the contractor had changed, "*unequivocally expressed its will to accept the transfer of the disputed contract*"[18]. This was the case here, since the supplier, which was in direct contact with the U.S. parent company and was aware of the shutdown of the French subsidiary's factory, continued the relationship in full knowledge of the facts. It could therefore validly put forward a total sudden termination of the established business relationship. This ruling is now final.

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[17] Aynès L., in D. 1992, p. 278, note under Cass. com., 7 Jan. 1992, No. 90-14831.
[18] Cass. com., 7 Jan. 1992, No. 90-14831.