

Termination of the Mandate of an Agent: An Examination under OHADA Uniform Act on General Commercial Law

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Abstract

When an agency relationship is created, it confers on the parties obligations which must be fulfilled by the parties. These obligations do not remain forever as they can come to an end. This can be done under normal circumstances by the act of the parties or by operation of the law and when the conduct of the agent is in contradiction to the mandate agreement as may be the case if the agent is liable for serious misconduct as provided by the OHADA Uniform Act on General Commercial Law. The provisions of the act regarding termination on grounds of serious misconduct is worrisome, as the act talks about termination in such manner only for commercial agents and is silent about the other two types of agents: the broker and the commission agent. The act also, does not tell us what this serious misconduct it mentions by the commercial agent is, nor gives us insights on what constitutes such conduct to warrant termination of the mandate of the agent by the principal. When termination of the agency is done under conditions as such, it has grave consequences on the agent who might not be entitled to certain benefits associated with termination of the contract such as loss of the right to compensatory allowance or indemnity and more importantly may give room to arbitrary or wrongful termination of the mandate of the agent. Through analytical and comparative studies, this paper focuses on termination of the mandate of an agent under the OHADA Uniform Act on General Commercial Law, wherein, the different modes of termination of the mandate of an agent have been discussed, and more specifically makes an attempt in looking at what serious misconduct is and what could amount to such conduct so as to avoid arbitrary or wrongful termination. It is therefore suggested that, statutory guidelines found in other statutes in relation to the subject matter can serve as a lamp light in our context.

Keyword: OHADA Uniform Acts on General Commercial Law- Termination – Mandate - Agent.

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INTRODUCTION

An agency relationship is established when one person known as the agent, is empowered to act on behalf of or to the benefit of another person known as the principal. This relationship is very necessary when it comes to commercial transactions as it allows businesses to function smoothly by enabling the carrying out of large scale and multifaceted operations [1]. When this relationship is created, it confers on the party's rights and obligations which must be fulfilled [2].

However, there are several reasons which may cause such relationships to terminate even before the obligations are fulfilled. Under the OHADA [3]. Uniform Act on General Commercial Law, the mandate of an agent can be terminated under normal circumstances through mutual agreement, by renunciation of the contract by the agent or by revocation

of the agency by the principal, by operation of the law, in cases of death of the principal or agent, mental incapacity and insolvency of the principal or agent and at the completion of the transaction or transactions for which the agent is mandated [4].

The Uniform Act goes ahead to say that the mandate of the agent can also be terminated as a result of serious misconduct on the part of the agent. The act makes provisions for Termination of the mandate of the agent as such only for the commercial agent and is silent about the other two types of agents: the broker and the commission agent. Regarding the commercial agent, the act is silent in respect of what amounts to serious misconduct and is as well mute as to the circumstances where such misconduct could warrant a termination of the mandate of the agent by the principal. These lapses in the act have birthed inconsistencies of sorts that

sometimes lead to arbitrary and unfair termination of agency contracts.

This article sets out to examine termination of the mandate of the agent by looking at the different ways which such a mandate can be terminated under the Uniform Act (I) and through analytical and comparative research methods clearly define what serious misconduct is and acts that can constitute such conduct which the Uniform Act is silent on (II)

(I) Modes of Termination of the Mandate of an Agent Under Ohada Commercial Law

An obligation does not usually remain forever or indefinitely. It comes to an end and the mandate of the agent is not different from this general principle. Under the Uniform Act on General Commercial Law, which is the text which regulates business operations by agents, there are basically two ways by which the mandate of an agent can be terminated. This could be done by the act of the parties (A) and by operation of the law [5]. (B). Act of the parties here could mean by Agreement by the two parties or by a unilateral declaration from one of the parties [6].

A. Termination of Agency by the Act of the Parties

Act of the parties here could mean by Agreement by the two parties (1) or by a unilateral declaration from one of the parties [7] (2).

1. Termination by Agreement of the Parties

An agency relationship may come to an end upon agreement of the parties. Under this situation, the agent and the principal mutually agree that the agency relationship should come to an end when it is no longer beneficial to them or suits their purpose [8]. In like manner, the mandate of the agent can be terminated if the agent and the principal mutually agree or consensually agree that it should come to an end.

2. Unilateral Declarations to Terminate the Mandate of the Agent

The agent-principal relationship is not a slave master relationship that cannot come to an end or be terminated. We have seen that the mandate of the agent can be terminated when both parties are willing, upon agreement to terminate the relationship. But if one of the parties is not willing to do so the other party through a unilateral declaration can do so. On the one hand the principal can do so through what is called revocation of agency and on the other hand, the agent can do, through renunciation of the agency relationship [9].

a) Termination of the Agency by Revocation

The mandate of the agent can be terminated by revocation of the agent's authority by the principal. It is a general rule that the principal may revoke such authority at any time, unless the authority is one coupled with an interest. An authority is coupled with an interest when the agent has an interest or estate in the subject

matter of the agency. Revocation need not be express. It may be implied from the circumstances, as where the principal disposes of the subject matter of the agency. Upon revoking the authority of the general agent, the principal must give notice to the agent of the revocation of his authority [10].

b) Renunciation of the Agency by the Agent

Renunciation is a declaration made by the agent to terminate an agency relationship that existed with the principal or withdrawing from his responsibility as an agent. So just like the principal, the agent has the power to renounce the agency. Such renunciation is justified when the agent gives reasonable notice to the principal of his intention to terminate the agency. Failure to give such notice the agent will be liable to the principal for damages suffered as a result of that [11].

(B) Termination of Agency by Operation of the Law

There are certain conditions and circumstances whereby the law may intervene to bring to an end an agency relationship or the mandate of an agent. This could be where performance has been effected, in case of death of the principal or agent and incapacity due to insanity of either parties [12].

1. Termination by Performance or Completion of Transactions Mandated

This is another way through which the mandate of an agent can be terminated provided by the UAGCL. When the authority of an agent is given to achieve a specific result or object, it is natural that such authority terminates upon the object of the power being so accomplished or achieved. Similarly, if the authority of an agent was given to perform a specific task or carry out a specific transaction, his authority ceases automatically by the accomplishment or completion of that task or transaction. In *Blackburn v Schole*, Lord Ellensborough held that a broker who was engaged to sell goods became *functus officio* when the goods were sold [13].

2. Death of the Principal or Agent

The Act also provides that the death of the principal obviously terminates the agency relationship. This is because the agent can no longer work on behalf of the principal or be subject to her control. However, the agent's apparent authority continues for a reasonable time based on the nature of the business and of the agent's role. The problem is that after principal's death, it will probably take some time for someone to take over her affairs, identify pending business, and determine whether to re-appoint the agent to act on behalf of the estate. During that time, the estate is unable to protect itself from the unauthorized acts of the agent in the way that a principal who knows the risks of her business can [14].

3. Insanity of Principal or Agent

The insanity of the principal or agent operates to terminate the agency relationship. For the purpose of

agency law, a person is insane when he or she can be unable to appreciate the nature and quality of the act done [15].

4. Lapse of Time

When the business of agency is completed, the relationship between principal and the agent also comes to an end automatically. Similarly, where the agency has been created for a fixed time the agency is automatically terminated on the expiry of that time [16].

5. by Frustration or Change in Circumstances

Frustration or change in circumstances which renders the subject matter of the agency unlawful or impossible to accomplish is also one of the reasons that can terminate an agency relationship. This can arise due to any unforeseen, impossible events and events out of the control of the parties [17]. Such circumstances include outbreak of war, destruction of the subject matter of the agency contract, change in law, etc.

Under the Uniform act, when these conditions are not met by the principal or the agent under normal circumstances the party in breach will be sanctioned by paying compensation to the other party. The Act provides therefore that, the principal who abusively terminates the mandate of the agent by terminating the mandate of the agent without respecting these modes of termination provided by the Uniform Act will be liable to pay damages as compensation to the agent [18]. Similarly, when the agent abusively declines to execute his mandate he must compensate the principal for the damage caused as a result of his actions [19]. The amount of damages here will be determined by the Courts depending on the level of breach and the amount of damaged caused.

II Termination of the Mandate of an Agent for Serious Misconduct

Under the Uniform Act on General Commercial Law, it provides that the mandate of an agent can also be terminated when the agent is liable for serious misconduct in the execution of his contract. This is typical of the commercial agent who shall lose his right to compensatory allowance where his mandate is terminated as a result of serious misconduct of the agent [20], or even amount to the dismissal of the agent without notice.

Notice here plays an important role as termination only takes effect when it has been brought to the notice of the party. So if on the initiative of the principal, he invokes the mandate of the agent, for example, this revocation can only take effect when it has been brought to the notice of the agent. Under the Uniform Act on General Commercial Law, when the contract between the agent and the principal is for an indefinite term, each party may terminate it upon giving notice.

This notice period shall be one month for the first year of the contract, two months after the beginning of the second year, three months after the beginning of the third and succeeding years. In the absence of an agreement to the contrary, the end of the notice period shall coincide with the end of a calendar. In case of a term contract transformed into an unspecified contract, the notice period shall be calculated from the commencement of the contractual relations between the parties. The parties may not agree to shorter notice periods, where they agree to longer time periods, the notice period must be identical for the principal and the agent. However, the above provisions do not apply when the contract is terminated due to a serious misconduct of the parties [21].

This implies that if the agent a party to the contract, is liable for a serious misconduct during the execution of his mandate, the principal can terminate his contract without due notice and he will lose his right to compensatory allowance as provided by the Uniform Act. The question now is, what is serious misconduct as mentioned in this Act (A) and what amounts to such conduct (B)

A. Serious Misconduct under the UAGCL

The concept of serious misconduct has not been defined by the UAGCL, leaving it entirely to the interpretation of the courts, giving room to all sorts of inconsistencies that sometimes lead to arbitrary and unfair termination of agency contracts. The definition of serious misconduct can be inferred from other definitions that have been put forth in other statutes. According to the Australian Fair Work Regulations 2009, chapter 1, Division 2, r.07 (2) serious misconduct includes the following:’ (a) willful or deliberate behavior by an employee that is inconsistent with the continuation of the contract of employment, (b) conduct that causes serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the employers business’’. It equally involves the employee engaging in theft, fraud, assault, being intoxicated at work or refusing to carry out lawful instructions [22].

The above definition talks of employee but we want to think that an employee and an agent are subordinates of the employer/principal permitting us to suggest that this definition could be as well applied in the context of agent/principal relationship when trying to define serious misconduct. Applying to the principal/agent relationship, we can say that serious misconduct refers to the actions or behaviour of the agent that is considered to be a significant breach of the agent’s duties and responsibilities. Bearing this in mind, any willful or deliberate behavior by an agent that is inconsistent with the continuation of his mandate, puts the business of his principal at risk or involvement by the agent in acts of theft, fraud or negligence can be seen as serious misconduct and may lead to the termination of

the agency by the principal on grounds of serious misconduct.

This term serious misconduct is worth circumscribing for the purpose of clarity which will go a long way to minimize cases of arbitrary or unfair termination of agency contracts and in particular the mandate of an agent.

B. Circumstances That Can Lead to the Termination of the Mandate of an Agent for Serious Misconduct

For a principal to dismiss an agent on the ground of serious misconduct, the principal must state what amounts to serious misconduct or acts which constitute serious misconduct to warrant termination of the agency contract. Going by the definition of serious misconduct put forth above, we see that an agent who willfully or deliberately acts in contravention or breach of his mandate agreement (1) or is liable for theft, fraud or negligence in the execution of his mandate (2) can be dismissed on grounds of serious misconduct.

1. Termination of the Mandate of the Agent for Breach of the Mandate Agreement:

Looking at the Uniform Act on General Commercial law, it can be seen that the OHADA legislator has made provisions for behaviour that can be put up by the agent resulting to breach of the mandate agreement. As such, the principal can bring the agency relationship to an end or otherwise dismiss the agent from his employment without notice and in an action for wrongful termination or indemnity; the principal may set up the agent's breach as a complete defense [23].

Some of the instances where the agent specifically the commercial agent may be dismissed for breach of agency contract on grounds of serious misconduct include, breach of duties by the agent such as the duty of loyalty (1) breach of duty of accountability (2) confidentiality and failure to respect non-competition clauses (3)

A) Breach of Duty of Loyalty:

An agent has an obligation of loyalty [24], towards his principal who gives him orders and instructions. The agent therefore needs to act in accordance with the mission entrusted to him. He can, within the limits which have been set for him, freely choose the means most consistent with the aim of achieving the goal sought by the principal [25].

Loyalty here denotes the obligation to faithfully execute one's service in a reasonable manner and to refrain from any abusive behaviour in the execution of the contract [26]. This equally extends to the obedience of all lawful instructions by the agent from his principal. He must obey instructions contained in his express authority or he must act in accordance with the general nature of his business, that is to say within his implied

authority or he must act in accordance with trade, or other customs and usages [27].

An agent who therefore acts in breach of this obligation clearly does not act in the best interest of the principal. Such conduct can be classified as serious misconduct which can lead to the termination of the agent's mandate by the principal on grounds of serious misconduct.

However, an employee or agent is not obliged to obey any illegal or unlawful order of a superior. If an employee is dismissed from employment for not complying with an illegal or unlawful order, the dismissal would be deemed to be unlawful. In this regard, reference is made to the case of *JT International Trading Sdn Bhd v Mat Kamel Jusoh & Ors* (2005)3ILR 985 where it was held as follows: "obedience to the orders of a superior is not without limits and hence it is not a defense for an employee to carry out any act instructed by a superior that is illegal or unlawful" [28].

b) Accountability:

It is a fundamental obligation of the agent to keep and render appropriate accounts of his stewardship to his principal whenever he is called upon to do so. Mention of this has been made in the Uniform which says that commercial agents and their principal's are bound by an obligation of loyalty and information [29]. Thus the agent must be willing and ready at all times to account for all the transactions and activities undertaken by him for and on behalf of the principal [30].

This obligation proceeds from the requirement of transparency and control in the implementation of the activity of the agent. By this, the agent therefore has the duty to inform the principal both on the progress of the task assigned to him, the difficulties of execution of its contract or missions if applicable, or the costs and expenses incurred in the accomplishment of its tasks [31]. Violation of this obligation by the agent can be considered serious misconduct that can lead to the termination of the mandate of the agent.

c) Confidentiality

Agents have the obligation to keep information received or acquired during the agency and must not disclose it to third parties. In this light, the UAGCL provides that the commercial agent shall not even after the expiry of the contract, use or reveal information that the principal communicated to them in confidence or that they learned because of the contract [32].

In Cameroon for example, a breach of this duty is sanctioned by the Cameroon penal Code which provides that whoever reveals without permission from the person interested in secrecy any confidential fact or process which has come to his knowledge or which has been confided to him solely by reason of his employment in an industrial or commercial undertaking shall be

punished with imprisonment for from 3(three months) to 3(three years) and with a fine of from 100000(one hundred thousand) to 5000000(five Million) CFA or with both such imprisonment and fine [33].

The obligation of secrecy applies to protected information or confidential information stamped with the seal of secrecy. Secrecy can be defined as any fact destined to remain hidden. So the commercial agent should not divulge either the trade secrets or information concerning the commercial strategy of the principal, or the data relating to the customers he would canvassed [34]. A revelation of such information can be considered serious misconduct which may warrant the agent's mandate to be terminated.

The UAGCL only talks about serious misconduct in the case of the commercial agent and is silent about other agents like the broker and the commission agent. However, going by the same line of reasoning for the commercial agent, we suggest that an agent who generally breaches his obligation or duties under the agency contract can also be deemed to have committed a serious misconduct which may warrant termination of their mandate.

2. Termination of the Mandate of the Agent for Theft or Misappropriation, Fraud and Negligence

Apart from termination of the agent's mandate on grounds of serious misconduct where he breaches the mandate agreement, his mandate can also be terminated if he is involved in acts of theft, fraud or negligence on grounds of serious misconduct.

a) Theft or Misappropriation of the Principal's Assets by the Agent

An agent who steals or fraudulently appropriates property that has been entrusted to him or her, as could occur when an agent steals or otherwise misappropriates the principal's assets [35], would be considered to have acted in serious breach of his duties and as such can be regarded to have committed a serious misconduct which warrants a dismissal from employment or termination of his mandate. It must be noted that honesty and integrity are principles that must be adhered to by an employee in any organization irrespective of their position [36].

Theft and fraud are fundamental breaches of trust and of the working relationship between the employer and the employee and as such treated as gross misconduct. Apart from dismissal without notice, the employee may also face criminal sanctions as a result of the theft and fraud [37]. An agent just like an employee can also be subject to criminal sanctions as a result of theft and fraud. The UAGCL does not make provisions on this but has given national legislators of member states the powers to legislate on issues as such which fall under the scope of criminal law [38].

This is the case with the Cameroonian Penal Code which provides that "whoever causes loss to another by theft, that is by removing his property or by misappropriation, that is by destruction, waste or conversion of any property capable of being removed entrusted to him for the purpose of custody, return, accounting or any particular manner of dealing, shall be punished with imprisonment for from 5(Five) to 10(ten) years and with fine of from 100000(one hundred thousand) CFAF to 1000000(million) CFAF" [39]. This is how serious theft and misappropriation of entrusted property can be.

b) Gross Negligence

To be able to fully understand the notion of Gross negligence, it is necessary to understand what negligence itself is. Negligence is basically a failure to exercise the degree of care demanded by the circumstances, or a failure to use the care which an ordinary prudent man would use under the circumstances. It has also been said to be conduct which falls below the standard established by the law for the protection of others against harm unreasonably great risk of harm [40]. Gross negligence on its part is meant to cover something more than just ordinary negligence.

The distinguishing factor between the two causes of action is the defendant's degree of care, or lack thereof, in causing the alleged losses. Gross negligence requires a greater lack of care than is implied by the term ordinary negligence. The standard for ordinary negligence is failure to use the care which an ordinary prudent man would use under the circumstances. Thus to constitute, the act or omission must be of an aggravated character [41]. A serious lack of care either towards an employee's duties or to other people, even where not deliberate or intentional, could be deemed gross misconduct by gross negligence. Generally, the degree of damage to the working relationship and any loss of trust and confidence resulting from the act of gross negligence will be the measure of whether gross misconduct applies or not [42].

Extending this to agent/principal relationship, we see that UAGCL in the case of the commission agent provides that, the commission agent shall be liable for damage caused as a result of his negligence where he fails to safeguard the rights of appeal against the carrier, have the damage recorded and notify the principal without delay for goods shipped on commission to be sold that are clearly in a defective condition [43]. Generally, all agents owe a duty of care and skill in the execution of the authority conferred on them by the principal. An agent who has been paid by the principal to execute different tasks must exercise care and skill which is usual and proper in the type of work for which the agent is employed. The standard of care required is whatever is reasonable in the circumstances of each case. Where the agent holds himself out as being a member of a profession, the standard of care and skill expected is

that of a reasonably competent member of the profession [44].

Given that gross negligence implies negligence that is aggravated, we can say that when an agent violates this duty of care and skill, he can be liable for breach of his duties which can lead to the termination of his mandate for serious misconduct by the principal.

A step away from the UA, we see that, under employment Law serious misconduct covers more serious acts or behaviors and as such, can warrant more severe disciplinary action, including dismissal without notice. It equally has the effect of causing damage to an organisation or its reputation, or irreparably breaking trust and confidence in the relationship. Examples could include theft, insubordination, fraud, incapacity in the work place due to drugs. Organizations may also have their own specific rules on what constitutes gross misconduct, which should be detailed in the employee handbook or disciplinary policy [45]. What constitutes serious misconduct is a common question and it refers to serious behaviour or conducts by an employee that falls below the expected standards and damages the contractual relationship between the employer and the employee [46].

An organization therefore should state what it considers to constitute gross misconduct within its disciplinary rules and should also be clear on acceptable standards of behaviour and conduct within the work place and even the potential consequences where gross misconduct is established. This information should be made available to all employees. Employers are advised to regularly review their disciplinary policies and employee training to account for new and emerging types of gross misconduct. In instances of gross misconduct, an employer may be justified in dismissing the employee without notice, known as summary dismissal. As such, it is important for employees to understand the difference between gross misconduct and ordinary conduct and potential disciplinary action that could result. Gross misconduct can result from either a deliberate act or through the gross negligence of the employee [47]. This is not different in an agency context.

In the Common law for example summary dismissal could be used when the employer has sufficient cause to do so. It could in particular be for moral misconduct, willful disobedience or habitual neglect [48], as per *Parke B in Calo v. Brouncker* [49]. Summary dismissal is actually a serious matter that affects the career and livelihood of an employee. As was stated in the English case of *Jupiter General Insurance Co Ltd v Shroff* [50]. Summary dismissal is a strong measure justified only in exceptional circumstances and that the test to be applied in determining whether the dismissal was justified must vary with the nature of the business and the position held by the employee. For instance, a minor case of dishonesty for example, may warrant

summary dismissal, especially if the employee's job involves handling finances as in the English case of *Sinclair v Neighbour* [51].

Criminal and in particular fraudulent conduct could constitute gross or serious misconduct that justifies summary dismissal of an employee. In this case, the burden of proof is on the employer to prove the criminal conduct beyond reasonable doubt [52].

CONCLUSION

It is clear that the mandate of an agent does not last forever but eventually comes to an end either by the act of the parties or by operation of the law. However, there are instances where the mandate of the agent will be terminated as a result of the serious misconduct of the agent. Under the Uniform act, termination as a result of serious misconduct is peculiar to the commercial agent it is as a result of serious misconduct of the agent, particularly the commercial agent who will be deprived of compensatory allowance which is due him after termination under normal circumstances and the principal can terminate the agency without notice to the agent.

The act is silent about misconduct when it comes to the Broker and the commission agent and does not tell us what serious misconduct is, and what will amount to such conduct giving room to all sorts of interpretations and inconsistencies surrounding termination of the mandate of the agent. This lack of precision by the Act can likely lead to wrongful or arbitrary termination of the mandate of the agent by the principal.

To fight against wrongful termination or arbitrary termination of agency contracts, there is need for clarity and precision of this concept by the Uniform Act. This is possible by drawing inspiration from other statutes and seeking insights from other jurisdictions which can serve as a lamp light in our context.

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