

Examples of clauses

- *In an indefinite term agreement*
 - *« Unless Article [•] is applicable, the Agreement may be terminated by any Party at any time, subject to a three-month notice period, no indemnity or other compensation shall be due on termination of the Agreement ».*
- *In a fixed-term agreement*
 - *« This Agreement shall come into full force and effect on Effective Date and remain in force for a duration of three (3) years (Initial Term). After expiry of Initial Term, the Agreement shall be renewed for successive fixed-terms of twelve (12) month unless terminated by either party giving at least six (6) month prior written notice».*

Section L. 442-6, I, 5° Commercial Code

1. – “Any producer, trader, manufacturer who commits the following offences shall be held liable and obliged to compensate for the damage caused:

5° Abruptly breaking off an established business relationship, even partially, without prior written notice commensurate with the duration of the business relationship (...).

Where the business relationship involves the supply of products bearing the distributor's brand, the minimum notice period shall be double that which would apply if the products were not supplied under the distributor's brand.

The foregoing provisions do not affect the right to terminate without notice in the event of the failure by the other party to perform its obligations or in the event of force majeure”.

Main features of section L. 442-6, I, 5°

- *“Any producer, trader, manufacturer who commits the following offences...”*
 - *This provision applies to all economic operators unless they are non-traders and do not take part to business*
- *“Business relationship”*
 - *The notion of relationship differs from the one of contract*
 - *A relationship applies to a string of one-off contracts (orders, a string of fixed term contracts or to an indefinite term contract*
 - *A relationship can be set up even if one party changed e.g. a new supplier continues the performance of a contract made with a previous supplier following a merger.*

Main features of section L. 442-6, I, 5°

- *“Established”*
 - *The relationship must be continuous and stable what reasonably allows the victim of the break off to believe in the continuity of the relationship in the future.*
 - *Evidence of stability : duration of the relationship, frequency and consistency of the relationship, investments made in view of the relationship’s development, technical cooperation between the parties, size and evolution of the turnover.*
 - *Evidence of absence of stability: one-off contract for a limited time, systematic calls for tender and competitive biddings*
- *“Abruptly breaking off (...) even partially”*
 - *This provision applies to a complete termination*
 - *It may also apply to a partial termination: significant reduction of orders ; significant and unjustified change of the contract terms (prices, payment terms)*

Main features of section L. 442-6, I, 5°

- *“Without prior written notice...”*
 - *The notice must be sent in writing and the terminating party has to evidence this sending*
 - *The notice must be clear letting no possible doubt on the decision of the terminating party.*
- *“...commensurate with the duration of the business relationship...”*
 - *The prominent and first criterion for assessing the notice period is the duration of the business relationship.*
 - *Some rulings tend to uphold a notice period of one month per year of business relationship with a maximum of 24 months*
- *“... in line with standard commercial practices”*
 - *The Court must take account of other relevant criteria.*

Main features of section L. 442-6, I, 5°

- *The other criteria taken into account by the Courts*
 - AGGRAVATING CRITERIA
 - *Steady turnover increase*
 - *Economic dependence of the non-terminating party towards the party who decided the termination (no or few or hard to find alternatives)*
 - *Time required to sell off the stock*
 - *Specific investments made upon demand of the terminating party in respect of the business relationship*
 - *Technical nature of the products or services*
 - *Seasonality of the activity*
 - MITIGATING CRITERIA
 - *A low proportion of the products in the victim's activity*
 - *Partial breaking off*

Main features of section L. 442-6, I, 5°

- *“The foregoing provisions does not affect the right to terminate without notice in the event of the failure by the other party to perform its obligation or in the event of force majeure”*
 - *Breach of Contract and force majeure,*
 - *Justify the termination without granting a notice period.*

Liability and compensation

- Abrupt termination renders the terminating party *“liable and obliged to compensate for the damage caused”*
 - *Debate on the nature of the liability: in tort or pursuant to a Contract, the stake of this debate being:*
 - *the competent jurisdiction in international litigation.*
 - *The law applicable to the contract/business relationship (Rome I or Rome II)*
 - *The compensation must equal the gross margin that the non terminating party would have earned, had the notice period be sufficient.*
 - *Other losses of the non-terminating party may be compensated:*
 - *Lost stocks or investments*
 - *Disruption of non terminating party’s business*
 - *Damage to the reputation of the non terminating party*

Section L. 442-6, III Commercial Code

III. - "The action is brought before the competent civil or commercial court by (...) the Minister for the Economy when he detects a practice referred to in the present Article. When that action is heard, the Minister for the Economy may ask the court to which the matter is referred to order the cessation of the practices referred to in the present Article. They may also have the nullity of the unlawful clauses or contracts declared in respect of all such practices and request reimbursement of the sums improperly paid and the imposition of a civil fine the amount of which shall not exceed 2 million Euros. Compensation for the prejudice suffered may also be requested.

IV. - " The urgent applications judge may order the cessation of the discriminatory or unfair practices or any other interlocutory measure"

Mandatory character of this rule in international relations

- Section 9-1 of EC Regulation 593/2008 (Rome I) on the law applicable to international contracts

“Overriding mandatory provisions are provisions the respect of which is regarded as crucial by a country for safeguarding its public interests”

- *The right for the French Minister of Economy to act for the sake of protection of the economic public policy of France, lead to qualify art. L. 442-6 as an overriding mandatory provisions*
- *Growing recognition in case law of the overriding character of article L. 442-6*

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The good (?) clause

“Unless Article [•] is applicable, the Agreement may be terminated by any Party:

- *Subject to a three-month notice period when the Distributor has been distributing the Products for less than five years;*
- *Subject to a six-month notice period when the Distributor has been distributing the Products for more than five years”.*

The best advice

- **Do not be too confident in your clause: think of it before sending the formal notice**
- **Ask a lawyer first**

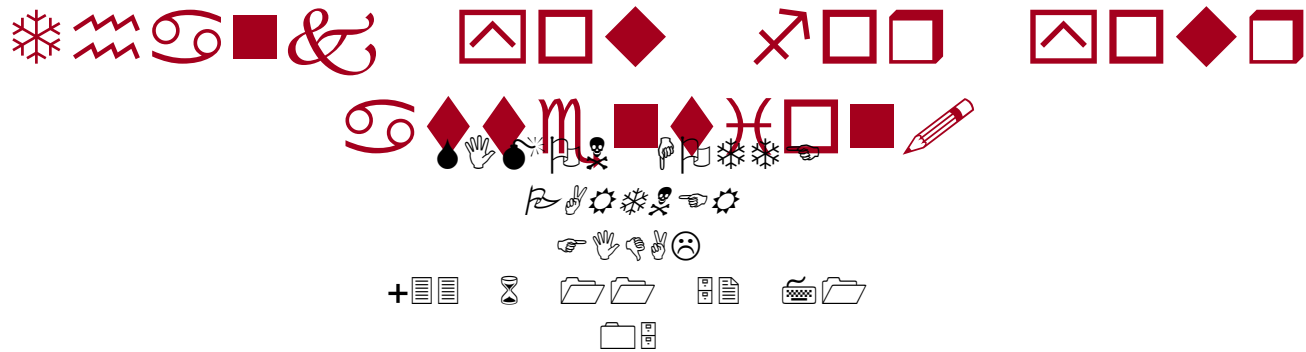
Why not think of a Compensation Clause ?

- **Example of backward looking compensation clause**

“Upon termination of the Agreement pursuant to clause [•], Supplier shall pay a compensation to Distributor the amount of which shall be no less than 6 months of net sales according to the average “

- **Example of goodwill compensation clause**

“Upon termination of this Agreement, A. shall pay to B. a Compensation for the goodwill created in the market, the transfer of Customer data to A., including but not-limited to, professional details of Customers, the sales reports for the last preceding 24 months, detailed sales split by distributor, list of KOLs (Key Opinion Leaders) and copies of the ongoing contracts”



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