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Upstream marketing of agricultural products: The Paris Court of Appeal sheds some light on the upstream marketing of agricultural products, particularly fruits and vegetables, and essentially dismisses a producer's various claims for compensation against his buyer *(La Fraiserie de Sologne / Prosol)*

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Paris Court of Appeal, 13 March 2024, RG n° 21/15034, La Fraiserie de Sologne / Prosol

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Facts. The dispute was between an agricultural fruit and vegetable producer, EARL La Fraiserie de Sologne ("the producer" or "the Fraiserie") and a distributor, S.A.S Prosol, operating Grand Frais stores ("the distributor" or "Prosol" or "the buyer"). The relationship, not formalized in a written contract, was established in 2014. Following their termination in 2016, the former sued the latter for compensation for various losses it considered it had suffered in respect of late payments, unjustified credit balances, failure to comply with the legal obligation to formalize a purchase contract and the brutal termination of relations. As a counterclaim, the distributor accused it of acts of disparagement for having discredited its products and services (press article, blog post). On appeal by the producer, whose case had been dismissed in the 1st instance, the Court upheld the first judgment, except insofar as it had rejected the producer's claim for reimbursement of the disputed assets, and ruled that the distributor had wrongfully terminated the purchase contract, even though on this last point the Court had not awarded damages, as the producer had failed to demonstrate his prejudice. Prosol, for its part, saw its claim for disparagement dismissed.

Problems and solutions. Some of the problems encountered, particularly with regard to restrictive practices, are of a general nature (pts. 1 to 5); others call for more specific discussions with regard to the marketing of agricultural products, in this case fruit, by a producer to a first buyer (pts. 6 to 8), while upstream litigation is still infrequent.

1. New claims for compensation on appeal in cases of sudden termination. Claims for compensation for specific losses (loss of investments made, moral prejudice) caused by the brutal nature of the termination and not presented at first instance are not deemed to be new and are therefore admissible. In fact, they were explicitly linked to compensation for the overall loss caused by the abruptness of the termination, and thus pursued the same remedial purpose as the initial claim for compensation, the amount of which they increase without altering its basis or objective. In terms of compensation, not everything is set in stone at the first instance stage.

2. Subject matter of claims, rules governing the non-aggregation of liability regimes and the principle of full reparation. The Court examines the content of claims that may have the same object, combining restrictive competition practices (under tort law) and contractual breaches (under contract law) and leading, rather than to the accumulation of tort and contractual liability, to the pursuit of double compensation for damage (in this case, lump-sum and global compensation), which is contrary to the principle of full reparation. More surprisingly, in contrast to a ruling to the contrary (Com., Oct. 24, 2018, n°17-25672, *Lettre distrib.* 12/2018, followed by others: Com., Apr. 10, 2019, n° 18-12882, *Lettre distrib.* 05/2019, *obs.* C.M-G. *A rappr.* Com., Sept. 25, 2019, n° 18-11.112 and Com., Oct. 2, 2019, n° 18-10886, *Lettre distrib. 11/2019*), the Court considers that " *the sanction of cumulation is not the rejection of complementary claims with the same object but (...) their inadmissibility* ", referring in this sense to a ruling " *illustrating an old and constant position. Com., December 4, 2019, n° 17-20.032* ". On this point, one of the most authoritative authors has taken the view that this ruling does not, however, entail a reversal of the jurisprudence sanctioning appeal rulings declaring all claims inadmissible when the claimant seeks, on the one hand, compensation for the brutal breach of contract in disregard of Article L. 442-6, I, 5° and, on the other hand, non-performance of an agreement on a contractual basis (C.M-G, *Lettre distrib. 01/2020*). In this vein, it is also interesting to note that in its analysis of " *brutal breach of contract and commercial relations* ", the Court refers to some of the aforementioned judgments which ruled against the sanction of inadmissibility. Ultimately, however, for the Court, the hypothesis is not so much that of a combination of actions on incompatible grounds, as that of the pursuit of double compensation for the same loss, regardless of the artificial difference in quantum. And this time, in the same ruling, it stated that the sanction " *is not the inadmissibility of the claim for restrictive practices, but its rejection on the merits* ", as the additional compensation sought runs head-on into the principle of full reparation. It is fortunate that this latter principle allows us, in a way, to find our way through this sometimes complex motivation. Therefore, and again quoting the aforementioned author, " *we cannot overemphasize the care that should be taken in the correct formulation of claims and the grounds on which they are based* "(*Lettre distrib. 01/2020*) or " *suggest that litigants, to be on the safe side, prioritize their claims (...)* "(*Lettre distrib. 02/2019*).

3. State of economic dependence. The subject is linked to the characterization of the submission of one of the parties, as a condition of the grievance of significant imbalance. As in a number of previous rulings, reference is made here to the " *threat threshold* " beyond which the company's survival could be jeopardized (Paris, March 15, 2023, no. 21/13227 and 21/1348, *Lettre distrib. 04/2023* or Paris, May 10, 2023, no. 21/04967, *Lettre distrib. 06/2023, our observations*; Paris, June 7, 2023, no. 21/19733), as an indication of a state of economic dependence. In this case, such a state had to be put into perspective, to arrive at the conclusion that " *the economic dependence of EARL LFDS is the result of its own choices and is not suffered, either because of the structure of the market or the behavior of SAS Prosol. It is not such as to characterize per se the general impossibility of negotiating, agreeing and refusing alleged by EARL LFDS* ". Please refer to the judgment for a description of the circumstances taken into consideration to arrive at this solution, which in this case makes the demonstration of a bid more demanding.

4. Existence of the counterparty as an indication of submission. The latter (or the attempt to do so) has not been demonstrated. However, the Court reiterates the formula: " *if the analysis of the consideration is primarily part of the assessment of the significant imbalance, the analysis of its existence, rather than its sufficiency, remains useful to characterize a possible submission or attempt at submission ...*".(*rappr.* Paris, March 15, 2023, May 10, 2023 and June 7, 2023, *aforementioned*).

5. Final imbalance in rights and obligations. Finally, when assessing the unbalanced nature of a unilateral termination option in the event of serious misconduct for the sole benefit of the buyer, as provided for in article 9.2 of the contract communicated in 2016, which the producer, claiming economic dependence, had refused to sign, the Court usefully points out that *the* " *asymmetry* " of the clause (which the Court notes is strictly supervised in terms of the substance and form of its implementation) does not generate an imbalance that would, moreover, be significant, as this must be " *assessed globally, not only in consideration of the clauses of the contract and its general scheme* ", but " *also in the light of the options offered by the ordinary law of obligations, which is intended to govern their relationship, either in the silence of the agreements, or by derogation from their provisions, 'the rights and obligations of the parties' within the meaning of article L 442-6 I 2°, which are evoked in all generality and have as their necessary support only a commercial relationship, must be appreciated in the normative context which they reproduce or modify* ". Although stipulated for the benefit of one party only, the right to terminate for gross negligence remains open to the other on the basis of common law. This lesson will prove useful both in assessing the imbalance and, where necessary, in " *rebalancing* " the contract, and may reduce the vulnerability of certain termination clauses stipulated for the benefit of only one of the parties.

6. Absence of a written contract for the sale of fruit and vegetables by a producer to a first buyer, and consequences in terms of compensation. As a reminder, pursuant to article L. 631-24 CRPM in its version resulting from the "LMAP" law of July 27, 2010 and a decree of December 30, 2010, amended on September 15, 2011, the purchase of fruit and vegetables intended for resale in a fresh state and delivered on French territory had to be the subject of written contracts between producers and buyers. However, as soon as the impact study for the Egalim Law was carried out, it seemed advisable to adapt the texts, and in particular to repeal articles R. 631-11 to R. 631-14, which had made written contracts compulsory in this case (to this end, decree of April 11, 2019, then of December 26, 2022). But in the case in point, the sales of fruit by the grower to the buyer took place in 2014 and 2015 and should therefore have given rise, for this same period, to a written contract proposal by the buyer to the grower and a subsequent written contract. This was not the case. The producer then claimed that the violation of the aforementioned public policy regulation, punishable by an administrative fine (cf. art. L. 631-25 in force at the time), and in particular the failure to provide the written contract proposal, had caused him damage for which he sought an order against the purchaser for 100,000 euros. His claim was rejected: " [la Fraiserie] *does not specify the financial or moral nature of the loss it alleges, nor the methods used to assess* it. *And while it does not prove that it was unable to negotiate the economic and legal terms of the commercial relationship, and that SAS Prosol was not responsible for its termination, as will be explained below, it does not explain how the absence of a written agreement,* which *it only belatedly denounced, and for which it is just as responsible as its co-contractor, as the court rightly pointed out, would be such* as to *make the relationship more "precarious" or to increase its dependence, since there is nothing to explain the concrete impact of the non-existence of a written document on its activity and its choice to contract.* As a *result, she cannot justify any reparable prejudice linked to the fault she alleges* ". In this way, the judge avoided having to rule on the questions raised by the distributor as to whether the plaintiff was a wholesaler and not a producer, which is necessary for the application of the law, as well as on the consequences of the subsequent repeal of the contractualization obligation for the characterization of the alleged fault, the distributor invoking retroactivity "in mitius", even though the regulation in question is not subject to criminal sanctions.

If we accept the idea that a written contract presupposes that both parties agree to it, then its proposal, initiating the negotiation, was the buyer's business. Unless we are to assert the inanity of the multitude of contractual frameworks in the food supply chain, it is not out of the question to think that the lack of formalization of a mandatory contract (at the time, three years for fruit and vegetables) is likely to encourage the expression of the economic power of one of the parties and the precariousness of supply from the other. But this is not enough to be compensated: failure to comply with the obligation to enter into a contractual agreement can only be compensated if the prejudice claimed is proven and quantified in a way other than by guesswork.

7. Fruit and vegetable purchasing credit notes and late payment. At the time, a buyer, distributor or service provider could not benefit from discounts, rebates and refunds for the purchase of fresh fruit and vegetables (art. L. 441-2-2 C. Com.), and indeed still cannot (art. L. 443-2 II C. Com.), except in the case of price reductions resulting from non-conformity of the product delivered with the order, if an agreement, concluded by an interprofessional organization, has specified the conditions. Such an

agreement, concluded for three years, existed at the time. Other agreements of the same type were subsequently concluded (the latest on December 22, 2024, for a one-year period). However, such a reduction had to be provided for in "the contract, the general terms of sale or purchase or any other contractual document" concluded between the supplier and the buyer, prior to the fruit and vegetable purchase in question. But there were no such documents in this case. According to the Court: "the credit notes (...) for a total proven amount of 9,630 euros (...) were (...), legally proscribed". As a result, the distributor was ordered to pay this sum, "regardless of the absence of any contemporaneous dispute as to whether they had been obtained", since this was a matter of public policy. On the other hand, and with regard to the claim for an award of 100.000 for "loss of earnings which had a significant impact on the producer's cash flow", the claim was dismissed, as "nothing establishes a distinct prejudice in causal link with the fault of SAS Prosol (...) the amount of the credit notes granted, which represent 4% of sales for the corresponding financial year, being particularly low and having had no tangible impact on the cash flow of EARL LFDS, already in difficulty for other reasons since at least 2006". The same logic applies as in point 6 above.

8. Brutal breach of contract and established commercial relations and suppletive rules. With regard to this last point, it is questionable whether the supplier's request for 15 months' notice for a two-year relationship was successful. The distributor argued that the relationship had not been established, given the punctuality of the orders received and the grower's refusal to sign the proposed contract for 2016, in addition to the fact that the grower could not rely on a minimum three-year contract for the broken relationship, as provided for in article R 631-14 CRPM for sales of fruit and vegetables subject to compulsory contractualization, from which the grower deduced the established nature of the relationship and which did indeed provide for notice of termination, but of at least 4 months. The question was whether, despite the failure to conclude such a contract, the content of which had to comply with legal requirements, one of the parties could rely on a statutory regime, a usage or a standard contract, all of which derived from the content of an imperative contractual regime, even though in this case it had not been respected. The Court gave the following answer to this question: " (...) the absence of a written contract, which is no more attributable to SAS Prosol than to EARL LFDS, as the former's obligation to issue a prior written proposal does not make it de jure responsible for the subsequent conditions of formalization of the agreement, excludes the invocation of the benefit of article R 631-14 of the French Rural and Maritime Fishing Code, including as an element of assessment of the legitimate projections of EARL LFDS, which has not demonstrated any usage enshrined in this text, which does not institute any standard contract applicable in the absence of special provisions by the parties. Above all, the established nature of the relationship must be assessed in the light of the economic data relating to the flow of business between the parties" (Comp. in terms of payment terms and late payment penalties: Com. March 3, 2009, no. 07-16.527 P, Lettre distrib. 03/2009, our obs.; Civ. 3e, Sept. 30, 2015, no. 14-19.249, Lettre distrib. 10/2015, M. Alby). The Court concluded that the relationship had not been established, and that the buyer was not responsible for breaking it off. This solution would appear to be transposable to other "upstream" sectors where written contracts are mandatory. And even if contractualization is optional, voluntary contractualization, provided it remains balanced, has certain virtues, such as giving the parties visibility over their future.