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Soulie Bunch, Cabinet d'avocats d'affaires basé à Paris et Lyon

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Breach of sales target clause and termination without prior notice

In a decision dated April 5, 2018, the Commercial Chamber of the *Cour de Cassation* (French Supreme court) confirmed that failure by a party to achieve the sales targets set forth in a contract does not alone suffice to justify the termination of an established business relationship without prior notice.

The trial judges must indeed specify why failure to meet this obligation is likely to establish the existence of a breach that is sufficiently serious to justify the termination.

Pursuant to Article L 442-6-I 5° of the French Commercial Code, prior notice must in principle be given in order to terminate an established business relationship. Failure by a party to perform its contractual obligations or *force majeure* can, however, justify a termination without notice.

As recalled by the decision commented herein, the power to assess whether the contractual breach is serious enough to justify a termination without notice rests with the judge.

The facts of the case are as follows.

A supplier of construction equipment and a company specialized in sanitation works had entered into a distribution contract with an exclusivity clause that set forth minimum annual sales targets for the granted territory.

The supplier terminated this business relationship without prior notice on the ground that the distributor had

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failed to achieve the sales targets defined in the contract.

The distributor and its manager argued that the business relationship had lasted for approx. 20 years and initiated proceedings to seek the payment of damages on the basis of Article L. 442-6, I, 5° of the French Commercial Code.

The Court of Appeals of Paris dismissed this claim for damages. It pointed out, in particular, the existence of a clause by which the distributor was to achieve certain sales targets and the existence of another clause that stipulated that the performance of the contract could be immediately suspended *“in case of serious and gross breach of a contractual clause”*.

It also held that, as per the terms of the contract, failure to achieve the minimum sales targets can be constitutive of a serious contractual breach that justifies the immediate termination of the contract without prior notice. It noted that the sales achieved by the distributor in 2008, 2009 and 2010 were significantly below what was provided for in the contract, and it inferred therefrom that the supplier was entitled to invoke a serious breach on the part of its distributor to terminate the contract without prior notice.

The *Cour de Cassation*, relying on Article L. 442-6, I, 5° of the French Commercial Code, quashed the judgment of the Court of Appeals of Paris and held that *“by ruling so, without specifying why the non-achievement by [the distributor], of the sales targets set forth in the contract was likely to establish the existence of a breach of its obligations that is sufficiently serious to justify the termination of the business relationship without prior notice, the Court of Appeals has failed to provide a legal basis for its decision”* [1].

As such, the Commercial Chamber of the *Cour de Cassation* confirms that failure to achieve sales targets that allows, as per the terms of the termination clause, for the automatic termination of the contract does not necessarily constitute a serious breach that releases the terminating party from its obligation to provide a prior notice under Article L. 442-6, I, 5° of the French Commercial Code.

Trial judges are obliged to establish – independently of the contractual provisions – the existence of a breach that is sufficiently serious to justify the termination of the business relationship without prior notice.

[1] Commercial Chamber of the *Cour de Cassation*, April 5, 2018, n° 16-19.923

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