

Agency Vs Distribution

Overview:

The commercial market in Egypt is, without a say, an extremely competitive and eminent market. As it keeps on growing, principals started referring to agents and distributors to facilitate the process of getting into new markets, know their customers, reach their targeted audience, and increase their profits. The most agreements executed in this regard are agency and distribution, however, there are some differences between them. Under this Article, we have prepared a brief overview on the main similarities and differences between agency agreements and distribution agreements, the legal and regulatory framework that govern both types of agreements and finally the pros and cons of each type of agreement.

This article provides an overview on agency and distribution arrangements and intended to provide a general guidance for investors aiming to enter the local market through third parties and any specific required advice should be sought separately. This Article may not be relied upon in any manner or for any purpose by any person without our prior written consent.

I. Agency Vs. Distribution

◆ Agency

According to the commercial agency law no. 120 of 1982 (“**Commercial Agency Law**”)¹ a commercial agent is a natural or juristic person who carries out the business of bidding or concluding purchase, sale or lease contracts or providing services either in the name and for the account of producers, manufacturers or distributors, or in the agent’s own name and for the account of any of them.²

Further, the Egyptian commercial code no. 17 of 1999 (“**Commercial Code**”) have listed two types of agency contracts, as follows:

- **Commission Agency:** a contract whereby the agent undertakes a legal act in his own name and for the account of his principal. The commission agent is directly liable vis-à-vis the third party that such agent has entered into contracts with. The principal in, Commission Agency, is not liable toward

¹ Article 1 of the Commercial Agency Law.

² Appeal No. 13641 of Judicial Year 85 in the hearing of 02/05/2017

the third party and the latter may not have the right of recourse against the principal, unless otherwise provided by the law.³

- **Contracts Agency**: a contract whereby the agent undertakes the promotion, negotiation and contracting in the name and for the account of his principal, permanently and with respect to a precise activity.⁴

Based on the above, the main criteria to differentiate between both types of agencies is that the agent under the Commission Agency concludes commercial transaction with third parties in his own name, while in Contracts Agency the agent concludes commercial transaction with third parties in the name of his principal. However, both types of agencies are concluded for the account of the principal.

◆ *Distribution*

Distribution agreements do not have special regulations under the Egyptian law and hence will be subject to the general provisions of the Egyptian laws. In other words, a distribution agreement may/is considered as a sale and purchase transaction, whereby the distributor buys the underlying products from the principal and then re-sell them. In this context, it is only the distributor who is bearing the risk to re-sell the products they purchased from the principal while the principal following such sale is no longer exposed to the risk of not selling its products.

Based on the above, we have noted some similarities and some differences between the agency and the distribution contracts, as follows:

- **Similarities:**

- Both agency and distribution agreements are concluded for a very similar purpose which is providing a service/product to clients of customers, nonetheless, the agent acts on behalf of the principal while the distributor acts on his/her behalf.

- **Differences:**

- In agency agreements, an agent arranges sales for another entity to customers, but never gains title to the goods; the title passes directly from the entity, as a principal, to the customer. In other words, an agent provides a service to the principal by assisting it to market and sell its products in a certain region, thus, the ultimate risk of the business remains with the principal and the agent

³ Article 174 of the Commercial Code.

⁴ Article 177 of the Commercial Code.

is only liable for performing its services to the principal. Whilst, in distribution agreements, a distributor buys products from another entity to resell them to its customers for its own benefit.

- Agency agreements are specifically regulated under the Commercial Agency Law as well as the Commercial Code; unlike the distribution agreement which remains subject to the general principals of the law.

II. Legal & Regulatory framework

◆ Agency Agreements:

Agency agreement is a contract whereby the agent is obligated to perform a legal act on behalf of the principal.⁵ The agent is also obliged to perform the agency without exceeding the limits set for him.⁶

The Commercial Agency Law provides that every person that acts as an agent to register themselves with the Commercial Agents' Registry⁷ ("CAR"), otherwise, this would constitute a criminal offence by the agent.⁸ The executive regulations no. 342/1982 of the Commercial Agency Law ("Commercial Agency ER") lists the required documents for registration before the CAR. However, these requirements differ depending on whether the applicant is a natural or juristic person.⁹

For a natural person to be registered:

The agent must submit, among other required documents, the commercial agency agreement that shall include the nature of the commercial agent's work, the responsibilities of the parties of the agreement, the determined commission rates, its payment conditions, and in particular, the type of currency in which they are paid.

Moreover, the agent must have a good reputation and should not be an employee of a local governmental body or public sector companies.

For a juristic person to be registered, the following requirements shall be satisfied:

- Its headquarters must be in Egypt;

⁵ Appeal No. 13641 of Judicial Year 85 in the hearing of 02/05/2017

⁶ Article (703) of the Civil Code.

⁷ Form 14 Q Commercial Agents in accordance with the provisions of Law No. 120 of 1982 AD and its executive regulations issued by Ministerial Resolution No. 342 of 1982 AD

⁸ Article 16 of the Commercial Agency Law.

⁹ Articles 15 and 16 of the Commercial Agency ER.

- one of its objectives is to undertake commercial agency works;
- to be fully owned by Egyptians or by an Egyptian company the majority shareholders of which are Egyptians;
- all its managers or directors must be Egyptians;
- the capital of the company shall not be less than EGP 20,000 according to the latest financial statement;
- the principal signing the agency agreement with the agent that request registration must not have any agency relationship with any of the public sector companies; and
- an Arabic version of the agency agreement must be submitted to the CAR.

◆ *Distribution Agreements*

There are no legal or even practical requirements to have distributors register themselves before any governmental authorities in Egypt nor submitting the distribution agreement to any such authorities.

III. Termination

◆ *Agency Agreement*

The parties' right to terminate a commercial agency agreement is regulated under the Commercial Code and accordingly, there are some restrictions imposed on both parties when deciding to terminate an agency agreement.

Generally, commercial agency agreement may not be terminated by either party without paying compensation to the other party if the agreement was either terminated (i) without prior notice; or (ii) at an inopportune time. This rule must apply to all types of commercial agency agreements whether concluded for fixed or indefinite terms.

Termination of Fixed term agreements:

Each party may not terminate a fixed term agreement without paying compensation to the other party unless there is a **serious and acceptable cause** for termination. There are no criteria to decide whether a cause is serious and acceptable or not, this will be subject to the discretionary power and interpretation of the competent judge.

However, if an agent turned out to be inefficient, since choosing an agent to represent the principal would mainly be for the former being efficient, or if such agent does not abide by the limits set under the agency agreement, this might be considered as a **serious and acceptable cause** by the court.

Termination of Indefinite term agreements:

Termination by the principal

The principal may not terminate an indefinite term agency agreement without paying compensation to the agent unless the agent has committed a breach to his liability or is being negligent.

Termination by the Commercial Agent

An agent may not terminate an indefinite term agency agreement without paying compensation to the principal if the agent terminated the same (i) at an inappropriate time; and (ii) without an acceptable excuse.

Moreover, the following points shall be noted:

- The compensation paid for terminating an agreement by any of the parties will be determined on the following two basis:
 - (1) the other party's losses, if any; and
 - (2) the profits that the other party would have made if the agency agreement had not been terminated.
- The abovementioned termination rules are of a public policy nature and the parties may not agree on other rules or provisions by any mean. Otherwise, the courts may award damages for an abuse of the rights of termination by either party to the agency agreement.
- Article 189 of the Commercial Code which entitles the agent to compensation in case of non-renewal of a fixed term commercial agency agreement has been declared unconstitutional by the Supreme Constitutional Court and, accordingly, is null and void. Accordingly, if the commercial agency agreement is concluded for a fixed term, it terminates after the expiration of such term without obligation for renewal or compensation.
- The principal will not be able to remove the name of the commercial agent from the CAR, except with their consent, or through a court order, which, in practice, is a time-consuming process in Egypt. The principal will not be able as well to register another agent unless the previous agent is de-registered from the CAR.

◆ ***Distribution Agreement***

Unlike the agency agreement, there are no provisions that regulates the termination of a distribution agreement. That said, termination would be subject to the parties' agreement.

IV. Mandatory Provisions

◆ *Agency Agreements*

When it comes to the formal requirements and regulatory framework for agents, the Egyptian laws are clear. In the agency agreement, the following information must be included:

- a. the commission paid;
- b. nature of the scope of work;
- c. obligations of the parties to the agency agreement;
- d. geographical range regulated;
- e. the commodity/commodities concerned; and
- f. the trademark of the exporter.

In addition, agency agreements must be bilingual or translated to Arabic and the extent of the agency must be precisely stated as well in the agreement so that the agent is obliged not to exceed the limits determined in representing the principal.

The abovementioned requirements are mandatory for the agreement to be registered before the CAR. Further, in case the principal is a foreigner, the agency agreement must to be authenticated by the chamber of commerce and notarized by the concerned Egyptian Consulate. The latter must be also notified by any amendment thereto. The CAR should be notified, as well, of any amendment to the commercial agency agreement, by the agent.

◆ *Distribution Agreements*

Termination procedures will be subject to the parties' agreement.

V. Advantages and disadvantages of each agreement

The above being said, we can conclude that each type of the agency and distribution agreements has its advantages and disadvantages and choosing which agreement to proceed with and what is more suitable depends on each case.

◆ *Distribution agreements*

Advantages:

- Companies scale up their sales by using distribution agreements as a way of expanding the territories in which their products are found, leading to an international awareness level for the product with no expenses of setting a permanent place.
- No contact takes place between the supplier and the final customer, which leave all the risks of selling the products on the distributor only. Not only risks as storing the goods and transporting them, but also risks of bad marketing which may lead to the product not being sold.
- Termination is subject to the parties' agreement.
- No registration requirement, thus, more flexibility in the commercial relationship.

Disadvantages:

- In most cases the disadvantages of a distribution agreement depend on the terms being unclear. When the agreement is done rapidly, overestimating or underestimating quantities of goods that will be sold tends to happen which may lead to surplus or shortage in the products.
- The supplier may lose the ability to manage the prices and how the product is sold. Failing to determine whether the agreement is exclusive or nonexclusive raises confusion and conflict in the market. Multiple distributors in a small area, due to competition, may lead to decrease in price which can affect not only the distributors but also the suppliers.

◆ *Agency agreement*

Advantages:

- Agency grants the principal a sustainable control over the transaction and the ability to broaden or limit the scope of the commercial agent's authority unlike distribution where such control is generally missing.

Disadvantages:

- The principal retains all of the financial risk of the product not selling, and even if the product is sold, confusion may occur as the agent is not aware of the product as the supplier does.

- The regulatory requirements of an agent and an agency agreement adds burden and reduces the flexibility required in the commercial relationships.
- Termination process is lengthy

It is worth noting that in some cases the law requires concluding a commercial agency agreement; such as the case of foreign bidders in government tenders which, by law, must have an agent in Egypt, therefore, concluding a commercial agency agreement in this case is obligatory.

Finally, we can conclude that the advantages and disadvantages must be taken into consideration before deciding which agreement to proceed with.

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