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How do courts assess a serious misconduct that deprives the sales agent of its right to termination indemnities?

The sales agent status is much talked and written about these days!

After having ruled on the determination of the place of performance of a sales agency contract^[1], the *Cour de Cassation* (French Supreme Court) has been recently asked to consider the concept of serious misconduct that deprives a sales agent of its right to termination indemnities.

When the contractual relationship between a sales agent and its principal is terminated, Article L.134-12 of the French Commercial Code stipulates that *"the sales agent is entitled to termination indemnities to compensate for the loss suffered"*. Yet, a serious misconduct on the part of the agent will deprive it of its right to termination indemnities, as per Article L.134-13 of the same Code.

In a decision dated July 9, 2013^[2], the *Cour de Cassation* recalled that the serious misconduct is a misconduct that **adversely affects the common purpose of the common interest mandate between the sales agent and the principal and that makes it impossible to maintain the contractual relationship**^[3]. This principle being reaffirmed, the trial judges must assess on a case-by-case basis whether the misconduct is so serious that it should deprive the sales agent of its right to termination indemnities.

In the commented decision, a company terminated the sales agency contract that had been entered into with its sales agent. The agent initiated proceedings and sought the payment of commissions and termination indemnities.

Hearing the case for the first time, the Court of Appeals considered that the agent's failure to meet the sales targets that had been agreed upon by the parties did not constitute *per se* a serious misconduct on the part of

the agent and, consequently, ordered the principal to pay termination indemnities to the latter.

The *Cour de Cassation* then reversed the judgment of the Court of Appeals. It held that the Court of Appeals had failed to ascertain whether the facts stated by the principal were likely to qualify a serious misconduct, whereas the principal had notably brought the agent's attention to the non-achievement of the sales targets and the seriousness of the situation that jeopardized the survival of the chain operated by the principal. It remanded the case to the same Court of Appeals.

The Court of Appeals, hearing the case for a second time, acknowledged the existence of a serious misconduct on the part of the agent and held that such serious misconduct was established not because the sales targets had not been achieved but because the business generated for the principal by the agent was so small that it was likely to jeopardize the survival of the chain operated by the principal.

In addition, the Court of Appeals found that the sales agent (i) had failed to state the services/works performed under the agency contract as well as the encountered difficulties that could have explained its poor performance, and (ii) had not improved its practices after the principal had explained it that such poor performance caused serious difficulties that jeopardized the survival of the chain.

The sales agent decided to appeal against this second appellate judgment.

The *Cour de Cassation* held that the Court of Appeals had this time failed to establish the existence of any precise and concrete breach of its obligations by the sales agent. In other words, the sales agent had not committed a breach that would meet the requalification as serious misconduct.

Moreover, the *Cour de Cassation* ruled that it was up to the principal to prove the agent's serious misconduct.

The *Cour de Cassation*'s position is quite difficult to understand: initially, the Court of Appeals ruled that there had not been a serious misconduct on the part of the agent and its judgment was reversed because the *Cour de Cassation* considered that it had not sufficiently explained why the agent's behavior was not constitutive of a serious misconduct; then, the Court of Appeals ruled that there had been a serious misconduct on the part of the agent and its judgments was also reversed because the *Cour de Cassation* considered that it has not sufficiently characterized such misconduct!

It is therefore necessary to be very cautious when assessing the existence of a serious misconduct and it is necessary to be able to establish **what concrete and precise facts** are constitutive of a **breach** of the agent's obligations, and to what extent such breach **adversely affects the common purpose** of the mandate and **makes it impossible to maintain the contractual relationship**.

[1] Commercial Chamber of *Cour de Cassation*, May 14, 2013, n°11-26.631: the *Cour de Cassation*, asked to

determine the territorially competent court to adjudicate a dispute arising from or in connection with a commercial agency contract, had to rule on the place of performance of the agency contract in question. Cf. our [June 2013 e-newsletter](#).

[1] Commercial Chamber of *Cour de Cassation*, July 9, 2013, n°11-23.528.

[1] Cf. Commercial Chamber of *Cour de Cassation*, October 15, 2002, n°00-18.122.

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