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Comparison of Brokerage and Commission in Iranian Commercial Law

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Abstract

Terms such as commission and brokerage are similar in the concept of agency and in some cases they are different. In the legal system of Iran, commission section is derived from French law and it drives out the commission from the realm of agency and justifies it as an entity equal to the contract of the mandate. On the other hand, the brokerage has not been discussed in Iran's jurisprudential sources and civil law as a legal body establishment; therefore, we can take it as new found phenomena that came to our legal system simultaneous with the commercial law concepts. Such differences between commission agent with broker can be stated like this: the commission agent is only obliged to announce the actions and especially do his missions to the commander, in fact the commission agent has the right of disclosure before his commander, but according to the article 337 of the written law, the broker also has the right of disclosure of the details of transaction toward the party with whom the brokerage contract has not been signed. The broker is usually the middleman of the transmission in consideration of receiving a specific amount of money or he can find a party for a person who wants to conduct a transaction and he himself doesn't get involved in the transaction and is not engaged, whereas the commission agent is directly a contracting party and the true beneficiary (commander) which the transaction is done in his account has no contact with the main buyer. This survey is done by the analytical-descriptive method for comparing the brokerage and commission in the commercial law of Iran.

Keywords: Brokerage, Commission, Agency, Iranian law, Commercial law, Legal system.

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I. Introduction

The brokerage has not been discussed in our jurisprudential sources and civil law as a legal body establishment; therefore, we can take it as new found phenomena that came to our legal system simultaneous with the commercial law concepts (Jafari, 2012, p. 1).

According to the article 335 of commercial law, a broker is a person who becomes the middleman of doing a transaction regarding the wage or finds a transaction party for a person who wants to transact. A brokerage contract is dependent on the rules of power of attorney. The second section of the above definition considered the relation of broker and commander dependent on the regulations of the power of attorney. The aforesaid relation indicates the contract and it is allowable about the parties. The legislator's motivation from stipulating the inclusion of the regulation of the attorney toward brokerage is the close similarities between contracts of rewards and lease with brokerage contract, and also the adaptability with the vindication of the subject of article 336 of civil law. Because of the mentioned reasons, the relationships between broker and commander do not lie under the above-mentioned titles. The brokerage of the precise attorney in a trading transaction that has a heavy financial burden for the parties of the transaction requires that the buyer and seller in addition to being aware of the latest prices of the day know the party of the transaction at the same time and do their intended transaction. Reaching to a desired condition and price in all transactions requires preliminary conversations with the party of the transaction and doing the transaction is impossible without these kinds of negotiations and preliminary agreements. Therefore, any of the parties to the transaction can delegate the negotiation and determine the terms and conditions of the agreement to another person but he himself makes the final stage of the transaction which is the stage of offer and acceptance. The Iranian commercial law which is a derivation from the French commercial law, in the article 335 explicitly considered the brokerage contract dependent on the regulations of the attorney. Commission is a kind of attorney in the commercial affairs and it is a legal body establishment that can have a valuable role in the commercial transactions especially the international commercial transactions (AllahAbadi, 1991, p.6). Commission is a kind of attorney in commercial affairs, but if he does the commission to its name, we cannot call it attorney but it can be considered as an applicability of proxy, because proxy has a broader and more general meaning than the attorney. According to the article 357 of the commercial law, a commission agent is a person who makes some transactions to his name and the commander's account and then receives a commission for it. Article 358 of the commercial law stipulates that the regulations of attorney for the commission will be observed except in the cases which have been pronounced as an exception. But we must consider that the commission is different from agency and attorney. Because in the ordinary agency or the attorney of the agent or lawyer, he will act with the name of the commander or the client, but the commission agent often conceals his

commander's name and even the other party doesn't know for whom the transaction is and only knows the commission agent, the commission is a commercial action. Paragraph 3 of the article 2 of commercial law mentioned each part of the commission as a commercial transaction. The commercial law does not consider any condition for embarking on the commission and anyone who has the capacity to be a businessman can embark on the commission. In addition to that, there is no need to have a license or special permission for the employment in commission. But the broker needs a business license. The commission agent like the broker has no responsibility in the transactions and he cannot be the agent of the parties without the special permission. But the commission agent himself is the party of the transaction and in addition to that he is responsible for performing the obligations of the party of the contract that has undertaken to his name, and in return the commander is responsible for giving him the outcomes of the transaction.

1.1 Legal responsibility of the broker and commission agent

In general, civil responsibility is divided into two sections in term of particular meaning.

The civil responsibility results from the contract or the law created it. In the first case, if the person sustains damages because of non-fulfillment of the obligations, he can claim for the damages based on the contract. But for the second case, in accordance with the law, the person will be responsible and must compensate the damage and there is no need of a pre-determined contract (Zare & Farajiha, 2014, p. 33). According to the article 363 about the legal responsibility of the broker and commission agent, if the commission agent sells merchandise less than the price that the commander determined, he is responsible for the difference unless he proves that he avoided more loss and it was impossible to get permission from the commander at that time (Skini, Behnam Farid, 2011, p. 190).

1.2 Criminal responsibility of the commission agent and the broker

If a person does some actions which are legally considered as crime actions and an Islamic punishment was predicted for that action by law, he has criminal punishment. According to the article 2 of Islamic criminal law, any action including acting or non-acting that the punishment is predicted for in the law is considered as a crime, and the person has criminal responsibility. Because the violation of some commercial regulations has a criminal sanction and the commercial criminal law is a field that explores this issue (Skini, 2014, p. 5). According to the commercial law, persons who embark on either commission or brokerage are known as a businessman and also tenure to any kind of facility for doing some affairs such as facilitating the estate transactions is considered as business. There is no difference between businessman and shopkeepers and other persons who do common transactions, the law imposed some obligations on him that there is no such obligation for common people. For

example, there isn't any problem for a common person if he is not able to pay off his debt or his property is less than his debt. But if the businessman is not able to pay off his debt or he is declared by law as bankrupt and if this bankruptcy is his fault, he will go to the prison. In general, about the brokerage criminal punishment we can say that any broker who acts against the regulations of brokerage will be prosecuted and he will be prohibited from brokerage from 3 to 12 month and his license will be canceled. If his action is known as a criminal act such as malversation or scam, he will be prosecuted and punished in judicial competent authority, and if he works as a broker before finishing the prohibition period, he will be imprisoned from 6 months to two years and he must pay fine. The commission agent is only responsible for compensating the damage if he causes loss to the commander, while the broker is responsible for compensating the losses even for the waste or loss of the objects and fiduciary documents of the contract parties, unless he proves that basically the waste or loss is not because of his action. Some of the criminal responsibilities and offenses which are discussed the commission are crimes in the malversation verdict which are subject to punishment in malversation in term of punishment, and perpetrators will be punished according to article 674 of Islamic Punishment law. This article determines from 6 months to three years in prison for the malversation. we must consider that the crimes in the verdict of malversation are the same as malversation and they have general dignity and are unforgivable, and the forgiveness of the claimant and injured plaintiffs just eliminate the private aspect of the crime, and according to the article 22 of Islamic punishment law, it just causes a discount and the Tazir punishment will remain. According to the article 30 of Islamic punishment law approved in 1996, these crimes are the same as malversation and are unsustainable (Skini, Behnam Farid, 2011, p.195). The convicts of these crimes are condemned to both principal punishments of article 674 and supplementary punishment of article 19 of Islamic punishment law. This article says that: 'the court can condemn a person to deterrent penalties or Tazirat because of committing an intentional crime, and deprive some of his social right and prohibit him from living in special areas or force him to live in a certain area as a deterrent sentence. These penalties must be mentioned in the verdict of the court (Skini, Behnam Farid, 2001, p. 197).

1.3 Responsibility for the preservation of the goods

It is mentioned in the article 344 of commercial that: "the broker is not responsible for the value and the material of the merchandise which is to be transaction, unless it is been proved that it is the broker faults". He has no responsibility for the goodness or badness of the material and the credit of the parties. but about the responsibility for the preservation of goods by commission agent is said to act according to the article 362 of commercial law which means using perishable goods before the waste of them or sell it so that the goods owner get less loss.

1.4 Responsibility based on the assumption to fault

In the present speech, we study the responsibilities of broker and commission agent based on the assumption to a fault and also we discuss the conditions such as the responsibility of both of them in facing with the legal responsibilities in the assumption of the unintentional fault of brokerage and commission.

1.4 Legal responsibility in the assumption to unintentional fault of brokerage and commission

One of the responsibilities of the brokers against the commander is observing the goodness and welfare of the commander; therefore, the broker must do his best for protecting the commander's rights. Thus, the broker which neglect in doing his task even unintentionally (for example, persuading the commander to sell his goods less than the price of the day without enough investigation about the market price), violate the brokerage contract and is responsible for compensating the damages to the commander in term of civil responsibility. In this case, there is no difference between a broker who is the middleman of the transaction without receiving any money and a person who receive a commission. Although the title 'breach of contract' doesn't apply with the broker without payment, such a broker is responsible for compensating the damages to the commander in accordance with the civil responsibility law.

1.5 Criminal responsibility in the assumption to unintentional fault of brokerage and commission

There is no definition of abuse of the options in the commercial law of Iran, but of the relationship of the commercial law with the civil law, in some aspects it can be comparable to the general rules of abuse of rights abuse of right in law reformation is defined in this form: applying the right, whether corporeal or in the form of a legal action to the detriment of the others which is apparently used as legitimate right but the owner of that right applying it with the purpose of damage except of his right

This expression is for the new law of Iran but this topic is mentioned in article 132 of civil law and in figh as the rule 'La Zarar' or no harm. In the above definition, we can take (using legitimate right) equivalent with legal right, and do not take it as the definition in the European law which is an expanded meaning. But the expression 'expresses malice to others' according to the new legal procedure is not considered as an abuse of right in the law of other countries and we will see in detailed discussion. We can only consider some part of the above-mentioned article comparable with the abuse of options about the no harm principal which is mentioned in article 132 of civil law, because the mentioned article says that no one is allowed to making changes in his own property that require the loss of the neighbor unless the change is in normal amount and for the sake of meeting a need or loss. The first part of

this article says that no one is allowed to make a change in his property which requires the loss of the neighbor and the responsibility is with the fault. But the fault which its base is loss may be intentional or unintentional action. In the first case, we call it crime fault and the second case is a quasi-crime fault. In abuse of right basically the judicial nature of the fault is discussed by the right scholars of different countries. Abuse of right only takes place when a person wants to harm the others. Professor De page defended this system and believed that the abuse of a right is for the loss of others than the use of the person himself. But this theory is criticized extremely and is rejected by law scholars. In the view of contemporary scholars, if a person faults a crime with the purpose of harming to others, in some way he exceeded from his right and in the case of the establishment a causal relationship, he must be condemned based on the predicted options in the civil law. But abuse of right requires tort responsibility that will be done out of any intention to precaution harming or inattention to the consequences of the implementation of the right. Therefore, fault in civil law of Iran including encroachment or negligence (article 953 of civil law), this article in the term of saying the fault is intentional but article 328 of civil law doesn't talk about the fault but mentioned the casual theory and say that: 'anyone who waste the properties of another person, he is responsible for the loss including intentionally or unintentionally waste and he should give its price or the same product including both interests and the same and if he defect or flaw it, he is responsible for that'. And the role of harming action is known responsible with these three conditions: loss, the casual action between the loss, and the agent.

The encroachment means exceeded from the permitted limitation or the conventional. Guardian of negligence in relation to the property or other's right means the omission of actions which is necessity for saving the other's property because of a contract or tradition. Articles 951 & 952 & 335 of civil law also mentioned unintentional fault and finally civil responsibility of Iran approved in 1960 divided the faults into intentionally and carelessness. The loss mentioned in article 132 of civil law may be done with goodwill that in this case it is an example of abuse of right and the doer is responsible for compensating the damage. According to the major difference between a broker and a commission agent in term of their independence in doing the subject of the contract and also the type of each mentioned contracts is related to the validity of the license and their requirements (Ghahremani, 2008, p. 35).

1.6 The responsibility of the brokers against the party of the contract

Article 335 of commercial law define broker in this form: a broker is a person who becomes the middleman of a transaction or he finds a party for a person who wants to do some transactions. Therefore, the broker is not a party to the contract and has no direct role in contacts, unless in a case that mentioned in article 342 of commercial law, the broker has a

role in adjusting the writings between the parties of the contract. But the commission agent as mentioned in article 357 of commercial law is a person who does some transactions with his name but in the account of the commander. Therefore, we can see that the broker basically has no right or responsibility about the contract for his commander. Thus, the broker has no responsibility except finding the customer or seller and introducing them to each other for doing the transactions. But we must think that the commission is known as trading just in a commercial transaction and in other transaction it is noncommercial. But regardless of the type of the commission transaction, the commission itself is a commercial activity and followed the rules of commercial laws just like the brokerage. According to the article 1 of commercial law, someone who select his common job the commercial activities is known as a businessman. The broker has no responsibility for the transaction except in the cases that he guarantees on of the parties of the contract or he commits fault he violates from the brokerage regulations.

Joint responsibility: Joint responsibility has a special position in commercial law. This responsibility regime is taken into consideration in the law of the joint and mixed companies. In the law of commercial documents, the principle of joint responsibility and the principle of the abstraction of commercial documents and the principle of the inaudibility of the objections are important principals ruled over the legal relations of the commercial documents (Skini, 2014, pp. 145-155).

1.7 Joint responsibility is based on two main foundations:

- A) Each of the joint debtors is responsible for paying all the debt and the creditor can refer to one or more debtor and demand all or some part of the debt from each of them.
- B) Payment of debt from each debtor will free others and the creditor is not allowed to get more than his debt from the debtors. In general, in the definition of joint responsibility we can say that the various obligation for payment of a debt. This definition reflects the main essence of joint responsibility in all its forms (Katouzian, 2014, p. 202).

One of the differences between broker and commission agentis is their responsibility. After the transaction, the broker has no responsibility for the conducting the subject of the contract which is signed between the parties, while the commission will sign the contract as the middleman for the genuine (one who the commission agentis on his authority). This means that, at first the obligation of the contract is on the commission agentand then these tasks and responsibilities will transport to the genuine person or the commander, whereas the brokerage is a direct agency (Langeroudi, 2009, p. 860).

On the other hand, the role of deputy or direct agency will be removed after the signing of the contacts between the origin parties and the rights and the contract obligations are on the person represented or the commander from the beginning (Katouzian, 2014, p. 56).

1.8 The responsibility of the commission agent about the party of the transaction

A direct contractual relationship will be established between the genuine (commander) and counterparty (third party). The counterparty can refer to the agent of the commissioner. There exists a similar condition in Iran law, in the first section of article 196 of civil law of Iran which has a jurisprudential root, the transaction is for a person who does it, unless at the time of contract he mentioned the contrary of that or the contrary of that be proven. Therefore, according to the law of Iran it is the client and he himself is not responsible. If at the time of the contract the name of the client is not revealed, the transaction will be considered for the client and the party of the transaction and the lawyer has no right to refer to his client. But the commission contract does not follow the general regulations of the civil law (Katouzian, 2014, p. 108).

Some believe that the commission is as an attorney, but not actually have the essence of attorney. Most of the layers of Iran follow the Germanic Romano law of French law for expressing the essence of the commission and consider the essence of this contract based on the text of the article 358 of commercial law, attorney and agency (Sotoodeh Tehrani, 2003, p. 57, asani, 2006, p. 579, Langeroudi, 2010 p. 99, Amiri Gaem Maghami, 2009, p. 109). This is despite the fact that contract of mandate in Iran law is in contrast with the French law and commission mechanism. in other word, in Iran law, this relationship is the public and private absolute, but in French law the relationship between contract of mandate and the public and private agency is abstract (Ghanavati & Tafaroshi Esaaei, 2001 p. 59).

In addition to this, the qualification of commission contract is not the same as the qualifications of the brokerage contract; consequently, the commission contract has an attorney essence. Because, in spite the commission, the attorney a revocable (according to article 678 of civil law), remission (Katouzian, 2014, p. 155), permissive (Katouzian, 2016, p. 112), and absence of consideration contract. Therefore, the structure of commission contract doesn't match with the contract of mandate. In articles 375 & 376 of the commercial law say that in each case that the commission agent himself can be seller or buyer, and if he informs the transaction to the commander without the determination of the contract party, he himself will be considered as the party of the contract. If the commander withdrawal from his order and the commission agent be aware of this withdrawal before the sending the report of the transaction, he cannot be buyer or seller anymore. We can say that this law establishes an agency for the commission agent and create this power for the agency for the commander.

II. Conclusion

Concepts such as commission and brokerage are both similar and different to each other in some way. The commission as a conceal agent does commercial activities. In the law of the Islamic Republic of Iran which is derived from the Germanic-Romano law, a direct contractual relationship between the genuine and the third party will not be established by the commission contract, and the situation is the same for the agent. According to the meaning of brokerage which is derived from the French law and it is nothing more than negotiation and finding the customer, brokerage is not considered as the instances of agency in Iran law. As mentioned before, commission agent and broker both are included in the attorney law, and also the brokerage and commission are considered as a contractual agency in term of the legal relationship between the parties, and the legal essence. The purpose of agency in these cases is the legal relationship that whereby the actions of the agent will cause some benefit or detriment for the person represented. In general, we can say that the broker and commission agent are both the middleman of the transactions, but there are some differences between their tasks. The broker has no commitment for the implementation of the transaction and after doing the transaction; the broker's work finishes, while the commission agent is considered as the party of the contract and in addition to that he is responsible for doing some commitments before the contracting party that has undertaken to his name, the commission agent is responsible to the commander and must give the outcomes of the transaction to the commander. The commission agent has two direct commitments: one before the party of the contract and the other is before the commander; he must be informed about the transaction. If the commission agent does not guarantee the good doing of the transaction and in case he didn't commit a fault, he is not responsible before the commander for not doing the transaction on behalf of the party to the contract. We can say that one of the differences between the commission agents with broker is that: the commission agent is only responsible for announcing the actions especially doing his mission for the commander, but in fact the commission agent has the disclosure task and this is mentioned in article 359. But according to the article 337 of the mentioned law, the broker has the responsibility for disclosure the details of the contract to the person with whom he has not signed the brokerage contract. According to the article 364 of the commercial law, the commission agent isn't obliged to the disclosure of the identity of his commander to the third party with whom he is transacting, because according to the commercial law, there is no direct relation between the genuine (commander) and the third person (contract party) based on which some rights and responsibilities be established for the parties. As a result, the genuine and the third person need to know each other's identity, but also according to the demand of the commander, in some cases the commission agent has no right to the disclosure of the identity of his commander and he should hide the identity of his commander.

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