

# **Reflection on Exclusivity and Termination of Commercial Agency in Jordan: The Intertwining of Domestic Regulation and International Trade Law**

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## **I. Introduction**

Any foreign manufacturer desiring to market its products in Jordan has several courses open to it. The foreign manufacturer could establish a branch or wholly-owned subsidiary in Jordan or enter into a licensing or joint venture agreement with a company doing business in Jordan. If it wants a less significant presence, however, it is left with the alternative of having a local commercial agent market and sells its products.

Commercial agency has taken an increasing share of domestic and international business. The number of agencies and percentage of total retail sales has grown rapidly, far outpacing economies as a whole.<sup>1</sup> Agents play essential role in promoting the sale of their principal's products and performing a multiplicity of other functions for their principals, ranging from the procurement of visas and customs clearances to providing support and assistance in contract negotiations and local government relations.

The law of commercial agency in Jordan is statutory. Agency is subject to dual regulation; civil and commercial codes.<sup>2</sup> A basic law also exists regulating agency legal

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<sup>1</sup> See Augustin Jausas, *International Encyclopedia of Agency and Distribution Agreements* 23-26 (2008) (agency contracts run to the tune of billions of dollars worldwide).

<sup>2</sup> The Arab legal system distinguishes between acts to which private persons are parties (civil acts) and acts to which merchants are parties (commercial acts). The former are generally subject to the civil code and the latter to the commercial code. The civil and commercial codes complement each other in many areas including agency relations. See H S Shaaban, *Commercial Transactions in the Middle East: What Law Governs?* 31 *Law & Pol'y Int'l Bus.* 157, 160-163 (1999). See also See Mohamed El-Sayed El-Keky, *Commercial Law* 78 (in Arabic) (2004).

relationships; Law of Commercial Agents and Intermediaries No. 28 of 2001.<sup>3</sup> In addition, international developments at the World Trade Organization (WTO) impact the future of commercial agencies laws in Jordan.

Given the high financial commitment of agency investments, and the time duration of most agency agreements, it is not surprising that the legal issues surrounding exclusivity and termination are among the most controversial in agency law. Clauses governing exclusivity and termination are likely the most important provisions in the agreement, as they limit what an agent may do.

The purpose of this article is to study certain aspects-exclusivity and termination- of commercial agency according to the Jordanian law.<sup>4</sup> The article is divided into four sections. Section two explains the general rules governing commercial agency in Jordan. Section three analyzes exclusivity of commercial agents. This section introduces the WTO's General Agreement on Trade in Services (GATS), the basic instrument covering trade in services, and analyses the current commercial agencies regulation in Jordan and its relation to articles VIII and IX of GATS. Also, section two explores Jordan schedule of specific commitments under the GATS in order to shed light on the extent and limit of its obligations with regard to commercial agents. Section four discusses agency termination. Finally, the article concludes by summarizing the main issues discussed and provides recommendations to streamline agency law in Jordan.

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<sup>3</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, Official Gazette No. 4496 (July 16, 2001).

<sup>4</sup> The article examines mainly the agency laws of Jordan. Reference to laws of other Arab countries will be made when necessary. The agency laws in the countries discussed share similar characteristics. For example, in Egypt, Jordan, Kuwait, Saudi Arabia and the UAE, where private enterprise is encouraged, foreign suppliers must use agents in practically all instances. In general, these countries reserve agency activities to their own nationals. Agents are regulated by mandatory registration procedures, and they are protected against arbitrary termination by their foreign principals. See Sections II and IV *infra*.

## II. What is an Agency?

The Law of Commercial Agents and Intermediaries No. 28 of 2001 defines a commercial agent broadly so that it covers commission agent, agent who distributes on his own behalf (distributor), and agent who distributes on behalf of a foreign company or a trader whose headquarter is located outside Jordan (commercial agent).<sup>5</sup> Moreover, the Commercial Code defines commercial agency as an agency related to commercial acts involving an agent who carries out his duties in the name of his principal.<sup>6</sup> The concepts of commercial agency and other intermediaries such as distributorship are not clearly distinguished in the Jordanian laws.<sup>7</sup> As a result, regulators and practitioners alike may suffer from uncertainty about the exact kinds of commercial arrangements intended to be regulated as agencies.

The Jordanian law should define a commercial agency, in a straightforward manner, as an independent individual or juristic person who is contractually controlled by a principal and assigned to promote, sell, distribute products and provide services in the name and on behalf of the principal for remuneration.<sup>8</sup> The distributor is an independent

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<sup>5</sup> A commercial middleman is defined as any person who carries on the profession of mediation with a view to concluding or facilitating the inclusion of commercial dealings and transactions, in return for a fee provided that such a person is not an employee or a deputy of either one of the two parties to such commercial transactions. *Id.* art. 2. While Arab jurisdictions that regulate commercial agency share common definitional approaches, each jurisdiction has its own definitional subtleties and mix of exclusions and exemptions. See Egyptian Code of Commerce of 1999, art. 5; Kuwaiti Code of Commerce of 1980, art. 271; Lebanese Commercial Code of 1942, art. 272; Moroccan Commercial Code of 1996, art. 393; Syrian Code of Commerce of 2007, art. 154; and UAE Commercial Transactions Law of 1993, 217.

<sup>6</sup> Acts defined as commercial in the commercial include purchase of goods intended to be sold as they are or after their manufacture, leasing of goods for lease, exchange operations, banking operations, land and maritime and air transport, brokerage and commission, insurance, public entertainment, and business agencies. Other commercial acts which are similar to these acts by nature or aim are considered commercial acts. See Jordanian Code of Commerce No. 12 of 1966, art. 6.1 & 2, 81.1.

<sup>7</sup> Commercial agencies and distributorships are essentially different and governed by different laws on Western legal systems. See Rochelle B. Spandorf, Franchise Player, 29 Los Angeles Lawyer 34, 43 (2006). See also Uri Benoliel, Rethinking the Distributor-Manufacturer Fiduciary Relationship: A Marketing Channels Perspective, 45 Am. Bus. L.J. 187, 215 (2008).

<sup>8</sup> A person is independent if he is essentially free to arrange his activity and determine his hours of work. It is important to point out the distinction between an independent agent and an employee. Any person who is

contractor who buys and resells for his own account and is normally free to fix his own resale prices.<sup>9</sup> The distributor must generally pay the manufacturer regardless of whether or not he has been paid by his own customers. The distributor thus acts on his own behalf and assumes the risk of possible insolvency of the customers, which is not the case for the agent.<sup>10</sup> In contrast with a distributor, a commercial agent does not own the goods and thus must render the proceeds of his sales to the principal.

Agents in Jordan are only subject to certain nationality and registration requirements.<sup>11</sup> There is no age, experience in the agency's field of activity, or financial restrictions as requisites for registration. An individual agent should be a Jordanian national.<sup>12</sup> A company, acting as an agent, must also be Jordanian.<sup>13</sup> The Law of Commercial Agents and Intermediaries of 2001 does not set parameters for determining how a company could qualify as a Jordanian. Such parameters would have included majority of Jordanian ownership, having an office in Jordan, or majority of board of directors are of Jordanian nationality.

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regularly entrusted to solicit business for an entrepreneur or conclude business in his name is deemed an employee. Whether someone is independent turns on the factual circumstances of each case; merely having an agreement declare independence or non-employee status may not suffice.

<sup>9</sup> In the agency situation, the manufacturer retains an absolute control of the price at which his products will be sold in Jordan.

<sup>10</sup> In practice, however, the contrast between an agent and a distributor is often not so marked. This is the case, for example, where the manufacturer participates in or follows closely the activities of the distributor, or where, for a variety of reasons, the distributor's gross profit upon his resale of the goods is not more than the commission which a sales agent would normally receive on such a sale. This is also the case where the distributor is granted payment terms by the manufacturer which exceed those the distributor normally grants to his own customers.

<sup>11</sup> The laws of other Arab countries imposes financial and professionals qualifications for practicing agency. See Fredrick J. Taylor Jr. & Howard O. Weissman, Middle East Agency Law Survey: Legal Requirements for Commercial Agency Arrangements in the Middle East: A Survey of Algeria, Egypt, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Saudi Arabia, Syria and the United Arab Emirates, 14 Int'l Law. 331 (1980).

<sup>12</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 3.

<sup>13</sup> *Id.*

In addition to the nationality condition, a commercial agent must be duly registered at the Commercial Agents Registry of the Ministry of Industry and Trade.<sup>14</sup> A person who desires to practice as a commercial agent must submit an application to the Registrar. The application contains personal information of the agent and the principal and a copy of the agency agreement.<sup>15</sup> The agency agreement may include many provisions, but the most crucial which ought to be included are territory, products, exclusivity, commission rate, effective term, just cause for termination, compliance with law, and governing law and dispute resolution.

Of course, nothing prevents the Registrar from requesting further documents or information as he deems necessary. The Registrar will have to issue his decision regarding the application within two weeks.<sup>16</sup> In the event of acceptance, a certificate will be issued by the Registrar after payment of the appropriate fees.<sup>17</sup> The agent must quote his registration number on all correspondence and commercial transactions.<sup>18</sup> Although not stated in the Law of Commercial Agents and Intermediaries of 2001, the agent ought to report any addition or amendment to the information required in the application for registration so as to keep the file up to date.

A commercial agent will be crossed off the Register in case of submitting incorrect information, termination of the agency agreement, or expiry of its term.<sup>19</sup> Non-

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<sup>14</sup> *Id.* art. 5.

<sup>15</sup> *Id.* art. 6.a(1) & (2). See also Howard L. Stovall, 'Short Form' Agreements under Arab Commercial Agency Law: Some Legal and Practical Issues, ABA Middle East Law Committee Newsletter (September 2016) (The commercial agency agreement must be drafted in Arabic or accompanied by an Arabic translation. Preparing this Arabic translation could be relatively costly if the parties commercial agency agreement is lengthy, and a local commercial agent would usually prefer to avoid incurring this translation cost).

<sup>16</sup> *Id.* art. 6.b.

<sup>17</sup> *Id.* art. 6.c.

<sup>18</sup> *Id.* art. 7.

<sup>19</sup> *Id.* art. 9.

registration results in a fine.<sup>20</sup> Non-registration does not invalidate an unregistered commercial agent. Thus, a failure to register will not prevent a commercial agent from practicing as such. A commercial agent must be duly registered in order to qualify for the protection and enjoy the privileges of the law.<sup>21</sup> An agent will not be entitled to any indemnity upon termination if the agent is not duly registered with the commercial registrar at the time his contract is terminated by the principal. However, even if an agent were not so registered when he entered into the agency agreement and he so represented in the contract, he could probably under certain circumstances register after the signing of the sales agency contract, thus defeating any representation or undertaking not to register which he might have made in the sales agency contract.

An agent must have a direct relationship or link with his principal.<sup>22</sup> The direct relationship requirement is enforced through the registration process and the law does not grant any exceptions or discretion in this regard. The direct relationship requirement is intended to prohibit the use of sub-agents. Without the direct relationship requirement, a commercial agent would become sub-agent of foreign parties intervening between him and the producers or manufacturer. This type of intervention, if permitted, would defeat the requirement that the agent must be a Jordanian national. Another reason that may justify the requirement of direct relationship is to maintain prices of products low for consumers. Interference of many intermediaries could increase costs of production. However, taking into consideration the continuous exorbitant prices of products in

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<sup>20</sup> *Id.* art. 18.a(3).

<sup>21</sup> *Id.* art. 10.a.

<sup>22</sup> The commercial agency laws of Egypt, Kuwait, Syria, and UAE have similar requirement of direct relationship. See Thomas F. Clasen, *International Agency and Distribution Agreements: Middle East/Africa/Asia/Pacific* 25-31 (1994).

Jordan, as well as in other Arab countries, makes this reasoning a mere illusion.<sup>23</sup> Prices are inflated anyway and generally increased by commissions paid to hidden middlemen and brokers. The reasonable justification for the rule of direct relationship is to maintain the requirement of nationality and make commercial agency a closed circuit.

The importation of most products is allowed by both private and public entities. Jordan only restricts the use of agents in armaments contracts. The law prohibits anyone acting as an agent from buying, importing, or selling arms, spare parts and ammunition.<sup>24</sup> The importation of armament and defense equipments must be channeled through government departments.

The Law of Commercial Agents and Intermediaries of 2001 does not address in details rights and obligations of parties to an agency contract. The Law of Commercial Agents and Intermediaries of 2001 states, in one article only, that an agent is under an obligation to keep sufficient quantities of spare parts for the products and offer facilities for after-sale services.<sup>25</sup> The bulk of the parties' rights and obligations are found in the Commercial and Civil Codes. The parties cannot modify these rights and obligations by agreement.

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<sup>23</sup> See Taking the Strain; Food Prices and Protest, *The Economist* (May 10, 2008) (As a result of food inflation, millions of people are being pushed into hunger and malnutrition—and 30-odd countries face social upheaval unless food policy improved. In the Middle East, the part of the world most dependent on food imports, there have been demonstrations and strikes in Egypt, Morocco and Jordan. But all three countries withstood more serious food riots in the late 1970s and 1980s. Some countries in the Middle East, such as Syria, have so far survived demonstrations by issuing ration cards or hiking wages).

<sup>24</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 12. The laws of many countries restrict or prohibit the use of commercial agents in military sales. See Roger S. Goldman, Have I Got a Deal for You: Use of Commissioned Agents in Foreign Military Sales, *Int'l Q.* 51, 63-68 (1990).

<sup>25</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 11.

The primary duty for an agent is to carry out the authority granted to him by the principal.<sup>26</sup> In carrying out his authority, the agent must act with the care of an ordinary person.<sup>27</sup> An agent receives the funds of his principal as a trustee.<sup>28</sup> As such, the agent is liable if the funds are lost due to his negligence. The products must be sold at a price fixed by the principal.<sup>29</sup> Hence, an agent is not free to sell the products at a lower price or any other price. The agent, as part of the agency contract, must report to the principal the agency's activities and other information regarding its performance.<sup>30</sup> The purpose of this reporting is to keep the principal abreast of the affairs of the agency and to act accordingly, if necessary.

As a commercial agent has certain duties, the principal is also bound by certain duties. For example, the principal is under an obligation to remunerate the agent.<sup>31</sup> The Jordanian law does not specify any remuneration ceilings. The agent's remuneration could be based on a percentage of the value of the contract obtained through the agent. Moreover, the law does not specify if the commercial agent has a right to remuneration for the business concluded which is to be attributed to his activity. In some cases, an agent may have the right to remuneration without having conducted any attributable activity. If, for instance, an agent is assigned an exclusive sales area or a defined group of customers, he has the right to claim remuneration for all contracts concluded with persons within the scope of the area or with the designated customers, even though he did not actually participate in the transaction. The law does not determine when the remuneration

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<sup>26</sup> An agent may exceed the authority granted by the principal if the outcome is beneficial to the latter. See Jordanian Civil Code No. 43 of 1976, art. 840.

<sup>27</sup> *Id.* art. 841.

<sup>28</sup> *Id.* art. 846. See also Jordanian Commercial Code, art. 84.

<sup>29</sup> See Jordanian Civil Code, *supra* note 26, art. 852.

<sup>30</sup> *Id.* art. 856.

<sup>31</sup> *Id.* art. 857.

is due. It could be due upon the completion of the supplier's performance of the transaction. Unless otherwise provided by contract, the principal could account for remunerations on a monthly basis.

The principal is bound by the agent's actions.<sup>32</sup> However, the agent is jointly and severally liable with the principal to the local merchant for whose benefit a contract has been concluded until all the terms and conditions of the contract have been performed.<sup>33</sup> Finally, the principal is liable for any damages caused to the agent through the ordinary performance of the agency.<sup>34</sup> The principal is not liable if the damage is caused by the agent's own negligence.

Courts in Jordan have exclusive jurisdiction in settling disputes arising out of commercial agency contracts.<sup>35</sup> A foreign court cannot decide such disputes. Moreover, the use of arbitration is not permitted.<sup>36</sup> The wording of the law means that the parties do not have the choice to use arbitration even after a dispute has arisen. The exclusive jurisdiction of Jordanian courts is thus mandatory and leaves no room for using other alternative dispute resolution mechanisms. There is no obvious reason as to why the law grants courts the exclusive jurisdiction in settling commercial agency disputes without any exceptions. The exclusive jurisdiction of Jordanian courts could be intended to protect local agents by not using foreign courts which they are not familiar with.

The Law of Commercial Agents and Intermediaries of 2001 provides that after a certain length of time, three years post contract termination or term expiry, claims arising

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<sup>32</sup> *Id.* art. 859.

<sup>33</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 15.

<sup>34</sup> See Jordanian Civil Code, *supra* note 26, art. 859.

<sup>35</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 16.a.

<sup>36</sup> In general, arbitration can be used to settle all civil and commercial disputes. See Omar Aljazy, Arbitration in Jordan: From Old to New, 25 *Journal of International Arbitration* 219, 223 (2008)

out of agency contracts will not be heard.<sup>37</sup> This rule is founded upon considerations of public policy. Documents may be lost, witnesses may be dead, and the recollection of events long past may have become dim. Passage of time extinguishes the legal right of enforcement; it does not extinguish the underlying obligation.<sup>38</sup> Parties cannot contract out by denying the lapse of a period of time. Courts would invalidate such a provision on the grounds that it contravenes public policy.

Agency law violations carry several penalties. Parties who "willfully" submit false information to the Registrar pertaining to agency registration or who falsely represent themselves as agents are subject to a fine of between Jordanian Dinar 500 (equivalent to US \$706) and Jordanian Dinar 2000 (equivalent to US \$2827).<sup>39</sup> The inadvertent agent who had no intention to violate the law cannot be punished. Foreigners who engage in commercial agency activities in contravention of the law are subject to up a fine.<sup>40</sup> Violators of armaments contracts prohibition are subject to severe penalties. These violators can be sentenced between six months and one year, and/or fined between Jordanian Dinar 10000 (equivalent to US \$14,139) and Jordanian Dinar 15000 (equivalent to US \$20,208), and recovering any remuneration received or profits made, if known, or any amount at the discretion of the court if the remuneration is unknown.<sup>41</sup> Injured individuals may have private remedies-such as compensatory damages, restitution, or lawyer's fees- for agency law violations. The Law of Commercial Agents

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<sup>37</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 16.b.

<sup>38</sup> Jurisprudence of Arab countries allow an action to enforce a claim of right to be barred by the passage of time. However, the Sharia does not recognize the legal notion of passage of time as extinguishing any right. This distinction between a legal right and its enforcement, which is cogent, has greatly influenced the laws of Arab countries. See Mahir Jalili, Time Bar Clauses in Saudi Arabian Contracts, 13 International Construction Law Review 488, 490-91 (1996).

<sup>39</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 18.a.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* art. 18.b.

and Intermediaries of 2001 does not provide several other penalties such as blacklisting, freezing of assets and confiscation, ordering restitution, issuing cease and desist orders, banning violators from registration.

### **III. Exclusivity of Commercial Agency**

Exclusivity exists when a manufacturer utilizes only one agent for the sale of his products. The Law of Commercial Agents and Intermediaries of 2001 and related laws do not regulate the exclusivity clause. In contrast to some legal systems mainly in the Gulf States-Kuwait and UAE- the Law of Commercial Agents and Intermediaries does not set out the basic elements which a contract of commercial agency must contain.<sup>42</sup> Rather, the Jordanian legislator left the exclusivity provision to the agreement of the parties. In other words, exclusivity is determined by general principals of contract and is a matter of negotiation between a foreign principal and its Jordanian commercial agent. In practice, all commercial agents are Jordanian nationals and enjoy exclusive privileges.

The first inquiry into exclusivity involves the express language of the agency agreement between the parties. Agency can be *de facto* exclusive without an express agreement between manufacturer and agent.

A manufacturer can simply appoint an agent in a particular geographic area and refrain from appointing any other. To put it differently, a manufacturer may impose territorial limitations upon the agent which confine an agent's sales within an assigned geographic area. For example, a cheese manufacturer might expressly prohibit each agent from selling cheese outside its assigned territory. This type of restriction can be referred

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<sup>42</sup> See Kuwaiti Code of Commerce, art. 274.

to as an "exclusive territory" as it results in a closed territory.<sup>43</sup> A manufacturer can agree that the agent will sell the manufacturer's product only within a specified territory. This arrangement, which can be referred to as creating an "exclusive sales territory," limits the agent's freedom to deal with other manufacturers. In other words, the agent is not free to sell the goods of other manufacturers in the designated areas. A manufacturer may also forbid its agents to sell to certain designated customers or customer classes.<sup>44</sup> These types of agency restraints involve the allocation of customers or classes of customers among agents on the basis of characteristics other than geographic location. The manufacturer may reserve certain accounts to certain agent because, among other things, it is more qualified to serve the special needs of those customers. In addition, the manufacturer may assign a class of customers to some, but not all, agents so as to permit agent specialization.

The question is whether the manufacturer, having granted the agent territorial exclusivity, thereafter lawfully may engage in market expansion conduct designed to increase the manufacturer's market penetration within the territory already provided to the manufacturer's agent. Agents fearing encroachment of their established and well-developed territories could respond by filing lawsuits against the manufacturer. The encroachment of the manufacturer violates his contractual obligations to the dealer.

#### **A. The Law and Economics of Competitive Market**

Competition is the linchpin of the free market system. A market is considered competitive if individual firms in that market have little or no power to influence the

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<sup>43</sup> See Ernst-Ulrich Petersmann, International Competition Rules for Governments and for Private Business: A "Trade Law Approach" for Linking Trade and Competition Rules in the WTO, 72 Chi.-Kent L. Rev. 545, 550 (1996).

<sup>44</sup> The Law of Commercial Agents and Intermediaries No. 28 of 2001 does not address customer restraints.

price or other terms on which products are sold.<sup>45</sup> By ensuring that resources are allocated efficiently and by spurring innovation, competitive markets ultimately maximize consumer welfare.

The relationship between competition and commercial agency is particularly relevant to so-called "vertical restraints".<sup>46</sup> Vertical restraints frequently involve manufacturers and distributors. Vertical restraints typically relate to the geographic territories or classes of customers to which distributors sell, the degree of exclusivity the manufacturer or the distributor can count on from the other, and the prices at which distributors sell. The negative anti-competitive effects of exclusivity can be considerable.

Exclusivity of commercial agency can be a restraint of trade or monopolization.<sup>47</sup> Exclusivity can raise barriers to entry or market access and thus enhance unilateral price-raising power. The loss of business resulting from exclusivity could lead to claims of anti-monopoly violations by excluded parties.<sup>48</sup> An exclusive agency can eliminate rivalry among agents in the sale of the manufacturer's product and has the potential of

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<sup>45</sup> See Michal S. Gal, Imported Antitrust Competition Policy for Small Market Economies 35 (2003). See also Michal S. Gal, Market Conditions under the Magnifying Glass: The Effects of Market Size on Optimal Competition Policy, 50 Am. J. Comp. L. 303, 314 (2002).

<sup>46</sup> See Jessica L. Taralson, What Would Sherman Do? Overturning the Per Se Illegality of Minimum Vertical Price Restraints under the Sherman Act in *Leegin Creative Leather Products, Inc. V. PSKS, Inc.* was not as Reasonable as it Semmed, 31 Hamline L. Rev. 549, 556 (2008). See Barbara Ann White, Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation, 60 Geo. Wash. L. Rev. 1 (1991). See also Val D. Ricks and R. Chet Loftis, Seeing the Diagonal Clearly: Telling Vertical From Horizontal in Antitrust Law, 28 U. Tol. L. Rev. 151, 159 (1996).

<sup>47</sup> See Lahouel, Competition Laws in MENA: An Assessment of the Status Quo and the Relevance of a WTO Agreement, 6-7 (The Economic Research Forum for the Arab Countries, Iran and Turkey: Cairo 2000). For an examination of the competing view of antitrust law see Page, Ideological Conflict and the Origins of Antitrust Policy, 86 Tulane L. Rev. 1 (1991).

<sup>48</sup> In principle, Jordan competition law covers the entire economy; yet it provides several important exemptions. For example, competition law does not apply if other legal provisions do not allow competition in a market for certain goods or services. Such provisions take precedence over the provisions of the competition law. See Jordan Provisional Anti-Trust Law No. 49 of 2002, Official Gazette No. (4560), art. 7 (August 15, 2002).

permitting the authorized agent himself to exercise some market power.<sup>49</sup> However, the manufacturer's or agent's purpose could be not to limit rivalry in itself or to permit an agent to exercise market power but rather to render more efficient the distribution of his product. The manufacturer would not grant the exclusive agency unless he believed it would make the distribution of his product more efficient. Exclusivity can be lawful in the absence of monopolistic purpose or anticompetitive effect i.e. the maintenance of a minimum pricing. That exclusive agency is lawful remains to be tested in courts.<sup>50</sup> Therefore, the legality of exclusive agency, under anti-monopoly laws, remains intact.

National authorities in Jordan systematically favor the interests of domestic commercial agents over the interests of domestic consumers. For example, customs authorities will prevent the entry into Jordan of goods originating with a foreign manufacturer who has a duly registered agent for these goods in Jordan, but are shipped through another person. Jordanian courts can issue an injunction to prevent parallel import made by a third party in breach of the exclusivity clause. Parallel imports involve the importation of genuine goods outside the authorized distribution channels.<sup>51</sup> In other words, parallel import is the importation of goods from a foreign source by bypassing the authorized local agent therefore allowing the sale of goods directly to retailers or consumers. The matter of parallel importation is addressed through case law as the following case illustrates.

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<sup>49</sup> The Kuwaiti Antitrust Law, for example, prohibits abusive use of a dominant position. See Lahouel, *supra* note 44, 8. See also El-Dean, *Privatisation and the Creation of a Market-based Legal System: The Case of Egypt 167* (Egypt competition law forbids exploitative behavior) (Brill Academics: Leiden 2002).

<sup>50</sup> No case to our knowledge has addressed the question of legality of exclusivity.

<sup>51</sup> Parallel imports or gray market goods are genuine goods and not counterfeits whereby trademark is misappropriated. See Keith E. Maskus, *Parallel Import*, 23 *World Econ.* 1269 (2000).

The case concerns a Jordanian company, Jordan Mechanical Engineering Company, acting as an agent of “Maggi” chicken stock cubes which is a product of Nestle, a Swiss company.<sup>52</sup> It came to the knowledge of Jordan Mechanical that some Jordanian traders, such as Abdul-Fattah Qinno, imported about 1000 box of Maggi cubes (product of Egypt). These products did not conform to the required specifications. The Court of Cassation found that Jordan Mechanical was entitled to preserve its rights as the authorized agent of the manufacturing company for marketing certain goods.

By bringing the case, discussed above, the agent sought to protect regular trade channels. Local agents have built the goodwill of imported products by marketing plan, promotional efforts, and providing a product warranty through after-sale servicing. The purpose of all these programs is to maintain clients and increase the sale of goods. Agents provide services and incur costs that parallel importers may not provide or incur. Thus, parallel importers free ride at the expense of authorized distributors. In addition, parallel imports may damage product quality control. Poor quality could cause consumer confusion and diminish the reputation of the manufacturer and agent.

## **B. The General Agreement on Trade in Services**

The basic WTO instrument regulating trade in services is GATS, introduced as Annex 1B to the Agreement Establishing the WTO of April 15, 1994.<sup>53</sup> GATS establishes the basic structure for regulating trade in services by adopting a framework similar to that for trade in goods under the General Agreement on Tariff and Trade

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<sup>52</sup> See Court of Cassation, Journal of Jordanian Bar Association, Case No. 95/1418, page 957 (1996).

<sup>53</sup> See General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments-Results of the Uruguay Round vol. 28 (1994), 33 I.L.M. 1167 (1994).

(GATT).<sup>54</sup> Articles XVII and II of GATS respectively establish the National Treatment and Most-Favored-Nation (MFN) principles, subject to rather substantial rights of derogation under each country's Schedule of Specific Commitments and List of MFN Exemptions, respectively drawn up in line with further stipulations in Article XX of the GATS and the GATS Annex on Article II (MFN) Exemptions. Article XVI establishes a market access obligation somewhat akin to the provision on quantitative restrictions in Article XI of the GATT, which obligation is also subject to derogations under the Schedule of Specific Commitments. Despite these basic disciplines, the GATS is very much an agreement in continuous progress. In several aspects, GATS is no more than an agreement to enter into further negotiations with reference to progressive liberalization to further liberalize trade in services.<sup>55</sup> This makes GATS, in several respects, a difficult agreement to enforce, since several of the provisions end up in effect as expressions of intent to liberalize despite their not being worded as such.

GATS requires the member country to ensure that a monopoly supplier does not "abuse" its monopoly position when it competes in the supply of services outside its monopoly rights.<sup>56</sup> This language applies only when there is a "sole" supplier of the service in question. GATS provides that member country recognizes that certain business practices of service providers, other than those falling under article VIII, may restrain competition and thereby restrict trade in services.<sup>57</sup> Obviously, this provision leaves a great deal of discretion to countries as to the definition of these restraints on competition,

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<sup>54</sup> See Aly K. Abu-Akeel, Definition of Trade in Services under the GATS: Legal Implications, 32 GW J. Int'l L. & Econ. 189, 190 (1999) (GATS speaks to trade in services through certain supply modes: cross-border supply, consumption abroad, commercial presence, and presence of natural persons. The peculiar characteristics of trade in services require that any international instrument for their regulation depart, in certain key respects, from the concepts and rules incorporated in the GATT).

<sup>55</sup> See General Agreement on Trade in Services, *supra* note 53, art. XIX.

<sup>56</sup> *Id.* art. VIII. GATS left the important term "abuse" undefined.

<sup>57</sup> *Id.* art. IX.1.

the regimes applying to them, and the measures available to oppose them. Furthermore, GATS obliges the member to accede to any request for consultation with any other Member concerning eliminating restrictive business practices with a view to eliminating them.<sup>58</sup> GATS also imposes a duty to cooperate in the provision of non-confidential information of relevance to the matter in question. GATS Article VIII violations are subject to, under the Article XXIII, the Dispute Settlement and Enforcement provisions which authorize a complaining member to resort to the WTO's Dispute Settlement Understanding procedures. To date, there have been several requests for consultations concerning GATS article VIII.<sup>59</sup> Those requests represent a good example of the potential for competition to be used for further liberalization in trade in services and to address market access barriers.

Article VI of the GATS deals with domestic regulation. At its most basic level, it provides that in sectors where specific commitments are undertaken, each Member shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner. GATS sets out specific rules to apply to measures relating to qualification requirements and procedures, technical standards, and licensing requirements to ensure that they do not constitute unnecessary barriers to trade in services.<sup>60</sup> Such measures in domestic regulations should not constitute unnecessary barriers to trade in services.

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<sup>58</sup> *Id.* art. IX.2.

<sup>59</sup> See Catherine B. Harrington, Weather May Not Stop USPS, but Special Interests Will: The Bush Administration's GATS Offer Supports Private Express Delivery Services but Threatens to Stamp Out USPS, 19 Am. U. Int'l L. Rev. 431, 448-459 (2003) (providing references to Deutsche Post case, Canada Post's activities, and U.S. Postal Service).

<sup>60</sup> See General Agreement on Trade in Services, *supra* note 53, at art. VI.4.

Beyond this, the negotiating technique adopted in drawing up the GATS is unique. Unlike the GATT, which involves a negative list approach under which any item or sector not included in a schedule is deemed to be automatically covered by the agreement, the GATS involves a positive list approach, under which only those items specifically scheduled by a contracting party are covered. The latter approach is inherently more restrictive, since only those commitments and sectors which the parties have expressly considered are covered. This approach excludes, for example, newly-emerged services that parties could not anticipate at the time of negotiations.

### **C. Jordan's Specific Commitments in Relation to Commercial Agency**

Jordan made specific commitments in specific service sectors on both market access-Article XVI of GATS- and national treatment-Article XVII of GATS.<sup>61</sup> These specific commitments are inscribed in a schedule with such limitations and derogations as Jordan deemed necessary. These specific commitments effectively form the crux of the obligations currently undertaken by Jordan under the GATS, since they determine the incidence of the wider, more general disciplines under the agreement.

The sector of distribution services- whereby Jordan made many commitments- includes postal, energy, land transportation, maritime, environmental, audiovisual, and tourism services. However, since my goal is not to analyze this sector thoroughly in the present article, at this stage I will discuss Jordan's commitments as they relate to commercial agency only.

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<sup>61</sup> In addition to specific commitments, Jordan adopted a general commitment that may not be undermined or modified by it to recognize most-favored nation status (MFN status). The general commitment applies horizontally to all sectors and to all countries. *Id.* art. II.1 (With respect to any measure covered by this Agreement[GATS], each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country).

With regard to commercial agency, Jordan submitted a rather limited schedule of commitments. Jordan introduced several limitations on market access. Barriers to market access include exclusive rights for "Jordanians" to supply; restrictions on the legal entity through which a service supplier may deliver the service (e.g., natural persons and partnerships); and limitations on the level of shareholding or equity that a foreign service supplier may make.<sup>62</sup> Jordan also made no commitments for "presence of natural persons" mode of supply so that it could introduce or maintain measures inconsistent with market access or national treatment.

The commitments made by Jordan with regard to commercial agency can be evaluated as trade barriers operated intentionally to protect the exclusivity rights for Jordanian agents. However, these commitments may reflect the particular cultural-social environment in Jordan which would support their incorporation, the necessity of sustaining specific public policy objectives, or the inevitable reflection of the particular situation intrinsic to Jordan. At any rate, based on the commitment Jordan made in the WTO, commercial agency seems to be particularly ripe for the consideration of competition policy and for further liberalization.

#### **IV. Termination of Commercial Agency**

Agent effectiveness within his assigned market area is critical to a manufacturer's plans. Ineffective agents can lead to lost sales and ultimately taking the manufacturer out of the market. As such, the principal or manufacturer can terminate the existing agency relationship. The termination clause is one of the most important clauses in any agency agreement. The elements of the clause involve: mutual termination rights without cause;

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<sup>62</sup> See Sector Specific Commitments of Jordan-Distribution Services, available at <<http://tsdb.wto.org/simplesearch.aspx>> (last accessed August 26, 2010).

a definite term; termination for cause; and the delineation of the parties' rights and obligations upon termination and thereafter.

The simplest form of termination is bilateral termination right whereby the agency agreement is terminable by both parties.<sup>63</sup> Thus, one party cannot terminate a valid agency contract without the agreement of other party. While unilateral termination is generally accepted for ordinary contracts,<sup>64</sup> the Law of Commercial Agents and Intermediaries of 2001 does not permit this type of termination.<sup>65</sup>

Moreover, it is common for a commercial agency to contain a specific term.<sup>66</sup> Agency terminates at the end of its specific term. In this case, the commercial agent is not entitled to compensation. The Law of Commercial Agents and Intermediaries of 2001 provides that the termination of an agency agreement without any fault on the part of the agent allows him to claim compensation.<sup>67</sup> The rule seems to apply only to termination of an agency before its expiry term. Thus, termination of an agency agreement due to its expiration does not entitle the agent to compensation. In commercial agency for fixed term, the agreement, not the law, may provide for serving a notice. It is possible that an agency agreement does not contain a provision for termination. In this scenario, the length of the contract will be set at a reasonable duration.

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<sup>63</sup> See Jordanian Civil Code No. 43 of 1976, art. 241, 242. See Court of Cassation, Journal of Jordanian Bar Association, Case No. 1870/96, page 4620 (1997).

<sup>64</sup> See Jordanian Civil Code No. 43 of 1976, art. 176.

<sup>65</sup> In contrast with Jordan, the commercial agency laws of other countries permit unilateral termination by either party at any time and compensation is due only if the termination takes place without prior notice or in an untimely manner. See Egyptian Code of Commerce of 1999, art. 163; UAE Commercial Transactions Law of 1993, 214.

<sup>66</sup> The term of the agency agreement is simply one of the terms bargained for.

<sup>67</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 14. See also Howard L. Stovall, Recent Changes to Commercial Agency and Distributorship Law in the Middle East, Texas Transnational Law Quarterly (September 2008) (The UAE Commercial Agency Law states that if the commercial agency is terminated “at an inappropriate time” or for any reason beyond the commercial agent’s control, the commercial agent may claim compensation for damages suffered).

An agent may sue the principal/manufacturer for termination without cause or fault on the part of the agent and may recover any damages relating to the termination and his lost profits.<sup>68</sup> Causes for termination may include fraud or breach of contract. These causes are considered significant transgressions committed by the agent that merit termination. The Law of Commercial Agents and Intermediaries of 2001 does not provide standards for "cause or fault."<sup>69</sup> The presence of these standards is designed to prevent principals or manufacturers from engaging in opportunistic behavior when the relationship between the principal and the agent sour. In addition, these standards compel principals to treat their agent fairly. The law should have provided that termination can only occur upon a failure to perform substantially on material aspects of the contract. The law also should have provided an opportunity for the agent to correct the problem before resorting termination. In other words, termination of an agency agreement should be the last resort. The law does not address the issue of burden of proof of cause for termination and whether the burden falls upon the principal or the agent.

To protect the principal against an agent's under-performance, the agency agreement ought to include a performance evaluation provision which should be linked to a termination. Such an evaluation provision may include sales performance trends over

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<sup>68</sup> *Id.* Like Jordan, other Arab countries afford agents a high degree of protection against termination and non-renewal of agency agreements. See Egyptian Code of Commerce of 1999, art. 163; Lebanese Code of Commerce, art. 289; Syrian Code of Commerce, art. 384; and UAE Commercial Transactions Law of 1993, art. 214. See also Theodore W. Kassinger and Dylan J. Williams, Commercial Law Reform Issues in the Reconstruction of Iraq, 33 Ga. J. Int'l & Comp. L. 217, 222 (2004).

<sup>69</sup> Every contract imposes an obligation of good faith and fair dealing on contracting parties. This rule can be relevant in defining termination. See Chibli Mallat, Commercial Law in the Middle East: Between Classical Transactions and Modern Business, Am. J. Comp. L. 81, 104-110 (2001). See also Frederick V. Perry, Shari'ah, Islamic Law and Arab Business Ethics, 22 Conn. J. Int'l L. 357, 374 (2007).

time.<sup>70</sup> In this way, a manufacturer can reasonably justify the termination of the agency within for those commercial agents who fail to perform effectively.

In the event of wrongful termination, the Jordanian courts decide the amount of indemnity owed to the agent, taking into account the harm actually suffered by the agent and lost profits.<sup>71</sup> In practice, however, the indemnity is frequently determined arbitrarily by the courts on the basis of an annual commission arrived at by averaging the commissions of the preceding years of activity.<sup>72</sup> A court is likely to take into account as well factors other than the amount of past commissions, such as showroom costs, warehouse, maintenance or repair facility, the amount of money which the agent has invested, the portion of the agent's time which has been devoted to the principal's business, or the cost to the agent of the termination of employment and other contracts resulting from the termination of the sales agency relationship. To recover this indemnity, the agent must demonstrate that he has not breached the agency agreement, and that he has successfully promoted the principal's products.<sup>73</sup> The overlapping provisions of the Civil Code and the Law of Commercial Agents and Intermediaries of 2001 may increase the sum awarded in case of termination. The right to an indemnity cannot be waived by contract. In other words, this right to an indemnity exists notwithstanding any contractual provision to the contrary.

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<sup>70</sup> Jordanian courts must walk a fine line in interpreting the evaluation provision. For example, the fact that sales for a given year are less than those of the previous year "without being ridiculously low" is not sufficient to deprive the agent of a termination indemnity. Also, in a case where mandatory sales goals are provided, courts should refuse to permit termination of an agency agreement for failure to comply with the sales goals, on the ground that such failure do not result from a lack of activity on the part of the agent but from the fact the products are becoming less popular with the potential customers.

<sup>71</sup> See Law of Commercial Agents and Intermediaries No. 28 of 2001, *supra* note 3, art. 14.

<sup>72</sup> See Court of Cassation, Journal of Jordanian Bar Association, Case No. 88/148, page 1355 (1990). See Court of Cassation, Journal of Jordanian Bar Association, Case No. 88/235, page 1379 (1990).

<sup>73</sup> See Court of Cassation, Journal of Jordanian Bar Association, Case No. 95/515, page 2885 (1997).

Termination can occur by the operation of the law. For example, the death or insanity of the commercial agent terminates the relationship by operation of law.<sup>74</sup> However, death or insanity of the supplier does not automatically terminate the agency. The agency relationship, unless otherwise agreed, will be deemed effective until the successor of the supplier gives different instructions. Bankruptcy of the principal terminates the agency relationship by operation of law.<sup>75</sup> Bankruptcy of the commercial agent does not terminate the agency relationship automatically, but constitutes a reason for the principal to terminate the contract. If the principal does not choose to terminate the relationship, the trustee in bankruptcy may do so on behalf of the agent.

## **Conclusion**

A successful relationship between the foreign principal and his local agent must be based on familiarity with the laws of Jordan. The Civil and Commercial Codes as well as the Law of Commercial Agents and Intermediaries of 2001 govern agency relationships in Jordan. Many of these codes and laws overlap leading sometimes to confusion. For instance, parties' rights and obligations are found in the Commercial Code, Civil Code, and Law of Commercial Agents and Intermediaries. The Jordanian legislator should enact a comprehensive commercial agency law that governs all aspects of agency.

The Law of Commercial Agents and Intermediaries gives commercial agency a sweeping scope. The law does not distinguish between agencies and other intermediaries. Consequently, a broad variety of unsuspecting commercial arrangements may qualify as agencies. The Jordanian law should provide a clear definition for each type of intermediaries.

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<sup>74</sup> See Jordanian Civil Code No. 43 of 1976, art. 861.

<sup>75</sup> *Id.* art. 205.

The Law of Commercial Agents and Intermediaries does not regulate exclusivity. Rather, the Jordanian legislator left the exclusivity provision to the agreement of the parties. Rational use of exclusive agency may affect competition and consumer welfare. Anti-monopoly enforcement agencies should not elevate the short-term pecuniary interests of discrete competitors at the expense of competition and consumer welfare. That exclusive agency is lawful remains to be tested in courts. If a case arises in the future, courts should uphold exclusive agency. When the decision to grant an exclusive agency is made by manufacturer acting in its own self interest, consumer welfare could be protected to a greater extent than any *ad hoc* decision-making by a court could secure. A subsidiary rationale for sanctioning exclusive agency is the common sense notion that courts should not provide artificial, non-market incentives for internal expansion, an alternative to exclusive agency that will be inefficiently pursued if appointments of exclusive agents are met with expense and protracted challenges under the anti-monopoly laws.

Jordanian courts have exclusive jurisdiction in settling disputes arising out of commercial agency contracts. The Law of Commercial Agents and Intermediaries does not permit the use of other alternative dispute resolution mechanisms such as arbitration and mediation. Litigation flies in the face of maintaining healthy relations between the principal and agent. The principal and agent must continuously cultivate good personal relationships. These types of mechanisms help mitigate the spillover effects of disputes between principals and agents especially if they are engaged in long-term relationships. Therefore, the law should be amended so as to permit the use of such mechanisms.

On balance, Jordan's approach to the use of commercial agents is restrictive. The law sets certain conditions for a person to act as an agent. For instance, these conditions relate to nationality and registrations. Only Jordanian persons can become agents for foreign principals or manufacturers. In addition to the nationality condition, a commercial agent must be duly registered at the Commercial Agents Registry of the Ministry of Industry and Trade. The purpose of registration, among other things, is to keep record of persons acting as agents. As currently written, the law does not invalidate an unregistered commercial agent who can practice agency. The law should be modified to invalidate unregistered commercial agents so as to protect consumers and other third parties whom may deal with the agent.

In discussing exclusivity of commercial agency, Law of Commercial Agents and WTO rules are closely related and interact with each other. It is not surprising, therefore, that the GATS, through articles VIII and IX, places an obligation on the part of WTO members not to introduce more restrictive rules on the flow of services and preserve the degree of access provided under current domestic regulations. Jordan maintains restrictions in the distribution sector, including commercial agency, in which foreign investment is circumscribed through equity and other restrictions. Trade partners may pressure the Jordanian government to adopt the policy of increasing competition in commercial agency as a basic principle of regulatory reform. Moreover, GATS can be a promising tool for achieving liberalization in commercial agency sector. Thus, any future modification to the commercial agency law will not be a voluntary response by the government to internal public and private sector concerns who prefer to maintain the status quo.

The termination clause is one of the most important clauses in any agency agreement. The agency agreement can terminate by the mutual desire of parties, at a definite time, or for a good cause. A manufacturer cannot terminate the agency at any time, for any reason or for no reason at all. An agent may sue the manufacturer for termination without cause or fault on the part of the agent and may recover any damages relating to the termination and his lost profits. The "cause" standard for termination is vague and variable because clear patterns of acceptable or proscribed conduct are difficult to discern. The law, or even courts through judicial decisions, should provide a bright-line standard for termination. It is also advisable that a reason be given for the termination so as to avoid a claim that the termination is malicious. In addition, a notice of termination, with a "cure" provision should be included in the law. In other words, the law should provide a notice of termination so that the agent and principal can settle their accounts and avoid surprise termination. Even before termination, the law could grant the agent a grace period to rectify the problem that would merit termination.

Many lawsuits are the product of the parties' failure to honestly or sufficiently communicate their expectations of each other during the course of their agency relationship. As far as the contract is concerned, the structure of a commercial agency agreement varies considerably, depending on the legal drafting technique. A well-written contract, combined both with honest communication by the manufacturer and solid justifications for its business conduct, are big steps toward avoiding the filing of a lawsuit to begin with. Beneficial relationships will result from a combination of frequent and timely communications between the principal and his agent and also from knowledge of the laws of Jordan related to commercial agency. If still more reforms do prove

necessary, the presently suggested improvements will give future legislatures the background for serious consideration and understanding of what, in fact, remains to be done.