COMMERCIAL AGENT IN ETHIOPIA: A COMPARATIVE STUDY

LL.M IN COMMERCIAL LAW

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FEB, 2019

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THESIS SUBMITTED TO THE SCHOOL OF LAW, COLLEGE OF LAW AND GOVERNANCE, SCHOOL OF GRADUATE STUDIES, HAWASSA UNIVERSITY

HAWASSA, ETHIOPIA

IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF LL.M IN COMMERCIAL LAW

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FEB, 2019

SCHOOL OF GRADUATE STUDIES

HAWASSA UNIVERSITY

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I, the undersigned, declare that this thesis is my original work, has not been presented for a degree in any other University and that all sources of materials used have been appropriately acknowledged.

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Acknowledgement

At the very outset, my thank goes to the Almighty, God and His Mother, St. Mary, as they are always by my side.

Second I would like to extend my warm appreciation to my Advisor: Shimeles Ashagre (LLB, LLM & Candidate PhD) for his invaluable and constructive feedbacks and comments on the preliminary draft of the thesis. I also enjoyed his full and unreserved guidance and availing of pertinent documents for the completeness of the paper, without such constructive assistance the paper would not have been materialized.

I would also like to express my deep gratitude to my father Teklehaimanot Sinke, to my mother, Abrhet Belay, Like wise to Dr. Kiros Teklehaimanot (my Lovely elder brother), Yemane Tsegahun(my God father), to Leaki Ameha(my bro), and to Huluf who gave my life a meaning.

The support, care and patience extended to me from my queen wife, SELAM (Tutuye) Mehari, to my much-loved sons Yafet &Yulian during my research was also priceless, and for that I would like to thank them deeply with my full and sincere heart. Without their help it would be unthinkable to come up with this final thesis at it appears here and for that I am really grateful to everyone.

Last but not least, I owe debts of gratitude to all those who had besides of me at time when I had faced a Challenge, to Esak, Brhanemeskel, Wendye, Aschalew, Dr. Tsiruy, Haftish ,Akile, Tariku, Mamush, Abebe, Sisay, Gech, Bogale.

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Abbreviations /List of Acronyms

CA Commercial Agent

ECC Ethiopian Commercial Code

ECRBLP Ethiopian Commercial Registration and Business Proclamation

EU, European Union

EUR, European Union Regulation

ICC International Chamber of Commerce

ICCMCCA International Chamber of Commerce Model Contract on Commercial Agency

UK United Kingdom UNIDROT United Nation Draft Convention on Agency in the International Sale of Goods

WTO World trade Organization

Abstract

This is a comparative research work on the legal frame work of "Commercial Agent" in Ethiopia with an objective of exploring the various available legal frameworks there for and the associated problems therein. In this LLM thesis, it has been tried to overview the various legal protections on Commercial Agent in different jurisdictions and to also compare and contrast these 'Commercial Agent' frameworks with that "Commercial Agent" Legal frame work in Ethiopia. The paper finally comes up with some conclusions drawn from the legal loopholes and problems observed in the Laws which bestowed protection to Commercial Agent and the findings of the research show that there are inadequate legal frameworks to regulate the Commercial agency, particularly Commercial Agent in Ethiopia. As a result under the Commercial Code of Ethiopia regarding the scope of a commercial agent's activities , the exclusionary rule from Commercial agent businesses , the effect of Continued performance after the expiry of fixed period, the consequences of non-observance of mandatory notice for termination, duty to cooperation of the commercial agent and principal, issue of remuneration post termination, the entitlement of Commercial Agent up on termination for definite period of time, the entitlement of Compensation/indemnity if the agency relation is terminated due to death, illness, age and infirmity of the agent ,obligation not to compete post termination and the time-barred(period of limitation) for entitlement of compensation up on termination of the agency agreement are not properly addressed in a manner that attracts Commercial agency business investment.

Key terms: Commercial Agency• Principal• Commercial Agent • Ending and Terminating •covenant not compete•

CHAPTER ONE

INTRODUCTION

Background of the Study

Among the Channels which are preferred by the manufacturer to penetrate the market or to distribute their products (goods and services) either across national boundary or within the domestic market is, by using representatives.[1] Commercial agent is one of among the different sort of intermediators.[2]The Commercial Agent plays an important role in promoting new business, facilitating access to new markets by foreign players-especially SMEs-, and driving sales growth.[3] Their closeness to customers, expertise, market knowledge and consultation has always been valued as key factors in a highly competitive trading environment.[4] This shows us the vital role commercial agent contributes in Economic sector development. They are also active in a wide range of economic branches such as agricultural raw materials, textiles clothing & footwear, fuels & chemical industry, timber and building material, machinery & industrial equipment, furniture & household equipment, food & beverages, automotive or medical industries.[5]

The international community developed different laws that regulate Commercial Agent relationship. Among the international laws which are intended to regulate specifically Commercial Agents are, private international law (Hague convention on the law applicable to Agency (14 March 1978) that entered into force on the 1st of May 199272.[6] This convention is applicable to the relationship between agent and principal), international Uniform laws (there is a UNIDROIT *Draft Convention on Agency in the International Sale of Goods* (Geneva, 17

[1] Robert E. and others, Theories of international trade, foreign direct investment and firm internationalization: a critique (2001)62-65.
[2]Martijin W. Hesselink and others, European Civil Code principles of European law Commercial agency, Franchise and Distribution contract (PEL CAFDC) volume 2,(2006) 230.
[3]See Euro commerce, the retailer wholesaler and international trade presentation to the EU (2014)1.
[4]Ibid 2.
[5]Ibid 11.
[6]Dr. Eleanor CashinRitaine, 'The Common Frame of Reference (CFR) and the Principles of European Law On Commercial Agency, Franchise and Distribution Contracts (2010) 16.

February 1983)[7] and International models (International Chamber of Commerce Model Contract on Commercial Agency).[8]

Moreover, the modern agency law, tends towards the protection of the agent, who is usually considered to be the weaker party, *vis-à-vis* a stronger principal. Accordingly, under various domestic laws/ regional legal frame works the commercial agent is bestowed best protection. For instance, the commercial agent is bestowed ever best protection under European Union regulation (here after: EUR).[9]

In Ethiopia too, as part of global economy and as a result of the country's economic policy; it modeled a Commercial law code (hereinafter: ECC) in 1960s,[10] from the Continental legal system particularly from the French Commercial Code and that is drafted by Professor Jean Escarra, a French legal scholar. [11]. Accordingly, the Commercial Code under title two as part of auxiliaries and agents[12] recognizes the Commercial travelers and representatives[13], Commercial brokers[14], Commission agent [15]and Commercial agents.[16] Apart from the ECC, Pursuant to the Ethiopian Commercial Registration and Business Licensing (hereinafter: ECRBL), foreign companies are allowed for appointing Commercial Agent in Ethiopia.[17]

Seemingly it remained unchanged irrespective of fundamental changes in the constitutional and economic fabric of the country. [18] Indeed, although the government is found under draft to the existing commercial code the draft did not come up with fundamental change with respect

[7] Amy Krois and others, Introduction to International Legal English Student's Book (Cambridge University Press,2010) 67.
[8] Ibid 17.
[9] Council Directive/regulation 86/653/EEC of 18 December 1986 on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 1986 O.J. (L382) 17[hereinafter "regulation"]art 13.
[10]NegaritGazeta Gazette Extraordinary Commercial Code of the Emperor of Ethiopia Proclamation No 166 of 1960.
[11]LikuWorku Haile, A critical analysis of Ethiopian Civil Code: in the light of the core features of Continental European Codification LLM thesis (University of London, 2012) 5.
[12] See Ethiopian commercial code (n10).
[13]Ibid art 35.
[14] Ibid art 36.
[15] Ibid art 42.
[16] Ibid art 44.
[17]Ethiopian Commercial Registration and Business Licensing Proclamation, No.980/2016.
[18] Ibid.

Commercial Agent.[19] In turn it is non-friendly with the current situation of the country. After all there is no work done in Ethiopia with respect of commercial agent protection. Even though the Commercial code is under draft, it does not come up with fundamental changes with respect of Commercial Agent and this is also substantiated by the research which is conducted by the business community on the revision of the commercial code of Ethiopia.[20]

Hence, conducting on this in which researches dose not conducted for which is not touched is pertinent. Thus under this the chapter two, deals with General Overview of Agency Chapter three, on International Instruments on Commercial Agency, Chapter four Legal analysis of Commercial Agent In Ethiopia compare with other Jurisdictions and finally conclusion and recommendation.

[19]TilahunTeshome and others, Position of the Business Community on the Revision of the Commercial Code of Ethiopia (2008) 13.
[20] Ibid 14.

1.2 Statement of the Problem

Commercial agency is of particular importance in international trade, and most companies engaged in such business make use of agents also often employed to help facilitate trade in domestic market.[21]Commercial agents are representatives whose main role is to create, develop or maintain a customer base (goodwill), within a given territory, for manufacturers who want to expand their businesses.[22]During the life of the commercial agency contract, both parties benefit from the commercial agent's efforts since the principal acquires more customers through the sale or purchase of the goods and/or services and the commercial agent receives more commissions.[23]

These expectations, however, do not meet. Many have argued that Commercial agency agreement favors principal and ignores Commercial agent interests. It undermines and cannot usually be avoided commercial agent risks because most of the information which is necessary in order to assess the profitability and the economic risks which are involved in the performance of contract lie exclusively in the hands of the principal, who regards them as its trade secrets. Secondly, Commercial agents intrinsic in a long-term relationship. In order for such a relationship to be successful each party will have to invest in their mutual co-operation. To the extent that those investments are relationship-specific, a party becomes dependent on the continuity of the relationship. Thirdly, there is often a strong discrepancy in bargaining power between the parties. [24]Frequently, the principal is at the top of an extensive network of agents, whereas, on the other hand, the agent is merely a medium-sized or even a small business entity.[25]

[21]PetarSarcevic ,Yearbook of Private International Law Volume X (Published in Switzerland, 2008)20.
[22]Roy Goode, and others, Transnational commercial Law Texts, cases and Materials (2nd end, USA Oxford University, 2015) 293.
[23] Ibid 300.
[24]Hesselink and others (n2) 393-95.
[25] Ibid.

Looking to the legal framework of Ethiopia, it has enacted Commercial code that regulates the commercial activity in 1960s.[26]These provisions have noticeable gaps. Having only few provisions which are not comprehensive may bring unintended obligation to the commercial agent and every principal may claim to benefit from that gap. Ethiopia's commercial code contain only the enabling provisions of commercial agent agreement, and do not deal with detail rules of the scope of agreement, the issue of compensation for definite period agreement up on termination, the issue of continued performance and the consequence non observance of mandatory notice etc, . This has a problem for they give high possibility to dispute discretion to arbitrators. Due to this fact, Ethiopian commercial code are lackluster to the general criticisms commercial agent protection While many countries are taking measures of revisiting their Commercial law aggrieved by existing system of commercial agency agreement, no official comment have been made on the position of Ethiopian government. Indeed, even if the government is found under draft to the existing commercial code the draft did not come up with fundamental change with respect Commercial Agent.

Moreover, no research has been conducted to assess if the Commercial agent provisions maintains the status quo between the interests of principal and commercial agent. Thus, this research is aiming at finding solution to the problems which are stated here above.

1.1. Research Questions

The research is aimed at searching answers to the following questions;

1) Dose provisions of the Ethiopian Commercial code protects the interests Commercial Agent sufficiently?
2) Can the Commercial Agent legal frame work and the protections laid down by the law sufficiently attain the Ethiopian commercial code over all objectives?
3) Are the Commercial Agent protection frame work viable in light of the prevalent principles and Commercial Agent laws and practice of the other jurisdiction?
4) And what would be the best possible alternatives for effective and efficient Commercial Agent rights protection in Ethiopia?

[26] See Ethiopian Commercial Code (n10).

1.2. Research Objectives

1.2.1. General objective

The general objective of this study is to test the adequacy of the Ethiopian law in the Commercial Agent protection. On top of testing the adequacy of the Ethiopian law, this study will also identify the legal gaps, pitfalls, hindrances and perils of the existing Commercial Agent protection law and forward suggestions and recommendations that produce practical relevance.

1.2.2. Specific objectives

In addition to the general objective, the study has specific objectives and these include;

- ✓ To examine if the Ethiopian Commercial provisions sufficiently protects the interests the Commercial Agent;
- ✓ To assessing if the Commercial Agent legal frame work sufficiently attains the Ethiopian commercial code over all objectives.
- ✓ To assessing into the Commercial Agent protection in Ethiopia under the existing legal regime in light of the prevalent principles and laws on the commercial Agent protection and the practice of other jurisdictions.
- ✓ To develop and to contribute its fair share to provide legal solutions to the problems that would be faced in the course of Commercial agent dispute settlements.

1.3. Research Design and Methodology

Under this thesis a Comparative methodology is used to address the problems framed under this study, Comparative study of the law is a critical component of the thesis. 'Comparative law' can be defined as an intellectual exercise with law as its subject through the process of comparing various legal jurisdictions of the world. [27]Comparative study of the law can be classified as macro comparison and micro comparison; while the former involves the study of

[27]KonardZweigert and Hein Kotz, Introduction to Comparative Law, 3rd Revised edition (Clarendon Press-Oxford, 2008) 2.

legal materials, dispute resolution procedures and the roles of legal institutions such as techniques of legislation, the authority of precedents as well as the role of attorneys and judges; the later deals with particular legal institutions or problems such as determining liability of the manufacturer in the event of defective goods or establishing appropriate rules for the determination of custody rights over children.[28]

Comparative study of law refreshes and enriches the study of one's national law since one can have an access to the principles for doctrinal elements beyond interpreting plain texts of the national laws. [29]Moreover, beyond the study of facilities to interpret texts, principles, rules and standards of a legal jurisdiction, the study of law as a legal science strives to discover best schemes and solutions to deter and resolve social conflicts.[30] Comparative study of law provides tremendous opportunity to access model solutions from the different legal systems of the world as it's famously said that comparative law is 'ecole de verite' i.e. a supply of solutions.[31]Given the Ethiopian Commercial Code is adopted from a foreign jurisdiction, comparative study has a Paramount importance in resolving problems raised under this study

Under this study, a micro comparison is made on the Commercial Agent protection in Ethiopia vis a vis International convention (ICCMCCA), European legal framework and their practice on Commercial Agent, France and England. Those countries are both from continental (France) and common law legal System (England). It is obvious that both Ethiopian and the Countries which I have stated here above are found at different legal and economic development. However, as comparison is possible if it is to take lesson from the countries that have best practice and experience the Study is conducted a comparison regardless of their difference on the legal and economic development.

Besides, the comparisons aims at showing in boldly term the similarity and difference between the Ethiopian Commercial Agent protection system and the other jurisdictions which bestowed a best protection to Commercial Agent. By presenting such differences it is possible to show

[28] Ibid 4 & 5.
[29] Ibid 4.
[30] Ibid 15.
[31] Ibid.

what Ethiopia can borrow some good approaches without contradicting the existing protection bestowed to principal and Commercial Agent.

In addressing and analyzing the pit falls that exist in the legal regime of Ethiopia with respect of Commercial Agent protection, the study uses a qualitative approach (doctrinal research method) which is confined to the analysis of principles, laws and cases. In other words, this research is short of empirical data analysis. Accordingly, from the Ethiopian side, the study employed related legislations. From the EU, France and England perspective, an attempt has been made to use the pertinent legislations/regulations, and directives which recognized and protect commercial Agent. Likewise, books, journals, published and unpublished materials, Internet, Court decisions (case) which deals with the Commercial Agent protection also consulted.

1.4. Scope of the Study

In line with the very topic of the thesis, the research mainly targets the Commercial Agent protection law in Ethiopia. In so doing, the existing legal frame work and the current draft legislation on the pertinent part will be highly treated for clear taste. The prevalent principles, laws and practice of EU, France and England will have important place both as a litmus test and as guidelines to Ethiopia's current scenario in order to hold a viable and sustainable Commercial agent protection frame work and scheme.

1.5. Significance of the Study

The thesis will have multitude contributions, inter alia, being the subject matter in general very infant in Ethiopia and is almost untouched, it will be an enormous source of reference for further research work. It will help the government see the gaps in the Commercial agent protection and show ways of reforming them. It can also serve as a reference material in the academic domain. The drafter of the existing commercial law will be the primary beneficiary by making use of the thesis as an input for the amendment.

1.6. Limitations of the Study

Since no study has been made concerning Commercial Agent in Ethiopia and as this study is conducted for the first time, the researcher faced source limitations. In addition, as the

Ethiopian court experience is yet not developed the researcher suffered from getting court decisions in Ethiopia dealing with commercial agent.

After all, because of the research digests, principles, legislations and cases, the researcher may face budget constraints, shortage of time, internet connection problem and difficulty of access to websites.

1.7. Organization of the Chapters

This thesis contains four major chapters. In Chapter-two we will review some important literature backgrounds around Agency such as definitional issues, theoretical foundation of Agency, the concept of agency both in Common and civil legal system, the related features of commercial agency ...etc.. Chapter-three of the thesis discusses the Commercial agency in EU, France, England and International instruments (Conventions). In Chapter-four, an endeavor has been made to examine some prominent legal issues related to 'Commercial agent' with a view to deeply grasp the nature of Commercial agency agreement. Comparative outlook of Commercial agent legal frameworks with an objective to reveal the Commercial agent treatments in various jurisdictions including Ethiopia also dealt under this chapter. Finally, Chapter-Five makes some conclusions based on findings and advances recommendations for the way forward.

CHAPTER TWO

GENERAL OVERVIEW OF AGENCY

2.1 Introduction

Agents are to be found in all advanced societies and their activities are an inevitable feature of a developed economy. An agent plays a vital role in commercial activity. Many commercial transactions in the field of commerce are conducted through agents who act as intermediaries and represent the interests of their principals in the conduct of the principals' business. There are different sort of agency, inter, alia, Auctioneers, estate agents, commercial agents, commission agents, mercantile agents, brokers, factors, solicitors and barristers are just a few of the many people described as agents who may act on people's behalf in the ordinary course of life . Indeed, the essential point to be borne in mind is that the relationship between agent and principal is essentially a binding contractual one which imposes upon both parties' rights, duties and obligations. Thus, it may be useful at the commencement of any discussion of agency to attempt a definition of the common factor which brings them all into the category "agency" or, indeed, it may be useful to ask whether they all properly called agency agreements.

2.2. The Concept of Agency

It is virtually impossible to provide an all-embracing definition of agency.[32] Noting the presence of a difference between the legal and the commercial use of the term, different scholars come up with different definitions of the term of agency from legal perspective: the *narrow* and *wide definition*. The wide-ranging definition is provided by the American Law Institute's Restatement as follows:

> *The fiduciary relationship that arises when one-person (a principal) manifests assent to another person (an agent) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act'.*[33]

[32] Nicholas Ryder, and others, Commercial law principles and policy (Published in the USA Cambridge University, 2012)3.
[33] Ibid 5.

Besides, Halsbury Laws of England defines an agent as: "*An agent primarily means a person employed for the purpose of placing the principal in contractual or other relations with a third party.*" [34]

Further, Dobson and Stokes defined agency as:

> *A relationship between one person, the principal, and another, the agent, under which the agent will fulfill the intentions of the principal and act on his behalf, generally through the creation, modification or termination of Contracts with a third party*.[35]

In the context of the above definitions, the following points emerge: First, the relation is a consensual one; an agent agrees, or at least consents to act under the direction or control of the principal. Second, the relation is a fiduciary one; an agent agrees to act for and on behalf of the principal. He is in no sense a proprietor entitled to the gains of enterprise-nor is he expected to carry the risks. What's more, the definition of agency often refers to a contractual agreement (often described as an agency agreement) and the scope of an agent's authority may have different meanings.[36] Hence, so as to clearly appreciate the scope of an agent's authority, looking into the Creation of agency would be important.

The process of concluding a contract through an agent involves a twofold relationship. On the one hand, the law of agency is concerned with the external business relations of an economic unit and with the powers of the various representatives to affect the legal position of the principal. On the other hand, it rules the internal relationship between principal and agent as well, thereby imposing certain duties on the representative (diligence, accounting, good faith, etc.) [37]From this we can safely deduce that an agent can only act to alter the principal's legal position if he has authority to do so.

The relationship of principal and agent may be created by: first, express or implied agreement between the principal and agent. While express agreement requires an explicit authorization of the principal to the agent, an implied agreement refers to a situation in which the principal has entered into an explicit agreement to employ the agent, and although he has not specifically

[34]L. Gorton, 'Ships management agreements' (Journal of Business Law, 1991**)** 562.
[35]See Ryder and others(n32)4.
[36] Ibid 3.
[37]Eric Rasmusen, Agency Law and Contract Formation (Discussion Paper No. 323 Cambridge, Ma 02138, 2001)6.

authorized the particular action at issue, the agent can reasonably infer that authority from that action he has been delegated.[38]

Secondly, agency may be created under the doctrine of apparent authority. It arises not from any agreement between principal and agent, but on account of the principal having made a representation to a third party that the agent has the authority to act on his behalf. If a principal's words or actions represent that he has consented to a person acting as his agent, then the principal may be estopped (prevented) from denying this once the third party has acted upon the representation.[39] Three requirements are necessary to give rise to such an estoppel :(i) there must have been a representation that the person was an agent; (ii) this representation must have been made by the principal or by someone authorized to make it on his behalf, (iii) the third party must have relied on the representation.[40]

The third means of creating agency is through the operation of law. This sort of creation of agency has existed not because of the authority that drives from expressed, implied and apparent, instead this is established for the reason that the law makes such kind of events for the sake of different purpose, inter, alia, for public interest to be consider as validly existed relationship as between the principal and agent.[41] Agency relationships that may be considered as agency by the operation of the law include; agent of necessity and agency by marriage and cohabitation. Agency of necessity is derived solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." This is possible in circumstances where one person acts to safeguard the property of another.[42] This will only be the case if the following requirements are satisfied: (i), the agent must have been in control of the principal's property. (ii), it must have been impossible for the agent to obtain the principal's instructions. (iii), there must have been a commercial emergency which made it necessary for the agent to act as he did and (IV), the agent must have acted in good faith as regards all parties.[43]This sort of agency is usually found in maritime emergencies. Established cases have

[38] Ibid 6.
[39]Judge Stephen, Business law (2nd edn, Macmillan Press 1999)340.

[40] Ibid.
[41]. Professor Michael Furmston, Principle of commercial law (2nd end Published London Sydney 2001) 141
[42]See Stephen(n39)343.
[43] Ibid 344.

given the captains of ships the power to sell cargoes which were perishing and to borrow money on the ship owner's behalf. Seldom can agencies of necessity be found on dry land, but only if the four conditions which are stated above are satisfied.[44]Agency by marriage and cohabitation, on the other hand, refers to situations like a wife or de facto spouse is presumed to have authority to pledge the husband's credit for necessaries in keeping with their social status. Necessaries are items such as food, clothing and medical attention for the spouse and the children in keeping with the family's social standing. Necessaries for which a wife can pledge the husband's credit as his agent do not include luxury items or items such as jewelry.[45]

Fourthly, agency may be created by ratification of the agent's acts by the principal; using consensual but it need not be contractual.[46]This sort of agency relationship occurs when an agent acts for a principal either without any authority at all, or in excess of the authority which he does have.[47]This is the instance which occurs only when the principal ratifies the contract (later agrees to adopt it), either expressly or impliedly; then he retrospectively confers actual authority on the agent. As a result, the principal and third party will therefore become contractually bound to each other, just as if the agent had been given prior actual authority, and so the agent will not be liable to the third party on the contract or for breach of warranty of authority. [48] However, five conditions must be satisfied for the ratification to be effective, and these are; ***(****1) The agent must have purported to act as an agent this means t*he principal cannot ratify the contract unless the agent supposed to make the contract as an agent. Only the principal who was either named or capable of being ascertained can sue. An undisclosed principal cannot ratify. *(2) The principal must have had full capacity to make the contract both when the agent made the contract and when it was ratified (3) At the time of ratification the principal must either have known all of the material facts or intended to ratify no matter what they were (4) A void contract cannot be ratified (5) Ratification must take place within a reasonable time, and will not be allowed where third parties have acquired property rights which would be adversely affected by Ratification.[49]*

[44] Ibid 347.
[45]See Furmston (n41)154**.**
[46]See Ryder and others (n 32) 154.
[47] Ibid.
[48]See Stephen (n 39)348.
[49] Ibid.

2.3 Types of Agency

Appreciating the difference that exists on who should be considered an Agent, different Scholars used various labels to distinguish particular types of agent, there by indicating the extent or nature of an agent's powers or duties. Though, it is not possible to reach an agreement with respect of the types of agency, the following types could serve as a large class of agency agreement. Those are;

Special Agents, as the name indicated that Special agents have authority on specific occasions or for a specific purpose, such as signing cheques. The principal is only bound where the agent has actual authority; General agents, this sort of agents has an authority to act within certain limits. The principal can be bound by acts within the usual authority of the agent; and Universal agents, this category of agents has unlimited authority to act for the principal.[50]

Apart from the difference in the types, there are different sorts of arrangements which indicates the nature of appointment of the agent who enters into the relationship. The most common types of arrangement are:

A**.** Exclusive agency agreement, where the agent has exclusive rights to represent the principal and the principal cannot appoint other agents to represent him. The exclusivity may be worldwide or be limited to particular territories.

B. The sole agency agreement, where the principal is barred from appointing other agents (again on a worldwide or territorial basis) but is free to seek customers directly himself.

C. The non-exclusive agency agreement, where the principal can appoint other agents and seek customers himself. Some agents (who may fall into any of the three categories above), and are often known as commercial agents, are self-employed intermediaries who have continuing authority not just to negotiate but also to conclude the sale or purchase of the goods on behalf of the principal.[51]

[50] Ibid 338.

[51]SeeInternational-commercial-agency,\availableat<https://www.translegal.com/lesson/commercial-law-3>last accessed November 2, 2017.

2.4 Justificatory foundation of Agency

First, there are positive views which substantiated that as outside representatives are better equipped for manufacturer for the distribution of their product than involving the manufacturers or the suppliers themselves on the task of distribution of their finished or semi-finished products.[52] So as to manifest the positive assertion that how out-side representative would serve as a better equipped tool for the manufacturer and on how they could play a vital role on the Economic efficiency (Some authors have argued that an intermediate (Agency) has comparative advantage over a manufacturer when it comes to product marketing.[53] The argument seems to rely on the proposition that specialization makes the distribution process more effective. If a firm concentrates only on distribution, it should know it much better than a firm which is also involved with manufacturing. Consequently, a manufacturer might choose to fully focus on production and leave the distribution to an outside representative specialized for this function. Similarly, it has been argued that a representative has greater knowledge of the retail market and broader access to customers than a manufacturer. Some authors even suggest that one of the main reasons why firms do not distribute goods themselves is that representatives or Agency have specialized information about the market. Familiarity with the local market is particularly an asset in international transactions, where a manufacturer might originate from a completely different cultural setting than his customers. An agent or a distributor could be the manufacturer's tool in overcoming this gap.[54]

Second, there are legal considerations and other constraints which necessitated the establishment of agency agreement than involving either directly or by establishing subsidiary company in other jurisdictions. There are several ways in which legal considerations can favor distribution through an outside representative. One legal concern could be that certain jurisdictions simply do not allow foreign manufacturers to market their product directly.[55] .

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[52] DraganGajin , Antitrust Aspects Of Exclusive Distribution Agreements Phd thesis(Central European University, 2011)13.

[53] Ibid.

[54] Ibid 16.

[55]See Euro commerce (n7)11.

The other reason which necessitated for the existence of agency is to represent legal persons. Meaning, as a large proportion of contracts are made, at least on one side, through agents, since in most contracts at least one of the parties is a company and the company doesn't possess mental alike natural/physical person companies have to act through human beings who act on their behalf.[56]

2.5. Characteristics of Commercial agency compare to Other Commercial contracts

Commercial agency, unlike the other sort of Commercial contracts (i.e. distributor ship, Franchising contract), it is a contracts under which one party (the commercial agent) agrees to act on a continuing basis as a self-employed intermediary to negotiate or to conclude contracts on behalf of another party (the principal) and the principal agrees to remunerate the commercial agent for the commercial agent's activities.[57]

Thus under this section so as to appreciate plainly the features of Commercial agency it is essential to address the other Commercial Contracts that holds significant relationship and variance nature that existed among the commercial agency, Distributorship and Franchising contracts . Accordingly, the first point of similarity is the Commercial agency, franchise and distribution contracts are hold the nature of Commercial contracts in the sense that both parties are merchants: being a principal, supplier, franchisor, agent, distributor or franchisee is their profession. [58]This is an indication that the three contract agreements as they are different from other sort of relations, such as, the contractual agreement in which their intended purpose and objective is for non -commercial activity and regardless of the parties qualifications and skills.[59]

The other point of sameness is, all the three contacts are so-called vertical agreements. They are agreements between economic actors on different levels in the production and distribution chain (as opposed to horizontal agreements which are agreements between business entities on the same level).[60]Apart from being their vertical- agreement when we look to their economic

[56]See Furmston (n41) 139.
[57]See Hesselink and others (n2)6.

[58] Ibid 93.
[59] Ibid.
[60] Ibid.

function of all the three contracts is that they are an instrumental in bringing products to the market. Obviously, the economic importance of these contracts is enormous since they form the connection between producers and retailers who sell the products to consumers and other final users.[61]

Yet, among the three commercial contracts there are also major differences which exist among them. In turn their difference required for the need of separated regulations of the three commercial contracts, inter, alia, the following issues serve towards of their variance;

1. Control: One of the main differences is the level of control that a principal has over a commercial agent/. In general, a principal can exercise much stricter control over his Commercial agents than manufacturer and franchisor over their distributors and franchisee.[62]
2. Authority to act on behalf of the principal: In general, a commercial agent does have authority to act on behalf of the principal while a distributor and franchisee does not.[63]
3. Tax treatment: Performing distribution through commercial agents, unlike distributors and Franchising can have certain tax consequences for a Manufacturer, especially if he is marketing his products abroad. Commercial agents are often considered as permanent establishments, which can subject the manufacturer to local taxation (i.e. to taxation of the commercial agent's jurisdiction). [64]
4. The passage of title: The distinction between Commercial agency, Franchising and distributorship is that title to the product passes to a distributor and Franchising, while it doesn't pass to Commercial agent.[65]
5. Intellectual property rights issue: another difference is that in franchise contracts the granting of intellectual property rights is a central issue whereas most commercial agency contract and many distribution contracts do not involve any intellectual property rights at all. These are merely a few examples; there are many more differences.[66] Thus the points of discrepancy that existed among the three commercial contracts that stated here above

[61] Ibid 95.
[62] See Gajin, (78) 24.
[63] Ibid 23.
[64] Ibid 27.
[65] Ibid.
[66] See Hesselink and others (n4)95.

necessitated for the establishment of separated legislations among the three commercial contracts.

2.6 Agency in Common Law Vis a Vis Civil law legal system

Under English law, one must distinguish between an undisclosed principal and an unnamed principal. In the case of an unnamed principal, in contrast to the case of an undisclosed principal, the agent conceals the identity of his principal, but not his existence. This distinction is important in relation to the liability of the agent.[67]In the case of an unnamed principal, the agent will incur personal liability on the contract alongside the principal, unless a contrary intention appears; while in the case of an undisclosed principal, the contractor is entitled to sue the principal or the agent, but if he chooses to sue one of them, he cannot sue the other.[68]

In civil law legal systems, in order to bind his principal towards a third party the agent must act in the name of the principal, and reveal that he acts as a representative on his behalf. The publicity principle does not require that the agent should expressly mention that he is concluding the contract in the name of the principal. It is sufficient that the contractor is aware the agent is acting in the name of the principal from the circumstances of the case.[69]Thus, when the agent concludes a contract with a contractor in his own name on behalf of a principal, he does not create a direct relationship between his principal and the contractor. Consequently, the principal cannot sue the contractor or be sued by him. Where the agent acts in his own name, the situation is referred to as indirect representation. Such a situation arises in the case of a commission agent. Thus, although the contract between a commission agent and his principal is an agency contract, the contractor cannot sue the principal, whether or not he was aware that the agent was acting on behalf of the principal.[70]

Other notable differences are indicated by some as follows: the first point of difference is, while in common law countries such as the United States, the United Kingdom, New Zealand,

[67]Alexey V. Kostromov, International Unification of the Law of Agency (Research Master of Law) (University, Montreal, 1999) 24.
[68] Ibid.
[69] Ibid.
[70] Ibid 25.

Canada and Australia, and those countries whose legal systems are largely derived from the common law tradition, such as India, the parties to an agency contract are largely free to establish their own mutually agreed upon terms and conditions.[71] This freedom includes the right to express and limit the grounds for terminating the relationship, with violation of such termination provisions usually subjecting the offending party to damages, primarily for loss of earnings.[72] Contrariwise, in many other countries, especially certain civil law countries, the parties are more restrained in contract terms, and statutory provisions may exist which override the expressed desires of parties on the grounds of overriding public interest. In particular, these countries stipulate that the law of the situs forum is the sole applicable law to a principal-agent dispute. Thus, regardless of a contract's terms, the governing law would be the law of the country in which the agent is located.[73]

As a general rule, in common law countries parties are free to contract as they desire to fix the terms of the relationship. No provisions exist, for example, regarding termination indemnities, or foreclosing choice of law agreements. This includes, of course, the former British colonies in all areas of the world.[74]

[71]Henry T. King Jr., Legal Aspects of Appointment and Termination of Foreign Distributors and Representatives (1985)92.
[72] Ibid.
[73] Ibid 93.
[74] Ibid.

CHAPTER THREE

INTERNATIONAL INSTRUMENTS ON COMMERCIAL AGENCY

3.1 Introduction

The essence of commercial agent's job, often acting as an international facilitator between its principal and customer, justified the need to establish uniform rules creating a more predictable legal environment for the industry and to protect commercial agents. As a result, the following International conventions on agency come up with minimum standard of protection. Those are UNIDROIT *Draft Convention on Agency*[75], ICC Model Contract on Commercial Agency[76] and The Hague Convention on the Law Applicable to Agency[77].Besides, it is the 1986 Commercial Agents Directive/regulation[78] the one that deals with contractual scenario that falls within the area of long-term contracts used for making goods and services available in different stages of a distribution chain and in different geographic markets. The Directive, however, applies only were a relationship between a principal and a commercial agent is at stake.

Commercial agency is usually a tripartite relation among a businessperson, a commercial agent and a third party. Agency relation, therefore, includes the internal relationship between the agent and the principal, and the external relationship which involves the principal and the third party as well as the relation between the agent and the third party. Through agency relationships, the principal benefits from the performance of the agent and is willing to take liabilities.[79] But, there are doctrinal disagreements as to what agency relations should include;

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[75] UNIDROIT Draft Convention on Agency in the International Sale of Goods (Geneva, 17 February 1983)
[76]International Chamber of Commerce Model Contract on Commercial Agency (2nd ed., ICC Publication No.644, 2002).
[77] The Hague Convention on the Law Applicable to Agency, 14 March 1978 (entered into force In May 1992). [hereinafter Hague Agency Convention].
[78] See EU regulation(n9).
[79] Eric A. Posner 'Agency Models in Law and Economics', The Law School of University of Chicago John M. Olin Law & Economics. Working Paper No. 92 (2d Series), (2000) 4.

and, in different legal systems, scope of agency relations varies.[80] Likewise, there is difference among the International instruments regarding the nature of commercial agency. That is while the Convention on Agency in the International Sale of Goods (UNIDROIT Principles) focus upon the external aspect of agency law, venturing into the internal aspect only where and to the extent that the internal aspect impacts upon the external. This limitation is expressly stated in instrument as reflected in the titles to the relevant sections of the instrument concerned with agency: It carry not a general heading such as "Agency" but the more limited heading of "Authority of Agents".[81] The Hague Convention in relation to Agency, on the other hand, includes the relation between the agent and the principal within the scope of agency relations.[82] The ICC on Agency Model Contract, which consists of a set of contract terms designed to regulate the relationship between a principal and an agent. Therefore, it deals with the internal, but not the external, aspects of agency.[83]

In line with the scope of this research, the internal relationship of the two professionals involved (principal and commercial agent) as reflected within the regional and domestic laws, the EUR and France and UK legislations as well within the International instruments (The 1978 Hague Convention on the Law applicable to Agency and the Unification of Conflict rules &ICC on Agency Model Contract will be discussed.

All parts of such agreement are equally important. However, we could name some elements, which rather frequently are raising thorny issues regarding the Scope and the definition of a commercial agent, the duty to cooperation of commercial agent and principal, Ending and terminating of the commercial agency agreement and Post termination obligation (i.e. obligation not to compete). Therefore, it is possible to make an assumption that particular parts of the agreement should receive special attention.

3.2. The Scope and Definitional aspect of Commercial Agent

[80] Ibid 5.
[81]Howard Bennett, Agency in the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts (2004)(Rev .dr. UNIF.2006)772.
[82] See Hague Convention(n97).
[83]See Goode, and others (n22)297.

Among the core element of the agency agreements is that the scope and definition of commercial agent. This is particularly important in cases where a commercial agent scope and the exclusionary activities of the representation is clearly provided under the national law. Inter, alia, the issue of whether the commercial agent selling or purchasing is only limited either to goods or services or the selling/purchasing encompasses both the goods and services. Besides, in case it is limited to ether of goods or services or for both of goods and services. The sort of excluded activities from the selling/purchasing of goods or services also have to be clearly indicated. Thus the most important point is to provide the scope and definition of commercial agency in order to avoid dispute during the termination of the commercial agency. Because, in case the national law is silent with respect the scope and at the same time in case there is no clear indication in the commercial agency contract this is one of the areas that has frequently led to litigation , inter, alia, the issue of compensation/indemnity post termination of the contract.

For these or similar reasons, domestic laws and regional agreements/International models in relation to commercial agency provides a clear scope and definition of Commercial agent. For example, under the EU directive it is clearly set out its scope and contains the definition of a commercial agent. Accordingly, for the purpose of the directive, a commercial agent is:[84]

"…a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another ,person, hereinafter called the "principal", or to negotiate and conclude such transactions on behalf of and in the name of that principal."

This regulation specifically defines the commercial agent, but both the definition of a commercial agent and the scope of application of agency differ from State to State. For example, some States only include within the scope of agency, contracts relating to the sale of goods (England, Finland and Sweden), whereas other States also include services (e.g. France, Germany, The Netherlands, Spain and Portugal). [85]

3.2.1. Exclusionary businesses on the scope of commercial agency relations

[84]See EU regulation art 1(2).
[85] See CashinRitaine(n10)16.

In order to avoid any misapprehension under domestic and regional/International convention a number of specific exclusions from the scope of the Commercial agent are provided. Accordingly under the EU directive, the scope of Commercial agent is confined to self-employed agents who act on behalf of the principal, so that if the agent is an employee of the principal the Regulations will not apply. [86]The provisions are also confined to agents who negotiate the sale or purchase of goods (as distinct from services and intangible assets, such as shares, bonds and patents), unless the laws of member states provide otherwise.[87]

Besides the regulation specify that a commercial agent does not include '(I) a person who, in his capacity as an officer of a company or association, is empowered to enter into commitments binding on that company or association; (II) a partner who is lawfully authorized to enter into commitments binding on his partners; (III) a person who acts as an insolvency practitioner,[88] commercial agents whose activities are unpaid, commercial agents who operate on commodity exchanges or in the commodity market, etc. are not covered under the European Council Directive.[89]

Likewise under the International Hague convention[90] it excludes questions relating to: the capacity of the parties; requirements of form; agency by operation of law, in family law, matrimonial property regimes, in the law of succession, by judicial order or in connection with a judicial proceeding; and the agency of shipmaster acting in the exercise of his functions. Likewise, the convention [91] directors, officers and partners of corporations, associations, partnerships and similar entities are excluded from the Convention where the authority of such persons derives from law or from the constitutive documents of such organizations. In addition under the Convention, when the agent deals with the principal as his employee and their agency relationship is created by a contract of employment, this contract will be excluded from the scope of the Chapter II of the Convention. In other words, the law that normally governs the

[86]See Gregorkleinknecht, commercial agency contracts: Termination and Indemnity England and wales 94.
[87] See EU regulation art 2(1).
[88] Ibid art 2(1).
[89] Ibid art 2(a&b).
[90] Hague Convention (n77).
[91] Ibid art 3(a).

internal relationship will not govern the relationship between the principal and the agent when it arises from an employment contract.[92]

3.3. The cooperation duty of the principal and commercial agent

The individuals enter into contracts to utilize such knowledge in achieving their various purposes in the spontaneous order of international commerce, which enables them to make feasible plans. However, once the individual enters into a contract, there appears the possibility of conflict between the interests of the individual and the interests of both parties in their contractual relationship.[93] This is because once the rights, obligations and risks are specifically allocated through the rules that are articulated by the parties, each party has less incentive to bear the costs of accommodating the other's subsequent request for adjustments in the initial allocation, and each party thus confronts the question of whether to act cooperatively or to respond to immediate self-interest and evade the responsibility.[94] The articulated rules should encourage both parties to undertake active or passive cooperative actions. Those actions can be in the form of an active conduct, such as duties of notification or negotiation, or a passive conduct, in the sense of refraining from performing particular acts that can be detrimental in achieving the contractual purpose, such as duties of noncompetition. [95]Thus under this section the duty to cooperation of the principal and the commercial agent will be discussed**.**

3.3.1. The principal duty to cooperation

A/ Remuneration of commercial agent

The agent's remuneration typically consists of commission. In the case of commission based remuneration, the interests of the agent and those of the principal run parallel: both parties aim at a maximum number of (successfully performed) contracts. Hence, if the agent does not find

[92] Ibid art 10.
[93]MertElcin, LexMercatoria in International Arbitration, Theory and Practice Volume II (published in European, Florence, 2012)468.

[94] Ibid 468.
[95] Ibid 469.

many customers that are willing to conclude contracts, not only the gains of the principal are directly affected, but also the agent's income is reduced.[96] In this regard, the EU regulation sets out three rules or possibilities in which the agent is entitled to a commission during his performance: the commercial agent entitled to commission on transactions concluded during the period covered by the contracts, which arises whenever the principal and the third party have entered into a contract and extends to sales by the principal in an area where the agent has exclusive right, or to persons within a group in respect of which the agent has exclusive rights.[97]The agent may be entitled to commission on post-termination sales within a reasonable period resulting from his efforts; and on orders placed pre termination but concluded afterwards: besides under the directive apportions commission between a departing and an incoming agent is addressed.[98] Commission should be paid as soon as one or more of the following occurs: (i) when the principal has accepted or delivered the goods; (ii) when the principal should have accepted or delivered the goods; (iii) when the third party accepts or delivers the goods; or (iv) when the third party pays for the goods[99]and at the latest when the third party has executed his/her part of the transaction or should have done so if the principal had executed his/her part, as s/he should have done [100]and not later than on the last day of the month following the quarter in which it became due.[101]In addition, in the absence of agreement on remuneration, a commercial agent is entitled to that which is usually allowed to commercial agents for the goods where s/he carries on his/her activities and, if there is no customary practice, he is entitled to reasonable remuneration.[102]

B/The duty to inform the acceptance or rejection of a contract

The obligation to inform to his commercial agent, regarding the principal's acceptance or rejection of a contract which the commercial agent has negotiated on the principal's behalf: is important for the 'commercial agents' because it enables the agent, inter, alia, to calculate its

[96] See Hesselink and others (n2)114.
[97] See EU regulation (n9) art7.
[98] Ibid art 9.
[99]Ibid art 10(1).
[100] Ibid art 10(2).
[101] Ibid art 10(3).
[102] Ibid art 6(1).

commission, to verify whether refusals have been given systematically, arbitrarily or in bad faith, and to inform the customers regarding the Principal's reaction. This rule also takes the interest of the principal into account. The principal serves its own reputation if the agent can speedily answer a (potential) customer. Moreover, if the principal informs the agent in due time that it does not want to conclude a certain contract, no right to commission comes into existence.[103]

This rule also incorporated in International/regional legislations. For example, under the EU regulation, the principal has an obligation to provide for the commercial agent the information necessary for the performance of the agency contract, and in particular notify the agent within a reasonable time if he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.[104]Similarly under the ICC model the obligation of both active and passive cooperation for commercial agent the principal has required by provides that the principal must inform the agent without undue delay of his acceptance or rejection of the agent's orders and principal may not unreasonably or contrary to good faith reject the agent's orders.[105]

C/ The duty to inform warning of decreased volume

The other important duty of the principal is the duty to inform with respect of warning of decreased of volume. If the principal does not inform the agent regarding, for instance, a decrease in the principal's production, the principal may refuse more orders than the agent would reasonably expect. This warning may be essential for the agent, because the agent's income depends solely, or to a large extent, on the amount of contracts concluded. The warning enables the agent to search for other means of income in time. This provision also avoids that the agent incurs expenses in locating customers and negotiating contracts that the principal will

[103] See Hesselink and others (n2) 192.
[104] EU Regulation(n9)art 4(2).
[105]See ICC model (75) art 6.

eventually not conclude. This obligation to warn is also in the principal's own interests. If the agent is warned a sufficient time in advance, it will not negotiate with customers in vain; the customers will not be disappointed and the principal's reputation will not be affected.[106]This obligation also pursuant the EU regulation article 4(3) requires the principal to inform his commercial agent, within a reasonable time, of any acceptance, refusal or non-execution of a commercial transaction which the commercial agent procured for him. The duties set out in reg.4 cannot be excluded by agreement between the parties.

3.3.2. The commercial agent's duty to cooperation

A/ The duty to Negotiate and Conclude Contracts

A commercial agent is entitled to negotiate and conclude transactions. Only then, the agent will have the power to bind the principal to transactions. [107] Nevertheless, if we delve deeper, we will find that the meaning of the word 'conclude' is clear, when the agent enters into the contract on behalf of the principal and creates a legal relationship for the principal.[108]

However, the meaning of "negotiation" is more complex as it initially sounds. The main task of the commercial agent, who negotiates contracts on behalf of the principal, is to prepare transactions by searching for customers and convincing them to conclude a contract with the principal. Nevertheless, this task does not create obligations for the agent with respect to the customer, nor vice versa.[109]

This actually means something far less than an authority that binds the principal. It corresponds to the issue of how much authorization the agent requires to negotiate. For example, in the UK this type of agent is rare. Clearly, an agent only collecting and relaying business back to the principal, does not bind the principal to the contracts.[110]

The Law Commission report stated that:

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[106] See Hesselink and others (2)193.
[107]See EU regulation (n9) art 3 (2).
[108] Dennis Campbell 'International agency and distribution law' (vol.2 York hill law Publishing,2008) 93.
[109] M. Hesselink, J. Rutgers, M. Scotton, 'Principles of European Law: Commercial Agency, Franchise and Distribution Contracts' (Sellier, Munich 2006) 161.
[110]Fergus Randolph QS and Jonathan Davey 'The European law of Commercial agency' (3rd edn, Hart, Oxford 2010) 41.

"By far the majority of commercial agents in the member states are authorized only to negotiate on behalf of their principals, the conclusion of the actual agreement for the transaction being a matter for the principal himself"[111]

During negotiations the agent must put his best efforts forward for the parties to agree upon, and conclude the contract. However, once we begin talking about reasonableness, we should bear in mind the cultural features and usages in a particular area where the agent is operating. For example, the agent and principal in the same situation might have different views on the term "reasonableness". Hence, it is advisable for the parties to determine the meaning of the 'reasonable effort', if not in a theoretical way, then at least by giving a number of examples.[112]

B/ The obligation to Information during Performance

Although the principal is the party that will be bound by a sales or service contract negotiated by the agent, the principal is not in a position to verify, for instance, the Customer's solvency or reputation. It is thus important for the good functioning of the principal's business that the principal is provided with such information. Accordingly, this obligation is clearly incorporated under national statutory and regional/International. For example, according to the EU regulation the '… commercial agent ... must communicate to his principal all the necessary information available to him'.[113] This obligation is also laid down in article 9 of the ICC model commercial agency contract states the agent's obligation to keep the principal informed about his activities, market conditions and the state of competition within the territory and to answer any reasonable request for information made by the principal. The general purpose of this obligation is to enable the principal to evaluate the operations and to adapt his strategies to the particular conditions accordingly.[114]

3.4. Ending and Terminating of Commercial Agency Agreement

[111] Ibid 42.
[112] See Hesselink M, and others (n2) 162.
[113] See EU regulation (n9) art 3 (2) b.
[114] See Elcin (93) 480.

3.4.1. General framework of the termination process

The end of a commercial contract is often a critical moment. A substantial part of disputes between business partners occur at or around this stage. Disputes might obviously be caused by an alleged breach of contract by one of the parties. But conflicts arise even if the agreement has been performed properly. Probably, the most interesting part of Commercial agency agreement law is its termination and its severe consequences, where the commercial lawyers play their part. One could even say that for them it is here that the real 'game' starts.

Termination of agency may take place in two ways either by the operation of law or by the act of parties. Thus, unless the parties doesn't violated what the law stated as a ground for termination. Parties are free to determine the principles of termination, the effective date of termination, and the contents of the termination agreement, to the extent possible under the applicable law. Content should be determined by taking into consideration the particulars of the main contract and the parties' intention. Depending on the parties' intention, the termination date may be set as the signing date of the termination agreement, or a specific date or occasion after the date of signing, as well as a retroactive date.[115]

3.4. 2. Term of commercial agency

Since the termination of commercial agency possess different consequences based on the sort of duration of the commercial agency agreement. Thus it is imperative to address the commercial agency duration. Unlike agency in civil transactions, commercial agency between an agent and a principal is not confined to a specific activity, and thus needs to create a relatively long lasting relationship between the two. The agency relation may be for indefinite or definite period of time. While, the Contract is for an indefinite period either when it does not contain any specific duration or when it explicitly states that it is for an indefinite period. The contract for definite is when it contain specific duration or implied contains definite period. When an agreement is concluded for indefinite period there is almost consensus under all legal systems either party may end a commercial agency contract, provided that a notice has been

[115] H. ErcümentErdem, Termination Agreements for Agency and Distribution Contracts (2015)12.

given. The French Commercial Code, for example, states that the agent should be "permanently entrusted" by the principal. Likewise, the European Council Directive s relating to Self-Employed Commercial Agents provides that the relation need be a continuous one. Apart from the definite and indefinite period, it goes beyond a one-time activity. That is why the European court of Justice decided that "it is not important whether the agent negotiated one or more contracts so long as he has continuing authority".[116]

With respect of the parties' right to termination, it is obviously, as a result of continued performance the parties are not bound to each other forever. As in any contract for an indefinite period, either party has the right to unilaterally end the contract by giving notice of reasonable length. For that reason under all legal systems either party may end a commercial agency contract, provided that a notice has been given. For commercial agency a rule to this effect is laid down in statutory provisions based.[117]Under French Commercial Code[118], and Spain [119] the terms and terminations of the agency agreement may have a fixed or indefinite term. In case the agreement has an indefinite term, it may be terminated by either party subject to a prior notice. The minimum termination notice period which are provided under the law also apply to agency agreements having a fixed term, if such agreements were continued after their normal termination date.

Likewise under the EUR 'Where an agency contract is concluded for an indefinite period either party may terminate it by notice. As to commercial agency contracts the regulation[120] includes a fixed minimum mandatory notice period. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice. However, the directive leaves it to the Member States to include a minimum mandatory fixed notice period for the fourth, fifth, sixth and subsequent years of the contract as well. Member States may fix the period of notice at four months for the fourth year of the contract, five

[116] Ellen Eftestol-Wilhelmsson 'EC agency law and intermediaries in shipping', Legal Studies Research Paper Series Paper, No 11.141-178. (2016)143.
[117] Ibid.
[118] See France article L 134-11 of the Commercial code: Adequate termination notice in agency agreements is required.
[119] See Baker & McKenzie, General guide for doing business in Spain (2015)16.
[120]See EU regulation (n9) art15 (1&2).

months for the fifth year and six months for the sixth and subsequent years. They may decide that the parties may not agree to shorter periods.')[121] Though, the obligation of prior notice according the directive[122] the notice period which the principal must observe, it is not allowed to be shorter than the one observed by the commercial agent if parties agree upon longer notice periods than the minimum notice periods provided for in the Directive. If the parties agree on longer periods than those laid down in Par as 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.[123]

The ICC model also regulates the consequences of the absence of prior notice in termination. If a party's termination of the contract is not justified, the termination will be effective, but the other party will be entitled to damages for the unjustified early termination. [124] Thus, prior notice is a classic obligation for terminating contracts concluded for an indefinite period. Both the principal and the commercial agent must respect this obligation, so both parties are treated equally, without particular protection for the commercial agent; violating the obligation entails responsibility for any damages.

The other pertinent point which is worth mentioning is the fate of a Commercial agency agreement in case the parties actually continue performing the contract after the agreed term has expired. If parties continue to perform a contract for a definite period after the expiry of the contract, in the majority of the legal systems the contract will be converted into a contract for an indefinite period. For commercial agency, under the France commercial code, in case an agency agreement, which initially had a defined term, continued to be applied by the parties after the initial term, it is construed as of undefined term.[125]. This rule is also laid down in specific statutory provisions in Spain. That is agency agreements entered into for a specific term will terminate in accordance with the terms and conditions agreed upon. But if an agency agreement for a specific term continues to be performed by both parties after the lapse of its initial term, the agency agreement will be converted into an indefinite term agreement.[126]

[121] Ibid art 15(3).
[122] Ibid art 15(4).
[123] Ibid.
[124] See ICC model (n75) art 20(6).
[125]See French Commercial Code, Article L 134 -11.

[126]See Hesselink and others **(**n2)117.

Likewise under the EUR ,clearly stated that 'An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an in definite period'.[127] Accordingly being the agency for definite period converted in to indefinite period the minimum period of notice for termination of agency contract under the directive[128]an agency contract for a fixed period where it is converted under regulation 14 above into an agency contract for an indefinite period subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice period subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

3.4.3. Consequences of the termination in definite and indefinite period

Firstly, to see the real consequences of termination we have to determine whether an agreement was concluded for a fixed period, or for an indeterminate period. In most cases the period during which the contract has lasted will be an important factor. Normally, the longer the contractual relationship has lasted the more a party becomes dependent on it and the more difficult it will be to adapt to a new situation and, as a consequence, the greater its damage in the case of unilateral ending by the other party. The importance of this factor is reflected in the fact that the termination of an agreement that was concluded for an indeterminate period will have greater consequence than a fixed one. The reason is when an agreement is concluded for a fixed period, none of the parties may make a claim if the agreement is terminated before the due date at the end term as agreed before.

Yet with respect of the commercial agency termination there are situations that, regardless of whether the commercial agency contract was for an indefinite or a definite period and irrespective of the way in which the contract ended (unilateral ending, termination for non-performance), the mere fact that the contractual relationship comes to an end may lead to a transfer of goodwill.[129] To the extent that such a transfer has actually taken place, and that

[127]See EU regulation (n9) art.14.
[128] Ibid art 15(5).
[129] See Hesselink and others(n2) 141.

indemnification would be reasonable in the circumstances. The most typical example of transfer of goodwill is where the principal, has access to lists of clients and other similar data either because the commercial agent, has handed such lists over after the termination or ending of the contract or because the principal, otherwise has access to such data (e. g. because the commercial agent has regularly passed such information on to the principal, during the course of the contract).[130]

Thus, unlike the classical approach in which the commercial agency for indefinite period only required indemnification under the modern approach which stands for the protection of weaker party (in our case commercial agents) the consequence for termination irrespective of the commercial agency contract term, by the mere fact that the ending of the contract will normally lead to a transfer of goodwill the commercial agent allowed to be indemnified. For example, under the EU regulation, a commercial agent is also entitled to 'compensation for the damage which he suffers as a result of the termination of his relations with the principal.'[131]Similarly under Franc**,** the termination payment is in particular due: When the principal terminates an agency agreement of undefined term, at the term of an agency agreement of defined term, When the principal does not renew a tacitly renewable agency agreement, If the commercial agent dies and If the commercial agent cannot continue acting for the principal due to age or disease.[132] Besides, under the ICC model provides[133] that the goodwill indemnity is in lieu of any compensation for loss or damage arising from contract expiry or termination, but contains an exception[134] and makes it clear that damages for unjustified early termination will be in addition to the indemnity.[135]

3.4.4. The importance of notice period and Consequences of its disregarded

An important function of the period of notice is to allow the aggrieved party to adapt to the new situation, especially to find an alternative, either a new principal, to commence a different economic activity. Thus, it is significant mentioning that the term "notice period" is giving way

[130] Ibid pp142.
[131] EU regulation (n9) art 17(3).
[132]Thomas Fleinert-Jensen, Almain A.A.R.P.I, Terminating Commercial Contracts in France (2016)7.
[133] See ICC model (n75) art 21(5).
[134] Ibid art 20(6)
[135] Ibid art 21.

to the legal practices and that case law has introduced the common principles under which the notice period must be permitted to the evicted Commercial agent, to find a new commercial agency agreement, which would be approximately equivalent to the one he has lost. Thus entitlement to damage in the case of nonobservance of a notice period is based on considerations of economic efficiency: as long as a party is ready to pay (damages), it should be capable of ending the contract without observing a period of notice. Compelling it to, 'wait' until a reasonable period of time has expired, could result in the loss of other opportunities.[136]However, with the issue of whether the commercial agent is entitled to damages in case of non-observance of the Notice Period or not. The national legal systems differ as to the consequences of the non-observance of a notice period. In case of commercial agency, in some systems the aggrieved party is entitled to damages in lieu of a notice period. This can be found in the following legal systems: In Belgian and Dutch law, in the case of commercial agency the aggrieved party is entitled to damages in lieu of a notice period, unless the contract was ended because of important and urgent reasons, which is notified to the other party., However under French and Spain law there is no entitlement to damages unless the non-observance of the notice period also results in an abus de droit. In contrast, in other systems for example under Germen law there is no entitlement to damages, although the notice period will be substituted by one which is proper. However, the aggrieved party may end the contract (without a notice period), since the nonobservance of the notice period can be considered an important reason for termination.[137]

Despite there are different tendencies, the EUR as its aim is to protect the weaker party (commercial agent), and as the period of notice (and the damages in lieu of this) is meant to safeguard the interests of the party which is confronted with unilateral ending by its counterpart. Under the directive [138]establishes that the entitlement to indemnity does not prevent the commercial agent from seeking damages. From the Commission Report it follows that it concerns both damages for non-performance and damages in lieu of a notice period.[139]

[136]See Hesselink and others (n2)119-120.
[137] Ibid 134.
[138] See EU regulation art 17(2) c.
[139]See Study Group on a European Civil Code and the Research Group on the Existing EC Private Law (Acquis Group) Principles, Definitions and Model RulesOf European Private Law Draft Common Frame Of Reference (DCFR) (2005)956.

The remedy for the non-observance of the period of notice is damages. A party which ends a contract without giving a reasonable period of notice is liable to compensate the (concrete) damage thereby caused to the other party.[140] The EUR has brought about a greater interest claiming damages for failure to respect the proper notice period. The amount awarded is the highest of the period not respected calculated on commission received for the last two years or the commission received during the identical period the previous year. Indeed since an agency contract for a fixed period[141] which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an in definite period. Accordingly the consequence of disregarded of prior notice apply to an agency contract for a fixed period where it is converted under regulation 14 above into an agency contract for an indefinite. In turn the issue of notice and the remedy (damages in lieu of a notice period) also paid in the same fashion. Thus the regulation has brought about a greater interest in claiming damages for failure to respect the proper notice period.

3.4.5. Termination of the agency contract and compensation.

The other most relevant point of worthy mentioned is termination of the agency contract and compensation**.** Termination and compensation after termination are two of the most relevant, albeit not the only ones dimensions of the long-term contracts through which commercial agency chains are formed and structured. Instead, Commercial gents and principals are at different levels, they engage in contractual relationships varying in degree of legal formalization, scope, intensity of the interrelation, and initial term of duration. [142]As a result there are different approaches under civil law and common law rules with respect to whom protection shall bestowed. That is while the civil law assumption that commercial agents deserve protection'. This is in contrast to the assumption which has tended to underpin the common law rules, namely that it is the principal who is the party in need of protection. [143]

[140]See Hesselink and others (n2)131.
[141] See EU regulation art 14.
[142]Fernando Gómez Pomar, Compensation after Termination of Long-Term Distribution Contracts: An Economic Perspective of EU Law (2006)12.
[143]Goode and others (n22)299.

The main rationale behind traditional commercial agency law was protecting the principal who trusted the agent. For that reason**,** the 'common law rules as to the relationship between any principal and any agent are based on the assumption that freedom of contract prevails and, in so far any protection has been perceived as necessary, it is protection of the principal against misuse of his powers by the agent, as by taking a bribe, making a secret profit and in general assuming a position in which his own interests or those of others for whom he acts are adverse to those of his principal. [144]

However, modern laws of the civil law countries, incline towards the protection of the commercial agent, usually considered to be a weaker party. The reason that stipulated by civil law is, because of commercial agents do not act for themselves, the risk that once commercial agents have created or developed the customer base, manufacturers might terminate the contract, by-pass commercial agents and deal directly with the clients which would deny commercial agents their legitimate share of the profits. In turn this would cause them to suffer a loss and would create an imbalance, since the principal is the only one who can continue to benefit from the goodwill.[145] One of the arrangements in this regard is obligatory compensation upon termination of a commercial agency, and this has evoked extensive academic discourse in commercial agency law. At present, international/regional agreements also focus on the protection of commercial agents rather than the principal. Under the EUR significantly strengthened the commercial agent's position on termination of the commercial agency contract. Thus the directive regulates in some detail the termination of an agency contract. Accordingly, under the regulation requires the agent either to be indemnified or to be compensated for damage upon termination of the commercial agency contract.[146]

The agent's claim to an indemnity or compensation is mandatory and the parties may not derogate from regulation to the detriment of the commercial agent before the agency contract expires.[147]This leaves room however for the parties to come to a different arrangement for the settlement of the agent's claims after the commercial agency contract has come to an end. The

[144] Ibid 300.
[145] Ibid 299.
[146]See EU regulation art 17 (1).
[147] Ibid art 19.

claim to an indemnity or compensation does not require the principal to have acted in any way wrongfully and it arises even if the commercial agency contract had been entered into for a fixed time period and has expired through simple lapse of time[148]; or, in the case of a commercial agency contract entered into for an indefinite period, where the principal terminated the agreement in accordance with the contractual notice provisions and adhered to the required minimum notice period; or where the commercial agency contract comes to an end as the result of the death of the commercial agent.[149] Regulation 17 is a 'no fault' provision and the entitlement to an indemnity or compensation arises simply as a consequence of termination of the agency relationship, provided that the principal continues to derive substantial benefits from the goodwill that the agent has generated for the principal.

In particular, the Regulations state that a commercial agent is entitled to indemnity if and to the extent that:
(a) he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers; and (b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.[150]

If the commercial agent is granted indemnity, he is still entitled to seek damages from the principal.[151] The commercial agent is permitted to seek compensation for damage suffered as a result of the termination of the agreement and relations with the principal. In particular, the regulations provide that: such damage shall be deemed to occur particularly when the termination takes place in either or both of the following circumstances, namely circumstances which (a) deprive the commercial agent of the commission which proper performance of the agency contract would have procured for him whilst providing is principal with substantial benefits linked to the activities of the commercial agent; or (b) have not enabled the

[148] See Light –v- Ty Europe Ltd [2003 EWCA Civ 1238; Cooper and others –v- Pure Fishing (UK) Ltd [2004] EWCA Civ 375.]
[149] See EU regulation art 17(8).
[150] Ibid art17.
[151] Ibid art 17 (5) a.

commercial agent to amortize the costs and expenses that he had incurred in the performance of the agency contract on the advice of his principal.[152]

The regulation obliges member states to adopt either the indemnity approach or the compensation approach.[153] Besides unless otherwise agreed by the parties in the commercial agency contract, the commercial agent shall be entitled to be compensated rather than indemnified. [154] However, compensation will not be payable to the commercial agent where:
(a) the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract; or (b) the commercial agent has himself terminated the agency contract, unless such termination is justified (i) by circumstances attributable to the principal, or (ii) on grounds of the age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities; or (c) the commercial agent, with the agreement of his principal, assigns his rights and duties under the agency contract to another person.[155]

Likewise under the ICC Model Commercial Agency Contract which is drafted to cover the long-term agency relations in the scope of international commerce and more particularly in a European context.[156] While under some national laws, when a commercial agency contract is terminated, the agent is entitled to some form of compensation from the principal for the goodwill that the agent has created or substantially increased. In view of differing approaches of national laws to the issue of "goodwill indemnity", the ICC Model Commercial Agency Contract incorporates two alternative solutions. First alternative[157] provides the standard protection applicable in many national legal systems, whereas the second [158]alternative expressly excludes a right to indemnity for the agents from countries where no legal indemnity is recognized.[159]

[152] Ibid art 17(7) a.
[153] Ibid art 17.
[154] Ibid art17 (2).
[155] Ibid art 18.
[156]MertElcin ,LexMercatoria in International Arbitration, Theory and Practice Volume II (European, Florence, 2012) 201.
[157] Ibid 202.
[158] Ibid.
[159] Ibid 203.

Generally, obligatory compensation/indemnity is meant to protect the agent. The principal may want to reach customers directly after effective market entry of his products due to the efforts of the agent and may terminate the agency agreement. The agent may also lose investments made in the interest of the activity he had been doing in relation with the work entrusted to him by the principal. The principal may also continue to benefit from the new customers brought by the efforts of the agent even after the termination of the agency. Therefore, the agent needs to be compensated.

Nevertheless, the commercial agent is entitled for compensation or indemnity during termination irrespective of the term of the relation. It doesn't mean the commercial agent is free from limitation, among other thing, he is claim is barred via period of limitation. That is why many domestic laws and regional legislation provide specific period. For example, under the EU regulation pursuant art 17(8), the agent will lose the rights to indemnity or compensation if he does not inform the principal, within one year of termination of the agency contract that he intends pursuing his entitlement.

3.5. The obligation not to compete (Covenant not to Compete obligation)

3.5.1 Conceptual understanding of Non-compete obligation

Non-compete covenants are agreements that prohibit one or more persons or entities from competing with another, usually in a defined territory, for a set period of time. They may bar all competition or certain types of activities only, such as maintaining business relations with certain customers or co-employees. They arise most often in employment agreements, [160]but also they are commonly encountered in business purchase agreements, joint venture and shareholder agreements, franchise and commercial agency agreements. Covenants not to compete could then be seen as contractual means to enforce this implicit agreement to pay back investments in general training and know-how.[161]

[160] John F. Rehaa1, The Law of Trade Secrecy and Covenants not to Compete in Colorado-Part ii(2001).6.
[161]Gómez Pomar (n 142) 35.

In international practice, such restrictions are called *restrictive covenants* and their several types-*non compete*, *non-deal*, *non-solicit*, *non-poach* covenants, etc. These normally include all or some of the following elements: a) an undertaking not to solicit the customers of a company (*non-solicitation*), which may extend to an undertaking not even to have any dealings with any such customers (*non-dealing*); b) an undertaking not to interfere with the sources of supply to a company; c) an undertaking not to solicit away a company's key employees; d) an undertaking not to be involved in a competing business.[162]

A restrictive covenant is a legal obligation imposed in business relationship to do or not to do something. It may also be in the form of a clause in a Contract/Agreement that requires one party to do or refrain from doing of certain things .Accordingly the obligation not to compete could be existed during the term of the agency agreement and post termination of the agency agreement. Thus non-compete agreements, or covenants not to compete, after the termination of the relationship, are contractual instruments that immediately affect the consequences of termination, and through them, can influence the contractual behavior of the contracting parties. [163] At common law, restrictive covenants are presumptively unenforceable on the basis that they constrain the freedom of the covenanted to engage in trade. However non-competition clause may be justified since in some cases can be socially desirable to protect trade secrets, to encourage training, promote innovation and economic growth. Nevertheless as Covenants not to compete can have a potential influence on the competitive environment in a given economic sector. The object of prohibiting the non-competition clause must be determined, measurable, it should not be general. In the case of a free and competitive market, no one can be stopped from exercising an activity or a profession under an agreement of private law. Thus, the duration, the geographical field of application, its subject matter and the persons subject to it do not exceed what is necessary for the implementation of the concentration and it relates to the nature of business .The restriction is usually imposed in practicing a trade similar to that carried out by the beneficiary of the clause and its operation area. [164]

[162]seeU.S. Department of the Treasury, Non-compete Contracts: Economic Effects and Policy Implications (2016)6.
[163]See GomezPomar (n 142)36.
[164]AlinaRotaru, Invalidity Of Non-Competition Clause In Employment Law Perspectives Of Business Law Journal Volume 1, Issue 1,(2012**)**

3.5.2. Conditions of the validity of non-compete obligation

Due to the deeply ingrained modern attitude towards any reminiscence of indentured servitude or slavery, and the corresponding fundamental principle of freedom to work, legislations and Courts all over Europe and all over the world are intuitively suspicious of covenants not to compete.[165] Indeed, as covenants not to compete can have a potential influence on the competitive environment in a given economic sector the non-competition clauses included in the commercial contracts and statute should fulfill certain validity conditions. Thus, non-competition clause shall not valid on the merely the parties have agreed to introduce it in the contract. Instead it is necessary to a justified interest of the clause beneficiary and should not be brought excessive restrictions of the freedom of the party care assuming the obligation not to perform certain commerce. Non-compete clauses are subject to a number of conditions, which vary according to each jurisdiction. These conditions may include under the two principles; these are the principles of legitimate and principles of proportionality/ reasonableness.

A/ Legitimate Principles

Non -compete agreements can be a significant impediment to people who aspire to start their own firms. Thus non-competition covenants must have a legitimate purpose, i.e. they must be designed to protect only the legitimate interests of the parties. The courts of various countries consider that a legitimate interest is goodwill, maintenance of a stable system of distribution, the preservation of secure outlets, the protection of the buyer's trade, customer or supplier relationship, confidential information, etc. [166]

In competition law, the striving to ensure the effective implementation of the concentration is generally considered as a legitimate purpose of non-competition covenants. In a sense, a legitimate purpose could also mean the promotion of technical or economic progress or the improvement of the production or distribution of goods, while allowing consumers to receive additional benefit. That goal can be achieved only if the non-competition obligations

[165] See Gomez Pomar (n 142)35.

[166] Virginijus Bitė ,Non-Competition Covenants in case of a Business Transfer (MykolasRomeris University, 2011) 184.

(additional constraints) satisfy two criteria of the objective nature-*direct relation* and *necessity* to the implementation of the concrete concentration. The first criterion means that restrictions must be closely linked to the concentration itself. Restrictions which are directly related to the concentration are economically related to the main transaction and intended to allow a smooth transition to the changed company structure after the concentration. [167]The second criterion means that, in the absence of those covenants, the concentration could not be implemented or could only be implemented under considerably more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably greater difficulty.[168]

B/ proportionality/reasonableness principle

As a legal concept, proportionality expresses the idea that there should be a balance between competing objectives or values. Proportionality/ reasonableness are the test for the validity of all non-compete agreements.[169] For the non-competition covenant to be recognized as legitimate (acceptable) and enforceable, a legitimate purpose is not enough; the measures for reaching the purpose must be proportional (reasonable). Thus, the principal cannot prevent the commercial agent from competing forever and (or) in any scope. Indeed a balance has to be struck between the public interest in allowing businesses to compete and the protection of the buyer's legitimate commercial interests. Therefore, most jurisdictions recognize and enforce non-competition covenants provided they are reasonable.[170]Typically the following issues affecting the reasonableness (proportionality) of non-competition covenants are;

a. The scope of activities prohibited: Non-competition covenants can only be regarded as proportional (reasonable) when they address a subject (subjects) whose competition should necessarily be restricted in order to achieve a legitimate aim.[171]Thus the subject matter must be proportional to the legitimate intended to pursue.
b. Where the restriction is limited to the clients with whom the individual concerned had personal dealings within a reasonable period immediately preceding termination ;

[167] Ibid 185.
[168] Ibid 186.
[169] Ibid.
[170] See John Dwight Ingram, Covenants not to Compete [Vol. 36:49 (2003)2.
[171] Ibid 3.

c. The geographical scope of the restriction: geographical scope of a non-competition clause also has to be limited to the extent which is objectively necessary to achieve the abovementioned purpose. [172]It is common practice not to expand the covenants beyond the territory where acts the business being sold at the completion of transaction, i.e. as a rule, the territory of the application of the covenants should therefore only cover the markets where the products concerned were manufactured or sold at the time of the agreements or in which it may be regarded as a potential competitor on the basis of its relevant and demonstrable activity, since the buyer does not need to be protected against competition from the seller in territories not previously penetrated by the seller[173] and finally;

d. The period of time the restrictions: One of the most significant factors which determine the proportionality (reasonableness) of the non-competition covenant is its duration.[174]Thus, the covenant not to compete should not stand alone but should be accompanied by related provisions strengthen the enforceability of the non -compete and may provide relief that wins the litigation. As a result for a covenant not to compete to be valid and enforceable, it must contain "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promise.

3.3.3. Regulatory Approaches and the experience of International and other countries on enforcement of covenant not compete

The two approaches

Restrictive covenants such as these have long been reviewed with suspicion by the courts because of their tendency to reduce competition and restrain the freedom of individuals to practice their chosen profession. Despite this long-standing suspicion there is still no consensus from judges and policymakers on the proper extent of non-compete enforcement; therefore,

[172]See, Bitė (n166)14.
[173] Ibid 15.
[174] Ibid.

there remains considerable variation in how state courts and legislatures view these contracts.[175]

Accordingly there are two different views among scholars. While the proponent, scholars point out that non-competes provide an incentive for firms to invest in employee training, encourage employees to share secrets within the firm, and safeguard against the disclosure of confidential information to a competitor. On the other hand on the opponent side, scholars emphasize that non-competes impasse an individual's fundamental right to earn a living. This seems particularly unjust when an employee (Commercial agent) has limited bargaining power and receives no separate consideration for the covenant. Non-competes also interferes with the flow of information that naturally results when employees change firms. [176]

In European legal system, the primary legislation regulating vertical agreements are found under antitrust law. The key source which sets out the antitrust law applicable to vertical restraints is article 101 of the Treaty on the Functioning of the European Union (TFEU). Article 101(1) prohibits agreements between undertakings that may affect trade between EU member states and have as their object or effect the prevention, restriction or distortion of competition within the European Union.[177] Though Agency agreements are typical example of vertical agreements, under the TFEU under, article 101 provided that the possibility of non-application of to an agreement between a 'principal' and its 'genuine agent' in so far as the agreement relates to contracts negotiated or concluded by the agent on behalf of its principal. However, the concept of a 'genuine agent' is narrowly defined that for the purposes of applying article 101, an agreement will be qualified as an agency agreement if the agent does not bear any, or bears only insignificant, financial or commercial risks in relation to the contracts concluded or negotiated on behalf of the principal. [178]In addition, the Commission's Vertical Guidelines explain that, where a genuine agency agreement contains, for example, a clause preventing the agent from acting for competitors of the principal, article 101 may apply if the arrangement leads to exclusion of the principal's competitors from the market for the products in question.

[175]Norman D. Bishara , Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy Volume 87 | Issue 3 Article 3 Indiana Law Journal(2012)18.
[176]Robert W. Gomulkiewicz, Leaky Covenants-Not-to-Compete as the Legal Infrastructure for Innovation [Vol. 49:251 (University of California, 2015).
[177] Stephen KlnsellaOBE,The regulation of distribution practice in 36 jurisdictions worldwide (published by Sidley, 2013) 96.
[178] Ibid.

Further, the Vertical Guidelines note that a genuine agency agreement that facilitates collusion between principals may also fall within article 101(1). Collusion could be facilitated where: 'a number of principals use the same agents while collectively excluding others from using these agents, or when they use the agents to collude on marketing strategy or to exchange sensitive market information between the principals'.[179]

Thus, as vertical restraints are restrictions on the competitive behavior of a party that occur in the context of such vertical agreements. Examples of vertical restraints include: exclusive distribution, certain types of selective distribution, territorial protection, export restrictions, customer restrictions, resale price fixing, exclusive purchase obligations and non-compete obligations. Hence, article 101 paragraph 1 of the TFEU prohibits agreements with the purpose to restrict competition within the internal market. Post-term non-compete clauses in case it have prevent access to the market for former Commercial agent, non-compete clauses should be prohibited in commercial agency contracts. However, because of the Treaty (TFEU) articles are general and often ambiguous in their wording and therefore the EU institutions have used their right, as provided for in Articles 103 and 288 of TFEU, to introduce secondary legislation, e.g., directives, regulations and guidelines. [180]These help to bring the Treaty Articles into force in Member States and provide interpretations, specifications, exceptions, etc. necessary to ensure a uniform application of the EU competition rules. Some have as their object a consumer protection whereas the others are to regulate relations between contractors.[181] As of now, there are four pieces of secondary legislation in EU made precisely to regulate competition in the area of vertical agreements. These are the 2001 Notice on agreements of minor importance (*de minimis* Notice), 2010 Regulation 330/2010 on Vertical Agreements[182] 2010 Commission's Guidelines on Vertical Restraints and the 1986 Directive 653 on self-employed commercial agents. However as the main important documents for this study purpose is the 1986 Directive/Regulation 653 on self-employed commercial agents .Then it is the time to see what

[179] Ibid 97.
[180]Anna-LiisaAasrand, Do the Limitations on vertical restrictions set by European Union Conflict with the Principle of Free Market Economy?(Master Thesis Lund University, 2013)21.
[181]ibid 22.
[182] See, Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (2010) OJ L 102, retrieved from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF

limitations have been set to the possible restrictions in vertical agreements(commercial agency agreement) by this document.

The EUR is 'based on the civil law assumption that commercial agents deserve protection'. This is in contrast to the assumption which has tended to underpin the common law rules, namely that it is the principal who is the party in need of protection.[183]As a result unlike the EU competition laws which regulated the vertical agreement restraints, the EUR goes on to provide certain minimum levels of protection of commercial agents, in particular concerning the enforcement of covenants not to compete post termination of commercial agency contract. Accordingly, it is possible to have a restraint of trade clause operating following the termination or expiry of the agency agreement and, if so, it is subject to any qualifications that clearly provided under the statutory. Under EUR, a commercial agent and his principal may agree on a post-termination restraint of trade clause. This must be put in according to the EUR provisions which deal with covenants not to compete, in a way that severely constrains its use. Such covenants -referred to as restraint of trade clauses- require, for their validity, to be concluded in writing, to be related to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract, and to last not more than two years.[184] Indeed, apart from the validity requirements, under the EU legal system it will not be binding on the agent where it unreasonably restricts the agent's opportunity to make a living or goes further than is necessary to protect the principal against competition.[185]

Besides, the EUR on restraints of trade clause elements, the conditions of the validity (admissibility) of non-competition covenants were also firstly indicated by the Court of Justice in *Remia BV and others v.Commission of the European Communities* case**.**[186]The Court distinguished two conditions:1) *necessity* for an appropriate enterprise; and 2) *proportionality*-strict limitation of their duration and scope to that purpose.[187] Thus, under the EU law, a non-competition covenant (clause) is admissible if, firstly, the restriction is *objectively necessary for*

[183]Goode, and others (n22)293.

[184] See, EU regulation art 20.
[185] Alan Hyde &EmanueleMenegatti ,Legal Protection for Employee Mobility (University of Bologna, 2013) .16
[186] Case 42/84, Remia BV and others v. Commission of the European Communities.[1985] ECR 2545
[187] Ibid.

the implementation of the concentration and, secondly, it is *proportional*, i.e. when its duration, subject matter, geographical field of application and the persons subject to them do not exceed what is reasonably necessary to the implementation of the concentration.

Likewise, under many domestic legislation the above two principles are clearly incorporated. For example under French commercial code[188] and under Spain commercial code,[189] a non – compete clause set forth in a commercial agency contract must, to be valid, cover a period not exceeding two years, and be limited to (i) the geographic areas and, as the case may be, the clientele, entrusted to the agent and (ii) the products or services covered by the commercial agency contract. In other words, the non-compete clause must be necessary and commensurate with the pursued objective, i.e. the protection of the principal's interests. Indeed any clause obliging the agent not to compete with the activities of the principal after the termination of the agency agreement must be in writing.

[188] See French Commercial Code ArticeL.13 4-14.

[189] Baker & McKenzie, General Guide for Doing Business in Spain (2015)16.

CHAPTER FOUR:

COMMERCIAL AGENT IN ETHIOPIA; A COMPARATIVE ANALYSIS

4.1. INTRODUCTION

The growth of intra and interstate trade in Ethiopia pressed for the need to the introduction of institution of commercial Agency. The response was the enactment of the Civil and Commercial codes in 1960. The civil code governs the external relationship. Besides, the relationship between the principal and the commercial agent are contained in two separate laws: the Commercial Code and the Commercial Registration and Business Licensing Proclamation No. 980/2016. Chapter 4 of title II in book I of the Commercial Code sets 12 provisions with this respect. Likewise, although under the civil code under the special part of the \agency contract under different provision contains some sort of Agency like, Del creder commission Agent and at the same time article 1 and article 3 of the Commercial code which deals about the application of the Civil code which stated that, unless otherwise provided in this code, the provisions of the civil code shall apply to the status and activities of persons and business organizations carrying on a trade. Yet, with respect of the nature of commercial agent which deals about commercial transaction as well as it deals about the internal relationship which existed as between the principal and commercial agent. Hence, the sort of agency like that of Del creder commission agent which is stated under the civil code in civil agency relationship does not have any cross reference towards of the commercial agent. After all, the problems which are framed neither under this research neither under the general provisions which deals about Agency nor under the commercial code which deals about commercial agent dose not covered, inter alia, the problems in relation to the scope of the commercial agent, the issue of during and post termination, the issue of obligation not to compete. Thus, since there are not related provisions neither in the civil code nor under the commercial code which can address the framed problem there is no possibility to apply interpretation by analogy.

Therefore this chapter will dwell upon those provisions contained under the Ethiopian commercial code *and* the Commercial Registration and Business Licensing Proclamation 980/2016. As such we will analyze the scope and definitional aspect of commercial agency (agent), the obligation to cooperation of the principal and Commercial agent, Covenant not compete during and post termination (non-compete after termination) and Ending and Termination of commercial agency agreement and finally the issue of period of limitation are reflected**.**

4.2 Definition of Commercial Agent and Exclusions

According to the Commercial Code, a commercial agent refers to "a person or business organization, not bound to a trader by a contract of employment and carrying out independent activities, which is entrusted by a trader with representing him permanently in a specified area and dealing or making agreements in the name and on behalf of the trader."[190] From the above definition of commercial agent we can safely say that the following points are outside (excluded matters) from the scope of definition;

> To begin with, the commercial code does not apply to any other type of commercial agency or distribution arrangement falling outside of the scope of the definition of "commercial agent". Thus Franchisees, Distributorship and Commercial representative fall outside the scope of application of the**,** commercial code. Next, a commercial agent who is entrusted by a trader representing him permanently in a specified area and dealing or making agreements in the name and on behalf of the trader is excluded. This will further exclude, an agent appointed for a specified number of transactions, who will lack the continuing authority required by the commercial code. In penultimate, as per the definition, the commercial agent should act "*in the name and on behalf of the trader*". By virtue of this phrase, it may be argued that undisclosed agency has no place in commercial agency law of Ethiopia. Thus the external relationship is not covered. Finally, the Ethiopian Commercial Code provides that there is no commercial agency if there is an employment relationship between the parties. Accordingly t*he employment relationship has no place* in commercial agency law of Ethiopia.

[190]See Ethiopian Commercial code (n 10) art 44(1).

In connection with the exclusionary rules, the European Council Directive on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents 653/1986 excludes commercial agents whose activities are unpaid, commercial agents who operate on commodity exchanges or in the commodity market, etc. Likewise, directors, officers and partners of corporations, associations, partnerships and similar entities are excluded from the ambit of the Hague Convention where the authority of such persons derives from law or from the constitutive documents of such organizations.[191]

Moreover, the EUR excludes commercial agents for negotiating contract for service from the ambit of the directive unless the laws of member states provide otherwise.[192] Meanwhile, the French law does not only the sale of goods but also service contracts. Unlike the position in most of the continental European countries, the commercial agency rules is restricted to contracts for the sale of goods and does not include services in the English law.[193] We have to also note that while the Hague Convention does not require continuity,[194] the European court of Justice decided that "it is not important whether the agent negotiated one or more contracts so long as he has continuing authority".[195]

Unlike other jurisdictions, both the Commercial Code and the Business registration and licensing proclamation do not clearly stipulate whether the dealing or making of agreement by the commercial agent should belongs to Service or Goods or both of them. As opposed to international instruments but alike the various domestic laws of other jurisdictions, the Ethiopian Commercial Code provide that there is no commercial agency if there is an employment relationship between the parties.[196]

4.3. The obligation to cooperation of the principal and commercial agent

Under the ECC, both parties (the principal and commercial agent) owe each other a duty to act in good faith,[197]and these duties are mandatory so that it is not open to the parties to derogate

[191] See Hague convention (n77).
[192] See EU regulation (n9) art.3.
[193] British Commercial Agents (Council Directive) Regulations 3053/1993, art.1 (2).
[194] See Hague convention (n77).
[195] See Ellen Wilhelmssonn (n13)141.
[196] See Ethiopian Commercial Code (n10) art44.
[197] Ibid art 46 and 48.

from them .However, the ECC does give some content to the duty insofar as its sets out some specific instances of the application of the duty. Thus, while the agent pursuant the ECC article 46(1-2(a-c) is obliged to make the necessary efforts in the interest of the principal (to keep the latter fully informed and to follow his instructions), the principal pursuant article 48 of the ECC, must provide the agent with the necessary documentation and other relevant information. Yet, when we appreciate the nature of obligation in which the parties owe each other, while the principal obligation against the commercial agent is, to the best of the principal ability, enable his agent to carry out successfully his duty, whereas the obligation which impose up on the commercial agent is mandatory as well, with serious warning to safeguard the principal's interests.

Thus, unlike the modern approach which gives wide protection to the weak commercial agent. In Ethiopian law the obligation to cooperation imposed on the commercial agent than the principal by making the principal his obligation to the best of his ability to support the commercial agent.

The other point in connection with the obligation of the principal toward of the commercial agent is the agent's remuneration. The agent's remuneration typically consists of commission. In the case of commission based remuneration, the interests of the agent and those of the principal run parallel: both parties aim at a maximum number of (successfully performed) contracts. Hence, if the agent does not find many customers that are willing to conclude contracts, not only the gains of the principal are directly affected, but also the agent's income is reduced.[198] In this regard, the EU directive sets out three rules or possibilities in which the agent is entitled to a commission during his performance: the commercial agent entitled to commission on transactions concluded during the period covered by the contracts, which arises whenever the principal and the third party have entered into a contract and extends to sales by the principal in an area where the agent has exclusive right, or to persons within a group in respect of which the agent has exclusive rights.[199]The agent may be entitled to commission on post-termination sales within a reasonable period resulting from his efforts; and on orders placed pre termination but concluded afterwards: besides under the directive apportions

[198] See Hesselink and others (n2)114.
[199] See EU regulation (n9) art7.

commission between a departing and an incoming agent is addressed.[200] Commission should be paid as soon as one or more of the following occurs: (i) when the principal has accepted or delivered the goods; (ii) when the principal should have accepted or delivered the goods; (iii) when the third party accepts or delivers the goods; or (iv) when the third party pays for the goods[201]and at the latest when the third party has executed his/her part of the transaction or should have done so if the principal had executed his/her part, as s/he should have done [202]and not later than on the last day of the month following the quarter in which it became due.[203]In addition, in the absence of agreement on remuneration, a commercial agent is entitled to that which is usually allowed to commercial agents for the goods where s/he carries on his/her activities and, if there is no customary practice, he is entitled to reasonable remuneration.[204]
According to the Ethiopian commercial code, unless otherwise provide in their agreement, the commercial agent is entitled to receive remuneration for all dealings negotiated or made by him and to receive remuneration for all dealings made, in the area where he acts, either by the principal himself or by another agent of the principal[205] even where dealings made by him are not carried out by the principal. In the absence of fixed remuneration in the agency agreement, the commercial agent is entitled to receive by custom.[206]

Likewise, "whenever an agency agreement terminates, the agent or his heirs or the business organization having acted as agent shall receive remuneration for all contracts negotiated or entered into prior to the termination of the agreement."[207]

Under various national laws, the agent's entitlement of remuneration is outside of the payment upon termination. In other words, the Commercial agent entitlement of remuneration to post termination is independent of any claim to an indemnity or payment of compensation. Yet, Ethiopia's commercial code remains silent regarding the entitlement of the commercial agent to post termination remuneration. However, since the principal benefits from the transaction

[200] Ibid art 9.
[201] Ibid art 10(1).
[202] Ibid art 10(2).
[203] Ibid art 10(3).
[204] Ibid art 6(1).
[205] Ibid art 50(1).
[206] See Ethiopian commercial Code(n10)art50(3).
[207] Ibid art.53(3).

which is concluded shortly after the ending of the agency relationship, the interests of the commercial agent for receiving payment for his/her must be protected post-termination.

4.4. Ending and Termination of the Commercial agency agreement

Termination of the agency agreement depends on whether the contract was concluded for a fixed or indefinite period. A contract is for an indefinite period either when it does not contain any specific duration or when it explicitly states that it is for an indefinite period. When an agreement is concluded for indefinite period there is almost consensus under all legal systems either party may end a commercial agency contract, provided that a notice has been given.[208]Under Ethiopian law, a commercial agent represents the principal permanently, which seems to mean until it is terminated according to the law or by agreement. This fact is reflected under Art.52 (1) (A) of the Commercial Code which reads "agency agreement shall terminate where the period of time for which it was entered into expires". Besides, either party to an agency agreement made for an undefined period of time may terminate it on notice.[209]Accordingly the period of notice shall be made in the agency agreement or, where not fixed, by custom. It shall not be less than one month during the first year of service and not less than two months after the first year.[210]Notice need not be given where there is good cause for termination.[211] Thus what we can deduct from the commercial code provisions is that the duration of commercial agency could be either for definite or indefinite period. Either party is at liberty to terminate their agreement by providing prior notice with the exception of good cause for termination to terminate without observing the mandatory period of notice which is stated under the commercial code.[212]

It is worthwhile to mention the fact that the majority of the legal systems convert the contract into a contract for an indefinite period if parties continue to perform a contract for a definite period after the expiry of the contract**.**[213]Under the EU directive[214] also it is clearly stated that

[208]See Hesselink and others (n2)129.
[209] See Ethiopan Commercial code art. 2(2).
[210] Ibid art 52(3).
[211] Ibid art. 2(2).
[212] Ibid.
[213] See Hesselink and others(n2)12.
[214] See EU regulation(9)art14.

'An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an in definite period 'this issue is subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

However toward of the consequences of disregarding there are different approaches. Accordingly in some systems the aggrieved party is entitled to damages in lieu of a notice period. This can be found in the following legal systems in Belgian law, Finnish law Greek law, Swedish law.[215]

In contrast, under French and Spanish Law there is no entitlement to damages unless the non-observance of the notice period also results in an abus de droit.[216] However, in other systems there is no entitlement to damages, although the notice period will be substituted by one which is proper. (German Law) However, the aggrieved party may end the contract (without a notice period), since the nonobservance of the notice period can be considered an important reason for termination[217]

Yet under EU directive as its aim is to protect the weaker party (commercial agent), it clearly provided that the entitlement to indemnity does not prevent the commercial agent from seeking damages. Indeed the issue of compensation for termination and the damage in lieu of non-observance of notice period is not the same pursuant to EU directive.[218]

In Ethiopia even if the agency duration of the relation could be made either for definite period or indefinite period of agreement and the agency agreement ground to be terminated is clearly stated that. Where the period of time for which it was entered into expire**,** where the agent, being a person, dies, becomes incapable or is declared bankrupt, where the business organization acting as agent is wound-up and agency agreement made for an undefined period of time may terminate it on notice.[219]

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[215] See Hesselink and others (n2)146.
[216] Ibid 147.
[217] Ibid 149.
[218] See EU regulation (n9) art 17(2) c.
[219] See Ethiopian Commercial Code (n10) art 52(1&2).

Yet, unlike other jurisdiction which have clearly stated that the effect of continued performance that converted to indefinite period in turn to be terminated a prior notice is soughed from either party. The Ethiopia commercial law remain silent with respect what would the fate of in case performance is continued after the fixed period. Similarly due to the absence of clear cut with respect of the effect of continued performance after the fixed period expired it is unsolved the rule on prior notice by either party at time they intended to terminate the continued performance**.** Thus a clear rule on continued performance is important in practice in order to avoid the situation where continuation may create legal uncertainty. It should clearly state the fate of continued performance.

Similarly despite under the commercial code Ethiopian for termination through prior notice for indefinite period agreement is allowed.[220] Yet with respect the issue of non-observance of the period of notice, unlike other jurisdictions which required damages in lieu of the dis regarded prior notice, it remains silent regarding the remedy for non-observance of the period of notice. Yet considering the important function of the period of notice is to allow the aggrieved party to adapt to the new situation, especially to find an alternative, either a new principal or to commence a different economic activity. After all, the period of notice (and the damages in lieu of this) is meant to safeguard the interests of the party which is confronted with unilateral ending by its counterpart. Thus the merely recognition of the issue of prior notice for termination without indicating the consequence of non-observance of notice is Worthless. Therefore so as to achieve the very essence and function of prior notice in case either the principal or commercial agent has not observed the proper notice period provided for in the contract or by law. Both the principal and agent should be liable to the other party in damages.

Ethiopia Commercial Code provides for compensation upon termination of commercial agency, and it states two c*umulative* conditions that are required for the payment of compensation, namely: *undefined period of time* as the duration of agency and *absence of good cause.* Article 53 reads:

Since compensation upon termination is for the goodwill the agent has created or the cost incurred by the agent in relation to the business of the principal, there is no justification for the

[220] Ibid art 52(2).

omission of such compensation (from Article 53 of the Commercial Code) where agency relations for a definite period of time is terminated by the principal *without good cause*. The same reasons (i.e., undue advantage from goodwill created by an agent, and cost incurred by the latter) apply for agents whose agency is unduly terminated before the end of the *definite period* stated in the contract.

Although, Ethiopian commercial code provides compulsory compensation/indemnity as well, a commercial agency agreement for a specified period of time recognized, which reads "agency agreement shall terminate where the period of time for which it was entered into expires".[221] It remains silent regarding the issue of compensation/indemnity in case parties continuing performance after the expiry date for definite period agreement. Meaning the law is unclear with the issue whether the commercial agent who continued performance after the expiry date of definite period agreement entitles to compensation/indemnity.

In many legal systems, compensation upon termination of the agency agreement is taken as a mandatory statutory provision that obliges the principal to pay irrespective of the causes of the termination. The principal is therefore, required to pay compensation upon termination of the agreement even if the agency is terminated legally.[222] The EU directive, for example, states that Indemnity/compensation shall be due even if the agency relation is terminated due to the death, illness, age and infirmity of the agent.[223]But, the agent may not be entitled for compensation/indemnity if the agency agreement is terminated by the principal due to the fault of the agent –that can justify the termination of agency contract under the law– and if the agent willingly terminates the agency agreement without any fault from the principal.[224]

Under Ethiopian law, the agent is entitled to compensation if the principal, as stated above, terminates the agency agreement "without good cause".[225] The phrase '*without good cause*' should be interpreted with caution and the agent should, for example, be compensated if he has not committed fault that has caused the termination of agency. Unless indicative standards of '*good cause*' are stated, its definition becomes susceptible to unpredictable and inconsistent

[221]See Ethiopian Commercial Code (n10) art 52(1a).
[222] See Wilhelmsson (n116) 148.
[223] See EU regulation (n9) art 18(a&b).
[224] Ibid art 18(b&c).
[225] See Ethiopian Commercial Code (n 10) art 53.

judicial discretion. Besides as the principal benefited by the effort of commercial agent during and after the relationship in case agency relation is terminated due to the death, illness, age and infirmity of the agent the commercial agent has to share from the profit in which he/she contributed during the relationship.

The other issue also, unlike other jurisdiction which clearly stated the Extinguished/Loss of indemnity/compensation. For example, under the EU directive[226] it sets out three circumstances in which neither indemnity nor compensation are payable, where the principal has justifiably terminated the contract on account of the agent's breach of contract. Where, the agent has himself terminated the contract. (Unless this was justified by circumstances attributable to the principal, or unless the agent had become so old, ill or infirm that he could not reasonably be required to carry on with his activities) and where the commercial agent, with the agreement of the principal, has assigned his rights to a third party. In turn it supports the contracting party and the judicial institution to look the grounds in which the commercial agent is not entitled to indemnity/compensation.

Under the Ethiopian commercial code unlike other jurisdiction, apart from providing the term of good cause which served as a ground for the entitlement of indemnity/ compensation, neither illustrative nor exhaustive grounds in which the commercial agent neither indemnity nor compensation are payable is not existed .[227]

It is, however, to be noted that the agent deserves compensation only if s/he has enhanced the goodwill of the business and if the principal continues to drive benefits thereof. With regard to cost incurred by the agent who is not entitled to compensation (or indemnity) upon termination of agency, the agent may claim damages under the general law of obligations.

4.5. Non-Compete Obligation

Non-compete obligation of the commercial agent is assessed under two headings under Ethiopian Law. These are the non-compete obligation of the agent during the term of the agency agreement. Pursuant to article 47(2) of Ethiopian Commercial Code and the post termination obligation pursuant to article 55(1) of the Commercial code.

In Ethiopia under the commercial code in principle, non-competition clause does not restrict a

[226] See EU regulation (n9) art 8.

[227] See Ethiopian Commercial code(n10)art53.

commercial agent or a principal from competing with each other during the agency relationship or afterwards. However, the parties are free to stipulate a contractual non-competition obligation during or after the term of the agency agreement.[228] The restrictions for post-contractual non-competition clauses are the same as for non-competition clauses during the agency relationship.[229]However in the absence of agreement during the agency relationship, a commercial agent may not act in the area specified in the agreement on behalf of traders other than the principal.[230]. The agency agreement may be cancelled and damages may be due where the agent carries on trade similar to the trade carried on by the principal.[231]

In addition after the termination of the agency relationship unless otherwise the party agrees the commercial agent shall not carry on the same trade as the principal or act as commercial agent or representative for a trader carrying on the same trade as the principal. [232]At the same time irrespective of any provision to contrary any such prohibition shall not be effective for more than five years.[233]

However under various national laws due to the deeply ingrained modern attitude towards any reminiscence of indentured servitude or slavery, and the corresponding fundamental principle of freedom to work, legislations and Courts all over Europe and all over the world are intuitively suspicious of covenants not to compete. For example Under the EU directive that deals with covenants not to compete, in a way that severely constrains its use Such covenants – referred to as restraint of trade clauses- require, for their validity, to be concluded in writing, to be related to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract, and to last not more than two years.[234]After all, as the very purpose of the validity requirements are aiming to achieve different goals. The party to the commercial agency is not allowed to excluded the validity requirement of non-compete obligation via agreement. Thus it is mandatory not permissive under other Jurisdictions.

[228] See Ethiopian Commercial Code (n 10) art 47(2).
[229] Ibid art 55(1).
[230] Ibid art 47(3).
[231] Ibid art 47(1).
[232] Ibid art 55(1).
[233] Ibid art 55(2).
[234] See EU regulation (n9) art 20.

However, under Ethiopia commercial code, as I have stated above the validity requirement for covenant not to compete during and after termination of the agreement, the party to commercial agency are at freedom to excluded the validity requirements, as well the validity requirements are only restricted that to commercial agent not to carry on the same trade as the principal or act as commercial agent, and not to act in the area specified in the agreement on behalf of traders other than the principal and shall not be effective for more than five years. Yet, as Covenants not to compete, can influence the competitive environment in a given economic sector. In turn it could harm competition or consumers. The commercial code remains silent with the form of agreement, the group of customers and the kind of goods covered by the agency contract. After all the duration as the law stated that in the absence of the agreement the restriction maximum duration is five year which is too long and it affects the commercial agency .Thus it has to be also specific not only to the specific area instead it has to be restricted to the Group of customers so as to protect the competition plus the interest of third party. Besides it has to be in written form the agreement as it protects the interest of commercial agent as well the restriction time (i.e. five years) sought amendment. Furthermore, as the importance of the validity requirements is important to protect different interests, the validity requirements have to be a mandatory and non-derogate by the party to the commercial agency.

4.6. Period of limitation (time barred for entitlement of compensation up on termination)

Despite under the commercial code of Ethiopia, the commercial agent is entitling to compensation for indefinite period relation up on termination. Neither the commercial code nor the Civil code under the special type of contract (agency agreement) provided the time-barred for entitlement of compensation up on termination of the agency agreement by the commercial agent .However by looking the cumulative provisions of the commercial code art,1 and art 1676/2/ of civil code which legalized the possibility of invoking the period of limitation which is provided under civil code of Ethiopia, in case the special law is remain silent regarding a specific issue. Hence the period of limitation which is provided under the general contract *art.1845 reads:*

"Unless provided by law, action for performance of a contract, action based on non-performance of a contract and action for invalidation of a contract shall be barred if not brought within ten years."

It is possible to invoke the above provisions for claiming compensation up on termination. Yet when we look other jurisdictions by considering the different nature of commercial agency contract they have clearly provided specific period that the commercial agent will lose his entitlement to an indemnity or compensation if he does not notify the principal that he intends to pursue his entitlement. For example; under EU regulation introduce a statutory exclusion period in that it provides that the commercial agent will lose his entitlement to an indemnity or compensation if he does not notify the principal that he intends to pursue his entitlement within one year following termination of his commercial agency contract.[235]

Yet as Commercial agency is of particular importance in international trade, and engaged in such business. Indeed it has different nature from other sort of contract in turn applying the general period of limitation which is incorporated under the general law is too long and not reasonable. After all, the absence of clear provision which regulate period of limitation results legal uncertainty as well it would result unnecessary litigation cost. It is important to provide specific period of limitation by considering the nature of the business.

[235] Ibid art 17(9).

CHAPTER FIVE: CONCLUSION AND RECCOMMENDATION

5.1. CONCLUSION

Agency is both a term of art known to all legal systems and a less technically perceived business model for reaching customers through middlemen to which the commercial law in many systems has devoted a number of special rules. The growing interdependence of intra and interstate trade in Ethiopia the need to modernize the legal system demand an introduction of the concept of Agency contract. As a result the enactment of the Ethiopian Commercial Code and the Commercial Registration and Business Licensing Proclamation 980/2016, embodied the status, powers and duties of commercial agents in the two separate legal instruments.

Nevertheless in order to appreciate the existing Ethiopian legal frame works that bestowed protection Commercial agent I have raised the following questions:

1. Does the existing Ethiopian legal frame work that acknowledged Commercial agent balance the interests of both the principal and Commercial Agent? 2. Can the legal framework on Commercial Agent and the protections laid down by the law sufficiently attain the Ethiopian Government's policy of ensuring protection to the Commercial Agent? 3. Dose the Commercial Agent protection frame work viable in light of the prevalent principles, laws and practice on Commercial Agent of the other jurisdiction, without ignoring however the Ethiopian economic and political setting? 4. And what would be the best possible alternatives for the effective Commercial Agent rights protection in Ethiopia?

   - ✓ Likewise in line the research questions which have stated here above, I have framed the General and specific objectives; while the general objective of this study is to test the adequacy of the Ethiopian law in the Commercial Agent protection. On top of testing the adequacy of the Ethiopian law, this study will also identify the legal gaps, pitfalls, hindrances and perils of the existing Commercial Agent protection law and

forward suggestions and recommendations that produce practical relevance; and the specific objectives are, to examine if the Commercial Agent provisions of Ethiopia balance the interests of both the principal and the Commercial Agent; assessing if the Commercial Agent legal frame work sufficiently attain the Ethiopian Government's policy of ensuring protection to the Commercial Agent; assessing in to the Commercial Agent protection in Ethiopia under the existing legal regime in light of the prevalent principles and laws on the commercial Agent protection and the practice of other jurisdictions; and finally to develop and to contribute its fair share to provide legal solutions to the problems that would be faced in the course of Commercial agent dispute settlements.

Indeed so as to test the result of the research questions and research objectives that I have framed I have deploy the Comparative methodology is used to address the problems framed under this study. Since Comparative study can be categorized at macro and micro level, under this study, a micro comparison is made on the Commercial Agent protection in Ethiopia vis- a-vis European legal framework and their practice on Commercial Agent, France and UK. Those countries are both from continental (France) and common law legal System (UK).

Finally I have come up with the following finds:

1.In Ethiopia despite a commercial agent who is entrusted to dealing or making agreements in the name and on behalf of the trader both in commercial code and Business registration and licensing proclamation. Yet, under the commercial code of Ethiopia, neither the English nor the Amharic version provides the scope of whether the dealing or making of agreement by the commercial agent belongs to Service or Goods or both of them. Besides, although Ethiopian Commercial Code provides that there is no commercial agency if there is an employment relationship between the parties. Yet as the issue of services or goods to be dealing by the commercial agent doesn't clearly stipulated it is also unclear the exceptions in which excluded either from the Services or Goods.

The other loophole also despite under the Ethiopian commercial code provides obligatory entitlement of remuneration to commercial agent during the agency relationship. The law

remains silent regarding the entitlement of remuneration post termination to commercial agent. Likewise Ethiopian commercial code remain mute with regarded the due dates of the remuneration during agency relationship in case there is no agreement as well after termination were thee is no fixed agreement plus the result of in case no customary practice in the specified business area to what extent the commercial agent is entitled. Besides, the obligation to cooperation of the commercial agent and the principal incorporated under article 46 and 48 of Ethiopian commercial code respectively. Yet, In Ethiopia the nature of obligation imposed on the commercial agent is more obligatory than the obligation which is imposed on the principal (i.e. the obligation of principal provides that to the best interest of his ability).While the obligation of commercial agent shall safeguard the principal's interest with due care due by a good trader.

Despite under the Ethiopian Commercial code the duration of commercial agent relationship are both for indefinite and definite. Either party may terminated the relationship for indefinite by providing the mandatory notice for termination.

The law does not address the following issues; the law is unclear with the issue whether the commercial agent who continued performance after the expiry date of definite period agreement entitles to compensation/indemnity ,the consequence of non-observance of the mandatory period of notice, the law also remain silent with regard the issue of compensation or indemnity up on termination for definite period of relationship, the entitlement of commercial agent as the entitlement of compensation is restricted with two conditions (i.e. for indefinite period agreement plus the termination has to be without good case) the entitlement of compensation due to the death, illness, age and infirmity of the agent is not addressed, the law also remain unclear with the ground for the commercial agent to extinguished/Loss of indemnity/compensation and despite the commercial agent is entitled compensation for goodwill and the term of good will defined under the commercial code it lacks the indicative elements of goodwill that serves as aground for the entitlement of commercial agent. At the same time while the commercial law provided mandatory entitlement of compensation up on termination. Yet, neither the Ethiopian commercial code nor the civil code under the special

type of contract (agency agreement) provided the time-barred for entitlement of compensation up on termination of the commercial agency agreement by the commercial agent.

Moreover even though under the Ethiopian commercial code for covenant not to compete after termination in case the party failed to fixed the condition that are mandatory requirements for the enforcement of covenant not to compete. The commercial code remains silent with the form of agreement, the group of customers and the kind of goods covered by the agency contract. After all the duration as the law stated that in the absence of the agreement the restriction maximum duration is five year which is too long and it affects the commercial agency.

5.2. RECOMMENDATION

These issues all create a demand for amendments of the current provisions in the Commercial code or an adoption of a sound regulation by the Ethiopian government that would provide clarification on those issues that have been raised previously.

Based on the findings of this paper, the writer would like to recommend the following.

1. The ECC does not specifically address the Scope of Commercial agent and it is not clear both under the Amharic and English version. Since, there are two approaches as to the Scope of commercial agent in commercial agency law. The first one is the power of commercial agent is to selling and purchasing only goods. The second approach is extending the power of commercial agent to selling and purchasing of goods and services.

   Besides alike the various domestic laws of other jurisdictions, the Ethiopian Commercial Code provide that there is no commercial agency if there is an employment relationship between the parties. Yet, the exclusionary rule is neither exhaustive nor excusive. Hence, providing and addressing specifically the Scope and exclusionary rule of the commercial agents activity avoids the uncertainty.

2. Despite under Ethiopian commercial code provides, obligatory remuneration during the agency relationship, it remains silent regarding the entitlement of post termination remuneration to commercial agent. However since the principal will benefit from the transaction which will be concluded shortly after the ending of the agency relationship. The rule protects the commercial agent's interest in receiving payment for its efforts made before the ending of the agency contract after termination has to apply in the same fashion in case of post termination.

   Similarly unlike other Jurisdiction which provides the due dates of the remuneration during agency relationship in case there is no agreement as well after termination where there is no fixed agreement plus no customary practice in the specified business area the commercial agent is entitled to reasonable remuneration. These issues are not addressed under the Ethiopian commercial code while it is important being clear and specific.

3. Although, under the ECC, a commercial agency agreement for a specified period of time and termination of the commercial agency by prior notice are recognized. The law remains silent both on the effect for continued performance for contract after the agreed term has expired as well, on the consequences of non-observance of notice period.

   Firstly, I would suggest that the ECC on the agency should provide fixed rules on the fate of a Commercial agency agreement in case the parties actually continue performing the contract after the agreed term has expired. If parties continue to perform a contract for a definite period after the expiry of the contract, in the majority of the legal systems the contract will be converted into a contract for an indefinite period. Besides, the consequence of disregarding of the notice period before the termination compensation in lieu of the notice period has to be allowed like the other jurisdiction experiences, and the parties would not have the possibility to derogate. This notice period would protect not only the agent (which certainly appears weaker in the relationship) but also the principal, which would need this time to replace his previous agent. Therefore, the adoption and implementation of such provisions would give benefits to both parties.

4. Ethiopia Commercial Code provides for compensation upon termination of commercial agency, and it states two c*umulative* conditions that are required for the payment of compensation, namely: *undefined period of time* as the duration of agency and *absence of good cause.* Article 53 reads:

Since compensation upon termination is for the goodwill the agent has created or the cost incurred by the agent in relation to the business of the principal, there is no justification for the omission of such compensation (from Article 53 of the Commercial Code) where agency relations for a definite period of time is terminated by the principal *without good cause*. The same reasons (i.e., undue advantage from goodwill created by an agent, and cost incurred by the latter) apply for agents whose agency is unduly terminated before the end of the *definite period* stated in the contract.

The other issue link to compensation/indemnity, unlike other jurisdiction which clearly stated the Extinguished/Loss of indemnity/compensation. For example, under the EU directive[236] it sets out three circumstances in which neither indemnity nor compensation are payable, where the principal has justifiably terminated the contract on account of the agent's breach of contract. Where, the agent has himself terminated the contract. (Unless this was justified by circumstances attributable to the principal, or unless the agent had become so old, ill or infirm that he could not reasonably be required to carry on with his activities).and where the commercial agent, with the agreement of the principal, has assigned his rights to a third party. In turn it supports the contracting party and the judicial institution to look the grounds in which the commercial agent is not entitled to indemnity/compensation.

Under the ECC, apart from providing the term of good cause which served as a ground for the entitlement of indemnity/ compensation, neither illustrative nor exhaustive grounds in which the commercial agent neither indemnity nor compensation are payable is not existed .Thus, in order to avoid the confusions that would result in from loss of indemnity/compensation a comprehensive grounds should be provided.

[236]See EU regulation (n9) art 8.

5. Non-compete obligation of the commercial agent is assessed under two headings under ECC. These are the non-compete obligation of the agent during and post termination of the agency agreement. Obligation not to compete can have a potential influence on the competitive environment in a given economic sector.

   After all, the object of prohibiting the non-competition clause must be determined, measurable, it should not be general. Thus, the duration, the geographical field of application, its subject matter and the persons subject to it shall not exceed what is necessary for the implementation of the concentration and it relates to the nature .Therefore, the obligation not to compete clauses included in the commercial contracts and statute should fulfill certain validity conditions.

   Yet, unlike other jurisdictions for a non-compete obligation clause set forth in a commercial agency contract must be , cover a period not exceeding two years, and be limited to (i) the geographic areas and, as the case may be, the clientele, entrusted to the agent and (ii) the products or services covered by the commercial agency contract. The ECC remains silent with the form of agreement, the group of customers and the kind of goods covered by the agency contract. After all the duration as the law stated that in the absence of the agreement the restriction maximum duration is five year which is too long and it affects the commercial agency .Thus it has to be also specific not only to the specific area instead it has to be restricted to the group of customers so as to protect the competition plus the interest of third party. Besides it has to be in written form the agreement as it protects the interest of commercial agent as well the restriction time (i.e. five years) sought amendment**.**

6. Under the commercial code of Ethiopia, the commercial agent is entitling to compensation for indefinite period relation up on termination. Yet, unlike many domestic legislation the agent will lose the rights to indemnity or compensation if he does not inform the principal, within one year of termination of the agency contract, that he intends pursuing his entitlement .Under Ethiopian law, nether the commercial code nor the civil code under the special type of contract (agency agreement) provided the time-barred for entitlement of compensation up on termination of the agency agreement by the commercial agent. Thus,

like the other jurisdiction trend by considering the distinct nature of the commercial agency agreement a specific period of limitation should provide.

Certainly, these changes do not require a dramatic step to grow closer to the European approach of the agency agreements. Nevertheless, it would be preferable if these amendments would take a gradual approach, to avoid to sudden changes. These above proposals should serve as a starting point for a better protection of the weakest party, and cleared rules in the benefit of both parties, as well as gained efficiency (by legal certainty) for the courts.

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