Hughes Hubbard & Reed

"Brutal Termination" of Established Commercial Relationships in France – In-depth Reform?

Client Advisories

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May 10, 2019 – On April 25, a French regulation went into force modifying the heavily litigated French statute governing anti-competitive practices, as part of an in-depth overhaul of Title IV, Book IV of the French Commercial Code, which covers transparency, anti-competitive practices and other prohibited practices.

Of notable and immediate interest to companies doing business in France are the modifications of the law on the "brutal termination" of established commercial relationships, a provision that does not exist in many other countries.

What is "brutal termination"?

The statute creates liability for the sudden termination of an established commercial relationship without adequate notice period, except in the event of non-performance by the terminated party or force majeure. In all other situations, termination or non-renewal of an established commercial relationship triggers the requirement to give adequate notice. Failure to give adequate notice is called brutal termination in the statute and French case law (*"rupture brutale"*; *"rompre brutalement"*). Commercial relationship are considered established when they are stable, regular and durable, whether governed by contract or informal, exclusive or not.

Brutal termination rules

In a nutshell, French commercial law prohibits the brutal termination or brutal partial termination of established commercial relationships without sufficient written notice, taking into account the length of the commercial

relationship. The length of sufficient notice is based on the length of the overall commercial relationship, irrespective of the length of any contractual notice period or of any particular contract during the overall commercial relation. The brutal termination provisions apply to all sectors of business, exclusive and non-exclusive commercial relationships, whether or not embedded in written agreements.

Brutal termination practice

French brutal termination law has led to abundant litigation and case law, including preliminary rulings by the Court of Justice of the European Union, and repeated modifications of the law in recent years. French courts have given the statute an expansive and expanding interpretation.

Damages for brutal termination are calculated based on annual profits on turnover during the year preceding termination or average annual profits during the last three years preceding termination, divided by twelve and multiplied by the number of months of notice that should have been given, with notice periods frequently ranging from six months to two years.

This formula for calculating damages and the courts' expansive views on what constitutes adequate notice often yield substantial damages in situations where the terminated party has nothing to lose by filing a lawsuit against its former vendor or distributor, thus fueling the substantial number of lawsuits each year.

An overview of French case law with respect to brutal termination claims shows in aggregate that French courts generally require notice periods of:

- three months for commercial relationships of up to three years;
- six months for commercial relationships of up to ten years;
- twelve months for commercial relationships of up to fifteen or twenty years;
- eighteen months for longer commercial relationships.

The new rules

The most recent changes are intended to simplify and clarify the statute by (i) providing that if a business provides a notice of eighteen months, it can no longer be held liable for inadequate notice, and (ii) removing the statutory doubling of the minimal length of notice where products are supplied under distributor brands or where terminations result from the use of competitive request for proposals.

The Report to the French President that accompanied the recent changes explains that according to market participants, the increase in length of notice periods and damages, and the expanding and fluctuating case law had anti-competitive effects, including encouraging litigation by terminated parties, stifling competition that would be beneficial for consumers, and imposing continued commercial relations during very long notice periods even where suppliers' commercial offers no longer correspond to market conditions or realities.

In practice, the modifications of the statute seem unlikely to resolve any of the anti-competitive effects set out in the Report to the President, or to diminish the volume of litigation.

Recommendations

Bearing in mind that the terminating party is required to continue to do an undiminished level of business with its vendor or distributor during the entire notice period in order to avoid liability, it continues to make business sense to give shorter notices for all but very long established relationships notwithstanding the prospect of a likely brutal termination claim. Even when eighteen months' notice are given, claims and litigation as to the level of business during the notice period seem likely.

Terminating a business relationship with a company in France, including not renewing a contract or diminishing turnover should therefore be carefully prepared and framed to mitigate the cost and liability of litigating a potential brutal termination claim.

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