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Business Ethics in Agency Relationship under Ohada Commercial Law: From the Perspective of Non-Competition and Confidentiality

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ABSTRACT

The Uniform Act on General Commercial Law has provisions on some aspects of business ethics in the relationship of agent and principal. This article questions the extent to which the Act has regulated business ethics with focus on the agent's duties of non-competition and confidentiality. With the objective to examine critically the provisions of the Act relating to the ethical conduct of the agent with respect to the mentioned duties, this article reveals that the duties are sparsely regulated and the Act is almost silent on the effects of their breach. Presently, solutions to certain problems relating to the duties of confidentiality and non-competition are found in national laws and case law of the members states. This is inimical to the harmonisation mission of OHADA. The article advises the OHADA lawmaker to amend the Act to address the deficiencies identified.

Keywords: *agency, commercial, confidentiality, ethics, non-competition*

I. INTRODUCTION

The word ethics is derived from the Greek word 'ethos', which means character. Ethics is concerned with human character and conduct. It deals with that which is good and bad with moral duty and obligation. Ethics is the embodiment of moral values, which describes what is right and what is wrong in human behaviour and what ought to be. Thus, ethics refers to good character and morality, human character and behaviour considered as desirable by contemporary society[2]. As the study and philosophy of man with emphasis on the determination of right and wrong, ethics is also seen as the basic principles of right action, moral principles, moral philosophy, etc. The word ethical has been variously interpreted as morally correct, honourable, decent, fair, good, honest, just, noble, principled, righteous, upright, virtuous, and so on[3]. This brief taxonomy suggests that it is not easy to precisely

[1] Author is an Associate Professor at The University of Bamenda, Cameroon.

[2] Menezes A., "Business ethics and its importance in banking industry", *International Journal of Scientific Research and Modern Education*, Volume 1, Issue 2, 2016, 196-201, 196.

[3] Mirza A.B., "Ethics in banking", *Eleventh Nurul Matin memorial lecture*, Bangladesh Institute of Bank

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delineate the scope of ethics.

Business ethics is the study of business situations, activities, and decisions where issues of right and wrong are addressed. It is normally considered as normative because ethics gives justification for abstract standard by which people act[4]. In short, business ethics has to do with *"choosing the good over the bad, the right over the wrong, the fair over the unfair, the truth over the lie"*[5]. In business ethics embroils a wide range of issues including what should be kept confidential such as trade secrets. In broad sense, a trade secret is information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who have obtained economic value from its disclosure and use, and (ii) is the subject of reference that are reasonable under the circumstances to maintain its secrecy[6]. Brief, a trade secret is 'any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others'[7].

OHADA[8] commercial law contains some aspects of business ethics. This is so glaring in agency relationship under the Uniform Act on General Commercial Law adopted on 17 April 1997[9] and amended on 15 December 2010[10], hereunder referred to as the Act. The Act regulates the profession of trade middlemen or intermediaries. As per the Act, *a commercial intermediary or middleman is a natural or legal person who has the power to act, or intends to act, habitually and professionally on behalf of another person, whether a trader or not, in order to conclude a legal transaction of a commercial nature with a third party*[11]. Three

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Management, Mirpur, Dhaka, 2011, 1-2.

[4] Atta Boahene C., *Managing business ethics in the banking industry: an essential component for performance*, Masters thesis, Kwame Nkrumah University of Science and Technology, 2015, 9.

[5] Menezes A., "Business ethics and its importance in banking industry", *op. cit*., 196.

[6] Section 4 of the United States Trade Secret Act

[7] Menezes A. (2016), "Business ethics and its importance in banking industry", *op. cit*., 92

[8] *Organisation pour l'Harmonisation en Afrique du Droit des Affaires*, translated into English as Organisation for the Harmonisation of Business Law in Africa.

[9] Adopted at Cotonou on 17 April 1997 and entered into force on 1 January 1998. Commentry, Akuété Santos P., « Acte Uniforme relatif au droit Commercial général », in Issa-Sayegh J., Pougoue P.G. & Sawadogo F.M. (Coords), *OHADA: Traité et Actes Uniformes Commentés et Annoté*, 2e Edition, Juriscope, 2002, 187-288 ; NGUEBOU TOUKAM J., *Le droit commercial général dans l'Acte Uniforme OHADA*, Coll. Droit Uniforme, Yaoundé, PUA, 1998. Akuété Santos P. & Yado Toé J., *OHADA, droit commercial général*, Coll Droit Uniforme, Bruxelles, BRUYLAND, 2002 ; MARTOR B. et al, *Le droit uniforme Africain des affaires issu de l'OHADA*, Paris, Editions du Juris-Classeur, Litec, 2004; Martor B. et al, *Business Law in Africa: OHADA and the Harmonization Process,* 2nd Edition, London, GMB, 2007.

[10] Pougoue P.G. (Dir), *Encyclopédie du droit OHADA*, Lamy, 2011; Akuété Santos P., « Acte Uniforme relatif au droit commercial général », in Issa-Sayegh J., Pougoue P.G. & Sawadogo F.M. (Coords), *OHADA: Traité et Actes Uniformes Commentés et Annoté*, 4e Edition, Juriscope, 2012.

[11] Section 169.

categories of intermediaries are governed by the Act to wit: commission agent, broker and commercial agent. A commission agent is a professional who, in return for a commission, undertakes to conclude any legal act in his own name but on behalf of the principal who gives him the mandate[12]. A broker is a professional who puts people in touch with a view to facilitating or bringing about the conclusion of agreements between them[13]. A commercial agent is a professional representative who is permanently responsible for negotiating and, where appropriate, concluding contracts for the sale, purchase, rental or provision of services, in the name and on behalf of producers, industrialists, traders or other commercial agents, without being bound to them by a contract of employment[14].

The specificity of OHADA commercial law is that these intermediaries are traders and must fulfil the conditions incumbent on the later[15]. As traders, ethical considerations warrant that trade middlemen refrain from certain acts in their business dealings. If business ethics deals with what is good or bad, fair or unfair, and what ought to be done, it is obvious that it embodies prohibitions or restrictions of certain acts in business relations or transactions. An agent must exercise the highest level of integrity, ethics and objectivity in his actions and relationships which may affect the principal. He must shun any form of bribery and corruption. An agent must not misuse authority in his relationships. Moreover, an agent has the duty to act in the best interest of the principal at all times. This is to prevent conflict of interest between the agent and the principal. All these are reminiscent of the fiduciary duties of commercial intermediaries. Even though fiduciary duties are more of moral obligations, today most of the fiduciary duties of trade middlemen are regulated by statute. Thus, fiduciary duties can be viewed as legal obligations that require an individual or entity to act in the best interests of another party. In agency relationship, agents owe fiduciary duties to their principal, which means that they must act in the best interests of their principal and not their own interests.

From the above, it is obvious that agents as well as other commercial intermediaries, while performing their duties relating to the agency contract, must also act as fiduciaries. A fiduciary is 'someone who has undertaken to act for or on behalf of another in a particular manner or circumstances which give rise to a relationship of trust and confidence'[16]. Agents must observe their fiduciary duties which generally are: obedience, loyalty, disclosure,

[12] Section 192.
[13] Section 208.
[14] Section 216.
[15] Section 170.
[16] Millett LJ, in *Bristol & Wess BS v Mosthew* (1998) Ch 1, 18.

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confidentiality, accounting, and reasonable care and diligence. Besides, the Act especially as far as the commercial agent is concerned, contains other moral duties such as fairness, honesty and non-competition. More particularly, it is his duty not to allow his personal interests to conflict with those of the principal. Every authority conferred upon an agent, whether express or implied, must be taken to be subject to a condition that the authority is to be exercised honestly and on behalf of the principal[17]. The most important of these ethical and moral duties are non-competition and confidentiality.

As already mentioned, fiduciary duties of the agent are not necessarily contractual but are recognised by statute. The Act recognises them in agency relationship but they are limited in scope. This article questions the extent to which the Act has regulated business ethics as far as the obligations of non-competition and confidentiality are concerned. A glance through the Act vividly reveals that its provisions relating to ethical obligations of the agent are insufficient. Through doctrinal, theoretical and comparative analyses, with most examples taken from France, England, Cameroon and other OHADA member states, this article sets out to examine critically the provisions of the Act relating to the ethical conduct of the agent with respect to non-competition and the duty of secrecy. It demonstrates that the Act sparsely regulates these duties of the agent and it is almost silent on remedies for their breach.

II. OBLIGATIONS OF NON-COMPETITION AND CONFIDENTIALITY OF THE AGENT UNDER THE ACT

The duties of non-competition and secrecy are the most important aspects of business ethics as far as agency relationship is concerned. However, ethical conduct in the relationship of agent and principal goes beyond the mentioned duties. Like non-competition and confidentiality, there are other prohibited conducts in agency relationship mention by the Act without any further details. Some of those duties are implied in the agency contract especially as the agent must act as a fiduciary. In any case, the obligation of non-competition of the agent as well as the duty of confidentiality may have different sources under the Act.

A. The obligation of non-competition in agency relationship under the Act

Competition is the ability for enterprises or traders to 'fight' and 'capture' customers. As such, free competition entails that they have the liberty to produce and sell what they like under conditions of equal competition and under strict respect of laws in force. The obligation of non-competition has the tendency of restraining the agent's trade freedom. Non-competition emanates naturally from the duty of loyalty of the agent but may also be a

[17] Munday R., *Agency law and principles*, 3rd edition, Oxford University Press, 2016, 177.

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contractual obligation.

1. Non-competition, an emanation of the ethical requirement of loyalty

The agent owes the duty to act with fairness and loyalty on behalf of the principal[18]. Loyalty entails sincerity in the conclusion of contract and good faith in its execution[19]. For the agent, loyalty materialises through the obligation of non-competition. The Act provides that *unless otherwise stipulated, a commercial agent may agree to represent other principals without authorisation. He may not agree to represent a business competing with that of one of his principals without the written agreement of the latter*[20]. The agent's obligation not to compete is justified by the fact that, because the principal has a tangible interest to protect, either in the specific training that he provides or information he bestows on the agent, the agent forfeits his right to work in a certain area as valid exchange for access to this interest[21]. While the contract is still a going concern, the agent's obligation of non-competition is inherent in his moral duties of loyalty and professional secrecy. That is why the law permits the agent to represent several principals but must not represent a company competing with that of one of his principals without his written authorisation[22] or cannot represent another principal with conflicting interests[23].

However, this provision of the Act is open to questioning; it is not precise on the information the agent should communicate to the principal[24]. How is the principal to know that the agent is not competing or that his activities do not create conflict? In principle, the agent should give details of any outside businesses and ownership interests which relate to the apparel and design fields. This list should include investments and activities involving apparel companies the agent is working for. If an agent's activities change, he should update the principal. The principal will determine if such activities or investments are not consistent with his business. Any activities or investments which relate to the apparel and design fields, but are determined not to conflict with the principal, will be verified.

Non-competition undoubtedly restricts the agent's freedom of trade. Restriction of trade freedom appears ironical since in commercial law freedom of trade and industry is

[18] UAGCL, section 194, 217.
[19] Cornu G., *Vocabulaire juridique*, Paris, PUF, 1987, 528.
[20] Section 218.
[21] This is in line with the strict economic view on the enforcement of non-compete contracts as explained in Gallo A.J., "A Uniform Rule for Enforcement of Non-competition Contracts Considered in Relation to "Termination Cases", *Journal of Labour and Employment Law*, Vol. 1.2, University of Pennsylvania, 1998, 723.
[22] UAGCL, Section 218.
[23] Dal Pont G.E., *Law of Agency*, Australia, Butterworths, 2001, 301.
[24] Pougoue P.G. (dir), *Encyclopédie du droit OHADA*, Lamy, 2010, 1100.

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recognised[25]. This entails on the one hand, the freedom to undertake and establish a commercial and industrial profession and on the other hand, the freedom to exploit and compete with others in the same line of business without fear or favour. This principle of trade freedom is meant to ensure that people do not enter into agreements to restrain trade. There are, however, some waivers to this principle, since trade freedom is subject to the respect of laws and regulations in force[26]. In fact, freedom to trade is restricted exceptionally for some persons due to certain reasons[27]. This makes laws relating to restrictive agreements, restraint of trade or non-competition the most complex parts of law, since they involve the adjustment of two freedoms, both based on public policy – the one the freedom to contract, the other the freedom to trade[28] – or as Lord Shaw once put it, *the right to bargain and the right to work*[29]. In any case, the respect of laws and regulations is always ethical and violation unethical.

Ethical considerations in business relations which were simply viewed as moral obligations are now statutory and are sometimes dealt with contractually. Both are taken into consideration in OHADA commercial law as concerns non-competition. In this perspective, there are statutory restraints that are aimed at protecting general interest and contractual restrictions aimed at protecting private interest. Historically, all restraints of trade, whether general or partial, were regarded as totally void because of their tendency to create monopolies. This view, however, did not prevail, for it was gradually realised that a restriction of trading activities was in certain circumstances justifiable in the interests both of the public and of the parties themselves. It was clear, for instance, that a master was at the mercy of his servants and apprentices if they were free to exploit to their own gain the knowledge that they had acquired of his personal customers or his trade secrets[30]. As such, restraint of trade gradually became authorised as business ethics and practice. In order to ensure that the agent does not make use of the principal's trade secrets or customers after termination of contract, there is always need for a clause restricting him post-term.

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[25] For the case of Cameroon, see Olanguena Awono U., *Liberté du commerce et de l'industrie au Cameroun*, Thèse de Doctorat, Université de Yaoundé, 1982.

[26] For instance, section 4 of Cameroonian Law nº 90/031 of 10 August 1990, governing commercial activity as replaced by section 5 of Law nº 2015/018 of 21 December 2015 governing commercial activity in Cameroon.

[27] Anoukaha F., « L'incompatibilité d'exercice d'une activité commercial dans l'espace OHADA : le cas du Cameroun », *Annales de la FSJP-UDs*, Tome 5, Yaoundé, PUA, 2001,15-24, 6.

[28] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, 9th Edition, London, Butterworths, 1976, 374.

[29] *Mason v. Provident Clothing and Supply Co., Ltd*., [1913] A.C. 724 at p. 728.

[30] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, *op. cit*., 369; Berlioz P., « Quelle protection pour les informations économiques secrètes de l'entreprise », RTD Com., nº 2, 2012, 263 et seq ; Galloux J.C., « Droits sur les créations nouvelles », RTD Com., nº 1, 2014, 87 et seq.

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2. Non-competition, a contractual clause under the Act

Restriction of trade freedom may be contractual. In this perspective, the Act has adopted a mechanism whereby, parties to an agency contract are permitted to insert non-competition clauses in such contracts, which have the effects of restraining the agent's freedom to trade[31]. Thus, in a contract of agency, the obligation of non-competition is in-term and post-term[32]. This means that the agent owes that duty while performing his contract and for a particular period after termination of same if they so agree[33]. As such, post-term non-competition obligation is not only an ethical requirement but also a legal requirement since it emanates from an agreement. As a contractual clause, a non-competition clause needs to be enforced. For it to be enforceable, it must be valid since invalid contracts are void and or unenforceable. The Act says nothing detail in relation to the conditions for the validity of the clause. However, it mentions payment of a special allowance.

a. Payment of a special allowance

The Act states that, *where an agreement on the prohibition of competition is concluded between the commercial agent and his principal, the commercial agent shall be entitled to a special allowance at the end of the contract*.[34] In principle, payment of an indemnity should not be a condition for the validity of a non-competition clause in a contract of agency. In fact, the legislator never intended that the obligation of non-competition be indemnified, if the clause providing it is in conformity with the conditions laid down in section 134 of the *code de commerce*. The Act deviates from this principle by providing for the compensation of the clause. Where the contract of agency terminates normally, the agent is always entitled to a compensation allowance calculated according to the criteria determined by the legislator, if there is an obligation of non-competition.[35] The allowance is mandatory even though the lawmaker has not indicated sanctions for non-respect of this provision. Nevertheless, it is obvious that the absence of such special indemnity renders the contract null. In fact, a non-competition clause is a contractual clause and for it to be valid, they should be consideration which is an essential element for the validity of contracts. Indemnification for a non-competition clause therefore, is justified as consideration, without which a contract is invalid.

[31] See Zeumo Nguenang M., « La non-concurrence en droit OHADA des affaires ; esquisse d'une analyse croisée », *Revue de Droit des Affaires OHADA*, nº 4, 2013, 191-212.
[32] Malo D., « La clause de non-concurrence post-contractuelle et ses alternatives », *RTD Com*., nº 2, 2009, 259-277.
[33] Serra Y., « La non-concurrence », Dalloz, Droit Usuel, 1991, 117.
[34] Section 219.
[35] Sections 229-232.

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Unfortunately, there are uncertainties surrounding the payment of the special allowance. First, the legislator has not determined the criteria of assessment of the allowance. In our opinion, the parties are free to negotiate the allowance[36] taking into consideration the agent's remuneration, duration in the enterprise, duration of the restraint, etc. Second, the time of payment of the indemnity is another issue to be determined. Is it paid at once at the end of the contract or in instalments? Can the payment be spread to cover the duration of the period for the enforcement of the clause? Given that the will of the parties is primordial in contractual provisions, they may agree on any time of payment provided that the time does not extend beyond the period for the enforcement of the clause, since the agent's prohibition is partial.

b. The agent's prohibition must be partial

Except for the payment of an indemnity that is provided by the OHADA lawmaker, no other conditions arise from the Act. However, under ordinary law, a non-competition clause must be partial. An English court since 1711 held, that *a contract, whether made between a master and servant ... which imposed a general restraint, was necessarily and without exception void; but that a partial restraint was prima facie valid, and if reasonable was enforceable*.[37] An unlimited non-competition clause would be considered as a general and absolute prohibition from carrying out an activity. As provided by section 134 of the French *code de commerce*, it must be limited in time, space and with respect to the persons and the activities or goods or services targeted.

A non-competition clause should not provide for "perpetual" prohibition, that is, without limitation of the duration. Unfortunately, the Act is silent on the limitation of a non-competition clause in the contract of agency. Certain authors think that it is perpetual but may end with the enterprise or if the enterprise is changing its activity.[38] In any case, if a perpetual obligation of secrecy may be justified on the basis of protection of intellectual property and invention rights, a perpetual non-competition clause is against public policy. A non-competition clause unlimited in space would be considered as implying that the debtor of the obligation is generally and absolutely prohibited from exercising a particular activity and would be null.

As to space, the geographical sector may be limited to a locality, localities, a town or towns, divisions and even a country or countries. It may equally be limited in terms of distance. It does not suffice that the clause is limited in space; the limitation should equally be reasonable.

[36] Nguebou Toukam J., *Le droit commercial général dans l'Acte Uniforme OHADA*, *op. cit*., 89.
[37] See Lord Macclesfiend in *Mitchel v. Reynolds*, (1711), 1 p. WMS. 181.
[38] Akuété Santos P. & Yado Toé J., *OHADA, droit commercial général*, *op. cit*., 330.

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A non-competition clause though limited in space may be nullified or be unenforceable for being unreasonably wide. This may be the case for example, where the agent during his contract was confined to a particular geographical sector[39] and the limitation clause is wider than the said geographical sector. This is equally the case where during the performance of a contract of agency, the agent might have been committed to deal specifically with certain persons.[40] A non-competition clause in this circumstance would be required to limit dealings just between the agent and those people. This is usually when such persons have identified with the principal as his permanent customers. The prohibition will be limited to similar activities or services rendered to the principal's customers.

c. The object of the prohibition must be a similar activity

Non-competition is intended to prohibit the agent from carrying out the same activities or render the same services as he did under the principal, either for his own benefit or for that of a third party. The object of the limitation should be commercial activities similar or identical to those of the business of the principal.[41] This is usually to protect trade secrets or any information that the agent might have gotten by reason of activities or service conferred on him by the principal. It is usually required that the agent must have acquired some skill or training from the principal.[42]

Like in the case of vendor of business, the Act stipulates, *the seller of a business shall abstain from any act tending to disturb the buyer's operation of the business*.[43] This provision makes no mention of similar activity or activities but it is a matter of common sense that acts of the seller may only disturb the buyer of business if they sustain the same commercial activity as that of the latter. It is the same thing with the agent; his acts must be similar or identical to those of the principal, irrespective of whether he is doing them on his behalf or behalf of another principal. The task, therefore, becomes enormous for the courts to determine which activities are similar.

In this task, the court may be confronted with several difficulties, for instance, must the activity be a commercial transaction in a strict sense? For example, an agent who was specialised in buying and selling fruits who now sells fruits from his own garden. The new reforms of the Act seem to suggest that such a person is prohibited. In fact, a trader is defined

[39] UAGCL, S. 221.
[40] *Ibid*.
[41] Com., 20 septembre 2011, nº 10-20. 664, Arrêt nº 863 F-D; RJDA 2012, no 5; RTD Com., nº 1 2012, p. 80, obs. Saintourens Bernard.
[42] Gallo A.J., "A Uniform Rule for Enforcement of Non-competition Contracts Considered in Relation to "Termination Cases", *op. cit*., 723.
[43] Ripert G. & Roblot R., *Traité de droit commercial*, *op. cit*., 353.

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as *any person carrying out commercial transactions by nature as a profession.*[44] *Commercial transaction by nature is one in which a person undertakes the circulation of goods he produces or buys or by which he furnishes services with the aim of drawing pecuniary benefits*.[45] From the forgoing, an agent selling fruits from is garden is carrying out a commercial transaction and may be prohibited. However, this will not be the case if he acts solely as a supplier to his former principal.

Must the scale of the activity be the same? For instance, an agent who was involved in wholesale or sale at industrial scale that now buys and retails the same items. The answer to this question will depend on the circumstances. If the principal continues as a wholesaler and that the agent is buying from him to retail, then he is not restrained. The essential is to ensure that the agent does not divert the principal's customers[46]. He cannot, within the area and time of restraint, carry out the same business like the principal through an intermediary; create a company as sole proprietor to carry out the same activity or be a manager of a company in the same line of business. In any case, restraint should not be general and absolute.[47] Is the obligation transmissible to third parties? In principle, restraint should not be transmissible; it is personal since the contract of agency is *intuitu personae* and so too is the obligation of non-competition. The cause of termination of contract also matters.

d. The termination of agency contract should be attributed to the agent

This is a subjective condition. A subjective condition is one linked to the person or attitude of the parties to the contract. In the contract of agency, it is the attitude of the agent that matters. In this perspective, a non-competition clause would be considered valid and therefore enforceable, only if the contract terminates normally or prematurely based on the agent's misconduct. A contract of agency may be of a specified or unspecified duration.[48] Where the contract is of specified duration, it can only end after expiry of the period prefixed by the parties. Premature termination can only occur in the event of a force majeure or based on the agent's gross misconduct.

On the contrary, where the contract is of unspecified duration, it may end at any time on the initiative of either party. In that case, the party initiating the termination would notify the

[44] UAGCL, S. 2.
[45] *Ibid*, S. 3.
[46] Houin R. & Pedamon M., *Droit commercial*, *op. cit*., 279 ; Ripert G. & Roblot R., *Traité de droit commercial*, *op. cit*., 353 ; Nguebou Toukam J., *Le droit commercial général dans l'Acte Uniforme OHADA*, *op. cit*., 51.
[47] Houin R. & Pedamon M., *Droit commercial*, *op. cit*., 172, 279.
[48] UAGCL, S. 227.

other of the reasons for termination.[49] Termination in this circumstance is considered normal if the period and conditions of notice are respected. If not, the termination will be wrongful and will invalidate the clause. A non-competition clause can only be enforced against an agent if the contract terminates normally or on the initiative of the agent. Wrongful termination of agency contract occurs where the principal ends it prematurely for reasons not inherent in the person of the agent, that is, not based on the agent's misconduct.

The Act is not precise on the formalities for the validity of non-competition clause in a contract of agency. Though today the tendency is to generalise the formality for the validity of restraint of trade, some special observations need to be made as concerns the contract of agency under the Act. The requirement of writing in agreements restraining an agent from competing with the principal is controversial under the Act since a contract of agency may be oral.[50] This does not pose any problem when the contract is still a going concern since the agent's obligation of non-competition is inherent in his moral duties of loyalty and professional secrecy or confidentiality of information.[51]

However, after termination of the contract, the question of proof of a clause restraining trade will be posed. This will require that even if the contract of agency was verbal, the agreement of non-competition at the end of the contract should be written. This is obvious because under the Act the clause is indemnified and the contract will need to be in writing so as to clearly define the modalities for compensation. Writing is also necessary so as to state when the agent will regain his freedom[52]. The type of writing will be determined by the parties – an authenticated deed or private deed as the case may be. The duty of non-competition is as important as the agent's duty of confidentiality.

B. The obligation of confidentiality of the agent under the Act

In addition to non-competition, other ethical requirements or obligations exist in agency relationship. These obligations are: obedience, disclosure, accounting, and reasonable care and diligence. Further, the agent must shun any form of bribery and corruption. This implies that the ethical and professional duty of confidentiality under the Act is complemented and supplemented by other fiduciary duties.

1. Confidentiality, an ethical and professional obligation under the Act

The agent is prohibited from disclosing information given to him confidentially by the

[49] *Ibid*, S. 228.
[50] UAGCL, S. 176.
[51] Dal Pont G.E., *Law of Agency*, *op. cit*., 311.
[52] Nguebou Toukam J., *Le droit commercial général dans l'Acte Uniforme OHADA*, *op. cit*., 51.

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principal, or which came to his knowledge in his capacity as agent owing to the contract[53]. As per Black's law dictionary, confidentiality means secrecy; the state of having the dissemination of certain information restricted[54]. Confidentiality is the maintenance of secrecy or privacy vis-à-vis information. The duty of confidentiality, therefore, is intended to protect information which should be kept secret. Information can remain secret and thus, private and confidential, if its possessor does not disclose it to anyone. A confidentiality obligation aims to limit the disclosure and/or use the confidant can make of the information. Accordingly, the concept of confidentiality is definable by reference to information communicated, secured or received for a limited purpose, which in turn makes it relevantly inaccessible[55]. Once information enters the 'public domain', whether or not in breach of an obligation of confidence, any confidentiality attaching to the information itself necessarily evaporates.

The obligation of confidentiality even though today recognised by law and contract, was developed by equity. Independent of any legally enforceable contract, equity revealed a willingness to recognise and enforce what has proven to be a 'stand-alone' obligation of confidentiality. Not being grounded in agreement, equity's intervention here aligned with its traditional targeting of *conscience*. A person in whom confidential information is reposed is, in equity's view, placed in a position of trust vis-à-vis that information, and cannot in good conscience, abuse that trust by disclosing or using the information for an object inconsistent with its receipt[56]. According to Fry LJ in *Boston Deep Sea Fishing*[57], it is a matter of simple dictates of conscience and according to broad principles of morality and law.

Confidentiality of information is justified by the fact that the modern 'information age' has seen information, more so than at any other time in the past, become the most valuable currency across the spectrum of society. As information clearly has value, most commonly viewed from a commercial or business perspective, the ability to control or protect access to, and use and dissemination of information is imperative[58]. This is very common with trade secrets. A trade secret is protected because it is information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others[59]. Evidence suggests that businesses regard 'trade secrets' as important assets and rely on such secrecy as part of their innovation

[53] UAGCL, S. 219.
[54] Garner B. A. (ed), *Black's law dictionary*, 8th edition, Thomson West, p. 318.
[55] Dal Pont, *Law of confidentiality*, Australia, Lexis Nexis Butterworths, 2015, p. 1.
[56] *Ibid,* p. 14.
[57] [188] 39 ChD 368.
[58] Dal Pont, *Law of confidentiality*, Australia, *op. cit*., 2015, p. 1.
[59] Menezes A. (2016), "Business ethics and its importance in banking industry", *op. cit*., 92

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strategies[60]. Just as an agent must not allow his own interests to come into conflict with those of his principal, so too an agent may neither make use of the principal's property nor exploit any confidential information that has come into his possession during the course of the agency[61].

The obligations of the agent extend to the misuse of confidential information acquired during the course of his agency. *Lamb v Evans*[62] provides an example of agents who sought to make use of such confidential information. Canvassers, who had been employed on commission to collect advertisements from traders for exclusive publication in the claimant's business directory, were held not to be entitled to hand them on to a rival publication when their employment terminated and they joined another similar outfit. As *Lindley, LJ* explained, such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligations to his principal. An agent has no right to employ as against his principal materials which that agent has obtained only for his principal and in the course of his agency. They are the property of the principal. *The principal has ... such an interest in them as entitles him to restrain the agent from the use of them except for the purpose for which they were got*[63]. Action for breach of confidence is the primary legal mechanism for the protection of 'trade secrets', a vehicle for the protection of commercially valuable ideas and information.

Although this may well be incorporated as a term of the agent's contract, this duty is quite distinct from contractual obligations. *Lord Denning, MR* famously declared in *Seager v Copydex Ltd (No 1)*[64] the rule that an agent may not derive a profit from use of such confidential information 'depends on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it. He must not make use of it to the prejudice of him who gave it without obtaining his consent'. The agent owes the duty of confidentiality even at the end of the mandate[65]. This is because in his dealing with the principal, he receives so much information in confidence by virtue of his function. The Act talks about this duty without further details, especially as concerns its duration. The duration of the obligation of secrecy during the contract is that of the contact but is uncertain when the contract is terminated. The duties of confidentiality and non-competition are reinforced by

[60] Tanya A. et al., *Gurry on breach of confidence: the protection of confidential information*, 2nd edition, Oxford University Press, 2012, p. 4.
[61] Munday R., *Agency law and principles*, *op. cit*., p. 184.
[62] [1893] 1 Ch 218.
[63] *Ibid*, at 226.
[64] (1967) 1 WLR 923, 931.
[65] UAGCL, section 219.

other ethical obligations of the agent.

2. Other complementary ethical obligations of the agent under the Act

Ethical conduct in the relationship of agent and principal goes beyond issues of competition and secrecy. These other prohibited conducts in agency relationship are not regulated by the Act, even though they can be implied from some of its provisions. This is the case with the duty of honesty.

a. The duty of honesty

A middleman owes the duty of honesty to the principal, which makes him answerable to the latter for good and faithful execution of the power of attorney[66]. The duty of honesty encompasses other obligations like information, account, etc. Concerning the obligation of information, the Act states that *at the principal's request, the intermediary is required to report to him at all times on its management*[67]. The Act does not specify the information that the agent should give the principal[68]. In any case, the information should be such that the principal will need to give him precise and useful instructions for the execution of the contract, example, wishes of the customers, the market situation, etc.[69].

In addition, honesty also requires that the middleman must avoid false statements which may mislead a party to enter into a contract[70]. Honesty further requires that the agent should give the principal a faithful account of the transactions completed[71]. The duty to render account also requires that the agent should return to the principal anything given him for the duration of the contract[72]. The obligation of restitution arises at the end of the contract and the agent is to return all that was given him by the principal or third parties for the possible execution of the contract, for example, documents given him destined for the principal in the course of the contract. This duty of restitution is without prejudice to the agent's right of retention or possessory lien. The duty to render account even extends to money illegally obtained such as bribe or secret commissions or profits made in breach of confidence.

b. The duty of integrity

This requires that the agent should shun bribery, corruption and extortion. An agent lacks integrity if he receives bribe, is corrupt or is involved in extortion. Corruption is dishonest or

[66] *Ibid*, section 182(2).
[67] *Ibid*, section 187.
[68] Pougoue P.G. (dir), *Encyclopédie du droit OHADA*, Lamy, 2010, p. 1100.
[69] Akuété Santos P. & Yado Toé J., *OHADA, droit commercial général*, *op. cit*., 316.
[70] UAGCL, section 210.
[71] *Ibid*, section 195.
[72] *Ibid*, section 233.

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fraudulent conduct by those in power, typically involving bribery. Extortion is the unlawful extraction of money or property through intimidation. This could also involve revealing confidential information or threatening to steal data. Extortion attempts by an agent can attract criminal sanctions[73]. Bribery involves so many acts such as the following:

- when a financial or other advantage is offered, given or promised to another person with the intention to induce or reward them or another person to perform their responsibilities or duties improperly; or
- when a financial or other advantage is requested, agreed to be received or accepted by another person with the intention of inducing or rewarding them or another person to perform their responsibilities or duties inappropriately. It does not matter whether the bribe is given or received directly or through a third party (such as the distributor, supplier, joint venture partner or other intermediary); for the benefit of the recipient or some other person

Bribes can take many forms, for example: money (or cash equivalent such as shares); unreasonable gifts, entertainment or hospitality; kickbacks; unwarranted rebates or excessive commissions (e.g. to sales agents or marketing agents); unwarranted allowances or expenses; "facilitation" payments – payments made to perform their normal job more quickly and/or prioritise a particular customer; political/charitable contributions; uncompensated use of company services or facilities; or anything else of value. A bribe does not actually have to take place - just promising to give a bribe or agreeing to receive one is prohibited.

It is obvious that an agent who, in the course of his agency, takes a bribe or agrees to take a bribe or receives a secret commission from any third party who is either seeking to enter into legal relations with the principal or who is already transacting business with the principal, will be in breach of his fiduciary duty to that principal. If an agent takes a bribe or secret commission, he must account for it to the principal. Thus, the agent is liable, jointly and severally along with the briber, to the principal for the sum of the bribe or secret commission[74]. Under English law, any bribe that has actually been paid will be held by the agent on trust for his principal[75]. That is one of the remedies for breach of duty.

III. REMEDIES FOR AGENT'S BREACH OF ETHICAL OBLIGATIONS UNDER THE ACT

The Act has not sufficiently regulated remedies as far as breach of ethical obligations is

[73] Hanover, *Business ethics, anti-bribery, antitrust and fair competition policy*, September 2021, p. 2.
[74] Munday R., *Agency law and principles*, 3rd edition, oxford university press, 2016, 188.
[75] *Att-Gen for Hong Kong v Reid* (1994) 1 AC 324; *FHR European Ventures LLP v Mankarious* [2013] 1 Lloyd's Rep 416.

concerned. The Act provides generally that *the intermediary's liability is generally subject to the rules of agency*[76]. Generally, these rules are those of the respective member states[77]. As per section 187 of the Act, the agent is *liable to pay compensation for any damage caused by the non-performance or improper performance of the mandate*. As far as the liability of the agent is concerned, there is usually distinction between his personal act and those of the third parties. However, with respect to non-competition and confidentiality, liability is based personal acts of the agent. That is why here a distinction is made between civil liability and criminal responsibility of the agent.

A. Civil remedies for agent's breach of ethical obligations under the Act

The common remedy that is available to the aggrieved party to a contract of agency is damages. However, parties may determine the sanctions for such a breach in their contract, that is, the parties may prescribe the remedies that will accrue to the promisee if the promisor fails to respect the terms of the agreement, for instance, a liquidated damages clause. With non-competition and confidentiality, other remedies may be sought under national laws. Generally, there are remedies common to all breaches of ethical obligations during execution of contract of agency while others apply only at the end of the contract.

1. Civil remedies common to all breaches of ethical obligations

The violation of a non-competition clause is essentially a civil wrong and a series of remedies are available to the plaintiff.[78] As such, in a breach of restraint of trade the plaintiff may consider the contract as discharged and take an action for rescission. The breach to him may not be considered so serious and he decides to take action to restrain the defendant (prohibitive injunction) or to recover damages.

a. Rescission of the contract and or clause

Rescission is a remedy usually sought in case of a fundamental breach of contract. The breach of a contract is fundamental if it concerns a fundamental term or a condition unlike the breach of a warranty. The distinction between conditions and warranties varies with the contract, that is, what is a condition in one contract may just be a warranty in another. This distinction is relevant for the consequences of their breach. The breach of a condition is considered serious breach and therefore fundamental, that is, breach which is so serious that it gives one of the

[76] UAGCL, section 182.
[77] Senegal has legislated on that (article 465 of the code of civil and commercial obligations) main while for other member states they are still applying the French civil code (articles 1992 et seq).
[78] See articles 1142, 1143 and 1184 of the Civil Code.

parties the 'right to end' the contract[79]. This is the case with breach of confidentiality where company secrets are disclosed.

Nevertheless, rescission as a remedy for the breach of an ethical obligation has some strings which may stifle its grant. Generally, the remedy is granted where the *status quo ante* can be restored, that is, a contract can only be rescinded, especially for misrepresentation, if such *restitutio in integrum* is possible.[80] This is because the effect of rescission in this case is to terminate the contract *ab initio* and the parties must be relegated to their original positions. However, this argument which is classic in case of misrepresentation is not valid when it concerns agency. The justification is that cancellation of the contract in case of misrepresentation is retrospective. In a contract of agency, parties to the contract can conserve the benefits that have accrued to them on the date of rescission of the contract. In the words of *Dixon J.* in *McDonald v. Dennys Lascelles, Ltd*:[81]

> *Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which accrue from its breach alike continue unaffected*.

Nevertheless, the court has to appreciate the gravity of the damage caused by the agent's breach; it may be preferable to restraint the agent from further breach of the obligations.

b. Injunction to restrain further breach of ethical obligations

An injunction is another way by which the performance of a contract *in specie* may be enforced.[82] It could be a suitable remedy in case of breach of the duty of non-competition. An injunction is either prohibitive or mandatory. A prohibitive injunction is granted to restrain the breach of a promise while a mandatory injunction is issued to constrain a promisor to perform a positive act; it is retrospective in its effects and not merely preventive. Here we are interested in a prohibitive injunction because it is usually granted only in case of a negative promise.[83] Like specific performance, an injunction is a remedy for breach of contract where damages may not adequately protect the promisee. An injunction therefore, ensures some sort of indirect specific performance. It is issued in a contract which contains a negative promise

[79] Treitel G.H., *An Outline of the Law of Contract* (1979), Second Edition, London, Butterworths, 82.
[80] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, *op. cit*., 584.
[81] (1933), 48 C.L.R. 457 at pp 476-7.
[82] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, *op. cit*., 614.
[83] Achike O., *Nigerian Law of Contract*, Enugu, Nwamife Publishers Limited, 1981, 310; Boillot C., « L'obligation de ne pas faire: étude à partir du droit des affaires », RTD Com., nº 2, 2010, 243-267.

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such as a promise not to compete.[84] Where an agent violates a non-competition clause, an injunction may be granted to restrain the breach.

Such restraint will entail that the violator should cease performing his activities. As such, if the agent has established a competing business or enterprise, the court will order its closure[85]. The court will also grant an injunction restraining the agent from producing goods with the use of confidential information[86]. This solution cannot be adopted if the agent has become an employee of another producer within the area or time restricted. This is simply because the court cannot issue an injunction ordering an employee to resign or an employer to dismiss a worker. Nevertheless, the employer can be sanctioned if he knew of the agent's obligation, since he will be considered as an accomplice and thus, guilty of disloyal competition.[87]

There are times the courts will not issue an injunction even if there is proprietary interest meriting protection. It may happen that the restraint though reasonable, is one which nevertheless prejudices the public by depriving it of much needed additional services of the kind provided by the business.[88] This may be the case with opening of a chemist's shop in an area in which there was shortage of chemists. In certain countries restraint of trade is not allowed for physicians. In Colorado for example, statute prohibits using non-competes to enjoin the practice of physicians.[89] In other words, injunctions are not available as a remedy for a violation of a non-compete agreement by a physician in Colorado.

Similarly, a restraint on an agent might be struck down, though it satisfied the test of reasonableness, if the agent had special skills, for which there was great public demand. It could also be struck because of the social and moral implications of an injunction limiting a person's ability to earn a livelihood. More generally, damages are sometimes more attractive than an injunction on policy grounds.

c. Recovery of damages for breach of ethical obligations

The remedy of damages is always available when a contract has been broken or when a tort is committed. In this respect, it differs from claims for specific performance or restitutionary relief discussed above, which may be subject to the discretion of the court, or only be

[84] Treitel G.H., *An Outline of the Law of Contract, op. cit.*, 363.
[85] Houin R. & Pedamon M., *Droit commercial*, *op. cit*., 298.
[86] *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd* [1964] 1 WLR 96.
[87] Zeumo Nguenang M., *Les restrictions à la libre concurrence en droit positif Camerounais*, Thèse de Master, Université de Dschang, 2011, 160 ; Poumarede M., « La sanction de l'embauche déloyale d'un salarié d'une entreprise concurrente : aux confins du droit des affaires et du droit du travail », RTD Com., nº 4, 2012, 651 et seq.
[88] Treitel G.H., *An Outline of the Law of Contract, op. cit.*, 175.
[89] Jay Kesan P. & Carol Hayes M., "The Law and Policy of Non-Compete Clauses in the United States and their Implications", Illinois Public Law and Legal Theory Research Paper Series nº 11-07, 381-404, 2013, 391.

available if certain conditions have been satisfied. The victim of a breach of contract is entitled to damages as of right. Even if he has not proved any loss, he is entitled to nominal damages. Claims for nominal damages may be awarded simply to establish the existence of a legal right.[90] This is the case of a breach of a non-competition clause in the contract of sale of business[91], since the vendor's obligation of non-competition is statutory and therefore, gives the purchaser a legal right not to face the vendor's competition. Nevertheless, actions for nominal damages have become something of a rarity and of an anachronism[92]. Thus, focus here will be on recovery of substantial damages.

Substantial damages are awarded as compensation for any loss that the plaintiff might have suffered. If the plaintiff has suffered damage that is not too remote, he must, so far as money can do it, be restored to the position he would have been in had that particular damage not occurred[93] or had the contract been performed[94]. This means that the plaintiff is put into the position he would have achieved if the obligation (non-competition clause for instance) were not breached[95]. The compensation principle in the recovery of damages warrants that the plaintiff should prove loss before any substantial damages can be awarded. They are concerned to cover or provide a financial equivalent for the claimant's loss caused by the breach of an obligation[96].

The difficulty in awarding substantial damages in case of breach of ethical obligations will be its assessment. This is because the assessment is based on the loss sustained, which itself is difficult to evaluate. Loss generally means any harm to the person or property of the plaintiff, and in business specifically, it will mean any amount by which the plaintiff's wealth is diminished in consequence of the breach of an obligation. This certainly will have to do with the profits he would have earned. In this case, the award of damages will be based on speculation.

Speculative damages are awarded where a breach of obligation might have deprived the plaintiff of the chance of gaining some benefit. Such damages will be awarded for "loss of profits" due to the violation of ethical obligations, even though there was only a chance and

[90] Treitel G.H., *An Outline of the Law of Contract*, *op. cit*., 324.
[91] Civ. 1ere, 31 mai 2007, RTD Civ. 2007, p. 568, obs. FAGES B.
[92] Treitel G.H., *An Outline of the Law of Contract*, *op. cit*., 324.
[93] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, *op. cit*., 590.
[94] *Robinson v. Harman* (1848) 1 Exch 850, Court of Exchequer.
[95] Ets Leo Werner Finzl c/ Nanfack Fozem Jean, TPI Douala-Bonanjo, Jugement Civil nº 271 du 4 juillet 2007 ; Dame Sahnatu Salifu c/ La Sté Cameroun Télécommunication, TPI Douala-Ndokoti, Jugement Civil nº 004 du 6 janvier 2009, see Zeumo Nguenang M., *Les restrictions à la libre concurrence en droit positif Camerounais*, *op. cit*., 155.
[96] Burrows A., *A Casebook on Contract*, Oregon, Hart Publishing, 2007, 337; Terre F., Simler P. & Lequette Y., *Droit civil, les obligations*, Paris, Dalloz, 2005.

not any certainty that such profits would be made. In such a case, the value of the chance is to some extent a matter of speculation. The court has to value the expected benefit and also to take into account the likelihood of its being actually received by the plaintiff[97]. The fact that the chance cannot be valued precisely is no ground for refuting its value at all[98].

The parties may in their agreement avoid the difficulty and uncertainty associated with the assessment of damages in case of non-respect of the contract. In this case, they may insert a liquidated damages clause which fixes a sum to be paid in the event of breach[99]. If the sum is a reasonable estimate of the probable loss, the provision will be valid. This clause is of utmost importance in non-compete agreements and will be regarded as a valid liquidated damages clause if "the consequences of breach are such as to make precise pre-estimation an impossibility"; and if in addition, the actual amount bears a reasonable relation to the probable consequences of the breach[100]. In *Dunlop Ltd. v New Garage Ltd*.[101], a contract for the sale of tyres imposed numerous restrictions on resale and provided that the buyer should pay the seller £5 for every tyre sold or offered in breach of the agreement. This provision was held valid since such breaches had a general tendency to disrupt the seller's business organisation, though the exact loss flowing from each breach was almost impossible to quantify.

A principal is also entitled to an account from his agent of any profits the latter may have made in breach of confidence. In *Peter Pan Manufacturing Corp v Corsets Silhouette Ltd*[102], for instance, the claimants sought injunctions restraining the defendants from manufacturing or selling brassieres of the styles known as 'U15' and 'U25' (and also a fabric known as 'striped fabric') which the claimants had designed, patented, and marketed under a variety of alluring brand names. *Pennycuick, J* while granting an injunction forbidding further manufacture of products deriving from use of the confidential information, also ordered that the defendants account to the claimants for all profits made from sales of the articles in question. The above civil remedies are different from those that may be sought in case of breach of post-term ethical obligations.

2. Remedies specific to breach of post-term ethical obligations

Post-term obligations such as non-competition are based mostly on agreement. Like any other contractual clause, such agreement needs to be enforced; it needs to be valid since an invalid

[97] Treitel G.H., *An Outline of the Law of Contract*, *op. cit*., 337.
[98] *McRae v. Commonwealth Disposals Commission* (1950) 84 C.L.R. 337, 411.
[99] Code Civil, articles 1150 et seq.
[100] Treitel G.H., *An Outline of the Law of Contract*, *op. cit*., 351.
[101] (1915) A.C. 79, 87-88.
[102] [1964] 1 WLR 96.

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contract is void and or unenforceable. Remedies or sanctions for the breach of conditions of validity of a contractual clause will vary depending on whether they are conditions of substance or form. The gravity of sanction therefore, is determined by the nature of the condition breached. In this perspective, any disregard of conditions of validity of a non-competition clause may be sanctioned by nullity or unenforceability of the clause.

a. Nullity of the agreement

Nullity is a remedy pronounced by the court and entails retrospective annulment of a legal act which does not fulfil the required conditions[103]. Nullity may be absolute or relative. Relative nullity is when it is intended to protect a party to the legal act, for instance, incapacity to contract. Absolute nullity arises where substantial or fundamental conditions intended to protect general interest or public policy, are violated. In this case, the agreement is considered null and void; the parties are deemed to never have contracted at all[104].

A contract restraining trade is *prima facie* void, but it becomes binding upon proof that the restriction is justified in the circumstances as being reasonable from the point of view of the parties themselves and also the community[105]. Such contracts should meet the conditions of validity without which they will be void. A non-competition clause which falls short of substantial conditions of validity is void; it is considered to never have existed in the first place. This solution is dangerous because it liberates the agent from the obligation and his acts can cause continuous damage to the principal. For this reason, the tendency in France today is to revise the clause rather than nullifying it[106], a solution criticised by a Cameroonian author who thinks that a contractual clause which falls short of conditions of validity should be annulled automatically.[107]

Nevertheless, a distinction should be drawn between a void and a voidable non-competition clause. A voidable contract is valid initially but can be avoided or set aside by the plaintiff within reasonable time. A non-competition clause that was initially valid may be set aside subsequently if conditions consequent on the clause are not fulfilled. This may be the case in a contract of agency, where the principal fails to pay a special indemnity agreed initially as consideration for the clause at post-term,[108] making it unenforceable.

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[103] Guillien R. & Vincent J., *Lexique de termes juridiques*, 18e Edition, Paris, Dalloz, 2011, 236.
[104] *Mogul Steamship Co. v. McGregor, Gow & Co*. |1892| A.C. 25 at p. 39, per Lord Halsbury.
[105] Furmston M.P., *Cheshire and Fifoot's Law of Contract*, *op. cit*., 368.
[106] Serra Y., « Dix années de jurisprudence en matière d'obligation de non-concurrence en droit du travail », in Dix ans de droit de l'entreprise, p. 161, cited by Zeumo Nguenang M., *Les restrictions à la libre concurrence en droit positif Camerounais*, *op. cit*., 149.
[107] Olanguena Awono U., *Liberté du commerce et de l'industrie au Cameroun*, *op. cit*., 154-156.
[108] UAGCL, S. 219.

b. Unenforceability of the agreement

A contract is unenforceable if it cannot be received in evidence in court during judicial proceedings because it does not conform to a particular formality. This is usually the case when the contract is not in writing or is written but not as prescribed by law. Unless the law so provides, breach of formalities in a contract is always sanctioned by unenforceability. As such, a non-competition clause which is not stipulated in writing is unenforceable.

Even though, the Act does not emphasise on writing as condition of validity of an agency contract, it is obvious that if there is a non-competition clause at post-term, it must be written. If this formality is not respected, the clause cannot be accepted in evidence in court proceedings and will, therefore, be unenforceable. A valid non-competition clause may be unenforceable because it is unreasonable. The courts' inquiry into the reasonableness of non-competition contracts indicates that there is a general presumption against their enforcement[109]. Unenforceability of a non-competition clause may be based on the personhood view, which holds that a non-competition contract may be invalidated if the agent demonstrates a personhood interest in the right that he has contracted away[110]. This means that if he can show some personal stake in what he is giving up, which would be the right to work at a particular occupation in a particular area, then the contract cannot be upheld. This is possible in the situation where the agent had the experience or knowledge before entering into the contract with the principal. That is, the principal has not contributed any specific information or training to the agent. It may equally be that he has an interest in the invention that is contracted away.

In the same line of reasoning, there is no entitlement in a principal to restrict an agent from disclosing or making use of know-how gained in the course of the agency. Know-how represents an agent's accumulated knowledge, skill and experience derived by reason of the agency relationship with the principal and must be distinguished from confidential information[111]. An express contractual term restricting an agent's post-agency use of know-how is, again on the grounds of public policy, likely to be struck down as an unreasonable restraint of trade. Summarily therefore, non-competition clauses are only enforced to the extent necessary to protect the interests of the principal.

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[109] Gallo A.J., "A Uniform Rule for Enforcement of Non-competition Contracts Considered in Relation to "Termination Cases", *op. cit*., 721.
[110] *Ibid*, p. 726.
[111] Dal Pont G.E., *Law of Agency*, *op. cit*., 313.

Unenforceability of a non-competition clause may be due to wrongful termination of the contract by the principal. In this case, the principal is rather required to pay the agent damages. This is logical because except otherwise provided by statute, post-contractual obligations are binding only if the contract terminates normally. Nullity and unenforceability generally protect public interest but there are other remedies that protect the victim of the breach of valid restraint of trade. The principal may decide to prosecute the author of the breach if it also constitutes an offence.

B. Criminal sanctions for the breach of ethical obligations

Criminal sanctions lie most often for breach of confidence or professional secrecy. The breach of confidence by an agent, though essentially a civil wrong, may give rise to a criminal offence. The agent will be criminally responsible under national laws[112] of the contracting states punishing the violation of professional secrecy[113] and corruption. These sanctions are applicable only if the agent is a natural person.[114]

1. Criminal sanctions against an agent for breach confidentiality

Penal laws of OHADA member states provide sanctions for breach of professional secrecy. Section 310 of the Cameroonian Penal Code, for instance, provides:

> *Whoever without permission from the person interested in secrecy reveals any confidential fact which has come to his knowledge or which has been confided to him solely by reason of his profession or duties shall be punished with imprisonment for from three months to three years and with fine of from twenty thousand to one hundred thousand francs.*

From the above provision, it is clear that it is not all revelation of protected information that is punishable. The agent is protected if the revelation is made with the consent of the principal. It is also the case if the revelation is required by law such as statements made during legal proceedings[115]. The agent may also be exempted if the principal is no longer carrying out the activity which was intended to be protected.

These sanctions are intended to deter any agent from divulging information on the commercial or industrial secrets of his principal. However, the victim of the offence benefits nothing from

[112]See for example, sections 310 and 311 of the Cameroonian Penal Code, sections 316 and 383 of the Ivorian Penal Code, sections 176 and 214 of the Togolese Penal Code, etc.
[113] Akuété Santos P. & Yado Toé J., *OHADA, droit commercial général*, *op. cit*., 319 ; Galloux J.C., « Droits sur les créations nouvelles », RTD Com., nº 1, 2014, 87 et seq.
[114] This precision is necessary because under the Uniform Act, an agent as a middleman may be a natural person or corporate body, see section 169.
[115] Section 310(2) of the Cameroonian Penal Code.

these sanctions. The Cameroonian lawmaker does not demonstrate a lot of rigour in preventing further breach of secrecy or use of confidential information released by the offender, especially when his sanction is not imprisonment. It is true that the law permits the court upon conviction to order one of the forfeitures in section 30 of the Code[116] but this is only discretionary. There are even some accessory penalties provided by the same Penal Code, which may be of help to the victim of the offender's act but are not applicable here. For instance, section 34 of the Code gives the court the opportunity to:

> *... order closure of a business or industrial establishment, or of any premises devoted to gainful activity, which was used for the commission of an offence, such closure shall imply a ban on the exercise of the same business or industry or activity in the same premises, whether by the offender or by any other to whom he may sell, transfer or let the establishment or premises*.

Unfortunately, this sanction applies only where the definition of the offence and its sanction provides for it, which is not the case with the breach of secrecy. This may be justified on the basis of public policy; the closure of an establishment may engender economic and social problems such as loss of jobs which the state will always want to avoid. Is it possible for the court in this situation to order the closure of the establishment with an obligation on the victim to take over the employees of the offender or beneficiary of the confidential information? This would have been a better solution but the court cannot oblige an employer to employ because of contractual freedom that characterises employment contracts. Besides, the victim enterprise may not have the capacity to absorb the workers and even if it does, the workers may refuse the new employer. What then can the victim do to avoid losing everything? In this case, it will be advisable for the victim besides prosecuting the offender, to introduce a civil action to recover damages.

2. Criminal sanctions against an agent for corruption

Corruption is another breach of ethical obligations which constitutes an offence and punishable by the criminal laws of member states. The Cameroonian penal code punishes corruption in various forms[117]. Unfortunately, there is no specific mention of an agent involved in corruption. However, the code punishes corruption of private sector employees. Section 312 punishes *whoever, either directly or indirectly, makes offers, promises, gifts, presents or procures any other advantages in order to abstain from a person…the performance or non-performance of any professional act or the facilitation of the*

[116] *Ibid*, Section 311(2).
[117] See for example sections 134-136.

performance of such professional act…in violation of his legal, contractual or professional duties, with imprisonment for from one to five years and with fine of from CFA 200000 to CFA 2000000. The sanctions also apply to whoever in similar circumstances refrains from performing his legal, contractual or professional duties. These sanctions could be meted out on an agent who receives bribe in any form to perform or refrain from performing his duties.

IV. CONCLUSION

The OHADA Uniform Act on General Commercial Law governs agency relationship. Nevertheless, concerning the duties of non-competition and confidentiality, it lays down only general principles leaving much in the hands of the parties, national legislators and the courts. So many lacunae exist relating to the substantial rules regarding these duties and remedies for their breach. This article reveals that the duties are sparsely regulated and the Act is almost silent on the effects of their breach. Presently, solutions to certain problems relating to the duties of confidentiality and non-competition can be found in national laws and case law of the members states, at least pending the time that the legislator will make up for the lacunae or that the CCJA will lay down precedent. Paradoxically, most of the OHADA member states have not enacted laws to tackle these specific aspects of agency relationship. This is inimical to the harmonisation mission of OHADA. This article advises the OHADA lawmaker to amend the Act to address the deficiencies identified.

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