

CLIENT ALERT

The Distributor's Compensation Claim under Tunisian Law

By Meriem Rezgui

From the international company's perspective, the distributor's compensation claim at the end of a contractual relationship is the most critical issue of any distribution relationship. This alert sheds light on the complex rules governing this issue under Tunisian law. On the one hand, the difference between dealers and agents is critical, and on the other, the interplay between contract and competition law must be considered.

Legal Framework

Different legal regimes govern distribution contracts in Tunisia. For foreign parties, the interplay between contract and competition law principles is not always easy to understand. For an international supplier of goods and services, distributors' compensation claims at the end of a contractual relationship are the most critical issue when appointing a distribution partner and agreeing on a contractual arrangement. Under Tunisian law, the difference between dealership agreements and agency agreements is fundamental.

Dealership Agreements – Economic Dependency?

In a dealership agreement, the parties are principally free to agree on the duration of the contractual term. Under a dealership agreement, the dealer sells the supplier's products in the local market under a framework distribution agreement based on the general principle of freedom of contract enshrined in Article 242 of the Code of Obligations and Contracts ("**COC**"). Upon the expiry of the contractual term, the dealership agreement lapses by operation of law without the need for a notice of termination.

Abusive non-renewal?

However, the non-renewal of a dealership contract can be considered "abusive" and entitles the dealer to compensation, according to competition law principles, which supersede general contract law. Article 5 of the Law of 15 September 2015 on the Reorganization of Competition and Prices prohibits "*the abusive exploitation of a state of economic dependence in which a client or supplier finds itself without alternative solutions for the marketing, supply or provision of services.*"

The termination of a commercial relationship without presenting a valid reason or resorting to termination unilaterally on the grounds that the commercial partner refuses to submit to unjustified commercial conditions is often considered abusive. Usually, this type of abusive termination of a commercial relationship does not refer to a fixed-term contract that has expired but instead to an agreement that is to be or already has been renewed.

Definition of Economic Dependency

The Tunisian legislature did not define the concept of economic dependency. The Tunisian Competition Council¹, however, has held that *“Economic dependency results from the combination of several elements which are likely to put an economic partner in such a situation that it is difficult to overcome its effects. These elements are the notoriety of the partner's brand, its share of the reference market, the partner's share of the customer's or supplier's turnover, the difficulty for the latter to find an equivalent solution.”*

Economic dependence is made on a case-by-case basis. In assessing the economic dependency of a company on a dominant company, case law is consistent. It considers the reputation of the dominant company's brand, its market share, the size of the dependent company's share of the turnover achieved with the dominant company, and the existence and diversity of alternative solutions for the dependent company. An alternative solution is defined as the ability of customers to obtain products corresponding to their needs under technical and commercial conditions equivalent to those prevailing in the relationship with the former supplier.

The compensation calculation is left to the court's discretion and will depend on the case in question.

Agency – the Doctrine of “Mutual Interest”

The situation is different when it comes to agency agreements, under which an agent intermediates transactions on behalf of the principal in return for a commission payment.

Commercial agency is subject to Article 625 of the Commercial Code (“CC”) and the general rules regarding agency (“*mandat*”) pursuant to Articles 1104 to 1171, COC. As would be the case with dealership contracts, parties are free to determine the duration of a commercial agency agreement contractually. However, there are certain limitations based on the doctrine that any agency agreement is a contract concluded in the *“mutual interest of the parties.”*

Article 626, CC provides: *“[T]he commercial agency contract made without duration cannot be terminated by either party without one of the parties observing a notice period in accordance with customary practice, except in the case of default of the other party.”* In addition, Article 1160-1, COC provides that, *“the principal may not revoke the agent without the consent of the party in who's interest the mandate was given.”* Based thereon, the Tunisian courts would typically award the agent

¹ The Competition Council is the Tunisian competition watchdog that also serves as a competition authority.

compensation if the principal terminates the agency agreement, except where the termination is attributable to the agent. In the event the principal terminates the contract for default, no compensation is due.

Furthermore, non-renewal of an agency contract would often entitle the agent to compensation, but not because non-renewal of a fixed-term contract would be qualified as "unfair," *per se*. Instead, compensation may be due when the principal's previous conduct gave the agent the impression that the contract would be renewed. This outcome is supported by the principle of estoppel, which prohibits a party from contradicting itself in its actions when discharging a contract and is enshrined in Article 547, COC, and reinforced by Article 243, COC (that establishes a general obligation to perform a contract in accordance to good faith).

Determining whether compensation is due and in what amount is in the court's discretion. Where the agreement was in force for several years, the court would typically award an amount equivalent to two years' commissions.

Contract Drafting

Several measures can be adopted to avoid unpleasant surprises when entering into a contractual relationship with a dealer or agent.

Termination for Cause

As a general rule, no compensation is due where a foreign company is entitled to terminate the agreement for cause. This rule applies to both dealer and agency agreements.

Particular attention should be given to the clauses that define the criteria for terminating for cause. Experience shows that the arbitrary dismissal of distribution partners is the exception rather than the norm. Disputes, however, frequently arise regarding what sales targets need to be reached and what efforts should be used in developing the market. Therefore, a precise definition of termination for cause enhances contractual clarity.

Limitation of the Contract Term

To reduce the risk of compensation claims for non-renewal, the contract may contain a clause expressly excluding any renewal of the contract by tacit agreement at the end of its term. Difficulties arise when, upon the expiry of the contract, the parties continue their contractual relationship. The question is whether the continuation of the contractual relationship after the expiry of the term constitutes a modification of the agreed non-renewal clause. The answer is it does not. This rule is analogous to the provisions of Article 794, COC concerning leases providing that, "*Continued enjoyment does not imply tacit renewal where there is a notice of termination or other equivalent act indicating the intention of one of the parties not to renew the contract.*"

Choice of Law and Dispute Resolution

Tunisia's rules protecting dealers and agents are part of Tunisian public order and are mandatory, which means that a Tunisian court or an arbitral tribunal seated in Tunisia is bound to apply them.

These rules do not apply when the parties have agreed on an exclusive venue or arbitration outside Tunisia. Usually, an international arbitral tribunal would give more weight to the parties' contractual agreement and would be prepared to disregard compensation claims if the parties have excluded them contractually. As a general rule, under Tunisian law, distribution agreements may be submitted to arbitration, and a Tunisian court would uphold an arbitration agreement in a dealership or agency agreement that provides for international arbitration outside Tunisia.

However, a Tunisian court may invalidate an arbitration agreement if it determines it infringes the competencies of the Competition Council. The examination of the Competition Council's competence reveals that the latter only declares itself competent when the practices which are the subject of the dispute concern the normal functioning of the market in its entirety and call for an infringement of the freedom of competition. Therefore, if a party invokes certain competition law principles in a contractual dispute, it does not automatically invalidate the arbitration agreement.

For further information, please contact:

Meriem Rezgui

Associate

Berlin/Tunis

rezgui@amereller.com

DUBAI | AMERELLER Legal Consultants | One by Omniyat, 14th Floor | Business Bay P.O. Box 97706 | Dubai, United Arab Emirates | T +971 4 432 3671

BERLIN | Amereller Rechtsanwälte Partnerschaft mbB | Kurfürstenhöfe, Spreeufer 5 | 10178 Berlin, Germany | T: +49 30 609 895 660

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