

It's not so simple to terminate an agreement without misconduct

Following the clauses of the agreement is not sufficient to terminate a commercial relationship. Economic law imposes constraints which cannot be neglected.

Feel like a change? Want to benefit from a new supplier's innovative ideas and original proposals? Want to work for a new client in whose organization you are most interested and with which you could easily renegotiate your terms and conditions of sale? Quite often, after several years of collaboration, companies wish to change partners. Not because a partner has breached its obligations. All is working well, the agreement is performed and exchanges are correct. But an indescribable desire for renewal, the impression that things could be better with a new partner, is slowly taking hold.

How to end the existing collaboration and recover the freedom to conclude a new agreement with a new company? Most simply check whether there is an agreement, and if so, read its terms to comply therewith. But, for several years now, there is a developing economic law, which overlaps standard contract law. This law, whose aim is notably to encourage fair commercial relationships, has a direct impact on the terms of their termination. Simply analyzing the clauses of an agreement, without taking this economic law into account, could lead to grave errors.

Notice period to be observed once a relationship is established

A striking example of economic law is Article L.442-6, 1-5° of the French Commercial Code (mandatory rule). It states that any producer, trader, industrial or any person registered with the trade register incurs its liability if it suddenly terminates, even partially, an established commercial relationship, without written notice taking into account the commercial relationship and respecting the minimum notice period determined, by reference to business practices, by interprofessional agreements. Excluding this Article in international agreements does not necessarily work, as French judges regularly characterize it as a mandatory rule.

What are the practical consequences of the application of this Article? Here are a few examples.

In the absence of agreement, many companies think that they are free and can change commercial partners as they please. This is not the case. If you have been in a commercial relationship with a partner for several years, you have to give your partner a sufficient notice period. Namely a notice period which will allow it to reorganize its activity before the termination becomes effective. The judge has sovereign power to appreciate such notice period, notably taking into account the duration of the relationship.

To clarify matters, partners sometimes decide to include in their indefinite term agreement a clause pursuant to which each of them may terminate the relationship, without having to substantiate its decision, after a notice period of X months. Is it possible to refer only to this period when deciding to terminate? In actual fact, economic law forces you to recalculate this notice period if it is insufficient with respect to the duration of your relationship. And otherwise, in case of litigation, the judge has the authority to increase this period and to sanction you for not having extended it automatically.

A fixed-term agreement offers predictability in business management. But its termination may be more delicate, notably in case of successive fixed-term agreements. Case law considers that a notice period must also be granted to a partner which may legitimately expect a renewal of the fixed-term agreement. In these circumstances, it is important to meet before the expiration of the agreement to discuss the future of the relationship early enough to be able to grant sufficient notice period in the absence of renewal. A sudden drop in the relation's business volume, characterized as partial termination, must also be accompanied by a notice period.

Another difficulty to take into account: The notice period must be given in writing. Thus, even when a relationship of trust has been established between the partners and daily exchanges take place over the telephone, notifying the notice period in writing is the only permitted form of proof. During any notice period, the relationship must remain identical to what it was prior to the notification (same business volume and prices in particular). These few examples are sufficient to demonstrate the complexity resulting from economic law. Although the relationship is still cordial, the conclusion of a win-win settlement agreement will allow each party not to waste time, to remove hazards and to invest itself fully in the construction of new partnerships.

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