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Severance indemnities owed to commercial agents: review of recent case law

In preamble, it should be recalled that pursuant to Article L. 134-12 of the French Commercial Code the payment of severance indemnities to a commercial agent following the termination of the contractual relationship between the commercial agent and his principal aims at compensating the agent for the future commissions lost on the business transacted with joint consumers. These provisions are public policy provisions and may not be contractually circumvented by the parties^[1].

Yet, severance indemnities are not owed when the termination of the agency contract (i) is due to a serious default on the part of the agent, (ii) is initiated by the agent (unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities), or (iii) results from the assignment of the contract by the agent to a third party with the principal's consent^[2].

French courts regularly recall, clarify and complete the conditions in which severance indemnities are to be paid **(1)** and adjudicate cases concerning alleged serious defaults likely to deprive commercial agents from their entitlement to said indemnities **(2)**.

1. Conditions governing commercial agents' entitlement to severance indemnities

The principle of commercial agents' entitlement to severance indemnities is rather broadly implemented by judges.

- As such, the Paris Court of Appeals recently recalled that the entitlement to severance indemnities applies to **fixed-term commercial agency contracts**, and that **the non-renewal of a fixed-term commercial agency contract does not deprive the commercial agent from its entitlement to severance indemnities**^[3].

In the case at hand, a company entered into a three-year commercial agency contract with a former employee. The company did not renew the contract at the expiration of the three-year period and refused to pay severance indemnities, relying on a contractual clause that stipulated that the payment of such indemnities was conditional on the expansion of the consumer base. The Paris Court of Appeals recalled that severance indemnities aim at compensating the agent for the future commissions lost on the business transacted with joint consumers, even where the termination occurred at the expiration of a fixed-term agency contract and, therefore, ruled that the commercial agent was duly entitled to severance indemnities. The Paris Court of Appeals also rejected the principal's argument on the required consumer base extension on ground that any clauses or agreements that suppress or reduce severance indemnities or make them conditional on the fulfillment of certain requirements, are deemed unwritten (i.e. null and void).

- Similarly, trial judges have recalled that the commercial agent is entitled to claim severance indemnities even though **the agent is not registered in the special register of commercial agents**^[4].

This is an established case law since the adoption of the Law of June 25, 1991 that transposed Directive n°86/653/EEC of December 18, 1986 that prohibits any provisions of national law that make the validity of a commercial agency contract conditional upon the registration of the commercial agent in a special register established especially for this purpose. The commercial agent's obligation set forth in Article R.134-6 of the French Commercial Code to register in a special register kept at the clerk of the commercial court having jurisdiction over the territory where the agent is established is merely a professional requirement that has no influence on the relationship between the agent and the principal and on the agent's entitlement to severance indemnities^[5].

- Lastly, the *Cour de Cassation* has also specified that Article L. 134-12 §3 of the French Commercial Code, according to which the legal successors of a commercial agent are entitled to severance indemnities when the termination of the contract is due to the death of the agent, is to be enforced irrespective of the cause of the commercial agent's death.

Interestingly, the *Cour de Cassation* ruled that the suicide of a commercial agent was not to be considered as a termination initiated by the agent (as defined in Article L. 134-13 §2 of the French Commercial Code), and that the **severance indemnities were to be paid to the commercial agent's successors**^[6].

- Yet, the *Cour de Cassation* continues to attach great attention to the commercial agent's due compliance with all required formalities applicable to the notification of the request for payment of the severance indemnities that must be sent to the principal.

Indeed, the *Cour de Cassation* very recently clarified a few issues raised in connection with the application of Article L. 134-12 §1 of the French Commercial Code that stipulates "The commercial agent shall lose its right to severance indemnities if he does not notify the principal, **within one year of the termination of the contract**, that it intends to assert this right".

The *Cour de Cassation* specified that the one-year period during which the commercial agent is entitled to notify the principal of its intention to assert its right to severance indemnities starts running as from the **effective termination** of the agency contract, not from the end of the notice period, should the date of the end of the notice period differ from the effective termination date.

In this case, the principal terminated the agency contract with effect on February 24, date on which the commercial agent stopped his activities, whereas, as per the contractual provisions, the end of the notice period coincided with the end of the calendar month. The agent notified the principal of his intention to assert its right to severance indemnities on February 27 of the following year. The *Cour de Cassation* held that this notification was late since the effective termination of the contracts occurred on February 24 of the preceding year^[7].

2. The existence of a serious default by the commercial agent : an evolving case law

The principal very often claims serious defaults on the part of the commercial agent to try to escape the payment of the severance indemnities. The conditions in which such an argument is likely to prevail are subject to an evolving case law.

As such, throughout 2010, the *Cour de Cassation* specified that a principal that terminates a commercial agency contract **could escape his obligation to pay severance indemnities in case of a serious default by the agent during the performance of the contract, even if it became aware of such default only after the termination**^[8].

In the case at hand, the commercial agent sued the principal that had terminated the agency contract without claiming any default by the agent. The agent benefited from a notice period, which proved – according to the agent – that the principal did not consider that the agent’s default was sufficiently serious to make it impossible to maintain the contractual relationship. The *Cour de Cassation* held that the agent’s defaults discovered by the principal after the termination of the contractual relationship justified the termination for serious breach of contract.

It is interesting to note that this decision is in line with another decision rendered six months earlier by the *Cour de Cassation* in which it considered that a commercial agent claimed to be in default – i.e. low sales volume due to the fact that the principal’s agent was also the agent of a principal’s competitor – **could not lose its right to severance indemnities insofar as the principal was aware of this situation and tolerated it before the termination of the commercial agency contract.**^[9] In this case, when the principal terminated the agency contract, it indicated that it thought that this default had been lasting for two years. This decision therefore de facto limits the principal’s possibility to rely on the existence of defaults by the agent to escape the payment of severance indemnities.

As such, the *Cour de Cassation* admits that the principal may be released from his obligation to pay severance indemnities when the agent is in serious default during the performance of the contract insofar as (i) the principal became aware of such default before the termination and immediately raised them against the agent, or (ii) it became aware of such default only after the termination.

However, this case-law is balanced by a decision of the Court of Justice of the European Union that, in the framework of preliminary ruling proceedings, held that a commercial agent **could not be deprived of severance indemnities where the principal establishes a default by that agent which occurred after notice of termination of the contract was given but before the contract in question expired**^[10].

While French courts have not yet been referred a case concerning a serious default by the agent during the notice period, the position adopted by the Court of Justice of the European Union suggests a possible reversal of the aforementioned case-law of the *Cour de Cassation* that admitted the termination for serious breach because of facts attributable to the agent during the performance of the contract but discovered by the principal only after the termination of the contract.

[1] Article L. 134-16 of the French Commercial Code.

[2] Article L. 134-13 of the French Commercial Code.

[3] *Paris Court of Appeals, December 9, 2010, n°09-18151*. See also Commercial Chamber of the *Cour de Cassation*, April 23, 2003, n°01-15.639; Commercial Chamber of the *Cour de Cassation*, June 25, 2002, n°1257: *RJDA* 12/02 n°1260.

[4] *Versailles Court of Appeals, October 21, 2010, n°2010-023439*.

[5] In this respect, it should be noted that Decree n°2010-1310 of November 2, 2010 that entered into force on November 5, 2010 amended Article R. 134-6 of the French Commercial Code as follows: **(i)** commercial agents based abroad who do not have any establishment in France and offer their services in France on a temporary and occasional basis only do not have to register in the special register of commercial agents, and **(ii)** commercial agents are no longer required to renew their initial registration that will remain effective until they cease their activities as commercial agents.

[6] *Commercial Chamber of the Cour de Cassation, November 23, 2010, n°09-17.167*.

[7] *Commercial Chamber of the Cour de Cassation, January 18, 2011, n°09-72.510*.

[8] *Commercial Chamber of the Cour de Cassation, June 1, 2010, n°09-14.115*.

[9] *Commercial Chamber of the Cour de Cassation, December 8, 2009, n°08-17.749*

[10] *CJEU, October 28, 2010, case 203-09*

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