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COURT OF APPEAL OF PARIS  
International Commercial Chamber

DIVISION 5 - CHAMBER 16

JUDGMENT OF 22 MARCH 2022

(no. 35 /2022 , 9 pages)

VU NE VARIETUR  
Traduction conforme à  
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Française N° 2022-136

12/08/2022  
2022-136



Registration number in the general register: No. RG 20/17279 - No. Portalis 35L7-V-B7E-CCXEA

Decision referred to the Court: Judgment of 20 July 2020 - Commercial Court of PARIS - RG no. 2018063524

**CLAIMANT**

**SRM Company**

Company under Moroccan law

Having its registered office: route d'El Jadida RN 1 Commune Oued Azouz Province de Nouaceur BP 23593

Lissasfa CASABLANCA (MOROCCO)

Acting through its legal representative,

Represented by Me . [GD] . of the SELARL CABINET [XXXXX] , attorney of the bar of  
PARIS, toque: [XXXX]

Assisted by Me [PF] , pleading lawyer at the bar of LILLE

**RESPONDENT**

**SAS SDMO INDUSTRIES**

Registered with the RCS of BREST sub numero 548 202 985

Having its registered office at: 270 rue de Kerervern 29490 GUIPAVAS (FRANCE)

Acting through its legal representative,

Represented by Mr. [JC] , attorney at the bar of PARIS, toque: [XXXX]

Assisted by Me [BC] substituting Me [PG] . of the Association [BP] ,pleading  
lawyer of the bar of PARIS: toque: [XXXX]

**COMPOSITION OF THE COURT:**

The case was debated on 7 February 2022, in public hearing, before the Court composed of:

Mr. François ANCEL, President

Ms Fabienne SCHALLER, Councillor

Ms Laure ALDEBERT, Councillor

Who deliberated, a report was presented at the hearing by Mrs. Laure ALDEBERT under the conditions provided for by Article 804 of the French Code of Civil Procedure.

**Clerk**, during the debates: Mrs. Najma EL FARISSI

## JUDGMENT:

- contradictory
- by placing the judgment at the disposal of the Court, the parties having been previously notified in accordance with the conditions provided for in the second paragraph of Article 450 of the French Code of Civil Procedure.
- signed by François ANCEL, President and by Najma EL FARISSI, clerk to whom the minute of the decision was handed over by the signatory magistrate.

## I/ FACTS AND PROCEEDINGS

- 1-SDMO Industries company (hereinafter "SDMO") is a French company that sells power generators in France and abroad.
- 2-The company concluded in Brest with the Moroccan company SRM, which is a distributor of capital goods for the construction industry in Morocco, a Distribution Contract tacitly renewable for successive periods of one year named on September 29, 2010 and taking effect on August 25, 2010.
- 3-By registered letter dated 29 April 2016, SDMO terminated the commercial relationship with effect from 24 August 2016, giving SDM four months' notice.
- 4-SRM company, reproaching SDMO company for breaches of its contractual commitments and a brutal breach of an established commercial relationship of an exclusive type, summoned SDMO company by writ dated 6 November 2018 before the Commercial Court of Paris pursuant to the jurisdiction clause designating that court to rule in the event of a dispute, on the basis of Article 1134 of the French Civil Code and L.442-6, 1, 5° of the French Commercial Code, in order to obtain compensation for its losses.
5. By judgment of 20 July 2020, the Commercial Court of Paris ordered SDMO company to pay SRM company the sum of €17,000 in compensation for direct sales and the sum of 71,985 on the basis of the brutal termination of an established commercial relationship, taking into account a necessary notice period of 6 months, and granting €6,000 under Article 700 of the French Commercial Code.
- 6- By a declaration dated 27 November 2020, SRM company lodged a partial appeal against the judgement, which only partially granted its claims.
- 7- In the course of the proceedings the parties subscribed to the protocol of the proceedings applicable before the International Commercial Chamber of the Court.
- 8- The closing order was pronounced by the Pre-trial judge on 18 January 2022.

## II/ CLAIMS OF THE PARTIES

- 9- Via submission no. 2, transmitted electronically on **14 October 2021**, SRM company ask the court, in particular under the former article 1134 of the French Civil Code, the former article L 442-6 I 5° of the French Commercial Code and article 700 of the French Code of Civil Procedure to kindly:
  - DECLARE that SDMO company has failed to pay the balance of the invoices acknowledged by SDMO;
  - ORDER SDMO company to pay the sum of €12,904.03 with interest at the legal rate from 24.08.2016, the designated term of notice.
  - SAY AND JUDGE that SDMO company has violated its contractual obligations of information, compensation and exclusivity;

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*[Signature]*





- CONDEMN SDMO company, as a provisional measure pending the communications which will be ordered, as compensation for the damage suffered by SRM and on the basis of its average gross margin of 18% on SDMO products for paying the following amounts:

On the sales revealed by Exhibit adv. 5:

2013: €1,888,656 of which to be deducted sales to SRM: - €1,758,446

2014: €2,762,823 of which to be deducted sales to SRM: - €1,478,177

2015: €1,513,955 of which to be deducted sales to SRM: - €1,384,595

TOTAL TURNOVER WITH THIRD PARTIES: €1,544,216

Of which 18% BM = .....€277,958.88

On the BYMARO sale:

€515.751 x 18 % =

€92,835

On the DEGREMONT sale:

€115.000 x 18 % =

€20,700

On the ADVANCED VISION MOROCCO sale:

€435.000 x 18 % =

€78,300

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Amélie



- ORDER SDMO company to communicate to SRM company

1/ a statement certified by its Accounting Firm summarising the sales operations by SDMO or its distributors and customers of power generators intended for Morocco during the period from 25.08.2010 until 24.08.2016;

2/ the quotations, order forms, transport and delivery notes, invoices, setting the dates, addressees, descriptions and amounts of each of the sales included in this statement under penalty of a fine of €500 per missing document and per day of delay from the 30th day following the notification of the decision to intervene.

On the sudden termination of the commercial relationship

- SAY AND JUDGE that SDMO company has brutally broken off its established commercial relations with SRM company.

- CONDEMN, as a provisional measure, SDMO company to pay damages pending the communications that will be ordered, for €586,527.02

- CONDEMN SDMO company to pay compensation of €25,000 on the basis of article 700 of the French Code of Civil Procedure for the proceedings at first instance and on appeal, in addition to all costs and expenses, including the right of recovery in favour of SCP SEVELLEC,

- DISMISS SDMO company from all its claims, ends and conclusions.

10- By submissions transmitted electronically on 16 July 2021, SDMO company requests, on the basis of article 1134 of the French Civil Code, article 566 of the French Code of Civil procedure and article L.442-6 5° of the former French Commercial Code, to kindly:

- REVERSE the judgment of 20 July 2020 of the Commercial Court of Paris insofar as it ordered SAS SDMO to pay the Moroccan company SRM the sum of €17,000 for direct sales;

- CONFIRM the said judgment for the remainder

- CONDEMN SRM company to pay the sum of €15,000 under article 700 of the French Code of Civil Procedure and all costs, with the benefit of Me [...] ; lawyer, under the terms of article 699 of the French Code of Civil Procedure.

### III/ PLEAS OF THE PARTIES

11- SRM company claims that SDMO owes it, firstly, the sum of €12,904.03, which corresponds to the balance of invoices for the recovery of stocks according to a statement that it drew up in accordance with the provisions of article 6f of the Distribution Contract.



12- Secondly, it argues that, regardless of the analysis of the exclusive nature of the contract, SDMO had undertaken to entrust it with all of its sales in Morocco, as is clear from the contractual provisions for the initial period from August 2010 to December 2011, which provided for a principle of financial compensation in the event of direct sales (Article 4§i of the contract).

13- It adds that this compensation was no longer necessary as of 1 January 2012 date from which, as it had not been terminated, the contract officially became an exclusive Distribution Contract in accordance with clause 24 "exclusivity clause".

14- While this clause provided for their contract to be formalised by the signing of a new contract, it confirms that their contract was reached by consensus without requiring the signing of a written document, which they did not consider necessary.

15- It blames SDMO company for having granted direct sales to Morocco of power generators in violation of its commitments, depriving it of commissions and or financial compensation, for which it is now seeking compensation.

16- It provisionally calculates its damage on the loss of its gross margin at a rate of €469,793.88 calculated provisionally on the basis of the order history (Exhibit 5 -SDMO) and on the direct sales made without its knowledge to the companies Bymaro, Degremont and Advanced Vision Morocco during the period of performance of the contract.

17- It also wishes to have access to additional information on the direct sales made by SDMO or its distributors, and customers of power generators intended for Morocco during the period from 25 August 2010 to 24 August 2016.

18- Finally, it seeks compensation on the basis of the sudden termination of an established commercial relationship on the basis of the former article L 442-6-5° of the French Commercial Code calculated over 18 months and not over 6 months as retained by the first judges.

19- In this respect, it explains that it benefitted from less than four months' notice after receiving the letter of termination of 29 April 2016, which was insufficient to reposition itself on the power generator market.

20- In this respect, it highlights the duration of the performance of the contract, emphasising the period of exclusivity for at least 4 years and 4 months, the existence of a non-competition clause and its heavy human and material investments that it devoted to its organisation per the request of SDMO without failing in its obligations, and whereas SDMO chose a new Sirmel distributor as early as May 2016 before the end of the notice period, which later employed on two of its main employees

21- In response, SDMO asked that the decision be confirmed, except for the award of the sum of €17,000 in respect of a commission due for direct sales on the Byramo contract.

22- It contests that it owes an outstanding sum for the recovery of stocks, which SMR company has not proven.

23- It contests the alleged exclusivity of the Distribution Contract which was expressly non-exclusive and could not become exclusive without the drawing up and signing of a new contract as agreed by the parties in clause 24 of the contract.

24- It argues that the contract continued unchanged and was tacitly renewed for successive one-year periods during the entire contract period, pointing out that it was

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well known that during this period it used distributors other than SMR in Morocco, as evidenced by its sales history, and that exclusivity was only claimed for the purposes of the dispute. (exhibit 5).

25-It contests the existence of direct sales giving rise to a payment to SMR company, namely companies Advanced Vision Morocco, Degremont and Bymaro.

26- Concerning the sale of equipment to Byramo company, it cross-appeals against the head of the decision that charged it with €17,000, arguing that while negotiations began with the Moroccan subsidiary of Bouygues Batiment International, they were conducted at its sole initiative without any intervention by SDMO company and resulted in a sale concluded in July 2017 outside Morocco with Bouygues Batiment International, after the termination of the Distribution Contract which could not give rise to any financial compensation or commission.

27- On the sudden termination of the commercial relationship, SDMO requests the confirmation of the court's decision.

#### **IV/ REASONS FOR THE DECISION**

##### **On the applicable law**

28-The dispute originates from a Distribution Contract for manufactured products concluded between a French company, the manufacturer, and a Moroccan company, the distributor, which is international in nature.

29-The determination of the applicable law is subject to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, known as Rome I, which, according to article 3§1, states that "the contract shall be governed by the law chosen by the parties. The choice shall be express or shall result in a certain way from the provisions of the contract or the circumstances of the case. By this choice, the parties may designate the law applicable to the whole or only to part of their contract."

30-In the present case, it is established and undisputed that according to articles 18 and 19 of the contract signed between them, the parties intended French law to apply to any disputes arising from their commercial relations, brought before the French court.

##### **On the exclusive or non-exclusive nature of the Distribution Contract**

31- Article 1134 of the French Civil Code in its version prior to Order No 2016-131 of 10 February 2016, applicable to the dispute, states that legally formed contracts take the place of law for those who have made them. They can only be revoked by their mutual consent, or for the reasons that the law authorises. They must be performed in good faith.

32- In this case, it is clear from the contract produced that the parties signed as a contract expressly referred to as a *non-exclusive Distribution Contract* for SDMO brand products by SRM company in Morocco, taking effect on 25 August 2010, renewable for successive one-year periods.

33- In order to claim the exclusive nature of its relationship, SMR relies on the "exclusivity clause" and the consensual nature of the parties' contract to grant an exclusive relationship, pointing out in this respect that it was well known among professionals as the exclusive distributor of SDMO brand products in Morocco.

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34-Article 24 of the "exclusivity clause" contract states that: "This contract is established under a non-exclusive form of distribution until 31/12/2011. From this date onwards and unless expressly denounced by one of the parties by letter sent with acknowledgement of receipt 3 months before, a new exclusive Distribution Contract will be established and signed".

35- In order to rule on the claim of the appellant company, it is necessary to verify whether the same contract was continued or whether the parties entered into a new contractual relationship of an exclusive nature after 31/12/2011.

36- The court notes that according to article 14 of the Distribution Contract, from which article 24 did not departed, the parties had agreed that "Any modification of this contract is subject to mutual agreement of both parties and must take the form of an amendment signed jointly by the manufacturer and the distributor" so that the change of the relationship from a "non-exclusive" to an exclusive commercial relationship required, according to the will of the parties to sign a writing document in application of the contractual provisions clearly provided for this purpose.

37- In order to avoid any inconsistency from a practical and legal point of view, this change required to review or modify certain clauses, including Article 4§i "direct sales by the manufacturer" 4§j "indirect sales by the manufacturer 4k "sales to other distributors", under which SDMO company was directly or indirectly dealing with business in Morocco as mentioned in the history of SDMO orders from 2010 to 2016 (exhibit 5), some of which could give rise to financial compensation.

38- These orders were not contested by SRM company during the period of execution of the contract, during which no document emanating from SDMO company establishes that it was recognised by the manufacturer as its exclusive distributor in the area concerned, even though some professionals might have believed so.

39- It thus follows from the foregoing that, as the Commercial Court held, whose decision is confirmed on this point, the intention of the parties was, as of 1 January 2012, to expressly maintain the same sales model, that the contract of 29 September 2010 was therefore tacitly renewed beyond 31 December 2011 under the same non-exclusive relationship as in the initial contract.

#### **On the claims for payment for contractual breaches**

40-According to the former provisions of Article 1315 (now 1353) of the French Civil Code, a person a person who requests the enforcement of an obligation must prove it. Conversely, a person who claims to be discharged must justify the payment or the fact which produced the cessation of his obligation.

#### **On the balance due for the recovery of the stock**

41. In support of its claim, SMR company refers Article 6(f) of the contract, which provides among the obligations after termination, that "*The Manufacturer undertakes to take back all the spare parts held by the Distributor at the time of breach, unless the termination is made per the request of the Distributor*".

42-It claims that SDMO company, which initiated the termination, did not pay all the sums due under this obligation and owes it a balance of €12,904.03, which it sets as follows:

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SRM invoice for parts recovered:	€86,583,11
SRM invoice for guarantees:	€ 24,810.92
<b>Of which to be deducted:</b>	
Transfer received from SDMO on 04 Jan 2018:	- €81,355
Remaining SDMO invoice no.11542:	- €17,135
<b>BALANCE TO BE PAID BY SDMO:</b>	<b>€ 12,904.03</b>

43-However, this statement drawn up by the appellant is not sufficiently conclusive considering that the amount retained for the guaranteed invoices (€24,810.92) does not correspond to the agreed amount of €20,631.06 as stated in its email of 1 June 2017 and that an additional compensation payment of €6,853.49 was made, which can be seen from the tables produced by the appellant.

44-It thus follows from these findings and statements and for the reasons of the first judges that the court finds that SDM company does not provide sufficient proof of a remaining amount due by SDMO company.

45-The claim will consequently be rejected and the decision on this point will consequently be confirmed.

**On the claim for payment for sales not entrusted to SRM in Morocco**

46-SMR claims compensation for sales made by SDMO company in Morocco in view of the history of SDMO sales (produced in exhibit 5) which, according to it, should have been entrusted to it or should have been subject to financial compensation.

47-For the reasons given above (§39), SRM company cannot make a claim for payment based on SDMO's alleged breach of an exclusivity clause, which has not been established.

48- With regard to its other claims for payment of financial compensation, which are based on "false indirect sales outside Morocco" to Advanced vision Morocco, Degremont and Byramo companies, it is worth recalling the parties' forecasts in the event of a sale made by the manufacturer.

49- The parties distinguished between two situations:

According to Article 4 §j -for indirect sales by the manufacturer:

*"If products sold directly by the Manufacturer to customers outside the relevant areas are transported, delivered, used or resold by these customers within the relevant areas, no financial compensation or commission will be due by the Manufacturer to the Distributor".*

According to article 4§i) for so-called direct sales: *"Direct sales of Products by the Manufacturer in the areas concerned are to be dealt with on a case-by-case basis in order to determine any financial compensation to be received by the Distributor".*

50-With regard to Advanced Vision Morocco company, SMR claims that SDMO unknowingly made a direct sale of €435,000 for a palace in Tangiers in May 2016 without paying it any commission or compensation, in violation of the obligation set out in article 4§i of the contract applicable to direct sales.

51. However, as the Commercial Court held, SMR did not provide sufficient evidence of the relevance of the case nor on its reclassification as a direct sale since it produced an estimate dated 11 May 2016 without showing that it was followed by a sale.

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52- Concerning Degrémont company, SMR company blamed SDMO company for having the company for having settled a sale to this company in 2014 of the amount of €115,000 for power generators dedicated to Sidi Bernoussi and delivered directly to Morocco by SDMO company.

53- However, it appears from the documents produced that the sale was made not with the local subsidiary but with the parent company in France, so that the status as direct sale to Morocco is not established.

54- On the other hand, as regards the equipment of the Bouskoura hospital by Bymaro company, the sale of the power generators, although concluded after the Distribution Contract was initiated by SDMO company during the contractual period according to the estimate produced on 8 March 2016 to the Moroccan subsidiary and constitutes a direct sale by the manufacturer which should have given rise to a discussion in accordance with article 4§i.

55- For the reasons given by the court, which the court validates, including the calculation of the damage based on the absence of a commission scale on commissions paid on other cases, to grant this request and to order SDMO company to pay to SRM company the sum of €17,000 in this respect.

56- The court's decision will therefore be confirmed on this point.

#### **On the request for additional information on the direct sales made by SDMO in Morocco**

57- This request is not useful since the commercial relationship was non-exclusive and SDMO, as indicated on page 2 of the contract, was allowed to appoint other distributors in the area concerned, so that it will be rejected and the judgment will be confirmed on this point.

#### **On the sudden termination of the established commercial relationship**

58- In application of Article L. 442-6, I, 5° of the French Commercial Code, in the version applicable to the facts of the case, *"the fact that any producer, trader, industrialist or person registered in the trade register, (...) 5° brutally breaks off, even partially, an established commercial relationship, without prior written notice taking into account the duration of the commercial relationship and respecting the minimum period of notice determined, with reference to trade practices, by interprofessional contracts"* engages the liability of its perpetrator and obliges him to compensate for the damage caused.

59- The concept of an established commercial relationship presupposes, even in the absence of a written contract, and even if it was brief, the existence of a business relationship that is long term, continuous and of a certain intensity, so that the victim of the breach should have been able to reasonably anticipate for the future, even if brief, a certain continuity of the flow of business with his commercial partner, the established commercial relationship being understood to mean commercial exchanges concluded between the parties to the dispute.

60- The existence of an established commercial relationship is not disputed by the parties, who agree that their collaboration lasted for nearly six years.

61- The termination took place with a written notice period of 4 months, which the commercial court considered insufficient and evaluated at 6 months, which only contested by SRM company.

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62-It requests that the notice period be set at 18 months for reasons related to the exclusivity of the commercial relationship and its human and material investments which benefited to SDMO company, which, without waiting for the end of the notice period, decided to choose a new distributor in May 2016, which also hired two of its main employees in December 2016.

63 However, in view of the elements already retained and the relevant reasons of the first judges that the court agreed upon, it must be considered that in view of a relationship that lasted nearly 6 years, including 4 months' notice, the absence of exclusivity and financial dependency but also the nature of the sector concerned and the time needed to find a new supplier, SMR company should have been given six months' notice, i.e. two months more than the notice period given, giving rise to a loss of €71,935 on the basis of the margin on variable costs, the amount being calculated on the basis of the last three financial years and the data of SRM company which are not contested.

64. SRM should therefore be dismissed of all its claims and the judgment should be confirmed.

**On costs and expenses ;**

65-SRM company, which is mainly unsuccessful in its appeal, should be ordered to pay the costs, which will be recovered in accordance with the provisions of article 699 of the French Code of Civil Procedure.

66-In addition, it must be ordered to pay SDMO company, which has had to incur irreducible costs in defending itself, a compensation under Article 700 of the French Code of Civil Procedure, which it is fair to set at the sum of €10,000.

**V / DISPOSITION**

On these grounds, the court:

- 1-Confirms the judgment of the Commercial Court of Paris dated 20 July 2020 in all its provisions;
2. Orders SRM to pay the costs of the appeal, which may be recovered by Jean-Claude Cheviller, lawyer, in accordance article 699 of the French Code of Civil Procedure;
- 3 - Orders SRM company to pay SDMO Industries company the sum of €10,000 under article 700 of the French Code of Civil Procedure.

**The Clerk**

**The President**

**Najma EL FARISSI**

**François ANCEL**

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