ALEXANDER & PARTNER

France
Abrupt termination of a long-standing business relationship
Dr. Daniel Smyrek / Petra Kuhn (Avocat à la Cour, Lyon) / Charlotte Baxmann
March 2020

The latest French jurisdiction on the abrupt termination of a long-standing business relationship – a contractual or tortious basis for claims?

In a decision of 7 May 2019, the highest French court missed an opportunity to discuss the legal nature of the claim for damages due to abrupt termination of a long-standing business relationship under Art. L.442-6, paragraph 1, point 5, old version, of the *Code de Commerce* (now Art. L. 442-1, II new version, of the *Code de Commerce*, please see our previous publication Important news in French commercial and distribution law).

This decision shows once again how hesitantly and at the same time contradictory the French case-law of recent years has reacted to the Granarolo decision of the ECJ.

1. The position of the French jurisdiction before the Granarolo decision

The French courts had confirmed in consistent case law that a claim for abrupt termination of a long-standing business relationship is a **claim for damages in tort**. This qualification was used to determine both the applicable law and the competent court.

However, this tortious basis for the claim did not prevent the parties from choosing the law applicable to their business relationship and the competent court. If such a sufficiently broadly formulated party agreement existed, it also extended to claims for damages in connection with the abrupt termination of a long-standing business relationship.

2. The Granarolo decision and its consequences

In this decision the ECJ has decided that

„an action for damages founded on an abrupt termination of a long-standing business relationship […] is not a matter relating to tort, delict or quasi-delict within the meaning of that regulation if a tacit contractual relationship existed between the parties, a matter which is for the referring court to ascertain."

This judgment raises the question of whether the scope of the ECJ's - contractual - qualification is limited to international cases or whether it also applies to **litigation with no international element**.

Does the scope of application relate only to the question of the competent jurisdiction or does it also extend to the question of applicable law?

The French Court of Cassation (see judgment of 13 September 2017) has followed the assessment of the European Court of Justice, but at the same time has determined that the European jurisdiction rules of the Brussels I Regulation do not apply to purely national disputes. This limitation of the scope of the Granarolo ruling was confirmed by the Court in its judgment of 11 January 2017 with regard to a purely domestic dispute, again referring to Art. L. 442-6, I, 5° old version of the *Code de Commerce* and thus based the claim on a tortious basis.

The **French case law** of the lower courts remains **divided on the classification of such disputes as tort or contract law,** both with regard to the determination of the applicable law and to the differences in jurisdiction between national and international disputes.

Thus, in its judgment of 5 December 2016, a chamber of the Paris Court of Appeal had recognized a tort nature in the determination of the applicable law in the case of abrupt terminations of long-standing business relationships with an international element (in the Granarolo judgment, the classification of the legal nature served as a means of determining the competent jurisdiction), while another chamber of the same court had recognized a tort nature in its judgment of 19 September 2018 in the case of abrupt terminations of long-standing business relationships with an international element; the same court assigned therefore the abusive termination of business relations to contract law, also with regard to the applicable law, without limiting itself to international litigation.

3. The decision of the French Court of Cassation of 7 May 2019

The claimant was a company under French law, a supplier of industrial plant, and the defendant was a company under Croatian law from which the claimant company had been purchasing its goods since 1980. The business relationship ended in October 2011, when the parent company of the Croatian company announced the closure of its subsidiary as of December of the same year via a press release. In the course of this, the French company claimed damages before the Commercial Court in Marseille, on the one hand for poor performance and delivery delays and on the other hand for the abrupt termination of their long-standing business relationship.

In its judgment of 22 September 2016, the 5th Chamber of the 5th Division of the Paris Court of Appeal affirmed the applicability of French law, in particular Art. L. 442-6, I, 5°, old version, of the *Code de Commerce*, which it justified by the fact that the **choice of law clause in the general terms and conditions of the French company** provided that French law was applicable.

The court did not rule on the applicability of the Rome II Regulation (concerning the applicable law for non-contractual obligations), but pointed out that there was a link between the place of damage and French territory. It also pointed out that Art. L. 442-6, old version, of the *Code de Commerce* belongs to the category of mandatory rules (*loi de police*) and is therefore applicable regardless of the law to which the dispute is subject under the conflict-of-law rules.

In its decision, the Court of Appeal **did not take a position on the contractual or tortious nature of the liability** of the person who has improperly terminated the business relationship, since French law, and thus Art. L. 442-6, I, 5° old version, of the *Code de Commerce* was applicable.

The court ruled that a press release does not constitute a written notice within the meaning of Art. L. 442-6, I, 5°, old version, of the *Code de Commerce*.

The Court of Cassation concurred with the reasoning of the Court of Appeal and confirmed that, according to the facts of the case, irrespective of its qualification as a matter of tort or contract law, French law was applicable, either as the statute of the contract (general terms and conditions of the French company) or as the law of the place where the damage occurred (French injured party and occurrence of the damage in France). The Court of Cassation therefore failed to comment on the legal nature of L.442-6, I, 5° old version, of the *Code de Commerce*.

However, the Court of Cassation in its judgment did not comment on the qualification of Art. L. 442-6, I, 5°, old version, as an obligatory norm (***loi de police***). As a result, this question remains unresolved by the Court of Cassation.

4. Conclusion

The Court of Cassation has not used its opportunity to clarify the legal qualification of the abrupt termination of long-standing business relationships. The qualification by the predominant French jurisdiction as **tortious liability** corresponds to the systematic classification of Art. L. 442-1, II (L. 442-6, I, 5° old version) of the *Code de Commerce*, but contradicts the qualification as **contractual liability** by the ECJ. This leads to differences in the determination of liability, depending on whether or not the dispute has an international dimension.

The lack of uniformity in French jurisprudence regarding the legal nature of the abrupt termination of long-standing business relationships may cause great legal uncertainty.

It is therefore advisable, particularly in view of this **legal uncertainty**, to determine the applicable law in addition to the determination of the competent court in a sufficiently broadly formulated **choice of law clause**, which expressly also refers to non-contractual claims, since otherwise the **determination of the applicable law** can be very arbitrary, depending on the opinion of the court first seized. At present, in the absence of a contractual agreement by the parties, the court's decision as to the applicable law is hardly foreseeable.

This article was written in cooperation with our French partner law firm LEXT Avocats.

Our law firm provides you with comprehensive support in all questions of cross-border contract drafting and review, enforceability and assertion of your claims.

For further questions, please contact us:

Alexander & Partner Rechtsanwälte mbB

Dr. Daniel Smyrek
Petra Kuhn

Joachimsthaler Straße 30
10719 Berlin, Germany

ds@alexander-partner.com
pk@alexander-partner.com

T +49 (0)30 88778050/ F +49 (0)30 887780599

Please note:

This legal update does not contain and shall not be construed as legal advice. Specific legal advice should be obtained in every case. Alexander & Partner Rechtsanwälte mbB and its partners, staff and affiliates do not accept any responsibility and/or liability for any loss, howsoever caused, by any person relying on this guide.