Comparative models of freedom of trade:

The hurdle of Lebanese sole agency

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I. Local setting

A major element of surprise for the foreign manufacturer tends to arise upon a dispute with a Lebanese importer who might have represented him over a period of years in a "sole/exclusive agency/distributorship" contractual relationship which, for one reason or the other, the manufacturer/exporter would like to discontinue. For the European trader who is used to the protection of Articles 85 and 86 regulating competition, the snare of the Middle Eastern agency/distributorship is the more surprising in view of what is viewed as a huge judicial compensation equivalent to two to three years (sometimes even up to five) of average net benefits per annum of the agent in the last years of the relationship, compensation which is peremptorily owed by the foreign principal/exporter to the agent/distributor notwithstanding any agreement to the contrary.

"No person shall engage in the business of commercial agencies in the state unless his name has been entered in the Register of Commercial Agents prepared for this purpose in the Ministry. *A Commercial Agency which is not recorded in this Register shall not be recognised*, nor shall any claim be heard with regard thereto. (Art.3)

An agent shall be entitled to commission on transactions which the principal concludes himself or through another person in the agent's territory, *even if such transactions are not concluded as a result of the efforts of the agent*. (Art.7)

A principal shall not terminate the agency agreement in the absence of any reason to justify such action. An agency may not be re-registered in the Register of Commercial Agents in the name of another agent, *even if the previous agency is limited to to a fixed term*...(Art.8)

If an agency is withdrawn at an inopportune time for any reason not attributable to the agent, the principal may be required to provide compensation for any losses and loss of anticipated profits. In the absence of proof that the agent committed a wrong justifying non-renewal, *the principal's refusal to renew an agent's contract after the expiry of it original term shall constitute an abusive exercise of rights entailing appropriate compensation...* (Art.9)"

Thus Federal Law No.18 of 1981 Regulating Commercial Agencies in the United Arab Emirates, as amended by Federal Law No.14 of 1988. Such legislation is typical of the Arab Middle East, where a principal is forced to retain an agent -in the absence of a major fault-, even if the agency agreement comes to an end. Breach of the agreement or failure to renew it will invariably lead the agent to claim compensation, and both the courts and the administrative agencies will play a large role in ensuring that the system is so centralised that any other agent would be either barred or deterred from carrying on the agency until full compensation is paid to the previous agent.

The discontinuation of the relationship, leading as a matter of principle to compensation for the agent regardless of the terms or length of the contract at the origins of this relationship, constitutes a first element of surprise for the foreign observer.

At the legislative origin of such exorbitant constraints on the principal, who tends to be invariably a foreign manufacturer or supplier, lies Lebanese Decree-Law No.34, issued on 5 August 1967 (amended 1975). Decree-Law 34 is the first such law to be passed in the Arab Middle East and represents the prototype for a plethora of

agency/distributorship legislative regulations in the UAE, the Gulf and elsewhere, all featuring the same "exorbitant" character as the original:

"A commercial representation contract shall be deemed to be made for the mutual benefit of the contracting parties. Therefore, in the event of its termination by the principal without any fault on the part of the agent or without any other lawful cause, the agent shall, *notwithstanding any agreement to the contrary*, be entitled to claim compensation equivalent to any damage he may have sustained or to *any profits he may have lost*." (Art.4 §2)

In addition,

"The commercial representative shall also be entitled, *even in the event of termination of the contract by the expiry of its term and notwithstanding any agreement to the contrary,* to claim compensation to be determined by the court, when the efforts of the commercial representative have led to manifest success in the promotion of the trade mark of his principal or have resulted in an an increase in the number of his customers and *the refusal of the principal to renew the agency agreement* has prevented the representative from reaping the profits of his success." (Art.4 §1)

Thus the first "excessive" dimension: compensation for termination of agency as a matter of principle, regardless of its length or terms.

A corollary "exorbitant" dimension arises in relation to the stringent application of the laws on agency/import by the judicial and administrative set-up within the country.

Illustration of the exorbitant character of these dispositions, which one encounters with few variations across the Arab Middle East, can indeed be found in the judicial and administrative apparatus which enforce the protection of the agent/distributor in an exclusive contract. The judicial apparatus tends to be involved in the award of

compensation, which is often put, in order to take into account "lost profits" a compensation of two, three, and up to five times the amount of net profits of an annual average in the last years of the agency. The administrative apparatus ensures that, once the agency is breached or not renewed, a subsequent agent would be held jointly liable with the foreign principal for the amount of compensation decreed by the court. In some Gulf countries, the Ministry of Trade or a specialised committee will refuse the registration of a new agent so long as the termination of the previous agency has not been fully settled.

In practice, this allows the impounding of goods and the involving of any new agent/importer as a joint debtor in solidum with the foreign principal/exporter by the agent/trader whose contract is terminated or not renewed. The necessity of registering the agency, and the explicit or implicit assimilation of distributorship and agency, are also common features in the area.

Thus arises the second element of dismay over the easy assimilation in Lebanon and in the Middle East generally of the "commercial agent" and the importer/distributor/trader.

Decree-law 34 adds another crucial paragraph to Article 1 (which defines commercial agency), whereby "a trader who sells on his own behalf what he purchases in accordance with a contract which grants him the capacity of representative or exclusive distributor, shall be deemed to be the same as a commercial representative."

So, notwithstanding some fine points of Lebanese case-law, a distributor tends to be assimilated to a commercial agent, and will benefit from the exclusive clause even if he buys and sells on his own behalf. This appears to be the crux of the difference between the two regimes, and the one which seems to be conducive to foreign manufacturers shouting blue murder every time a Lebanese (or an Arab importer) claims compensation for the termination of an agreement.

Thus the second excessive dimension, where agent and distributor tend to be amalgamated by Arab statutes, whereas they tend to be radically distinguished in terms of their legal regimes for purpose of competition in Europe (Arts.85ss of the Treaty of Rome) and the United States (the Anti-trust laws)

The vast impact on commerce of these regulations explains why, next to corporate work, commercial representation and distributorship offer the commercial practitioner in Lebanon (and in the Arab Middle East generally) a major point of anchor of daily activity. In a region where commerce and banking have so far consituted the nerve of wealth, Decree-Law 34 and its 1975 Amendment, as well as its Arab followers, is a central staple of commercial litigation.

What is the legal rationale behind these laws, which clearly go against the grain of three basic principles: contractual freedom, ad nutum revocation of agency, and freedom of trade ?

Since its inception, Decree-Law 34 was noted for its exorbitant dimension by one of the most distinguished Lebanese authors, Prof. Emile Tyan: "Le décret a reconnu au représentant en vertu d'un tel contrat un droit exorbitant: bien que ce contrat soit arrivé à terme, le représenté est obligé -sauf faute du représentant ou motif légitime- à renouveler le contrat (art.4, al.2, in fine) sous peine de dommages-intérêts, au cas où l'activité du représentant avait abouti à un succès manifeste consistant dans la diffusion de la marque du mandant ou dans l'augmentation du nombre de ses clients."

Why was this glaring violation of contractual principles allowed ? In legal terms, it has often been argued that such an agency should be conceived as a mutually beneficial contract of agency, which must take into account the investment of time and energy by the agent to promote the goods of the principal. It is for this amount of work that it is simply not possible, according to the supporters of the law, to terminate the agency, whatever its terms, when the agent has not committed a gross mistake toward the principal. Why should a new agent benefit from all the work provided by the former agent without compensating him ? Why should the foreign principal/exporter be able to shop for a new agent as he pleaseth, wihout consideration for the fiduciary relationship established with his current agent ? For this purpose, the

concept of "mandat d'intérêt commun" was developed by courts both in Lebanon and in France. It had the added advantage of contributing to the stability of commercial transactions generally, and international agencies in particular, notwithstanding the clear violation of the principle of freedom of trade and contract.

This is a common explanation which merchants in Lebanon will put forward in support of the law, and which they reinforce by explaining the little likelihood of expending time and effort for a non-exclusive arrangement.

One can find in a unique decision of the Supreme Federal Court in the United Arab Emirates, another perspective which stands in support of such laws on agency. The case is the more interesting for the constitutional status it holds and its special attention to Islamic law. The dispute involved an exclusive agent selling computers in the country, who had the goods of a parallel importer impounded under Federal Law No.18. A constitutional plea was brought to the Federal Court by the parallel importer, who argued agains the constitutionality of the aforementioned Federal Laws 18 (1981) and (14) 1988, on the basis that Islamic law (*shar'*, or *shari'a)* which is the supreme law of the land under the UAE constitution, did not accept such constraints on the market, and that these laws were therefore conducive to the forbidden hoarding and monopoly (*ihtihkar).* The Court demurred, expaining that if indeed monopoly was illegal under Islamic law, "it appears from reading and analysing the text of the laws under consideration that it leads in no way to the prevention of commercial offers which are the objects of commercial agency or the increase of price. These texts only regulate the relationship resulting from the contract of commercial agency between the commercial agent and between the manufacturer or supplier inside or outside the country, or the exporter and the exclusive distributor chosen by the supplier; the legislator considers this contract to arise for the benefit of both contracting parties. The legislator did not prohibit its termination or its renewal as the appellant alleges, but, under Art.8 of the law, allowed the termination of the agency contract by the principal and its non-renewal if there were reasons to do so. The legislator did prohibit the importation of merchandise, products, manufactured items or other goods which are subject to an official registration with the government when such sale is done to circumvent the agent. It permitted at the same time the principal to use one sole agent in the [federal] State, considered as one unit, or in each Emirate or in a number of Emirates, and it required from the commercial agents to provide spare parts, items and appendages necessary and sufficient for maintenance of the imported goods; all of which helps the flow of merchandise and facilitates commercial loans bringing them

to everyone's reach in various areas [which may be close to each another], and leads to preventing the increase of prices."

The Court went on to explain that this competitive reality "is not affected by the last section of Art.5 of the Law on the exclusivity of the distribution of merchandise and services which are the object of the agency given to the commercial representative within his territory, since the object of the agent is always the selling of these products in order to get his commission, which encourages him to lower its price as much as possible, and the acceptance of a small profit in order to reach this aim and stand on a par with other companies which produce goods with the same object and put them on offer in a competitive set-up. This, in addition to the fact that a failure in distribution or an attempt to hoard these goods in order to increase their price could [actually] provide a reason for the principal to terminate the agency or to refuse its renewal."

In conclusion, the Court said, "this statute does not encourage the monopoly which is prohibited by the *shar'* and does not lead to it. There is nothing in it which violates the rules of Islamic law, and consequently constitutional provisions. The appeal lacks base and should be rejected."

One can see in the Court's explanation a sophisticated battery of arguments in support of the agency/import laws of the UAE, some of which textual (the *hadith),* some of which economic (prevention of monopoly, encouragement of interbrand competition), some legal (mutually beneficial contracts).

Lebanese case-law, in the absence of parliamentary discussions, also offers some further rationale for Decree-Law 34. Whilst the Commercial court admitted that the statute stands against the general principle of contractual freedom, it also held that there was a clear difference between the commercial agent and the distributor (concessionnaire, *muwazzi'*): "The first sells the goods in the name and for the benefit of the principal, whereas the second buys the goods and sells them to others in his own name." Only an*exclusive* distributorship would be entitled to the protection of D-L 34, and the seller could come to an agreement with others at any time in the absence of the exclusivity clause.

"Irrespective and notwithstanding all the aforementioned," the Court held, "it is absolutely impossible, neither from the point of view of social justice, nor from from the economic point of view, and in view of Lebanon's relations with the outside, to expand the interpretation of Article 1 section 2 of Decree-law 34, which does constitute a statutory exception undermining general principles and contradicting all established known legal rules and all usual practice in commerce, so that it is necessary to interpret the decision in a limited way, which restricts its application to commercial representatives who possess the quality of exclusive representatives or distributors, and who are harmed in absolute from the rescission of the contract binding them to their principal with regard to distributing a specific type of merchandise, considering that they are not entitled to distribute any other similar type of merchandise."

Thus a further rationale, under which the statute must be narrowly interpreted because both agent and principal are limited to "specific types of merchandise", and because the distributor will not be benefit from the protection of the law so long as his contract is not explicitly "exclusive." Once it is so labelled, it is surmised, there is no reason why the supplier should not be held to the contract he wilfully signed.

But how exorbitant is Decree-Law 34 in a comparative setting ?

II. Comparative Setting

One should first note that the system in Lebanon, as adopted in August 1967 by Decree-Law 34, followed closely French legislation in the matter, despite the disclaimer of the total calque attributed to it early one by Professors Charles Fabia and Pierre Safa: "Contrairement à ce qui a été écrit, de décret n'est pas un simple démarquage de textes législatifs venus d'autres pays. Notamment, la protection qu'avait instituée le droit français était beaucoup plus limitée, quant aux personnes et quant aux moyens, parce que dans bien des branches les agents commerciaux en

France ont depuis longtemps renoncé à se faire une concurrence désastreuse et ont élaboré des contrats-types sauvegardant leurs intérêts, qu'ils s'entendent pour imposer à leurs représentés. Cette voie paraissant impraticable au Liban, l'intervention du législateur y fut plus étendue, plus détaillée, et présente à ce point de vue comme à d'autres une incontestable originalité. Toutefois, l'on établira qu'elle ne dépasse pas les limites de l'équité et ne heurte aucun principe considéré comme d'ordre public international."

How much indeed does Decree-Law 34 jar with international public policy?

For comparative purposes, one should distinguish a number of traditions and concepts, as well as two types of focus, one domestic and the other international.

First there is the French, civil law, pedigree of Decree-Law 34, and its European civil law ramifications, to be contrasted with the treatment of "commercial agency" under the common law tradition. Beyond, there is the larger area of "the distribution networks", under which trade should be examined, first with regard to the distinction between the rules of competition as conceived within one country, secondly with regard to the same rules examined under a wider, inter-state, angle, notably under the philosophy which presides over the European common market.

Agency in common and civil law

"In common law jurisdictions the principle of autonomy of contract applies with particular vigour to commercial agency. There is no special statutory regime governing commercial agents, no requirement for registration, no principle of compensation to the agent following lawful termination of the agency agreement." Whilst the philosophy of the common law is clearly opposed to the limitations on the contract of agency which was introduced by the Lebanese (and many Arab) legislator,

it is less clear that the original civil law system, that of France, is so dissimilar from its Lebanese or Arab equivalents.

Indeed Decree-Law 34 closely resembles its French and European cousins: it took as a model French Decree 58 of 23 Dec. 1958, which was passed in France to protect the category of commercial agents and reinforced by various statutes, the latest being Law 91-593 of 25 June 1991. Article 1 of Law 91-593 defines commercial agents as "agents (mandataires) who, as members of an independent profession, and without being tied by an employment contract (louage de services), are required in a permanent manner to negotiate and eventually to conclude contracts of sale, purchase, lease or services, in the name and on behalf of producers, industrialists, merchants or other commercial agents." In so far as commercial agency is concerned, the definition under the Lebanese statute is exactly similar.

For the rest, that is for the remainder of provisions concerned with compensation after the termination of contract, registration, compensation, and "territorial delimitation" of the agency, French Law 91-593, together with the original decree of 1958, are hardly different from their Lebanese counterpart, even if some areas of detail are regulated slightly differently. This is the case of the uncertain situation of registration, which was required by Article 4 of the 1958 decree but is not mentioned in the new text, following the relaxation of formalism in the wake of the European directive of 18 December 1986, but registration in the special register continues.

What about the wider European conception of commercial agency? First one should note that European law has reinforced the original French decree of 23 December 1958 by adopting much of its content in the 1986 directive relating to the coordination of various national laws on independent commercial agents. In turn the French Law of 1991 was aligned on the European directive, with the result just outlined of a developed protection of the agent in case of termination of the contract, whether termination came before or after the contract came to an end, and whether the contract was limited or not in time.

One should therefore conclude that, in so far as commercial agents are concerned, there may be variations in some details over the first so-called "excessive" dimension

between the Lebanese/Arab and the French/European-civil statutes which regulate "the profession", but that the exorbitant dimension, if indeed the final verdict be that it is excessive, continues in both systems. This may be different in common law countries, but the concern with the discrepancy between legislations must lie elsewhere.

Agency and Distributorship

The question, indeed, depends on the legal qualification of the contract which binds the two parties: is the contract to be conceived under the rules of commercial distributorship/sale, or is it an agency contract ?

In Europe generally, and in France in particular, the assimilation of the agent to the buyer (and invariably the importer, as in our second "exorbitant" dimension) is not accepted readily, because the commercial categories involved are different, even if one might end up with some odd results in terms of legal rationale.

There is no better example for these conflicting results than the passing remark, in the latest edition of a leading French treatise on commercial law, on the use of the concept of "mutual benefit for the contracting parties" for legislation on distribution.

In addition, an illustration of the hesitant qualification of French domestic legislation of the legal regime of car dealers will help appreciate the difficulty:

"Il est permis de penser que cette catégorie d'agents alimentera un contentieux abondant, tant sur le principe que sur ses modalités d'application. Il n'est même pas impossible que la loi de 1991 entraîne une réorganisation des réseaux de distribution de véhicules automobiles"

Reference in this special category is to the some 20,000 French car dealers (so-called concessionnaires automobiles), whom the legislator wanted to protect: they "exercent à titre principal une activité de garagiste pour l'entretien et la réparation des voitures, et à titre accessoire une activité d'agence commerciale pour le compte d'un concessionnaire et plus rarement d'un fabricant."

For this important category, some legislative circles tried to withdraw the commercial agency character, by stipulating in Art.15 of the Law of 25 June 1991 that in case of plurality of activities, contracting parties could stipulate in the contract that "les dispositions de la présente loi ne sont pas applicables à la partie correspondant à l'activité d'agence commerciale." Thus one could imagine the host of small dealers being bereft of compensation in case of termination, on the pretext that their commercial agency was secondary to their other activities. The fear of being at the mercy of the principal led to pressure from their trade-unions, which imposed Paragraph 2 in Art.15 to the effect that "cette renonciation est nulle si l'exécution du contrat fait apparaître que l'activité d'agence commerciale est exercée, en réalité, à titre principal ou déterminant." Hence the fear of excessive litigation expressed above, as the main or decisive manner is naturally prone to much interpretation.

Yet, the confusion between commercial agent and trader (or importer as the case may be) must be appreciated in the light of an abnormalcy deriving from classication of commercial sales in altogether different register as that of commercial agency.

For a European or an American mind, the two do not lead to any confusion: the agent will not purchase himself. He will act as an authorised intermediary, an agent of the foreign principal qua manufacturer or wholesaler, and will receive commissions on the sales effected, without him engaging in purchasing the merchandise. He is, essentially, a go-between. If the contract says so, he will be an exclusive go-between in a particular territory.

To the extent that our go-between has involved time and effort (although not money, as he doesn't purchase the goods for his own account), European or French law will

protect him from the termination of contract by his principal. Once however, and in addition to time and effort expended as go-between, he starts purchasing the goods with a view to reselling them, the approach is fundamentally different, and the full force of competition and other "free" market regulation comes into being.

Contracts in restraint of trade under the common law

There is another way to approach the matter from a domestic point of view, which requires investigating commercial practices and their restrictions, under the category which the common law called "contracts in restraint of trade". Whilst originally totally forbidden, "at least since the early eighteenth century, the law has recognised that some contracts in restraint of trade are acceptable." Let us look briefly at the overall picture in the United States and Britain.

In the United States, where concern for breach of anti-trust laws is particularly acute, an important change from the precedent established in the Schwinn decision occurred in 1977, when the Supreme Court held that when a particular dealer *purchases* goods from a manufacturer and is restricted as to the territory within which he may resell those goods, the restriction would violate Section 1 of the 1890 Sherman Act (which considers unlawful "every contract, combination... or conspiracy in restraint of trade" in interstate or foreign commerce). Where however the goods are merely *consigned* by the manufacturer to the dealer, rather than sold, then the balance established under the so-called Rule of Reason applies.

But in 1977, the distinction between sold and consigned goods was abandoned by the Supreme Court. In the Sylvania case, the Rule of Reason would apply to all such vertical restrictions, whether customer, territorial or location. The Court explained that certain vertical restrictions could foster interbrand competition even if they reduce intrabrand competition, and thus serve competition. The test under the Rule of Reason was manifold: (1) how much does the vertical restraint limit competion ? (2) is the vertical restraint legitimate in view of the business objectives it aims to achieve, and are there other, less harmful ways to competition, which are able to achieve the same

objectives ? (3) If intrabrand competition is restricted, would it be compensated by an increase in interbrand competion ? (4) Are there substitutes to the manufacturer's product on the market, hence making intrabrand competion of less importance ? (5) Are restrictions helpful to keep the companies involved in business ?

Generally, the restraint will be considered against the overall structure of the industry, the history and duration of the restraint and the reasons why it was adopted. So long as price-fixing does not result in vertical restraints, and market segmentation and shares from horizontal restraints, there is no per se illegal competion under Section 1 of the Sherman Act.

As a consequence, the burden of proof is heavy on the plaintiff, especially since the defendant can offer various justifications for the restriction in question. In a case involving vertical restraint on the sale of beer, the Court of Appeal upheld restriction on beer distribution to preserve the quality of the beer.

In the specific case of exclusive distributorships, the application of the Rule of Reason allows generally the supplier or manufacturer to choose whomever he wishes to do business with. Presence of interbrand competition make such exclusive distributorships pass muster, in general, under the test. In the leading Packard case, the Court confirmed the legality of the restriction of Packard car sales to one sole dealer in the city of Baltimore, whilst all other distribution contracts in the same city were being terminated under the agreement between the manufacturer and that dealer.

Nor is the situation in Britain, under the common law of contracts, essentially different, and the House of Lords has in recent decisions followed a rule of thumb akin to the US rule of reason, under which so-called "solus agreements" have been upheld or rejected in a very empirical appreciation of "the restraint of trade doctrine": In the Esso case, was upheld a four and a half-year agreement made between oil companies and a garage proprietor in which the garage owner would, in return for an advance of money by the oil company to help with the purchase or development of the garage, give three undertakings: a tying covenant, to buy all petrol from the oil company; a "compulsory trading covenant", to keep his garage open at all reasonable times for the sale of petrol, and a continuity covenant, to extract similar undertakings

from any person to whom he might sell the garage during the solus agreement. But the 21-year agreement between the same parties was held by the House of Lords to be unreasonable and contrary to the public interest. Said Lord Wilberforce, who reserved the powers of the court to subject contracts to scrutiny in the light of changing social or economic conditions: "the solus system is both too recent and too variable" to allow it to pass muster unchecked by the court. At the same tine, courts and legislation will give special attention to the bargaining power and "mutual undertakings" between the two parties.

Once a contract is deemed to be within the scope of the doctrine of restraint of trade, it is not automatically void: English courts will subject it, much as in the American case, to a number of tests, which Professor Treitel has reduced to three: (a) interest, where a distinction between the "proprietary" and "commercial" categories allows many a "network of outlets" to pass muster; (b) reasonableness, which includes balancing tests such as length of restrictive agreements, bargaining power of the parties, and the Court will generally allow the contract to stand so long as restrictions are "no more than what was reasonably required to protect [the] legitimate interest" of the party in whose favour the restriction operates; and (c) public interest, where the cases do not offer much guidance beyond Lord Reid's statement "that everyone should be free so far as practicable to earn a livelihood and give to the public the fruits of his particular abilities".

Thus, the picture under the common law domestic tradition is not decisive, as contracts in restraint of trade, even when they allow for some territorial exclusivity, are not forbidden so long as a moderate reason for their conclusion is provided.

There remains for distribution networks and territorial delimitation to be considered in an international setting.

III. Whither reform ? Territorial delimitation and distribution networks

Under Art.85 of the Treaty of Rome, "agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within the common market" are void, unless they fall under a special exemption granted by the Commission under paragraph 3 of the same article.

Since the draft treaty under consideration between Lebanon and the European Union introduces the exact same wording under Art.36, and makes reference to Articles 85 and 86 in the following draft article, one can already bring up the question of reform when dealing with various forms of distributorship. Two points must be made here for the immediate incidence of what appears as a major incorporation of European law into the Lebanese legal system:

In a country like Lebanon, and notwithstanding the apparently peremptory wording of Decree-Law 34, a treaty has precedence over domestic law, whether domestic law comes before or after it. A recent decision handed down by the court of cassation (the highest civil-commercial court in the country) reinforces the superiority of treaty over Decree-laws in this very area of agency/distributorship:

The case arose from a dispute between a Czech car company and its sole agent in Beirut, who sued the company for breach of agency in 1977, and, on the basis of Decree-law 34/67 on Commercial agency and steady precedents, requested compensation for a half million dollars. Both the Court of Appeal and the Court of Cassation rejected his claims for compensation, on the basis that the Lebanese-Czech Protocol of 1957 and the contracts of agency between the parties "clearly indicate that disputes arising from the contract must be solved amicably, otherwise by arbitration... before the Czech Chamber of Commerce". Was not relevant Art.5 of the Decree-law, even if passed after the entry into force of the Convention, and its qualification as "public order disposition" was deemed by the Court to be confined to the domestic arena. Consequently, compensation which appears to be decided against the Convention was ruled out by the Court of Cassation, in a decision which terminates the stringent application of the severe rules on breach of commercial agency whenever there is a treaty, and regardless whether the treaty was ratified before or after Decree-Law 34/67 was adopted.

This case is of importance for commercial agency and distributorship. The Court of Cassation clearly states that "the text of the Convention [here a 1957 Lebanese-Czech Protocol] is superior to the text of domestic law [Decree-law 34/67 on commercial agency] and the dispositions of domestic law remain effective only to the cases on which the texts and conditions of the Convention do not apply". In a declaration obiter, the court explained that "international judicial order [cited in French as 'l'ordre juridique international'] cannot be strengthened unless states apply conventions and agreements which they have ratified in full trust and confidence, and gives them priority of application when in contradiction with domestic law."

Thus the first conclusion with regard to Art.36 of the Draft treaty: it will supersede domestic legislation.

So if and when the Treaty between the EU and Lebanon is ratified, the courts will be very quickly confronted, in view of the importance of Lebanese imports as well as agencies of EU goods, to a plethora of disputes resulting from the cancellation of such agencies on the basis of Art.85. Any person who has been confronted with the dockets of the courts in the country will immediately realise what this will mean both for the legal system and for commercial practice, as EU law of the most difficult type, that is competition law, enters the fray.

Nor is the result, beyond certain litigation and commercial chaos, to be easily summarised: if the concept of exclusive agency will be most probably upheld, even in its "exorbitant" character of the necessary compensation of an agent when the contract is limited in time, what about exclusive import/distributorship ? This brings up the second and more intractable conclusion, namely that Lebanese courts will be drawn unto the terrain of competition law as defined in Europe with regard to territorial delimitation of imports.

In the same way as agency/distributorship is a main staple for legal consultants and attorneys in commercial practice in the Middle East, so is the case for European lawyers with regard to competition law, one of the most impenetrable thickets in an already complicated legal system. Whilst such a complex area can hardly be addressed in a contribution like the present one, the implications of Art.36 of the draft

treaty require taking on, at least in its generalities, the framework of "distribution networks" in European law. This brief foray will show the problem inherent in the draft treaty as and when Lebanese courts will have to deal with the subject.

The generality of Article 85 being obvious ("agreements preventing, restricting or distorting competition"), it behove the Commission, and more importantly, the European Court of Justice, to apply it. The Court did so energetically :

- first, it accepted the principle that Art.85 applied to distribution agreements across the board (Case LTM-MBU, ECJ 30 June 1966).

- second, it held that exclusive distribution clauses tailored "territorially" fall under the prohibition of Art.85 para.1, *and that was it*. (Grundig Case, ECJ 23 September 1964, where the Court held "that clauses which establish absolute territorial protection lead*necessarily* to a distortion of competition in the Common market; they affect adversely commerce between member states *by their very nature*").

- thirdly, even in the absence of an absolute territorial exclusivity clause, the court will look into the contract so as to cancel any clause which might affect competition. The principle was defined under Case LTM-MBU and has since given way to a large set of precedents.

For our comparative purposes, the most telling dimension of Art.85 is the prohibition of any exclusivity which would prevent parallel imports, the so-called grey markets which constitute also a major problem in American law. This established principle would run afoul of most exclusive distributorship arrangements in Lebanon and in the Middle East at large, and constitutes the most delicate point of contention of the recent draft.

Therefore the second conclusion which can be drawn with regard to Art.36 of the Draft treaty is that, left standing as is, the Article strikes the death knell of a good part of "exclusivity" legislation which courts have been upholding for the past thirty years in the country, and more dramatically, that have become a customary practice of the merchants themselves. This means that courts and merchants will face a period of severe uncertainty in the rules governing competition and territorial exclusivity, with fine points being made between agency and distributorship, between contracts entered with the European Union and contracts with the rest of the world. In addition, reference to the application of Articles 85 and 86 by the European Court of Justice may become inevitable. Such case-law is hard enough to digest for seasoned courts in the various jurisdictions of the European Union, and one is at a loss to see the Lebanese judge smoothly operating in the labyrinths of European competition law and its effects on distributorship. Considering the fragility of a legal system already smothered by the pile-up of cases during and after the war, a more considered reflection on reform in this sensitive field seems warranted.

Epilogue

There is no point underlining again the exorbitant character of Decree-law 1967 and its calques in the Middle East, and it is common place (albeit not an area subjected to serious economic studies on competition and its effects on the Lebanese market in the absence of exclusivity) that such legislative interference in favour of the exclusive trader harms the consumer by preventing competion. It is no less true that a closer examination of similar legislation in Europe and elsewhere does not allow an easy way out: in the first place, the civil law agency models are very close to Lebanese regulations, in contrast to a much more open legislation on agency under the common law. Secondly, and from a domestic perspective, solus agreements and exclusive dealerships with territorially delimited operations are current both in Europe and in the United States. It is only when one comes to distributorship in a more international context that stringent regulations may apply to prevent so-called distortion of markets, with US anti-trust laws and European competition as regulated by the Court interpretation of Art.85, looking severely upon "market segmentation" under the form of exclusive distributorships.

A final note of caution may be useful as a general conclusion: before allowing a drastic departure from current Middle Eastern and Lebanese practice, one ought perhaps (in addition to other elements not discussed in this study, which relate to freedom of establishment and movement), assess the severe Art.85 appreciation of the freedom of trade under the angle of Lebanese imports of European goods against a much wider local and comparative setting.