FORMAL REQUIREMENTS FOR A COMMERCIAL AGENCY CONTRACT

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Received:11/03/2024; Accepted: 28/08/2024; Published: 19/09/2024

Abstract:
A contract serves as the legal framework through which parties express their intentions regarding their obligations and rights toward each other. It establishes the relationship between the principal and the commercial agent, thus directly linking the existence of the contract to the commercial agent. For a commercial agency contract to be valid and meet its legal requirements, it must fulfill all general substantive conditions of contracts as well as formal conditions. Additionally, the commercial agency contract requires specific formal requirements that distinguish it from other commercial contracts, such as the exclusivity clause and the non-competition clause.

Keywords: *Commercial Agency Contract, Principal, Commercial Agent, Exclusivity Clause, Non-Competition Clause.*

INTRODUCTION:

The commercial agency is one form of commercial activity whereby a trader delegates certain commercial transaction to another person who acts on their behalf in carrying out these transactions. This delegation is formalized through a contract known as a commercial agency contract, in which the parties mutually define their rights and obligations as well as the temporal and spatial framework for executing the agency contract. As such, the agency is considered a contract within private law, given that its parties are private law entities governed by commercial law. The legal framework of the agency contract is subject to the general contract theory in terms of the elements required for its formation and the conditions for its validity.

For a commercial agency contract to be valid and meet its legal requirements, it must fulfill all general substantive conditions of contracts, including a valid consent free of any defects, issued by legally capable parties, and must adhere to the formal conditions necessary for these contracts, such as being in writing and registered in a special registry. Additionally, the commercial agency contract requires specific formal conditions that set it apart from other commercial contracts.

From this standpoint, the central question of this study is: To what extent do the exclusivity and non-competition clauses apply in a commercial agency contract?

This question will be addressed in two main sections, with the first focusing on the exclusivity clause, and the second on the non-competition clause.

Section One: The Exclusivity Clause in a Commercial Agency Contract

The default position for a commercial agent is that they are not required to restrict their activity in promoting goods or products to a single producer. They are entitled to operate on behalf of multiple producers as long as there is no conflict of interest among these producers. However, it is common for the commercial agent to require the principal to refrain from granting an agency to sell the same products to another person within the area where the agent operates, allowing the agent to act exclusively on behalf of the principal without competition.

The exclusivity clause is typically implied in a commercial agency contract unless the parties agree otherwise. To clarify this issue, we will first examine the concept of the exclusivity clause, followed by an exploration of the scope of this clause as follows:

First: The Concept of the Exclusivity Clause

The exclusivity clause entails that one of the parties in an agency contract devotes their efforts within a specified field or exclusively for the benefit of a specific person. For example, it may

stipulate that the commercial agent only markets the products of a single producer, or that the principal exclusively selects one agent to market their products in a specific area. Alternatively, it may restrict the agent to act solely on behalf of the principal within a certain geographical region.[1]
In a commercial agency contract, the exclusivity clause implies that the agent is the sole representative of the principal for promoting products or services, or for concluding deals concerning them, within a designated geographical area. The agent may also have exclusive rights to a specific type of product or service provided by the principal. Although the contract might include this clause, it is not a condition whose absence or omission would render the contract void.[2]
Typically, commercial agency contracts impose exclusive distribution rights within a defined geographical area, limiting the agency to a single agent and prohibiting the agent from receiving agency contracts for other producers or companies in the same region. This arrangement, known as the mutual exclusivity clause, binds the agent to refrain from accepting other agency contracts that could compete with the original principal. In turn, it also obligates the principal not to appoint any other agent who might compete with the first agent within their operational area.[3]
French legal scholars have defined it as a clause whereby one contracting party grants the other exclusive rights to a product or service within an agreed-upon geographical scope.[4] Other scholars view it as an obligation imposed on the commercial agent to restrict their activities for the benefit of a single principal, granting that principal exclusive benefit from the agent's transactions, which places the agent in a position of true economic dependence, a feature characteristic of commercial representation.[5]
Another perspective refers to it as the obligation of one party to deal exclusively with the other party within a specific area and limits, known as the regional exclusivity clause.[6] This exclusivity clause was explicitly stipulated in French legislative decree issued on December 23, 1958, in Article 1, Paragraph 2.[7]
In Egyptian legislation, the exclusivity clause is addressed in Article 179 of the Commercial Law, which states: "The principal may not employ more than one contract agent in the same region for the same type of activity, nor may a contract agent represent more than one establishment engaged in the same activity in the same region, unless expressly agreed otherwise by the parties."[8]
On the other hand, Algerian law does not explicitly define the exclusivity clause, unlike many comparative legislations. However, it implicitly references exclusivity in various scattered legal texts, such as Article 102, Paragraph 2, of Ordinance No. 97-10 related to copyright and related rights. This provision states that the exclusivity clause for an author's work may not exceed three years from the date it is made public.[9] Meanwhile, Egyptian law in Article 179 of the aforementioned Commercial Law addresses the exclusivity issue by assuming its presence in exclusive agency contracts unless expressly excluded by the contracting parties.
From the above, it is evident that the exclusivity clause is commonly found in commercial agency contracts due to its significance for both the principal and the commercial agent. It is essential for the principal, particularly for an industrial establishment, which needs a commercial agent to market its products. When the commercial agent is the sole representative, they can focus their efforts on marketing the product they represent throughout the country where they hold the agency.

Second: The Scope of the Exclusivity Clause

A commercial agency contract may include an exclusivity clause regarding the agent's activity, whether this exclusivity pertains to defining the geographical scope or specifying a particular type of goods.

1. Defining Exclusivity in Terms of the Place and Duration of the Activity

In this context, the commercial agent is referred to according to the geographical scope of their activity. They may be known as a "general agent" (Agent général), who holds exclusive distribution rights within a specified region, such as the Middle East or the Gulf. Alternatively, they may be designated as a "regional agent" (Agent régional) if their activity is restricted to a region within the country, a specific city, or a particular geographical area, or even as an agent for a single province (Agent général).[10]

The importance of clearly defining the commercial agent's geographical scope lies in how third parties interact with the principal. When a third party contracts with the commercial agent, they enter into a direct relationship with the principal, and the agent's office within their area of activity serves as the legal center for representing the principal in matters related to the agency.

Defining the geographical scope enables the exclusivity clause in a commercial agency contract to offer substantial benefits to the principal, who gains assurance that the commercial agent will not represent other principals within their territory or engage in similar activities within the contract's specified geographical area. This exclusivity protects the principal from competition on both fronts, maximizing profits, expanding their business, and increasing investments.[11] The principal is responsible for defining the commercial agent's authority and ensuring they do not exceed the exclusive area, taking necessary measures to enforce this. The agent's exclusive hold on agency activity within a region also benefits the principal, enhancing the marketing and reputation of their goods, particularly when the agency operation is successful within a given territory.

The scope of the commercial agent's authority in representing the principal can be further defined so that, if the agent exceeds their geographical bounds, any affected party—such as another agent for the principal in a neighboring area—may seek compensation. However, if the agent exceeds their authorized area without harming any third party and with the principal's explicit or implicit approval, it is considered prior approval of the transaction.[12]

In cases where a transaction is conducted within another agent's area, the latter is entitled to a commission for each transaction completed by the commercial agent with the principal's consent. Without this consent, the commercial agent is responsible for any consequences without imposing any liability on the principal. The principal may also execute the transaction themselves and later seek compensation from the commercial agent.[13]

Regarding the duration of the commercial agency contract, it is typically established from the date the contract is signed until its termination. If no specific duration is stated, it remains in effect until the contract naturally concludes.[14]Exclusivity may also be limited to a set duration, allowing the principal to appoint additional agents within the same region after the exclusivity period ends. Each contract may stipulate unique conditions, permitting the principal to appoint multiple agents within a specific area for the same goods. However, if exclusivity is time-bound and the principal appoints another agent for the same products within that period, courts have ruled that this action constitutes not only a breach of contract but also its termination, as established by English courts.[15] French legal doctrine also considers such a breach of exclusivity as grounds for termination of the agency contract, based on Article 2006 of the French Civil Code, which states that appointing a new agent for the same task equates to termination from the day the agent is informed.[16]This highlights the significance of the exclusivity clause in this context.

One of the primary effects of the exclusivity clause is the principal's responsibility to compensate the agent for any harm caused by breaching this clause. The agent has the full right to pursue appropriate legal actions to protect their right to exclusivity and prevent the principal from granting additional agency contracts to others.

2. Defining Exclusivity by Specific Types of Goods

Exclusivity may pertain to a specific type of goods or clients, whereby the agent is prohibited from brokering deals for other goods. An example of the exclusivity clause's application is when the principal and the commercial agent agree that the agent will operate exclusively within a specific region, while the principal retains the right to contract directly with specific clients within that area.[17] For instance, they may agree that the commercial agent's distribution be limited to wholesale rather than retail, or exclusively to individual consumers rather than other merchants, and vice versa. The purpose of the exclusivity clause in favor of the principal is to prevent the commercial agent from prioritizing another client's interests over those of the principal.[18]

Referring to Article 10 of Order 03/03, as amended and supplemented on competition,[19]it prohibits any monopolistic practices within the market, whether in marketing, production, or distribution. As such, monopolistic practices in distribution, like exclusive purchasing or distribution agreements, are deemed restrictive. Therefore, Algerian legislation prohibits absolute exclusivity clauses that

eliminate market competition by granting exclusive distribution or marketing authority to a single agent.[20]

On the other hand, the contract between the principal and the commercial agent may usually include a clause preventing the agent from accepting contracts from other agents to distribute the same products within their region, thus increasing their profits as a result. In this case, the commercial agent is considered the general distributor within a specific area. The principal may assign other agents within the same area if they distribute non-competing products unless otherwise agreed.[21]

The exclusivity clause does not prevent the commercial agent from engaging in other commercial activities. They may conduct non-competitive business on their own account, which does not conflict with their role as a commercial representative. Thus, the commercial agent can fulfill both roles simultaneously.[22] The contract may also prohibit the commercial agent from competing with the principal even after the contract ends. In this case, the restriction must specify a geographical area and the type of products involved in the commercial agency contract, and it should be time-bound according to Article L134-14 of the French Commercial Code of 1991 on commercial agencies, which stipulates, "The period shall not exceed two years after the end of the contract."[23]

The exclusivity clause offers numerous benefits for both the principal and the commercial agent. For the commercial agent, it eliminates competition, providing exclusive access to the product and the opportunity to leverage their expertise and knowledge of the market. This advantage enables them to attract the highest possible number of clients within their region by adopting the best promotional and advertising methods.[24] Additionally, the agent receives compensation for each transaction executed.

The exclusivity clause implies that the commercial agent is entitled to a commission on every transaction involving the distribution and marketing of the assigned goods, whether direct or indirect. A practical example is when the principal executes transactions independently or through another party within the agent's designated area. Even if the transactions were not a direct result of the agent's efforts, the agent remains entitled to a commission.[25]

The commercial agent's entitlement to compensation in this scenario is based on the principal's breach of their commitment to restrict distribution within the agent's territory. The principal is required to inform the agent of all transactions made without the agent's involvement to ensure fair compensation.[26]

In such cases, the principal and agent may agree that the agent will not receive compensation if the principal or another party executes specific transactions within the agent's area, as this does not concern public order. However, it is recommended that the contract stipulates each potential scenario to secure a mutual interest between the principal and the commercial agent and prevent disputes.

In principle, the commercial agent is not obligated to restrict their promotional activity to a single product. They may operate on behalf of multiple producers, provided no conflict of interest arises between them. Nevertheless, it is common for the commercial agent to require the principal to refrain from granting another agency for the same products within the agent's area, thereby securing exclusive contracting rights on behalf of the principal. This arrangement is known as the exclusivity clause. In some cases, the principal may stipulate that the commercial agent not accept other contracts to market similar products within the same area. The exclusivity clause may be time-bound or left open-ended.

Both the judiciary and legal scholars generally agree on the validity of this clause, even if it is absolute and not time-limited, as each party retains the right to terminate the agency unilaterally if the clause conflicts with their interests.[27]

Section Two: The Non-Competition Clause in a Commercial Agency Contract

Parties in commercial agency contracts often agree on a non-competition clause, prohibiting the commercial agent from engaging in similar trade that competes with the principal. Such clauses are considered valid if they are limited in duration, location, and activity type. It is generally recommended that the commercial agent refrain from competing with the principal, even without

an explicit clause, by avoiding competitive or unfair practices, as the nature of these contracts obligates the agent to act in the principal's best interest. Here, we will first examine the concept of the non-competition clause, followed by its scope as outlined below:

First: The Concept of the Non-Competition Clause

The non-competition clause is a significant departure from the principle of contractual freedom, as it is an agreement where one party commits to not engage in specific activities that would compete with the other party. For this reason, it is termed the non-competition clause (Clause de non-concurrence).[28]

This clause is also an application of the principle of good faith in contract performance, as stated in Article 107, Paragraph 1, of the Algerian Civil Code,[29]Paragraph 1 of Article 148 of the Egyptian Civil Code, and Article 1104 of the French Civil Code, issued on February 10, 2016. This principle requires that contracting parties avoid harming each other, refrain from intentional wrongdoing, avoid fraud and abuse of rights, and prevent gross negligence, such as harming vital interests or failing to perform obligations when effective means for good faith execution are available.*30*[30]

Additionally, the non-competition clause is a natural consequence of the mutual interest inherent in an agency contract. If a commercial agent promotes a competitor's products, it undermines the shared purpose of the agency, harming the principal's objectives. When the principal manufactures products that compete with those the agent is contracted to promote, this constitutes a breach of professional integrity.[31]

According to Article L134-4 of the French Commercial Code, issued on June 25, 1991, which governs relations between commercial agents and their principals, agency contracts are mutual-interest agreements and must therefore be executed in good faith.[32]

Due to the importance of this clause, various legal systems, such as French legislation, have addressed it explicitly. Article L134-14 of the French Commercial Code, issued on June 25, 1991, states that "the contract may contain a post-termination non-competition clause, which must be in writing and limited to a specific geographic area, a defined group of persons, and a specific type of goods or services, and is only valid for up to two years after contract termination."[33]

Article L134-3 of the same code provides that "a commercial agent may accept new principals without authorization; however, they may not represent a competing business without the prior consent of their current principal." Similarly, Article 2 of the older French decree issued on December 23, 1958, stipulates that "the commercial agent is entitled to represent additional principals, but may not represent competing businesses without the principal's approval and may conduct commercial operations on their own behalf."[34]

Second: The Scope of the Non-Competition Clause

This section addresses the scope of the non-competition clause, specifically concerning location, duration, and type of activity, with the agent's commitment not to engage in unfair competition against the principal.

1. Legitimacy of the Non-Competition Clause

The general principle of competition is that it involves lawful activities. However, some forms of competition are considered unlawful when a trader engages in practices that violate the norms of fair business conduct. Unfair competition includes any competitive act that conflicts with honorable practices in industrial and commercial dealings.[35] Legal scholars and courts widely agree that unfair competition claims fall under tort liability based on the personal fault committed by the defendant. This is stipulated in Articles 1240 and 1241 of the French Civil Code issued on 10/02/2016, paralleled by Article 124 of the Algerian Civil Code, which states: "Any act, whatever its nature, committed by a person through their fault and causing harm to others, obligates the perpetrator to compensate for the harm."[36]

Therefore, it is essential to distinguish between lawful and unlawful competition. The former encourages innovation, creativity, and fair rivalry, while the latter deviates from standard business practices and harms public interest. Algerian legislation, in Article 4 of Law No. 10/05, which amends and supplements Ordinance 03/03 on competition, specifies: "Prices for goods and services are set freely according to the rules of fair and free competition. Price freedom is exercised in

compliance with applicable legislation and regulations, based on equity and transparency principles, particularly concerning price composition for production, distribution, service provision, and goods importation for resale in their original state, as well as profit margins for goods production, distribution, or service provision, and transparency in commercial practices." [37] Additionally, Article 1 of Ordinance 03-03 on competition states: "This ordinance aims to establish conditions for practicing market competition, prevent anti-competitive practices, and oversee economic mergers to enhance economic efficiency and improve consumers' living conditions."[38]

One of the critical aspects of this ordinance pertains to transparency and fairness in commercial practices, which have been removed from competition law and incorporated into Law No. 04-02, which sets the rules for commercial practices.39 Furthermore, Articles 6 and 7 in Chapter Two of the same law address practices that restrict competition.

From the above, we conclude that a commercial agent is prohibited from representing multiple activities that engage in unfair competition with each other, especially if the agent is aware of this. Furthermore, the agent may not represent even a single activity that engages in any unlawful competitive practices as outlined in Articles 6 and 7 of Ordinance No. 03-03.

Therefore, legislation actively regulates competition between traders, safeguarding both traders and consumers, as well as the national economy, through legal provisions that distinguish between fair and unfair competition. Certain situations require specific individuals to refrain from competing against others due to their particular relationship, a concept known as prohibited competition.[40]

Regarding the commercial agent, who is a trader and operates independently from the principal, they are bound by an obligation to avoid unfair competition against the principal. This non-compete obligation implies that the agent must not undertake any activities that compete with those of the principal, whether for their own account or on behalf of other principals. Since restricting competition impacts a person's freedom to trade, it must be expressly stipulated and defined by agreement, legal provision, customary practice, or established trade usage.[41] The non-compete obligation may also extend beyond the duration of the contract.

The principal’s obligation to adhere to fair competition practices toward the agent, like any other trader, requires them to conduct their business with honesty, integrity, and good faith. If the principal acts otherwise, engaging in practices that violate established norms and fair customs in business, such as damaging the agent's reputation or using a name or title similar to that of the commercial agent, such actions constitute unfair competition.[42]

2. Defining the Non-Competition Clause by Location and Duration

Article L134-14 of the aforementioned French Commercial Code permits the inclusion of a non-competition clause in the contract even after its termination. However, the second paragraph specifies that this clause must be in writing and limited to the geographic area within the agent’s activities, as well as the goods and services represented by the agent according to the contract. The third paragraph restricts the duration of this clause to a maximum of two years after contract termination.[43]

Similarly, Moroccan commercial legislation in Article 403 states: "The contract may impose a non-competition obligation on the commercial agent after its termination. This clause must relate to a geographical area, a designated group of people, as well as the type of goods or services represented in accordance with the contract. This clause is valid only for a maximum of two years from the date of contract termination, despite any conflicting terms."

For the non-competition clause to be valid, it must be time-bound. The two-year period may seem lengthy if the agency contract lasted only a few months. Therefore, it would have been appropriate for Moroccan legislation to consider the invalidity of the non-competition clause post-contract if the contract itself lasted only a short time, as a short agency term does not provide the agent ample opportunity to gain confidential information or establish close client relationships that would influence their business post-contract. [44] This seems reasonable, as a short contract duration coupled with a non-competition obligation could impose a severe economic disadvantage on the agent, especially if they gained little financially during the initial client acquisition phase.

Additionally, the non-competition clause becomes invalid if the agency contract was terminated by the principal without fault on the agent's part, or if the agent resigned due to the principal's misconduct. The agent may have only accepted this clause with the expectation of a long-term relationship with the principal.[45]

Other laws, such as the Belgian law on commercial agency contracts issued on April 13, 1995, impose a shorter time frame, with Article 24 stipulating that the non-competition clause is invalid if it exceeds six months after contract termination.[46]

The French Court of Cassation has recognized this issue, ruling that "While parties may agree to restrict freedom of work and trade, such a restriction cannot be unlimited in terms of location or duration; it must be confined to a specific area, and if it applies everywhere, it must be limited to a specified duration."[47] Based on this, the non-competition clause should not be limited solely by location or time; it must be confined in both respects.

From the above, it is clear that a contract may contain a non-competition clause post-termination, provided it is written, relates to a specific geographical area, group of people, and type of goods or services, and is valid for a maximum of two years after the contract ends.[48]

3. Defining the Non-Competition Clause in Terms of the Nature of Activity

The commercial agent has an obligation not to compete with the principal by producing or marketing similar goods or services that may attract the same clients, particularly within the same activity and geographic area. Breaching this obligation may lead to contract termination, requiring the agent to compensate the principal for any resulting damages.[49]

French courts require that the non-competition clause be limited to activities similar to those of the principal. Article 5 of European Regulation 1999/2790 also stipulates that for the non-competition clause to be valid, it must be restricted to goods and services that directly compete with those covered by the contract.[50]On December 17, 1986, the Paris Court of Appeal ruled that a commercial agent working for a competing company without the principal's explicit consent constitutes a contractual breach that justifies contract termination by the principal.[51]

In practice, commercial agents often take on multiple agencies for different principals, provided that the products are not in direct competition. French courts interpret the concept of competition narrowly, as evidenced by French rulings: if the products marketed or distributed by the commercial agent under the agency agreement compete or are similar, thereby harming the principal's economic interests, this constitutes unfair competition.

Therefore, a commercial agent may not represent multiple commercial or industrial establishments that compete in the same activity within the same area, except under legally specified conditions inherent to the agency contract, such as protecting the rights, interests, and trade secrets of the business the agent represents. Additionally, the agent must not, personally or through representatives or associates, compete with any of the represented businesses in the same activity and region.

From the above, it is concluded that the commercial agency contract should include a non-competition clause specifying the prohibited scope in terms of goods, services, or competitive activities, as well as its temporal and geographic limitations.

CONCLUSION:

At the end of this study, we have reached several findings and recommendations necessary to complete the research from all perspectives:

First: Findings

1. The exclusivity clause is often found in almost every commercial agency contract due to its significant importance for both the principal and the commercial agent. It is crucial for the principal, especially for those in industrial establishments who need a commercial agent to market their products. With an exclusive agent, the focus is solely on promoting the represented product across the state in which the agent operates.
2. If the exclusivity clause is included in the commercial agency contract, it must be respected by both parties; otherwise, the affected party has the right to seek compensation for

damages incurred due to the other party's breach. This clause is a specific rule within commercial agency contract provisions related to public order and cannot be violated, as established in most comparative legislations.

3. The commercial agent is required to refrain from engaging in any activity that competes with the principal's business. While agents may represent multiple agencies, these must not operate within the same activity or geographical area as the principal unless agreed otherwise.

4. The contract should include a post-termination non-competition clause, which must be written and limited in terms of geographical area, clientele, and type of goods and services. This clause is valid only for a maximum of two years after the contract ends.

Second: Recommendations

1. There is a need for specific legal provisions on the formal requirements of a commercial agency contract. Currently, both the civil and commercial codes lack explicit clauses regarding exclusivity or non-competition, particularly in the general or specific provisions on agency contracts. The Algerian legislator should consider following the example of other comparative legal systems.

2. A legislative provision within Algerian law, either as an independent regulation or within the commercial code, should be established, similar to the approach of the Egyptian legislator, to govern commercial agency contracts. The absence of a clear legal framework for commercial agency contracts allows for unregulated contractual freedom, which necessitates a structured approach to maintain a balance between the parties, especially for those in a weaker negotiating position.

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