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Good news! Amicable termination is expanding in today's French working world: The rupture conventionnelle now prevails over standard dismissals and resignations

Created in 2008, the *rupture conventionnelle* – an alternative means of terminating the employment contract which replaces standard dismissals or resignations – is a growing success.

It must be said that French case-law has considerably extended the horizons of the possible and – for once in labor law – French courts develop a very liberal case-law that complies with the rules of ordinary contract law.

In three decisions issued on March 3, 2015, the Labor Chamber of the *Cour de Cassation* (French Supreme Court) provided further insights on the possible interferences between *rupture conventionnelle* and dismissal, and acknowledged, among other things, that a *rupture conventionnelle* can be validly entered into following a dismissal, and even following a resignation.

Here's a development that will upset the points of reference and prime reflexes of labor law specialists!

Before the introduction of the *rupture conventionnelle* (i.e. the mutually agreed termination of the employment contract) – an alternative means of terminating the employment contract which replaces standard dismissals or resignations – amicable termination in the French working world did not exist... at least officially.

Employers and employees who wished to terminate their contractual relationship by common agreement had to engage into confidential settlement negotiations through their respective legal counsels in order to agree on an indemnification that implied a waiver by the employee of any and all claims or actions before the courts and, as such, they had no other choice but to set up a mock dismissal process (since the conclusion of a settlement agreement necessarily pre-supposes the prior notification of the termination of the employment contract).

And then, the *rupture conventionnelle* was established and legalized long-standing practices through the implementation of a simplified process… The *rupture conventionnelle* is based on the freedom of consent of both contractual parties. Contrary to dismissals, the employer does not have to justify the termination by a personal or economic ground. Yet, just like following a dismissal, the employee receives severance indemnities (corresponding at least to the amount of the dismissal indemnity provided for by law or by the applicable collective bargaining agreement.) and is entitled to unemployment benefits.

This type of termination is enjoying increasing success and the number of concluded *ruptures conventionnelles* is growing steadily: according to the statistics of the French Ministry of Labor, 334,000 *ruptures conventionnelles* were concluded for 2014 alone (320,000 in 2012) with a record number of 33,000 in July 2014.

It must be said that French case-law has considerably extended the horizons of the possible and – for once in labor law – French courts develop a liberal case-law that complies with the rules of ordinary contract law.

Until recently, companies were strongly discouraged to enter into a *rupture conventionnelle* with an employee when there was a dispute with that employee or when a disciplinary/dismissal process has been initiated against the latter.

Since January 2014, it is clear and indisputable that a *rupture conventionnelle* can be entered into even in an adversarial context. The *Cour de Cassation* has upheld the validity of a *rupture conventionnelle* concluded after receipt by the employee of two warning letters and the conduct of two interviews during which the possibility of entering into a *rupture conventionnelle* had been discussed[1].

In three decisions issued on March 3, 2015, the Labor Chamber of the *Cour de Cassation* provided further insights on the possible interferences between *rupture conventionnelle* and dismissal.

In the first matter, an employee summoned to pre-dismissal meeting in the framework of a disciplinary procedure had signed on the very same day a *rupture conventionnelle*. He, however, exercised his right to withdraw from the *rupture conventionnelle*, and the employer consequently resumed the disciplinary process, summoned the employee to another pre-dismissal meeting and eventually dismissed him for serious misconduct.

The employee challenged his dismissal as he considered that the employer, by signing the *rupture conventionnelle*, had waived its right to initiate a disciplinary procedure for the relevant facts.

The *Cour de cassation* upheld the trial judges' judgment and, quite logically, rejected this interpretation. It held that the signature of a *rupture conventionnelle*, following the commencement of a disciplinary procedure, is not to be considered as a waiver by the employer of its right to exercise its disciplinary power wherever the employee exercises his right to withdraw from the *rupture conventionnelle*. The employer was, therefore, entitled to resume the disciplinary procedure and summon the employee to another pre-dismissal meeting[2].

Yet, a particular attention should be paid in order to make sure that the change of strategy that consists in putting on hold a disciplinary procedure to initiate a *rupture conventionnelle* process will not lead to a situation where the employer will run the risk of ultimately losing his disciplinary power because of the expiry of the statute of limitations period.

Indeed, in another case adjudicated on March 3, 2015, the *Cour de Cassation* specified that while it was absolutely possible to summon an employee to a pre-dismissal meeting in the framework of a disciplinary procedure if the negotiations for the conclusion of a *rupture conventionnelle* had failed, the two-month statute of limitations provided for under Article L. 1332-4 of the French Labor Code must nonetheless be complied with. Signing a *rupture conventionnelle* before summoning the employee to a disciplinary pre-dismissal meeting does not, quite logically, interrupt the two-month statute of limitations[3].

In the third case adjudicated on March 3, 2015, the *Cour de Cassation* went even further in its move towards a liberalization of the *rupture conventionnelle* by ruling that a *rupture conventionnelle* can even be entered into after the notification of the dismissal!

In that particular case, a company had informed his employee of his dismissal by letter dated January 9, 2009, the effective end of the contractual relationship being scheduled at the expiration of the 3-month unworked notice period. A little over one month later, i.e. on February 10, the company and the employee entered into a *rupture conventionnelle* that set the end of the contractual relationship on April 10. The *rupture conventionnelle* agreement was then approved by the *Direction Régionale des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi* (Regional Directorate for Companies, Competition, Consumption, Labor and Employment, known under the acronym "DIRECCTE").

It could have been logically expected that this second termination could not take place as the employment contract had already been terminated through the notification of the dismissal. French case-law had always been very clear on this specific point and the French maxim "*rupture sur rupture ne vaut*" (meaning that a contract that has already been terminated may not be terminated again) had always prevailed so far. Yet, pursuant to the terms of this March 3, 2015 decision "*When the employment contract has been terminated as a result of the exercise by either party of his/her/its unilateral termination right, the subsequent signature of a rupture conventionnelle is to be considered as a mutual waiver of the termination that has previously occurred"* ***[4]***.

As a result, a *rupture conventionnelle* can validly be entered into following a dismissal, and even following a resignation. Here's a development that will upset the points of reference and prime reflexes of labor law specialists!

In this respect, another noticeable decision of the *Cour de Cassation* – handed down already two years ago – is worth mentioning. While it had already ruled in the past that the conclusion of a *rupture conventionnelle* makes any legal action previously brought by the employee to seek the judicial termination of his/her employment contract devoid of any purpose, the Labor Chamber of the *Cour de Cassation* held that when the employment contract has been subsequently terminated by way of a *rupture conventionnelle* approved by the DIRECCTE, the employee is no longer entitled to request the judicial termination of his/her employment contract by reason of the wrong conduct of the employer, even in case of alleged moral harassment[5]. Such a decision, while fully compliant with the principle of contractual freedom, was already quite a surprise for labor law specialists who are used to practice a French labor law that is eminently favorable to employees and that derogates from ordinary contract law. It should indeed be remembered that if a dismissal is notified after the introduction of a legal action seeking the judicial termination of the employment contract, the outcome is quite the opposite: the judge must first rule on the request for judicial termination and it is only if such request if found baseless that he/she will rule on the justifiability of the dismissal.

A such, as applicable case-law evolves, the *rupture conventionnelle* is becoming a quasi-unchallengeable and unquestionable element. The employee is restored to his/her status as an adult person fully capable of entering into an agreement and making firm and definitive commitments.

As per ordinary law, the employee may only challenge the validity of a *rupture conventionnelle* for lack of consent (i.e. error, deceit, duress) or fraud but he/she must be able to prove that he/she has been forced or pressured into signing the *rupture conventionnelle*.

Under applicable civil law principles, when it comes to the question of lack of consent, the burden of proof rests with the employee. And, contrary to the rules that govern dismissals, wherever there is some uncertainty as to the reality of the alleged facts, the employee does not get the benefit of the doubt. In a decision dated January 15, 2015[6] rendered in connection with a case where the employee, claiming that he had been the victim of moral harassment, pleaded lack of consent to seek the nullification of a *rupture conventionnelle*, the Court of Appeals of Paris held that the psychological violence was not proven and that the rule provided for under the last paragraph of Article L. 1235-1 of the French Labor Code – according to which the employee gets the benefit of the doubt – only applied to dismissals and was, therefore, irrelevant in that matter.

In the absence of fraud or lack or consent, nothing can be raised to challenge the validity of a *rupture conventionnelle*, and definitively not the existence of a dispute between the employer and the employee, a legal action seeking the judicial termination of the employment contract or else a dismissal or a resignation that has already been notified, etc.

Beyond the revival of the sacrosanct principle of contractual freedom, the *Cour de Cassation* also seems to consider that the *rupture conventionnelle* can be used as a tool to unblock an extremely complicated situation, e.g. for employees suffering from a long-term illness.

In this respect, the *Cour de Cassation* approved a *rupture conventionnelle* signed after a “fitness for work, subject to reservations” medical certificate[7]: this “escape door” can be very useful when no redeployment

position can *de facto* be offered to an employee who is only partially fit for work. It is even possible to enter into a *rupture conventionnelle* with an employee on sick leave, including if such leave is due to an occupational accident, despites the specific protection afforded to such an employee[8]. It should be recalled here that the dismissal of an employee on sick leave as a result of an occupational accident is extremely regulated and limited to very few cases.

In conclusion, the *rupture conventionnelle* is indisputably a true revolution in today's working world.

Yet, just like any flexible tool and instrument of "liberalization", the *rupture conventionnelle* does have a deleterious effect: an employee who wishes to quit his/her job has no reason to resign and will negotiate with his/her employer a "low cost" *rupture conventionnelle*, which will entitle him/her to unemployment benefits. A flexibility tool definitely, but a tool which has the inevitable effect of increasing the number of unemployed in France…

[1] Labor Chamber of the *Cour de Cassation*, January 15, 2014, n°12-23942

[2] Labor Chamber of the *Cour de Cassation*, March 3, 2015, n° 13-15.551, P+B

[3] Labor Chamber of the *Cour de Cassation*, March 3, 2015, n° 13-23.348, P+B

[4] Labor Chamber of the *Cour de Cassation*, March 3, 2015, n°13-20.549 P+B

[5] Labor Chamber of the *Cour de Cassation*, April 10, 2013 n° 11-15.651

[6] Court of Appeals of Paris, Pole 6, Ch. 5, Janaury 15, 2015, n°12/09546

[7] Labor Chamber of the *Cour de Cassation*, May 28, 2014, n°12-28.082

[8] Labor Chamber of the *Cour de Cassation*, September 30, 2014, n°13-16.27

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