Published on 1 May 2011 by **Thomas Caveng**, Legal Translator / Marketing Director
t.caveng@soulier-avocats.com
Tel.: + 33 (0)4 72 82 20 80

Read this post online

The latest findings of the Cour de Cassation in cases concerning commercial agent's entitlement to severance indeminities

In three decisions dated February 8, 2011, the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) further clarified and complemented the conditions in which a commercial agent is entitled to severance indemnities at the end of the agency relationship. On the whole, the case law of the *Cour de Cassation* remains quite strict for the principal.

In the first commented decision[1], the trial judges had acknowledged the termination of the contractual relationship between a commercial agent and its principal but had failed to determine who was liable for the termination. They had rejected the commercial agent's claim for severance indemnities.

The trial judges had not, however, identified any factual circumstances likely to exclude the payment of severance indemnities, e.g. the existence of a serious default on the part of the commercial agent, the termination of the relationship at the agent's initiative or the assignment of the agency contract to a third party[2].

This judgment was, therefore, quite logically reversed by the Commercial Chamber of the *Cour de Cassation* that considered that **merely acknowledging the termination of the relationship could not result in the commercial agent being deprived of severance indemnities, regardless of whether such termination was attributable to the agent or to the principal**.

This decision is in line with the *Cour de Cassation*'s case law and serves as a reminder of the fundamental principle set forth in Article L. 134-12 of the French Commercial Code according to which the commercial agent has a right to severance indemnities.

In a second decision, the Commercial Chamber of the *Cour de Cassation* ruled on the evidence of a default on the part of the commercial agent.

In this case[3], the principal blamed its commercial agent for having made denigrating statements to a client and for breaching its contractual obligations, which, according to the principal, was constitutive of a serious default.

To prove the existence of the serious default and be released from its obligation to pay severance indemnities, the principal produced in court an email from the agent showing denigrating statements, the termination letter as well as two warning letters mentioning contractual breaches that he had sent to the agent prior to the termination.

The trial judge had recalled the principle according to which no one can create proof for him/herself and considered that the termination letter should not be admitted as valid evidence of a serious default on the part of the agent. As such, they had concluded that the principal had abusively terminated the contract since there was no evidence of the agent's alleged default.

The Commercial Chamber of the *Cour de Cassation* quashed this judgment for two reasons.

First, it held that trial judges failed to examine the agent's email produced by the principal, the terms of which would have been considered as denigrating.

As such, the *Cour de Cassation* recalled that the production of emails as evidence has become widespread and urged contractual parties to be cautious when writing emails, especially when the contractual relationship becomes tensed.

Second, the *Cour de Cassation* held that the termination letter issued by the principal could establish the commercial agent's default since the complaints set forth therein had already been expressed in two warning letters.

Consequently, it seems that it is **the repeated warnings made before the termination** that lead the Commercial Chamber of the *Cour de Cassation* to take a document authored by the principal into account in assessing whether there was a serious default on the part of the commercial agent.

Yet this should be put in perspective with other decisions recently rendered by the Commercial Chamber of the *Cour de Cassation*[4] that has considered that previous defaults that have not been notified and requested to be cured by the principal could not be subsequently considered as serious defaults depriving a commercial agent from its right to severance indemnities. Prudence requires that a contractual party wishing to invoke the defaults of its co-contractors to justify the termination of the contractual relationship must have the existence of such defaults acknowledged and recorded in due time.

Lastly, in the same decision, the *Cour de Cassation* also invalidated the Court of Appeals' inconsistent

valuation of the severance indemnities owed to the commercial agent. Specifically, the Court of Appeals had partially reversed the first instance judgment by decreasing the amount of commissions remaining due to the agent while leaving the amount of severance indemnities unchanged.

The *Cour de Cassation* thereby recalled the usage according to which **severance indemnities must be determined on the basis of the commissions paid during the performance of the agency contract**.

Lastly, in a third decision[5], the *Cour de Cassation* ruled on the issue of whether the principal should pay severance indemnities to an agent who has reached the legal retirement age.

In this case, the 60 year old commercial agent had terminated the agency contract to retire.

The Court of Appeals had considered that the agent had failed to demonstrate that the continuation of the agency relationship after his 60th birthday was incompatible with his health condition and concluded that the mere fact of turning 60 was, in itself, insufficient to prove this. It had, therefore, rejected the agent's claim for severance indemnities.

The Commercial Chamber of the *Cour de Cassation* quashed this judgment because it held that the lower court judges had not sought **whether the age of the agent and the *"particular circumstances of the personal situation"* of the agent were likely to prevent him from reasonably continuing his activity**.

The Commercial Chamber recalled firstly that, on the basis of Article L. 134-13 of the French Commercial Code, the age of the agent is not sufficient to entitle it to severance indemnities. Indeed, **proof that this age prevents the agent from reasonably continuing its activity must also be brought**[6].

Further, in order to determine whether the commercial agent is entitled to severance indemnities, the *Cour de Cassation* extended the trial judges' power to **examine the particular circumstances of the personal situation of the agent** in order to assess whether the continuation of the activity was possible or not.

While the *Cour de Cassation* did not specify what it meant by "*particular circumstances*", circumstances like the agent's health condition, like in this ase, are likely to justify the impossibility to continue the activity.

However, it is likely that the older the agent is, the more chance it will have that this age be considered as a determining factor in justifying the impossibility for it to continue the contract.

Lastly, in this same decision, the Commercial Chamber of the *Cour de Cassation* also quashed the Court of Appeals' decision that had considered that the agent should have notified the

principal within one year from the termination of the contract, that its right to severance indemnities was based on health issues, and consequently ruled that the recent medical certificates produced by the agent during the hearings could not be admitted.

After having recalled that, in order to keep its right to severance indemnities, the commercial agent must

indeed notify the principal that it intends to assert this right within one year of the termination of the contract[1], the Commercial Chamber ruled that **the agent was not held to notify the principal of the reasons for its decision within this same timeframe**.

Consequently, an agent that terminates its contract can expect to be potentially brought before the court to prove that it is entitled to severance indemnities.

---

[1] Decision of the French Supreme Court: *Cass. Com., February 8, 2011, n°10-30.527*

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

[3] Decision of the French Supreme Court: *Cass. Com., February 8, 2011, n°09-15.647*

[4]Cf. our February 2011 e-newsletter regarding the decision of the French Supreme Court: *Cass. Com., December 8, 2009, n°08-17.749*

[5]Decision of the French Supreme Court: *Cass. Com., February 8, 2011, n°10-12.876*

[6] See also the decision of the Court of Appeals of Paris: *CA Paris, February 12, 2004: D. 2004, p. 696*