FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Chamber
Division 5-16

JUDGMENT OF 5 MARCH 2019

(No 04/2019, 34pages)

General Directory Entry Number: **18/04137 — No Portalis 35L7-V-B7C-B5EC6**

Decision referred to the Court: Judgment of 19 January 2018 – Nancy Commercial Court — RG No 2014013165

APPELLANT:

A
having its registered office at (...)
Registered in the Trade registry of Udine (Italy)
Represented by its legal representatives,

Represented by (...) of member of the PARIS Bar

RESPONDENT:

B
having its registered office at (...)
Registered in the Commercial and Companies Registry of STRASBOURG under the N°
Represented by its legal representatives,

Represented by (...) of member of the PARIS Bar

COMPOSITION OF THE COURT

The case was discussed on 29 January 2019, in open court, before the Court of Justice:
M. (...), President
Mrs (...), Judge
Mrs (...), Judge

who ruled on the case, a report was presented at the hearing by [...] in accordance with Article 785 of the Code of Civil Procedure.

Clerk, at the hearing**:** Mrs (...)

JUDGMENT:
- Adversarial
- judgment made available at the Clerk's office of the Court, the parties having been notified in

advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by..., President and by..., Clerk to whom the minute was delivered by the signatory judge.

I FACTS AND PROCEDURE

Facts:

1. (A), formerly known as... (...), is a company incorporated under Italian law whose business is the production and marketing of electronic equipment.

2. (B) is a simplified joint stock company incorporated under French law, which is engaged in the manufacture and sale of electrical and electronic equipment for the industrial, tertiary and household sector.

3. (B) and its Italian subsidiary (C) were doing business with the Italian company (A) purchasing electronic cards (printed circuits) in order to insert them into inverter intended to ensure proper energy supply of equipment, particularly in the medical field.

4. (A) and (B) concluded a Logistics Agreement (Logistics Agreement (B)-(C)) on 7 June 2001 and business relations lasted until 2011.

5. Taking the view that (A) had committed various breaches, (B) informed this company, by registered letter with acknowledgement of receipt dated 6 June 2011, of its intention to terminate business relationship effective as of 30 June 2011 and to cease purchasing electronic cards accordingly.

6. By letter in response of 23 June 2011 (A) challenged this decision.

Procedure:

7. It is under these circumstances that (A) brought action against (B) before the Nancy Commercial Court by writ of summons of 28 November 2014, seeking a ruling on the abrupt termination of commercial relations pursuant to Article L. 442-6 I 5° of the Commercial Code and compensation for the damage suffered.

8. By judgment of 27 November 2015 the Nancy Commercial Court dismissed the plea of lack of jurisdiction raised by (B) and found it has jurisdiction.

9. (B) appealed that judgment. By decision of 25 October 2016, the Paris Court of Appeal dismissed the appeal and upheld the judgment of the Nancy Commercial Court in that it found it has jurisdiction and referred the case to rule on the merits.

10. By a provisionally enforceable judgment of 19 January 2018, the Nancy Commercial Court:

- dismissed Italian documents not translated,

- ruled that the A's action against (B) for contractual liability is time-barred and inadmissible

- found that French law is applicable,

- ordered (B) to pay (A) the sum of EUR 137,800, together with legal interest rate from the date of

service of the present judgment, with compound interest per full year in application of Article 1342-2 of the Civil Code,

- ruled that all other claims of (A) have no merits,

- ruled that (B)'s counterclaim has no merits,

- ordered (B) to pay (A) the sum of EUR 7,000 and the costs.

11. (A) lodged an appeal before the Court of Appeal on 22 February 2018. The case was registered under number (...). (A)'s appeal is essentially intended to obtain:

- the upholding of the judgment at first instance in that it applied Article L 442-6 I (5) of the Commercial Code and dismissed (B)'s counterclaims,

- that the judgment be overturned in that it ruled (A)'s action against (B) for contractual liability is time-barred and inadmissible, as well as the action for payment of :

  - as regards the action for breach of contract,the sum of EUR 1,612,454 in execution of firm orders or, failing this and in the alternative, damages in the sum of EUR 631,268,75 for breach of contract and the sum of EUR 16,523 in reimbursement of the storage costs incurred by (A);

  - as regards the termination of established business relations, damages in the sum of EUR 708,474 for failure to comply with a notice period which should have been of 24 months.

12. (B) lodged an appeal against that judgment on 13 March 2018. The case was registered under number (...). (B)’s appeal is essentially seeking to have the judgment under appeal overturned in that it refused to dismiss the undisclosed and untranslated adverse exhibits, found French law applicable to the dispute, ordered (B) to pay (A) the sum of EUR 137,800 in compensation for a notice period of 6 months on the basis of Article L. 442-6-5-I of the Commercial Code, in addition to the sum of EUR 7,000 under Article 700 of the Code of Civil Procedure and dismissed (B)'s counterclaims.

13. The two cases were joined on 20 November 2018 under the number (...)

II - CLAIMS OF THE PARTIES

14. According to its latest submissions sent electronically on 11 September 2018, (A) requests the Court, pursuant to, inter alia, Article 2242 of the Civil Code, Article 1191 of the Civil Code, Articles 1103, 1104, 1193, 1343-2 of the Civil Code and Article L. 442-6 I 5º of the Commercial Code, to :

As regards (B)'s appeal :

- Rule that (B)'s pleas that (A)'s actions are time-barred has no merits ;

- Find inadmissible (B)'s pleas regarding alleged new claims of (A) lodged in the procedure in which (A) is appellant;

- Dismiss (B)'s claim for reversal of the appealed judgment

As regards (A)'s cross-appeal :

- Overturn the judgment of the Nancy Commercial Court of 19 January 2018 in that it found (A)'s claims based on the contract between the parties inadmissible;

Ruling again:

- Find admissible (A)'s claims based on the contract between the parties;

As regards non performance of the contract

Principally,

- Order (B) to perform the firm orders;

- Order (B) to pay (A) the sum of EUR 1,612,454 in payment of these orders;

Alternatively,

- Order (B) to pay (A) damages in the sum of EUR 631,268,75 for non-performance by (B).

In any event,

- Order (B) to pay (A) the sum of EUR 17,225.00 in respect of the storage costs borne by the latter as a result of the breach of the Contract by (B);

On the notice period and compensation for (A):

- Uphold the judgment in that it found that there was a commercial relationship between the parties, rejected any justification for the benefit of (B) and stated that (A) could reasonably have anticipated for the future that there was a degree of continuity in the trade flows with its business partner;

- Uphold the judgment in that it found that the conditions for the application of Article L. 442-6 I 5° of the Commercial Code are met;

- Overturn the appealed judgment in that it set at six months the duration of the notice period which should have been granted by (B) to (A);

Ruling again:

- Order (B) to pay (A) the sum of EUR 708,474,00 in compensation for the loss suffered;

In any event,

- Uphold the judgment in that it dismissed (B)'s counterclaims;

- Order (B) to pay a sum of EUR 35,000 under Article 700 of the Code of Civil Procedure;

- Order it to pay the costs.

15. According to its latest submissions sent electronically on 17 December 2018, (B) requests the Court of Appeal to:

As regards (A)'s appeal :

- Find (A)'s claims inadmissible;

- Rule that (A)'s claims have no merits

- Dismiss all of (A)'s claims.

IN THE VERY ALTERNATIVE:

- Find and rule that any payment of stocks, finalised or semi-finalised maps, components or other parts shall be payable only after delivery of the item in a good working order.

As regards the cross-appeal:

- Overturn the judgment of the Nancy Commercial Court of 19 January 2018 in that it:

  - Refused to reject all of the adverse unreadable, undisclosed, untranslated or unnumbered exhibits;
  - Found that French law is applicable to the dispute,
  - Found there are commercial relations between the parties,
  - Found that (A)'s faults were not sufficiently serious to justify a termination which was to be deemed to be abrupt,
  - Found that (A) should have been given a 6 months' notice,
  - Ordered (B) to pay (A) the sum of EUR 137,800, together with interest at the legal rate from the date of service of the judgment and with compound interest ,
  - Ordered (B) to pay (A) the sum of EUR 7,000 on the basis of Article 700 of the Code of Civil Procedure,
  - Found(B)'s counterclaim has no merits,
  - Dismissed (B)'s claim for damages and its claim based on Article 700 of the Code of Civil Procedure,
  - Ordered (B) to pay the costs of the proceedings;
  - Ordered provisional enforcement of the judgment.

And ruling again :

- DISMISS from the proceedings AND FIND inadmissible the exhibits that have not been disclosed, in particular the unpublished case-law, and the exhibits filed without a detailed listing or numbering.

- FIND Italian Law applicable to the dispute.

- DISMISS all of (A)'s claims.

- ORDER the reimbursement to (B) of the sums paid to (A) in execution of the provisional enforcement of the judgment of the Nancy Commercial Court of 19 January 2018, namely the sum of EUR 137,800 with legal interest from the date of service of the judgment, and the sum of EUR 7,000 with legal interest from the date of the judgment, that is, EUR 145,207.04.

- ORDER (A) to pay to (B) damages in compensation of the loss suffered as a result of (A)'s failure to comply with its obligations, in the sum of EUR 656,725, with legal interest from 16.03.2015, date of the claims;

- ORDER (A) to pay all costs and expenses and the sum of EUR 30,000 pursuant to Article 700 of the CPC for the first instance and of EUR 25,000 for the appeal proceedings.

- UPHOLD the judgment of the Nancy Commercial Court of 19 January 2018 in that it:

- Dismissed from the proceedings the exhibits drafted in Italian and not translated,
- Found (A)'s claim against (B) based on contractual liability is time-barred and inadmissible;
- Found all other claims from (A) with no merits and dismissed them.

III — PLEAS AND REASONS FOR THE DECISION:

On the admissibility of the exhibits produced by (A)

16. (B) raises the inadmissibility of the exhibits produced without a detailed listing or numbering, and the undisclosed exhibits, in particular the unpublished case-law and exhibits No 10 unreadable. However, it seeks upholding of the judgment at first instance, which dismissed the Italian exhibits which had not been translated.

17. In response, (A) does not present any plea in this regard and requests only in the operative part of its final submissions that (B)'s claim for reversal be rejected. It does not say anything about the admissibility of untranslated Italian documents.

Thereupon,

18. The Nancy Commercial Court dismissed the Italian and untranslated documents in the proceedings. As (A) did not challenge the judgment on this count in its notice of appeal, the judgment shall be upheld on this count.

19. Exhibit No 10, which is a table of (B)’s provisional orders to (A), is an important document for the trial that it is not appropriate to dismiss at the outset, the Court reserves the possibility of examining its legibility and evidentiary value.

20. Finally, (A) has indeed filed a list of exhibits, annexed to its latest submissions, and there is no reason to disregard the unpublished and undisclosed case-law with regard to a source of law which it is in any event for the Court to know and, where appropriate, to apply in the context of its own ruling.

21. (B)'s claim in this regard shall therefore be rejected and the judgment of the Commercial Court upheld on this count.

(B) On the admissibility of (A)'s claims raised in the appeal proceedings

22. (B) states, on the basis of Articles 564 to 566 of the Code of Civil Procedure, that the claims for performance of the contract and for damages in compensation of the loss suffered raised on appeal are new and therefore inadmissible in that they were not raised at first instance and they do not pursue the same aim as that of seeking compensation for lack of notice.

23. In response, (A) submits that this ground of appeal is inadmissible because it is submitted by (B) in response to (A)’s appeal (...). It adds that, in any event, a claim is not new if it aims the same

purposes as those submitted to the first judge even if their legal basis is different and the claims relating to performance of the contract were already made in the initial writ. Lastly, it states that the claim relating to storage costs is ancillary to its claim for performance of the contract and falls within the provisions of Article 566 of the Code of Civil Procedure.

Thereupon,

On the admissibility of the plea alleging claims are new

24. The plea alleging some of (A)'s claims are new is presented in the latests submissions filed by (B) in the present proceedings, registered under number (...), to which the case registered under number (…) has been joined following an order of the pre-trial judge of 20 November 2018, so that this plea is admissible.

On the issue wether (A)'s claims are new

25. Pursuant to Articles 564 and 565 of the Code of Civil Procedure, the parties may not submit new claims, subject to inadmissibility being raised ex officio, except to set-off, to set aside adverse claims, to have a ruling on the questions raised as a result of the intervention of a third party or the occurrence or disclosure of a fact. However, claims are not new as long as they are intended for the same purposes as those submitted to the first judge, even though their legal basis is different.

26. In the present case, it is apparent from the exhibits filed in the proceedings that before the Nancy Commercial Court, (A)'s claims sought 'to *find that (B) incurs contractual liability ; In any event, (B) shall be deemed to be liable pursuant to Article L. 442-6 I (5) of the Commercial Code, on grounds of tort or delict for having terminated abruptly an established commercial relationship (...)'* and '*Consequently*', *order (B) to pay the company the sums of:*

- EUR 300,076.38 in respect of finalised cards and not withdrawn;
- EUR 158,469.79 for loss of margin;
- EUR 6,894.87 in respect of the almost finalised cards ordered by (B);
- EUR 301,329.70 for the components in the (A)'s warehouse ;
- EUR 22,967.80 in respect of sums due to suppliers;

27. It must therefore be observed that (A)'s claims before the first judges did not relate solely to compensation for the abrupt termination but also to the consequences of that termination.

28. Before the Court of Appeal, some of (A)'s claims relate to the performance of the logistics agreement concluded between the parties, namely the requests to:

- Order (B) to pay (A) the sum of EUR 1,612,454 in payment of orders;

Alternatively,

- Find and rule that (B) incurred contractual liability by failing to carry out its orders under Article 2 of the contract of which (A) shall be compensated ;

- Order (B) to pay (A) a sum of EUR 631,268.75, for the loss suffered by the company as a result of (B)'s non performance.

In any event,

- Order (B) to pay (A) the sum of EUR 17,225.00 in respect of the storage costs borne by the

company as a result of (B)'s breach of contract;

29. Other claims are based on the lack of a notice and seek an order that (B) pays damages in the sum of EUR 708,474.00 corresponding to a 24 months' notice period.

On the issue whether the claim for (B) to be ordered to pay the sum of EUR 1,612,454 pursuant to the logistics agreement is new

30. If the request for an order against (B) for payment of a certain sum in fulfillment of its contractual obligation differs from the request for an order against (B) for payment of damages in compensation of the failure to comply with these obligations, these two actions are merely two different forms of exercising the same right, namely the right to be compensated for the damage caused by the non-performance of the logistics agreement concluded between the parties

31. It shall therefore be held that this claim raised in the appeal proceedings, in that it has the same purpose as that made before the first judge and is aimed at requesting compliance by (B) with its contractual obligations or at recognising the sanction for their breach, cannot be deemed to be new within the meaning of Article 565 of the Code of Civil Procedure, so that the plea alleging its inadmissibility shall be rejected.

On the issue whether the claim for (B) to be ordered to pay the sum of EUR 17,225 in respect of storage costs is new

32. (A) asks for compensation for the storage costs of goods which were not withdrawn by (B) following the notification of the termination of their contractual relationship.

33. That claim is ancillary to the one made at first instance in respect of undelivered cards and the consequence of (A)'s claim against (B) for contractual liability, expressly made at first instance. It cannot therefore be deemed to be new within the meaning of Article 566 of the Code of Civil Procedure.

On the issue whether the claim for doubling the notice period is new

34. It is common ground that at first instance the compensation sought by (A) for the abrupt termination of commercial relationships was based on a 12-month notice period and that, on appeal, it applied for a doubling of the duration of that notice period, claiming that the goods were manufactured under (B)'s trade mark.

35. However, on the one hand, the increase in the amount of compensation sought by (A) which is intended to compensate for the same damage as that sought at first instance arising out of the abrupt termination of commercial relationships does not constitute a new claim.

36. On the other hand, the doubling of the notice period, founded on appeal by (A) based on the provisions of Article L.442-6 5° of the Commercial Code, under which ' *Where the business relationship is for the supply of goods bearing the distributor's brand, the minimum period of notice shall be double that which would be applicable if the products were not supplied under the brand of a distributor* ', constitutes the supplement to that brought at first instance.

37. In the light of these grounds, all pleas of (B) on inadmissibility of (A)'s claims made in the appeal proceedings shall be dismissed.

(C) On the action for contractual liability brought by (A) against (B):

38. (A) claims that, under Article 2 of the logistics agreement, (B) was required to send provisional orders which were deemed to be firm at 100 % for the first 3 months, at 80 % for the 4th and 5th months and then at 50 % for the 6th month. It maintains that, at the time of the termination, (B) had placed provisional orders for the 2nd half of 2011, that it shall pay under these terms in the sum of EUR 1,612,545, plus late penalties pursuant to Article L. 441-6 of the Commercial Code.

39. In the alternative, (A) asks that (B) be ordered to compensate for the loss arising from the non-performance of forecast orders pursuant to Article 2 of the said logistics agreement, namely:

- EUR 300,076.38 for payment of the cards ordered and undelivered (Exhibit 12 (A));
- EUR 331,192.37 in respect of the almost finalised cards and components ordered by (A);

40. (A) asks for (B) to be ordered in any event to pay EUR 17,225 in respect of the storage costs of goods that have not been acquired.

41. In response to the plea of inadmissibility based on limitation period, (A) maintains that its claims based on contractual liability are not time-barred since the operative part of its writ referred to Articles 1134 and 1154 of the Civil Code; in addition, that the action for compensation for the abrupt termination of commercial relationships established on a contractual basis in international matters and that, in any event, an action in tort interrupts the action in contractual as long as this action has the same purposes as the first action.

42**.** In response, (B), seeking the upholding of the appealed judgment on this point, submits that the action in contractual is time-barred under Article 2224 of the French Civil Code, since that action was initiated by submissions of 10 May 2017, which were notified on 2 June 2017, that is to say, more than 5 years after the termination of the contract in June 2011.

43. It states that (A) cannot rely on the reference to Articles 1134 and 1154 former of the civil code in its writ of summons, since they do not apply to contractual liability governed by Article 1147 of the Civil Code (previous version) and were only in the operative part of the writ of summons.

44. (B) claims moreover that the case-law that found an action in contract brought after the limitation period admissible as long as it has the same purposes as the action in tort, which is the subject of the writ of summons, is not applicable to the present case. It states in this regard that the writ of summons of (A) sought to obtain compensation for the loss suffered as a result of the lack of notice (as a result of the abrupt termination of the contract) and the cancellation of the orders placed, which has not the same purposes as the action in contract for faults committed in the course of the execution of the contract.

45. (B) thus considers that all claims for damages made on a different basis than the abrupt termination are time-barred and, in particular, the claim for payment of firm orders in the amount of EUR 1,612,454 under Article 2 of the logistics agreement and, in the alternative, compensation for damage suffered as a result of the failure to comply with that article in the amount of EUR 631,268.75 and storage costs, as well as the claim for the application of a notice period of 12 months, and those relating to the doubling of the notice period as a result of the distribution of goods bearing brand and the application for compensation recalculated over 24 months, since they do not pursue the same purposes as the action brought by the writ of summons.

46. In the alternative, (B), which considers that the logistics agreement provided the conditions relating to orders and deliveries, but did not constitute a contract requiring the parties to purchase and sell, objects to (A)'s claims on the ground that the harm that shall be compensated, in particular on the basis of Article L. 442-6 I 5º of the Commercial Code, is solely that caused by the brutality of the termination and not the harm caused by the termination itself.

47. (B) states, thus, that Article 2 of the logistics agreement does not provide for firm orders and that orders cycles are of three months but not six months (Article 3-1,2 of the contract). It also denies that the contract imposes to charge it for the goods which were not acquired and considers that the claim for payment of forecast orders duplicates the claim for compensation for lack of notice.

Thereupon,

On the limitation of the action in contractual liability

48. It is common ground that the action brought by (A) relates to the logistics agreement concluded on 7 June 2001, according to which the parties organised their commercial relations by specifying the forecasts of orders, ordering, flexibility of orders, delivery, invoicing or phasing out of orders, and that this agreement does include a choice of law by the parties.

49. Since each of the parties, in their pleadings, examines the plea of inadmissibility based on the limitation period in the light of French law alone, it shall be held that they intended implicitly but necessarily to submit that question to that law.

On the merits of the plea of inadmissibility based on the limitation period

50. Pursuant to Article L. 110-4 I of the Commercial Code, together with Article 2224 of the Civil Code, obligations arising from trading between traders or traders and non-traders are to be barred after a period of five years from the date on which the holder of a right knew or should have known the facts enabling him to exercise that right.

51. In the present case, (B) informed (A) of its intention to terminate their contractual relationship by letter dated 6 June 2011, with the result that, from that date, (A) was aware of the facts enabling it to exercise its action seeking to enforce (B)'s contractual liability and its condemnation for abrupt termination of contractual relations.

52. Since (A)'s writ of summons was served by a bailiff on 28 November 2014, the five-year limitation period had not expired when it brought its action.

53. In addition, it is apparent from the terms of the writ of summons that, despite references limited to Articles 1134, 1154 of the Civil Code and Article L 442-6 I 5° of the Commercial Code, (A) complained that (B) had not ‘ *complied with its obligation under the contract concluded between the parties on 7 June 2001 to comply with the progressive phasing-out stage* ’ and requested the court to find that, for its part, it was not ‘ *liable for any fault of liability* ’.

54. (A) also requested the court to order (B) to pay various sums as a consequence of the termination of the contract and, in particular:

- EUR 300,076.38 in respect of finalised and undelivered cards;
- EUR 158,469.79 for loss of margin;

- EUR 6,894.87 in respect of the almost finalised cards ordered by (B);
- EUR 301,329.70 for the components present in the (A)'s warehouse;
- EUR 22,967.80 in respect of sums due to suppliers;

55. Thus, the interruption by the writ of summons of the limitation period under Article 2241 of the Civil Code can apply both for the claims for compensation for the abrupt termination of commercial relations and for the claims based on (B)'s contractual liability seeking compensation for the consequences of that termination, and thus cover all claims relating to the implementation of the logistics agreement on which they are based, even if the claims relating to the performance of the contract or, in the alternative, compensation for non-performance, were set out only in the submissions notified on 2 June 2017.

56. The plea based on the limitation period shall therefore be dismissed and the decision of the Nancy Commercial Court reversed on this point.

On the claim for (B) to be ordered to pay the price of the forecast orders

57. It is apparent from the logistics agreement concluded on 7 June 2001, and in particular paragraph 2 thereof, that, in order for (A) to be able to negotiate the best possible price with suppliers of raw materials, (B) undertook to provide ' *data concerning the overall volume'* of orders ' *for the following 12 months '* within the 3rd month from the beginning of that agreement and that ' *the forecasting horizon*' was then fixed at 6 months. Under the terms of Article 3 of that contract, entitled ' Orders', in section 3.2 next to the term ' orders' cycle" is mentioned '*3 months*'.

58. In addition, within Article 2 dealing with '*forecasts*', Article 2.6, entitled '*Minimum percentage of guaranteed quantity*' mentions: ' *80 % for 4 and 5 months; 50 % for 6 months '* and the section entitled ' *Notes* 'shows the following comments: ' *Materials referring to non-compliance with the forecast shall be debited to the customer in the event that the relative orders cannot be canceled. In case of cancellation, the relative costs, if any, will be charged to the customer."*

59. It is clear from those clauses, which clearly distinguish the 'forecasts' from 'orders', that, contrary to what is submitted by (A), the logistics agreement, which differs from the sales taken in its execution, does not expressly provide a purchase obligation by (B), even if a forecast of 6 months is sent to (A).

60. Consequently, these indications alone are insufficient to characterise a firm order only by (B) sending a forecast to (A) to purchase a minimum guaranteed quantity corresponding to 100 % of the forecast for the first 3 months, 80 % for 4th and 5th months and 50 % for the 6th month.

61. In addition, it is in no way apparent from the terms of that agreement that, even if an order for 3 months has been placed by (B), the fact that the quantity of product ordered is not in correspondence with that shown in the forecast at 6 months, entails an obligation for (B) to reach a purchase of 100 % of the quantities appearing in the forecast for the first 3 months, and then 80 % for the 4th and 5st months and 50 % for the 6th month.

62. Clause 2.6 does not indeed refer to the purchase of products but mentions only the reimbursement of materials acquired for the manufacture of cards, and this only '*in the event that the relative orders cannot be cancelled '* being added that, in the event of cancellation, ' *the relative costs, if any, will be charged to the customer*'. This was clearly to pass on to (B) the cost of materials acquired by (A) to satisfy the forecast orders in the event that the quantity of cards finally ordered is less than the quantity of cards announced in the forecast.

63. Such an interpretation of the contract is also consistent with the justification mentioned in Article 2.5 of (B)'s submission of a forecast, since this submission was not intended to commit (B) to acquire the quantities mentioned in the forecast but to allow (A), by having visibility over 6 or 12 months, to negotiate the best price for the acquisition of the raw materials.

64. It is therefore appropriate, in the light of those contractual clauses, which in no way impose an obligation on (B) to acquire the printed cards according to the forecast provided for in Article 2, to reject the (A)'s application of an order against (B) to pay the sum of EUR 1,612,454 in respect of the non-performance of the forecast orders from June 2011 onwards.

On the alternative claim for compensation for non-performance of forecast orders:

65. In the alternative, (A) seeks compensation for the damage it claims to have suffered as a result of the company's failure to comply with forecast orders and, in particular, the reimbursement of the stocks of cards ordered and not withdrawn between July and September 2011, of the raw materials and storage costs.

66. As stated above, the failure to meet the forecasts could not force (B) bear the payment for the printed cards, but only, if the orders had been made, the cost of the raw materials acquired by (A) whose orders could not be cancelled by it, as well as the reimbursement of the cancellation fee, if any.

67. (A) shall therefore be dismissed from its application for an order against (B) to pay the sum of EUR 300,076.38, corresponding to the price of the products for the months of July, August and September 2011, being observed in addition that it does not justify any firm order from (B) for that period. The last order was placed in April 2011, covering purchases until June 2011, as attested by an email from the latter dated 20 April 2011 according to which the order lists certain difficulties in the performance of the logistics agreement and nevertheless indicates that orders were confirmed until June 2011 and that the forecasts submitted runs 'until March 2012'.

68. As regards the reimbursement of the raw materials, it is true that, as (B) confirmed an order in April 2011 and a forecast running until March 2012, shall bear the costs of the raw materials acquired by (A) at 80 % in July and August 2011 and 50 % in September 2011 (there is no issue as regards the first 3 months between April and June 2011, since it is not disputed that the products were purchased and paid for that period).

69. However, (A) claims a sum of EUR 331,192.37, without producing the details of its calculation, exhibits 13 to 15, since it does not show a cumulative amount that does not confirm that amount or explain the method of calculation in order to achieve it, particularly as Exhibit No 14 relates to invoices of which the oldest date back to November 2009, with the result that (A) does not explain how (B) would be required to pay raw materials stored and acquired on that date when business relations were ongoing between the parties at that time.

70. Furthermore, it should be noted that, as regards the raw materials due for the period from July to September 2011, (A) in no way justifies the impossibility to have had these orders cancelled as stipulated in the logistics agreement on the one hand, and/or that cancellation costs were paid by it.

71. It is therefore appropriate, in the absence of relevant evidence from (A), the production of uncommented listings alone cannot make up for, to dismissed these claims.

72. The same applies to the storage costs in respect of which (A) seeks reimbursement of the sum of EUR 17,225 which is not supported by any document.

(D) On the claim based on the abrupt termination of commercial relations pursuant to Article L. 442-6 I (5) of the Commercial Code

73. (A) states that the logistics agreement must be interpreted as meaning that, pursuant to Articles 2 and 7, the parties have given a minimum of six months' notice (Article 7) which could not run until the end of the six-month period of actual orders provided for in Article 2. It thus claims that the starting point of the 6-month notice must be fixed in accordance with the contractual provisions from the end of the forecast, that is to say, on 6 December 2011.

74. It considers, however, that that period of contractual notice is insufficient in the light of the duration of business relations (10 years) and the turnover achieved with (B) (EUR 6,340,713), and thus relies on the application of Article L. 442-6 I of the Commercial Code, which it considers to be applicable to the dispute by virtue of Article 17 of (B)'s general conditions of purchase, to apply a 12-month notice, that it is appropriate to double by application of the provisions relating to the products under distributor's brand, in so far as the products supplied by (A) to (B) were intended to be incorporated into products sold under (B)'s brand. In reply to (B), it disputes the alleged breaches relating to delivery times, claiming that the delays in delivering were attributable to the changes made to its orders and that in May 2011 it complied with 100 % of the delivery objectives. It also disputes the alleged failures to fulfil obligations as regards the quality of the products and the observance of the prices agreed. It states in this regard that the manual reworking of components does not affect the quality of the products and that the defect in the assembly of the components was immediately resolved, it being specified that defects in the assembly of the electronic cards could not be detected by it and that some defects were due to transport problems. It points out, finally, that (B) had sent its forecast for the second half of 2011, which makes it impossible to forecast the termination.

75. In reply, (B) argues that the Italian law is applicable to the dispute on the ground that, although the individual sales contracts were concluded on the basis of orders (purchase order), referring to its general terms and conditions of purchase which contained a clause designating French law, that choice of law was made only in order to govern individual sales contracts and the parties have in no way agreed that that law would govern their business relationship, whether or not they are formalised in a framework contract or logistics, nor the liability incurred in the event of termination of that relationship.

76. It states that if the action based on Article L. 442-6 I (5) of the Commercial Code is found to be in tort, the question of applicable law shall be governed by Article 4.1 of Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) which applies to events giving rise to damage occurring after its entry into force. It concludes that the Italian Law is applicable where the damage occurred in Italy, where (A) is established. It thus states that claims based on French law, in particular Article L 442-6 I (5) of the Commercial Code, must be rejected, being specified that under Italian law, a (distribution) contract of indefinite duration may be terminated without reason, subject to compliance with contractual notice or reasonable notice (Article 1569 of the Italian Civil Code) and that the notice is not required when the termination is due to a fault on the part of the other party.

77. (B) adds that if the action based on Article L. 442-6 I (5) of the Commercial Code is considered to be of a contractual nature, it will be necessary to apply Article 4.1 of the Rome Convention of 19 June 1980 on the law applicable to contractual obligations under which the contract is governed by 'the law of the country with which it is most closely connected', which must lead to the dispute being subject to Italian law, in view of the relationship between the parties, the law applicable being

that of the seller under Article 3 of the Hague Convention of 15 June 1955 on the law applicable to international sales.

78. (B) also claims that the absence of notice was justified by the absence of contractual notice, by (A)'s serious and repeated breaches in the performing its contractual obligations, by the application of Article 3.3 of its general terms and conditions of purchase, and the foreseeable nature of the termination in the light of the numerous warnings addressed to (A).

79. (B) states that Articles 2 and 7 of the logistics agreement cannot be applied cumulatively and do not relate to the duration of a notice period and points out that under the general law of contracts, a contract of indefinite duration may be terminated without notice if the other party fails to fulfil its obligations.

80. (B) adds that its refusal to pursue business relations is justified by the poor performance of (A) regarding the quality of the products delivered, the delivery times, the agreed prices and the additional costs generated by these defects. It thus states that the delays in delivering were frequent, causing disruption of production and delivery problems with its own customers, in spite of the forecast of 12 months — instead of the six months provided for in the contract — and that the rate of service never reached the rate of 96 % required. It adds that several quality defects have been found such as non-compliance with standards prohibiting manual reworking, component assembly defects, electronic cards assembly defects or that (A) did not comply with the agreed prices or imposed prices under threat to cease deliveries in the absence of payment.

81. In the alternative, (B) claims that the application for a 12-month notice period is not justified because it represented only a small part of (A)'s customers which, being in a monopoly situation, did not have any difficulty in finding other partners and that its investments were not specific to (B). It contests that the products sold by (A) can be considered as branded products because it supplied standard electronic cards intended to be inserted into inverters.

Thereupon,

On the applicable law

82. It is common ground that the action brought by (A) relates to the logistics agreement concluded on 7 June 2001, according to which the parties organised their commercial relations by specifying the forecast of orders, ordering, order flexibility, delivery, invoicing or ' *the "phasing out"*' of orders.

83. The action for compensation for the damage arising out of the abrupt termination of these commercial relations in the light of the contractual relationship thus established between the parties concerns matters relating to a contract within the meaning of the Court of Justice of the European Union (CJEU, judgment of 14 July 2016, Granarolo v Ambrosi Emmi France, C-196/15).

84. In the present case, the agreement concluded on 7 June 2001 does not involve any choice of law by the parties. It is not a '*manufacturing* agreement', since the parties expressly acknowledge at the end of the document that '*notwithstanding the foregoing, the parties state that, unless otherwise agreed, the content of [the] point (1 to 10) will be considered to form part of the manufacturing agreement currently negotiated between the parties*', being noted that it is not disputed that such a manufacturing agreement was not finalised.

85. Nor is this agreement a contract for the sale of goods, since it is not disputed by the parties that

sales of printed cards have been made pursuant to purchase orders placed by (B) with (A) in accordance with (B)'s general terms and conditions of purchase, that (A) does not deny having been aware of or even their application.

86. Distinct from a manufacturing agreement, but also from the sales made in its application, this logistics agreement cannot therefore be assimilated to a contract for international sales of goods in that it is intended primarily to provide a framework for the future contractual relationships between the parties, specifying the terms of the service offered by (A) in the case of orders placed by (B), in particular the frequency and terms and conditions of the orders placed by the latter.

87. The determination of the law applicable to this logistics agreement must therefore be made not in accordance with the Hague Convention on the law applicable to international sales of goods of 15 June 1955 but in accordance with Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), applicable in the present case on the day of the termination on 6 June 2011, which provides in Article 4.2 that in the absence of choice made in accordance with Article 3, and where the contract is not covered by paragraph 1, which is the case here in the light of its special nature as mentioned above, the contract shall be governed by the law of the country in which the party required to effect the characteristic performance has his habitual residence.

88. Reading this agreement, which lays down logistical procedures for both (A) and (B), it is not possible to specify which of the two parties provides the characteristic performance, since each of the parties undertakes to follow the detailed rules laid down in the agreement in order to facilitate the performance of their respective obligations with regard to orders for products, delivery and invoicing.

89. Pursuant to Article 4.4 of that Regulation, where the applicable law cannot be determined on the basis of paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is more closely connected.

90. In the present case, if the parties did not expressly choose the law applicable to the logistics agreement, the contracts entered into pursuant to that agreement were all subject to French law according to Clause 17 of (B)'s general terms and conditions of purchase, the products manufactured by the latter being also intended to be delivered in France and incorporated in inverters marketed by (B), which has its registered office in France. Moreover, for all contracts taken out under the terms of the logistics agreement, the parties have chosen to submit their dispute to the French court, in accordance with the jurisdiction clause included in (B)'s general terms conditions of purchase.

91. In the light of these elements, it must be held that the logistics agreement is closely connected with France, so that it is appropriate to consider that French law is applicable to the disputed commercial relationship.

On the conditions of application of Article L. 442-6 I (5) of the Commercial Code:

92. Pursuant to Article L. 442-6 I of the Commercial Code, in the version in force at the date of the termination on 6 June 2011: *"Engages his responsibility and obliges him to compensate for the damage caused, any producer, merchant, industrial or person registered in the trade registry : (...) 5°abruptly terminating, even partially, an established commercial relationship, without written notice taking into account the duration of the commercial relationship and respecting the minimum period of notice determined, with reference to commercial practice, by means of a interprofessional agreements. Where the commercial relationship relates to products under distributor's brand, the*

minimum period of notice is double than when the products are not under distributor's brand. In the absence of such agreements, orders of the Minister responsible for the economy may fix, for each category of products, a minimum notice period and lay down the conditions for the termination of commercial relations, in particular on the basis of their duration. The foregoing provisions shall not preclude the right of termination without notice in the event of non-performance by the other part of its obligations or in case of force majeure".

On the existence of an established commercial relationship

93. It is apparent from the exhibits filed and it is not disputed that the commercial relationship between the parties started in June 2001 to continue until 6 June 2011, the date on which (B) informed (A) that since it 'is *currently in the process of reorganising its sources of supply with regard to the assembly of printed circuits* ', it intended to ' *interrupt all business relations* ' with (A) as from 30 June 2011.

94. Over that period of 10 years, (B) regularly placed orders for printed electronic cards according to a 3-month order cycle for quantities representing several thousand cards per month for all models.

95. Commercial relations between the parties are therefore established.

On the existence of a notice period:

96. It should be observed that the decision to terminate the commercial relationship is explained in the abovementioned letter of 6 June 2011 by (B), which stated that it ' *is the result of a series of dissatisfaction and low performance [from your part] in terms of services, quality and price for more than a year"* and that among a*"non-exhaustive list of major events"* is mentioned the fact that it has been forced to stop *"several times"* the production lines of its two plants, the '*poor* ' level of the services obliging it to review on a daily basis the production timetable and causing delays to its clients followed by fines, the obligation to bear costs associated with the purchase of missing components, the low quality of the products and the lack of confirmation ' *on several occasions* ' of delivery dates.

97. It is apparent from these elements, on the one hand, that the termination at issue was accompanied by a 24 days written notice, and on the other hand, that, on the date of that notification, (B) excluded the existence of a breach of (A)'s obligations sufficiently serious to justify a termination without notice or even force majeure.

98. Thus, having granted a notice, albeit of 24 days, (B) is now no longer justified in opposing the seriousness of the (A)'s non-fulfillment of its obligations, in order to take the view that the circumstances justified the absence of a notice period.

99. However, it is for the court to assess whether the duration of that notice is sufficient in the light of the duration of the commercial relationship, the usages of the trade and the other circumstances of the case in order to determine whether or not the termination is abrupt.

On the duration of the notice period and the abrupt nature of the termination:

100. The notice period is intended to cover the time needed for the neglected company to prepare for the redeployment of its business, to find another partner or other alternative solution. The principal criteria to be taken into account are the economic dependence, the duration of the relationships, the volume of business and the increase in turnover, the specific investments made

and not amortised, the exclusive relationship and the specificity of the goods and services in question.

101. Whether notice period is sufficient shall be determined at the time of the notification of termination.

102. Although the notice period set by the parties is not binding on the Court, in assessing the duration of the notice period in the case of a termination in accordance with Article L 442-6, I, 5, mentioned above, which must determine the reasonable period notice which a company may claim, after having analysed the duration of the commercial relationship between the parties and the circumstances of the case, it may be a factor to be taken into account among others.

103. In this regard, the parties disagree on the interpretation of Clause 7, entitled '*phasing-out* ', referring to a 6-month period, that (A) analyses as contractual notice period agreed between the parties, unlike (B) which analyses that Clause 7 as relating to the duration of the phase of gradual elimination of a product and the duration of integration of a new product, and not as a notice period to terminate the agreement.

104. That clause is not clear in that it refers to a '*minimum* '"*cycle elimination order*"of 6 months and a note is specifying that '*obsolete raw material must be charged to the customer, as well as orders which cannot be cancelled or cancellation costs*', thus appearing to confine that period to the removal of a product and not as being intended to govern the termination of the contractual relationship between the parties.

105. It gives however an indication as to the maximum period necessary for (A) and accepted by (B) in order to withdraw from the production line a model of printed card without losing raw materials necessary for its manufacture.

106. In addition to this, account must be taken of the duration of the business relations established between (A) and (B), which lasted for 10 years, but also the frequency of past orders (orders cycle every three months and forecast every 6 months) and the volume of these orders (several thousands of printed cards per quarter).

107. With regard to (A)'s dependency on (B), (B) was not (A)'s only customer, as can be seen from its own report on the assessment of the profitability of the products supplied by (A) and issued by a chartered accountant and according to which ' *(A) is an industrial partner with most companies (...) in the world of railway, automotive, medical and industry technology, thanks to obtaining the most important certifications of the electronic industry such as (...) Iso 13485 for the production of electronic cards for active non-implantable medical devices'* .

108. Moreover, the (A)'s turnover for the years 2010 and 2011, as is globally apparent from that document, is significantly higher than that achieved with (B) since it was EUR 30,531,403 in 2010 and EUR 32,998,871 in 2011, whereas the turnover alleged by (A) with (B) would be between EUR 4,881,538 and EUR 6,340,713, which rules out any alleged dependency.

109. In the light of all these elements, the reasonable notice period was to be fixed at 6 months, and not 24 days as granted by (B).

110. However, (A) does not provide any proof that printed cards, even if they have been incorporated in products under (B)'s brand, were sold under (B)'s brand, so that it has no merit in seeking for the doubling of the notice period provided for in Article L. 442-6 I 5º of the Commercial Code.

111. A notice period of six months shall therefore be granted, from which shall be deducted the 24 days' notice granted.

On the loss suffered as a result of the abrupt termination

112. (A) argues that the loss suffered as a result of the failure to give notice is calculated on the basis of the gross margin multiplied by the number of months' notice. It produces a certificate from its chartered accountant to establish that the gross margin was 21,77%. It concludes that its compensation should be EUR 708,474 (gross margin X 24 months X average turnover of EUR 135,598.29).

113. In reply, (B) claims that (A) has not substantiated either the turnover achieved, or the gross margin, or the variable cost margin with supporting documents and states that the margin is not 21 % but 3.7 %. It therefore seeks the dismissal of (A)'s action and the reimbursement by the latter of the sums paid according to the provisional enforcement of the judgment at first instance, together with legal interest.

Thereupon,

114. It is common ground that the harm resulting from the abrupt nature of the termination is the loss of the gross margin that the victim could expect to receive during the period of notice which should have been granted to him, that is to say, the difference with the turnover of which the victim was subject under deduction of costs which were not incurred as a result of the reduction in activity resulting from the termination of the activity.

115. In the present case, (A) in no way justifies the turnover achieved in the three preceding years with (B), relying even on different figures, sometimes of EUR 6,340,713, sometimes without specifying the period in question, being noted that Exhibit 16 sent in support of the first of these figures relates only to a number of orders placed by (B) between 2006 and 2008, which in no way support the reported figure.

116. In the absence of any justification for these figures, only those recognised by (B) may be accepted, or EUR 580,815 in 2008, 762,000 in 2009 and EUR 1,919,629 in 2010, or EUR 3,262,444 over three years, and on average EUR 90,623 per month.

117. As regards the gross margin, (A) claims a margin of 21.77 % and justifies it by producing an statement from an accountant.

118. Although that figure is disputed by (B), which relies on documents originating from (A) (‘*quotation analysis sheet* ’) and assesses the margin at 3.7 %, the latter figure is based only on the sole cost of acquiring the materials required for the production of the printed cards without taking into account the entire raw cost of manufacture, thus making the margin thus determined by not very credible.

119. In the absence of other evidence, the rate of 21.77 %, which results from a statement by an chartered accountant and which was determined by the latter following a detailed analysis of the accounting records of (A), shall be taken into account.

120. Consequently, the damage suffered by (A) in connection with the abrupt termination of commercial relations established with (B) shall be set at EUR 102,588.86 (90,623 x 21.77 % x 6-24 days).

(E) On (B)'s counterclaims

121. (B) submits a counterclaim for damages, based on Articles 30, 45 and 74.1 of the Vienna Convention governing international sales of goods and on the contract, setting out the objections relating to the delays in delivery, lack of quality and non-compliance with the agreed prices. It therefore submits that these grievances have resulted in additional costs resulting from the purchase of components (€46,945.68), additional transport costs charged (EUR 52,641 € + EUR 5,021.30 €), costs related to the quality defect (EUR 28,832), costs due to late delivery (EUR 207,000), administrative costs related to differences in the invoiced price compared to the agreed price (EUR 5,600), by an over-invoicing of an ADDICOM item (EUR 4,446), unilateral price increase (EUR14,526.90), additional management costs (EUR 128,842.13) and harm to its image(EUR 100,000).

122. In reply, (A) disputes the alleged breaches and claims, in the alternative, that (B)'s counterclaims have no merits. It points out that Article 3.3 of the general terms and conditions of purchase relied on by (B) does not authorise it to claim damages on that basis and states that damages are not justified.

Thereupon,

123. Under the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna on 11 April 1980, which applies to contracts for the sale of goods between parties having their registered office in different States where these States are Contracting States, and in particular Article 45 thereof, the seller fails to perform any of his obligations under the contract or this Convention, the buyer may exercise the rights provided in articles 46 to 52 and claim damages as provided in articles 74 to 77.

124. Under Article 74, damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

125. In the present case, these provisions are intended to apply to contracts for the sale of goods concluded between (A), Italian company and (B), French company, pursuant to the abovementioned logistics agreement.

On the additional costs for purchases of components:

126. The exhibits filed in the proceedings show that several emails dated between May and December 2010 refer to difficulties by (A) in order to comply with (B)'s orders and in particular because of the difficulties of its own supplier of components, and that (B) justifies having taken over the supplies of components from third companies in order to enable (A) to honour its own orders. Several orders of components placed by (A) with (B) throughout 2010 are established, which gave rise to additional costs for (B) of EUR 46,945.68, corresponding to the cost of purchasing these components from third parties and on resaling to (A) at a lower price, each of the invoices concerned being produced in the proceedings.

127. However, it should be noted that (B) deliberately agreed to resell these components at a lower price to (A) so that it cannot 8 years after be asking for the difference between these prices, being

furthermore observed that this practice has clearly been made necessary in order to enable (A) to meet the orders and deliveries to the benefit of (B), which was thus able to find its own interest and has in any event agreed to bear the cost.

128. In the light of these elements, this application shall be dismissed.

On additional transport costs:

129. The exhibits filed in the proceedings show that between September 2009 and January 2011, (A) invoiced (B) for transport costs in respect of emergency supplies, in the amount of EUR 52,641.80 as shown by the produced invoices. Similarly, (B) justifies the use of an ‘express’ carrier for some deliveries to (A) for total amounts between February 2010 and May 2011 of EUR 5,021.30.

130. However, it is not disputed that (B) paid the abovementioned invoices, which were issued in its name.

131. Secondly, (B) failing to justify that the amount invoiced for the cost of transport has exceeded the price shown on the order, or that the cost of transport exceeded the standard price originally agreed, there is no reason to go back on the agreement on the price concluded for the abovementioned sales, since the causal link with the alleged late deliveries is not established.

132. Finally, as regards the use of express transport, no actual causal link is established between the use of that means of transport by (B) on its own initiative and a fault on (A)'s part .

133. That claim shall therefore be dismissed.

On the costs related to the quality of the products:

134. (B) has filed in the proceedings three tables covering the years 2009, 2010 and 2011 listing the cases that it qualifies as ‘non-compliance’ of the products purchased from (A) and seeks compensation for the costs incurred by the ‘ *detection, repair, sorting* ’ in each of these years, for a total sum of EUR 28,832 over these three years.

135. In particular, a sum of 112 euros is being requested for a "balance sheet" of the various breakdowns, a sum of 944 euros for a "problem of appearance of the silver-coloured piece that surrounds the screen" without these costs being justified, and this is the case for each of the rows in the "cost" column of the tables. In addition it is sought that (A) bears the cost of tests carried out on its products, the presence of "same label" or lack of labelling on certain lots, the presence of alleged errors in order referencing.

136. However, these costs, which are supposed to be ‘real’ costs, are not supported by any documents and the losses actually incurred by (B) are not characterised so that this claim shall be rejected.

On the costs related to late delivery:

137. The exhibits filed in the proceedings show, and in particular, several emails exchanged between the parties in October 2010 (email of 4 October 2010), July 2010 (e-mail of 13 July 2010), April 2010 (emails of 6 and 21 April 2010) and March 2010 (emails of 8, 9 and 31 March 2010) but also a table produced as exhibit 18 by (A) that for the period from April to June 2010, the delivery dates were not complied with.

138. Similarly, by e-mail of 22 February 2011, (B) again found that the delivery deadlines were not met for the month of January 2011, calling for an action plan to address these delays.

139. These delays are recognised by (A), which in an email of 22 March 2011 produces a graph of delivery times confirming the late deliveries, the rate of compliance for which was 55 % in January, and it undertook to increase to 65 % from March 2011 in order to reach 80 % in October 2011 and then 96 % in January 2012.

140. Likewise, by e-mail of 20 April 2011, (B), while confirming 'the *orders until June 2011 '*, emphasises that *' the level of service for the first quarter is far from '* the objectives *' 56 % (objective set at 96 %) concerning the date confirmed, and 20 % as regards the date applied for '*.

141. Finally, these elements are confirmed by several witness statements from (B)'s employees , all of which are consistent in exposing the recurring late deliveries from (A) 2010 and 2011 and the consequences on the disorganisation of t(B)'s production and in particular that of Mr (...), a former Procurement Manager at (B) and Mr. (...), the purchasing director.

142. If (A) argues that these delays are caused by the non-compliance by (B) of forecast orders, these changes, the extent of which are not specified by (A), cannot themselves explain the number of late deliveries, not even the fact that for a single month (that of May 2011) no delay has been observed, what however (B) challenges, assessing the delivery rate for that month at 77 % and not 100 %.

143. (B) applied for payment of EUR 207,000 in compensation of the costs incurred, in its view, as a result of the late deliveries in 2009, 2010 and 2011.

144. However, it does not produce any documentary evidence to support that amount which does not correspond to expenditure or costs actually incurred by (B), but to a flat-rate assessment which it proposes by reference to the rate of service applicable to delivery times. Thus, (B) estimates at EUR 3,000 per unit of 10 %, a service rate of less than 90 %, that sum being, according to (B), intended to compensate for the expenditure connected with production stoppages, the new production planning, transport costs and penalties.

145. None of these items is corroborated by supporting documents showing the amount of losses suffered, and in particular the penalties it claims to have been charged by its own customers, that it should be able to prove, or even the losses arising from production stoppages in terms of a decrease in turnover, which it does not do.

146. In so doing, if the late deliveries have existed, proof of direct damage linked to these delays and quantified by (B) is not provided, so that this claim shall be dismissed.

On the application relating to the overcharging of an Addicom article:

147. (B) seeks reimbursement of the sum of EUR 4,446 for the over invoicing of an Addicom article, corresponding to the difference between the price alleged to be negotiated (EUR 235,51) and the price charged (EUR 253,51) on invoices from 31 August 2009 to 28 February 2010, each of the invoices being produced in the proceedings contrary to the (A)'s allegations.

148. Although (A) submits that the over billing has been rectified by the payment of the payment of credit notes, the list of which is provided as exhibit No 40, it should be noted that that list relates to subsequent invoices covering the period from 30 April 2010 to 28 April 2011.

149. In the light of these elements, which attest on the one hand of recurring errors on the invoicing of Addicom products by (A) and, on the other hand, the absence of regularization for the invoices in pointed out by (B), the latter's claim for reimbursement shall be granted up to the amount of EUR 4,446.

On the over billing in relation to the prices agreed in the order:

150. (B) seeks reimbursement of the sum of EUR 64,830.15 in respect of over billing with regard to agreed prices.

151. Under the terms of Article 5 of (B)'s general terms and conditions of purchase, accepted by (A), *'in the absence of any stipulation to the contrary,... the prices mentioned in the order are firm and final'.*

152. (B) produces a number of e-mails evidencing claims about the price of the goods charged by (A) and, in particular e-mails dated 6 April 2011 (relating to a discussion of a price increase from January 2011) dated 18 to 28 March 2011 (relating to an increase in tariffs from April 2011) or warnings freezing orders in the event of non-payment of invoices (email of 14 April 2010 from (A) to (B) or 1 December 2010).

153. (B) also filed in the proceedings all purchase orders and corresponding invoices recapitulated in Exhibit No 78 in which it appears that there is a price difference between that mentioned in the purchase order and that actually invoiced, to the detriment of (B) for a total amount of EUR 64,830.15.

154. In view of these exhibits, of the general terms and conditions of purchase and the lack of proof of payment of the corresponding credit notes by (A), (B)'s application is justified, so that (A) shall be ordered to pay the sum of EUR 64,830.15.

On the administrative costs connected with the price differences invoiced by the agreed price:

155. (B) seeks reimbursement of the sum of EUR 5,600 for administrative work required by 140 invoices showing incorrect amounts, at a rate of EUR 40 per hour for its services.

156. It is common ground that (A), which admits that it has credit notes in favour of (B), does not dispute the errors thus made on the invoicing between the price agreed upon and the price actually invoiced.

157. However, the administrative checking of invoices constitutes a necessary and normal task of an administrative service of a company, the cost of which shall be borne by it and taken into account in its overall costs and in determining the price of the services or products which it invoices itself in order to guarantee the profitability of its business, so that the link between the errors alleged against (A) and the damage actually suffered by (B), due to the time spent by its services in treating the (A)'s invoices, is not sufficiently precise and exclusive to provide a basis for such a claim against the latter, which does not have to bear the general costs of operation of (B), even partially.

158. That claim shall therefore be dismissed.

On the application under the unilateral price increase:

159. (B) seeks reimbursement of the sum of EUR 14,526.90 in respect of an increase in the price of two cards in December 2010.

160. However, on the one hand, (B) does not justify the initial agreement on the price of these two cards. On the other hand, it does not dispute that it accepted that price increase. Therefore it cannot be requested 8 years the repayment of a price agred and paid.

161. That claim shall therefore be dismissed.

On additional management costs:

162. (B) seeks that (A) be ordered to pay a sum of EUR 128,842.13 in respect of wage costs generated by management problems due to (A) between September 2009 and June 2011 on the basis of 3 employees showing working time devoted to (A) at 25 %, 50 % and 100 %.

163. However, notwithstanding the statements of these three employees who confirm that they devoted a significant amount of working time to their commercial relationship with (A), these employees also worked on behalf of (B) and other customers with the result that, having participated in profits and tasks not necessarily linked to (A), the link between the wrongful acts alleged against (A) and the loss suffered by (B) linked to the cost of the wages paid to these three employees is not direct and cannot therefore form the basis for a claim for compensation.

On (B)'s image damage :

164. The claim for compensation for (B)'s image damage is not supported by any documents. It shall therefore be dismissed.

165. It follows from all of the foregoing that (B)'s counterclaims have merits up to the sum of EUR 69,276.15, together with interest at the legal rate from the date of this judgment, that (A)shall be ordered to pay, the other claims being dismissed.

(F) On costs and expenses

166. In view of this Decision, each of the parties being partially unsuccessful, shall bear each half of the costs.

167. In addition, each of the parties being partially unsuccessful, they shall bear the irrecoverable costs which they have incurred in order to assert their rights and their claims in this regard shall therefore be dismissed.

168. The judgment shall therefore overturned on this count.

IV - ON THESE GROUNDS, THE COURT HEREBY

(1) Upholds the judgment of the Nancy Commercial Court of 19 January 2018 in that it ruled French law applicable and found that there was abrupt termination of commercial relations;

(2) Overturns the judgment of the Nancy Commercial Court of 19 January 2018 as to the remainder;

Ruling again,

(3)Dismisses (B)'s applications for rejection of some of (A)'s exhibits ;

(4) Finds admissible (A)'s claims brought on appeal;

(5) Finds that (A)'s action based on contract performance and contractual liability is not time-barred;

(6) Dismisses (A)'s claims based on performance of the logistics agreement of 7 June 2001 and on contractual liability;

(7) Orders (A) to pay (B) damages in the sum of EUR 102,588.86 in compensation of the abrupt termination of the established commercial relationship;

(8) Orders (A) to pay (B) the sum of EUR 69,276.15 in compensation of the contractual breaches, with interest at the legal rate from the date of this Decision;

(9) Dismisses (A)'s and (B)'s applications based on Article 700 of the Code of Civil Procedure;

(10) Orders (A) to pay (B) to pay the costs of the proceedings, which shall be shared between the parties.

Clerk
Mrs (...)

The President
Mr. (…)