

Commercial agents, material breach of contract and duty of loyalty

Recent court decisions in France have attempted to refine the definition of a material breach of contract (*faute grave*) by the commercial agent on the one hand and of the duty of loyalty (*devoir de loyauté*) they owe their principal on the other hand.

First, France's highest civil law court, the Cour de cassation ([Commercial division, 08 June 2017, 15-29.313](#)) set as a principle that a material breach of contract by the agent is not sufficient grounds for denying the agent compensation for termination **unless the breach is the cause of the contract's termination**. In the case at issue, a commercial agent had terminated an agreement because the principal kept withholding the payment of commissions owing to the agent; the agent requested the payment of compensation for termination. The principal had refused on the grounds that the agent was guilty of a material breach of contract, having taken on him to negotiate product terms of sale directly, contrary to the terms of the contract. The position of the Cour de cassation is quite clear: Even if such conduct might amount to a material breach of contract, it is not grounds for denying the agent compensation for termination insofar as the contract's termination did not originate therein. Where the principal wishes to invoke a material breach of contract by the agent, they must initiate termination proceedings on such grounds, not wait for the agent to terminate the contract.

The Cour de cassation traditionally holds the view that it is a material breach of contract for an agent to represent products that compete with the products marketed by their principal. Here the court went further by ruling that **representing non-competing products marketed by a competing business** also was a material breach of contract ([Commercial division, 29 March 2017, 15-26476](#)). In the case at hand, Achat Direct had recruited an agent to promote decorations. At the same time, the agent had entered into another agreement with People Love It under which it was to represent lamps. Achat Direct having criticised the agent for working with a competing business, the agent immediately put an end to the business relationship with People Love It. Achat Direct terminated the contract nonetheless for material breach of contract by the agent and refused to pay them any compensation for termination. Although the Cour de cassation found that the contract's non-compete clause was invalid because too vaguely worded and that the agent had not represented the same products, it nonetheless found that the agent was guilty of a material breach of contract on the sole grounds that the agent had represented a competing business without the principal's authorization, whereby the fact that the agent had immediately put an end to the relationship with the competing business was irrelevant. This is a typical illustration of the agent's statutory non-compete obligation included in article L134-3 of the French Commercial Code.

However, the Bordeaux Court of Appeal (09 January 2017, 15/03500) recalled that a material breach of contract by the agent, **by its very nature, prevents the continuation of the contractual relationship**. For instance, one-off, insufficiently proven actions cannot amount to a material breach of contract in the meaning of article L134-12 of the French Commercial Code. In the case at issue, the court declined to find that the conduct of the agent, who from time to time had passed themselves off to several of the principal's customers as a direct importer of competing products, amounted to a material breach of contract insofar as the principal had been fully aware of the situation and had tolerated it.

On the other hand, the Paris Court of Appeal (04 January 2017, 14/12979) found against an agent who had **intentionally deceived their principal** by hiding the fact that they had set up a business that they intended to introduce to the principal as a new customer. In the case at hand, Al Ko, a manufacturer of spare parts for automobiles, had recruited a commercial agent who, in addition to their job as a commercial agent, had set up a company, ATW, for the purpose of marketing spare parts for automobiles. After having authorized ATW to market its products, the principal had limited their relationship with ATW to a simple storage facility. The commercial agent then set up another company, FIPA, which it introduced to the principal who established a business relationship therewith. However, Al Ko terminated its business relationship with ATW and FIPA on the one hand and the agency agreement on the other hand after finding out that FIPA had been set up by the agent for the purpose of anonymously and fraudulently recreating a distribution network that Al Ko had decided to terminate. The Court of Appeal found that the fact that Al Ko's forbidding ATW from marketing its products and the agent's setting up of FIPA had occurred simultaneously was proof that FIPA was set up by the agent to circumvent the end of the marketing authorization granted to ATW by Al Ko and that as a consequence the agent was not entitled to any compensation for termination.

Lastly, the Paris Court of Appeal (30 March 2017, 15/15977) contributed interesting solutions **for termination cases where both the principal and the agent have breached the contract.**

First of all, the court found that the termination of an agency agreement **for breach by both parties** excludes any notion of material breach by the agent. Here the agent accused the principal of failing to settle several commission invoices and of breaching the contractual territorial exclusivity whereas the principal accused the agent of representing competing businesses during the term of the contract. This is a strict interpretation of the definition of a material breach of contract which appears to be the result of the conduct not only of the breaching party (the agent) but also of the contracting partner's. The court's position seems to imply that, where the principal has also breached the contract, it can no longer accuse the agent of material breach but only of a "simple" breach of contract, which does not constitute sufficient grounds for denying the agent compensation for termination.

Furthermore, the Court of Appeal directly set the **amount of compensation** owed to the agent, taking the agent's breach into account to reduce it. In theory, the principal would first need to prove a loss caused by the agent's breach, which they could then set off against the compensation owed to the agent (generally 24 months' worth of remuneration). In the case at hand, the court, at its sole discretion, immediately set the amount of compensation owed to the agent at 12 months' worth of remuneration without first attempting to determine the loss effectively suffered by the principal due to the agent's breach.

The other innovation contributed by this ruling is that it **does not grant the agent any compensation in lieu of notice** on the grounds that the agent, by breaching the contract, contributed to its termination – even though, according to article L134-11 of the French Commercial Code, only a material breach of contract can justify a termination of an agency agreement without prior notice.

By Ornella Edon and Christophe Héry

Contact: Christophe Héry

E-mail: chery@lmtavocats.com

Tel.: +33 1 53 81 53 00

Fax: +33 1 53 81 53 30

LmtAvocats

www.lmtavocats.com

Follow us on 

Click on the following links to view our previous Distribution / Competition newsletters:

- [Designers and operators of connected devices: Beware the new personal data protection rules!](#)
- [Forum-selection clauses and the sudden termination of an international business relationship](#)
- [Are you a victim of anti-competitive practices? Then these new rules should help you to secure compensation](#)
- [The freedom to negotiate prices: A significant imbalance is where the courts draw the line](#)
- [The Sapin II Act: Relaxing pricing transparency regulations and hardening the rules against restrictive business practices](#)

Click here to view of other newsletters.

Lmt Avocats A.A.R.P.I. is an independent business law firm with about 40 lawyers and staff led by 10 partners. Whether as legal advisors or trial lawyers, we provide advice and assistance, mostly in international contexts, to both French and foreign clients in the main fields of business law: company law, employment, tax, commercial litigation, distribution and competition law, bankruptcy proceedings, commercial property, construction law, public law, IP / IT, international arbitration, industrial risk & liability and insurance law.

This newsletter is not a legal opinion and should not be construed as giving any advice on any specific facts or circumstances. If you no longer wish to receive this newsletter, please send us an e-mail at Unsubscribe with a word to that effect in the subject line.

www.lmtavocats.com