Published on 1 June 2012 by **Jean-Luc Soulier**, Member of the Paris Bar
jl.soulier@soulier-avocats.com
Tel.: +33 (0)1 40 54 29 29, + 33 (0)4 72 82 20 80

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When the legal protection afforded to commercial agents turns against them…

In a recent decision rendered on April 3, 2012 (n°11-13527), the Commercial Chamber of the *Cour de Cassation* (French Supreme Court) held that Article L.442-6 I-5° of the French Commercial Code (hereinafter "FCC"), a "public policy" provision according to which a party that is the victim of an abrupt breach of commercial relationships may claim for indemnification, notably if the granted notice period is insufficient with regard to the length of the relationships, was inapplicable to commercial agents.

This decision, that is welcome, puts an end to the *Cour de Cassation*'s extensive application of Article L.442-6 I-5° to a series of commercial and business relationships of various nature (pre-contractual or even contractual), whatever the status of the victim of the breach (an association can claim enforcement of this Article[1]) and even in cases where the victim is an indirect victim that has never had any direct business relationships with the terminating party[2].

In the commented decision, the Dijon Court of Appeals – that had rendered the challenged judgment – considered that, in addition to the severance indemnities of EUR 40,000 under Article L. 134-12 of the FCC, the commercial agent was also entitled, pursuant to Article L.442-6 I-5 of the FCC, to a notice indemnity of EUR 6,666 corresponding to an additional two-month notice period – trial judges having considered that the two-month notice period that had been granted was insufficient given the length of the commercial relationships (two years).

The *Cour de Cassation* overturned the part of the appellate judgment that precisely concerned this additional notice period indemnity granted to the commercial agent. It specifically relied on Articles L.442-6-I-5° and L.134-11 of the FCC and held that:

" (…) to order the company Boudier to pay to the company RFD the sum of EUR 6,666 in the form of a notice period indemnity, the judgment specifies that the two-month notice period granted by Boudier to RFD upon termination of the commercial agency agreement was insufficient and that the notice period ought to be fixed at four months;

By ruling so, whereas Article L.442-6-I-5° of the French Commercial Code does not apply to the termination of relationships that existed between a commercial agent and its principal and for which the notice period to be observed is determined as per Article L.134-11 of the French Commercial Code according to the number of years during which the agency agreement remained in force, the Court of Appeals violated the aforementioned legal provisions" (emphasis added by us).

Through this decision, the *Cour de Cassation* clearly recalls that the notice period must be determined pursuant to the provisions set forth in Article L.134-11 of the FCC according to which:

"When the agency agreement is entered into for an indefinite period of time, each party may terminate it subject to a notice period (…). The notice period shall be one month for the first year of the agreement, two months for the second year started and three months for the third year started as well as for subsequent years. Unless otherwise agreed between the parties, the end of the notice period shall coincide with the end of a calendar month. The parties may not agree on shorter notice periods."

As the commercial agent benefits from a public policy protection with respect to the notice period to which it is entitled, the judge may not ignore such legally granted protection; conferring to judges the power to re-assess the scope of this protection and to determine the notice period would mean that the law is imperfect and would result in the judge being substituted to the legislator.

Only the contracting parties may contractually agree upon a notice period with a duration longer than that provided for under Article L.134-11 of the FCC. And the judge must merely apply the provisions of said Article.

Refusing to apply Article L.442-6-I-5° to commercial agents is justifiably based on the cardinal principle according to which specific rules prevail over general rules (*"specialia generalibus derogant").*

As such, each time legal or regulatory provisions fix the legal duration of a notice period, the application of Article L.442-6 I-5° of the FCC must be excluded, even if such Article turns out to be more protective of the terminated party's rights. In the past, the *Cour de Cassation* has already applied the aforementioned principle in a case concerning the termination of a transportation agreement governed by Decree of December 26, 2003[3].

So, as a result of two recent decisions, terminated parties that benefit from a regulated status are paradoxically disadvantaged when the legal or regulatory provisions that precisely regulate their status set an unalterable notice period duration that applies whatever the length of the commercial relationships they have had with their contractual partner.

Thus, because it is impossible to combine the protections afforded under Article L.134-11 and L.442-6-I-5° of the FCC, the commercial agent that has been involved in a commercial relationship for 10-15 years will not benefit, if such relationship is terminated, from a notice period in excess of three months that applies to "*the third year started as well as for the subsequent years*".

For once, the commercial agent is treated worse than a buyer-reseller that, in the same situation, would be entitled to claim for a notice period of about one year, as per applicable case-law. Certainly, the commercial agent will still be paid its severance indemnities but he will not be entitled to additional indemnification for the suddenness of the termination if he is given a three month-notice period.

The commented decision prompts an inescapable conclusion: the commercial agent cannot have it both ways!

This decision should compel certain trial judges to review their decision-making practice that is very protective of commercial agents and that leads them to cumulatively apply Articles L.134-11 and L.442-6-I-5 of the FCC[4].

Anecdotically, it should be noted that, in the dispute adjudicated by the *Cour de Cassation* on April 3, 2012, both the parties and the trial judges – obviously overly focused on the issue of the applicability of Article L.442-6-I-5° of the FCC – had apparently failed to verify whether the notice period granted to the commercial agent was compliant with the provisions set forth in Article L.134-11 of the FCC.

According to the case-law of the *Cour de Cassation*[5], this was not the case: the granted notice period should have been three months (not two) insofar as the commercial relationship had lasted for more than two years and as the third year had already started at the time such relationship was terminated.

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[1] Commercial Chamber of the *Cour de Cassation*, February 6, 2007, n°03-20.463

[2] Commercial Chamber of the *Cour de Cassation*, September 6, 2011, n°10-11.975: in that case, the party that terminated the relationship challenged the judgment of the Court of Appeals because he had been ordered to pay EUR 500,000 to a company that was a sister company of the entity with which it had entered into a direct commercial relationship. The terminating party claimed that "*Article L.442-6-I-5° of the French Commercial Code is intended to govern only the relationships between commercial partners and therefore allows indemnifying only the damage directly suffered by the victim of the termination, not an indirect damage potentially suffered".*
The *Cour de Cassation* replied that "*a third party may, under tort liability, claim damages for an abrupt termination of a commercial relationship to which it is not directly a party, if such termination has caused him a loss*" and therefore admitted that a third party may seek application of Article L.442-6-I-5° of the FCC for its own account.

[3] Commercial Chamber of the *Cour de Cassation*, October 4, 2011 n°10-20.240 : *"(…) By ruling so, whereas Article L. 442-6, I, 5° of the French Commercial Code, that provides for tort liability, does not apply to commercial relationships concerning public transportation of goods by road performed by subcontractors, where the standard agreement, that sets forth the duration of notice periods, introduced by the so-called LOTI Law, governs, in the absence of contractual provisions, the relationships between the subcontractor and the transport operator(…) "*

[4] Aix-en-Provence Court of Appeals, March 26, 2010, n°2010/131: For example, in this specific case, in addition to the three-month notice period indemnity (fixed at EUR 12,793.40) and to the severance indemnities (fixed at EUR 104,577), the trial judges also granted an additional indemnity of EUR 60,000 considering that *"since the termination of such relationships was abrupt and sudden, Mr. X is entitled to request from the Company Z an indemnification for the loss he suffered, as per Article L.442-6-I-5° of the French Commercial Code".*

[5] Commercial Chamber of the *Cour de Cassation*, November 2, 2011, n°10-22.859: *"However, pursuant to Article L. 134-11 of the French Commercial Code, the duration of the notice period is three months if the third year of contract has started; the Court of Appeals noted that the contract entered into on July 1, 2005 had been terminated on December 10, 2007, meaning that the contract was in its third year. As such, the Court of Appeals rightfully held that Mr. X was to apply a three-month notice period".*