

Commercial Agency Contract: LUXEMBOURG



1 Claims of the Agent in the case of termination of the contract

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1.1 Introduction

Applicable norms

In Luxembourg, the legal framework governing the commercial agency contract was established by the Act of 3 June 1994 published in the Memorial A, Recueil de Législation number 58 and dated 6 July, 1994 (“the Luxembourg Law”), which essentially enacts in national legislation the Directive 86/653/EEC Member States on the coordination of the laws of the Member States relating to self-employed commercial agents and bring Luxembourg into line with other member states, notably France, Germany and United Kingdom.

Prior to the Luxembourg Law, there was no specific legal framework in Luxembourg for commercial agents. The activity of commercial representation was governed by Civil Code’s provisions (in particular rules on mandate) as well as by case law. Furthermore, Labor law, in particular the Act of 24 May 1989 on employment contracts, has allowed the distinction between the activities of commercial agents on self-employed basis and the ones under employment contracts as salaries. Regarding restraint of trade clauses, these clauses were valid as far as they did not set out general and absolute prohibition. Parties were free to determine their mutual obligations as the duration of the contract, the remuneration and the modalities relating to termination of the contract.

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The Act of 31 June 1994 is very close to the Directive. However, whenever the Directive gives to the Member States freedom, the Luxembourg legislation has been strongly influenced by the convention on commercial agency signed on 26 November, 1973 by Belgium, the Netherlands and Luxembourg on November 1973 (“the Benelux Convention”) but which has never entered into force due to the absence of ratification by Luxembourg and Belgium.

The commercial agent: definition and criteria

Article 1 of the Luxembourg Law sets forth:

“For the purposes of this Act, “commercial agent” shall mean a self-employed intermediary who has continuing authority to negotiate either mainly or secondary against remuneration the sale or the purchase of goods on behalf of another person, hereinafter called the “principal”, or to negotiate and conclude businesses on behalf of and in the name of that principal.

The commercial agent is a commercial subject to provisions on the Act on establishment/setting up of 28 December 1988. He is not subordinated to the principal”.

Under Luxembourg law, the commercial agent is a merchant “commerçant “ in first hand subject to Commercial Law and shall thus comply with the Act of 28 December 1988 governing the right to set up skilled craft trades, industry, commercial business and certain professions. This Act states that a government permit is required for any industrial or trade activity. The commercial agent shall ask for this government permit prior to start its activities carried on in Luxembourg.

The commercial agent shall not be subordinated to the principal so that he may organize his activities up to him and he has time at his disposal. The commercial agent shall be independent and acts autonomously.

A person who has power to enter into commitments on behalf of a company is not a commercial agent. Neither is a partner acting as a partner in his firm.

Thus, this Act does not apply to commercial agents who are legally subordinated to their employers pursuant to an employment contract governed by the Act of 24 May 1989 on employment contracts. The salaried employee acts in the name of and for the account of the principal, however he is not independent. In reality, their activities are very similar to those of commercial agents.

In accordance with the option proposed by the Directive, the Luxembourg legislator has decided that the Luxembourg legislation shall also apply to commercial agents whose activities are secondary. These activities shall be carried on on a permanent basis but shall not be occasional. Handling of isolated transactions, even if

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numerous does not give rise to the statutory protections afforded a commercial agent.

Whereas the Directive refers to commercial agent as the ***“one who negotiate the sale or the purchase of goods on behalf of another person or negotiate and conclude such transactions on behalf of this person”***, the Luxembourg Law has opted for the wording of the Benelux Convention mentioning general terms “negotiate and conclude businesses” as the activities of the commercial agent are not limited to the sole activities of sale and purchase of goods but include as well service activities.

The Luxembourg Law requires that agency contracts and any subsequent addenda or amendments shall be made in writing in double exemplars in order to afford to parties increased securities. Thus, Luxembourg took the option allowed by the Directive to consider agency contracts as not valid unless evidenced in writing.

The agency relationship gives rise to reciprocal rights and obligations. A principal owes duties to a commercial agent such as:

- to provide him with the necessary documentation
- to obtain for the commercial agent the information which the agent needs to perform the agency contract
- to notify the commercial agent if he anticipates that the volume of commercial transactions will be lower than the agent could normally have expected

The agent owes duties to the principal:

- to make proper efforts to negotiate and conclude transactions
- to communicate to the principal all the necessary information available to him
- to comply with the principal's reasonable instructions.

2 Indemnity or/and compensation



Prior to the introduction of the Directive and due to the absence of specific legal framework governing the commercial agency contract, the only possibility for commercial agents to be indemnified after termination of the agency contract, in absence of a written contract including indemnity's clause, was in the context of an action brought to Luxembourg Courts with claims based on general principles of Civil Law on obligations, Civil law rules governing mandate and Commercial Law.

In accordance with the Directive, the Luxembourg legislator has implement regulations ensuring that after termination of the agency contract, commercial agent is entitled to be indemnified.

Luxembourg law, being inspired by the system set out in the Benelux's Convention provides for cases where termination of the contract confers the agent the right to an indemnity called "eviction indemnity" and the other option proposes by the Directive relating to compensation for the damage suffered by the agent as a result of the termination of the agency contract.

The expression "eviction indemnity" refers generally to the indemnity claiming by the titular of a commercial lease whose renewal is refused at the end of its lease. This indemnity granted by courts may be so important so that the indemnity may allow the renewal of the lease.

The agency contract concluded for an indefinite period or for a fixed period with a term allowing an anticipated termination may be terminated by notice by either party. The duration of the notice varies according to the duration of the agency contract. The minimum period of notice

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for termination of agency contract is as follows:

- one month for the first year of contract
- one month more for each additional year commenced but the period of notice cannot exceed six months

The parties may not agree on any shorter periods of notice.

No notice is required in the event of willful malfeasance or force majeure of each party.

The Luxembourg legislator provides compensation in case of non respect of the notice and in case of termination of the contract before its end in case of agency contract concluded for a fixed period as in the Benelux's Convention.

If compensation is claimed by the commercial agent in this context, damages could be cumulated with the amount of the eviction indemnity. However, if the agency contract was terminated in accordance with the rules set by the Luxembourg Law, the commercial agent is not entitled to receive additional indemnity on the grounds of the Luxembourg Law. A decision taken by the Luxembourg highest Court ("Cour de cassation") taken on 17 January, 2002, considers that the commercial agent is entitled to indemnity and in case of non respect of the notice compensation but nothing else.

However, the commercial agent shall seek damages based on other grounds.

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3 Conditions of eviction indemnity

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Under Luxembourg Law, the commercial agent shall be entitled to an eviction indemnity if and to the extent that the following requirements have been met:

- the commercial agent brought the principal new customers or has significantly increased the volume and the principal continues to derive substantial benefits from the business with such customers.

In this respect, a decision taken by a Luxembourg Court (Cour d'appel 22/03/2002, number of the role 25250) has specified, regarding the grant of the eviction indemnity, that the new customers must have been brought as a result of specific activities of the agent and the principal must continue to take substantial benefits from the business with these customers. The Court has insisted on the fact that it should concern important customers who survive by themselves once the suspension of the commercial agent's activities.

- the payment of this indemnity is equitable having regard to all circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers as well as the restrictions placed on his professional activities due to the inclusion of a trade clause if any.

- the commercial agent shall, within one year following termination of the contract noti-

3 Conditions of eviction indemnity

fy to the principal that he intends pursuing his entitlement to the indemnity, if not the commercial shall lose his entitlement to identity. In other words : upon the requirements for eviction indemnity to be paid being met, the agent has one year to notify the principal that he wishes to receive it; in the event of the principal refusing to pay, the agent may resort to the courts but he has one year to do so, after which his right will lapse.

However, the eviction indemnity is not due under the following circumstances:

- where the principal has terminated the agency contract because of serious default attributable to the commercial agent justifying immediate termination of the agency contract. Whereas the wording of the Directive is “default”, the Luxembourg legislator has added the adjective “serious “.

According to a decision taken by Luxembourg Court (Tribunal d’Arrondissement 17/01/2002), a “serious” default could be composed of serious wrongs which makes the maintenance of the contractual link between the commercial agent and the principal impossible.

- where the commercial agent has terminated the agency contract at his request, unless such termination is justified by circumstances attributable to the principle or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue its activities. Those circumstances shall make it impossible for the commercial agent to carry on its activities. The death of the commercial agent does not prevent his heirs to claim the eviction indemnity due in respect of the commercial agent contract.

- where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person. No indemnity is due because in this case, the commercial agent and the third party agree to the amount due to the commercial agent in consideration of the transfer of the agency contract.

The fact that the agency contract had a limited duration does not prevent the commercial agent to claim an eviction indemnity. In this case, the amount of the indemnity will be calculated on a prorata basis.

According to the Luxembourg law the principal and the commercial agent may agree to derogate from the grant of the eviction indemnity if the following conditions are fulfilled:

- the derogation shall occur only after termination of the agency contract
- the derogation shall occur only with the consent of the commercial agent

4 Calculation of Indemnity

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The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years in the context of his contract binding him to the principal.

If the event of the contract having been in force for less than five years, the indemnity shall be calculated based on the average's remuneration throughout the period it was in force.

The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

The limit of the amount of the eviction indemnity is thus one year of the commercial agent's remuneration.

Under Luxembourg law, remuneration of commercial agents having been agreed upon between the parties shall be made as follows:

- a given fixed sum
or
- a commission which may consists of a percentage on the volume of business achieved by the commercial agent or of the value of this business
or
- a combination of both given sum and commission

If there is no agreement as to remuneration (which as a matter of good practice there should

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be), the commercial agent is entitled to remuneration customarily allowed to commercial agents for the type of goods involved in the area where the commercial agent carries on his activities. If there is no such customary practice, the commercial agent is entitled to reasonable remuneration.

In case of litigation concerning the amount of the indemnity, the judge is competent to raise or to reduce the amount of such indemnity.

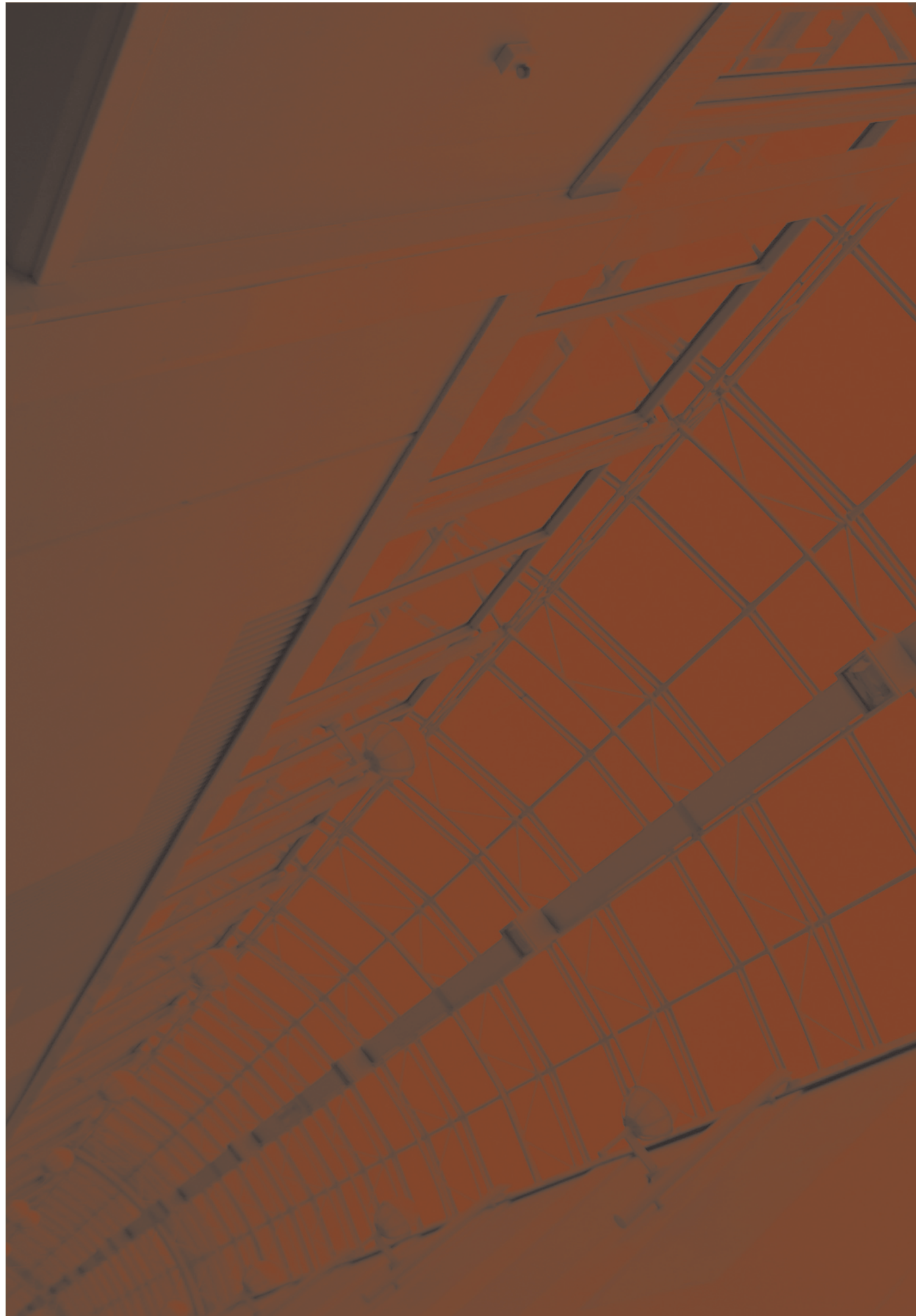
5 Indemnity and/or compensation for franchisee

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The term “franchising” is used to describe many different forms of business relationships, including licensing, distributor. The more popular use of the term has arisen from the development of what is called 'business format franchising.'

Business format franchising is the granting of a license by one person (the franchisor) to another (the franchisee), which entitles the franchisee to trade under the trademark or trade name of the franchisor and to make use of an entire package, comprising all the elements necessary to establish a previously untrained person in the business and to run it with continual assistance on a predetermined basis.

There is no specific legal framework in Luxembourg for franchising so that there is no legal rule regarding the indemnity after termination of franchising contract. The General Principles of Law of Obligation and freedom of contract apply.





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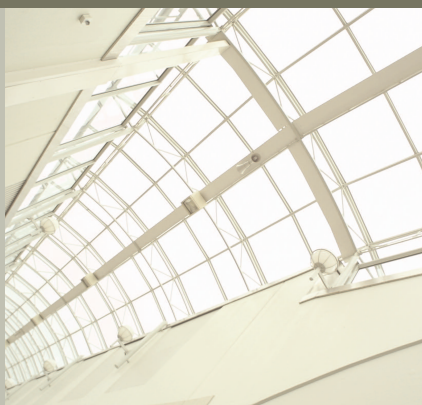
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