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**PARIS COURT OF APPEAL
Division 5 – Chamber 16
International Commercial Chamber**

DECISION DATED SEPTEMBER 15, 2020
(no. /2020, 16 pages)

Registration no. on the general roll: **RG no. 19/09518 – Portalis no. 35L7-V-B7D-B74QM**

Decision deferred before the Court: Judgment dated March 29, 2019 – Paris Commercial Court – RG no. 2017026903

APPELLANTS:

ASUS FRANCE

A limited liability company registered with the BOBIGNY Registry of Trade and Companies under the number 442 854 261,
with its registered office at: 1, rue Galilée Copernic 2 – Bâtiment Le Neptune – 93160 NOISY LE GRAND,

Represented by its legal representatives
&

ASUS GLOBAL PTE LTD.

A company governed under the laws of Singapore (LLP),
with its registered office: 15 A Changi Business Park Central 05-01 Eightrium 486035 (SINGAPORE)

Represented by its legal representatives

Represented by Me _____, attorney at the PARIS bar, court registration:

With litigating attorney Me 1 _____, attorney at the PARIS bar, court registration:

RESPONDENT:

SAS SODEXPO FRANCE

Registered with the Bobigny Registry of Trade and Companies under the number 388 10 6 8 82

with its registered office at: 22 Avenue des Nations – Paris Nord 2 – Bâtiment Raphaël – 93420 VILLEPINTE

Represented by its legal representatives

*Represented by Me C. _____ of the
attorney at the PARIS bar, court registration: _____ with litigating attorney
attorney at the PARIS bar, court registration:*

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no 00614*

Expert traducteur près la Cour d'appel d'Paris
Jane KOCHANSKI
Anglais
02/10/2020

COMPOSITION OF THE COURT:

The matter was heard on June 29, 2020, in open court, before the Court, comprised of:
 Mr. François ANCEL, President
 Mrs. Fabienne SCHALLER, Judge
 Mrs. Laure ALDEBERT, Judge

who deliberated and a report was presented at the hearing by Mrs. Fabienne SCHALLER under the conditions provided by Article 804 of the French Code of Civil Procedure.

Court clerk, during the proceedings: Mrs. Clémentine GLEMET

DECISION:

- IN ADVERSARIAL PROCEEDINGS
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Clémentine GLEMET, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEEDINGS**The facts**

1-The Singapore company Asus Global PTE (hereafter “ASGL”) and ASUS France (hereafter referred to together as “the ASUS companies”) are the subsidiaries of the Taiwan group, ASUS, which manufactures and commercializes globally under the eponymous brand, with all the products relating to information technology and, in particular, computers, tablets, smartphones, components and peripherals. ASGL sells new equipment of the ASUS brand to national wholesalers who subsequently sell to local vendors and it sells the spare parts to approved technical providers. Asus France proclaims to be a company which does not sell but promotes the Asus products.

2- Sodexpo is a French company which proclaims to carry out a wholesale activity in I.T. equipment, in particular, intended for the DOM/TOM.

3-A partnership between the Asus companies and Sodexpo was envisaged at the end of 2014 for the purchase by Sodexpo of certain ASUS equipment from approved wholesalers of the ASUS group, and their resale by Sodexpo in the DOM/TOM, in return for commission.

4-A confidentiality agreement for the setup of said partnership was entered into on November 7, 2014 between Sodexpo and Asus France, with the latter intervening as “legal representative” of ASGL.

5-As Sodexpo does not provide for an after-sales repair service, a partnership for the after-sales service of the ASUS products in Martinique, Guadeloupe and Guyana was entered into between the parties in May 2015, liaising Sodexpo with a third party company proposing

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this service, CSD, and ASGL opening an account in its books for Sodexpo on June 30, 2015, enabling the latter to order the spare parts directly from ASGL.

6-At the end of February 2016, a one-year partnership agreement, beginning on January 1, 2016 and ending on December 31, 2016, was entered into between Sodexpo and ASGL. This agreement, relating to the Asus "system" product category (laptops, tablets and a various range of office computers), guaranteeing Sodexpo a remuneration in the form of annual discounts, upon the condition of meeting the objectives in terms of turnover and volume order commitments with four approved wholesalers appointed by ASGL, paid via credit notes by one of these wholesalers.

7- In an email dated December 22, 2016, Sodexpo was informed by [redacted] "Commercial Business Manager" of Asus France, that for reasons of strategic reorganization, this partnership would not be renewed for 2017: accordingly, he was proposed another partnership relating to the "Zenfone" smartphone range, which Sodexpo refused.

8-Sodexpo also received in an email dated January 5, 2017 that it was no longer approved to order spare parts from ASGL. After an unsuccessful interpellatory summons and formal notice to obtain the re-establish access to the spare parts, Sodexpo referred the matter before the summary proceedings judge at the Bobigny commercial court for such purpose, with the parties finally settling their dispute amicably and ASGL once again authorizing access to spare parts as from January 30, 2017.

Procedure

9-It was in this context that Sodexpo, considering that the absence of continuation of the partnership under the conditions initially entered into constituted a sudden termination of commercial relations, summoned the ASUS companies in deeds dated 6th and 8th of March 2017 before the Paris commercial court, in order to have them ordered to pay *in solidum*:

- 2,253,416 euros, excluding taxes, as a notice period indemnity (40 months' gross margin) and damages for the sudden termination of commercial relations
- 676,025 euros (1 year's gross margin) in damages for unlawful and disloyal dealings
- 526,315.24 euros in damages for the loss of inventory of ASUS products
- 500 euros per day as a late payment penalty as from one month following the decision with a view to publishing a press release
- 25,000 euros under Article 700 of the French Code of Civil Procedure.

10-In a judgment dated March 29, 2019, the Paris Commercial Court, in particular:

- held that Sodexpo's action against Asus France was admissible,
- judged that the termination of the commercial relations established between ASGL and Asus France on the one hand, and Sodexpo on the other hand, was sudden,
- ordered *in solidum* ASGL and Asus France to pay Sodexpo 508,000 € for sudden termination,
- ordered *in solidum* ASGL and Asus France to pay Sodexpo 25,000 € under Article 700 of the French Code of Civil Procedure,
- dismissed the parties' further claims or those contrary hereto,

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-ordered the provisional enforcement.

11- The ASUS companies lodged an appeal on the judgment rendered by the commercial court on March 29, 2019 by declaration dated April 30, 2019. The pre-trial investigation of the file was made according to the protocol relating to the procedure before this chamber on February 7, 2018 and accepted by the parties in accordance with Article 4.1 therein. The schedule was modified to take into consideration the public health crisis and the belated exchanges of new submissions. The closure order was deferred and pronounced on June 29, 2020.

II- THE PARTIES' PLEAS

12-In accordance with their submissions communicated electronically on June 12, 2020, the ASUS companies requested of the Court, under Articles L.442-6, I 5° of the French Commercial Code, Article 1240 of the French Civil Code and Article 31 of the French Code of Civil Procedure, as follows:

After having held that ASUS France was a third party to the disputed commercial relation and that Sodexpo did not have an interest to initiate a claim against ASUS France,

In the principle,

-to overrule the judgment rendered in all its provisions and dismiss all of Sodexpo's claims;

In the alternative,

-to overrule the judgment, including appeal, insofar as it had set the duration of the commercial relation between the parties at 25 months, the notice period duration at 10 months and Sodexpo's indemnification at 508,000 € and to dismiss all of Sodexpo's claims.

In the further alternative,

-to overrule the judgment, including appeal, insofar as it had ordered *in solidum* the ASUS companies to pay Sodexpo 508,000 € for the sudden termination of the established commercial relations and to limit the amount of their penalty to a maximum of two months' notice period, i.e., for up to a maximum of 16,510 €.

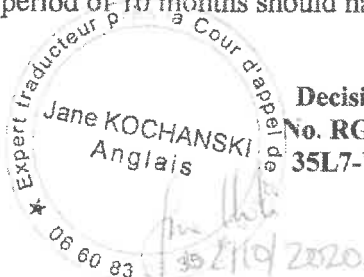
In any event,

-to dismiss all cross-appeal and counter claims by Sodexpo and order it to pay 15,000 euros under Article 700 of the French Code of Civil Procedure.

13. Pursuant to its counter and cross-appeal submissions communicated electronically on June 23, 2020, Sodexpo substantively requested of the Court, under Articles L.442-6-I-5° of the French Commercial Code and Article 1240 of the French Civil Code, in particular:

- to judge inadmissible and ill-founded the appeal by ASUS,
- to dismiss the estoppel raised by the appellant companies,
- to confirm the judgment rendered insofar as it judged Sodexpo's action against ASUS France admissible and retained the existence of a sudden termination of the commercial relations which had lasted for 25 months with both ASUS companies and judged that a notice period of 10 months should have been granted to Sodexpo,

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- to overrule the judgment for the surplus and order the ASUS companies *in solidum* to pay the following amounts:
 - 700,000 €, exclusive of taxes, as a notice period indemnity and damages in compensation for the sudden termination of the commercial relations, with a capitalization of the interest
 - 300,000 € as damages for disloyal and unlawful dealings
 - 526,315.24 € as damages in compensation for the loss of inventory of the ASUS products,
 - 200,000 € in compensation of the harm to its image and commercial credibility,
 - to order the publication of a press release, subject to a penalty, in three national journals, pursuant to which the ASUS companies acknowledge that the termination of the contractual relation is a unilateral decision non attributable to Sodexo
 - to order them *in solidum* to pay the latter 30,000 € for the time spent by the executives to follow these proceedings and 100,000 € as damages for an unlawful procedure and 50,000 € under Article 700 of the French Code of Civil Procedure.

III- THE PARTIES' LEGAL ARGUMENTS AND THE GROUNDS OF THE DECISION

A/Concerning ASUS France's exoneration from the proceedings

14. The ASUS companies asserted that Sodexo did not have an interest to initiate a claim against ASUS France and requested its exoneration from the proceedings on the ground that the latter was not a party to the commercial relation established between ASGL and Sodexo. Accordingly, they asserted that:

- ASUS France did not carry out any sales or after-sales activity, such as results from its corporate purpose mentioned on its K-BIS and that its website only proposed a link to the online sales website exploited by the German company, Arvato GmbH;
- the partnership agreement was entered into for 2016 by Sodexo solely with ASGL, a legal entity distinct from ASUS France;
- the confidentiality agreement entered into on November 12, 2014 with Sodexo was signed by ASUS France in the name and on behalf of ASGL, prior to the partnership agreement;
- ASUS France had only intervened as an intermediary for ASGL to facilitate the negotiations on the conditional and unconditional discounts granted indirectly, under certain conditions, by ASGL;
- no commercial exchange had been made directly between Sodexo and ASUS France;
- the orders of spare parts were made by Sodexo directly with ASGL, which solely issued the invoices and received payments;
- ASUS France and ASGL do not form a "sole economic entity", a notion which, incidentally, does not apply to tortious civil liability;
- ASUS France's predominance in the email exchanges shall not be sufficient as a basis for the latter's liability *in solidum* with ASGL.

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15. In response, Sodexpo, after having emphasized that the interest to initiate a claim within the meaning of Article 31 of the French Civil Procedure Code is independent from the admissibility of the claims, asserted that:

- ASUS France predominated in the business relations, which is established by the correspondence exchanged between the parties between 2014 and 2017; it administered the relation entirely, firstly by proposing the partnership in 2014, and then by proposing a partnership on other ASUS products;
- ASUS France granted the instructions directly to Sodexpo and fixed its sales objectives, granted the preferential tariff conditions, organized the commercial and pricing policy of the ASUS products in the DOM/TOM and organized the promotions on certain products, with Sodexpo;
- the confidentiality agreement dated November 12, 2014, relating to the negotiations in progress, was entered into with ASUS France;
- Sodexpo's preferred correspondent was Mr. [REDACTED], who carried out the duties of Sales Manager in ASUS France; he provided Sodexpo with a price list for the last quarter 2014, to "enable the start of the partnership";
- ASUS France's corporate purpose includes marketing, which, in particular, includes sales promotion and price and product policy;
- the messages from ASUS France establish that it was involved not only in the sales but also in the after-sales services ("ASS");
- Sodexpo was able to legitimately believe that both companies of the ASUS group with which it was in continuous and loyal relations, formed a single entity.

16. Sodexpo asserted in conclusion that ASUS France had continuously intervened in the commercial relation, created a misleading impression of a unit with the Singapore subsidiary, to such an extent that ASUS France and AGSL appeared in the form of a single economic and legal entity and must, accordingly, be judged to be co-liable for the sudden termination of the commercial relation established with Sodexpo.

Accordingly,

17. In accordance with Articles 31 and 32 of the French Code of Civil Procedure, the action is open to all those who have a legitimate interest for the acceptance or dismissal of a plea and any plea issued by or against a party without entitlement to initiate a claim shall be considered inadmissible.

18. In this case, it results from the exhibits produced in the proceedings that the commercial relation with Sodexpo was setup, negotiated and performed by ASUS France, and, in particular, by one of its employees, Mr. [REDACTED], both for the sales of the ASUS products and the after-sales, which created a genuine impression for Sodexpo that both ASUS companies were partners to this commercial relation, and thus, Sodexpo has an interest to initiate a claim in their regard.

19. It appears that Mr. [REDACTED], "B2B Sales Manager" at ASUS France, was Sodexpo's preferred correspondent, for the setup of the partnership since 2015 relating to the promotion and resale of the ASUS products in the DOM/TOM. Accordingly, the emails sent by this sales manager at ASUS France to Sodexpo on 10th of October, 7th and 17th of November and 12th of December 2014, establish that the meeting and the initial

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discussions relating to the ASUS partnership were undertaken by the latter. The latter granted Sodexpo access to the monthly price list, the order recommendations Q4.2014, announcing the possibility to work on more substantial volumes for the first quarter 2015, the after-sales procedures and conditions and announced working on the partnership agreement, whilst communicating the confidentiality agreement dated November 7, 2014.

20. It is also established in the emails sent to Sodexpo by Mr. C during 2015 that, during this year, Sodexpo benefited from specific prices with approved wholesalers by the ASUS group in the context of a partnership, non-formalized by a written agreement, developed with ASUS France, through the intermediary of its sales manager, “*B2B Sales Manager*”, who, in particular, communicated the promotional offers to Sodexpo, requested the order placements and reports on weekly inventories and intervened with the reference wholesalers, without ever confirming that it was acting in the name and on behalf of ASGL. Sodexpo also had as correspondent as from September 14, 2015, Mr. [redacted] the Key Account Manager at ASUS France, presented as the “*new preferred commercial contact*”.

21. Furthermore, ASUS France communicated the partnership agreement to Sodexpo, for 2016, presenting ASGL as a contracting party, set its objectives for 2016 (emails dated 16th of February and 23rd March 2016) and which, in an email dated 22nd December 2016, notified a change of strategy and the proposition to work on other products (the Zenfone smartphone range) and the dereferencing for the spare parts in an email dated January 5, 2017.

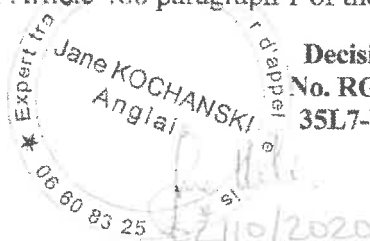
22. The exchanges with ASGL were limited to the confidentiality agreement, in which it appeared as being represented by ASUS France and the partnership agreement for 2016, for which, incidentally, it did not communicate a signed version, and invoices relating to the sale of spare parts.

23. Moreover, the reference made by the appellant companies to ASUS France’s corporate purpose, to contest its inclusion in the proceedings, is not relevant given the facts mentioned above; the evidence provided by Sodexpo that ASUS France had a sales team and an after-sales service and whereas it results from a decision by the European Commission dated July 24, 2018 (2018/C 338/08) that ASUS France was able to setup practices to restrict the vendors’ capacity from defining their sales’ prices independently, as the account managers were frequently in contact with the vendors, whereas no supplier-client relation existed between them.

24. It results from these elements that ASUS France’s active and quasi-exclusive intervention and its involvement in the setup, performance and development of the partnership with Sodexpo for the distribution of the ASUS products in the DOM/TOM caused a genuine impression for Sodexpo to legitimately believe that both companies were partners to this commercial relation.

25. Accordingly, ASUS France is entitled to defend its cause, it being recalled that the Court is not bound by the interim order rendered by the President of the Bobigny Commercial Court dated April 11, 2017, as, in principal, an interim order does not have *res judicata* by virtue of Article 488 paragraph 1 of the French Code of Civil Procedure.

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26. Therefore, the lower court judges had duly declared Sodexpo's action admissible against ASUS France and the judgment rendered shall be confirmed on this count.

B/ Concerning the claim based on the sudden termination of commercial relations pursuant to Article L.442-6 1 5° of the French Commercial Code

27. The ASUS companies asserted:

In the principal.

- that the relation related to the purchase of the spare parts must be distinguished from that relating to the pricing conditions, which represent two separate business issues;
- that the commercial relation between ASGL and Sodexpo relating to the conditional and unconditional discounts for the purchase of ASUS materials may not be qualified as an established commercial relation on the ground that this relation only existed in the context of the partnership agreement entered into for 2016, for a fixed duration of one year non-renewable and the purchase of ASUS products from wholesale partners by Sodexpo shall not fall within the scope of this relation;
- that in November 2014, Sodexpo purchased ASUS products from wholesale partners without any direct commercial relations with ASGL;

They also asserted:

- that they did not terminate said relation insofar as by email dated December 22, 2016, they did not make reference to the end of any partnership, but the possibility of a new partnership relating to different products;
- that Sodexpo continued to purchase ASUS materials from wholesale vendors after 2017;
- that the commercial relation relating to the purchase of the spare parts from ASGL, which began on June 30, 2015, had not ceased, with Sodexpo's account still open. It also emphasized that the repair service for the ASUS products was not carried out by Sodexpo but by a third party provider approved by the ASUS companies.

In the alternative.

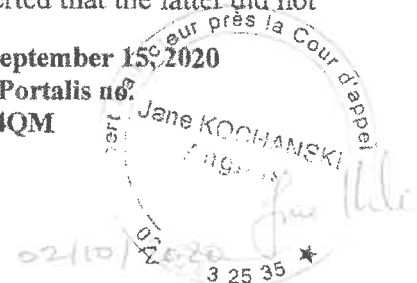
-They contest the duration of the commercial relation and notice period retained by the Commercial Court. They asserted that the commercial relation had lasted at most for 18 and not 25 months, with its starting point to be set at June 30, 2015, date of the opening of Sodexpo's account in ASGL's books, enabling the purchase of the spare parts, and not on November 17, 2014, as retained by the Commercial Court, in the absence of financial movements between the partner companies at this date. They asserted that the notice period should have been fixed at 2 and not 10 months. They contested the economic dependency alleged by Sodexpo by asserting that the turnover made by Sodexpo only corresponds to the discount obtained by the latter to meet its objectives, i.e., 2%, that the turnover of 40% announced by Sodexpo was not established, that the non-renewal of the partnership for 2017 only reduced Sodexpo's turnover by 19% and that Sodexpo had made 4 times the profit margin made with the ASUS group in 2017 and 2018. They added that Sodexpo did not have exclusivity on the supplies; that the ASUS products were easily substitutable and that Sodexpo did not establish any adaptation difficulties. They contested that the relations with ASGL were of financial significance as alleged by Sodexpo and asserted that the latter did not

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establish having made specific investments, or having been constrained to constitute an inventory of ASUS products.

-They also contest the evaluation method and reference period retained by the commercial court to settle the amount of the indemnity allocated to Sodexpo. They asserted that the profit margin on the variable costs should have been taken into account and not just the gross profit margin and exclude the year 2014 from the calculation. They added that the figures produced by Sodexpo are disputable. They asserted that Sodexpo did not establish the profit margin rate announced, i.e., 10.05%, and asserted, in the alternative, that this rate could not exceed 2%. The ASUS companies also contested the amount of the losses settled by Sodexpo at 700,000 €. In the further alternative, they added that the termination indemnity could not be greater than 16,510 €, pursuant to a profit margin rate of 2% on the actual amount of the purchases of the ASUS products by Sodexpo in 2016, reduced to 2 months' notice.

28. In response, Sodexpo asserted:

-that there was an established commercial relation of 25 months, which was evidenced by the correspondence exchanged between the parties and the accounting documents certifying the positive evolution in turnover made by Sodexpo with the ASUS products (40% of its turnover); they added that the established nature of the relation was acknowledged by the ASUS companies in its submissions, even if it concerned a lesser duration, and that the relation to be taken into account must include the purchase of the equipment with approved wholesalers of the ASUS group, insofar as Sodexpo could only benefit from beneficial commercial conditions granted by ASUS France from being supplied by said wholesalers;

-that the distribution network established and completed by a direct access to a "hub" of spare parts, located in Singapore, enabled Sodexpo to benefit from a *de facto* exclusivity in the TOM;

-that the ASUS companies established the legitimate belief that it could anticipate a subsequent certain continuity of business flow with the latter and that it would anticipate exclusivity for the ASUS distribution in the DOM/TOM;

-that the relation was terminated without notice and grievances in its regard, unlawfully, suddenly, unforeseeably and abruptly, by the notification in an email dated December 22, 2016, of the absence of continuation of the partnership for 2017; then in an email dated January 5, 2017, by the announcement of the withdrawal of the approval for the purchase of spare parts, whereas the nature and progression of its commercial relations with the appellant companies could reasonably have led Sodexpo to rely on a subsequent continuity of business flow; it recalled in this regard that ASUS France mentioned an exclusivity for 2017 in a correspondence dated September 19, 2016, i.e., 3 months prior to the email informing of the termination, and demanded orders from the latter two months prior to the termination;

-that there was nothing to anticipate such a termination;

-that the proposition by ASUS France of a partnership for the "Zenfone" smartphone range for 2017, a product which it presented as being marginal in the ASUS product range and insignificant on the global smartphone market, was only intended to create a diversion and that this proposition constituted a substantial modification of the contractual conditions altering the interest and economic equilibrium of the agreement;

-that the notice period duration cannot be estimated at less than 10 months, given the 25 month duration of commercial relation, which began on November 17, 2014, date of the

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partnership proposition notified by ASUS France, to be discontinued on December 22, 2016, the financial significance of the relation and the state of economic dependency (40% of its turnover in 2016 for a global amount of 15,000,000 €, with ASUS also being the leader on a highly competitive market), and the time necessary for its reorganization; it emphasized that it had actively participated in the development of the ASUS brand in the DOM/TOM, by establishing a distribution network and after-sales solutions, customized for this partnership; it considered that the ASUS companies had intentionally misled it by assuring that the “exclusive partnership in the DOM/TOM” would continue in 2017 and had misused its know-how and experience on this market in the DOM/TOM. It added that the possibility to continue its purchases with the approved wholesalers was non consequential in the absence of special pricing conditions, no longer being competitive, as its clients could order their supplies from said wholesalers for the same prices.

They asserted a loss of profits for an amount of 700,000 €, exclusive of taxes, over 10 months and not 508,800 €, as settled by the Commercial Court, which did not take into account the rapidity of the growth in turnover, pursuant to a profit margin of 10.05% on a turnover estimated at 8,000,000 € for 2017, with the loss to be taken into consideration being the loss of gross profit margin calculated for the year preceding the acknowledged decline in turnover.

It mentioned that this unilateral termination, with immediate effect, without notice or any grievance, was particularly vexatious and sudden.

It contested to have been able to readjust in a shorter period, and observed that the state of economic dependency must be taken into account for the calculation of the notice period duration, and the type of market in question, from which it had been rejected. In reality, the sudden discontinuation of the PC distribution of the ASUS brand represented a sudden loss for Sodexpo, with global commercial significance, for both its clients and its other suppliers.

On this ground,

29. Article L.442-6, I, 5° of the French Commercial Code, in its version applicable to the facts of the case, set forth that “any manufacturer, retailer, industrialist or person registered on the trade registry (...), 5° who suddenly terminates an established commercial relation, even partially, without written notice, taking into consideration the duration of the commercial relation and respecting the minimal notice period stipulated, in reference to the commercial practices, by inter-professional agreements shall be held liable and shall be obliged to compensate the prejudice. (...) The preceding provisions shall not affect the option of immediate termination, in the event of the other party’s non-performance of its obligations or in the event of a “force majeure” (...)”.

Concerning the existence of an established commercial relation

30. The notion of established commercial relation implies, even in the absence of a written agreement, and even if it was brief, the existence of a business relation for a certain duration, continuity and with a certain level of implication, to enable the party subject to termination to reasonably anticipate in the future, albeit briefly, a certain continuation of business flow with its commercial partner, with the established commercial relation resulting from the

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commercial exchanges entered into between the parties. A succession of sporadic agreements may be sufficient to characterize an established commercial relation.

31. In this case, it results from the exhibits produced in the proceedings and the facts recalled above that Sodexpo entered into business relations with the ASUS companies on November 7, 2014, that this relation firstly developed on the basis of an informal exchange of emails and various commercial benefits granted to Sodexpo by ASUS if it ordered ASUS equipment from its four approved wholesalers to resell them in the DOM/TOM. The principle of the remuneration of the partnership was accepted in the form of discounts granted upon request of the ASUS companies by the wholesaler vendors.

32. The commercial relation was then formalized by the opening of an account on June 30, 2015, in ASGL's books for the supplies of spare parts enabling the after-sales agreements to be assumed with a direct supply of spare parts and by the conclusion of a partnership agreement in February 2016, relating to conditional and unconditional discounts for the resale of certain ASUS products for 2016.

33. In this regard, the ASUS companies are ill-founded to assert the existence of two separate business flows, one concerning the sale of spare parts and the other that of products of the ASUS brand, whereas these operations are part of the same business relation, the purchase by Sodexpo of spare parts to assure the after-sales services in the DOM/TOM, appearing as the necessary complement for its resale activity of the ASUS products, given the existence of the contractual and statutory guarantees for the sale and the market's geographical specificities.

34. This cooperation relating to the granting by ASUS of conditional and unconditional discounts was based on Sodexpo's obligation to be supplied by referent wholesalers, expressly appointed by the ASUS companies, the discounts being paid by a credit note via one of the latter, and, accordingly, the analysis of the extent of the commercial relation must take this specific constraint into consideration.

35. In this regard, it appears that Sodexpo's partnership with the ASUS companies developed rapidly and exponentially, with Sodexpo's sales on the ASUS brand equipment developing through such partnership, from nil to 187,697.08 €, for the sales made at the end of 2014, at 2,267,044.11 € for 2015, then 6,066,768.38 € for 2016, with Sodexpo benefiting from an exclusivity as from 2016, as results from the email from ASUS France dated September 19, 2016.

36. It results from these elements that the parties had established a stable and durable commercial relation since November 7, 2014 and that Sodexpo could subsequently reasonably anticipate a certain continuity of business flow with the ASUS companies, and, accordingly, the existence of an established commercial relation is evidently established in this case.

37. The judgment rendered shall, accordingly, be confirmed on this count.

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Vu ne varietur
Traduction conforme à l'original en langue française
n° 00614

**Decision dated September 15, 2020
No. RG 19/09518 Portalis no.
35L7-V-B7D-B74QM**

Concerning the sudden nature of the termination

38. The purpose of the aforementioned text is to sanction not the termination *per se* but the sudden nature thereof, characterized by the absence of written notification or an insufficient notice period. It is well-established that the suddenness of the termination results either from the absence of any written notification, or too short a notice period, even notified in writing, but which does not enable the notified party to seek alternative solutions and find another equivalent commercial partnership.

39. In this case, the announcement by the ASUS companies, by email dated December 22, 2016, of the non-continuation of the partnership for 2017 and the proposition of a new partnership relating to the “Zenfone” smartphone range, for which the marginal nature is established for the smartphone sales, all brands considered, and in the ASUS equipment, followed by the announcement by email on January 5, 2017 of the termination of approval by Sodexpo for the purchase of spare parts, shall be analysed as a written termination of an established commercial relation, with a written notice of 7 days.

40. Yet, the notice period must take into account the duration of the commercial relations, albeit brief, and must take into consideration the time period necessary for the recipient company to prepare for a redeployment of its activity, find another partner or a replacement solution. The principal criteria to be taken into account include economic dependency, the duration of the relation, business volume and the progression of turnover, the specific investments made and not amortized, exclusivity relations and the specificity of the relevant products and services.

41. In this case, the commercial relation began on November 7, 2014, date on which order recommendations for the fourth quarter were sent, with the specification, according to which *“the volumes proposed are quite minimal but they should enable us to begin simply and rapidly on Q4”*. This was ended by an email dated December 22, 2016, with effect as of January 1, 2017. Accordingly, the commercial relation would have lasted for 25 months.

42. It results from the elements produced by Sodexpo, which are sufficiently probative, notwithstanding the objections made by ASUS, that the sales of the ASUS products were in continuous progression, representing almost 15% of the total sales made by Sodexpo in 2015, then 40% in 2016, exceeding 29% of the objectives set in the partnership agreement, Sodexpo anticipated a turnover of 8 million euros for 2017 (i.e., more than 50% of its turnover for 2016). Accordingly, the ASUS brand constituted a significant part of the sales made by Sodexpo in the DOM/TOM at the time of the termination of the commercial relations, it also being established that Sodexpo had registered a loss of 19.09% of its turnover in 2017.

43. It also results from the documents produced in the proceedings that the ASUS brand was well-established, representing in particular, 7% of the global PC market in 2016 and was not or was barely distributed in the DOM/TOM prior to the setup of the partnership with Sodexpo.

44. Whilst these elements do not enable the establishment of a state of economic dependency, no exclusivity of supplies was imposed to Sodexpo, and whilst the latter does not provide evidence of the alleged investments deployed, the foregoing elements nonetheless establish, in

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view of the duration of the commercial relation, a continuously evolving business volume, the announcement of an exclusivity on its products by ASUS, the notoriety and the brand's position on the global PC market, and the loss of a market for which Sodexpo had co-launched in the DOM/TOM, that a 7 day notice period was insufficient to redeploy its activity, and accordingly, that the sudden nature of the termination is evidently characterized in this case and that the application of a 6 month notice period appears to be necessary but sufficient to find a replacement solution.

45. Accordingly, the judgment rendered shall be overruled on this count.

Concerning the prejudice suffered as a result of the sudden termination

46. It is well-established that the prejudice resulting from the sudden nature of the termination is constituted by the loss of gross profit margin from which the recipient expected to benefit during the notice period which should have been granted.

47. In this case, it is unduly that the commercial court calculated Sodexpo's prejudice taking as the calculation basis the turnover made by Sodexpo on the ASUS sales and by applying the profit margin rate on variable costs (evaluated at 10.05% for 2016 by Sodexpo's chartered accountant), for the 2016 ASUS sales.

48. As specified in his memorandum dated March 16, 2020, Sodexpo's expert, Mr. insofar as Sodexpo did not purchase equipment of the ASUS brand, besides spare parts, directly from ASUS but through the intermediary of four referent wholesalers, appointed by ASUS, the gross profit margin realized by Sodexpo on the basis of which its indemnification shall be calculated is not the profit margin made on its turnover relating to the sale of ASUS equipment purchased from the wholesalers, nor the profit margin on variable costs made on the ASUS sales, as unduly asserted by Sodexpo, but corresponds to the discounts granted by ASUS to Sodexpo, pursuant to the partnership, via the four referent wholesalers, i.e., the 2% discounts provided by the partnership between ASUS and Sodexpo, which is the basis of the established commercial relation, for which the sudden termination results in the right to indemnification.

49. Accordingly, the average monthly discounts due under the agreement and made on the sales of the ASUS equipment purchased from the wholesalers should be taken into account as a reference. This profit margin is acknowledged by the ASUS companies, for an average monthly amount of 8,255 € (as they acknowledge in their written submissions an amount of 16,510 € for two months).

50. The indemnification due to Sodexpo for the notice period following the sudden termination and corresponding to the said profit margin over six months, is, therefore, 6 X 8,255€, i.e., 49,530 €.

51. Accordingly, the judgment rendered shall be overruled concerning the quantum of the prejudice.

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C/Concerning Sodexpo's other claims

52. Sodexpo asserted that the ASUS companies misused its know-how, resulting in the dilapidation of its business, by capitation of the market and clientele in the DOM-TOM causing it a loss of profits for an amount of 300,000 €, not overlapping the indemnification requested for the sudden termination.

53. In response, the ASUS companies asserted that this claim overlapped the indemnification request for the notice period that was not granted and asserted that Sodexpo did not provide evidence of its alleged “*business dilapidation*” and the reality of its prejudice.

Accordingly,

54. Sodexpo does not provide evidence of unlawful dealings by ASUS constituting a misuse of know-how or a distinct prejudice resulting from the suddenness of the termination of the commercial relation. Accordingly, the judgment rendered, which dismissed this claim, shall be confirmed.

Concerning the claim for reimbursement of inventory for 526,315.24 €

55. Sodexpo asserted that shortly prior to the termination, the ASUS companies imposed the constitution of inventories by requesting fixed orders at the end of October and the beginning of November 2016, for scheduled deliveries in December 2016 and January 2017. It specified that it currently held an inventory for a value of 526,315.24 €, which it was unable to dispose of due to the termination of the commercial relations.

56. In response, the ASUS companies asserted that Sodexpo still had access to spare parts, that it did not provide evidence of its inventory status, that it was able to sell its new equipment and that its inventory value is not evidenced.

Accordingly,

57. Sodexpo failed to establish its impossibility to sell the inventory evoked as a result of the termination of the commercial relation, whereas it is not contested that it never ceased to have access to the spare parts as from January 30, 2017 and in any event, failed to establish the actual inventory status, using as a basis, an uncertified internal list and settled at January 31, 2017. Accordingly, the judgment, which dismissed this claim, shall be confirmed.

Concerning the harm to Sodexpo's image and commercial credibility

58. Sodexpo asserted that the sudden nature of the termination had generated a prejudice to its image, given the lead position of the ASUS group, for which it claims compensation by the publication of a press release in three national journals and the payment of an indemnity for 200,000 €, emphasizing that, according to its expert, Mr. [redacted] by suddenly terminating the partnership, the ASUS companies would have economized 840,000 € per year, as from January 1, 2017.

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59. In response, the ASUS companies mention that this count of prejudice increased from 30,000€ to 200,000 € without any justification. They assert the absence of evidence for harm to image and object to any publication.

Accordingly,

60. Given the notoriety of the ASUS brand and the development of its distribution in the DOM-TOM, through the partnership developed by Sodexpo, the sudden nature of the termination necessarily caused Sodexpo harm to its image distinct from the indemnification for the non-respected notice period, which should be indemnified for 30,000€. It does not appear to be necessary to order a publication in a national journal, as Sodexpo was free to communicate this decision to the market, on any appropriate support medium.

Concerning the indemnification for the time spent by one of the key executives at Sodexpo for the follow-up of the dispute

61. Sodexpo asserted that the implication of its executive, Mr. H , in the processing of the dispute, to the detriment of his other administrative tasks and the development of the company's activity, should give rise to a financial compensation for an amount of 30,000 €.

62. In response, the ASUS companies emphasize that such executive is not the managing director of Sodexpo and considered that there was no connection between the bonuses referred to by Sodexpo for the calculation of its prejudice and this matter.

Accordingly,

63. Sodexpo did not establish Mr. H capacity, nor the latter's alleged investment in the processing of this litigation and its consequences on the company's activity. Sodexpo failed to provide evidence of the relation between the certification of exceptional bonuses granted to the latter, on which it bases its claim, and this litigation. Accordingly, Sodexpo's claim shall be dismissed.

Concerning the claim for damages for unlawful proceedings

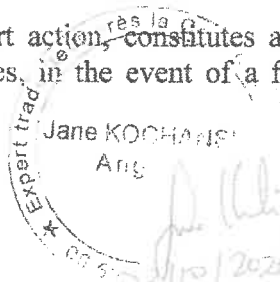
64. Sodexpo claims that the ASUS companies should be ordered *in solidum* to pay 100,000 €, for unlawful proceedings, in accordance with Articles 1240 of the French Civil Code.

65. The ASUS companies asserted in response that they used remedies already in existence whereas the lower court judgment is not in line with the current case law and they may not be suspected of having attempted to cause financial difficulty for Sodexpo insofar as the latter had already received the amount of 543,285.13 €, upon enforcement of the judgment.

Accordingly,

66. The initiation of a court action, constitutes a right, as a principle, and only becomes unlawful, triggering damages, in the event of a fault likely to engage the offender's civil liability.

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67. In this case, Sodexpo's claim shall be dismissed in this regard, if it fails to provide evidence of any fault on the part of the ASUS companies and to establish the existence of a prejudice other than that suffered due to the costs incurred for its defence, whereas, furthermore, the judgment rendered shall be partially overruled.

Concerning the unrecoverable expenses and costs

68. Sodexpo requested that the ASUS companies be ordered to pay the amount of 50,000 € under Article 700 of the French Code of Civil Procedure, in addition to the costs of the lower court decision and appeal.

69. The ASUS companies requested that Sodexpo be order to pay each of them the amount of 15,000 € under Article 700 of the French Code of Civil Procedure and the dismissal of Sodexpo's claim for reimbursement in the context of the procedural costs and Mr. . expert's fees.

Accordingly,

70. The outcome of the costs and indemnity of the proceedings was duly settled by the commercial court.

71. For the court, equity requires that the ASUS companies be ordered to pay Sodexpo the amount of 25,000€ under Article 700 of the French Code of Civil Procedure, and the costs of appeal.

IV – ON THESE GROUNDS,

THE COURT,

1. Confirms the judgment of the Paris Commercial Court dated March 29, 2019, insofar as it:
 - judged admissible Sodexpo's action against ASUS France,
 - judged established the 25 month commercial relation between ASUS France and Global PTE LTD on the one hand, and Sodexpo on the other hand,
 - judged sudden the termination of this commercial relation,
 - ordered *in solidum* ASUS France and Global PTE LTD to indemnify Sodexpo for the sudden termination of the commercial relation established between these companies,
 - dismissed Sodexpo's other claims relating to the indemnification of an alleged misuse of know-how and its request for a reimbursement of inventory,
 - ordered *in solidum* ASUS France and Global PTE LTD to pay 25,000 € to Sodexpo under Article 700 of the French Code of Civil Procedure.

2. Overrules for the surplus,

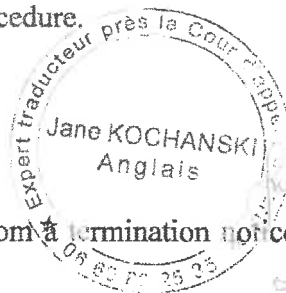
Deciding in a further hearing, and adding,

3. Holds that Sodexpo was admissible to benefit from a termination notice period of 6 months,

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4. Orders *in solidum* ASUS France and ASUS Global PTE LTD to indemnify Sodexpo for its prejudice resulting from the sudden termination of their established commercial relations that lasted for 25 months for up to 49,530 €;
5. Holds that the accrued interest due for at least one year as from the summons shall bear interest at the legal rate, in accordance with Article 1343-2 of the French Civil Code;
6. Orders *in solidum* ASUS France and ASUS Global PTE LTD to indemnify Sodexpo for its prejudice arising from the harm to the latter's image and commercial credibility for an amount of 30,000 €;
7. Dismisses Sodexpo for its indemnification claim for the time spent by Mr. Harris in the follow-up of the dispute;
8. Dismisses Sodexpo's claim for damages for unlawful proceedings;
9. Orders ASUS France and ASUS Global PTE LTD. to pay Sodexpo the amount of 25,000 € under Article 700 of the French Code of Civil Procedure;
10. Orders *in solidum* ASUS France and ASUS Global PTE LTD to pay all the appeal costs.

The Court Clerk

Clémentine GLEMET

The President

François ANCEL

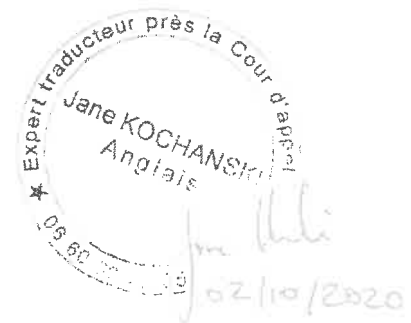
Pour traduction certifiée conforme à l'original en langue française *visé ne variatur* sub numéro 00614 ;

Ce jour, le 02 octobre 2020.

Jane Kochanski.

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