

## Distribution / Competition / Consumer Law Update

March 2017

### Forum-selection clauses and the sudden termination of an international business relationship

The ruling handed down on 18 January 2017 by France's highest civil court ([Cour de Cassation, 1<sup>st</sup> civil division, case no. 15-26105, Riviera Motors v. Aston Martin Lagonda Ltd](#)) clarifies the international jurisdiction rules for claims brought on the basis of article L442-6 I 5° of the French Commercial Code (sudden termination of a business relationship as one of the restrictive business practices). In the case at hand, the Cour de Cassation confirmed the Paris Court of Appeal's decision to uphold the jurisdiction clause giving jurisdiction to the courts in England and Wales, thereby definitively reversing the judgment of the Paris Commercial Court that had found it had international jurisdiction over a claim issued by a French distributor following the termination of the distribution contract by the English supplier.

The ruling is of great practical interest because (i) it confirms an essential principle of private international law, (ii) it clarifies the scope of jurisdiction clauses in case of a sudden termination of a business relationship, and (iii) it is in line with EU case law.

#### ✓ **A jurisdiction clause cannot be voided because of a domestic overriding mandatory provision**

The French distributor argued that following the jurisdiction clause and therefore recognising the jurisdiction of the courts in England and Wales (which would then apply the *lex fori* because it was also the parties' express choice of governing law) amounted to "*frustrating the overriding mandatory provisions of article L442-6 I 5° [of the French Commercial Code] which are economic public policy*". In other words, the distributor believed that an overriding mandatory rule of the *lex fori* should determine the issue of jurisdiction.

However, it is the very essence of private international law to appreciate a conflict of jurisdictions independently of any conflict of laws. The Cour de Cassation therefore very clearly turned down that argument by holding that the Court of Appeal rightly ruled that "*the jurisdiction clause applied to the sudden termination of the business relationship even should overriding mandatory provisions apply to the merits of the claim*", thereby confirming its jurisprudence on the issue (see the *Monster Câble* ruling of 22 October 2008).

The Cour de Cassation's position reminds us of an **obvious practical solution: In order to avoid any risk of interference by an overriding mandatory rule in a given system of law**, the parties should not only **choose the law of another country to govern their contract** but also **give jurisdiction to the courts of that same country**.

#### ✓ **Forum-selection clauses apply to the sudden termination of a business relationship**

The French distributor also argued that where "*an international jurisdiction clause in a distribution contract does not expressly include disputes pertaining to liability for breach of competition law, it does not apply to a tortious action brought on the grounds of the sudden termination of an established business relationship*". This is a restrictive interpretation of the scope of forum-selection clauses which according to the distributor do not encompass negligence or competition law claims where such claims are not expressly covenanted in the clause.

The Cour de Cassation however rejected that argument and confirmed the Paris Court of Appeal's decision according to which the jurisdiction clause's scope "*extends to disputes arising from the contractual relationship*" and "*the jurisdiction clause applied to the sudden termination of the contract*".

The practical application of the ruling is clear: There is **no need to expressly covenant that the jurisdiction clause shall encompass negligence or competition law claims for the clause to govern the issue of jurisdiction over claims based on article L442-6 I 5° of the French Commercial Code** (or other restrictive business practices).

#### ✓ **A consistent approach of international jurisdiction over sudden termination cases**

By ruling that a claim issued on the grounds of the sudden termination of a business relationship lies within the scope of the jurisdiction clause, not only did the Cour de Cassation bring its jurisprudence in line with international arbitration case law (see its HTC v. Doga ruling of 08 July 2010), it also gave the parties to international distribution contracts a solution that is consistent with the CJEU's [Granarolo ruling of 14 July 2016 \(C-196/15\)](#). In a dispute between a French company, Ambrosi Emmi France SA, and an Italian company, Granarolo SpA, the CJEU, sought out by the Paris Court of Appeal to issue a preliminary ruling on the connection between an implicitly established business relationship and article L442-6 I 5° of the French Commercial Code, found that "*an action for damages founded on [the sudden] termination of a long-standing business relationship (...) is not a matter relating to tort, delict or quasi-delict within the meaning of that regulation [Brussels I] if a tacit contractual relationship exists between the parties*".

Where there is a **written framework agreement**, it must now be admitted, at least at EU level, that, failing a forum-selection clause, whether a court has jurisdiction over a claim brought on grounds of the sudden termination of a business relationship (article L422-6 I 5° of the French Commercial Code) is determined in light of article 7.1 of the Brussels I Recast Regulation no. 1215/2012 (contract-based action), not article 7.3 (negligence-based action). According to the CJEU's ruling of 19 December 2013 in re Corman Collins v. La Maison du Whisky (C-9/12, see our [May 2014 Newsletter](#)), a framework distribution agreement should be likened to a service agreement within the meaning of the Brussels I Recast Regulation; **accordingly, the court of the place of performance of the distribution contract should have jurisdiction over a claim issued on the grounds of the sudden termination of a business relationship.**

However, where there is **no written framework agreement**, the solution presented by the Granarolo ruling is a little less clear-cut. In fact, the CJEU first operates a distinction depending on whether the "*long-standing business relationship*" is or not likened to a tacit contractual relationship (according to non-exhaustive criteria). Then, if the CJEU finds that there is such a tacit contractual relationship, which court has jurisdiction over a claim (especially one issued on the grounds of sudden termination) **will depend on whether the tacit contractual relationship is likened to a sale contract or to a service agreement** within the meaning of the Brussels I Recast Regulation. The jurisdiction rule will therefore vary depending on which definition is upheld. As a consequence, although the principle set out by the ruling is that a tacitly established business relationship is to be considered as a contractual relationship, the practicalities of such a solution are fraught with uncertainty.

#### ✓ **Conclusion**

- In order to be sure of the outcome on the issue of jurisdiction and to avoid any uncertainty due to the various definitions of EU case law (see Corman Collins / Granarolo cases), it is definitely in international operators' interest to formalise their relationship in a framework distribution agreement, and even better, to include a forum-selection clause.
- A jurisdiction clause will be all the more useful from a strategic standpoint if it comes to litigation as it will also apply to restrictive business practices even if it does not expressly include either negligence or competition law (see the Riviera Motors case). And an asymmetrical jurisdiction clause might be even more effective (the validity of asymmetrical jurisdiction clauses was recently confirmed in France ([Cour de Cassation, commercial division, 07 October 2015, eBizcuss.com](#)) and in England ([High Court of Justice, Queen's Bench division, Commercial Court, 03 February 2017, Commerzbank](#))).

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