Commercial Agency Contract: FRANCE

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1 Applicable Norms

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French law has recognised the specificity of the role of the commercial agent for years and provided the commercial agent with specific protection as early as 1958. Indeed, French law governing commercial agency was the source of inspiration for the protections under European law.

The original French statute is a decree dated December 23, 1958 setting out specific protections and organising a registration process (the Registre Spécial des Agents Commerciaux – RSAC).

This statute changed little until the law dated June 25, 1991, which introduced into French law the rules embodied in the CEE Directive 86-653 dated December 18, 1986. The June 25, 1991 law gave rise to an implementing decree issued on June 10, 1992.

Certain provisions of the December 23, 1958 law remain in force (those concerning the RSAC).

The June 25, 1991 law came into force gradually, and only applied to all contracts from 1994 onwards. It now applies to all contracts regardless of the date of signature.

French law rules governing commercial agency are currently codified under sections L 134-1 to L 134-17 of the Commercial Code.

In addition to statute, case law has made a large contribution to the definition of the rules applicable to commercial agents.

2 The Commercial Agent: Definition and criteria

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2.1 Definition under law

Article L 134-1 du Code de Commerce :

"Commercial agents are agents who, as independent professionals not linked by contracts for services, shall be permanently entrusted with negotiating and possibly concluding sale, purchase, rental or service provision contracts for and on behalf of producers, industrialists, traders or other commercial agents. Commercial agents may be natural or legal persons.

Agents whose representation tasks are carried out in the context of economic activities which are covered, with regard to these tasks, by special acts shall not come under the provisions of this chapter."

The rules governing commercial agents do not apply to activities regulated by specific bodies of law (insurance, travel agents, real estate agents, intermediaries in banking or stock exchange activities, agents for the sale of advertising).

The commercial agent is an agent, i.e. he must have the authority to act in the name and for the account of the principal. This excludes the intermediary who simple presents products, provides information or acts as a go-between. The commercial agent does not necessarily have a right to enter into contracts in the name of and for the account of the principal, provided he effectively represents and negotiates in the name of and for the account of the principal.

The relationship must be permanent, i.e. not limited to a specific task. Handling of isolated transactions, even if numerous, does not give rise to the statutory protections afforded a commercial agent.

2. The Commercial Agent: Definition and criteria

The commercial agent is an independent contractor, solely responsible for the organisation of his activity. A commercial agent is not a salaried employee. This criteria may be an issue where the commercial agent has only one principal, and thus is in a position of dependence, in fact, vis à vis his principal.

The agency relationship gives rise to reciprocal rights and obligations. The agent owes duties to the principal (to obtain the best financial conditions, non compete) and the principal owes duties to the agent (products, performance of the contract with the third party client).

2.2 Must there be a written agreement?

For a long time, the Courts in France considered that the protections of law governing commercial agency only applied where a formal contract had been signed. Article 134-2 of the Commercial Code states that the commercial agent has a right to a written agreement defining the rights and obligations of the parties. Today, the commercial agency relationship is recognised by the Courts even in absence of a contract, or even where a different type of relationship has been agreed, when in reality the relationship meets the criteria of commercial agency.

The parties may, however, exclude the characterisation of the relationship as commercial agency where the commercial agency relationship is subsidiary to and an accessory of another contract, e.g., the case of a distributor who also acts as his supplier's agent in providing accessory services in the context of the distribution contract. Such an exclusion must be in writing and included in the main agreement.

2.3 Multiple uses of a commercial agency contract

Commercial agency is found at all levels of economic activity, not only in B to B relationships, but also B to C, and both for professional and non professional consumers. Commercial agency is widely used, for instance, in door to door sales.

Commercial agents may work in France or abroad. French legal protections will only apply if the contract is governed by French law. Choice of law in international commercial agency agreements is free under the Hague Treaty of March 14, 1978. In the absence of a specific choice of law, the Hague Treaty provides (article 6) that the law of the State in which the commercial agent is established applies, or alternatively, the law of the State in which the contract is mainly performed.

3 Commercial agency and other similar contractual relationships

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3.1 Distributor, Commission Agent, Broker

The Distributor buys and sells for his own account, not as an intermediary acting for the account of a principal.

The Commission Agent acts for the account of a principal, but in his own name. The fact that he acts as an agent is not disclosed.

The Broker simply acts as a go-between, introducing the parties who contract directly in their own names and for their own account.

Distributors, Commission Agents and Brokers are all merchants. The Commercial Agent is not. Commercial Agency is a civil law relationship, and disputes arising with respect thereto are heard by the Civil Courts, not the Commercial Courts.

3.2 Salaried employee

The salaried employee acts in the name of and for the account of the principal, however he is not independent.

In reality, there is much room for confusion between commercial agency and salaried employment, as the activities are very similar. This is particularly true where the commercial agent has only one principal, a situation where his independence if fairly theoretical.

3 Commercial Agency and other similar contractual relationships

Similarly, where the principal participates in the organisation of the agent's activity, or provides the means for that activity (office, vehicle, staff), or sets standards of performance or requirements as to implementation, there is a serious risk that the relationship will be characterised by the Courts as salaried employment, with application of the protections of French Employment Law.

Law 2003-721 of August 1, 2003 provides some security in stating that where the agent is registered as such on the special registry (RSAC) it can be presumed that he is an independent agent and not a salaried employee. This presumption can be set aside if in fact the agent, or the social security administration, can show that in fact he did not act independently and that there was a subordinate relationship characterising salaried employment.

4 Essential rights of the commercial agent

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French law protects the commercial agent and regulates the contract with the principal. Certain rules are a matter of public order, cannot be waived and apply even where the parties may have stated otherwise in their agreement (right to a written contract, reciprocity of obligations, notice, commission, termination indemnity, limitation to two years of any non compete clause).

The principle rights of the commercial agent under French law are:

4.1 To a written contract

Even if no written contract was signed at the beginning of the relationship, at any time the commercial agent can demand one.

4.2 To loyal execution of the contract

This is a reciprocal obligation as both agent and principal owe each other loyal performance of their duties:

- the agent must not represent a competitor (article L 134-3)
- principal and agent must respect their mutual interest, and neither may act solely in his own interest, contrary to the mutual interest of the parties (e.g. if the principal prospects clients directly)
- principal and agent must inform each other : the agent of the steps taken on behalf of the principal, the principal with respect to the product and market trends to assist the agent in performance of his duties.

4.3 Exclusivity?

Exclusivity is not an essential criteria of the commercial agency. There is no presumption of exclusivity in a commercial agency agreement. Exclusivity must be provided expressly in writing.

Where exclusivity is granted over a territory or a clientele, all orders falling within the scope of the exclusivity will give rise to a commission, unless otherwise provided in the contract, which is permissible under law. These clauses must be drafted with care to properly limit their scope to business effectively generated by the agent.

The principal purpose of the exclusivity should be to prevent the principal from granting a parallel agency for the same territory or clientele, or to act directly with respect thereto.

4.4 Commission

The agent has a right to a commission over all transactions generated by him.
Unless otherwise agreed by contract, this right extends to direct orders sent to the principal by clients who had previously ordered through the agent and to orders received by the principal after the termination of the agency agreement, for orders resulting from the activity of the agent during the validity of the contract.

Commissions may be split between several agents working together. It is important to provide clear contractual rules in this situation. Otherwise the Courts will decide the split on rules of equity.

The commission is due when the transaction is completed by the principal, unless otherwise provided by contract (e.g. in the event of non payment or other breach by a third party through no fault of the principal).

In the case of the "ducroire" commercial agent, the agent guarantees the performance of the contract by the client. This type of clause, which must be in writing, is common in cases where the agent's duty is to receive payments on behalf of the principal on delivery of the product.

The commercial agent is treated like an ordinary creditor in the bankruptcy of the principal, unlike the salaried employee who has the benefit of guarantees.

Commissions must be paid to the agent no later than with a month of the close of each calendar quarter, reflecting the common practice of payment at the end of each quarter.

4.5 Contract terminable with notice

Fixed term contracts are allowed, but if the contract is pursued for over two years, even through tacit renewal, the commercial agent is deemed to have the benefit of a contract terminable with notice.

4.6 Notice

Minimum notice for termination of a commercial agency contract is:

- one month during the first year
- two months during the second year
- three months thereafter

No notice is required in the event of the agent's wilful malfeasance or force majeure.

4.7 Termination indemnity

Where the termination occurs through no fault of the agent and at the initiative of the principal, the agent has a right to an indemnity to compensate him for the damage caused by the termination. This indemnity must be claimed within a year of the termination.

Because the indemnity represents compensation for damages, the parties may not agree in advance on the amount. However, once the contract is terminated, and the right to the indemnity accrues to the agent, the parties can settle on the amount of the indemnity.

In the absence of agreement as to the amount of the indemnity, the Court will set an amount.

Generally speaking, the indemnity is equal to two years of commissions, but this is not an absolute rule. The indemnity is set as a function of the damages suffered, in particular the loss of clientele linked to the products or services supplied by the principal and investments made but not fully amortised.

4. Essential rights of the commercial agent

No indemnity is due in the event of termination by the agent, unless the termination is due to age, sickness or infirmity of the agent, rendering it impossible to continue performance of the contract.

If the contract is terminated for breach by the agent, no indemnity is due. The burden of proof of the breach is borne by the principal. For instance, failure to prospect the clientele would be considered a terminable breach, as would engagement in competing activity or unjustified criticism of the principal's products.

Provision of a long notice period (one or two years) is a way of reducing the amount of the termination indemnity, as a long notice period reduces the damages suffered by the agent.

5 International Applications

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In the case international contracts (i.e. where one of the parties is situated outside of France), French law will only apply if no other law has been agreed by the parties, despite the application, in a French law contract, of many of the legal protections afforded a commercial agent as a matter of public order. In these cases, the parties are free to choose the governing law of the contract.

However, where both the agent and principal are situated in the European Union, for a contract performed in the European Union, the 1986 EU Directive will apply.

If the parties have neglected to designate the governing law, the contract will be subject to the law of the State in which the agent is established or where the activity is performed.

6 Anti Trust Implications

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6.1 Non compete obligations of the commercial agent

The commercial agent is not allowed to act for a principal who competes with another of the agent's principals, without the express written consent of the principal. To do so would be a serious breach of his fiduciary duties to his principal.

The commercial agent is allowed to act for non competing principals without authorisation, but he must inform each principal of his other agency relationships.

It is common practice to insert a non compete covenant in a commercial agency contract. Such a covenant is valid only if it does not exceed two years. Under general principles of French law, it must also be proportionate to the legitimate interests of the principal and may be set aside if deemed excessive by the Court. Thus, if a commercial agent works within a limited territory (e.g. a department), a non compete clause covering the entire territory of France would be deemed excessive, unless special circumstances justified the clause. The Court would be entitled to strike out the clause or reduce its scope.

The commercial agent does not have a right to compensation during the non compete period (unlike a salaried employee), as he will already have received a termination indemnity.

In the event of breach of the non compete covenant by the agent, the Court can order not only the payment of damages to the principal, but also, in summary proceedings, that the agent cease and desist from all competing activity, with a penalty set for each instance of breach.

6.2 Anti Trust rules applicable to the commercial agency relationship

In theory, there is no distinction between the position of the commercial agent and that of the principal. The agent is not a separate player in the market, and is not an 'enterprise' in the sense used by anti-trust rules. The relationship between the agent and principal does not, in principle, constitute a prohibited arrangement under French and EU anti-trust rules.

However, in certain circumstances the agent can be deemed to have an independent effect on the market, either due to the fact that the agent acts for a large number of principals or because the agent's client base is captive, allowing the agent to set pricing independently of his principals. In such circumstances, the agent, due to his scope for independent action, can be deemed a player in the market and subject to anti-trust rules. Such was the case, for instance, of a travel agent who, because he acted for a large number of tour operators, was pursued for price fixing.

CONTACT

Vatier & Associés was founded in 2002 by seven partners wishing to jointly develop their legal practice serving individual and corporate clients for their corporate affairs and litigation in France and abroad.

This combination of partners provides the firm with years of experience and confirmed expertise in assisting businesses from their inception (or arrival in France), through their mergers and acquisitions, disposals and reorganisations, helping them to integrate their business environment into the French legal framework for contracts, distribution, employment and administrative compliance.

The Firm's strong litigation expertise extends to high level arbitration, bankruptcy, banking and enforcement of awards, as well as white collar crime, and all types of civil and commercial disputes. Unusual amongst the major litigation firms in Paris, Vatier & Associés' activity extends beyond that of the traditional French firm, advising also with respect to a broad range of non-litigious matters arising for a French and international corporate clientele.

Bernard Vatier, former head of the Paris Bar (1997/98) is extremely active in France and abroad in promoting the legal profession, and was President of the European Bar (CCBE) in 2.005.

Specialising in advice to the business world, Vatier & Associés has strong practice groups in employment law, company and commercial law, assisting in transactions dealing in a variety of areas from property to governmental tender offers, with particular expertise in liability (under both civil law and criminal law), insolvency, insurance, and pharmaceutical distribution.

Vatier & Associés' approach to international teamwork is based on independence and quality, dealing with a large number of correspondents, on a non exclusive basis. French and international correspondents are chosen on a case by case basis in response to the specific requirements of each case. Medium sized firms, with general or specialised practices, they share Vatier & Associés' s principles of independence and quality, and provide the firm with broad based expertise allowing it to handle even the most complex and technical cases for its international and French clients.

Each partner is a specialised in his or her area of practice and partners work together closely in teams in order that each case be handled by the most qualified partner, in liaison with the client partner.

Several partners may be involved in cases which draw on a variety of areas of expertise.

CONTACT

Technical skills

Technical skill is a fundamental for Vatier & Associés : the former head of the Paris Bar (with a life-long right to the title " Bâtonnier "), Bernard Vatier, has attracted a group of partners chosen for their high level of technical qualification, as well as their corporate and litigation experience.
The type of cases and the fidelity of the clients bear witness to the quality of the work done.

Humanity

Each case has a human side.
Clients deal directly with partners, from the opening to the close of the case. A reasonable number of associates (approximately 15) assist, but the firm makes it a point of honor that clients work as much with the partner as with the associates.

Ethics

The attachment of the partners to their ethical duties, and their experience in dealing with ethical issues are essential to the firm, as both the Courts and clients well know.
Ethics are not only revealed in the strict respect of rules of conflict of interest and client/attorney privilege, but also in the quality of the work performed for clients, a transparent approach to billing, a respect for specific client needs, continued legal education for all lawyers in the firm, particularly in rapidly changing areas of the law.

The principal areas of the firm's practice are:
Litigation, Corporate, Property, Health, Public Service.

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