

Form v. Substance: the requirements for an enforceable commercial agency agreement in the UAE

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Introduction

In a recent Dubai Court of Cassation judgment (Dubai Court of Cassation Judgment 731 of 2019 dated 15 December 2019), the court considered whether a distribution contract between two parties, which had been registered as a commercial agency fell within the scope of the UAE Commercial Agencies Law (Federal Law 18 of 1981, as amended). In this article, we consider the court's judgment and its implications for commercial agency agreements in the UAE.

The facts of the case

In 1992, the Appellant (a local UAE company) successfully registered a commercial agency with the Ministry of Economy based on a distribution contract between it and the Respondent's exclusive agent. The Respondent, who was not a party to the distribution contract, was named as the principal. The Respondent's exclusive agent was wound up in 2015.

In 2016, the Respondent filed a complaint before the Commercial Agencies Committee requesting the deregistration of the registered agency on the basis that the registration of the agency was null and void as there was no duly attested commercial agency contract with the Appellant. Furthermore, it argued that the agreement, documents, and correspondence relied upon by the Appellant did not expressly provide for the appointment of the Appellant as a commercial agent but rather as distributor for the Respondent's products pursuant to a contract (entered into between Appellant and the Respondent's agent (which had been wound up in 2015), and not directly with the Respondent). The Respondent also argued that the form of contract used by the Respondent was a distribution contract and not a commercial agency contract within the meaning of the Commercial Agencies Law.

The Commercial Agencies Committee did not recognise the Appellant as the Respondent's commercial agent and therefore ordered that the commercial agency be deregistered. The Committee held that there was no notarised and legalised commercial agency agreement between the Respondent and the Appellant when the agency was registered with the Ministry of the Economy. Further, the Committee referred to Article 954 of the UAE Civil Code (in relation to the ceasing of legal capacity of the agent and principal) and held that the contract used for the registration of the commercial agency automatically terminated when the Respondent's agent (the company) was wound up.

The Appellant challenged the decision on the basis that he had spent many years distributing the Respondent's products and that the Respondent continued to deal with the Appellant for 14 months before filing the deregistration application, notwithstanding that the Respondent's exclusive agent (who had a contract with the Appellant) was wound up in 2015.

The Appellant further argued that the relationship was formalised through registration of the agency at the Ministry of Economy, including registration of the product range in question with the Ministry of Health, Municipality, and the Pharmacies & Supplies Department in Abu Dhabi, based on a letter issued by the Respondent's exclusive agent.

Commercial Agency Law and the Dubai Courts' findings

The UAE Commercial Agency law provides the legal framework for all types of agency relationships under UAE law. Pursuant to Article 1 of the Commercial Agencies Law, "commercial agency" is defined as *"the representation of a principal by an agent for the distribution, sale, offer or provision of a commodity or service inside the UAE against a commission or profit."* As a result of this definition, "commercial agencies" can represent a broad variety of relationships. However, commercial agent status can only be obtained by UAE citizens and the name of the commercial agent must be recorded in the Register of Commercial Agents maintained by the Ministry of Economy and Commerce. Article 4 of the Commercial Agencies Law also provides that *"for a valid agency at the time of registration, the agent shall be directly bound with the principal by a written and notarised contract."*

Article 3 of the Commercial Agency Law provides that commercial agency activities are not permitted to be practised inside the UAE except by commercial agents registered in the specified register maintained for this purpose by the Ministry. Any commercial agency not registered in the above register shall not be considered, nor legal proceedings involving the same shall be heard. Any dispute concerning the performance of a commercial agency, whether the claim is for specific performance or damages, arising in tort, must be based on a written and notarised commercial agency contract registered on the relevant register of the Ministry of Economy.

The Dubai Court of Cassation also referred to Article 2 of the Commercial Agencies Law in its judgment which sets out who can practise commercial agency activities. The court also held that any commercial agency not registered in the above register should not be considered by any court in legal proceedings involving the same. A valid agency at the time of registration should exist (Article 4 as mentioned above), and the agent shall be directly bound with the principal by a written and notarised contract. Article 6 of Commercial Agencies Law adds that *"Any agreement to the contrary shall not be recognised."* Article 22 of Commercial Agencies Law provides that the penalty for carrying on the business of a commercial agency contrary to the provisions of this Law shall be a fine of not less than AED 5,000 (approximately US\$ 1360).

In view of the above, the court held that for a commercial agency to be recognised and enforceable, the agent must be a UAE national who is directly bound with the principal by a written and notarised agency contract that has been entered on the relevant register of the UAE Ministry of Economy. Legal proceedings involving a commercial agency may not be heard and considered: (i) without a written contract; or (ii) with a written but un-notarised contract ;or (iii) with a written and notarised contract that has not been registered on the relevant register in the UAE. Such legal proceedings would be in contravention of the Commercial Agencies Law.

The Court held that the agreement (presented by the Appellant) should not be construed as creating an agency relationship between the parties. The fact that the Respondent used the Appellant to carry out, on their behalf, various formalities in the UAE in connection with the registration of the Respondent's products in the UAE did not mean that the Appellant was a commercial agent for the Respondent's products. According to the particulars of the agency registration certificate provided by the Appellant, the principal was a third party and not the Respondent. There was nothing on record to indicate that the Respondent had awarded the Appellant a commercial agency or had delegated the third party (the agent) to do so. As a result, Commercial Agency Committee's decision to not recognise the Appellant as a commercial agent of the Respondent was correct. The action was therefore dismissed.

Conclusion

This judgment highlights the importance of having a registered and notarised commercial agency agreement with the Ministry of Economy in order to successfully enforce said agreement and confirmed that a distribution agreement entered into between the principal's exclusive agent and a third party will not be considered a commercial agency. In the UAE, it is typical for exclusive commercial agents to appoint distributors however, these distributors cannot be registered as commercial agents. This judgment confirms this. The judgment also clarifies the role of the Commercial Agency Committee which considers commercial agency disputes. At the time of writing, the Commercial Agency Law was amended (Federal Law No. 11 of 2020 amending Certain Provisions of Federal Law No. (18) of 1981 Regulating Commercial Agencies). The amending law however, does not change the role of the Commercial Agency Committee.

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