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RESEARCH NOTE

'Disputes arising from the termination of long-term commercial relations'

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Subject: Examination of the criteria for determining whether disputes arising from the termination of long-term commercial relations, national or international, not governed by a written framework agreement, fall within the scope of contractual or non-contractual law.

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C O N T E N T S

OVERVIEW

I. INTRODUCTION

1. This research note examines the criteria that are applied in the **German, Belgian, French, Italian, Latvian, Romanian, Slovenian** and **United Kingdom legal systems** in order to determine whether disputes arising from the termination of long-term commercial relations, national or international, between professionals, that are not governed by a written framework agreement fall within the scope of contractual or non-contractual law. It touches upon the question of the delimitation of the respective scopes of contractual liability and non-contractual civil liability, which is without doubt one of the most delicate and complex questions relating to the law of obligations. This complexity, moreover, is reflected in the somewhat qualified answers arrived at after studying the abovementioned legal systems in so far as concerns the issue analysed in this note.

2. It must immediately be pointed out that, in all the legal systems examined, long-term commercial relations that have been entered into without any written framework agreement may, in principle, be governed by an oral or tacit framework agreement, breach of which may give rise to contractual liability. The existence of an oral or tacit framework agreement cannot, however, be presumed and must consequently be proven. Generally speaking, that proof may rest on a body of consistent evidence, which is likely to include, in particular under German, Belgian, French, Italian and Slovenian law, the existence of long-term commercial relations between the parties and correspondence exchanged between them.

3. Nevertheless, it does not follow that, where there is an oral or tacit framework agreement, recourse may not be had to the rules on non-contractual liability in the case of all the legal systems examined. Conversely, the absence of a framework agreement governing long-term commercial relations does not mean that the termination of those relations cannot, in certain legal systems, give rise to contractual liability.

4. Furthermore, in the legal systems analysed, the type of liability that may be incurred by a party terminating long-term commercial relations does not, in principle, vary according to the country in which the commercial partners are established.

5. Those preliminary observations made, this note will examine, first of all, the legal systems which, in principle, address the question of the termination of long-term commercial relations not governed by a written framework agreement from the viewpoint of contractual liability (section II). The second part of the note will then examine the legal systems under which the rules on non-contractual civil liability come into play more substantially in the type of dispute under consideration (section III).

II. LEGAL SYSTEMS IN WHICH DISPUTES ARE, IN PRINCIPLE, EXAMINED BY REFERENCE TO THE RULES ON CONTRACTUAL LIABILITY

6. In **German, Italian, Latvian** and **United Kingdom** law, disputes arising from the termination of long-term commercial relations not governed by a written framework agreement are mainly examined by reference to the rules on contractual liability.

7. However, it must immediately be stated that, in those legal systems, disputes of this kind do not, by their very nature, fall within the scope of the rules on contractual liability, which will apply only where all the conditions for their application are met, and these include proof of the breach of an obligation of a contractual nature. Thus, the tendency to conduct a contract-law analysis may be explained, in **Latvian** and **United Kingdom** law, by the fact that, as a general rule, an action in non-contractual liability is not possible in the event of the termination of long-term commercial relations not governed by a written framework agreement, with the result that disputes of this kind can, in principle, only be examined by reference to the rules on contractual liability. In the same vein, in **German** law, the tendency to apply contract law seems to be the corollary of the very limited scope for actions in non-contractual

liability in situations of this type. In **Italian** law, the general trend toward the application of the rules on contractual liability has been confirmed in a recent judgment of the Corte di Cassazione (Court of Cassation), which drew inspiration from the case-law of the Court of Justice.

8. In **United Kingdom** law, the termination of long-term commercial relations that are not governed by a written framework agreement comes within the scope of the rules on contractual liability where it is established that those relations were the subject of an oral or tacit agreement. Nevertheless, it is clear from consistent case-law that contracting parties are at all times entitled to terminate their agreement, provided that they give reasonable notice. Where a dispute arises concerning the termination of commercial relations governed by an oral or tacit framework agreement, the key question will therefore be whether or not reasonable notice has been given. If no reasonable notice has been given, the party terminating will incur contractual liability and will consequently be liable to pay damages to its commercial partner. Where the commercial relations that have been terminated were not governed by a written, oral or tacit agreement, their termination cannot, in principle, fall within the scope of the rules on contractual liability, because there is no agreement, or within the scope of the rules on non-contractual liability, because there is no tort applicable to that type of conduct.

9. Under **Latvian** law, the termination of long-term commercial relations governed by a framework agreement, even one that is merely oral or tacit, gives rise to the contractual liability of the party terminating those relations if termination of the framework agreement has not been provided for, either by law or in the agreement itself, or where the party terminating the relations, even if it is entitled to do so, has terminated them in bad faith. As is the case under United Kingdom law, the termination of commercial relations not governed by a written, oral or tacit framework agreement will not, as a general rule, give rise to either contractual or non-contractual liability. Under Latvian law, the termination of long-term commercial relations cannot, in principle, give rise to non-contractual liability, since this would require proof of a breach of individual rights unconnected with the contractual relationship, whereas commercial partners, even long-standing commercial partners, do not have any individual right to the

indefinite continuation of their commercial relations.

10. In **Italian** law, disputes arising from the termination of long-term contractual relations fall, in principle, within the scope of the rules on contractual liability, on the basis of a pre-existing contractual obligation. The decisive factor that may be inferred from the case-law is whether or not there is any legal obligation that has been freely entered into by the parties under which each party is entitled to expect the other to adopt certain conduct, in accordance with the principles of good faith and fairness in the performance of reciprocal obligations.

11. That principle may be inferred from a judgment of 25 November 2011 of the Corte di Cassazione in which the Combined Chambers of that court examined the jurisdiction of the Italian courts to hear an action for compensation that had been brought by an Italian distributor against a Swiss company following the termination by the Swiss company of a distribution agreement between the two parties. The Corte di Cassazione held that the dispute in question was contractual in nature, since the alleged liability of the Swiss company arose from the existence of a commercial relationship based on an agreement. Nevertheless, in its judgment, the Corte di Cassazione also inferred from the judgments in *Peters Bauunternehmung* (34/82) and *Besix* (C-256/00) that the rules on non-contractual civil liability were residual in nature, inasmuch as any claim not based on contract had to be regarded as one based on liability in tort or delict, and that the Court of Justice had established the existence of a legal relationship between parties where one undertaking had freely given an undertaking to the other. The Corte di Cassazione concluded that all disputes concerning a practice relating to a legal obligation freely undertaken by one party to another are contractual in nature, including disputes concerning failure to observe a programme of action binding on the parties.

12. By contrast with the national legal systems examined above, under the **German** law of civil liability, a party that has suffered the termination of long-term commercial relations not governed by a written framework agreement is, in principle, free to base an action for compensation on either a contractual or a non-contractual claim. Nevertheless, the scope for bringing an action in non-contractual liability is, in principle, limited to certain very specific cases, namely those where the termination constitutes an infringement of the rules of competition law or conduct contrary to accepted principles of morality.

13. The necessary conclusion is therefore that, under German law, disputes arising from the termination of long-term commercial relations will mainly be examined by reference to the rules on contractual liability. The party terminating commercial relations will, in principle, be held contractually liable if the party suffering the termination is able to prove that the termination was contrary to the requirements of a framework agreement governing those relations, even one that is merely oral or tacit. Post-contractual liability falls within the scope of the scheme of contractual liability and pre-contractual liability is treated in similar fashion to contractual liability, and so an action to establish contractual liability is also possible where the termination of commercial relations takes the form of an unjustified breaking off of negotiations for the conclusion of a new, individual agreement, or where it is in breach of a post-contractual obligation arising from an individual agreement concluded before the cessation of commercial relations.

III. LEGAL SYSTEMS IN WHICH DISPUTES ARE EXAMINED BY REFERENCE TO BOTH THE RULES ON CONTRACTUAL LIABILITY AND THE RULES ON NON-CONTRACTUAL LIABILITY

14. Under **Belgian, French, Romanian** and **Slovenian** law, the termination of long-term commercial relations not governed by a framework agreement may result in liability in accordance with either the rules on contractual liability or the rules on non-contractual liability, depending on the circumstances.

15. It must immediately be stated that, under those national legal systems, the rules of the ordinary law of non-contractual liability that may apply in this type of dispute are, to a certain degree, all subsidiary to the rules on contractual liability. Consequently, in those legal systems, there is, generally speaking, a tendency to examine disputes arising from the termination of long-term commercial relations first of all by reference to the rules on contractual liability, before turning, in appropriate cases, to the rules on non-contractual liability. However, it should be noted that, in **French** law, where established commercial relations are abruptly terminated, any dispute arising from that termination will essentially be examined by reference to the special rules on liability laid down in Article L. 442-6 of the Code of Commerce, which appear to be rules of non-contractual liability, even though they are sometimes referred to as rules of contractual liability.

16. In **Belgian** law, the termination of long-term commercial relations falls solely within the scope of the rules on contractual liability where those relations are governed by a framework agreement, even one that is merely oral or tacit in nature. The very broad interpretation given in Belgian case-law to the conditions for contractual liability has led the courts and tribunals, which must follow the principle that application of the rules on contractual liability takes precedence, to examine such terminations by reference solely to the rules on contractual liability. The termination of commercial relations can thus give rise to contractual liability where the party terminating commercial cooperation breaches a contractual obligation, such as a requirement to give a period of notice.

17. In the absence of a framework agreement, whether written, oral or tacit, governing long-term commercial relations, the termination of those relations may, under Belgian law, result in the non-contractual liability of the terminating party where the termination takes the form of a refusal to conclude a new individual agreement. Even though the parties to negotiations for the conclusion of an agreement are not, in principle, entitled to demand success, they must nevertheless abide by the general rule of diligence and prudence laid down in Articles 1382 and 1383 of the Belgian

Civil Code, breach of which may lead to non-contractual liability. Thus, a refusal to enter into an agreement may constitute *culpa in contraendo*, which is a breach of a non-contractual duty occurring in the pre-contractual phase. Along the same lines, it has also been held that a refusal to enter into an agreement may constitute an abuse of rights. As between undertakings, a refusal to enter into an agreement may also constitute an act contrary to Article VI.104 of the Belgian Code of Economic Law, pursuant to which any act contrary to honest market practice by which an undertaking harms or may potentially harm the professional interests of one or more other undertakings is prohibited. According to prevailing opinion, that provision is a specific application of the general rule laid down in Articles 1382 and 1383 of the Belgian Civil Code.

18. Under **Slovenian** law, the unilateral termination of long-term commercial relations governed by a framework agreement, even one that is merely oral or tacit, falls within the scope of the rules on contractual liability if, in terminating the commercial relations, the party in question breaches a specific contractual obligation. As under Belgian law, the applicability of the rules on contractual liability excludes the application of the rules on non-contractual liability. On the other hand, where the termination of commercial relations is unconnected with any contractual obligation arising, in particular, from a framework agreement binding long-standing commercial partners, Article 333 of the Slovenian Code of Obligations applies. Under that provision, which falls within the scope of the scheme of non-contractual liability, each party is entitled at any time to terminate a 'long-term relationship of obligation', unless that right is exercised at an inappropriate time. In the event of non-compliance with that provision, it is for the courts to determine, having regard in particular to the length of the commercial relationship, the reasonable period of notice and, on that basis, to set damages corresponding to the loss of profit sustained by the commercial partner concerned. If, on the other hand, commercial relations are terminated at a time that is not inappropriate, it cannot be treated as unlawful and no right to compensation will arise under the rules on non-contractual liability laid down in the Slovenian Code of Obligations.

19. Under **Romanian** law, the unilateral termination of a framework agreement, even one that is merely oral or tacit, governing long-term commercial relations appears to be capable of giving rise to the contractual liability of the party terminating the relations if, in terminating the relations, that party has exercised its right to terminate — which is provided for by law in the case of agreements of indefinite duration but must be stipulated in the contract in the case of agreements of limited duration — without giving reasonable notice. Where a party that has suffered the termination of commercial relations has such a right of action in contractual liability it may not bring an action in non-contractual liability, even if the rules on non-contractual liability are more favourable. However, it must be stated in this connection that, under certain exceptional circumstances, disputes arising from the termination of long-term commercial relations governed by a framework agreement (oral or tacit) may, under Romanian law, come within the scope of the rules on non-contractual liability: there is a tendency in the case-law and in legal theory to accept that, where a commercial partner brings long-standing commercial relations to an end by exercising its right to terminate in an abusive manner, that abusive conduct may fall within the scope of the rules on non-contractual liability.

20. In the same vein, the termination of long-term commercial relations not governed by a framework agreement, whether written, oral or tacit, may under certain circumstances give rise to non-contractual liability under Romanian law, to the extent that the liability which may arise during the negotiation of a contract, or an abusive refusal to renew an individual agreement that has expired or to enter into a new agreement with a commercial partner falls in principle within the scope of the rules on non-contractual liability.

21. Under **French** law, in which, again, the principle applies that it is not possible to choose between the two schemes of civil liability, the rules on contractual liability are, in principle, the only rules which apply to compensation for damage sustained as a result of a failure to fulfil an obligation arising under an agreement, considered as

a whole. It follows that the termination of long-term commercial relations which are the subject of a framework agreement, including one that is merely oral or tacit, may give rise to the liability of the party terminating those relations if, in terminating them, it breaches a pre-existing contractual obligation, such as an obligation to give reasonable notice. On the other hand, where the ordinary law of contractual liability cannot be relied on, a party that has suffered the termination of long-term commercial relations may bring an action in non-contractual liability in which it will be necessary to prove that, in bringing those relations to an end, the terminating party has breached a non-contractual duty beyond the terms of the agreement. Non-contractual liability may be based on a finding of abusive conduct, such as a decision to foreclose the contracting partner or an abusive refusal to renew an individual agreement with a commercial partner.

22. It must, however, be stated that, since the introduction of the special rules on liability in the event of the abrupt termination of a commercial relationship laid down in Article L. 442-6 of the Code of Commerce, most disputes arising from the termination of established commercial relations between professional parties are examined by reference to that provision, which, as a provision relating to public policy, is intended to apply to all commercial relations of an ongoing, stable and customary nature and under which the party suffering the termination was entitled to entertain a reasonable expectation of a certain continuity in business dealings with its commercial partner in the future, even if the relationship was not a long-standing one. According to settled case-law, the liability incurred by a party responsible for such a termination under these special rules, which apply whether or not there is a framework agreement, is non-contractual, provided that the commercial partners are all established in France. In the case of international commercial relations, on the other hand, the case-law seems to regard liability sometimes as contractual and sometimes as non-contractual liability, and that has given rise to extensive debate in academic writing.

IV. CONCLUSION

23. In light of all the foregoing considerations, it must be concluded that, despite the several distinctions which become apparent on analysing the types of civil liability that may be incurred on the termination of commercial relations not governed by a written framework agreement, it is nevertheless possible to identify certain structural similarities between the national legal systems examined.

24. It must be observed that, with the exception of certain variations in French case-law, the type of liability that may be incurred by a party terminating commercial relations not governed by a written framework agreement does not vary according to the country in which the commercial partners are established.

25. A second area of common ground is to be found in the fact that, in all the legal systems examined, long-term commercial relations that have been entered into without a written framework agreement may be the subject of an oral or tacit agreement, breach of which is, as a general rule, capable of giving rise to contractual liability. Even if the existence of an oral or tacit framework agreement cannot be presumed, the fact remains that proof thereof may be furnished by means of a body of consistent evidence, which may include, in particular under **German, Belgian, French, Italian** and **Slovenian** law, the existence of long-term commercial relations between the parties.

26. The third common characteristic is a tendency towards analysis by reference to contract law, which is most pronounced in **Italian, Latvian** and **United Kingdom** law and, to a lesser extent, in **German** law, inasmuch as, under that law, disputes arising from the termination of long-term commercial relations are, as a general rule, examined by reference only to the rules on contractual liability. However, it must be reiterated that, even in those legal systems, disputes of this kind do not automatically, by their very nature, fall within the scope of the rules on contractual liability, which apply only where all the conditions for their application are met, and these include proof of the breach of an obligation of a contractual nature, which could be one arising from an oral or tacit framework agreement governing the commercial relations that have been terminated.

27. In the **Belgian**, **Romanian** and **Slovenian** legal systems, the rules on contractual liability will take precedence where the party terminating relations has breached a contractual obligation, including one arising from an oral or tacit framework agreement. However, the fact remains that non-contractual civil liability may apply in the case of disputes which do not fall within the scope of the rules on contractual liability. A party terminating relations may thus, under **Romanian** law, incur non-contractual liability if it abuses its right to terminate or its freedom to contract. That termination may, without constituting a failure to fulfil a contractual obligation, be treated under Slovenian law as the inappropriate termination of a long-term relationship of obligation or, in **Belgian** law, as *culpa in contraendo*, an abuse of a right or an act contrary to honest market practices.

28. Finally, the **French** legal system is peculiar as regards the determination of the rules on civil liability which apply where long-term commercial relations are terminated, inasmuch as, in the case of the abrupt termination of established commercial relations, French courts tend to examine most disputes by reference to the special rules on liability laid down in Article L. 442-6 of the Code of Commerce, which appear to be rules on non-contractual liability, even if they are sometimes regarded as rules on contractual liability in the context of international disputes.

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