COMPETITION FORUM
LAW & ECONOMICS

July 31th,/2023

Continuation of commercial relations: effects of a transfer of assets and judicial control over the length of the notice period

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To quote this paper: A.HUMEAU-PAYET, "Continuation of commercial relations : effect of a transfer of assets and judicial control over the length of the notice period", *Competition Forum – French Insights,* 2023, n°0048 https://competition-forum.com.

Resume: *According to the Cour de cassation, when the new owner of a company's activity breaks off its relationship with a partner who was already working with the company, this previous relationship does not count for the calculation of the notice period in the absence of proof of a common intention to continue this relationship.*

A carrier was initially linked to a first company for one year when the latter went into receivership and was then subject to a plan to sell all its assets. The transferee having granted a partial substitution option to its subsidiary, the latter approached the carrier and, a month and a half later, concluded a tariff agreement retroactive to the beginning of the month. Less than two years later, the new partners disagreed on the evolution of the tariffs and the subsidiary notified the termination of the "distribution" activity with a one month notice and, at the end of this first deadline, terminated the "rounds" activity with a one week notice and the "exclusive rentals" activity with a one month and one week notice.

The carrier considers itself the victim of a brutal breach of established relations, according to the former article L. 442-6, I, 5°, now L. 442-1, II, of the Commercial Code.

This new article states that "Any person engaged in production, distribution or service activities who suddenly terminates an established commercial relationship, even in part, without giving written notice that takes account of the duration of the commercial relationship, with reference to trade practices or inter-trade agreements, and, for the purposes of determining the price applicable during the duration of the relationship, the economic conditions of the market in which the parties operate, shall be liable for the damage caused.

In the event of a dispute between the parties as to the length of the notice period, the party who terminated the contract may not be held

liable on the grounds that the notice period was insufficient, provided that he gave eighteen months' notice.

The provisions of this II do not preclude the option of termination without notice in the event of non-performance by the other party of its obligations or in the event of force majeure."

The company Rave complains that the judgment rejects its claim on the grounds that it was necessary to take into consideration the entire duration of the relationship, initiated by the transferor, in order to assess the appropriate duration of the notice period, as well as to have considered that the notice period of one month was sufficient, whereas this duration was only granted on the occasion of the termination of the relationship concerning two of the activities that were the subject of the relationship, but not the third. And not to have investigated whether there was a manifestation of continuation of the relationship previously established.

Under what conditions does a transfer of assets or activities lead to the continuation of a relationship previously maintained by the transferor with a commercial partner, and what control should the judge carry out on the duration of the notice period subsequently granted by the transferee having resumed the relationship with this partner after the transfer?

The Court of Cassation overturned Rave Distribution's claim for compensation for damages resulting from the termination of the established business relationship. The buyer could not be considered to have continued the relationship initially established with the carrier - despite the fact that it was identical - on the grounds that the transfer plan of the first manufacturer did not provide for the transfer of the business, the contract concluded between the first manufacturer and the carrier did not fall within the scope of the contracts concluded by the second manufacturer and also that the agreement reached on the carrier's tariffs was valid for a period subsequent to the transfer plan.

We will therefore examine the terms and conditions governing the transferor's takeover of established business activities and commercial relationships (I). We will then look at how to determine the notice period for terminating an established commercial relationship (II).

I- The takeover of activities and the takeover of established commercial relationships by the transferor

A. The absence of a presumption that the relationship, even if identical, has been taken over

Originally, the takeover was almost automatic, simply because the agreement between the transferee and the original partner was very similar to the one on which the former relationship was based. However, this position was abandoned, giving way to the one we know today.

In this case, the Court explicitly confirms the principle that the resumption of an activity, whether total or partial, is not sufficient, in itself, to entail the resumption of the relationships established by the transferor and its partners.

In other words, the Court reiterates the fact that if a third party takes over the business of a person, continuing a commercial relationship as it was previously maintained with the partner concerned, this does not allow to consider that the commercial relationship is continued.

In this case, the judges consider that the relationship established by the new entrant and the historical partner, even if it is identical to the pre-existing one, is not taken over by the former.

B. <u>The need for the parties' common intention</u>

The Court of Cassation has previously defined an established commercial relationship as "the reasonable anticipation of a continuity of business flows between commercial partners"[1]. When there is a change of business partner, this in principle puts an end to a business flow, unless there is a common intention of the parties.

In this case, the transfer plan "did not provide for the transfer of the business, only a few elements of the business having been transferred", which did not include the contract initially concluded with the transferor, while "an agreement had been reached on the rates (of the carrier)". The defendant therefore "did not continue the relationship originally entered into with [the carrier], even though it was identical.

Case law has long recognized that a relationship may be continued by a person other than the person who originally entered into it[2]. Subsequently, it specified that the simple takeover of a business does not imply, by operation of law, the substitution of the transferee for the transferor in the contractual and commercial relations if it is not shown that the transferee "intended to continue the

[1] Annual report for 2008, French Supreme Court.

[2] Cass.com., 29 January 2008, no. 07-12.039; Cass.com., 2 November 2011, no. 10-25.323; Cass.com., 6 December 2016, no. 15-12.320.

commercial relationship initially entered into".[3]

The will of a single partner is therefore insufficient to bring about the resumption of the relationship and neither of them is now at the mercy of the other's intention alone. The Court of Cassation had suggested in the past that this manifestation of will could be tacit, for example by the placing of new orders. [4]

In the present case, this was not the case, even though the carrier argued that the transferee had "taken over and continued" the relationship "without any interruption before and after the transfer plan, with rates and invoicing methods as well as transport volumes remaining unchanged", implying that the transferee had, as a result, manifested its intention to continue the commercial relationship initially established.

It would therefore seem that proof of the "common intention of the parties" is required to qualify the continuation of a commercial relationship. In this respect, it should be noted that such an intention can be characterized when the preamble of the new contract concluded between the "transferee" and the assignee refers to the relationship initially entered into[5].

II- Determining the notice period for the termination of a relationship

A. Sufficiency of the notice period in case of separate activities

In the case of commercial relationships involving distinct activities, the sufficiency of the notice period granted must be assessed for each of these activities.[6]

In this case, the Court of Cassation censured the Court of Appeal's judgments for lack of legal basis, as they had only pronounced on the sufficiency of the one month notice period granted on the occasion of the termination of two of the activities, "without specifying the reason why the duration of one week's notice notified for the "tours" activity was sufficient".

It can be assumed that the previous relationship was only for one year. This length of time is not important, but as the relationship actually maintained by the terminator was itself only one and a half years, its artificial lengthening would necessarily have had a significant impact on the expected notice period.

On the other hand, the decision of the Court of Appeal which had considered the notice

[3] Cass.com., 15 September 2015, n° 14-17.964 ; Com., 11 may 2017, n° 16-13.464.
[4] Cass.com., 20 may 2014, n° 12-20.313.
[5] Cass.com. 25 September 2012, no. 11-24.301.
[6] CA Paris, 23 May 018, RG no.16/06103.

period of one month for the "chartering" and "exclusive rental" activities as sufficient for a commercial relationship lasting two years was overturned by the High Court.

Indeed, the Court of Cassation stated that "in so deciding, without specifying the reason why the one week notice period for the "touring" activity was sufficient, the Court of Appeal did not provide a legal basis for its decision".

It follows from this decision that if a party wishes to terminate several distinct commercial relationships with one and the same person, each of these relationships must be subject to a separate notice period, so that there should be as many different notice periods as there are distinct commercial relationships.

B. <u>The search for a balance between the length of the notice period and the duration of the relationship</u>

It might have been relevant to consider whether the notice period granted to the ousted partner was sufficient, but also to see whether the justification, other than simply stating that the notice period was sufficient in relation to the duration and the activity concerned, could have been different.

In the past, the Court of Cassation has regularly emphasized the imperative nature of the obligation for the judge seized of the matter to verify the adequacy of the duration of the notice period in relation to the duration of the relationship, taking into account the other circumstances of the case, even if the notice period granted was in accordance with the provisions of the contract or those of an interprofessional agreement.[7]

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[7] Cass com, 31 January 2006, no. 03-13739; Cass com, 6 March 2007, no. 05-18121; Cass com, 3 May 2012, no. 11-10544.