Consultant report versus court appointed expert: Proving material breaches and terminating a commercial agency

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Introduction

In a case tried three times by the Federal Supreme Court, the Federal Supreme Court (in case 247 of 2019 dated 13 July 2020) decided a commercial agency dispute between a principal and its commercial agent and considered the question of what constitutes a material breach of a commercial agency agreement to justify termination. The court's approach was unexpected as it relied on a report by a consultant expert used by the principal and ignored the report of the court appointed expert.

It is well known by legal practitioners involved in commercial agency disputes that it can be difficult to establish a material breach that convinces the Commercial Agencies Committee and court. However, the case below is a clear example of how we successfully persuaded the court to deregister a commercial agency agreement with the Ministry of Economy.

The facts of the case

The Appellant (the principal) is a limited liability company operating from its registered office in India and is engaged in the business of operating scheduled air transportation services. In 2011, the Appellant appointed the Respondent (the agent) as a general sales agent for its passenger and cargo business in the UAE. Accordingly, the Appellant executed a Passenger General Sales Agency Agreement (PGSA) and a Cargo General Sales Agency Agreement (CGSA) (the "Service Agreements") with the Respondent, whereby it appointed the Respondent as one of its general sales agents in the UAE, on a non-exclusive basis and for a fixed term of three years.

The Appellant later discovered that the Respondent, in bad faith, registered the two Service Agreements as commercial agency agreements at the Ministry of Economy, thereby making the Services Agreements governed by the Commercial Agency Law.

The procedural history of the dispute is complicated. The Appellant filed a complaint with the Commercial Agencies Committee and asked the Committee to cancel the registration of the agency. The Committee, however, rejected the complaint. Accordingly, the Appellant filed its claim before the Federal Court of First Instance challenging the decision of the Committee. The Court of First Instance also rejected the claim and so the Appellant appealed to the Federal Court of Appeal (first appeal) which allowed the appeal and overruled the Court of First Instance judgment. The Respondent appealed to the Federal Supreme Court (first cassation) and the Supreme Court overruled the decision of the Court of Appeal and remanded the

case for retrial by the Court of Appeal (second appeal). The Court of Appeal on the second appeal decided to uphold the Court of First Instance judgment and rejected the application to cancel the agency registration. The Appellant then filed an appeal to the Federal Supreme Court (second cassation) and this time the Supreme Court accepted the appeal and overruled the Court of Appeal judgment. In view of the second appeal to the Court of Appeal, the Court decided to apply its own powers and consider the merits of the dispute. The Court referred the case to two experts, an accountant and a commercial agencies expert, to report to the Court on the issues in dispute and to enable it to decide whether the Respondent committed any material breach of the GSA Agreements.

Appellant's grounds for termination

The Appellant based its claim for termination and deregistration of the agency on the following grounds:

1. The Service Agreements between the Appellant and the Respondent were not commercial agency agreements. Both agreements were on a non-exclusive, short term basis – the opposite characteristics of a commercial agency agreement. Furthermore, the Appellant had the right to determine its own representatives or agents and to establish its own company in the region for similar services as being provided by the Respondent under the Service Agreements.
2. Under both Service Agreements, the Respondent was described as a "General Sales Agent" and an "Independent Contractor" but never as an "exclusive commercial agent".
3. The Appellant alleged that the Respondent maliciously tricked the Appellant into providing a letter that the Respondent, in bad faith, used to register the Service Agreements under the Commercial Agency Law. Accordingly, the registration of the Service Agreements as commercial agency agreements by the Respondent was obtained by fraud and misrepresentation.
4. The Respondent had also committed multiple material breaches of the terms of the Service Agreements which were highlighted by the Appellant. These breaches justified the non-renewal of the Service Agreements.

The Commercial Agencies Committee decision and First Instance grounds

The Commercial Agencies Committee rejected the Appellant's complaint on the grounds that the two agreements were commercial agency agreements and that the commercial agency was still exclusive notwithstanding the fact that the Appellant was entitled to appoint other distributors. The Committee held that the agent had the right to commission on all transactions through others which did not negate exclusivity.

This reasoning was accepted by the Court of First Instance and the Court decided that the Service Agreements were commercial agency agreements and not simple service agreements. The Court also rejected the plea of non-exclusivity.

The Court of Appeal (first appeal)

In the first Court of Appeal decision, the Court however, had a different view and ruled that the Respondent was clearly described under the Service Agreements as an independent contractor and the services rendered by him were not similar to those undertaken by a commercial agent. The Court decided

to overrule the Court of First Instance judgment and order the deregistration of the commercial agency agreement.

Federal Supreme Court (first round)

The Supreme Court however disagreed with the Court of Appeal when the matter was appealed before it for the first time and decided that the two agreements were in fact commercial agency agreements since the Respondent was paid commission to provide services within a specific territory. Accordingly, the Supreme Court overruled the Court of Appeal decision and referred the matter back to the Court of Appeal for retrial to consider whether the breaches attributed to the Respondent constitute a material reason to justify termination of the agency agreement as provided under Article 8 of the Commercial Agencies Law.

The Court of Appeal (second appeal)

When the matter was tried again by the Court of Appeal, the court decided that the Service Agreements were in fact commercial agency agreements and the breaches attributed to the Respondent were not sufficient to justify the termination. The Court therefore decided to uphold the decisions of the Court of First Instance and Commercial Agency Committee.

Federal Supreme Court (Second Cassation)

The Appellant did not letter the matter rest and filed another final appeal before the Supreme Court, arguing that the Court of Appeal overlooked material grounds in its appeal. In view of the second appeal, the Supreme Court looked into the merits of the case. This time the Supreme Court issued a detailed and reasoned judgment which is the subject matter of this article.

Principles established by the Federal Supreme Court

First, before conducting an analysis of the merits of the dispute, the Federal Supreme Court in the second appeal referred the matter to new accountancy and commercial agency experts to report to the Court on the allegations of material breaches raised by the Appellant against the Respondent.

During the expert proceedings, the Appellant hired an independent accountant as a consultant and provided him with financial information of its business in the UAE. The consultant prepared his report and highlighted that the sales made by the Respondent were lower compared to the sales made by the other general sales agents appointed by the Appellant. The number of flights sold by the replacement agent were better than those made by the agent. In this comparison the consultant reported that the performance of the Respondent as a general sales agent had been poor and negatively affected the profitability of the business.

The Appellant submitted this consultant report (showing that the Respondent had been negligent in its performance of its obligations) to the two experts appointed by the Court. The Court appointed experts decided to ignore it without discussing it and instead published their own report in which they concluded that the reasons cited by the Appellant were not material or sufficient enough to justify terminating the agency agreement. They reached this conclusion even though the accountant expert appointed by the

Court also confirmed that the sales by the Respondent were weak but did not consider it a good enough reason to qualify as material reason.

The Federal Supreme Court's approach in this case was particularly helpful. It reviewed and compared the two reports and relied on the consultant's report rather than the report of the Court-appointed experts and held that the reasons outlined by the consultant were based on proper analysis of the sales and proved beyond doubt that the Respondent's performance in selling tickets of the Appellant had been poor. This was a material reason to justify termination of the agency agreement.

The Federal Supreme Court then overruled the Court of First Instance judgment and the Commercial Agencies Committee decision in rejecting the request of the Appellant to terminate the agency agreement and de-register it from the Commercial Agencies Register.

Conclusion

In this dispute the Appellant raised an important point about the non-exclusivity of the agreements and this is key to determining whether the agreements are commercial agency agreements. The agreements provided for the right of the Appellant to establish its own company in the territory and process sales directly or through others. In our opinion this was a valid argument, however it was not accepted by the Supreme Court on the grounds that the agent was appointed on a commission basis within a specific territory which was construed a commercial agency.

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