



International Distribution Institute



Sales Agent termination indemnity Specific termination indemnity for distributors under French law

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Agent - Compensation of the damage suffered

- Article L134-12 of French Commercial Code: « Upon termination of relations between the Principal and the Commercial Agent, the Commercial Agent is entitled [a le droit] to **compensation for any damage suffered** »
- **No longer enforceable right** (but no statute of limitations) after one year from contract termination
- Article L134-13: Exclusions when « *1° gross negligence of the Commercial Agent ; 2° Commercial Agent terminates the contract, unless such termination is justified by circumstances attributable to the Principal or due to age, infirmity or illness of the Commercial Agent, and consequently the continuation of its business can no longer be reasonably required ; 3° by agreement with the Principal, transfer of the agreement by Commercial Agent.*

Agent Indemnity covers loss of expected commissions

- The approach of various courts is that indemnity shall correspond to the loss incurred by the agent, i.e. the commission he would have received, should the contract have normally continued. Some courts add the amount of social or tax charges to be incurred after the termination of the agreement, while revenues are lesser, until new principal is found (Commercial court of Paris)
- As a legal « use », amount is generally two years of commissions based on the average commissions received for the last three years : sometimes the amount is lesser due to:
 - non performance of the agent;
 - short duration of the relation;
 - If a client list was provided to the agent (Cass. com., 21 févr. 2012).

Agent

Indemnity covers loss of expected commissions

- Some courts explained that the application of the legal use has no legal ground
- *Appeals court Paris 5ème Chambre B, 20 janvier 1995 : « aucune disposition législative ou réglementaire n'impose le versement de deux années de commissions à titre d'indemnité de rupture d'un contrat d'agent commercial, l'indemnité ne pouvant être supérieure au préjudice subi (...) »*
- *Appeals court Lyon 3ème Ch. Civ. 7 novembre 2002, jurisdata n°194736 : « cet usage ne s'impose pas aux juridictions, la mesure de l'indemnité étant celle du préjudice subi » (: 15,5 mois d'indemnité pour 8,5 années de contrat, en l'absence d'investissement de l'agent)*
- *Appeals court CA Lyon, 1re ch.civ. A, 13 juillet 2012 : Jurisdata n° 2012-019947 : « Contrairement à ce que soutient l'agent, il n'a pas droit à deux ans de commissions comme il le propose mais à la réparation de son préjudice effectif né et en rapport avec la rupture du contrat d'agent commercial »*
- *« si l'agent est fondé à obtenir une indemnité réparatrice du préjudice subi du fait de la rupture imputable au mandant, la société JLC ne produit aucun document comptable sur le montant des commissions perçues au titre du mandat pour la période du 1er janvier au 15 novembre 1992, ni aucun justificatif de ses investissements (...) ; société JLC ne rapportait pas la preuve qui lui incombait de l'existence de son préjudice » (Com. 19 décembre 2000, arrêt n°2125, pourvoi n°97-10.919 ; Com. 17 octobre 2000, arrêt n°1707, pourvoi n°98-12.465 ; confirmé par Cass.com, 15 octobre 2002, pourvoi n°07-21058 ; Com. 3 octobre 2000, arrêt n°1605, pourvoi n°97-21.294)*

Agent

Non competition indemnity plus termination indemnity?

- Com. 4 December 2007, n°06-15.137: « Although, given *that the legislator did not consider that the [post-contractual] non competition obligation shall be indemnified* when the clause providing such, complies with the provisions of article L. 134-14 of the Commercial Code ; (...)) the non competition clause invoked is limited in space to a 15 kilometers radius and in time for a 2-year period and did not create any improper constraint , *emphasizing thus that the clause was not disproportionate* to the purpose of the contract, the Court of Appeal has, apart from the grounds challenged by the two first arguments, legally justified its decision; the ground is therefore unfounded »

Agent

Unique indemnity : no additional indemnity based on brutal termination of the commercial relations

- Article L442-6 I 5° of French commercial code: liability from the terminating party having commercial relations with the terminated party if the notice period is not reasonable taking into account the duration of the whole relation. With possible action from French Fair Competition Administration (DGCCRF) on behalf of the French Economy Ministry, with potential fine up to 2 millions euros.
- Some court decisions had applied this provision and ruled that the principal had to pay a specific and additional indemnity BUT this is not a commercial, but civil relation.
- No longer applicable: Appeals court, CH.5, 5 février 2015, n° 13/11944

Distributor Specific Indemnity (Art. L.442-6 I 5° Commercial Code)

- Principle : no indemnity, subject to applying termination clause or, for defined term contracts, a reasonable notice period.
- For long-term or continuous commercial relation : Art. L442-6 I 5° :
 - Terminating party's liability : torts, not contractual liability
 - Commercial relation : means between party having commercial business ;
 - The relation shall be continuous, whatever the form, the evolution of the agreements;
- The contractual termination clauses does not bind on the court.

Distributor

Specific Indemnity (Art. L.442-6 I

5 ° Commercial Code)

- Reasonable notice period taking into account the whole duration of the relations and notification made in writing:
 - 0 to 5 years : 3 to 6 months
 - 5 to 10 years : 6 to 12 months
 - 10 year and more : up to 24 months
- Dependence shall be taken into account the calculation of the notice period
- Indemnity: covers missing notice period : loss of gross margin + lay-off costs + non amortized investment

Distributor Specific Indemnity (Art. L.442-6 I 5 ° Commercial Code)

- An example of a matter pending before Appeals court of Paris :
 - A contract effective from 2006 to 2016;
 - Our client was willing to terminate immediately because prices are too high, but no default; then, early in 2014, we decide announce RFP and to terminate with a 6-month notice period: the client was aware of the risk.

Distributor Specific Indemnity (Art. L.442-6 I 5 ° Commercial Code)

- The terminated party counsel's made a big mistake: he acted on the merit of Art. L442-6 I 5 (**torts**), in lieu of filing a claim for abusive termination (**contractual**); under French law, one cannot claim for both contractual and torts liability in a same action.
- The court considered that 6 months are not sufficient and gave an indemnity for loss of 3-month gross margin (gross margin recalculated by the court) because he considered that the terminated party admitted based on its claim that the contract was terminated, while the terminated party would have obtained two-year indemnity...
- Conclusion: choose well the merit of the claim in termination matters; 442 is not each time the most lucrative legal merit.



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