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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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INTERNAL RELATIONS BETWEEN PRINCIPALS AND AGENTS
IN THE INTERNATIONAL SALE OF GOODS

PRELIMINARY DRAFT OF A UNIDROIT CONVENTION
ON CONTRACTS OF COMMERCIAL AGENCY IN
THE INTERNATIONAL SALE OF GOODS

prepared by Professor Dietrich Maskow

(Professor of International Commercial Law, Institute of
Foreign and Comparative Law of the Academy of Political
and Legal Science, Potsdam-Babelsberg)

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PART I - GENERAL OUTLINE OF THE PROBLEM

1. Historical and economic background

1.1 Aspects of the development of the law of agency

The historical development of the legal regulation of agency in the broadest sense first emerged out of the necessity of regulating the situation where one person, the agent, is authorised to act for another person, the principal, and to bind that person by his own, the agent's, legal acts. This problem arises in many different contexts including family law and the law of succession, but very frequently in commercial life.

Differing opinions have been expressed as to when this legal institution, depending on the social requirements, first evolved. As to the situation in Roman law, some authors emphasize the development of certain forms of agency,⁽¹⁾ while others stress that Roman law ... never developed a complete theory of agency".⁽²⁾ At least there seems to be no argument that the law of agency has been more fully developed since the Middle Ages, to which end different methods have been employed by the civil law on the one hand (with further major modifications) and the common law on the other.

One tradition of the civil law system is to combine the right to act for somebody else, the authority, with the mandate. It finds its expression in existing legal systems and particularly in the French CC (Art. 1984 *et seq.*). However, modern French *doctrine* accepts the separation of mandate and authority,⁽³⁾ and Rigaux describes the French system of *représentation-mandat* as "an unsuccessful attempt to create a theory".⁽⁴⁾ Nevertheless this system has recently (1977) been adopted in the Québec draft CC (V. 707 *et seq.*).

A later development is connected with the name of Laband who developed a theoretical separation of authority from mandate.⁽⁵⁾ This theory has been adopted *inter alia* in the FRG/CC (para 164 *et seq.*), in the Swiss CO (Art. 32 *et seq.*) and in the Italian CC (Art. 1387 *et seq.*). Such a separation also exists in socialist legal systems as for example in RSFSR/CC (Art. 62 *et seq.*), CSSR/CIC, GDR/CC (para 53 *et seq.*) and GDR/ICCA (para 18 *et seq.*).

It must be recalled that Laband worked out his theory in connection with the *procura* which has a special importance for the representation of firms. Modern company law has developed many other forms for the representation of different kinds of firms, for instance by law and by the basic documents of the firm so that *procura* has lost something of its importance. To that extent, legal policy reflections relating to the protection of the public have become less severe. Even in relation to *procura* however the absolute separation of authority from mandate has subsequently diminished.⁽⁶⁾

In common law the theory of agency has developed in another direction,⁽⁷⁾ as a result of which the identity of principal and agent is the theoretical foundation of agency. Whereas the predominant civil law theory of agency mainly protects the third party, the common law theory contemplated in the first instance the protection of the principal.

While under the civil law the authority may be combined with different types of contract, this possibility does not exist in the common law, which does not have a developed system of types of

contracts regulated by statute. In common law agency is a rather general concept, but nevertheless certain particular forms do exist. The concept of agency is at least seen in close connection with the concept of contracts. With regard to the law of the USA Sell writes (quotations omitted): "While the agency relation is not necessarily contractual in nature, it is fundamentally a consensual relationship, in that it requires some manifestation by the principal that he wishes the agent to act for him and some indication of the agent's consent to act for the principal".⁽⁹⁾

A further characteristic feature of the common law is that it draws no important distinction between direct and indirect agency; in other words the commission agent is also covered by the general concept of agency.

1.2 The law of intermediaryship

There is however a second and in our context an even more relevant line of legal development which concerns the situation where one person, the intermediary or mercantile agent, acts in the marketing and distribution of the goods or services of another person, the principal, a phenomenon to be found in the business sphere. The connection lies in the fact that a person who acts in the sale of goods of another person is sometimes authorised also to act in the name and/or on behalf of that person although this is not necessarily the case. Nevertheless, legal developments have established a certain connection and sometimes even an exaggerated intermingling of the two problems.

In order to foster the development of a genuine international trade law, in the sense of a law which is international not only in its subject matter but also as regards its sources, it would seem to be necessary generally to draw a rather clear distinction between the two problems. This is important from a practical point of view, insofar as certain international instruments in both fields have already been elaborated (see 1.3) and this fact has to be taken into consideration when submitting new proposals. Furthermore, this distinction enables us to identify the real issues at stake and to focus on them. It thus becomes possible to define a manageable catalogue of problems which are also sufficiently homogeneous to be covered by international instruments.

From a theoretical standpoint this distinction is not quite the same as that between authority and mandate or, generally speaking, between first the external relations of the principal or the agent on the one hand and the third party on the other, and second the internal relations between principal and agent. If such a distinction is drawn the so-called internal relation has to be viewed quite differently. It does not necessarily include the traditional agency as the establishment of authority, but is concentrated on the different rights and duties of the parties in the context of distribution and marketing, in our case even more specifically in the sale of goods. In other words, these internal relations are not so much seen as a prerequisite for the establishment of external relations of an agency character, which very often never arise, but as a contract with its own content and purpose (for further discussion of the problem see 2.1).

In our age the marketing and distribution of goods have become a more and more important link in the chain of the production cycle.⁽⁹⁾ Producers are obliged to find the most effective distribution channels which are best adapted to the characteristics of their goods and to the preferences of their customers, and which at the same time permit cost saving.⁽¹⁰⁾

One important means for the organisation of marketing and distribution is the contractual integration of self-employed entities (mercantile agents, intermediaries) into the marketing network

of the producer. In this connection, a great variety of forms has emerged, the three main categories being:

the *commercial agent* who negotiates transactions for the principal or concludes contracts in his name and on his behalf;

the *commission agent* who makes contracts in his own name on behalf of the principal;

the *dealer* who in his own name and on his own account buys and resells the principal's goods.

Whereas the commercial agent and the commission agent are remunerated by a commission, the dealer secures his earnings out of the difference between his buying and his selling prices. The most important criterion for differentiation from a legal point of view is however the varying degree of independence of mercantile agents which increases in the above-mentioned order. Legally, these different degrees of independence appear in both directions, in relation to the principal on the one hand and to the third party on the other. But from a factual and social point of view the degree of independence of the intermediary does not necessarily depend on such legal forms. A dealer may be as dependent on the principal as a commercial agent, and even in the determination of the selling price, which seems to be a prerogative of the dealer, he may be bound by the principal in one way or another.

Besides these main forms a number of other variants have developed. The concept of the intermediary starts from the assumption that he acts on a permanent basis. This is the typical case. Nevertheless it is also possible for an intermediary to be engaged only in order to negotiate a single very important contract. In that case we speak of a *broker* as a sub-category of commercial agents. This category is further modified when the broker acts not only in the interest of one of the parties to the intended contract, as is the rule with intermediaries, but in the interest of both of them.

Another variant of intermediaryship may be seen in special types of so-called franchising which is "a system for marketing a product or service ... a contract between one party (the franchisor) and a second party (the franchisee) by which the former permits the latter to market a certain product or service under his trademark, tradename or symbol, against the payment of an entrance fee or royalty, or both. It is, however, the franchisee that makes the investment necessary to the business - he is a businessman in his own right and not an employee of the franchisor".⁽¹¹⁾

The franchisee is to a certain degree a special kind of dealer as he has to market, as a legally independent business, the goods or services of the franchisor. On the other hand the nature of the franchisee cannot for the most part be satisfactorily explained by reducing it to that of a special dealer. Sometimes this aspect even becomes less important. The franchisee also has something in common with the licensee.

The legal regulation of these contractual forms of marketing differs considerably from one country to another. It follows from the observations made above in relation to the differences between the civil law and the common law that the development of legal rules governing distribution and marketing problems, to the extent that they are in any way connected with agency, fits more conveniently into the civil law system. Indeed the legal regulation of contractual types and other legal institutions relating to distribution and marketing has developed mainly in civil law countries (but see the English Factors Act 1889).

In the years after the Second World War such legislation acquired a new dimension, mainly in some Western European countries, insofar as it was increasingly amended by rules for the protection of certain types of intermediaries. These rules were first and foremost directed to the protection of small firms or individuals acting as intermediaries, that is to say agents which are formally independent but whose position is comparable to that of an employed agent or even worse. Such agents mainly act of course within the territory of their own countries and therefore the protection is sometimes not extended to, or is less great for, agents acting at the international level. Those rules are of a mandatory character and are sometimes supplemented by jurisdictional and international private law rules which provide for the application of the enacting State's own law and the conferring of jurisdiction on its own courts so as to avoid the circumvention of the protection by way of the stipulation of foreign laws and jurisdictions.

Even the protection accorded by labour law or certain parts of it has been extended to some categories of intermediaries which are to a certain extent formally speaking independent. This latter approach has not been taken into consideration in this study, since it is of minor importance for international trade. But even insofar as it is relevant, this aspect does not for the time being seem to be amenable to unification of law on a universal plane.

In some socialist countries special rules have been enacted for intermediaries acting in international trade which are mainly directed to the integration of the intermediary into the marketing and distribution systems of foreign trade enterprises.

Many developing countries have introduced special legislation on intermediaries including provisions for their protection or for that of special categories of such intermediaries. In a few other developing countries another trend of legal development has emerged, namely the restriction or even prohibition of the activities of intermediaries,⁽¹²⁾ aimed at preventing abuses designed to exert undue influence on States or State enterprises to make certain contracts. It seems that such measures are only a transitory phenomenon.

These brief remarks will show that the centre of gravity in the regulation of agency has shifted from agency questions connected with the external relation (authority) to questions relating to intermediaryship. Interestingly enough, this development is reflected much less in the common law sphere. At least, the two most representative common law countries, England and the United States of America, have up to now introduced no special legislation to protect intermediaries.

1.3 Activities of international organisations in the fields of agency and intermediaryship

Because of the importance of agency (in the broad undivided sense) in international trade it is by no means surprising that the topic appeared rather early on the agenda of the international unification of law. As far back as 1935 work started in Unidroit⁽¹³⁾ and led in 1961, insofar as the subject dealt with here is concerned, to two drafts, that is to say the draft Convention providing a Uniform Law on Agency in Private Law Relations of an International Character and the draft Convention providing a Uniform Law on the Contract of Commission in the International Sale or Purchase of Goods. Principally because the distinction between agency and commission is not known to the common law the adoption of those draft Conventions proved to be impossible. In 1974 therefore a new draft Convention providing a Uniform law on agency of an international character in the sale and purchase of goods was drawn up. This draft covered both direct and indirect agency as well as the so-called internal and external relations. In other words it also dealt with certain aspects of intermediaryship.

This draft was discussed in 1979 at a diplomatic Conference in Bucharest, but the Conference could not agree upon a Convention (the form of a Uniform law having been abandoned). The difficulties which arose or which had to be expected if the work were to be continued on the same basis related in particular to the regulation of the relations between principal and agent. Some Western European countries which had enacted mandatory rules for the protection of the agent were not in a position to abandon them in the context of agency in the international sale of goods. On the other hand the socialist States were interested in regulating those relations although not by way of mandatory rules. The common law countries showed little interest in the regulation of these relations but since the Conference had from the beginning decided to extend the scope of the Convention to agents who only negotiated contracts, the need to consider the internal relationship became all the more urgent.

One of the reasons why these difficulties could not be overcome was that the EEC countries were preparing a Council Directive on a subject related to the intended scope of the Convention. The Directive has since been adopted,⁽¹⁴⁾ but was at the time the subject of intense debate.⁽¹⁵⁾

Lastly it should be mentioned that it did not seem to be desirable to unify the law of agency before the unification of sales law, which is the basis of international trade law, had been completed.

In the aftermath of the Conference it was decided as a result of the work of several sessions of different groups that relations between principals and agents should not be dealt with in the future Convention. A correspondingly reduced draft was prepared and considered at a diplomatic Conference which took place in Geneva from 31 January to 17 February 1983 and which saw the adoption of the Convention on Agency in the International Sale of Goods (CAISG).⁽¹⁶⁾ The Convention is not yet in force, but has been extensively discussed in the literature.⁽¹⁷⁾

The Conference further adopted a Final Resolution,⁽¹⁸⁾ whereby it agreed "that the further development of international rules relating to the relations between principal and agent in agency in the international sale of goods would be an important contribution to the development of international trade" and requested Unidroit "to consider the possibility of elaborating rules on a global or a regional level governing the relations between principal and agent in the international sale of goods."

Accordingly, in pursuance of a decision taken at the 62nd session of the Governing Council of Unidroit⁽¹⁹⁾ M.J. Bonell prepared a first paper⁽²⁰⁾ in which he expressed doubts as to "whether, at least for the time being ... there is sufficient justification for Unidroit to proceed to the preparation of uniform rules, whether on a global or a regional level, in this particular respect" (p. 70).

On the basis of this report the Governing Council decided at its 63rd session in May 1984 "to adjourn further discussion on the possibility of pursuing work on the internal relations between principals and agents until a later stage by which time it would be possible to assess developments in this field and in particular the outcome of the work in the European Communities on the draft directive on commercial agents."⁽²¹⁾ After that Directive had been passed by the Council of the European Communities on 18 December 1986 the Governing Council commissioned this study at its 66th session in September 1987.⁽²²⁾

The EEC Directive is indeed one of the decisive starting points for an evaluation of whether unification of the rules governing the relations between principal and agent is feasible and, if so, for the determination of the content of such rules. Here, only four principal aspects will be discussed.

First, the Directive does not provide a complete regulation of the subject but aims rather at the coordination of the laws of the Member States on the most important issues. This means that those States must bring their national law into line with the Directive within certain time-limits (Art. 22 EEC Directive), while maintaining their national law including indigenous provisions not in conflict with the Directive. Possible uniform rules governing the relations between principal and agent could relate also to some of the matters which were not coordinated, although it may turn out to be impossible to find solutions at universal level for all the delicate questions dealt with by the Directive.

Second, the Directive relates only to "commercial agents", a term which means "a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the 'principal', or to negotiate and conclude such transactions on behalf and in the name of that principal" (Art. 1, para 2). In other words the Directive does not cover commission agents, brokers or dealers. It is confined to the sale and purchase of goods, but does not require that the commercial agent have authority to act.

Third, the Directive to a large extent, and particularly for the most important questions, contains mandatory rules.

Lastly, it has to be stressed that the Directive deals exclusively with relations between principal and agent.

A further development should be mentioned which, although it has not been pursued at State level, clearly indicates the importance of the subject. This is the ICC Guide on Commercial Agency which was first published in 1961 and which has been updated by the 1983 version.⁽²³⁾ This document is also restricted to commercial agents in quite a similar way to the EEC Directive and indeed even more narrowly as it envisages only cases where the agent has the task of selling goods (Preliminary remarks). The Guide gives recommendations to the parties, taking into consideration not only possibly relevant provisions of the civil or commercial law of the respective countries, but also provisions for the regulation of the foreign economy (trade policy), taxes, cartels etc.

Documents of this kind and even model contracts are widely drawn up by international and national associations representing different interests as also of course by individual firms and legal writers. It follows from the character of these documents that they deal only with the relations between principal and agent.

1.4 Private international law of agency and intermediaryship

Finally, the treatment of agency in private international law must be mentioned. In that respect some results have already been achieved in that a Convention on the subject has been adopted.⁽²⁴⁾

The scope of this Convention is rather wide, wider indeed than that of the EEC Directive or of CAISG. It relates to agents with authority to act, who act or purport to act on behalf of another person, including cases where the agent has the function to receive and communicate proposals or to conduct negotiations on behalf of other persons irrespective of whether the agents acts in his own name or in that of the principal, or regularly or occasionally (Art. 1). There are different solutions for the relations between principal and agent (Chapter II) on the one hand, and the relations with the third party (Chapter III) on the other. Solutions for all relevant conflict of laws questions are thus offered. This Convention is not yet in force. As regards the EEC States the Convention on the Law Applicable

to Contractual Obligations⁽²⁵⁾ could also be of relevance. Although not yet in force, it has already been enacted as the national law of some EEC States. The EEC Convention would however cover only the relations between principal and agent.

For the solution under the national rules of international private law see Rigaux (*op. cit.* - footnote 4 - p. 29-1 *et seq.*).

It is widely known and accepted that in contract law in particular rules of private international law may supplement, but not replace, the unification of substantive law.

2. Conclusions regarding future work

2.1 The desirability of uniform rules on the law of intermediaryship

The factual development of the international unification or coordination of the law of agency in general as discussed above demonstrates that the international community views this as a very important subject. Nevertheless the fact cannot be overlooked that the emphasis differs. The earlier efforts of Unidroit, although taking into consideration certain aspects of the relations between principal and agent, were nevertheless focused on the external relations which were felt to be the most important. In that regard Basedow has however rightly pointed out that while in legal science the regulation of the external relations is seen as the basic question of the law of agency, non-judicial practice is more interested in the internal relations. Since intermediaries such as brokers or commercial agents usually have no authority to conclude contracts the external relations only concern rare cases.⁽²⁶⁾

Schmitthoff likewise stresses that: "In no other branch of the law of international trade is the cleavage between legal theory and commercial reality greater than in the law of agency". He continues by mentioning various types of intermediaryship - and here his explanation focuses on the internal relationship - whose legal characteristics "have been elaborated by commercial practice and are often at variance with the concepts of agency developed by legal theory".⁽²⁷⁾

The basic feature of this cleavage between legal theory and the practice of international trade as observed by Basedow and Schmitthoff is that the fact is sometimes overlooked that agency (in its external - authority aspect) and intermediaryship are entirely different legal institutions. Theoretically they have nothing in common, at least no more than do industrial law or family law relations on the one hand and agency (authority) on the other. They may coincide in a particular legal relation and it may even be the case that legal rules connect certain forms of intermediaryship with a particular authority, but there is no necessary connection on either side. Intermediaryship may exist without authority and authority without intermediaryship. Confusing these different legal institutions as far as substantive law is concerned will only make it more difficult to solve the problems, as past experience has shown.

Of course these institutions do have a common core which may explain why up to now the same or at least closely related terms have been used to characterize them. Only recently have new expressions been coined to denominate the relations between a principal and a self-employed person entrusted by the principal with the organisation of sale (or purchase). While formerly in English such expressions as agency, mercantile agency and commercial agency were mainly used (but also factor) nowadays the term intermediary also appears in the same way in German; "Absatzmittler" gains ground

against "Handelsvertreter" and in particular "Vertreter", while in French "intermédiaire" is employed in relation to a "représentant commercial" or "représentant".

The independent character of the law of intermediaryship has been reflected by legal developments in many countries as well as internationally and also in the efforts of business circles at different levels (see 1.2 above). Also in common law countries intermediaries exist with their special legal problems which are not entirely and, so it seems, not to the satisfaction of those intermediaries, dealt with by the law. This became apparent when they expressed their support for the EEC Directive.⁽²⁸⁾

The increasing importance of the legal problems of intermediaryship is furthermore evidenced by the voluminous and ever-growing literature which is mainly practice-orientated and not so much devoted to doctrinal considerations.⁽²⁹⁾

There is moreover a considerable amount of case law. It can be estimated that the case law concerning intermediaryship by far surpasses in volume that concerning the so-called external relations. A review of international arbitration practice likewise shows that the problems of intermediaryship seem to play the main role. The Yearbook Commercial Arbitration as checked by reference to the Yearbook Key 1987 and in particular its "Index of Arbitral Awards Volumes I-XII"⁽³⁰⁾ contains seven cases relating to intermediary matters (I, 127; VIII, 89; IX, 109; X, 33; XII, 97; 124; 154, mostly dealing with commission, termination and damage). Only three cases (I, 136; IX, 145; XII, 160) relate to questions of authority which sometimes moreover play only a marginal role. This coincides with the personal experience of the author as an arbitrator, particularly with the Court of Arbitration attached to the Chamber of Foreign Trade of the German Democratic Republic.

Intermediary contracts are at present among the most important and most frequent contracts in international trade.

The practical importance of problems concerning intermediaryship is a reason, but not alone a sufficient reason, for unification of the rules governing it. One further important reason is that the need for unification is felt. This is particularly so when the existing national rules differ considerably, as is very much the case in this connection.

By way of summary it may be said that intermediaryship has become a legal institution in its own right which plays an important role in the practice of international trade, that it is quite frequently a source of litigation, that it is increasingly addressed by international documents at both State and non-State level and that in many countries it is governed by widely differing legislation, while other countries have until now enacted no such legislation, although some of them feel a need for it.

For these reasons it can hardly be doubted that unification of the law of intermediaryship is desirable. The question of whether it is feasible is however more difficult to answer. Nevertheless, a first glance seems to offer a positive conclusion. Documents drawn up in international practice and in particular the EEC Directive, but also, though to a lesser degree, guides and model contracts and national legislation in many countries have proved that it is possible to draw up rules which are confined to intermediaryship relations.

Lastly, it has been demonstrated - and again the EEC Directive provides the best evidence - that such special rules for clearly defined types of such relations are also possible within the framework of the common law and moreover that the common law and the civil law may be reconciled in this regard.

Whether uniform rules on intermediaryship are feasible also depends on the level of abstraction contemplated and, closely connected thereto, their intended scope. At present it does not seem possible, nor is there an urgent need, to work out a general set of rules for all kinds of intermediaryship. These relations are extremely varied. Limitations are necessary in two ways, one of them addressed to the form of the intermediaryship relationship and the other to its substance. The question of form may be considered first.

2.2 The contract of commercial agency as the main target for the unification of the law of intermediaryship

As has already been indicated (see 1.2), the forms of intermediaryship are manifold. To try to encompass them all in a single set of rules would on the one hand lead to generality and abstraction and reduce the regulatory and unifying effect and on the other increase the difficulties of reaching agreement. Before however submitting any proposal, the possibility of regulating the most important forms of intermediaryship will be discussed.

As far as the dealer is concerned he is evidently an intermediary, at least in the economic sense of the term, but it is just as clear that he is not an agent. His legal qualification is therefore different. When a link is seen between intermediaryship and agency the dealer is something quite different from an intermediary. The same is true - and this is the same problem looked at from the other side - when the sale elements in the principal-dealer relationship are regarded as decisive.

While legal regulation in some countries starts out from the economic position of the dealer and treats him as a kind of intermediary, taking account of his particular status by the formulation of special rules (para 106 *et seq.* of the GDR/ICCA), other legal systems exclude his being dealt with in this way with the consequence that his legal position is essentially that of the buyer as in the common law world. But also in civil law countries with a developed market economy a tendency to stress the character of the dealer as an intermediary has more recently been observable. It pursues the aim of strengthening the protection of the dealer as well as of approximating this protection to that of the commercial agent.⁽³¹⁾ This development has however not yet been consolidated.

The considerable differences in legal opinion in relation to dealers will surely be an impediment to including general or frame contracts between producers and dealers in a possible regulation of intermediaryship. Notwithstanding this, it cannot be denied that the frame, that is to say the intermediary contract between producers (or wholesalers) and dealers, as distinct from the individual sales contracts, has its peculiar characteristics. It is sufficient to mention the determination of the remuneration of the dealer, the position of the dealer as regards the provision of information to his principal concerning his clients and the contents of the contracts concluded with them, as well as the necessity of considering the individual sales contracts between principal and dealer already in the frame contract. Differences of opinion exist not only in respect of these problems, but also in the theoretical approach (relation between frame contract and individual contract, obligation to make contracts). Although intermediary contracts with dealers play an important part in international trade and the differences in legal treatment would justify an attempt at unification, it nevertheless seems premature to embark on such a project. It would appear to be more complicated than the subject which will later be recommended and it might therefore be preferable first to accomplish the seemingly easier task and then to use the results to tackle afterwards the more complicated one.

The commission agency relation is by its very nature a three-sided one whose tripartite character is determined by the agency aspect. The intermediaryship element concerns only the relations between

principal and commission agent. Since however it is a feature of commission agency that the agent acts on behalf of the principal in relation to third parties it is difficult to disassociate the intermediaryship relation from the external agency relation. The external agency aspect is covered by CAISG. There, however, it proved to be impossible to deal only with the external element and at least such essential aspects of the internal relation as the establishment, scope and termination of the agent's authority had to be included. In this connection certain rudimentary features of the intermediaryship relation were touched on, although the more important aspects were left open. Should a recommendation be made to supplement CAISG in that respect? It seems that this is not at present the case and further developments relating to CAISG should be awaited.

If regard is had to the attention paid in the literature to the individual forms of intermediaryship and to the role which they play in court and arbitration practice it becomes obvious that commission agency occurs less frequently than the other forms. This finding is confirmed also by the personal experience of the author and that of many colleagues he has consulted. To this extent there seems to be less practical need for rules governing commission agency than other forms of intermediaryship.

Furthermore, the regulation of commission agency in Article 13 of CAISG is a delicate compromise between the civil law and the common law. The differences in this field will once again emerge, even if only the repercussions on the bilateral intermediaryship aspect are to be settled. This relates for example to such complicated questions, treated also from a theoretical point of view, as the legal status of goods received by the commission agent but not yet transferred by him to the final creditor when the commission agent becomes bankrupt. There are in addition a number of peculiarities attaching to the commission agency contract, that is to say predominantly the intermediaryship aspects of the contract which arise from the situation it occupies between contracts of commercial agency and of dealership. To this extent reference may be made to the arguments against unification at the present time raised in connection with dealership contracts.

As regards franchising it has to be said that it is a very complex and varied phenomenon. In most cases franchising contracts seem to be centred around the granting of a know-how licence concerning a special distribution method accompanied by further obligations of the parties, but the distribution of certain products or services in itself is not the centre of gravity of these contracts. These typical franchising contracts would fall within the framework of the Unidroit initiative on the franchising contract (see above). Nevertheless cases may occur where franchising primarily serves for the marketing of certain goods⁽³²⁾ and to this extent such contracts may either be similar to contracts of commercial agency or to dealership contracts and be treated according to the respective rules governing those contracts.

Since a broker usually does not act on a permanent basis, but only occasionally, uniform rules on commercial agency drawn up for permanent relations could in principle apply to him only in an abbreviated and simplified version. It is therefore suggested that the broker should not be dealt with.

Lastly we come to the contract of commercial agency. There is in general no question as to the practical importance of this form of intermediaryship. Such relations very often occur in international trade and are most frequently addressed by existing rules of different kinds. The differences between these legal rules are so great that they constitute a genuine impediment to international trade. They relate to almost all aspects of the contract, to its form, to the rights and duties of the parties, to termination and especially to the legal character of the rules themselves, that is to say, whether they are mandatory or not. The mandatory method is used in those countries which lay down special norms

directed to the protection of the commercial agent. This is true in particular of most of the EEC countries and now of the EEC Directive. However, this method has so far been little used for that purpose in the classic common law countries and in socialist legal systems. The situation varies in the developing countries. The differences seem to be greater than in sales law and are therefore possibly more difficult to overcome.

Uniform rules on commercial agency are important for trade between the socialist countries and developing and developed market economy countries (as for some peculiarities concerning EEC members see below) as well as between and within these groups, which suggests that such uniform rules might even gain importance in trade among the socialist countries themselves. Intermediaries already play a significant role in trade between Yugoslavia and the other socialist countries. Their use by parties from non-socialist countries has been encouraged in some socialist countries and discouraged in others. The developments in certain socialist countries where many firms, apart from foreign trade enterprises, are progressively being entitled to conduct foreign trade operations will inevitably lead to the necessity for foreign exporters to make use of intermediaries in order to contact potential customers. To this extent, the socialist community, and in particular the CMEA, could use a possible universal Convention not only for its external, but also for its own internal requirements. In addition, the absence of rules in one or another socialist country could be remedied by such an international instrument.

As far as the internal relations within the EEC are concerned, doubts may be cast on the need for unification following the adoption of the EEC Directive, as Basedow already did when the Directive was under preparation (*op. cit.*, p. 211). Nevertheless the existence of the Directive does not necessarily render meaningless unification of the law of commercial agency, even for the EEC States. The Directive only requires coordination of the laws of the Member States insofar as it establishes rules. There are therefore still some areas left for unification, albeit not the most important ones. Uniform rules could then have a subsidiary effect on the commercial agency contracts between parties from EEC countries. This will be the situation of CISG as a subsidiary source of rules to the GCD/CMEA which constitutes the unified sales law of the CMEA Member States, insofar as CISG will be ratified by those States. Since the Directive aims only at coordination of national laws and is not an international agreement *stricto sensu* the legal techniques of Art. 90 CISG would have to be adapted to secure such a subsidiary effect. A further possibility would be that any future uniform rules would not be used at all within the EEC, for which purpose a reservation along the lines of Art. 94 CISG could be envisaged since the EEC States have at least closely related laws on commercial agency matters. The EEC Member States would of course have to decide for themselves the path which they would choose to follow.

On the other hand uniform rules could be important for EEC countries as far as commercial agency contracts between EEC and non-EEC parties are concerned. In this respect it is important to see how far the EEC countries will apply to such external contracts the mandatory rules of their laws on commercial agency as modified by the Directive. Since the legislation by which the EEC States will comply with the Directive is still under preparation it is too early to venture definitive assessments. In the Federal Republic of Germany it was formerly possible to agree in international contracts of commercial agency to the application of a foreign law, even if the agent had his place of business in that country⁽³³⁾ and thus to circumvent the mandatory provisions of the national law, irrespective of whether the agent acted there or not. It is open to doubt whether this practice will be upheld after the introduction of the new law on private international law⁽³⁴⁾ with its provision in Art. 34 concerning certain mandatory rules.⁽³⁵⁾ On the other hand, it is possible in the Federal Republic of Germany for

the parties to modify mandatory rules if the commercial agent has no place of business in that State. Foreign commercial agents are not protected by the mandatory rules (FRG/CC para 92c, subp. 1). It is intended to maintain this provision when the Directive is transformed into national law.⁽²⁶⁾ The intentions of the authors of the Directive as indicated in the preamble do not seem to make it necessary to extend the application of the mandatory provisions to commercial agents who have their place of business in the EEC to the extent that their field of activity is outside the EEC and this is all the more the case for those agents who neither act nor have their place of business in the Communities. Similarly, a commercial agent, whether or not he has his place of business within the EEC, but who acts in that territory for a non-EEC principal does not necessarily need extended protection by way of mandatory rules or even by a prohibition or limitation of the choice of law. Often, such an agent will be a rather strong firm, maybe even stronger than its principals who might perhaps come from a less developed country.

In any case the EEC cannot prevent the national law of third countries having jurisdiction (for instance because the commercial agent is acting there or has his place of business there) being applied to contracts of commercial agency. We may therefore draw the conclusion that uniform rules on commercial agency could possibly be of some significance for trade within the EEC while they would be of considerable importance for trade between EEC countries and countries outside the EEC.

By way of summary, it may be stated that the interest in universally accepted uniform rules on contracts of commercial agency might be strong enough to justify an initiative in this direction.

2.3 Limitation on intermediaryship in the sale of goods

Commercial agency may relate to the distribution of different goods and services and to the performance of other obligations. The influence of the type of performance on the rights and duties arising under a contract of commercial agency varies and is in some cases quite weak. However, in order to avoid difficulties as far as possible, any future uniform rules should be limited to commercial agents acting in the international sale or purchase of goods and focus in particular on the sale of goods. If even CAISG which deals with more general categories limits itself to agency in the international sale of goods, this seems all the more advisable for a more specific set of rules which obviously depends to a greater extent on the contracts to be negotiated. Furthermore, a modern trend has developed to relate different subjects to their relevance to sales contracts and to deal with them from that angle. This is, apart from agency, true also of the conflict of laws.⁽²⁷⁾ Even UCIF governs factoring contracts connected with the sale of goods (Art. 1, para 2, lit. a). The EEC Directive likewise limits itself to commercial agents active in the sale or purchase of goods (Art. 1, para 2) and the ICC Guide is indeed addressed only to agreements "entrusting the agent with the task of selling goods" (preamble). This grouping of different international instruments around the problem of the sale (including purchase) of goods facilitates the establishment of consistency between them and the development of a coherent and more comprehensive body of rules covering facts of life which are inter-connected. This method seems preferable to another theoretically possible one, namely concentrating on an extended regulation of certain particular institutions such as commercial agency, since that would increase the difficulty of drawing up such rules and give rise to the danger of producing rather isolated uniform rules set in an environment of national rules covering the greater part of the economic relation in question. The centering of different uniform rules around sales law may offer a model and a starting point for extended efforts at unification in the future.

Obviously this approach also has certain shortcomings. In particular, an extension of rules relating to legal institutions such as the contract of commercial agency in the sale of goods to other facts of life might turn out to be difficult. Special rules might be required which would lead to an exaggerated diversification. For the time being however it is too difficult to seek to to everything at once.

It goes without saying that in international trade the main function of commercial agency is the negotiation of contracts for the sale of goods so that rules on this subject would cover most, and indeed the most important, cases. In other words this limitation also derives its justification from a pragmatic approach.

Nevertheless in order to be workable the term "sale and purchase of goods" should in this connection be understood in a broad sense and the rules should apply not only to contracts of commercial agency where it is the main task of the agent to act in connection with the sale (or purchase) of goods, but also where he has in this connection also to negotiate or conclude agreements relating to certain other secondary contracts (see Art. 3 of the draft in Part II and the comment thereon). The proposed determination of the scope of the rules under discussion would not prevent States extending them or part of them to intermediaryship in relation to contracts other than sale or to other forms (see 2.2) insofar as these rules become part of their national law on intermediaryship. To be sure, no reciprocity can be obtained unilaterally, but the uniform rules would come into play as far as the law of that State would be applicable. Nevertheless, if several States take the same decision they could broaden the scope of the rules among themselves.

2.4 The feasibility of drawing up uniform rules and some related problems

As to the feasibility of drawing up uniform rules on contracts of commercial agency the wide differences between the existing systems have in particular to be taken into consideration. Whether it is possible to reconcile them cannot be determined in an abstract manner, but must be checked against an analysis of such rules. At least, experience has shown that it is not impossible to reconcile these differences, although so far this has been done only in a limited area and between socio-economically rather homogeneous countries (EEC Directive).

Only some general arguments will be adduced here. The proposed scope of the rules would contemplate only a bilateral relation. To that extent the task would be even easier than that facing the authors of CAISG where a major difficulty arose in attempting to determine the tripartite relationship. In that context also considerable differences between the various systems were successfully reconciled. It should furthermore be mentioned that the recent success of UCIFIL and of UCIF have demonstrated that it is in general possible for such problems to be settled. Admittedly, both of these Conventions deal with subjects in relation to which no firm attitude has yet been adopted by national law but such situations on the other hand create uncertainty. The long experience in the unification of the law of agency in general, and commercial agency in particular, also militates in favour of an attempt at unification in this field.

As progress is made in the unification of international trade law, the possibility increases of gathering inspiration from existing bodies of rules. In many cases it is possible to take over solutions which have already been adopted by the international community on other occasions and to include them in new rules with or without modifications. This might also promote unification in regard to our subject.

It follows that the most important sources for the drawing up of uniform rules for commercial agency would be the existing instruments for the unification of international trade law on a universal level in general, specific instruments concerning agency and especially commercial agency, including those drawn up on a regional level only, and drafts and other materials concerning the unification of the law of agency at universal level worked out in the framework of the related efforts of Unidroit in particular.

A second important source would be international trade practice as reflected in model contracts and guides, in particular the ICC Guide, arbitration awards etc., as far as they are available.

National law can be taken into consideration only on a selective basis. The attitude of the EEC countries is mainly reflected in the Directive. Due regard should be had to the Directive in order to pave the way for the EEC States, as a very important group of States in international trade, to accept such uniform rules. Some of the socialist countries have already carefully worked out rules concerning intermediaryship whose principal common features could be considered. They are of special interest insofar as they are explicitly (Czechoslovakia, German Democratic Republic, Hungary) or impliedly (Poland) drafted for international contracts of commercial agency. Since English law will in important respects be determined by the EEC Directive the common law attitude should, apart from the existing English law, be considered in relation to the law of the United States. Attention should also be paid to the original and characteristic features of the law of the developing countries.

Sufficiently favourable conditions obtain therefore for the working out of uniform rules on contracts of commercial agency. Of course, the existing differences, in particular those relating to protective provisions, will make it difficult to reach a solution on every important question and to that extent reservations could be allowed (see Part II, Art. 5 and comment thereon).

If we look at the national and international rules dealing with commercial agency it is a striking fact that they approach the problem in two different ways, on the one hand as the regulation of a specific contract type and on the other as the regulation of the status of a person, the (commercial) agent. The first approach is typical of the socialist countries, some of which have enacted rules on the subject (CSSR/CIC para 607 *et seq.*; GDR/CCA para 106 *et seq.*; Hungarian Decree 8/1978) while others have not, but use more general rules (RSFSR/CC Art. 396 *et seq.*). The same pattern exists in the Swiss CO (Art. 418a) and also in the Québec draft CC (V. 707 *et seq.*) where it follows from the combination of mandate and authority. The other approach is characteristic of the EEC Directive and is already found in the FRG/CC where the commercial agent (*Handelsvertreter*) appears in the first book in the context of questions of status (*Handelsstand*). Certainly in both cases it soon becomes clear that we are in the presence of a contract type, although the form of the rules achieves that result in a roundabout manner. It is possible that the historical roots of commercial agency have played a part in that respect, or that the aim of protecting the commercial agent favoured this form. A third form is that of the common law which envisages the triangular relation of agency in general and does not focus specifically on the internal relationship. It does not therefore offer a solution to our special problem. Since the relationship between principal and commercial agent is clearly a bilateral contractual one it should be addressed as such.

The final preliminary question which has to be decided is that of the form which the uniform rules should assume. The whole of the preceding discussion has been based on the assumption that rules should be prepared and not just a guide or a model contract. Such instruments would not conform to the tradition of Unidroit; what is more, a guide already exists and the relevance of mandatory rules in this field limits the possibilities of a model contract and requires rules, although not only rules

as such. Rules cast in the form of recommendations such as those envisaged in connection with PICC would likewise be insufficient, since they would be unable to tackle the mandatory issues. Furthermore, it is desirable to conserve the same legal character as that accorded to the other uniform instruments adopted in the context of sales law. It has always been the understanding and the aim when pursuing work on different topics in Unidroit to create binding (derogable or possibly partly mandatory) rules. If this contention is accepted it needs no further detailed argument to affirm that the intended instrument should be a convention. The form of the convention has become the dominant one amongst the binding instruments for the unification of international trade law at universal level. The form of a uniform law was repeatedly used during the epoch of the League of Nations to that end, in particular when the rules were to apply not only to international but also to domestic relations. The uniform law was annexed to a convention by which States undertook an obligation to introduce that law more or less literally into their national law. This tradition still survives in model laws which are drawn up for different subjects, but are only recommended to States which assume no obligation to incorporate them into their national law.⁽³⁰⁾ The form of the convention also has the advantage that it emphasizes the international character of the rules agreed upon and reduces the degree of integration into national law which is in its turn one of the main reasons for purely national interpretation of conventions.

We come therefore to the conclusion that work should be undertaken within Unidroit with a view to concluding a Convention on Contracts of Commercial Agency in the International Sale of Goods.

As a basis for a better assessment of the feasibility of achieving this aim, the possible content of such a Convention has been tentatively set out hereafter together with a brief commentary.

**PART II - PRELIMINARY DRAFT OF A UNIDROIT CONVENTION ON
CONTRACTS OF COMMERCIAL AGENCY IN THE
INTERNATIONAL SALE OF GOODS**

THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning commercial agency in the international sale of goods securing a fair balance of interests between the parties to the transaction,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations amongst States,

BEING OF THE OPINION that the adoption of uniform rules which govern contracts of international commercial agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

Comments

1. The purpose of the preamble is to determine the most important aims of the Convention which might be of relevance if the underlying principles have to be clarified or if the need were to arise for interpretation in accordance with the international character of the Convention (cf. Art. 7).

2. The first para is taken from CAISG and amended by ideas reflected in UCIFIL which seem to have special importance in the present context as well (fair balance).

3. The second para corresponds to the second one of CISG. The hint at the New International Economic Order included in the matching para of CAISG has been omitted, nor is it taken up elsewhere. Nowadays other concepts have emerged such as that of international economic security. Despite their great importance in general, it does not seem to be particularly helpful to refer to them in texts for the unification of international trade law.

4. Para 3 repeats literally the corresponding paras of CISG and of CAISG.

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

**Article 1
Sphere of application**

(1) This Convention applies to contracts of commercial agency in the international sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The nationality of the parties is not to be taken into consideration in determining the application of this Convention.

(3) A contract of commercial agency for the purposes of this Convention is a contract whereby one party, the commercial agent, undertakes on a permanent basis to negotiate the sale or purchase of goods on behalf of another person, the principal, or to negotiate and conclude such transactions on behalf and in the name of that principal, and the principal undertakes to remunerate the services of the commercial agent by paying him a commission or otherwise.

(4) A commercial agent shall be understood for the purposes of this Convention as not including in particular, on whatever contractual basis it may be:

- (a) a person who is an employee of the person for whom he acts;
- (b) a person who, in his capacity as an organ, officer, or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, acts by virtue of an authority conferred by law or by the constitutive documents of that entity;
- (c) a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy or otherwise.

Comments

1. This provision has been drafted according to Art. 1, para 1 of CISG since that model is suited to bilateral relations other than sales contracts. It has also been taken up in Art. 1, para 1 of CAISG but, in accordance with the purpose of that Convention, in respect of the relations between the principal and the third party. Paras 2 and 3 of Art. 1 of CISG or of Art. 2 of CAISG respectively have not been included, the former para because the contract of commercial agency is a long term contract and because the place of business of the other party should be known, and the latter because the commercial character of the commercial agent is defined subsequently. Nevertheless the irrelevance of nationality has been mentioned in para 2.

2. As far as the definition of the commercial agent is concerned, para 3 corresponds in principle to the definition to be found in Art. 1, para 2 of the EEC Directive. In accordance however with the contractual approach of this proposal it became necessary to define the contract of commercial agency as a whole. This has required the inclusion of the main obligation of the principal as well.

In using this approach it seems to be preferable to stress the self-employed character of the agent separately (see para 4, lit. a).

3. The term "sale or purchase of goods" is not defined by the Convention. In general the meaning, which follows from Arts. 30 and 53 CISG taken together, may be used as a basis for understanding. This does not necessarily mean however that a sale of goods within the meaning of CISG is identical to that under COCCAISG; quite the contrary. While it is clear that sales made in a certain way (as mentioned in Art. 2, lits. b, c, d CISG - sales by auction etc.) do not affect the scope of the proposed Convention since agency relating to those very forms is excluded therefrom, there is no reason why commercial agency concerning sales of goods for personal use, of ships etc. (Art. 2, lits. a, e CISG), should not fall within the scope of the Convention. Commercial agency concerning sales contracts which fall under CISG in accordance with Art. 3 thereof (goods to be manufactured or produced provided the other party has not delivered a substantial part of the materials and contracts relating to services without them being the preponderant part) should clearly be covered by COCCAISG.

4. The goods in question have to be determined by the parties. They should specify them in a manner general enough to cover developments relating to the goods. The possibility of unilateral changes in the goods should be left to the agreement of the parties. Some model contracts attempt to tackle this problem.

5. The possible authority of the commercial agent to conclude contracts would be covered either by CAISG or by the applicable national law.

6. The list of persons who are not regarded as commercial agents (para 4) does not determine exceptions to the scope of application of the Convention. The persons listed would not normally fall within the proposal in any case. The list serves therefore mainly for purposes of clarification.

7. The distinction between employees and self-employed persons (para 4, lit. a) is not always easy to draw and operates differently in the various legislations. It will therefore be necessary in the course of the future work to ascertain whether a definition should be attempted, as some legal systems have sought to do. The issue is important because of the existence of special legislation on employed commercial agents in a number of countries.

8. Para 4, lit. b derives from CAISG, Art. 4, lit a, and corresponds in principle to Art. 1, para 3, dash 1 and 2 of the EEC Directive. The wording of the last part obviously stems from a convention on agency in general and might be improved at a later stage.

9. Para 4, lit. c is mainly inspired by the last half sentence of Art. 1, para 3 of the EEC Directive, with the addition of the words "or otherwise" which take up the more general idea of Art. 4, lit. b CAISG.

Article 2 Exceptions

This Convention shall not apply to commercial agents:

- (a) whose activities are unpaid;
- (b) who operate as dealers on stock, commodity or other exchanges;
- (c) whose activities are secondary.

Comments

1. Lit. a corresponds to Art. 2, para 1, dash 1 of the EEC Directive. The whole draft and its most important parts start out from the assumption that the commercial agent receives remuneration.

2. Lit. b is taken from Art. 3, para 1, lit. a CAISG and is similar to Art. 2, para 1, dash 2 of the EEC Directive although the EEC Directive also mentions the commodity market but not stock exchanges. The CAISG version has been taken not only in order to follow the general tendency of this paper of preferring a solution adopted at universal level, but also because it is assumed that

exchanges have their own rules for their dealers. Further research is required to determine whether a general exception is necessary for commercial agents operating on the commodity markets.

The exceptions mentioned in CAISG Art. 3, para 1, lits. b, c, d and e, may be omitted from the present text, since they clearly do not relate to commercial agency within the meaning of the proposed Convention, and have *inter alia* no permanent or contractual basis.

3. The idea of lit. c is contained in the EEC Directive as an option. Since the Directive also relates to strictly internal relations, secondary activities may be of some interest. In international commercial agency this could be the case only in highly exceptional situations which cannot be dealt with by the Convention and which should therefore be excluded from its scope.

Article 3 Extensions

This Convention shall also apply to contracts of commercial agency whereby the commercial agent undertakes activities for the principal other than the sale or purchase of goods, provided that those other activities do not form the preponderant part of his obligations.

Comment

Even if the understanding of the term "sale or purchase of goods" is very broad (see comment 3 on Art. 1) it may nevertheless not be advisable to limit the scope of the Convention to commercial agency relating to this subject. It sometimes happens that the commercial agent has, in connection with his main task, also to negotiate or conclude contracts regarding assembly work for machines sold, the granting of licences related to the subject of his sales activities etc. Such activities are usually agreed in one and the same contract which should be covered by the same legal rules. This is the aim of Art. 3. The wording is partly inspired by Art. 3, para 2 of CISG.

Article 4 Substantive scope of Convention

This Convention governs only the formation of the contract of commercial agency in the international sale of goods and the rights and obligations of the principal and of the commercial agent arising from such a contract. In particular, except as otherwise provided in this Convention, it is not concerned with the validity of the contract or of any of its provisions or of any usage.

Comments

1. This article is an adapted version of Art. 4, including lit. a, of CISG.

2. Since the proposed Convention governs a special contract type, it should contain provisions for the most important aspects of that type, and this includes in particular the making of the contract (see observations on chapter II). As in the model for this provision the problem of formation has been mentioned, but not questions of responsibility and termination although these will also be covered by COCCAISG.

3. The last sentence of the rule is of particular importance since individual States prohibit commercial agency or certain forms of it.

Article 5 National mandatory rules

Nothing in this Convention shall prevent the application of specified mandatory rules of the applicable law if this is the law of a State that has made a reservation under Art. ... [to be drafted at a later stage].

Comments

1. For the time being it appears to be impossible to reconcile the different concepts regarding mandatory rules, in particular those for the protection of the commercial agent. Some countries have introduced special rules for that purpose, while others have just as good reasons for not doing so. It seems therefore that the possibility of making reservations is inevitable if unification is to be achieved.

2. One could argue that unification that does not deal with these key issues is nothing more than a torso. That is why the form of the reservation as proposed has been chosen. It is based on two considerations, the first being that mandatory rules concerning contracts of international commercial agency are contained in the applicable law. This is the law applicable by virtue of the rules of private international law, possibly (as far as Member States of CLATA are concerned) including the law "of any State with which the situation has a significant connection, if and so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules" (Art. 16 CLATA). If it were felt to be necessary this latter idea could be included in the provision itself. The second assumption is that a State having such mandatory rules must have made a reservation in their favour if it wishes them to prevail and this mainly for two reasons. Firstly, this would compel every Contracting State to the future instrument desiring to maintain certain mandatory rules to inform the other Member States of those rules. In other words, insofar as it is not possible to attain unification, it would at least be possible to compile official information and the applicable rules would be known. Secondly, it might be the case that a State would wish to limit the application of its mandatory rules to purely domestic relations and therefore abstain from making a reservation.

Article 6 Exclusion, variation or derogation by the parties

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions except as stated in Articles 5 ..., 25, para 2, ... 30

Comments

1. This provision reflects ideas contained in Arts. 6 CISG, 5 CAISG and 5 UCIFIL. It is a compromise between an opting - in solution (Art. V Convention ULIS) and a solution which limits the freedom of decision by the parties either to the exclusion of the Convention as a whole (Art. 3 UCIF) or only to the variation of or derogation from individual provisions (preamble, GCD/CMEA). It appears that this compromise is for the time being the best way of obtaining a consensus.

2. It is obvious that the parties should not be allowed to derogate from the mandatory rules legally reserved by the Contracting States (Art. 5). Some other examples from the preliminary draft have been mentioned in the proposal.

Article 7 Interpretation of the Convention

(1) In the interpretation of this Convention, regard is to be had [to its object and purpose as set forth in the preamble,] to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Comment

This rule corresponds to Art. 7 CISG and Art. 6 CAISG, and is reflected in a very similar version in Art. 6 UCIFIL and Art. 4 UCIF. It may therefore be said that it has found wide international acceptance. It might even be preferable to add the square bracketed language as did UCIFIL and UCIF to the extent that this is seen as an improvement on the CISG formula.

Article 8 Interpretation of conduct of a party

Observation

Three options are possible in this connection. The first would be to insert Art. 8 CISG and the second to take over the corresponding rules of PICC (at present Chapter III). Since these are rather elaborate rules a third possibility would be simply to refer to PICC. This would of course be a rather unusual solution, in particular since there would be no possibility of changing the PICC rules at the time when the proposed Convention would be considered. On the other hand it would be possible to draft a flexible reference calling for the taking into consideration of the PICC rules in interpreting the conduct of a party. This could upgrade the importance of PICC. One variant of this approach could be that of relying tacitly on PICC coming into play. In other words the matter would not be addressed expressly as was the case with UCIFIL and UCIF and other comparable instruments.

Given so many options, no draft provision has so far been proposed.

Article 9 Usages and established practices

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Comments

1. This article corresponds to Art. 9 CISG and is in an amended version also contained in Art. 7 CAISG. UCIFIL and UCIF do not deal with the matter.

2. The problem is of particular importance for contracts of commercial agency as long term contracts in the performance of which the parties frequently establish practices between themselves.

3. This provision is a compromise. It must be reconsidered, at the time when a Convention is adopted, whether circumstances have altered which would permit a stricter formula.

Article 10 Place of business

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

Comment

This article corresponds to Art. 10 CISG and is very similar to Art. 8 CAISG. The essence of lit. a is also to be found in Art. 3, para 2 UCIFIL and Art. 2, para 2 UCIF. It is therefore well established in international trade law.

CHAPTER II - FORMATION OF THE CONTRACT

Observations

The first question to be answered in the context of formation is whether such a chapter is needed at all. There is one in CISG, but CISG is a result of two formerly independent instruments and the parts on formation and on sale of goods are to a certain extent independent of each other. UCIFIL and UCIF do not deal with these problems, but they are not strictly limited to bilateral contracts. This is all the more so true of CAISG which nevertheless at least deals with the problem of form.

In principle, rules governing a specific contract type require provisions on formation if they are to be complete. This approach was followed in drawing up the General Conditions of the CMEA, that is to say not only the GCD/CMEA but also the GCA/CMEA and the GCASS/CMEA - both of which contain cross-references to the provisions of the GCD on formation - and the GCSC/CMEA.

To deal with formation problems in connection with contracts of commercial agency is all the more desirable since certain peculiarities appear, for example regarding form, although they are not limited to that. On the other hand, the establishment of a different procedure governing the formation of each contract type must be avoided. The rules contained in CISG could therefore be used, although they would need some amendment (for instance a definition of "offer" in Art. 14, para 1). It is theoretically possible to employ the method of cross-references to those parts of CISG which should be made applicable within the framework of COCCAISG even if the Parties to those Conventions were to be different, but it would be an unusual procedure and could give rise to practical difficulties. Another solution would once again be to have recourse to PICC. Since that document would provide more general solutions than those tailored to one contract type those solutions might be better suited to contracts of commercial agency as long term contracts which are as a rule carefully negotiated and finally drawn up in a contract signed by both parties. Cross-references would also be theoretically possible, even if PICC were only to become a recommendation, and this might perhaps make them politically more easily acceptable.

Should it not be possible to include in one way or another in the proposed Convention a detailed set of rules on formation then national law would apply. This solution could be given a greater degree of flexibility by a general provision to the effect that national law would be interpreted in the light of international trade usages, especially those contained in PICC.

All these reflections serve one purpose: to regulate as far as possible questions of formation and at the same time to avoid hampering the process of drawing up conventions for special types of contracts.

In any event it would be desirable to regulate specific questions regarding the making of contracts connected with individual contract types within the context of the relevant conventions. The following proposal relates only to the form of the agency contract which in any case seems to require a specific solution, while in regard to the other problems associated with formation a decision should first be taken as to whether they should be regulated and if so then which of the options ought to be discussed and which of the different solutions adopted.

Article 11

Form of contract

(1) A contract of commercial agency, its modification or termination by agreement shall be made in writing.

(2) However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

(3) For the purposes of this Convention "in writing" includes telegram, telex and any other form of communication capable of being reproduced in tangible form.

Comments

1. While some legal systems such as the common law have, apart from certain exceptions, established no requirements as to form in relation to commercial agency, others contain legislation,

in particular that especially directed to international contracts, which requires written form for contracts of commercial agency, even if they do not do so for other contracts (CSSR/CIC para 607, subp. 2; French Decree 1958 Art. 1; GDR/ICCA para 107). According to some laws certain stipulations need to be in writing, such as the prohibition on acting for other principals or the taking over of a *délégué* obligation according to Swiss CO Art. 418c, paras 2 and 3. The EEC Directive lays down a mandatory rule to the effect that: "Each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency contract including any terms subsequently agreed" (Art. 13, para 1). Para. 85 FRG/CC is practically identical. Furthermore Art. 13, para 2 of the Directive allows the Member States to "provide that an agency contract shall not be valid unless evidenced in writing". The ICC Guide (Preliminary remarks) recommends written form "especially in the field of international trade". In fact contracts of international commercial agency are regularly made in writing. These are long term contracts which often contain a number of elaborate clauses. If they are not reduced to writing uncertainties as to their content will soon arise. Although one could imagine in respect of sales contracts exceptional situations where it would be impractical to employ written form, this is less likely in relation to contracts of international commercial agency.

In practice, litigation sometimes occurs when, after certain contracts have been made, persons appear on the scene who claim to be agents and, relying on vague conversations which were in the view of the other party not binding, claim commission. This could be avoided by requiring written form. Modern technical means have made it considerably easier for parties to express themselves "in writing" (see para. 3).

2. The second para foresees a possibility of curing a lack of form, so as to prevent abuse of the strict requirements as to form. The wording has been taken from Art. 29, para 2 CISG, last sentence where it relates to a similar problem. This would in practice lead to very similar results to those of Art. 13 of the EEC Directive.

3. Para 3 begins with the language of Art. 13 CISG, which latter has however been amended by ideas contained in the introduction of Art. 1, para 4, lit. b of UCIF. This was felt to be necessary in order to cover new technical developments. Compare in this respect also the final award in ICC case no. 5080 by Budin in: Van den Berg (ed.), Yearbook Commercial Arbitration, vol. VII, Deventer etc. 1987, p. 124 *et seq.*, item 10 *et seq.* based on Swiss law.

CHAPTER III - RIGHTS AND DUTIES OF THE PARTIES

Observation

As has been rightly pointed out in the final award in ICC case no. 5080 (see above): "... a representation agreement ... is ... a contract of cooperation whereby both parties concur in pursuing the same object: to obtain sales contracts from customers There exists a duty of loyalty between the representative and the represented party, somewhat similar to that which binds partners, or principal and agent" (*op. cit.* - comment 3 on Art. 11, p. 128). This duty of loyalty determines the rights and duties of the parties, especially as set out in Arts. 12 and 13 and has been expressed in particular in para 1 of both those articles.

Article 12 Obligations of the commercial agent

(1) In performing his activities the commercial agent shall look after his principal's interests and act dutifully and in good faith.

(2) In particular, a commercial agent shall:

- (a) make proper efforts to negotiate and, where appropriate, provided he is authorised to do so, conclude the transactions he is instructed to take care of;
- (b) communicate to his principal all the necessary information available to him;
- (c) comply with reasonable instructions given by his principal;
- (d) keep secret confidential information which he has received by virtue of the contract;
- (e) do whatever may be necessary in the circumstances to preserve all rights and remedies for the benefit of the principal;
- (f) support in the country where he is active the performance of transactions for the negotiation or conclusion of which he is to be remunerated.

Comments

1. Obligations of the kind contemplated by this article appear in one form or another in all legislations dealing specifically with commercial agency and this is particularly true of the general obligations set out in para 1. The concrete proposals for para 1 and para 2, lits. b and c stem from the EEC Directive, apart from some terminological deviations which are intended only to bring the text into line with the drafting style of this proposal. Lit. a modifies the language of the Directive by adding the words "provided he is authorised to do so". This should make it perfectly clear that the commercial agent *per se* is not authorised to conclude contracts and at the same time make the provision consistent with Art. 15, para 1. Lit. d is a modified version of Art. 15, para 2, lit. a Unidroit 1974 and lit. e takes up Unidroit 1974 Art. 18, para 1. The obligation under lit. f has been modelled on such socialist laws as have been specially enacted for international trade (CSSR/CIC para 610; GDR/ICCA para 112, lit. b, Hungarian Decree 8/1978 para 24).

2. The main problem regarding this article, as also the following one, is to determine the appropriate level of abstraction. For the purpose of solving it two levels have been contemplated, a rather general one in para 1 and a more concrete one in para 2 which provides examples of what falls under the general obligation of para 1 and at the same time clearly establishes certain basic obligations. The scope of all these obligations will in practice depend on the actual circumstances of the individual contract, insofar as it does not itself contain the necessary details.

3. Para 1 also covers those duties which are in other laws expressed by such terms as "loyalty, act with prudence and diligence in the interest of the mandator" (Québec draft CC V. 714) or "diligence of a good father of the family" (Algerian CC Art. 576), "care, skill and good conduct" (USA/Sell, p. 116), "diligent agent in the same situation" (Unidroit 1974 Art. 16). Cf. also the observation at the beginning of the chapter.

4. The obligation arising out of para 2, lit. a will normally be described in more detail in the contract, for example by an agreement to a minimum and/or a maximum turnover, by specifying methods for advertising, offering the goods, taking part in exhibitions etc..

5. The information to be given (para 2, lit. b) may be of a general nature, that is to say relate to the market situation, to regulations on import and export, taxes, customs duties etc. and their alteration, but it may also be of a more specific nature, concerning in particular transactions negotiated and individual clients and their financial situation. When the agent is to provide information on infringements of industrial property rights of his principal, that should be agreed to in the contract.

The information should in general be given on the initiative of the commercial agent. Nevertheless the principal should also be entitled to ask for specific information. The somewhat different solution in Unidroit 1974 Art. 17 starts from the assumption that, as a rule, the agent concludes the contracts.

6. The duty to comply with instructions (para 2, lit. c) is *inter alia* found in Unidroit 1974 Art. 16. The term "reasonable" which characterises the instructions indicates that they should relate to the contractual tasks of the commercial agent as did the old Unidroit text, expressly and perhaps in too concrete a manner, but also that they should not jeopardize the independent position of the agent.

7. The duty of confidentiality (para 2, lit. d) also appears in many national laws (Swiss CO Art. 418d, para 1; FRG/CC para 90 - in both cases it also refers to the period after the contract has come to an end; England/Charlesworth, p. 249). The information which is confidential may either emerge from the indications of the principal or must be recognized by the commercial agent himself when complying with his other duties.

8. The duty under para 2, lit. e is also to be found in some national laws (Polish CC Art. 760). It does not necessarily presuppose an authorisation of the agent. Often, acts required by this provision may occur during the performance of the contracts negotiated by the commercial agent and to this extent it is related to lit. f. The commercial agent may, for instance, preserve claims against transport organisations and insurance companies and possibly prevent the transfer of goods to a buyer who has become bankrupt after delivery. As for the commercial agent's authority to do so, cf. Art. 13, para 2.

9. In international trade the commercial agent is mainly active in the country where he has his place of business, but which is different from that of his principal. He is therefore in a much better position than the principal to do what is necessary to facilitate the transaction. This may include measures connected with the obtaining of licences, compliance with customs formalities, the organisation of domestic transport, encouraging payment by the buyer etc.

Article 13

Obligations of the principal

(1) In his relations with his commercial agent a principal shall act dutifully and in good faith.

(2) A principal shall in particular:

(a) provide his commercial agent with the necessary documentation relating to the goods concerned;

- (b) provide his commercial agent with information relating to his commercial policy necessary for the performance of the agency contract, and in particular notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected.

(3) A principal shall in addition inform the commercial agent within a reasonable period of his acceptance, refusal, and of non-execution of a commercial transaction which the commercial agent has procured for the principal.

Comments

1. The article corresponds, apart from some adaptations intended to ensure consistency with the drafting style of this proposal, almost literally to Art. 4 of the EEC Directive (but see comment 5). It is a generalisation and clarification of what is regularly said or meant by corresponding legislation (see also comment 1 on Art. 12). Apart from Unidroit 1974 Arts. 15, para 1 and 22 in part, mention may be made of very similar provisions in the legislation of non-EEC States (CSSR/CIC para 612; GDR/ICCA para 111; Swiss CO Art. 418f, paras 1 and 2). The specification of the obligation of the principal is in the interest of both parties since it is a prerequisite for the fulfilment of the agent's duties.

2. As to the general structure of the article see comment 2 on Art. 12. The correspondence in the structure of the two articles reflects the balance of the obligations of the parties. Such parallel or mirror-like structures are also characteristic of CISG.

3. Para 1 sets out the obligations of the principal in rather general terms. Cf. comment 3 on Art. 12.

4. The documentation relating to the goods (para 2, lit. a) has in some laws been determined in an even more precise way than has been felt possible here. This documentation may include advertising materials, drawings, manuals and price lists, in other words the documentation which is necessary to sell or buy the goods.

5. As regards para 2, lit. b a deviation from the EEC Directive has been proposed. The text of the Directive opens with the words "obtain for his commercial agent the information necessary ...". This may be misleading insofar as it is normally the agent who must obtain the information necessary for his activities. He has to analyse the markets, to look out for publication of tenders, to provide information regarding fairs and exhibitions, to monitor legal developments, to enquire into the credit-worthiness of clients etc. The principal should not so much gather information for the commercial agent as rather make available to him such information as emanates from the principal himself and in the first place that relating to his commercial policy (in this sense see also ICC Guide 9, B.) for which an important example is given in the text (volume of transactions). The information to be provided by the principal would include *inter alia* general conditions, clients to be especially addressed, or not to be addressed at all, and experience drawn from the performance of transactions with clients. Depending on the circumstances, the commercial agent may also need to receive a copy of the correspondence between the principal and the client.

Normally, the principal will put at the disposal of the commercial agent such information concerning the relevant market as he possesses himself, since this is in his own interest, but he should in general not be obliged to do so.

6. Para 3 envisages the case where the commercial agent has informed the principal of individual transactions which he has set up.

Article 14 Subagents

Unless the circumstances indicate otherwise the commercial agent may appoint subagents within the scope of his activities, without thereby creating a legal relation between principal and subagent.

Comment

1. This problem as such is rarely addressed in existing legislation, although Unidroit 1974 Art. 13, French Decree 1958 Art. 2 and CSSR/CIC para 621 contain a rule similar to that proposed. It is not however necessary to stress that the relationship between the commercial agent and his subagent is an agency relationship, since questions of authority are not dealt with in the proposal. The ICC Guide (10, K) follows the same lines as the proposal. As a rule, it is in the interest of both parties to permit the appointment of subagents since this will contribute to the expansion of the business. When the principal wishes to exclude this possibility he may insist on its express exclusion. The principal assumes no additional risks, since the commercial agent remains his only partner with the consequence that the commercial agent is responsible for the subagent and has himself to pay him his remuneration.

2. The proposed solution corresponds to a general tendency in commercial law to allow the obligor to perform with the assistance of a third party, unless personal performance is required. Even legislations following the French tradition which combines mandate and authority do not strictly forbid the person receiving the mandate to appoint a person to replace him and not just to assist him in the execution of the mandate where he has not been authorised to do so, but only make him responsible for that person (French CC Art. 1994, Algerian CC Art. 580, Québec draft CC V. 716 - contrast however Unidroit 1974 Art. 14).

Article 15 Authority

(1) Unless the authority has been specifically established the commercial agent is not authorised to act in the name and/or on behalf of his principal and in particular is not entitled:

(a) to conclude contracts for his principal, to alter or to amend them or to take over obligations for his principal, or

(b) to receive performances including payment for his principal.

(2) Notwithstanding paragraph (1) the commercial agent is deemed to be authorised in the name and on behalf of his principal:

(a) to receive notices relating to the lack of conformity of goods and the claims arising therefrom,
or

(b) to secure evidence or to give notice for maintaining the rights of his principal.

Comments

1. While it is in some countries the normal case or at least the legal rule that commercial agency and authority are connected, as in the common law and in the countries which follow the French tradition, the situation is quite the opposite in other countries such as those which follow the German tradition or at least accept the separation between mandate and authority, and the socialist countries. This means that as a rule the commercial agent has no authority to bind his principal. The ICC Guide also provides that "it is not common business practice to grant him [the agent - D.M.] authority to enter into binding agreements in the name and for the account of the principal" (10, B.). This seems to be international trade practice for the contracts concerned which is the most important reason for choosing that approach in this proposal.

2. In order to avoid ambiguity and differing interpretations as to whether the conclusion of a contract of commercial agency in itself confers a certain authority on the commercial agent, para 1 makes it clear that this is not the case and specifies the most important situations in which this might be of practical importance (for similar solutions cf. Swiss CO Art. 418e and even more explicitly Polish CC Art. 758 para 2; CSSR/CIC, para 611; Hungarian Decree 8/1978 para 19, subp. 2). The FRG/CC starts from the assumption that a commercial agent needs authority to make contracts for his principal (para 91, subp. 1) and then deals with cases where he lacks this authority (paras 91, subp. 2, 91a). According to the Italian CC the agent only has the task of facilitating the making of contracts (Art. 1742) while Art. 1744 further reduces his sphere of competence.

The formula "in the name and/or on behalf" is intended to clarify that the commercial agent as such shall act neither as a direct nor as an indirect agent.

3. The opening words of para 1 indicate that the commercial agent may be given authority, but any provisions as to how this can be done (for example in writing as in CSSR/CIC para 611 or expressly as in Hungarian Decree 8/1978) have been strictly avoided. The word "specifically" only indicates that the very existence of the contract of commercial agency is not sufficient to create authority. The establishment of authority will be governed by the relevant provisions, in particular CAISG. Similarly, no attempt has been made to determine whether the existence of the contract of commercial agency requires the principal to act in a specific way when the commercial agent acts for him without authorisation (FRG/CC para 91a).

4. Though the commercial agent in general has no authority, certain situations exist where he should be deemed to have it (para 2), in the preponderant interest either of the third party (lit. a) or of the principal (lit. b). For similar solutions cf. in particular Italian CC Art. 1745; Swiss CO Art. 418e, para 1; FRG/CC para 91, subp. 2.

Dealing with this matter leads to the danger of involvement in problems relating to authority. The rules have therefore been reduced to a strict minimum.

It must also be possible to exclude the limited authority of the commercial agent implied by law. Under which conditions this is possible and valid in relation to the third party has to be determined by the provisions applicable to questions concerning authority.

5. A third party who has carried out negotiations with the commercial agent may give notice of, for instance, non-conformity of goods delivered to the commercial agent, and such reliance on the agent should not be disappointed. This could also be disadvantageous for the agent himself. The most important consequence of this rule would be that periods for giving notice are observed when the relevant notice is given to the commercial agent.

6. The commercial agent is, according to Art. 12, para 2, lit. e responsible for preserving "all rights and remedies for the benefit of the principal". Lit. b provides him with the necessary conditions as to authority. The implied authority is obviously restricted to matters of urgency and does not include such a possibly costly decision as filing a claim with a court.

Article 16

Sole and exclusive agency

(1) Where the commercial agent is entrusted with a specific geographical area or group of customers the principal is not allowed to entrust the same area or group to another agent (sole commercial agency).

(2) Where the commercial agent has an exclusive right to a specific geographical area or group of customers the principal is allowed neither to entrust to another agent the same area or group nor to act directly with the same area or group (exclusive commercial agency).

(3) Neither the sole nor the exclusive commercial agent is allowed to act for third parties competing with the principal or himself to compete with him.

Comments

1. The problem of distinguishing different kinds of commercial agency is important, in particular in relation to the payment of the commission and to implied prohibitions on competition with the principal. The article starts from the assumption that three kinds of commercial agency exist. The first of these has not been described, but is assumed. It is the case where neither the area nor the customers which form the field of activity of the commercial agent are determined or where they are indicated, but no sole or exclusive agency has been created. In this situation a direct link has to be established between the activities of the agent and the transaction concluded between principal and third party as a prerequisite for a claim for commission (cf. for example, EEC Directive Art. 7, para 1). No implied restrictions on competition exist. This form is not typical of international commercial agency as described here, but does occur when brokers are involved.

2. The differentiation between sole and exclusive commercial agency which is made in the proposal does not normally appear in legislation (for a similar distinction in United States law see Sell, p. 148), but it does play an important role in commercial practice (see ICC Guide 7.). The rule proposed is moreover in a certain sense a compromise between the two solutions offered to the Member States by Art. 7, para 2 of the EEC Directive, namely that the remuneration is earned if a transaction

is either entered into with a customer belonging to a specific area or group with which the commercial agent has been entrusted (see Italian CC Art. 1748, para 2; FRG/CC para 87, subp. 2) or where he has an exclusive right to that area or group (as also in some non-EEC countries - Swiss CO Art. 418f, para 2; CSSR/CIC paras 622, 623; Hungarian Decree 8/1978 para 29, subp. 3). A compromise exists insofar as a further possibility has been introduced where the commercial agent in general receives commission for transactions concluded within his area or group, unless the transaction is due mainly to the principal's own activities which it will be for the principal himself to establish (GDR/ICCA para 121, subp. 3 in connection with para 109).

3. The definitions of sole and exclusive commercial agency in paras 1 and 2 are expressed in terms of prohibition. This qualifies violation as a breach of contract. As far as damages are concerned the consequences are nevertheless reduced to the commission relating to transactions negotiated or concluded by others (Art. 18, para 2).

4. Para 3 is mainly inspired by Unidroit 1974 Art. 15, para 2, lit. b, *in fine* (see also Italian CC Art. 1743 and French Decree 1958 Art. 2). The indication that otherwise the principals under both these other agency contracts have to give their consent has been omitted since it is self-evident. The extent to which implied consent is thereby admitted is open to question.

CHAPTER IV - COMMISSION

Article 17

Amount of commission

(1) In the absence of any agreement on this matter between the parties, a commercial agent shall be entitled to the commission or other remuneration that commercial agents appointed for the goods forming the subject of his agency contract are customarily allowed in the place where he carries on his activities. If there is no such customary practice a commercial agent shall be entitled to reasonable commission or other remuneration taking into account all aspects of the transaction.

(2) Where the commercial agent is remunerated by a commission he is not entitled to any reimbursement for his expenses, unless otherwise provided.

Comments

1. The original French tradition proceeds from the idea that the person receiving the mandate is entitled to remuneration only when it is promised (French CC Art. 1999, para 1). This is stated even more explicitly in the Algerian CC (Art. 581), according to which mandate is in general gratuitous and even an agreed remuneration may be reviewed by the judge. But mandate is as a rule an onerous contract according to the Québec draft CC (V. 708, para 1). This is also the standpoint of the common law (see Charlesworth, p. 250 *et seq.*; Sell, p. 144 *et seq.*) as regards agency in general. This position is clearly taken by the laws dealing specifically with commercial agency. The differences between them relate mainly to whether or how they deal with the problem which arises when the remuneration is not agreed by the parties. While some legislations only provide that remuneration is to be paid (Italian CC Art. 1748, para 1 - only for transactions ordinarily performed - but compare Art. 1749 and additional regulations; Hungarian Decree 8/1978 Art. 29, para 1, sent. 1) or simply assume that

remuneration is to be paid, but do not determine its amount (GDR/ICCA para 121), others deal with the amount. In this connection, two main systems exist according to which either a reasonable commission (CSSR/CIC para 620 in conjunction with para 602, para 1, sent. 1) or a customary commission (Swiss CO Art. 418g, para 1) is to be paid. The solution of the Québec draft CC (V. 708, para 2) to have regard to the value of the services rendered seems to lead in the direction of a customary remuneration.

2. The EEC Directive (like the United States law of agency, see Sell, p. 146) combines the two methods mainly used in a rather sophisticated and individual manner. Art. 6, para 1 has therefore been taken over in part.

Instead of "remuneration" the proposal speaks of "commission or other remuneration" so as to be able to continue by referring only to commission without further technical rules as in the EEC Directive Art. 6, para 2. Commission is the most important type of remuneration and some legislations do not even mention other forms. One might therefore wonder whether the rule could be concentrated on commission alone. The proposal has not gone that far, in particular since some legislations do not mention commission. If it were to be felt necessary, the definition of the term "commission" as contained in Art. 6, para 2 of the EEC Directive could also be included in the proposal.

The reservation in favour of national law in Art. 6, para 1 of the EEC Directive has been omitted since the problem is more generally covered by Art. 5 of the proposal.

3. The solution in para 2 will encourage the agent to use the most effective means for carrying out his activities and to avoid unnecessary expense. The approach chosen corresponds to the requirements of international trade. The ICC Guide (9, G.) recommends that it be clearly stated when expenses are to be covered, assuming the opposite to be the rule. The provision proposed has been regularly adopted by special legislation on commercial agency (Italian CC Art. 1748, para 3; CSSR/CIC para 717; GDR/ICCA para 121, subp. 4; Hungarian Decree 8/1978 para 29, subp. 1, sent. 2), although some legislations provide for exceptions. This is the case with the FRG/CC para 87d (where the compensation of expenses is commercially customary - which might give rise to litigation) and Swiss CO Art. 418n (where the expenses arise from special instructions or for acts of the agent for the principal with no mandate to perform them - which is consistent with the proposed rule). The EEC Directive leaves the question open, and Unidroit 1974 (Art. 21) is not very clear.

4. It goes without saying that the parties may agree upon a different allocation of expenses, and in that regard the last half sentence of para 2 would be superfluous. It has nevertheless been included because it would facilitate a different solution, that of not necessarily making it dependent on a formal (written) contract clause, but of allowing implied consent which might for example be construed where unusual performance is required by the principal.

5. Sometimes special commission is agreed upon, for instance where the commercial agent is entitled and authorised to cash money or where he assumes responsibility for the performance of the contract by the third party (*delcredere*). Some legislations mandatorily combine the taking over by the commercial agent of the obligations mentioned with the obligation of the principal to pay a commission for such services. For the time being the proposal has abstained from tackling these issues.

Article 18
Transactions to be remunerated

(1) A commercial agent shall be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

- (a) where the transaction has been concluded as a result of his action; or
- (b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

(2) A commercial agent shall also be entitled to commission on commercial transactions concluded during the period covered by the agency contract:

- (a) where he is a sole agent and the transaction has been entered into with a customer belonging to his area or group, unless this has been done directly by the principal; or
- (b) where he is an exclusive agent and the transaction has been entered into with a customer belonging to his area or group.

(3) Where the commission is calculated as a percentage of the price of the goods, the basis of calculation of the commission is the price *ex works*.

Comments

1. Para 1 corresponds to Art. 7 of the EEC Directive. It covers the case of a commercial agency which is not typical in international trade. However such cases occur rather frequently when a broker (an intermediary not acting on a permanent basis) is engaged. In this connection the final award in ICC case no. 4145 (Matscher/Fivaz/Reisman) based on Swiss law states: "According to that provision [Art. 413 Swiss CO], the causal nexus exists as soon as some influence has been exerted on the decision, even though such influence might be indirect and/or accessory ..." (Yearbook Commercial Arbitration, vol. XII, *loc. cit.* - comment 3 on Art. 11 - p. 108).

Lit. b might seem somewhat innovatory for many legislations although they may in fact also encompass such transactions within the activities of the agent.

2. Para 2 takes up the distinction which has been drawn in Art. 16, paras 1 and 2. The solution of lit. a is mainly inspired by common law, but also by some socialist laws and, last but not least, by contract practice. Lit. b is the stricter variant (exclusive right) of Art. 7, para 2 of the EEC Directive. The option for the Member States has had to be deleted, thus making it possible to avoid further complications in the text.

3. The basis for the calculation of the commission (para 3) is not specifically dealt with in many legislations, although it is of major importance. The proposal is taken from GDR/ICCA para 121, subp. 5 which also excludes packing, while FRG/CC para 87b favours the opposite solution (the basis is the price to be paid by the third party including freight, packing etc.), while admitting some exceptions. The proposed draft provides the basis for calculation independently of additional costs for freight, customs etc. which have no connection with the activities of the commercial agent. When this is the case he should be encouraged to reduce such costs in the interest also of his principal, and not to increase them.

Article 19
Commission after termination

1. A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has been terminated:

(a) if the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency contract and if the transaction was entered into within a reasonable period after the contract was terminated; or

(b) if, in accordance with the conditions mentioned in Article 18, the order of the third party reached the principal or the commercial agent before the agency contract was terminated.

2. The claim for commission shall be reduced to the extent that it is equitable in the circumstances for the commission to be shared between the commercial agents.

Comments

1. National laws on this matter vary. Prior to the EEC Directive the view of English law was that payment of commission after the termination of the agency was exceptional (Charlesworth, p. 253 *et seq.*). Those legislations under which the commission is earned only if the sales contract is not only concluded, but also performed, in particular by the third party, have found it necessary to insist that commission is also payable after the expiration of the contract of commercial agency, provided the sales contract was concluded before that date. This might be thought self-evident in other legislations, in particular where the claim for commission is conditional upon the conclusion of the contract with the third party. Other legislations go a little further, for example the Swiss CO, which allows a claim for commission under otherwise rather restricted conditions, when the order has been received before the expiration of the contract of commercial agency (Art. 418t, para 1). The GDR/ICCA allows this claim when a transaction negotiated by the commercial agent is concluded not later than three months after the expiration of the contract of commercial agency (para 124, subp. 1).

2. It is difficult to say which goes further, the GDR/ICCA or the EEC Directive which is inspired by the legislation of Member States, as reflected in the proposal, para 1, lit. a. The period stipulated in the proposal is more flexible, but less clear than that of the ICCA, and may be shorter or longer. The ICCA on the other hand requires that the transaction be negotiated by the agent and not just mainly attributable to him, and to that extent lays down stricter conditions as a prerequisite for a claim for commission than does the proposal.

3. Para 1, lit. b relates especially to cases where no link can be established between the activity of the commercial agent and the order, i.e. cases of sole and exclusive agency. It seems fair that it be sufficient for the order to have been received before the contract was terminated, and not to require that the contract have been concluded as many legislations do (see comment 1), since this could encourage the principal to reply to such offers only after the contract of commercial agency has been terminated. If the order arrives later, lit. a may apply, provided the necessary conditions are met.

4. When the principal pursues the transaction with another agent it is a matter of indifference to him whether and how far commission has to be paid after the contract of commercial agency has expired, provided that he does not have to pay it twice. This is the problem addressed by the next article. Like the EEC Directive however it deals only with the claims of the new commercial agent.

This is true insofar as his claims are reduced whenever the former agent has claims, but the next article goes further and recognizes certain claims for commission where, from a strictly formalistic point of view, the former agent has claims in respect of the same transaction. For the sake of consistency para 2 also approaches the problem from the angle of the claims of the former agent.

Article 20

Loss or division of commission

A commercial agent shall not be entitled to the commission referred to in Article 18 if that commission is payable, pursuant to Article 19, to the previous commercial agent, unless it is equitable in the circumstances for the commission to be shared between the commercial agents.

Comments

1. This article corresponds to Art. 9 of the EEC Directive. Only the cross-references have been modified. This solution is important since it seeks to alleviate the problem by addressing two successive contracts and dividing one and the same commission between two agents. Problems might arise where one of these contracts is governed by different rules which normally should not be the case.

2. The rule has been completed by a reference to Art. 19 (see comment 3 thereon).

Article 21

Arising of claim for commission

(1) The claim for commission shall arise as soon as and to the extent that the third party has executed the transaction.

(2) The claim for commission shall also arise as soon as and to the extent that the third party should have executed his part of the transaction if the principal had executed his part of the transaction, unless the principal's failure to execute is due to a reason for which he is not to blame.

Comments

1. Legislation which has been specifically enacted for international contracts of commercial agency, as it exists in some socialist countries, makes a claim for commission dependent on the performance of the third party (CSSR/CIC para 620 in conjunction with para 602, subp. 1; GDR/ICCA para 121, subp. 2; Hungarian Decree 8/1978 para 29, subp. 3, sent. 1 - in that latter case mutual performance is decisive). This is also one variant of the EEC Directive (Art. 10, para 1, lit. c and para 2) and admitted by United States agency law (see Sell, p. 147). Where the legislation is focused mainly on internal contracts of commercial agency, that is to say it takes as a model small intermediaries, the claim for commission arises earlier, namely when the contract with the third party has been concluded (Swiss CO Art. 418g, para 3) or where the principal has performed this contract (FRG/CC para 87a, subp. 1). The latter solution is also one variant of the EEC Directive (Art. 9, para 1, lit. a) although both the Swiss CO and the EEC Directive allow a solution of the kind proposed.

2. Where the claim for commission arises before the third party has performed the contract, it normally ceases or the commission is to be refunded if the contract is not performed, in particular by the third party (Swiss CO Art. 418h; EEC Directive Art. 11). In other words, generally speaking commission only has to be paid when the third party performs the contract, except in those cases described in para 2 of the proposed article.

3. The rule proposed in para 1 corresponds to Art. 10, para 1, lit. c of the EEC Directive. It is best suited to international contracts of commercial agency, since it avoids the eventual refunding of commission which is always more difficult at international level than domestically and starts from the realistic assumption that in international trade firms do not usually act without financial backing. This rule is furthermore usually in the interest of both the principal and the commercial agent, also in the phase of the performance of the contract with the third party, and encourages the commercial agent to provide assistance at that stage as required by Art. 12, para 2, lit. f.

4. When the commercial agent only negotiates contracts the principal is free to conclude or not to conclude contracts negotiated by the agent. His own commercial interest is such that he will not refuse to make contracts without good reason. Once the principal has concluded the contract he is also, with respect to the commercial agent, not entitled to terminate it without justification. This is true not only of legislations according to which the claim for commission arises when the contract with the third party is concluded, but also according to some of those legislations where it arises later (GDR/ICCA para 123). The claim for commission is therefore usually open to the commercial agent as if the contract with the third party had been executed, even if the principal has not done so and consequently neither has the third party.

5. This idea is expressed in para 2 which takes up certain elements of EEC Directive Arts. 10, para 2 and 11, para 1. The exception is that the principal does not have to pay commission when he is not to blame for his non-execution. The term "is not to blame" indicates that the exemptions are not limited to cases where the principal is not liable for non-execution, though they clearly are included. The most important cases where the principal is excused for non-execution may be those where this fact is caused by exceptional impediments, failure or anticipatory breach of the other party (for example in the sense of Arts. 79, 80 and 71 *et seq.* CISG respectively).

Article 22

Due date of commission

The commission shall become due on the last day of the month following the quarter in which it arose.

Comments

1. A differentiation between the dates on which the commission is earned, "it arises" in the terminology of the proposal, or "it becomes due" in the language of the EEC Directive on the one hand, and on which "it is due", as the proposal says, or "shall be paid" according to the EEC Directive on the other is quite common in the different legislations. This results from the fact that it would complicate matters considerably if every element of commission which has been earned has to be transferred separately. A collection is necessary, in particular in international trade.

2. The proposal is based on EEC Directive Art. 10, para 3, but the differences already mentioned in comment 1 are not only of a terminological nature. They have a bearing in particular on the payment of interest. The periods seem to be fair and are very similar to those contained in some national laws outside the EEC (GDR/ICCA para 121, subp. 4). It is of particular importance for technical reasons to contemplate a period between the expiry of that during which the commission was earned and the date on which it became due.

Article 23

Statement of commission due

(1) The principal shall supply his commercial agent with a statement of the commission due, not later than the last day of the month following the quarter in which the commission has arisen. This statement shall set out the main components used in calculating the amount of commission.

(2) A commercial agent shall be entitled to demand that he be provided with all the information which is available to his principal and which he needs in order to check the amount of the commission due to him.

Comments

1. Although this problem is not settled in many legislations it seems advisable to make provision for it in a future Convention to the extent that the statement is a commercial necessity.

2. Para 1 stems from Art. 12, para 1 of the EEC Directive with the adaptations resulting from previous modifications. Unlike the EEC Directive however a minor distinction has been drawn in respect of the due date for commission (last day) and for the statement (not later than the last day). This will encourage earlier delivery of the statement, thus giving the commercial agent the opportunity to make any possible objections before payment of the commission. It would however not be contrary to the rule if the principal were to deliver his statement and transfer the amounts stated together on the last day of the respective month.

3. Para 2 is somewhat more general although very similar to Art. 12, para 2 of the EEC Directive. It seems to be advisable not to go into too much detail at universal level, so as avoid conflict with mandatory national provisions.

CHAPTER V - TERMINATION OF AGENCY CONTRACT

Observation

There are provisions to the effect that the contract is terminated "at such time as it may specify, when the parties so agree, or when the obligations of the parties under it have been fully performed" (an example taken from Unidroit 1974 Art. 31, para 1). This is self-evident and need not be covered by special rules, though it could form a neat introduction to the chapter on termination. The last reason (obligations performed) is not relevant to the contract of commercial agency as addressed here, since this contract is defined as one of permanent intermediaryship. It operates therefore on a time basis and cannot in consequence be performed by individual acts.

Article 24 Prolongation

A contract of commercial agency for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into a contract for an indefinite period, unless it is prolonged either by agreement or by contractual clauses for another fixed period.

Comments

1. The first part of this article corresponds to Art. 14 of the EEC Directive, apart from terminological adaptations to this proposal. The last half sentence has been added.

2. The importance of this article which also justifies its presence in this context is of a technical nature, namely to make it clear when the periods for ordinary termination according to Art. 25 apply to contracts originally valid for a fixed period.

3. The first part covers the case where the parties tacitly continue to perform. It is not usually addressed by national law but, when it is, then in a much less far-reaching manner. According to Swiss CO Art. 418p and CSSR/CIC para 615 a tacit prolongation is valid for the same period, but for no more than one year or six months respectively.

4. The addition will make it clear that the contract will not be deemed to have been converted into one for an indefinite period when the parties continue to perform if they have agreed on another fixed period or have incorporated a clause in their contract according to which it is prolonged automatically for a fixed period (usually for one year), if it is not terminated by either party within a certain time before that date. Such clauses occur frequently in practice.

Article 25 Ordinary termination

(1) Where a contract of commercial agency is concluded for an indefinite period either party may terminate it by notice in writing.

(2) The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.

(3) Unless otherwise agreed by the parties, the end of the period of notice must coincide with the end of a calendar month.

(4) The provisions of this article shall apply to a contract of commercial agency where it is converted under Article 24 into a contract for an indefinite period, subject to the proviso that the earlier fixed period must be taken into account in the calculation of the period of notice.

Comments

1. Apart from terminological adaptations the proposal corresponds to EEC Directive Art. 15, paras 1, 2, 5 and 6, although notice in writing has been required for the sake of clarity. The wording

is often decisive in determining whether a declaration is a notice of termination or merely a warning or the like, but the exact wording can only be ascertained by a written document. Such written form also corresponds to the written form of the contract of commercial agency itself (Art. 11). For the definition of "in writing" see Art. 11, para 3.

2. The most important part of the proposal refers to the periods of notice (para 2). The solution of making the length of the period of notice dependent on the duration of the contract is very flexible and corresponds to practical needs since the commercial agent as a rule becomes more dependent on the principal the longer the relation lasts. Similar rules outside the EEC are to be found in the Swiss CO Art. 418q and in CSSR/CIC para 616, subp. 2. In a number of countries a three month period for notice applies, one earlier than that provided for in the proposal (see Czechoslovakia) or from the very beginning of the contract of commercial agency (GDR/ICCA para 305, subp. 2 which is not a special rule for contracts of commercial agency stipulates three months and allows termination only at the end of a calendar quarter, Hungarian Decree 8/1978 para 28, subp. 2 at least three months before the end of a calendar year). On the other hand the socialist laws mentioned do not grant any indemnity or compensation. In legal systems where no strict separation is made between mandate and authority, as in the French tradition and in the common law, it is emphasized that the mandate or the authority may be revoked by the mandator or principal or renounced by the person receiving the mandate or the agent at any time, subject however to claims for damages by the other party when such acts are unjustified (see Québec draft CC V. 737, 739, 741, 742; Sell, p. 191 *et seq.*). Such termination has also been contemplated in relation to the contract itself (c.f. Unidroit 1974 Art. 34).

3. These periods are mandatory insofar as they may not be shortened (para 2, sent. 2). Although this rule is intended in particular to protect the commercial agent, it also has some importance for the principal who may encounter problems in finding a new commercial agent immediately. On the other hand it is difficult to force an unwilling agent to continue to act.

4. Para 3 prolongs the period in most cases, but has the advantage of facilitating bookkeeping and other organisational problems associated with the end of the relationship.

5. The rule contained in para 4, although not often met with in national legislation, is important because it provides clarity. Nevertheless it may be doubted and has to be further considered whether it is fair to take account of the earlier fixed period since at that time the parties most probably did not yet envisage a long term relationship.

6. The article does not deal with the problem of whether the commercial agent may claim an indemnity or compensation for damages in the event of ordinary termination; nor indeed do the other parts of the proposal. This question must therefore be answered by national law (see also Art. 5 of this proposal and the comments thereon). Within the EEC also this problem has proved to be an extremely difficult one and full harmonisation has not proved possible; to the extent that it has been achieved however, special periods had to be allowed to some States to adapt their law (see Art. 17 *et seq.*). Still even less homogeneity exists at universal level so that for the time being it would seem to be impossible to achieve unification relating to this admittedly important issue.

Article 26

Termination on substantial grounds

Where in a contract of commercial agency, whether for a fixed or for an indefinite period, circumstances occur that either party cannot reasonably be expected to adhere to the contract, either party is entitled to terminate the contract in writing without prior notice.

Comments

1. The EEC Directive leaves this ground of termination ("where exceptional circumstances arise") to national law (Art. 16, lit. b). Some legislations contain special rules governing this problem in connection with contracts of commercial agency (Swiss CO Art. 418r; FRG/CC para 89a, subp. 1) whereas others rely on more general rules, but usually the grounds are not specified in detail. This is the case where no strict distinction between authority and contract has been drawn. In this context grounds such as death, loss of capacity, bankruptcy or similar procedures, whether invariably or subject to specified conditions, entail automatic termination of the agency contract, as is demonstrated in a summary way by Unidroit 1974 Art. 32 *et seq.* In commercial life such automatic termination is not as a rule appropriate. If the grounds are too complicated it might often be unclear whether the contract has been terminated or not. In any case automatic termination may lead to undesirable results and it is therefore preferable to require the giving of notice. The circumstances sometimes permitting automatic termination may be considered at least as substantial grounds justifying termination. Breach of contract may also constitute a substantial ground for termination, even if the more far-reaching effects of breach of contract (in particular compensation for damages) would not occur, because of the existence of exemptions, provided the breach is substantial enough. A breach of this kind could be the non-observance of a minimum turnover obligation (see CSSR/CIC para 624 which also allows termination without prior notice where a turnover reasonable in relation to the possibilities for sale has not been achieved). Further examples of substantial reasons would be the worsening of the financial situation of the other party, a sharp decrease in demand for the goods concerned, important changes in the management or in the legal position of the other party etc.

2. It is possible that a party may terminate the contract of commercial agency on substantial grounds connected with himself (for the opposite solution see GDR/ICCA para 306). Such a ground could, for example, be the prolonged illness of the head of the commercial agency firm. Such a situation would be different from that regarding termination for breach of contract. Nevertheless a party would not be allowed to terminate for substantial reasons which he had himself intentionally created.

3. Since a great variety of substantial grounds exists it is impossible to enumerate them in the rules. The question could be considered at a later stage of whether examples should be given to indicate the importance of the grounds intended to be covered.

In any case the parties should be advised to mention the most important grounds for termination in their contract.

Article 27

Termination for breach of contract

A party is entitled to terminate a contract in writing without prior notice where the other party:

- (a) has committed a fundamental breach, or
- (b) has committed several breaches which in their entirety form a fundamental breach of contract, or
- (c) has repeatedly or permanently been in breach, though the first party has required performance within a reasonable time by notice.

Comments

1. The EEC Directive does not deal with this problem in substance but leaves it to national legislation as a case of immediate termination "because of the failure of one party to carry out all or part of his obligations" (Art. 16, lit. a). Where national legislation deals at all with the problems concerning termination for breach of contract in the context of contracts of commercial agency, it normally does not make such a sharp distinction between that ground of termination and termination on substantial grounds. Sometimes national law considers termination for breach only as a more qualified form of termination on substantial grounds (FRG/CC para 89a), while sometimes it focuses on fundamental breach (Hungarian Decree 8/1978 para 28, subp. 3). Indeed, termination on substantial grounds is the more comprehensive ground for terminating the contract, since it would also cover all cases where termination for breach of contract is possible, though not *vice versa*, as pointed out (see comment 2 on Art. 26). This is especially true, where exemptions should not be admitted, as far as termination is concerned (see CISG Art. 79, para 5). The question might however be considered in the sense of allowing exemptions at least for justifying a certain suspension of performance. This is one reason for a special rule, the other being that it would permit a more detailed rule on the grounds of termination. At a later stage it might well be decided to use the individual cases of breach of contract as examples of substantial grounds for termination (compare GDR/ICCA para 306, subp. 2).

Termination should, as in other cases (Arts. 25, para 1, 26) be in writing (see comment 1 on Art. 25).

2. The rule starts out from the assumption that with long term contracts such as that of commercial agency it is not always possible for the parties to abide strictly by the terms of the contract. Therefore not every deviation from the contract, even though formally speaking possibly a breach, should be reason enough to terminate the contract. It is one of the purposes of this article, perhaps in contrast to national law, to make this clear.

3. Lit. a takes over the term "fundamental breach" from the CISG (see in particular Art. 25). Because of the importance of the violation no prior notice to put a stop to the breach is required.

4. Lit. b covers cases where one party repeatedly commits minor breaches of different kinds which in themselves would not be reason enough to terminate the contract, but which ultimately undermine the confidence of the parties. Since the forms of breach change it is not always possible to give notice, but if this is done then the reprehensible behaviour might be stopped, even though other breaches are committed.

5. Lit. c focuses on cases where one and the same behaviour (for example negotiating contracts with customers outside the agreed territory, failure to create the agreed prerequisites for successful activities, wrong use or non-use of the trade marks of the principal by the commercial agent; non-fulfilment of the obligation to support the commercial agent by way of technical documentation and

advertising materials, delay in payment of the remuneration by the principal) which is contrary to the contract is either repeated, that is to say by distinct acts such as delay in payment, or become permanent, which means continuously doing or not doing certain things. In these cases the form of breach is clear and notice by the party whose rights have been violated may be required. Such notice should contain a request to abstain from violating the terms of the contract.

CHAPTER VI - REMEDIES FOR BREACH AND POST-CONTRACTUAL RIGHTS

Article 28

Remedies for breach

(1) If one party fails to perform any of his obligations under the contract of commercial agency or this Convention the other party may:

- (a) require performance by the other party of his obligations, unless the former party has resorted to a remedy which is inconsistent with this requirement;
- (b) claim damages.

(2) A party is not deprived of any right he may have to claim damages by exercising his right to other remedies.

Comments

1. Under many laws the remedies for breach of the contract of commercial agency, apart from termination, are to a still greater extent left to the general provisions on breach than those concerning termination. For an international convention however it seems desirable to include provisions regarding at least the most important aspects. Therefore the most typical consequences of breach, namely (subsequent) performance and damages, have been mentioned.

The place of avoidance, which plays a major role in the CISG, has in the proposal been taken by termination for breach of contract which performs a somewhat different function and has therefore been placed in a different context, although it is at the same time a remedy for breach.

2. The wording of the article has been drafted according to Arts. 45, 46 and 61, 62 CISG.

3. In CISG these rules are embedded in a broader context, in particular as regards decisions on specific performance (Art. 28 CISG), damages (Art. 74 *et seq.* CISG), and also exemptions (Art. 79 *et seq.* CISG). As to whether these rules should be taken over or reliance placed on PICC or national law, the previous remarks on similar occasions apply correspondingly (see observations on chapter II).

4. The question may be considered of whether vicarious performance could be introduced as a further remedy. That is to say, where a party fails to perform, even after reasonable notice has been given, the other party might be entitled to perform the act himself at the expense of the other party in order to overcome a temporary deadlock in the relations between them, for example where the commercial agent, instead of the principal, translates advertising materials and has them printed, or where the principal, instead of the commercial agent, exhibits goods at a fair.

Article 29
Effects of termination

(1) Termination of the contract releases both parties from their obligations under it, subject to any claims for compensation which may be due. Termination does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the termination of the contract and in particular any right for remuneration which has already arisen or is to arise.

(2) On termination of the contract either party must return to the other party that which he has received from him for the execution of the contract.

Comment

1. The problem of the effects of termination is of a general nature and could therefore be dealt with in the same way as any other general question (see Art. 28, comment 3). It has nevertheless been taken up since the problem of which obligations cease and which continue to exist plays a particularly important role in connection with long term contracts including the contract of commercial agency. A number of provisions remain valid or even arise anew after the contract has been terminated (see for instance Art. 19). This should be reflected in a general manner.

2. It is of particular importance to state that the rights relating to remuneration are not affected by termination since some national laws provide that all claims of the commercial agent to commission or expenses fall due on termination (Swiss CO Art. 418t, para 2).

3. The wording of para 1 has been strongly influenced by Art. 81, para 1 CISG. It goes without saying that only justified termination is envisaged.

4. Since the principal is also placed under certain obligations by this proposal and probably to a greater extent by the contract of commercial agency, it may well be that he puts at the disposal of the commercial agent property of a certain commercial value. Para 2 makes it clear that this has to be returned by the commercial agent on his own initiative. Though the rule is primarily addressed to him it has been formulated as a bilateral norm so as to grant equal rights to both parties and to cover those rare cases where the commercial agent hands over property to the principal for the execution of the contract.

Article 30
Post-contractual restraint of trade

A clause restricting the business activities of a commercial agent following termination of the contract of commercial agency shall only be valid if and to the extent that:

- (a) it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract, and
- (b) it does not exceed a period of two years after the termination of the contract of commercial agency.

Comment

Many national laws do not deal with this problem at all, but limit themselves to competitive activities during the validity of the contract of commercial agency (see above). This could make it easier to find a uniform solution. The proposal is an abbreviated, simplified and modified version of Art. 20 of the EEC Directive.

CHAPTER VII - FINAL PROVISIONS

Observation

The chapter has not yet been drafted, but the well established patterns of CISG, CAISG, UCIFIL, UCIF and others could easily be used to that end. These Conventions also contemplate the necessary reservations which would allow the EEC States to maintain their particular regime.

NOTES

1. Hamza, "Fragen der gewillkürten Stellvertretung im römischen Recht", *Acta Juridica Academiae Scientiarum Hungaricae*, 1983/1-2 (vol. 25), p. 89 *et seq.*; and "La structure de l'autorisation dans les papyri égyptiens", *Acta ...* 1985/1-2 (vol. 27), p. 250 *et seq.* More reluctant, Schmitthoff, "Agency in International Trade. A Study in Comparative Law", *Recueil des Cours de l'Académie de La Haye*, 1971, I. p. 118 *et seq.*
2. See Müller-Freienfels, "Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty", *The American Journal of Comparative Law* 1964, no. 2 (vol. XIII), p. 193.
3. See Schmitthoff, *loc. cit.*, p. 122.
4. *International Encyclopedia of Comparative Law*, vol. III, Private International Law. Agency, p. 29-2, note 4.
5. See for details Müller-Freienfels, *loc. cit.*, p. 197 *et seq.*
6. See Müller-Freienfels, *loc. cit.*, p. 211 *et seq.*
7. See Schmitthoff, *loc. cit.*, p. 126 *et seq.*
8. Sell, *Agency*, Mineola, New York 1975, p. 1.
9. Mercantile agents can also be entrusted with the task of buying goods for their principal, though this happens less frequently. The legal problems connected with such relations are quite similar to those arising in respect of selling intermediaries and are not dealt with separately.
10. As for the economic background, see Ebenroth/Parche, "Die kartell- und zivilrechtlichen Schranken bei der Umstrukturierung von Absatzmittlungsverhältnissen", *Betriebs-Berater Beilage* 10 to 1988, no. 21.
11. Peters/Schneider, "The Franchising Contract", *UNIDROIT* 1986, Study LXVIII - Doc. 1, p. 5.
12. A striking example is the Loi no. 78-02 du 11 février 1978 relative au monopole de l'Etat sur le commerce extérieur. *Journal officiel de la République Algérienne* 1978 no. 7, p. 114.
13. See for the work of Unidroit in that respect in particular Bonell "The 1983 Geneva Convention on Agency in the International Sale of Goods", *The American Journal of Comparative Law*, 1984/4 (vol. XXXII), p. 717 *et seq.*; Evans "Explanatory Report on the Convention on Agency in the International Sale of Goods", *Uniform Law Review* 1984/I, p. 73 *et seq.*
14. Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC). *Official Journal of the European Communities* 1986. No. L 382/17.

15. See O. Lando, "The EEC Draft Directive Relating to Self-Employed Commercial Agents, The English Law Commission versus the EC Commission", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1980/1, p. 1 *et seq.*
16. Text in: Diplomatic Conference for the Adoption of the Unidroit Draft Convention on Agency in the International Sale of Goods. Geneva, 31 January - 17 February 1983. Acts and Proceedings of the Conference. *Uniform Law Review* 1983/I-II, p. 161 *et seq.*
17. See in particular Bonell, *loc. cit.*; Evans, *loc. cit.*; Mouly, "La convention de Genève sur la représentation en matière de vente internationale de marchandises", *Revue de droit international comparé* 1983/4 (vol. XXXV), p. 829 *et seq.*; Rjabikov, "The unification of legal norms on agency in the international sale of goods" in: Papers of the section law, edited by the Chamber of Trade and Industry of the USSR, Moscow 1983, p. 47 *et seq.* (Russian); Svarcevic, "The Geneva Convention on Agency in the International Sale of Goods", in: Volken/Svarcevic (eds.), *International Sale of Goods*, New York/London/Rome 1986, p. 443 *et seq.*
18. Final Resolution adopted by the Diplomatic Conference for the Adoption of the Unidroit Draft Convention on Agency in the International Sale of Goods, in: Diplomatic Conference ... *loc. cit.*, p. 175.
19. UNIDROIT 1983 - C.D. 62nd session, p. 7.
20. "Is it feasible to elaborate uniform rules governing the relations between principal and agent?", *Uniform Law Review* 1984/I, p. 52 *et seq.*
21. UNIDROIT 1984 - C.D. 63rd session, p. 18.
22. UNIDROIT 1987 - C.D. 66 - Doc. 14.
23. Commercial Agency (Guide for the drawing up of contracts), Publication 410 of the International Chamber of Commerce, 1983.
24. Convention on the Law Applicable to Agency in: Hague Conference on Private International Law, Thirteenth Session. Special Commission on the Law Applicable to Agency. Protocol of the Closing Session. The Hague, 16th June 1977. p. 2 *et seq.*
25. Official Journal of the European Communities 1980, No. L 266/1.
26. Basedow, "Das Vertretungsrecht im Spiegel konkurrierender Harmonisierungsentwürfe", *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 1981/1-2, p. 211.
27. *Op. cit.*, p. 116.
28. See Lando, *op. cit.*, p. 5 with reference to a report of the English Law Commission.
29. I give only very few recent examples: Stumpf, *Internationales Handelsvertreterrecht*, Teil 1, 6th ed., Heidelberg 1987; Stumpf (ed.), *Internationales Handelsvertreterrecht*, Teil 2, 4th ed.,

- Heidelberg 1986; Baldi, *Das Recht des Warenvertriebs in der Europäischen Gemeinschaft*, Heidelberg 1988; Thieffry, "La distribution des produits à l'étranger". *Revue trimestrielle de droit commercial et de droit économique*, 1985/4, p. 723 *et seq.*; Reuter, "Amerikanische Distributorship-Verträge", *Zeitschrift für Vergleichende Rechtswissenschaft* 1986/1, p. 63 *et seq.*
30. Sanders, since vol. XI Van den Berg (ed.), *Yearbook Commercial Arbitration*, vols. I to XII, Deventer etc. 1976 to 1987 and *Yearbook Key 1987* accompanying *Yearbook Commercial Arbitration Volume XII 1987*, Deventer etc. p. 25 *et seq.*. The quotations in the text refer to the volumes of the *Yearbook* (first figure) and the page (second figure).
 31. See Ebenroth/Parche, *op. cit.*, in particular p. 24 *et seq.*
 32. See Ebenroth/Parche, *op. cit.*, p. 6.
 33. Deutscher Bundesgerichtshof, 30 January 1961. *Neue Juristische Wochenschrift*, 1961, p. 1061.
 34. Gesetz zur Neuregelung des internationalen Privatrechts dated 25 July 1986, *Bundesgesetzblatt* part I, 1986 no. 37, p. 1142.
 35. Compare also Art. 7 of the Convention on the Law Applicable to Contractual Obligations (footnote 25) which goes even further in its para 1.
 36. See Gesetzentwurf der Bundesregierung. Entwurf eines Gesetzes zur Durchführung der EG-Richtlinie zur Koordinierung des Rechts der Handelsvertreter. Bundesrat. Drucksache 339/88, 12.08.88. no. 8 and comment on that number. pp. 7 and 23 *et seq.*
 37. See Convention on the Law Applicable to Contracts for the International Sale of Goods, in: *Proceedings of the Extraordinary Session of October 1985. Diplomatic Conference on the law applicable to sales contracts. Hague Conference on Private International Law. The Hague 1987.* p. 691 *et seq.* This Convention is already the second one on this subject.
 38. Related to our subject is in particular the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law, 21 June 1985, text *inter alia* in: Van den Berg (ed.), *Yearbook of Commercial Arbitration*, vol. XI - 1986, Deventer etc. 1986, p. 380 *et seq.*

ABBREVIATIONS

CAISG Convention on Agency in the International Sale of Goods, source see footnote 16

CC Civil Code

Charlesworth Charlesworth's *Mercantile Law*, 14th ed. by Schmitthoff and Sarre, London 1984

CISG Convention on the International Sale of Goods, in: *United Nations Conference on Contracts for the International Sale of Goods. Vienna, 10 March - 11 April 1980. Official Records*, p. 178 *et seq.*

CLATA Convention on the Law Applicable to Agency, source see footnote 24

Convention Convention relating to a Uniform Law on the International Sale of Goods, dated 1 July 1964, published *inter alia* in Doelle (ed.), *Kommentar zum Einheitlichen Kaufrecht*, München 1976, p. 771 *et seq.*

COCCAISG (Preliminary draft of the) Convention on Contracts of Commercial Agency in the International Sale of Goods

CSSR/CIC Code of International Commerce of the Czechoslovakian Soviet Socialist Republic

EEC Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653 EEC), source see footnote 14

French Decree no. 58-1345 of 23 December 1958 concerning commercial agents, *Journal officiel* 1958, p. 11947 as amended by decree no. 68-765 of 22 August 1968, *Journal officiel* 1958 1968, p. 8246

FRG/CC Commercial Code of the Federal Republic of Germany

GCA/CMEA General Conditions for the Assembly and other Technical Services in Connection with the Delivery of Machines and Equipment between the Organizations of the Member Countries of the Council for Mutual Economic Assistance (GCA/CMEA), as of 28 September 1973. *Gesetzblatt of the German Democratic Republic* part II, 1973 no. 18 p. 278 (German translation)

GCASS/CMEA General Conditions on the after Sales Service for Machines, Equipment, and other Products delivered between the Organizations of the Member Countries of the Council for Mutual Economic Assistance entitled to conduct Foreign Trade Operations (GCASS/CMEA 1973 in the version of 1982), *Gesetzblatt of the German Democratic Republic* part II, 1982 no. 3, p. 41 (German translation)

GCD/CMEA General Conditions of Delivery of Goods between Member Countries of the Council for Mutual Economic Assistance (GCD/CMEA, 1968/1975, version of 1979), as of 13 April 1979, Moscow 1979

GCSC/CMEA General Conditions of Specialization and Co-operation in Production between Organizations of Member Countries of CMEA (GCSC/CMEA), as of 18 January 1979, Moscow 1981

GDR/CC Civil Code of the German Democratic Republic

GDR/ICCA International Commercial Contracts Act of the German Democratic Republic

Hungarian Decree no. 8/1978 of the Presidential Council of the Hungarian People's Republic on the Application of the Civil Code of the Hungarian People's Republic on the Foreign Economic Relations, *Magyar Koesloeny* 1978 no. 2, p. 146 (Hungarian)

ICC International Chamber of Commerce

ICC Guide Commercial Agency (Guide for drawing up of contracts), source see footnote 23

PICC Principles for International Commercial Contracts, see for the last version the fourth consolidated version in: UNIDROIT 1988 Study L - Doc. 40, Rev. 2

QUEBEC draft CC Draft Civil Code of Québec

RSFSR/CC Civil Code of the Russian Socialist Federative Soviet Republic

Sell See footnote 8

Swiss CO Swiss Code of Obligations

UCIF Unidroit Convention on International Factoring, in: Final Act to the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on International Factoring and International Financial Leasing done at Ottawa, 28 May 1988, Annex II

UCIFIL Unidroit Convention on International Financial Leasing, in: Final Act to the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on International Factoring and International Financial Leasing done at Ottawa, 28 May 1988, Annex I