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PARIS COURT OF APPEAL

**Division 5 – Chamber 16
International commercial chamber**

DECISION DATED OCTOBER 12, 2021
(no. /2021, 7 pages)

Registration no. on the general roll: **RG no. 20/02342– Portalis no. 35L7-V-B7E-CBMYV**

Decision deferred before the Court: Arbitral award dated November 28, 2019 – Paris
Commercial Court – RG no.2017071851

APPELLANT:

SAS MÉCAGIL

Represented by its legal representative
Rue de l'Aqueduc 77430 Champagne sur Seine
Represented by Me from the
PARIS Bar, court registration:



RESPONDENT:

TRANSCOVER SYSTEMS LIMITED

A company governed under English law

Units 1 & 2 The Mill, St. Michaels Close ME207XE, Aylensford (Kent)/THE UNITED
KINGDOM

Represented by Me from the *attorney at*
the PARIS Bar, court registration:
Assisted by Me *attorney at the PARIS Bar*

Vu ne varietur
Traduction conforme à l'original en langue française
POOSTH

COMPOSITION OF THE COURT:

In accordance with the provisions of Articles 805 and 907 of the French Code of Civil Procedure, the matter was heard on June 29, 2021, in a public hearing, and the attorneys, informed of the composition for the court deliberation and not objecting thereto, before Mrs. Fabienne SCHALLER, Judge in charge of the report, and Mrs. Laure ALDEBERT, Judge.

These magistrates reported on the pleadings in the Court deliberation, comprised of:

François ANCEL, President
 Fabienne SCHALLER, Judge
 Laure ALDEBERT, Judge
 who deliberated

Court Clerk, during the proceedings: Inès VILBOIS

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 Najma EL FARISSI, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEEDINGS

1. The company governed under French law, Mécagil's activity includes the manufacturing of vehicle exteriors, trailers and equipment.
2. Transcover Systems Ltd (hereafter "Transcover") is a company governed under English law which manufactures truck tarpaulin systems. The company Eclats Limited (hereafter "Eclats Ltd"), working under the commercial tradename Transcover (called in English Eclats Ltd t/a Transcover) belongs to the same group.
3. On May 30, 2012, Mécagil entered into an exclusive distribution agreement with Eclats Ltd. on French territory for Transcover trademark tarpaulin products, for a duration of 3 years annually renewable by tacit renewal, with a facility to terminate with a 6 month notice period prior to the expiry of the current period, including a clause for the choice of English law.
4. In an email dated March 22, 2017, Transcover notified Mécagil of its intention to terminate their contractual relations ("*to give formal notice of termination of our agreement with Mécagil*") on the maturity date of September 22, 2017 and informed the latter by email dated April 19, 2017 of the liquidation of Eclats Ltd. dated March 4, 2016.
5. Considering that Transcover had suddenly terminated the commercial relations initially entered into with Eclats Ltd. and had breached its exclusivity agreement, Mécagil had summoned it before the Paris Commercial Court, in a deed dated December 12, 2017 in order to obtain a certified true communication from Transcover's chartered accountant for the volumes of products sold in France to other companies than Mécagil since November 1, 2015 and the copy of all the invoices established in the name of the French companies issued by Transcover since November 1, 2015 and its order to pay the amount of 103,939.43 euros as an indemnification of its prejudice.

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6. In a judgment dated April 18, 2019, the Paris Commercial Court dismissed Transcover's exception plea for territorial incompetence. This is a final judgment.

7. In a judgment dated November 28, 2019, the Paris commercial court:

- dismissed Mécagil's claim for the communication of exhibits;
- dismissed Mécagil's claim for the indemnification for the sudden termination of the commercial relations;
- ordered Mécagil to pay the costs, including those to be recovered by the court registry, liquidated at the amount of 182.87 euros, including 30.05 euros in VAT;
- ordered the SAS Mécagil to pay the company governed under English law, Transcover Systems Ltd., the amount of 10,000 euros under Article 700 of the French Code of Civil Procedure;
- ordered the provisional enforcement of the judgment without a provision of guarantee;
- dismissed the other, more extensive claims or those to the contrary.

8. Mécagil lodged an appeal on this judgment by declaration dated January 28, 2020 and the parties accepted the application of the protocol relating to the procedure before the international chamber of the Paris court of appeal dated February 7, 2018.

9. The close of proceedings was ordered on June 8, 2021.

II/THE PARTIES CLAIMS AND PLEAS

10-In accordance with its submissions dated May 20, 2021, Mécagil requested of the court as follows, under Article L.442-6 of the Commercial Code and former Article 1134 of the Civil Code:

- OVERTURN the judgment issued insofar as it:
 - Dismissed the SAS Mécagil's claim for the communication of exhibits;
 - Dismissed the SAS Mécagil's claim for indemnification for the sudden termination of the commercial relations;
 - Ordered the SAS Mécagil to pay the costs;
 - Ordered the SAS Mécagil to pay the company governed under English law Transcover Systems Ltd. the amount of 10,000 euros under Article 700 of the Code of Civil Procedure;

Ruling in a further hearing:

- ORDER Transcover Systems Limited to pay Mécagil-Lebon an amount of 91,346.03 euros as indemnification for the prejudice suffered by the latter due to the sudden termination of an established commercial relation;
- ORDER Transcover Systems Limited to pay Mécagil-Lebon an amount of 119,166.71 euros as indemnification for the prejudice suffered by the latter due to the termination of the exclusivity of the established commercial relations;
- ORDER Transcover Systems Limited to pay an indemnity of 10,000 euros under Article 700 of the Code of Civil Procedure,
- ORDER Transcover Systems Limited to pay all the costs, including for the benefit of Maître Matthieu Hue.

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11-Pursuant to the latest submissions dated May 31, 2021 TRANSCOVER SYSTEMS LIMITED requested of the Court as follows:

- CONFIRM the judgment issued in all its provisions (except, at most, the dismissal of the claim for the communication of exhibits);

AND, DECIDING IN A FURTHER HEARING:

- HOLD Mécagil-LEBON ill-founded in its claim to compensate the breach of exclusivity, dismiss the latter's claim;
- ORDER Mécagil to pay the additional amount of 20,000 euros under Article 700 of the Code of Civil Procedure;
- ORDER Mécagil to pay all the costs of the appeal without diversion thereof.

III/GROUNDS OF THE DECISION

1. Concerning the applicable law

12. For the rights on which it has the free disposal thereof, the parties may agree on the application of a law other than that designated by an international convention or a contractual clause, and this agreement may result from the invocation of this other law before the lower court judges.

13. The Court observed that Mécagil's liability action is based on former Articles L.442-6, I, 5° of the Commercial Code and former Article 1134 of the Civil Code to request both the indemnification for the sudden termination of the commercial relations established since 2012 to request the indemnification for the sudden termination of the exclusivity which alleges to have been subject for the established commercial relations.

14. Transcover objects to these claims solely based on French law.

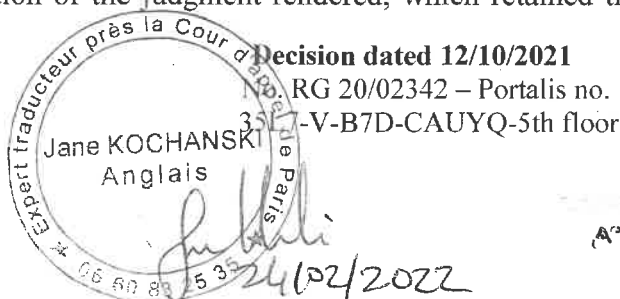
15. Accordingly, it should be considered, as ruled by the lower court, without further debate thereon, that the parties intended to submit the resolution of this dispute to French law, without recourse to the method for the conflict of laws to define the applicable law.

2. Concerning the sudden termination of the established commercial relations

16. Mécagil asserted on the basis of former Article L.442-6, I, 5° of the Commercial Code that an established and exclusive commercial relation existed that was suddenly terminated.

17. It asserted that it was bound to Eclats Ltd t/a Transcover by a written agreement dated May 30, 2012 signed for a period of three years, then tacitly renewable annually, and that following the dissolution of this company, for which it was only informed during these proceedings, the relation continued *de facto*, with Transcover Ltd., without any modification of such relations. It asserted that, accordingly, the calculation of the duration of the notice period must take into consideration the duration of the commercial relations established with Eclats Ltd., with the parties having agreed upon a continuation of the previous relations. It concluded upon the confirmation of the judgment rendered, which retained the existence of

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the commercial relations established between the parties for the duration of 5 years, which began on May 30, 2012.

18. With regard to the sudden termination of the commercial relations, Mécagil asserted that the commercial relation was terminated as from June 1, 2017, as it was no longer authorized to place new orders for tarpaulin systems, and, accordingly, that it had only benefited from a notice period of one month and ten days. It asserted that Transcover could not terminate either the exclusivity or the commercial relations without respecting a minimum notice period of twelve months, in accordance with customary practice after six years of commercial relations, given Mécagil's efforts for the product awareness and distribution on French territory. It concluded on the sudden nature of the commercial relations.

19. Concerning the indemnification of the prejudice, Mécagil asserted to have suffered from two separate prejudices. The first arising from Transcover's non-respect of the customary practice with regard to notice periods, and, the other, resulting from a decline in sales, due to Transcover's termination of the exclusivity of their relations.

20. With regard to the first prejudice, Mécagil asserted that the cumulated margin over the last three fiscal years is 220,075.29 €, excluding tax (over 29 months), i.e., an average gross margin of 91,346.03 € over 12 months.

21. Transcover asserted in response that it had not continued the commercial relations under the terms of the agreement entered into with Eclats Limited, that Eclats and Mécagil were bound by the agreement dated May 30, 2012, which ended in March 2016, and that the regime for this agreement only applied to the new commercial relations, which bound Transcover as from 2016.

22. It asserted that its commercial relations with Mécagil only lasted from March 4, 2016 until September 22, 2017, and that such relations were terminated by email dated March 22, 2017, with a 6 month notice period, which was respected; that such notice period was sufficient with regard to the short duration of their commercial relations, and that it would have been equally as adequate if the commercial relations established with Eclats Limited had been taken into account. It mentioned that it had continued to supply Mécagil in accordance with its commitments during the entire duration of the notice period until the expiry thereof and produced supporting invoices in the proceedings.

ACCORDINGLY,

23. Article L.442-6, I, 5° of the French Commercial Code, in its version applicable to the events herein, sets forth that *"the initiating party shall be held liable and shall be obliged to compensate the prejudice caused by any manufacturer, retailer, industrialist or person registered on the trade and company registry (...) 5° suddenly terminating, even in part, established commercial relations, without any written notice, taking into account the duration of the commercial relations and respecting the minimum duration of the relevant notice, in reference to commercial customary practice, by inter-professional agreements (...). The previous provisions shall not prevent the exercise of the option of termination without notice,*

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in the event of the non-performance by the other party of its obligations or in the event of a force majeure (...)".

24. The notion of established commercial relations assumes, even in the absence of a written agreement, and even if only briefly, the existence of a business relation over a sustainable period, with continuity and a certain level of commitment, thereby enabling the party subject to the termination to reasonably anticipate for the future, even briefly, a certain continuation and flow of business with its commercial partner, with the established commercial relation resulting from the commercial exchanges entered into between the parties. A succession of sporadic agreements may be sufficient to characterize an established commercial relation. Article L.442-6, I, 5° of the French Commercial Code does not require that the commercial relation existed since the start between the same individuals or legal entities.

25. The aforementioned text intends to sanction, not the termination *per se*, but the sudden nature of its termination, characterized by the absence of any written notice or an insufficient notice period. It is well-established that the sudden nature of the termination results either from the absence of any written notice or from a notice period that is too short in duration, even if notified in writing, but not enabling the party asserting to be subject to a sudden termination to find alternative solutions and an equivalent commercial partner.

26. The notice period must take into consideration the duration of the commercial relations and must be understood as including the time necessary for the deprived company to prepare the redeployment of its activity, find another partner or a replacement solution. The principle criteria to be taken into consideration include economic dependency, the duration of the relations, the volume of business and the progression of turnover, the specific investments made and not amortized and the relations of exclusivity and the specificity of the relevant products and services.

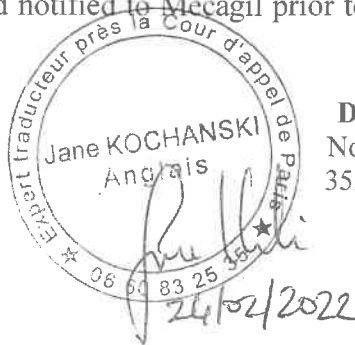
27. In this case, it results from the exhibits produced in the proceedings that after the amicable liquidation of Eclats Ltd. on March 4, 2016, Transcover Ltd. continued to supply Mécagil with tarpaulin.

28. Incidentally, it must be emphasized that the invoices were always issued with Transcover's letterhead, at the address of its registered office, including prior to Eclats Ltd's liquidation, and, accordingly, it was acceptable for Mécagil to consider that the commercial relations that it had established with the former, had continued with Transcover and that it could legitimately anticipate a certain continuation of business flow, by evidencing its intention to also align its position on the continuation of the previous business relations.

29. It results that Transcover must be deemed to have continued an established commercial relation with Mécagil since 2012, without Transcover being able to assert that this commercial relation would only have commenced in 2016.

30. Accordingly, it is irrelevant that the agreement signed on May 30, 2012 with Eclats Limited t/a Transcover following its amicable liquidation dated March 4, 2016, was not formally terminated and notified to Mécagil prior to April 19, 2017, with the continuation by

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Transcover of the pre-existing commercial relations being sufficiently established on the basis of a non-written agreement between the parties.

31. The commercial relations started on May 30, 2012 and continued between Transcover and Mécagil beyond March 4, 2016, until September 22, 2017, expiry date of the notice period granted, given the duration of the business relations and continuation of the business flow, throughout this period. Accordingly, it results from the exhibits produced that the products purchased by Mécagil with Eclats Ltd. continued to be provided by Transcover without any modifications of the relations and until the end of the notice period.

32. The email dated March 22, 2017, sent by Transcover to Mécagil formalized in writing the termination of the commercial relations, effective on September 22, 2017, which constitutes the start of a six-month notice period. Transcover justified that it had respected this notice period by continuing to meet Mécagil's orders after June 1, 2017, such as, for example, the order CF0G40462 dated July 11, 2017, invoiced on August 24, 2017, for an amount of 7,800 pounds sterling, whilst Mécagil simply asserted without justification that it had only benefited from a notice period of one month and ten days.

33. Given the duration of the commercial relations, i.e., five years, a notice period of six months appears to be sufficient to enable Mécagil to reorganize or readapt accordingly, and Mécagil does not justify any circumstances to benefit from a more extensive notice period.

34. Accordingly, the sudden and abrupt termination is not established given the duration of the notice period granted.

3. Concerning the breach of exclusivity

Mécagil asserts that pursuant to Article 1 of the agreement entered into with Eclats Ltd., it benefited from exclusivity on French territory, which continued in the context of the continuation of the commercial relations with Transcover and, that Transcover had terminated the exclusivity without any notice period commercializing its products through other distributors as from April 2017. It contested any termination of exclusivity asserted by Transcover.

36. It asserted that it was entitled to claim indemnification for its prejudice given the sales realized by Transcover by other distributors as from April 2017.

37. Transcover firstly contested the exclusivity of the commercial relations resumed by Transcover in 2016. It emphasized in this regard that Mécagil acknowledged in its written submissions that the agreement with Eclats Limited had terminated and asserted that the parties had started new commercial relations as from March 2016, without any written agreement, constituting the starting point of the relations, and therefore, without any exclusivity or jurisdiction clause. It makes reference in this regard to the final judgment dated April 18, 2019, in which the Paris commercial court considered that the parties were bound by a new and autonomous contractual relation since the liquidation of Eclats, which did not include any exclusivity. In any event, it asserted that the benefit of the exclusivity clause had

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already been forfeited for Mécagil, as, since 2013, Eclats had terminated this exclusivity and by two emails and a letter dated the 15th of July and the 24th of September 2013.

38. Finally, and incidentally on this point, it asserted that the alleged prejudice is not established, with the supply of 77 tarpaulins to a third party in 2017 not having disrupted Mécagil's sales.

ACCORDINGLY,

39. Whilst, in this case, the existence of a contractual exclusivity clause in Article 1 of the agreement entered into on May 30, 2012 between Mécagil and Eclats Ltd t/a Transcover is not contested, the continuation by Transcover of the commercial relation initially established between Mécagil and Eclats Ltd. did not result in a continuation of the exclusivity clause, unless the parties provided evidence to the contrary.

40. It results from the exhibits produced in the proceedings that Transcover had sent Mécagil an email dated July 2013 notifying its intention to terminate the exclusivity, given the lack of response by the latter. This email, firstly sent to an erroneous address on July 15, 2013, then to the proper address on September 24, 2013, was followed by a letter dated October 28, 2013, confirming Transcover's intention to terminate the exclusivity granted, prior to the continuation of the commercial relations following Eclats Ltd's liquidation.

41. It results that even although the commercial relations continued, it is by no means established that the parties had intended to continue their commercial relations under the exclusivity regime.

42. Accordingly, Transcover may not be accused of not having respected such clause during the notice period granted.

43. For all these grounds, Mécagil's claims should be dismissed and the decision rendered should be approved in all its provisions.

4. Concerning the irrecoverable expenses and costs

44. The commercial court duly settled the costs and the indemnity for the proceedings.

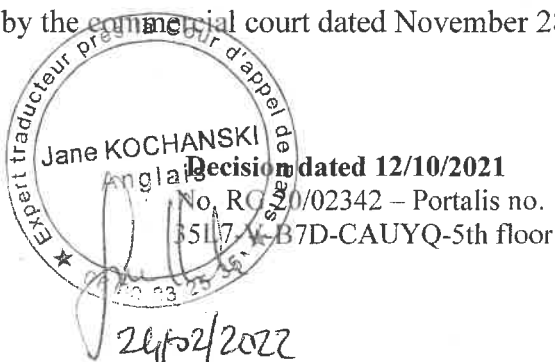
45. Equity requires that Mécagil be ordered to pay Transcover the amount of 8,000 € under Article 700 of the Code of Civil Procedure, and the costs of appeal.

IV/ ON THESE GROUNDS,

THE COURT,

1-Approved the judgment rendered by the commercial court dated November 28, 2019;

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Adding,

2-Dismiss Mécagil's claim to have Transcover sentenced for a breach of exclusivity;

3-Order Mécagil to pay Transcover the amount of 8,000 euros under Article 700 of the Code of Civil Procedure;

4-Order Mécagil to pay all the costs of appeal.

The Court Clerk

Najma EL FARISSI

The President

François ANCEL

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