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Decisions against commercial agents: Rare enough to be noted

The Law no. 91-593 dated June 25, 1991 transposing the European Union Directive 86/653 EEC of 18 December 1986 is notoriously protective of the status of commercial agent it created. For example, Articles L. 134-1 *et seq.* of the French Commercial Code (codifying the aforementioned Law) notably grants the agent a virtually automatic right to an indemnification *"if its commercial relationship with the principal ends"* (Article L. 134-12 of the French Commercial code). Further, case law interprets the provisions of French law in favor of the agent. As such, case law is well-established: the rule today is that the indemnity to which the agent is entitled amounts, in general, to two years of gross commission, regardless of whether the agency agreement had a fixed or indefinite term.

Among the decisions periodically rendered on the status of commercial agent, two recent judgments from the *Cour de Cassation* (French Supreme Court) dated **September 15 and 29, 2009** should be noted as they contain a restrictive interpretation of the commercial agent's rights – which is rare – in two specific areas: (i) the right to initiate proceedings claiming compensation within one year from the termination of the commercial relationship and (ii) the right to obtain a "*indemnité de remploi*" (an indemnity paid in anticipation and for compensation of taxes that will be due on the end-of-contract indemnity), established by standard case

law over the last few years by judges ruling on the merits.

1. The commercial agent's right to claim compensation (end-of-contract indemnity)

Pursuant to Article L. 134-12 of the French Commercial Code, *"the commercial agent loses his right to claim compensation if he has not notified the principal within one year of the end of the contract its intent to enforce his rights"*. Until now, case law had not required any particular formality with regard to such notification as long as the agent's intent was expressed unequivocally. Notably, the courts considered that the filing of summary proceedings expressly illustrated the agent's intent to enforce his rights (Court of Appeals of Paris, October 20, 2004).

In the decision rendered on September 29, 2009, the *Cour de cassation* specified the definition of "notification" to the principal of the intent to enforce his rights, and did so to the detriment of the commercial agent. In this case, the agent was penalized for having mischaracterized the legal relationship binding him to his principal.

The facts of the case are as follows: following the termination of the contract between a commercial agent and the principal on March 30, 2004, the commercial agent, considering himself as an employee, summoned the principal before the French labor court on June 10, 2004, claiming indemnification and damages. On June 6, 2005, the labor court found it had no jurisdiction over the case. The commercial agent then initiated proceedings before the French commercial court requesting compensation.

The principal argued that the agent's lawsuit was time barred. As a rebuttal, the agent argued that *"the summons to appear before the French labor court was deemed notification"* of his unequivocal intent to request compensation *"regardless of the fact that such intent was presented before a court lacking jurisdiction under a mistaken characterization"*. The Court of Appeals of Montpellier found in favor of the agent. The *Cour de cassation* reversed, reasoning in the end that the agent's claims *"presented before the French labor court and based on the existence of an alleged employment contract could not be deemed notification [to the principal] of his intent to request compensation for the termination of a commercial agency agreement"*.

The agent was therefore stripped of his right to claim an end-of-contract indemnity.

2. The blow against the *"indemnité de remploi "* granted to the commercial agent

In the last few years, standard case law containing more and more developed reasoning awarded the commercial agent another indemnity beyond that owed upon the end of the agency agreement. This additional indemnity, referred to as an *"indemnité de remploi"*, was meant to compensate the taxes owed by the agent resulting from the end-of-contract indemnity.

In principle, the end-of-contract indemnity is subject to short-term capital gains tax. Today, that amounts to a tax of 28.1% for individuals (16% + 12.1% of social charges) and about 33% for legal entities.

Numerous judges ruling on the merits of a case found it inequitable that this tax would put a dent in the amount of the agent's end-of-contract indemnity. They therefore held that a separate additional indemnity (covering this tax) should also be paid by the principal, which would increase the cost of terminating the agency agreement by more than one quarter (the tax base used to calculate the *"indemnité de remploi"* being the amount of the end-of-contract indemnity).

As such, based on abundant case law, the judges ruling on the merits more often reason that the recovery indemnity should be awarded in the following manner: *"in application of the principle of full restitution, the recovery indemnity is therefore due because it constitutes a direct tax consequence of the end-of-contract indemnity, which would have never existed had the contract been pursued"*.

The recent decision rendered on September 15, 2009 by the *Cour de Cassation* undoubtedly renders a brutal blow to case law favoring the award of an *"indemnité de remploi"*. Specifically, the *Cour de cassation* reasoned that *"the Court of Appeals breached Article L. 134-12 of the French Commercial Code when, by ordering the company to pay the commercial agent the amount of EUR 39,514.78 as an "indemnité de remploi", it held that (i) there should be full compensation and (ii) a claim for "indemnité de remploi" was legitimate to compensate the tax consequence resulting from the end-of-contract indemnity awarded to the agent"*. According to the *Cour de Cassation, "subjecting the end-of-contract indemnity to a tax does not constitute a reparable harm"*.