

**Law Office  
of  
HOWARD L. STOVALL  
2131 North Racine Avenue  
Chicago, Illinois 60614  
Telephone (773) 248-8896  
Facsimile (773) 248-8897  
E-mail Howard@Stovall-Law.com**

**Use of Foreign Governing Law and Arbitration Clauses**

in

**Arab Commercial Agency and Distributorship Agreements**

---

This memorandum summarizes certain contractual drafting issues that confront Western (e.g., U.S. or European) companies that do business through commercial agents or distributors in the Arab Middle East. (For ease of reference, the term "commercial agency" in this memorandum will also generally include "distributorship".) In particular, this memorandum addresses the use of contract clauses that specify the particular law to govern the commercial agency, and that provide for disputes arising from that contract to be resolved by arbitration.

Depending on the circumstances in any case, our general recommendation to Western companies usually is in favor of foreign (non-Middle Eastern) governing law and foreign arbitration clauses in Arab commercial agency agreements. However, this general recommendation is subject to a number of related Arab Middle Eastern legal issues, as discussed below.

**1. General Background**

For present purposes, we are limiting our analysis to contract clauses in commercial agency agreements, i.e., virtually always "private sector" contracts. Contracts with Middle Eastern governmental parties are often subject to special rules and regulations. For example, decrees have been issued in Saudi Arabia and Kuwait which generally prohibit all ministries and government departments from agreeing to foreign governing law or foreign dispute resolution in their procurement contracts, subject to some narrow exceptions and special approvals.

There are a number of reasons why Western companies may wish to contract for foreign governing law and/or foreign dispute resolution in Arab commercial agency agreements. For example, some local laws (like in Saudi Arabia) are based on Shariah (Islamic law). In this regard, one legal scholar observed that:

One of the modern criticisms of the classical shari'a is that simply finding an answer to a legal problem in the medieval law books is usually difficult and time-consuming. The classical treatises ... have an organization and style that make them cumbersome, if not impossible, for specialists to use in administering justice.

Perhaps most importantly, Western companies prefer to avoid agreeing to Arab governing law when such law contains so-called "dealer protection" rules favoring the local commercial agent. (This aspect of the matter is discussed further below.)

Western companies also often seek foreign dispute resolution clauses in order to avoid what is perceived to be expensive and difficult litigation in Arab jurisdictions. Local court proceedings and documents submitted therein are required to be in Arabic, the process (including appeals) can be quite lengthy, and local litigation attorneys charge fees based on a percentage (usually 10-15%) of the total amount in controversy, which can be quite high when a commercial agent is claiming unfair termination or non-renewal of the commercial relationship.

In our experience, most litigation is initiated (or threatened) by the local commercial agent, rather than the Western principal. By comparison, a well-advised principal can usually structure the commercial agency so that the principal is less likely to need recourse to local (Arab Middle Eastern) courts. For example, the Western principal should register its trademarks locally, and might also insist on advance payment for goods sold, or payment by irrevocable documentary letter of credit confirmed by a bank in its home jurisdiction.

## **2. Permissibility of Governing Law/Arbitration Clauses**

Most (if not all) of the Arab Middle Eastern countries influenced by European civil law expressly allow contractual parties to agree on governing law and arbitration clauses. Legal support is often contained in the particular Arab country's civil code and commercial procedure code. In addition, most Arab countries are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Thus, foreign governing law and foreign arbitration clauses are generally permitted in those jurisdictions, subject to certain exceptions (some of which are discussed further below).

Notably, at least a few Arab Middle Eastern countries have revised their commercial agency laws to expressly recognize the parties' freedom to agree upon resolution of disputes through arbitration. For example, the Bahraini Commercial Agency Law was amended in 1992, with Article 30 stating that "[i]f a dispute arising from an agency contract is referred to arbitration, the arbitration award shall be final". Similarly, the Qatari Commercial Agency Law enacted in 2002 grants jurisdiction to the Qatari courts "provided there is no agreement otherwise," and also states that "any arbitral award in a dispute arising out of the agency agreement shall be deemed final".

In comparison, many Arab Middle Eastern courts will likely accept jurisdiction and proceed to hear a commercial agency dispute despite a clause in the parties' contract selecting a foreign court to hear all disputes between the parties. Arab Middle Eastern law generally gives local courts jurisdiction to hear cases brought against a non-resident foreign party in certain instances, including if the action concerns an obligation which arose locally. Arab Middle Eastern courts are unlikely to cede jurisdiction to a foreign court (as opposed to a foreign arbitral tribunal) in these circumstances.

### **3. Protection for Commercial Agents**

Arab Middle Eastern ministries and courts are unlikely to enforce contractual provisions between private parties (including foreign governing law and dispute resolution clauses) which are deemed to violate local "public policy".

Such public policy is almost certainly reflected in the so-called "dealer protection" laws which exist throughout the Arab Middle East. Those laws give local commercial agents certain special statutory rights, including grounds for claiming compensation in the event of unfair termination (and, in some cases, unfair non-renewal) of the commercial agency. Many of those laws also explicitly grant exclusive jurisdiction to local courts over any commercial agency dispute.

For example, the UAE Commercial Agency Law empowers a local Commercial Agencies Committee and the UAE courts to resolve any dispute arising under a UAE commercial agency registered in accordance with that law. (Under Article 6, "no effect shall be given to any agreement contrary hereto.") Based upon these provisions, we believe the UAE Committee/courts would exercise

jurisdiction over any such dispute presented to it, regardless of a foreign forum selection clause in the agreement. Similarly, the UAE Committee/courts would likely apply at least local public policy (such as the dealer protections in the UAE Commercial Agency Law), regardless of a foreign governing law clause in the commercial agency agreement.

Similarly, Article 5 of the Lebanese Commercial Representation Law provides:

Notwithstanding any agreement to the contrary, the courts of the place where the commercial agent performs his activities shall have jurisdiction in disputes arising from the commercial agency agreement.

Lebanon's highest court (the Court of Cassation) has interpreted this provision to be a matter of public policy, giving exclusive jurisdiction to the Lebanese courts over such commercial agency disputes, notwithstanding any contrary dispute resolution clause that might be contained in the parties' agreement.

#### **4. Effect on Contract Registration**

Arab Middle Eastern commercial agency laws require the registration of commercial agency agreements in a special register, usually maintained by the local Ministry of Commerce. Administrative practices developed by registry officials in each Arab Middle Eastern country can affect the contractual parties' drafting of their commercial agency agreement.

For example, many years ago, the Saudi Ministry of Commerce insisted that a commercial agency agreement submitted for registration state that it was governed by Saudi Arabian law. Moreover, that Saudi Ministry also required such agreements to state that disputes between the parties be submitted to arbitration in Saudi Arabia in accordance with Saudi arbitration regulations or to resolution by the appropriate Saudi judicial tribunal. However, the Saudi Ministry's position has changed from time to time over the years, and it has been possible recently to register Saudi commercial agency agreements which contain foreign governing law and/or foreign arbitration clauses.

In the past, relevant commercial agency registries in other Arab countries have also sometimes refused to register commercial agency agreements containing provisions for foreign governing law. The more recent general administrative trend has been to

register commercial agency agreements with such foreign governing law clauses. Nonetheless, as discussed above, such foreign governing law clauses are unlikely to be enforced if the effect is to violate local public policy.

**5. "Defensive" Value to Such Clauses**

Despite the limitations and caveats discussed above, there are a number of reasons for us to customarily recommend the use of foreign governing law and arbitration clauses in Arab Middle Eastern commercial agency agreements. For example, the local commercial agent might abide by a contractually-agreed foreign arbitration clause (and/or have assets outside the local jurisdiction which could be used to satisfy an award). In addition, such clauses could be very useful "defensively" if the local commercial agent sues the Western principal in local courts, the Western principal decides not to make an appearance, and the commercial agent subsequently attempts to enforce the resulting local default judgment against the principal in another court, e.g., the courts of the latter's place of residence.

In general, the contractually selected foreign governing law should be that of a jurisdiction with which the Western principal has some connection (such as its place of incorporation and/or headquarters). However, if the parties also agree to resolve disputes through arbitration, then it may be acceptable to select the law of the situs of the arbitration as the governing law.

\* \* \* \*

This memorandum is intended to summarize some general legal principles of commercial agency law in the Arab Middle East, but not to provide legal advice on any specific question of law. Please let us know if you have any questions or comments regarding the background information in this summary, or if we might assist in connection with any other Middle Eastern commercial law matter(s).