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Validity of a non-compete clause inserted in a commercial agency contract: assessment in concreto of the proportionality principle

Pursuant to Article L.134-14 of the French Commercial Code (hereinafter the "FCC"), a non-compete clause set forth in a commercial agency contract must, to be valid, cover a period not exceeding two years, and be limited to (i) the geographic areas and, as the case may be, the clientele, entrusted to the agent and (ii) the products or services covered by the commercial agency contract. In other words, the non-compete clause must be necessary and commensurate with the pursued objective, i.e. the protection of the principal's interests.

The *Cour de Cassation* (French Supreme Court) has been led to define the conditions in which the proportionality principle provided for by said Article should be assessed in relation to a non-compete clause inserted in a commercial agency contract.

In a decision dated June 4, 2002[1], the *Cour de Cassation* first stressed the necessity to assess *in concreto* whether the non-compete clause set forth in a commercial agency contract is proportionate or disproportionate.

In that specific case concerning a non-compete clause set forth in several commercial agency contracts, the trial judges pointed out that, under the challenged non-compete clause, each of the commercial agents was

deprived of a geographical sector comprising about fifty *départements*[2] spread across the country. They inferred therefrom that such agents were prevented from organizing profitable rounds of their customers and thus materially and completely unable to continue their work after the termination of the commercial agency contract. Consequently, the trial judges invalidated the non-compete clause.

It held that the trial judges had made their decision only by referring to the geographic scope of the non-compete clause, and failed (i) to note that such clause was not limited to geographical sector and to the type of products or services covered by the commercial agency contract – which made it unnecessary to ensure the protection of the principal's interests – and (ii) to check whether such clause had the effect of preventing the former commercial agents from exercising any professional activity.

The decision commented herein that was handed down by the *Cour de Cassation* on May 15, 2012[3] provides an example of the assessment *in concreto* of the proportionality principle that led to the invalidation of a non-compete clause set forth in a commercial agency contract.

In this matter, the principal, a company that sells weight-loss products, had entrusted to its commercial agent the distribution of its products to private consumers.

Pursuant to the commercial agency contract, the commercial agent was free to define its geographical sector on the French territory and had not been granted any exclusivity.

The commercial agency contract also contained a non-compete clause prohibiting the commercial agent from engaging into **any business activity concerning the manufacture or sale of competing products** and from **becoming involved in any manner whatsoever in a company likely to compete** with the business of the principal, during a period of two years as from the termination of the commercial agency contract.

The commercial agent considered that this non-compete clause infringed the freedom of trade and industry and sought the annulment of said clause before the Commercial Court.

Appellate judges[4] found that the challenged non-compete clause met the duration and product requirements set forth in Article L. 134-14 of the FCC as it was limited to a period of two years, applied to dietetic products likely to compete with the products distributed by the principal and covered the entire national territory.

Yet, they found that the non-compete clause was not limited to carrying out an activity with a **clientele** that had been contractually entrusted to the commercial agent.

Indeed, the commercial agent was contractually required to serve a clientele made up **exclusively of private consumers.**

According to appellate judges, enforcing this non-compete clause was tantamount to prohibiting the commercial agent from engaging into any activity, whether salaried or not, related to the distribution of dietetic products, including with prescribers, intermediaries or distributors, as well as in any activity related to

the manufacture of such products, with no commensuration between the clientele contractually entrusted to the commercial agent under the contract and the scope of the non-compete clause.

The Court of Appeals held that, under this clause, the agent, who had benefited from a qualified training as pharmaceutical sale representative and had a substantial experience in this field, was also thereby deprived from the possibility of exercising this activity during a period of 2 years as from the termination of the commercial agency contract.

Based on these findings, appellate judges considered that the scope of the non-compete clause was **unnecessary to protect the interests of the principal**, since the latter was only engaged in direct sales to private consumers. Consequently, they invalidated the challenged non-compete clause.

Before the *Cour de Cassation*, the principal argued that the commercial agency contract expressly sets forth that its products were to be sold exclusively to private consumers so that the competing companies and products referred to in the clause necessarily concerned only private consumers, i.e. the exclusive clientele of the principal.

Indeed, the private consumers were the only clientele for which the commercial agent was likely to compete and constituted therefore the boundary of the non-compete obligation.

This argument was dismissed by the Commercial chamber of the *Cour de Cassation*.

The *Cour de Cassation* held that trial judges had to make a discretionary interpretation of the challenged clause because it was drafted in ambiguous terms and found that they rightfully concluded that such clause prohibited in practice the commercial agent from distributing dietetic products, including with prescribers, intermediaries or distributors, and more generally from engaging into any activity related to the distribution of such products.

Consequently, the *Cour de Cassation*, having pointed out the absence of commensuration between the clientele contractually entrusted to the commercial agent and the non-compete clause, found that the scope of said clause was unnecessary to protect the interests of the principal that was only engaged in direct sales to private consumers and upheld the appellate decision that had invalidated the challenged non-compete clause.

It should be noted that the challenged clause was indeed drafted in ambiguous terms, which led the trial judges to make a discretionary interpretation of its scope of application in order to assess *in concreto* whether such clause was disproportionate or not.

Incidentally, this judgment is a good reminder that any person drafting a non-compete clause must be very careful to expressly and precisely limit the scope thereof in order to avoid any subsequent interpretation that could lead to its invalidation because of its disproportionate character.

[1] *Cass. Com., 4 juin 2002, n°00-14.688*

[2] Administrative geographic sub-division

[3] *Cass. Com., 15 mai 2012, n°11-18.330*

[4] *CA Rennes,15 Février 2011, n° 64, 09/08191*