

## When does a business relationship become an established business relationship?

Pursuant to article L442-6 I 5° of the French Commercial Code, a party terminating an established business relationship must give notice in writing and sufficiently in advance, on penalty of substantial damages (unless the termination is due to force majeure or a clear case of wrongdoing). Because the law does not define the notion of an “established” business relationship, the courts generally had a very extensive approach to the concept, applying the penalty rule both to written agreements (whether open-ended or fixed-term) and to informal relationships (successive orders).

Article L442-6 I 5° of the French Commercial Code, which in France is public policy (whether it is an overriding mandatory provision in international matters is still subject to debate), is a source of legal uncertainty, insofar as its factors of application, not being clearly defined by law, are not uniformly applied by the courts, and a source of substantial financial risk, given the amount of damages that may be awarded.

However, the Paris Court of Appeal, who has jurisdiction over all appeals filed against first-instance judgments relating to article L442-6 I 5° of the French Commercial Code, has been attempting to establish a clear and uniform system and to limit the provision’s scope, if not its impact. Thus, recent case law includes interesting clarifications as to what does or does not constitute an established business relationship.

### What is an established business relationship?

The Paris Court of Appeal recently recalled that for a business relationship to be established “*there must exist a sufficiently prolonged, regular, significant, and stable flow of business that augurs the continuance of the business relationship*” (CA Paris, 18.01.2017, 14/08437).

The court’s test appears to include **temporal (“prolonged”), quantitative (“significant”) and qualitative (“regular”, “stable”) factors cumulatively**. From the court’s grounds, one can infer that these *objective* temporal, quantitative and qualitative factors must be combined with a more *subjective* factor (“*that augurs*”). Therefore, the judges must subjectively determine, on the basis of an objective appreciation of the past relationship (duration, quantity and quality), whether there was a reasonable chance that the relationship would have carried on in the future.

The court adds in unequivocal terms that, in order to appreciate whether a relationship is established, the judges must apply a **“test of legitimate belief”** by the terminated party that the relationship would have carried on. This is quite an important clarification, from a threefold point of view: first of all, this is a “test”, implying that the just terminated relationship is to be analysed in as homogeneous and objective a way as possible; furthermore, “legitimate belief” implies conducting the analysis on a case-by-case basis; and lastly, since the belief is the terminated party’s, it is not necessary to prove that the terminating party led the other party to believe that the relationship would have carried on.

This ruling therefore appears, through the “*test of legitimate belief*”, to set out the reasoning that judges must follow when determining whether the relationship at issue is an established business relationship and at the same time to strengthen the terminated party’s procedural chances.

### What is a non-established business relationship?

In the same ruling, the Paris Court of Appeal took care to identify two cases where the business relationship was not an established business relationship. In the case at hand, EMD, a cosmetics wholesale-dealer, sued its distributor on the grounds that the failure to select it as supplier following the latest call for tenders amounted to the sudden termination of their business relationship, as it had previously been selected every year since 2007 in similar circumstances.

- **Established business relationships and competitive selection**

The court recalled what has effectively been its position for the past few years, that calls for tenders are sufficient grounds for finding against the existence of an established business relationship because of the uncertainty involved by such a process. It goes without saying that there has to be an actual **call for tenders, or at least an organized competitive selection**, or the court may hold the call for tenders to be fictitious (and therefore rule it out as a factor of precariousness in the meaning of article L442-6 I 5° of the French Commercial Code). It is worth recalling here that when a call for tenders is put out for the first time, the corresponding notice may amount to notice of termination of the previously extant business relationship, in which case the entity organizing the call for tenders must ensure it gives such notice sufficiently in advance so as to abide by article L442-6 I 5° of the French Commercial Code. On the other hand, once the call for tenders is implemented, thereby rendering the relationship precarious, the latter will no longer apply anymore because the business relationship will no longer be an established business relationship.

In the above mentioned ruling, the Paris Court of Appeal went even further by ruling that the fact that the distributor had won every single call for tenders since 2007 had no impact whatsoever when determining whether the business relationship was an established business relationship or not. In other words, precariousness is the result of the competitive selection itself, not its outcome.

- **Established business relationships and lasting product demand**

In its ruling of 18 January 2017, the Paris Court of Appeal held that whether a business relationship was precarious could be inferred not only from the relationship itself but also from the underlying products. In the case at hand, the products concerned were cosmetics for children marketed under appellations borrowed from television programmes, **which by nature are trend-dependent** (ratings) and therefore do not lend themselves to lasting purchases from suppliers. In that regard, it is important not to confuse trends and seasonality, because the French courts have previously applied article L442-6 I 5° of the French Commercial Code to informal business relationships where the parties only worked together for certain recurring events (e.g., an annual fair).

- **Established business relationships and successive contracts**

More recently, the Paris Court of Appeal attempted to restrict findings of established business relationships by limiting the way prior business relationships could be taken into account (CA Paris, 05.07.2017, 17/08074). The case was brought by several stevedoring businesses led by TN who had been working for many years on an informal basis with six ship charterers united within the so-called G6 alliance. The G6 alliance, who wished to formalize the business relationship, put out a call for tenders that ended with the signature of an exclusive stevedoring agreement with TN. However, following the subsequent dissolution of the G6 alliance, the latter terminated the exclusive stevedoring agreement with three months' notice. On the basis of article L442-6 I 5° of the French Commercial Code, TN sued for the continuation of their business relationship until the expiration of a notice period of 21 months to take into account the length of their established business relationship (up to twenty years for some of the G6 alliance's members).

The court rejected the claim that the business relationship between TN and the G6 alliance was an established business relationship, mainly because it refused to take the prior, informal relationship between TN and the G6 alliance into account on the grounds that **it did not have the same object as the terminated exclusive stevedoring agreement**. This is a very strict, indeed severe, finding, even though it does seem to follow a case law trend that aims to restrict the scope of article L442-6 I 5° of the French Commercial Code.

- **Established business relationships and the selling of a business**

The Paris Court of Appeal was apparently intent on pursuing the same goal in another ruling about the assignment of a business relationship as part of the sale of a business (CA Paris, 22.06.2017, 16/10556). In the case at hand, Ms D. sold her PR business and its clientele to Fort et Clair (FC). A few months later, one of the business's clients, Albert Ménès, gave FC 2 months' notice of the termination of their business relationship. FC sued for compensation in amount of 24 months' worth of gross margin on the grounds that the relationship was a 26-year-old established business relationship.

However, the court recalled that the **sale of a business (and therefore of the related clientele) does not entail the assignment of the contracts entered into by the seller unless expressly provided for** in the contract of sale and approved by the third party (the other party to the assigned contract, here the client).

Therefore, both above mentioned rulings clearly require, for an economic operator to "capitalize" on the prior duration of a business relationship (created either through a relationship with a different object or through a relationship established by their predecessors) and benefit from its stability in the meaning of article L442-6 I 5° of the French Commercial Code, an express covenant to that effect, either in the contract superseding the previous contract (with a more or less different object) or in the contract of sale for the business (in which case they must also secure the approval of the third party). Thus, beneath this seemingly restrictive approach

to the determination of the length of a business relationship, the courts clearly give the parties the possibility to take its entire duration into account provided they include it in the contract.

## Conclusion

- Although theoretically the “test of legitimate belief” combined with the temporal, quantitative and qualitative factors established by the Paris Court of Appeal appears to set a framework liable to create legal certainty for terminating and terminated party, in practice, the courts often fail to examine all factors or even to (properly) apply the test.
- There is a risk that purchasers concerned that their business relationships with suppliers will be defined as established business relationships in the meaning of article L442-6 I 5° of the French Commercial Code will systematically, and therefore at times artificially, have recourse to competitive selection or calls for tenders.
- Article L442-6 I 5° of the French Commercial Code, which targets restrictive business practices, probably needs to be reformed, either to limit its application to relationships between suppliers and mass market retailers or to clarify its regime. In that regard, the French competition agency DGCCRF has launched a debate on a comprehensive overhaul of the laws targeting restrictive business practices... which is probably good news both for the courts and for economic operators.

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