

## **Legal side of Commercial Agency agreements**

Many business enterprises, would commonly appoint an agent or distributor to achieve maximum local and international market share. The Classical legal relationship between agent and principal exists when the agent has the authority from the principal to create legal relationship between the Principal and the third part. In creating such relationship the agent is acting on behalf of the Principal and the Principal will be held liable for all the acts and omission of the agent, if done in the course of agency. In Pakistan an “Agent” has been defined under section 182 of the Contract Act 1872(hereinafter referred as “the Act”), wherein it is stated that an “Agent is a person employed to do any act for another or to represent another in dealing with the third person”.

Depending on the agency agreement the remuneration for the said services can be fixed or varied. Hence under the classical agency law two relationships are created, one between the Principal and the third party and secondly between principal and agent. It should be observed that the relationship between the Principal and agent can also exist independent of contract under simple power of attorney, although the legal significance of a power of attorney are beyond the ambit of this article but it needs to be stated that General Power of Attorney will not empower the agent to perform specific acts, such as sale and transfer of specific property, whereas special power of attorney will specific power to sell or purchase shall enable the agent to sell the property on behalf of the principal.

The key difference between an attorney and an agent is first that the relationship of an agent is governed under the Contract Act 1872, whereas the former is governed under the Power of Attorney Act 1882. An attorney is generally not remunerated for his services and is authorized to perform specific task on behalf of another unlike a commercial agent who is in most cases remunerated for his services, although not required to be remunerated under the law as per section 185 of the Act.

Agency can be created in five forms under the law namely, by express appointment, by implied authority, by necessity, by estoppel and by ratification. However with reference to the commercial transaction we an agency is created by virtue of the agency agreement.

With reference to sales agency many factors must be taken into account by a supplier of goods, in determining the nature of representation which he requires in a given territory or in respect of a product and for international agreements the prime concern of any party is to ascertain the choice of law. Hence in international agreements both parties will endeavour to incorporate the application of their local laws as oppose to foreign jurisdictions. Therefore first and foremost factor for any businessmen is to identify which country's law will be applicable to the agreement. The Agency agreement must specify the territorial limits of to ensure that the agent will use his best endeavours to ensure that the Principal's product is sold across the entire territory mentioned in the agency. If it is an exclusive agency the territory clause will incorporate a specific condition that the agent shall not solicit or accept any orders for the Product from any person to be sold within the territory.

The most important part of the agreement is the duties, rights and liabilities of the parties. As per section 211 of the Act the agent is bound to conduct the business of agency according to the directions and instructions of the Principal. The directions and instructions to conduct the business can be specifically mentioned in the agreement and it is advisable that it should be expressly mentioned however it is not always the case that the agency agreements incorporate specific instructions and directions. If the agent fails to follow the directions he will be in breach of the terms and conditions of the agreement and hence liable under law of contract.

It would be practically difficult for most of the Principal to incorporate each and every instructions on the document and therefore the law caters for such difficulty by allowing the agent to follow the custom of business in the market at that point in time. Therefore in the absence of express instructions from the Principal the agent can rely on the custom of the business, however to rebut such assertion the Principal would need to collect evidence

that the standard custom of business in the circumstances dictated to that the agent should have acted otherwise. Albeit difficult to prove but if the Principal can rebut such assertion under section 211 of the Act the agent shall be liable to make good the loss the Principal suffered due to the failure of the agent to follow the express directions or custom of the market. Therefore a clause to cushion this type of situation would amount to suggest that subject to as expressly provided in the agency agreement and to any other directions which the Principal may from time to time properly give, the Agent shall be entitled to perform its duties under the agreement as he/she may think fit.

The agreement should incorporate that an agent shall use his/her best endeavours to promote and market the business of the Principal in the territory without prior reference to the Principal enter into a contract for the sale of the products on behalf of the Principal by exercising reasonable care, skill and due diligence and in accordance with the sound commercial principles. The Principal will be compensated for the direct loss or damage arising from the agents own neglect, want of skill or misconduct as provided under section 212 of the Act.

Another important clause of the agency agreement is that the duty of the agent is to render proper accounts of sales to the Principal on demand, under section 213 of the Act. Where the agent is suspected of misappropriation, the Principal would be legally empowered to demand full and complete accounts of sales and he may also file a civil suit for accounts if the agent received some property or benefit not belonging to him. For instance the agent shall be maintain a list of customers and potential customers for the Products and shall at the request of the Principal supply it with a copy of that list. The agreement should mention the fact that the agent shall from time to time keep the Principal fully informed of the Agent's promotional and marketing activities and further provide every quarter of a year a detail report of such activities. Under the Contract Act agent must seek further information and directions from the Principal if in event the agent is in difficulty as per section 214 of the Act.

The Financial part of the agency agreement is root of the agreement and both parties must scrutinize the provisions in details and also seek professional legal advise with respect to the clauses relating to finance. Firstly the commission or the retainer fee and currency of commission must specifically be mentioned in the agreement and it must specifically be mentioned that the commission will be a percentage of the Net Sales Value of all Products for which the contract of sale is made by the Agent on behalf of the Principal.

The common dispute between the parties is that the Principal will only make payments of commission for net sales of the product but most of the time the agents claim to be compensated for the business they brought forward albeit it failed to materialize. Therefore it is important that in the agency agreement the parties must specifically mention that the commission will be paid on account of net sales and not on account of business brought forward which failed to materialize. A selected procedure for preparing a statement of sales must be mentioned in the agreement so as to enable the parties to easily understand the necessary steps required for claiming commission and the modes of payment.

The other two important parts of the agreements are the Force Majeure clause and the Duration and termination of the agreement. The purpose of the Force Majeure clause is to highlight that if in the event either party is unable to perform their obligations due to uncontrollable circumstances the same shall not amount to a breach of a contract. Secondly the duration of the agency is important because some agencies are for a specific purpose whereas others are for a specific time period, therefore the duration of agency must be highlighted in the agreement.

It is important for the businessmen to appreciate that in the agency agreement the mode of termination of the agreement should be as water tight as possible. The termination clause should state that either party shall be at liberty to terminate the agency agreement by written notice to the other if that the other party commits any repudiatory breach of any of the provisions of the agreement and in case of a breach capable of remedy, fails to

remedy the same within 30 days after receipt of a written notice giving full particulars of the breach and requiring it to be remedied.

It would be advisable to incorporate the after termination clause, wherein it should be mentioned that the agent shall within 30 days dispose of the products in his possession and send a detail list of products sold, stock available, list of customers, samples and any advertising and promotional material. The agent shall be entitled for his commission of the products sold before the date of termination and until the date mentioned in the termination notice.

It is hoped that the above general discussion on the agency agreements will be helpful for the business community at large as well as the students of law who seek to grasp general idea about the law of agency and important provision which should be incorporate in an agency agreement.

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*Dated 24/08/07*

*Dedicated to*

(Late) Mutmaz Ahamed Shaikh