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Sudden break of established business relationships: The Paris Court of Appeal confirms the interim order concerning the pursuit of deliveries under daily penalty to a supplier in dominant position, who had announced to a client the stop the commercial relationship with a very short deadline, after a disagreement on business conditions, in particular prices, for the coming year (*ITM Alimentaire International / Coca Cola*)

DISTRIBUTION, FRANCE, DOMINANCE (ABUSE), DISTRIBUTION/RETAIL, DAMAGES, DISTRIBUTION AGREEMENT, PRICES, REFUSAL TO DEAL, TERMINATION OF SUPPLY, ANTICOMPETITIVE OBJECT / EFFECT, SUDDEN BREAK OF ESTABLISHED BUSINESS RELATIONSHIPS

Paris Court of Appeal, Nov. 26th, 2020, ITM Alimentaire International / Coca Cola European Partner France, RG n° 20/02392

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Facts and procedure

The case, which received a lot of media attention, was one of the highlights of the trade negotiations for 2020 (Ord. référé Trib. Com. Paris, 16 Jan. 2020, No. 202000169, Lettre distrib 02/2020, our observations). In summary proceedings more than elsewhere, the sequence of facts being of primary importance, we relate them from the decision of the first judges while adding some complements in view of the appeal judgment.

Following a disagreement during year-end negotiations over the pricing and distribution terms applicable for 2020 with central SAS ITM Alimentaire International (ITM), SAS Coca Cola European Partner France (Coca) has stopped supplying ITM as of 2 January 2020. This disagreement came after in August 2019, ITM notified Coca of a delisting of 18 products

from 1 October 2019 and then more, which would result in a decrease in forecasted sales of 38% with ITM according to Coca or 20% according to ITM. Given the importance of the value of the sales concerned between the two operators, i.e. 165 million for 2019, there was a question of Coca suffering a decline in turnover of around 33 million on an annual basis (if a 20% reduction). ITM nevertheless considered that the delisting had been announced a long time ago and that it would not necessarily lead to a drop in volumes, given the transfers that could be made to other products of the brand. The parties then tried unsuccessfully to find common ground for 2020, with Coca proposing a *"transitional"* agreement for January and February 2020 based on a 6% drop in " *volumes* " (which would seem to be less than the expected drop in sales, although this is only a guess on our part, as the order refers first to sales and then to volumes), in exchange for a 2.7% price increase for January and February 2020, while an agreement was reached for the new fiscal year. ITM opposed it with a " *deflation* " demand of 2.4%. The appeal judgment tells us more, specifying that ITM maintained that the proposed agreement amounted to imposing a 37% increase in the triple net price compared to the 2019 tariff and a deterioration in payment conditions, with the deadline reduced to 30 days instead of the usual 45 days. As the negotiation arm wrestling persisted, Coca notified ITM by email on December 24, 2019, of a total halt to its deliveries as of January 2, 2020, i.e. a 9-day notice period. The appeal judgment is more precise than the order on the content of the notification: Coca was surprised to have received orders for deliveries as of January 2, 2020, and had reminded ITM that given the absence of a signed agreement, there would be no more agreed price as of January 1, 2020, and that in the absence of an agreement, only its 2020 GTCs and tariffs would apply. Therefore, in order to ensure that there would be no dispute in the payment of the corresponding invoices and to proceed with the deliveries, Coca invited ITM to confirm by return and in writing whether, in this context, ITM wished to cancel or maintain its orders. Pending confirmation - which did not come - Coca decided to temporarily suspend delivery of these orders.

Invoking a brutal and total breach of an established commercial relationship, constituting a manifestly unlawful disturbance and a source of imminent damage, ITM immediately summoned Coca as a precautionary measure, in summary proceedings from hour to hour for the hearing of January 14, 2020 to be held before the President of the Commercial Court of Paris, to order Coca to resume its deliveries " *until the earliest of the following events* ", i.e., either " *the conclusion of an annual agreement between the parties for the year 2020* " (in the event of an agreement between the parties), or " *the expiry of a 24-month notice period expiring on December 31, 2021* " (in the event of disagreement between the parties at the end of the negotiation period for 2020). ITM also sought a penalty payment of 493,000 euros per day of delay in deliveries.

In view of the circumstances (30 years of commercial relations dating back to 1989, Coca's market share in the cola market of 75% to 90%, turnover of 165 million for 2019 between Coca and ITM), Coca was ordered on January 14, 2020 to resume its deliveries under a penalty payment of 460,000 euros per day of delay following the service of the order - i.e., a quantum corresponding to ITM's daily turnover with Coca in 2019. For the Court, " *the refusal to sell and the delivery from January 2020 announced with 9 days (including 5 working days) of notice leading to a stock shortage in the network of SAS ITM ALIMENTAIRE INTERNATIONAL and the risk of loss of clientele is an abusive breach and an abuse of dominant position by Coca Cola* ". *In the end,* the measures ordered by the Court were not those requested. The operative part of the order did not expressly indicate the conditions under which the deliveries were to be made, even though the reasons for the order indicate that the contractual conditions of 2019 were involved. This meant that Coca was to make deliveries for two months on terms which were not those offered to ITM on a transitional basis, albeit over a fairly short period, namely the period during which the annual commercial negotiations take place, in principle until 1 March. At the beginning of March 2020, the trade press announced that ITM and Coca had reached an agreement for the 2020 trade negotiations (LSA en ligne, 4 March 2020, Y. Puget). According to the commented judgment, deliveries resumed as of January 17, 2020. Everything finally went very fast to reach an agreement. However, on January 29, 2020, Coca filed an appeal to have the order reversed in all its provisions. The parties were thus once again to confront the imputability of the cessation of deliveries and the existence - or not - of a manifestly unlawful disturbance and/or imminent damage caused by this situation, which the summary judgment judge put an end to on a provisional basis, in a context of possible abuse of Coca's dominant position and commercial disruption of established commercial relationships.

Problem

Identifying the " *heart" of* the case as the lack of agreement for the period between the end of the calendar year and March 1, since in this case the agreements between the parties governed the calendar year, and at the end of each calendar year, when the parties are in the process of negotiating for the next year, the question arises "what *happens in the absence of an agreement for the January and February transitional period* ".

In other words, the question submitted to the judge of summary proceedings, judge of the evidence, was whether, in the absence of an agreement on prices for the transitional period of January and February 2020, Coca could refuse all deliveries (or, as it intended to do in the absence of an agreement on prices for the new year, decide to apply its tariffs and GTCs alone), no sale being possible without an agreement on the goods and price, without contravening the provisions of Article L 442-1 of the French Commercial Code (brutal breach) and without, in so doing, abusing its dominant position and if this refusal constituted a manifestly unlawful disturbance or caused imminent damage, the only hypotheses in which the interim relief judge has the power in the presence of a serious dispute.

Solution

No manifestly unlawful disturbance. The Court ruled that " *the constraint under which the parties find themselves, both to seek an agreement, not to continue to sell if an agreement has not been reached, but also not to break off their commercial relations unilaterally and without prior notice, all under penalty of criminal and administrative sanctions and compensation for damages, preclude considering, at the summary proceedings stage, the refusal to accept new orders without the price having been agreed beforehand as manifestly unlawful in the light of these contradictory injunctions. Similarly, the imputability of the failure to conclude an agreement and of the means of pressure used in the negotiations by one or other of the parties, and therefore of the rupture of commercial relations, is a matter for the judges of the merits.* ». The jurisdictional power of the judge in summary proceedings on this issue is therefore excluded.

But an imminent damage. The Court ruled that "On *the other hand, it is sufficiently established, as demonstrated by the facts that occurred between January 2 and January 17, 2020, the date on which deliveries resumed, that the sudden cessation of deliveries of the Coca Cola brand to Intermarché stores constitutes definite damage to the distributor in the case of a product that is not very substitutable, as demonstrated by (...) and for which studies confirm that stock shortages can lead a significant proportion of consumers to change brands in order to find it (...). Although the law does not require the parties to reach an agreement, it does sanction abuse of the commercial relationship. The sudden cessation of deliveries, in the middle of negotiations, at a time that Coca Cola knows to be crucial for distributors and for products that it knows are not substitutable, causes ITM the damage that is clearly required in summary proceedings, first imminent and then actual, which justifies the interim relief judge of the Paris Commercial Court taking action,* on the *clear basis of Article 873 paragraph 1 (...), the only measure likely to put an end to it, i.e. the resumption of deliveries, pending the outcome of negotiations or a decision by the judge on the merits on the price applicable to the transitional period* .

Analysis. Stormy: that's the word that comes to mind when talking about the negotiations for 2020 between Coca-Cola and ITM. It is also the word that seems to fit the negotiations for the same year between the other members of the European alliance AgeCore (Agecore's war with Coca-Cola spreads to Belgium, *www.retaildetail.be* 10 February 2020, S. Van Rompaey), which includes Intermarché Eroski in Spain, Conad in Italy, Colruyt in Belgium and Coop Switzerland (on this International Service Centre, see Commission of Inquiry into the situation and practices of large-scale distribution and their groupings in their commercial relations with suppliers, Wednesday 4 September 2019, report No. 96). The subject of European agreements or *"disagreements"* can moreover refer to the broader issue of European negotiations. In this regard, we refer to the new provisions introduced into Article L. 441-3 of the Commercial Code on the occasion of the ASAP Act of 7 December 2020.

Among other subjects raised by this dispute, there is that of the brutal rupture of established commercial relations and the summary procedure *(see the report of* the Committee on Contracts for the International Sale of Goods, No. 08-18.337, CCC, April 2020, No. 93, N. Mathey; Com. Com. 10 Nov. 2009, No. 08-18.337, CCC, April 2020, No. 93, N. Mathey; Com. 3 May 2012, Appeal No. 10-28.366; *Com., 24 June 2020, No. 19-12.261 to be reported* on this case in Lettre distrib. 10/2020, our comments). The particular interest of this case is that it combines the problem of a rupture with the possible abuse of a dominant position by a supplier and a disagreement on price in the context of the end of year commercial negotiations. The summary order had ordered the resumption of deliveries on the basis of Article 873 paragraph 1 of the CPC (referring to paragraph 2 because of a clerical error noted by the Court), according to a reasoning that could seem rather cryptic on the subject matter of the summary order, i.e. the manifestly unlawful disturbance, the imminent damage, or both. The clarifications recently made by the Court are therefore welcome. The Court confirmed the order, but without adopting the reasons relating to the manifestly unlawful disturbance, thus retaining only the basis of imminent harm. It is true that the characterization of a manifestly unlawful disturbance with the evidence of the summary proceedings could appear more difficult. It seems to us, however, that while the Court refused to enter into a debate on the imputability of the breach to one or the other of the parties, it nevertheless considered the opposability to Coca of the argument relating to the " *not very substitutable* " or even " *non-substitutable* " nature of its products, to the extent that the absence of the latter from the shelves would be likely to lead a non-negligible proportion of consumers to change the brand. The characterization of an imminent damage was thus more favourable here than the manifestly illicit disorder to order the maintenance of deliveries in the presence of a disagreement on the price. Without it being necessary to choose between the two aforementioned grounds, it would seem that imminent damage, a simple question of fact subject to the sovereign appreciation of the summary proceedings judge, is easier to assert, provided that the conditions are verified, than manifestly unlawful disturbance, a legal concept subject to the control of the Court of Cassation (L. Cadiet, M. Jeuland, Droit judiciaire privé, 11th ed. LexisNexis, No. 631). The existence of a manifestly unlawful disturbance suggests a confrontation conducive to a debate on the merits, whereas the parties are passing the buck here as to the imputability of the failure to negotiate, and thus of the failure to conclude an agreement, and in so doing of the termination of the commercial relationship.

But in terms of principles, there is nothing to prohibit invoking the latter basis as ITM did *(rappr.* Paris, Jan. 26, 2017, No. 15/18120). And why not wonder then, subject to the unknown content of the agreement between Coca and ITM for 2019 as to the possibility of modifying during the contractual period the essential elements of the relationship such as the number of products referenced, the negotiated purchase prices, the impact of the modifications of the "purchase plan" on the said prices etc.? on the legitimacy of the request to maintain - or almost maintain - the conditions previously agreed between the parties and, in so doing, on a possible and other manifestly unlawful disturbance which could also have been questioned as a disruptive act by one of the parties and damage suffered by the other? Indeed, since the initial parameters of the commercial relationship were seriously modified, one could suggest another assessment of the tariff disagreement. On the one hand, the substantial modification by ITM of the number of discontinued products as of October 2019 and the consequent significant loss of turnover for Coca in the last quarter of the year (notwithstanding a debate on the existence of possible range discounts and the sensitivity of this subject for possibly dominant companies) and then, on the other hand, ITM's demand for the former price conditions or conditions which were fairly similar, may call for another type of balancing, or weighing, of the interests or legitimate rights of the plaintiff (ITM) against the legitimate rights of the defendant (Coca), which may also have considered, but did not go so far as to formulate, counterclaims. For in this case, it might have seemed odd to demand that the supplier maintain its prices, when the latter had perhaps been agreed to on the basis of a broader listing, and therefore a much higher forecast turnover. Similarly, *what about* the partial termination of the established commercial relationship following the delisting of products representing, according to ITM or Coca, between 20% and 38% of the forecast turnover, by means of a notice given in August 2019 for the following 1 October, despite the hypothetical situation according to which, for ITM, " *the delisting did not necessarily lead to a drop in volumes, given the carry-over that could take place on other products of the brand* "? *What* if, by chance of a combination of qualifications, the same facts caused imminent harm to one of the parties and a manifestly unlawful disturbance to the other, or even imminent harm? This is food for thought in other similar disputes. Of course, in practice, unless you are totally rejected in the event of a complete

delisting due to disagreement over price, it is difficult, *especially* for an average supplier - who is not Coca - to go back on the prices agreed the year before. And if ITM had finally caught Coca off guard in this hour-to-hour dispute, although it is indeed unlikely that a supplier, including Coca, would act against its distributor in such a context given its desire to see the relationship continue *in the end*.

If Coca did not obtain a reversal of the decision, the fact that it maintained its appeal, having meanwhile reconciled with its customer, will have enabled it to better understand the room for manoeuvre it has in view of the degree of substitutability of its product in the event of another stormy negotiation. The lesson may also be of benefit to suppliers in a similar situation. But beyond the reflections that this case raises in terms of the foundations of the summary procedure, it would be, in our view, exaggerated to extend its scope without taking into account its underlying factors. The dispute is nevertheless worth examining, as it is emblematic of the tensions between suppliers and distributors during annual negotiations, in which the judge has become a player in the commercial negotiation process.