

Unidroit

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

COMPARATIVE PRESENTATION OF THE PROVISIONS OF THE COUNCIL DIRECTIVE
OF THE EUROPEAN COMMUNITIES ON THE COORDINATION OF THE LAWS OF THE MEMBER
STATES RELATING TO SELF-EMPLOYED COMMERCIAL AGENTS (86/653 EEC),
THE PRELIMINARY DRAFT OF A UNIDROIT CONVENTION ON CONTRACTS OF AGENCY IN
THE INTERNATIONAL SALE OF GOODS (COCCAISG) DRAWN UP BY
PROFESSOR DIETRICH MASKOW AND THE FINAL DRAFT OF
THE MODEL FORM OF AGENCY CONTRACT FOR INTERNATIONAL TRADE
(SELF-EMPLOYED COMMERCIAL AGENTS) OF THE INTERNATIONAL CHAMBER
OF COMMERCE, INCORPORATING THE COMMENTS ON COCCAISG OF GOVERNMENTS
AND CORRESPONDENTS OF THE INSTITUTE

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Rome, February 1992

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INTRODUCTION

This document is the result of an in-depth comparison between three documents.

The first is the Directive of the Council of the European Communities on the Coordination of the Laws of the Member States Relating to Self-Employed Commercial Agents, 18 December 1986 (86/653/EEC), hereinafter referred to as the Directive.

The second is a Preliminary Draft of a Unidroit Convention on Contracts of Commercial Agency in the International Sale of Goods. This proposed convention was drafted 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) and pertains to the internal relations between principals and agents in the international sale of goods. The text is from Unidroit 1989, Study LXXI - Doc. 1 (Original: English).

The third text is the 11-11-1990 Final Draft of the International Chamber of Commerce (ICC) Model Form of Agency Contract for International Trade (relating to self-employed commercial agents) which was published with an introductory note in Unidroit 1991, C.D. (70) 20 (Original: English), the Secretariat memorandum pertaining to Item 5(e) on the agenda of the 70th session of the Governing Council of Unidroit.

The Directive now exists as the law of the EC concerning the internal relations between principals and agents for international as well as domestic sale of goods.

The Maskow draft was circulated to Unidroit's Member States as well as to corresponding collaborators with a request for comments pertaining to the necessity or desirability of such an international convention as well as to the specific provisions of the draft. Various responses were received and these comments have been included in this document.

This analysis takes the following format. General comments relating to the entire proposed convention are listed first.

Each individual provision or paragraph or sub-topic of the Directive is then listed individually with corresponding provisions or paragraphs from the two other sources, if any. This constitutes part I of the study. Specific comments are attached to each individual section.

Part II of the study takes those remaining paragraphs or provisions of the Draft which have no direct correspondence with the Directive and lists them, along with corresponding ICC provisions, if any.

Part III of the study includes the provisions of the ICC contract which have no correspondence with either of the other documents.

Thus each and every provision of the three documents is included somewhere within parts I, II or III.

As will be noted, the three documents entirely different in character. The first represents existing domestic legislation, the second an international convention, and the third an actual contract. Thus, while there may be similarities between the texts there are certainly a number of differences.

It should also be noted that the Directive was chosen as the starting point for this study. It would also have been appropriate to start with the international document since it is meant to be a universal instrument and specific comments have been directed to that document. Of course the model contract would also have been appropriate as this probably represents real contracts between principals and agents at an international level. However, as the Directive is highly respected by countries desiring to bring their own law into conformity with that of the EC countries and given the importance of the EC today in international trade, this document has been chosen as the basis of the study.

It remains of course to be seen how effective or successful the Directive will become within the EC and it would be appropriate to incorporate any necessary modifications or additions into a truly international convention.

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GENERAL COMMENTS ON THE PROPOSED CONVENTION

1. The Directorate-General for internal market and industrial affairs of the Commission of the EC stated that the adoption of an international convention on the contract of commercial agency in the international sale of goods is NOT of priority for the Commission. The major concern of this office in this area is the "implementation and application of the Directive in all Member States ...". The response further stated that Member States of the EC were themselves reluctant to support a convention on a subject already covered by the Directive.
2. The response from the Directorate-General did not address the need for an international convention with respect to parties from EC nations doing business with other parts of the world. It would appear that given the existence of the Directive the issue has been recognised by the EC as one of some importance.
3. The Directorate-General further stated that "any such Convention would have to be made fully compatible with our Directive."
4. The response from Professor Sucharitkul stated that there are "... mounting needs for unification of rules on the subject ...". He added that the draft convention appears to cover "... most of the principal aspects that ought to be included in an international convention or model law in this field." He concluded by stating that the initial study indicated that additional work in this field would be worth pursuing.
5. The response from Professor Siqueiros noted that Mexico had ratified the United Nations Sales Convention (Vienna, 1980), the New York Prescription Convention (1974) and its Protocol (1980), and the Geneva Agency Convention (1983). He stated that as the latter had not yet entered into force, "it would seem sensible not to pursue the new endeavours until the co-related Convention does enter into force."
6. The response from the Swedish Government stated that there were plans for a national Act on commercial agency to enter into force on January 1, 1992. "The Act will totally comply with the EC Directive ...". It was the opinion of the Government of Sweden that it would be unlikely that any EC or EFTA country would be prepared to deviate from the rules set forth in the Directive, and therefore any future convention should, with respect to questions dealt with in the Directive, "aim at choosing the same solutions as those chosen there".
7. The Secretariat of the UNCTAD/GATT International Trade Centre indicated that those provisions of the draft which were in accord with the Directive and other main conventions would be acceptable.

8. The Secretariat also stated that there were legislative gaps in the subject of contracts for commercial agency in several Eastern European countries which should be filled rapidly. Those countries, in trading with EC countries, had often made their contracts subject to the legislation of the EC. It suggested that it would be a good idea to maintain several of the provisions of the proposal, especially those corresponding with Community law. Likewise, recognising the legislative activity in many of these countries, it would "... underline the urgency for proposing a definitive text on this subject ...".

9. Professor Azziman suggested that the preamble make a reference to the new international order. He believed that this would convey notions of justice which would help to "moralise" the principal-commercial agent relationship.

10. Professor Boudahrain wrote that the difficult situation of the remunerated intermediary acting on behalf of the principal followed from either the absence of specific protective statutes or the ineffectiveness or insufficiency of the existing law in this area.

He continued by stating that the proposal seemed oriented to the elaboration of a uniform law specifically regarding commercial agents, and consequently, to show gaps or insufficiencies existing in international instruments on this subject. The need to elaborate uniform legislation was ultimately based on the problems flowing from the insufficiency of national laws, or the gap between legal theory and commercial reality. "Nevertheless the recourse to universal and regional norms which are found within the proposal demonstrates the considerable role of essentially Western sources, and in this case of industrial countries which monopolise international trade."

Professor Boudahrain felt that the proposed Unidroit convention sought to solve certain problems "... experienced by market economy countries which are exacerbated by the competition between them. There is a quasi-unanimity of developed countries to put an end to this situation ... without permitting the countries of the third world to benefit from an egalitarian legal order, one based on an ethic of solidarity and cooperation, or at least from equal bargaining positions."

He suggested that unless the new economic order were to bring about fundamental changes in the area of international trade, any instrument, the object of which was to protect the commercial agent, would only add to other shortsighted rules.

11. Professor Boudahrain stated that the feasibility of a uniform law applicable to commercial agents would depend on mechanisms to assure acceptance, effectiveness and efficiency of mandatory laws which would be

adopted. "The proposal does not go far enough to overcome habits, usages and conduct presently followed."

He therefore suggested that it would be advisable to wait until relevant conventions such as the 1983 Geneva Convention on Agency in the International Sale of Goods, the 1977 Hague Convention on the Law Applicable to Agency, the 1980 EEC Convention on the Law Applicable to contractual obligations, and the 1986 EEC Directive on agency contracts came into force and were effective so as to be able to draw conclusions as to the need for any other related conventions such as the one proposed by Professor Maskow.

12. Professor Illescas queried the sources that Professor Maskow had chosen for his study, in particular those taken from various socialist countries whose regimes had experienced important changes of late.

13. He also questioned the use of different legislations as the basis of the study: "... the fixing of the centre of gravity in the study of the subject could be found in the contract of international agency as well as in the legal statute of commercial agency."

CHAPTER 1 - SCOPE AND GENERAL PROVISIONS

General Comments:

1. Professor Quenaudon remarked that the author of the proposal had suggested various exclusions from the scope of the future convention (those of commission agent, dealer, etc.) because of influences of the EC Directive of 1986 as well as at the 13th session of the Hague Conference on Private International Law, both of which had found it impossible to promulgate a body of law dealing with all forms of intermediaries. Professor Quenaudon noted, nevertheless, that the exclusion of the salaried intermediary might merit a deeper analysis because of this intermediary's similarity with others under subordination to the represented party.

2. Professor Quenaudon continued by stating that the case of the licensee had not been dealt with in the proposal. "Nevertheless his position is close to that of the commercial agent. The latter with its principal and the former with its licensor, they pool their efforts to increase their clientele. Of course the licensee does not legally represent the licensor, as is the case of the agent, but the licensee does "represent" a distinct entity and therefore the interests of someone else, which from this point of view makes the licensee closer to the agent than the dealer or the broker." Professor Quenaudon noted that there were still contractual links between the licensor and the clients of the licensee and therefore it was not inconceivable that they would be included in domestic forms of agency legislation. But the Hague Conference had decided to separate those forms of intermediaries from those of commercial agents on account first, of the legal aspect of the general contract between the licensor and the licensee which set out the nature of the contracts to be entered into by the licensee with third parties, and second, the financial risks and outlays which might be heavier for licensees than for other commercial agents.

I-1. Geographical scope

Dir Art 1(1) (in part)

The harmonization measures prescribed by this Directive shall apply to the laws, regulations and administrative provisions of the Member States ...

Draft Art 1(1) (in part)

This Convention applies to contracts ... 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.

Art 1(2)

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

Comments:

1. See Draft Art 10 (II-7: Place of business).
2. The Introduction (para 4) to the ICC contract states that the model contract "... has been prepared on the assumption that it would apply only to international agency agreements ..."
3. Professor Fazzone suggested that, as in CISG, Draft Art 1(1)b ought to include an option which would allow signatories not to adopt this provision. He noted that the United States and others had exercised this CISG option.

I-2. Substantive scope

Dir Art 1(1) (in part)

... laws ... governing the relations between commercial agents and their principals.

Draft Art 1(1) (in part)

... contracts of commercial agency in the international sale of goods ...

Art 4

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. Maskow states (p.20) that the last sentence of Draft Art 4 has been included to make it clear that individual States may prohibit commercial agency or certain forms of it. Thus, compliance with an international convention is not necessarily all that would be required to make a contract enforceable. See section II-2 relating to reservations made by signatories to such a convention.

2. It is noted that both the Directive and the Draft would allow the agent to "negotiate" or "negotiate and conclude" whereas the ICC contract would only allow the agent to "promote".

3. With respect to comment 2 it is noted that both the Directive and the Draft would apply to the "sale or purchase of goods" whereas the ICC contract would only apply to the "sale" of goods.

4. The Introduction (para 4) to the ICC contract states that the form applies to "self-employed commercial agents, acting for the sale of goods." The Introduction (para 4) also states that the model "... is meant for agents who represent a seller of goods without taking into account so-called 'buying agents' ...".

5. See Draft Art 3 (II-1: Agent's auxiliary functions).

6. The response of the International Union of Commercial Agents and Brokers (IUCAB) suggested that Art 4 of the proposal implies that "Contracting States are not bound by the Convention, but it is merely a letter of intent ..." They therefore question the meaning, the intent, and particularly the aim of the convention.

7. Professor Illescas noted that Art 4 of the proposal should include a statement that the scope of the convention also covers termination of the contract of commercial agency.

I-3. Commercial agency defined

Dir Art 1(2)

For the purposes of this Directive, 'commercial agent' shall mean 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 of and in the name of that principal.

Draft Art 1(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.

ICC Art 1.1

The Principal appoints the Agent, who accepts, as his commercial agent to promote the sale of the products listed in Annex 1, § 1

(hereinafter called "the Products") in the territory defined in Annex 1, § 2 (hereinafter called "the Territory").

Art 3.1

The Agent agrees to use his best endeavours to promote the sale of the Products in the Territory in accordance with the Principal's reasonable instructions and shall protect the Principal's interests with the diligence of a responsible businessman.

Comments:

1. In Art 1(2) of the Directive only the main obligation of the commercial agent is included. However, Maskow suggests (p.17) that due to the contractual nature of the proposed convention it would seem appropriate to include the main obligation of the principal also in the corresponding provision, Art 1(3).

2. The response from the Government of the USSR suggests that it might be expedient to add to Art 1(3) of the proposal "the provision that an agent acts as an independent intermediary, similar to the clause in Item 2 of Article 1 of the EEC Directive ..." It suggested that in light of Art 1(4)a (the provision excluding employees from the scope of this proposal) this would be an appropriate inclusion.

3. The USSR further stated that the inclusion of the words "or otherwise" might cause ambiguity in interpretation. It suggested that the words "commission or otherwise" could be replaced by the words "monetary remuneration that may be determined in the form of commission".

4. Professor Fazzzone noted that Draft Art 1(3) suggested that the convention would only apply when there was a formal contract of agency. He suggested, however, that there would be "no logical reason not to apply the convention also to situations in which an agency relationship ... arises by virtue of the conduct of the parties." He further suggested that it was important to make provision for this type of agreement especially in view of implications for third parties. He then noted that other provisions of the Draft (namely Arts 9 and 24) would recognise less formal types of agreements arising from the conduct of the parties.

5. Professor Fazzzone also noted that the vagueness of the term "permanent", absent elaboration, might cause problems of interpretation and application.

6. Professor Azziman considered the French version of the text of Draft Art 1(3) to be rather clumsy, particularly at the point: "... and the principal undertakes to remunerate the services ..."

7. Professor Illescas noted that the use of the terms "comitente" and "impresario" could be misleading and confusing. He suggested the use of the term "representado" as this was the term utilised in CAISG and seemed to be more general.

I-4. Exclusions: employees, etc.

Dir Art 1(3)

A commercial agent shall be understood within the meaning of this Directive as not including in particular:

- a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association,
- a partner who is lawfully authorized to enter into commitments binding on his partners,

Draft Art 1(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;

Comments:

1. Maskow has expressly (p.17) excluded "employees" from the scope of the Draft to stress the self-employed character of commercial agents.
2. Professor Azziman does not think that the term "employee" indicates a precise legal classification.
3. Professor De Nova has suggested that the entire proposed Art 1(4) be deleted. In his comment on this paragraph Maskow had stated that the list of categories would not normally fall within the scope of the convention anyway and that the list would serve mainly for clarification. Professor De Nova indicated that in his opinion a negative provision in such an article could determine exceptions to the scope of the convention.

I-5. Exclusions: special appointees

Dir Art 1(3) (cont)

- a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy.

Draft Art 1(4) (cont)

(c) a receiver, a receiver and manager, a liquidator or a trustee in bankruptcy or otherwise.

Comment:

1. Maskow states (p.18) that the words "or otherwise" were added to the Draft to make it clear that a trustee should not be regarded as an agent of the trust, of the person who created the trust, or of the beneficiaries of such trust.

2. The USSR response to the proposal would replace the words "or otherwise" by "or any other person accomplishing similar functions" in order to avoid possible ambiguity in interpretation.

I-6. Exclusions: unpaid agents

Dir Art 2(1)

This Directive shall not apply to:

- commercial agents whose activities are unpaid,

Draft Art 2

This Convention shall not apply to commercial agents:

(a) whose activities are unpaid;

Art 1(3) (in part)

... the principal undertakes to remunerate the services of the commercial agent by paying him a commission or otherwise.

ICC Art 15.1 (in part)

The Agent is entitled to the commission ... on all sales of the Products ... in the Territory.

Comments:

1. Maskow notes (p.18) that one of the most fundamental assumptions of the convention is that commercial agents receive remuneration.

2. Professor Azziman wrote that with regard to the presumed remuneration of the agent the law of Morocco (similar to the law of several other countries) starts from the hypothesis that the mandate does not imply remuneration unless specifically agreed to. Exceptions to this presumption are: when the agent undertakes the task as a professional, when the contract is between merchants and the task is undertaken in the line of business, and when, by usage, the acts which are the subject of the mandate are customarily remunerable.

I-7. Exclusions: market agents

Dir Art 2(1) (cont)

- commercial agents when they operate on commodity exchanges or in the commodity market, or

Draft Art 2 (cont)

This Convention shall not apply to commercial agents:

(b) who operate as dealers on stock, commodity or other exchanges;

Comments:

Maskow notes (p.18) that in general it is assumed that various types of exchanges have their own rules for dealers. Thus, the general exception for commercial agents operating on commodity markets may be justified.

I-8 Exclusions: crown agents

Dir Art 2(1) (cont)

-the body known as the Crown Agents for Overseas Governments and Administrations, as set up under the Crown Agents Act 1979 in the United Kingdom, or its subsidiaries.

I-9. Exclusions: special types of agents

Dir Art 2(2)

Each of the Member States shall have the right to provide that the Directive shall not apply to those persons whose activities as commercial agents are considered secondary by the law of that Member State.

Draft Art 2 (cont)

This Convention shall not apply to commercial agents:

(c) whose activities are secondary.

Comments:

1. Maskow (p.19): "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".

2. Thus, it is noted that the Directive allows for specific reservations by Member States which is different from the formulation of the Draft which excludes this type of agent automatically.

3. The Introduction (para 4) to the ICC model states that not only would purchasing agents be excluded from the scope of the contract, but so would agents promoting the sale of services as well as agents appointed as consignees of stocks of goods (such as spare parts, etc.).

4. The USSR response suggests that it might be useful to add to Art 1 of the proposal a provision similar to that of Directive Art 2(2).

5. Professor Routamo suggests that the meaning of the term "secondary activities" should be clarified, at least in the comments on the convention.

CHAPTER 2 - RIGHTS AND OBLIGATIONS OF THE PARTIES

General Comments:

It is noted that according to the Directive all of the duties and obligations of both the principal and the agent listed in Directive Arts 3 and 4 (sections I-10 through 17) are binding on the parties and no derogations from them are allowed. See section I-18.

I-10. Agent's obligations: good faith

Dir Art 3(1)

In performing his activities a commercial agent must look after his principal's interests and act dutifully and in good faith.

Draft Art 12(1)

[same, replace "must" by "shall"]

Art 12(2)

In particular, a commercial agent must:

(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;

ICC Art 2.1

In carrying out their obligations under this agreement the parties will act in accordance with good faith and fair dealing.

Art 3.1

The Agent agrees to use his best endeavours to promote the sale of the Products ... and shall protect the Principal's interests with the diligence of a responsible businessman.

Comments:

1. Maskow quotes (p.24) from ICC case no. 5080: "... 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". This duty of loyalty, which determines the rights and duties of both principal and agent, is expressed in this Draft, the

Directive, and in the ICC model (this section and I-14).

2. The words "due diligence" are used repeatedly throughout the ICC provisions concerning specific obligations of the agent.

3. Regarding the agent's authority to act according to this section see sections I-11 and II-11, 12, 13, 14.

4. Professor Fazzone suggested that Draft Art 12(2)d, rather than reading "by virtue of the contract", would better serve the needs of the parties if the provision were to read "by virtue of the principal-agency relationship".

5. Professor Illescas stated that the agent's obligation to keep secret confidential information belonging to the principal should extend beyond the duration of the contract. He considered the extent of the harm which could be caused by disclosure by the agent to be the same during or after the conclusion of the contract.

I-11. Agent's obligations: general

Dir Art 3(2):

In particular, a commercial agent must:

(a) make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;

Draft Art 12(2)

(a) [same, add after "appropriate" the words "provided he is authorised to do so"]

ICC Art 3.1

The Agent agrees to use his best endeavours to promote the sale of the Products in the Territory in accordance with the Principal's reasonable instructions and shall protect the Principal's interests with the diligence of a responsible businessman.

Comments:

1. Maskow has added (p.25) the words "provided he is authorised to do so" to Art 12(2)a in order to make it perfectly clear that the commercial agent is not allowed to conclude contracts with third parties unless specifically authorised to do so. This prohibition is repeated in Draft Art 15(1) (sections II-11 and 12).

2. See section II-11,12,13,14 for provisions expressly dealing with the authority of the agent.

I-12. Agent's obligations: disclosure/informative

Dir Art 3(2) (cont)

(b) communicate to his principal all the necessary information available to him

Draft Art 12(2)

(b) [same, replace "must" by "shall"]

ICC Art 9.1

The Agent shall exercise due diligence to keep the Principal informed about his activities, market conditions and the state of competition within the Territory. He shall answer any reasonable request for information made by the Principal.

Art 9.2

The Agent shall exercise due diligence to keep the Principal informed about: (i) the laws and regulations which are to apply in the Territory to which the Products must conform (e.g. import regulations, labelling, technical specifications, safety requirements, etc.), and (ii) the laws and regulations concerning his activity, as far as they are relevant for the Principal.

Art 11.4

The Agent shall notify the Principal of any infringement of the Principal's trademarks, tradenames or symbols that comes to his notice.

Art 12

The Agent shall immediately inform the Principal of any observations or complaints received from customers in respect of the Products. The parties hereto shall deal promptly and properly with such complaints. The Agent has no authority to engage in any way the Principal, until after he has received a specific written authorisation to such effect.

Comments:

1. Maskow notes (p.26) that the information referred to in Draft Art 12(2) would relate to the market situation, regulations on imports and exports, changes in tax rates and customs duties, etc, but may also include specific information such as client files, customer financial stability, etc. He suggests, in accordance with ICC Art 11.4, that when information relating to industrial property rights (trademarks, copyrights and

infringement thereon) is expected from the agent that this be specifically stated in the contract.

2. To a certain extent the concepts in comment 1 would be included by the agent's general obligations of good faith and, in particular, to preserve all rights and remedies for the benefit of the principal (section I-10).

3. Professor Routamo has compared the wording of Draft Art 12(2)b with that of Art 13(2)b. He says that the duty of the principal is expressed very clearly and precisely compared with the language of the former provision ("all the necessary information") and he suggests that a more precise formulation be used for Draft Art 12(2)b.

I-13. Agent's obligations: compliance

Dir Art 3(2) (cont)

In particular, a commercial agent must:

(c) comply with reasonable instructions given by his principal.

Draft Art 12(2)

(c) [same, replace "must" by "shall"]

ICC Art 3.1

The Agent agrees to use his best endeavours to promote the sale of the Products in the Territory in accordance with the Principal's reasonable instructions and shall protect the Principal's interests with the diligence of a responsible businessman.

Art 3.4

When negotiating with customers, the Agent shall offer Products strictly in accordance with the terms and conditions of the contract of sale which the Principal has communicated to him.

Art 5.3

The Agent shall refrain from representing or distributing non-competitive products of a manufacturer who is a competitor of the Principal, if requested to do so by the Principal, provided the latter's request is reasonable, taking into account all the circumstances of the case.

Comments:

1. It is noted that the ICC provisions listed in this section are specific examples of the incorporation into a contract of the general idea

given in the Directive and the Draft provisions.

2. The USSR response suggests that, in the interest of avoiding disputes, deletion of the word "reasonable" would be expedient.

I-14. Principal's obligations: good faith

Dir Art 4(1)

In his relations with his commercial agent a principal must act dutifully and in good faith.

Draft Art 13(1)

[same, replace "must" by "shall"]

ICC Art 2.1

In carrying out their obligations under this agreement the parties will act in accordance with good faith and fair dealing.

Comments:

1. See section I-10.

I-15. Principal's obligations: assistance

Dir Art 4(2)

A principal must in particular:

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

Draft Art 13(2)

(a) [same, replace "must" by "shall"]

ICC Art 14.1

The Principal shall provide the Agent with all necessary written information relating to the Products (such as price lists, brochures, etc.) as well as with the information needed by the Agent for carrying out his obligations under the contract.

I-16. Principal's obligations: disclosure/informative

Dir Art 4(2) (cont)

(b) obtain for his commercial agent the information 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.

Draft Art 13(2)

(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 with 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.

ICC Art 14.1

The Principal shall provide the Agent with all necessary written information relating to the Products (such as price lists, brochures, etc.) as well as with the information needed by the Agent for carrying out his obligations under the contract.

Art 14.3

The Principal shall keep the Agent informed of any relevant communication with customers in the Territory.

Art 14.4

If the Principal expects that his capacity of supply will be significantly lower than that which the Agent could normally expect, he will inform the Agent within a reasonable time.

Comments:

1. Draft Art 13(2)b deviates from the corresponding Directive provision with respect to the use of the word "provide" as opposed to the word "obtain". Maskow suggests (p.27) that the latter may be misleading in that usually the agent must gather together for himself necessary information to do his own job, as a self-employed entity. "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 ..." Such information would include copies of correspondence between the principal and the client, past client lists, etc.

2. It is noted that this requirement would inure to the benefit of both the principal and the agent.

3. Professor Fazzone suggests that Draft Art 13(2)b may impose an unreasonable obligation on principals to forecast the volume of commercial transactions. However, accepting the fact that principals should be obliged not to undermine their agents, he suggests that principals might be bound

by a clause stating an obligation to provide the agent with "the necessary support ... for the agent to perform its obligations." This would appear to be a generalisation of the obligations of Draft Art 13.

I-17. Principal's obligations: transaction status disclosure

Dir Art 4(3)

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

Draft Art 13(3)

[same, replace "must" by "shall"]

ICC Art 4.1 (in part)

The Principal shall inform the Agent without undue delay of his acceptance or rejection of the orders transmitted by the latter.

Art 14.2

[The Principal] shall furthermore inform the Agent without undue delay of his acceptance, refusal and/or non-execution of any business transmitted by the Agent.

I-18. Derogation by parties: obligations

Dir Art 5

The parties may not derogate from the provisions of Articles 3 and 4.

CHAPTER 3 - REMUNERATION OF THE AGENT

General Comments:

1. Professor Illescas suggested a slight variation of the proposed Arts 18 and 19. As these both deal with the events which give rise to a right to commission, a general provision with two subparts (to distinguish between events giving rise to such commission during and after the life of the contract) would be a preferable organisation.
2. Professor Quenaudon noted that as long as the main duty of the principal was that of remuneration of the agent then perhaps the provisions dealing with commission could also be placed in the chapter concerning obligations of the parties.
3. Professor Fazzzone has suggested that the provisions proposed in Arts 22 and 23 would better be left to the negotiation of the parties. They might function as default provisions in the absence of explicit agreement.

I-19. Remuneration: standard

Dir Art 6(1)

In the absence of any agreement on this matter between the parties, and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration, a commercial agent shall be entitled to the 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 remuneration taking into account all the aspects of the transaction.

Draft Art 17(1)

[same, exclude "and without prejudice to the application of the compulsory provisions of the Member States concerning the level of remuneration"]

Art 9(1)

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

Art 9(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. With respect to Draft Art 9, Maskow notes (p.22) that these provisions are particularly important when, in the course of performance of long term contracts, the parties frequently establish practices between themselves.
2. Maskow notes (p.31), with respect to Draft Art 17, that the idea of "mandate" allows for remuneration only when promised. His references to French and U.S. law, among others, indicate that when there is no reference made to remuneration (in the contract) two main systems exist for determining the amount of commission to be paid: either that which would be reasonable or that which would be customary. Art 6(1) of the EEC Directive, according to Maskow, seems to "combine the two methods mainly used in a rather sophisticated and individual manner". The same approach is taken in the proposed Art 17(1).
3. Maskow notes (p.32) that the reservation in favor of national law in Directive Art 6(1) has been omitted from the proposed legislation since the general problem is taken up in Art 5 (section II-2).
4. The Swedish opinion with respect to Draft Art 9 was that "mandatory provisions in agency law cannot be set aside by such usage or practices." In their opinion the Directive was based on the same assumption.
5. Professor Fazzone has queried the legal effect of those usages and practices referred to in Draft Art 9: "Do they in effect become part of the parties' contract? Can a violation of a usage or practice constitute a breach? Who determines if they are material or fundamental to the parties' agreement?"
6. Professor Azziman stated that he tended to distrust those usages which were said to be widely known in international trade and of which the parties should have known. Therefore, acknowledging that his criticism might not be the prevalent view in this debate, he would take the position of certain businesspeople of the "third world" who are not always aware of international commercial practice.
7. Professor Illescas suggested that the proposed Art 17 should anticipate the possibility of special forms of commission in the event of the agent's assuming special obligations or duties (e.g. an obligation to be completed for a third party).

I-20. Remuneration: definition of commission

Dir Art 6(2)

Any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission within the meaning of this Directive.

Draft Art 18(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.

ICC Art 16.1

Commission shall be calculated on the net amount of the invoices, i.e. on the effective sales price (any discount other than cash discounts being deducted) clear of any additional charges (such as packing, transportation, insurance) and clear of all tariffs or taxes (including value added tax) of any kind, provided that such additional charges, tariffs and taxes are separately stated in the invoice.

Comments:

1. Maskow notes (p.32) that while Directive Art 6(2) is an attempt to give a technical meaning to the term "commission" the proposed legislation has adopted the expression "commission or other remuneration" (see Art 17(1), previous section). This is an attempt to harmonise those legislations which only refer to "commission" with those which do not even mention the term.
2. Maskow cites (p.33) various pieces of legislation which come to opposite results with regard to the calculation of the commission: as extremes, either the commission would be based upon the cost of the product alone or the commission would be based upon the cost of the product and packing, freight, insurance, etc. Maskow suggests that the former be the basis since this would reflect the actual activities of the commercial agent as well as encourage the agent to reduce such costs in the interest of the principal.
3. It appears that a provision such as that found in the model contract would be most valuable. Indeed these secondary costs may be directly related to the volume of sales of a given product or in a given locale, and therefore they ought to be given consideration during the formation of the contract.
4. IUCAB notes that the proposed rule does not concur with current German law. See comment 2.

5. Professor Fazzone notes that perhaps the proposed Art 18(3) should be left to the parties to negotiate. He suggests that this may induce the agent to keep overall costs as low as possible to remain competitive.

6. Professor Azziman has pointed out (note 5.3) that sometimes the term "commission" refers to the actual offer to carry out the agency contract (either express or implied).

I-21. Remuneration: inapplicability of Directive

Dir Art 6(3)

Articles 7 to 12 shall not apply if the commercial agent is not remunerated wholly or in part by commission.

I-22. Entitlement to commission: directly procured customers

Dir Art 7(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 of his action; or

Draft Art 18(1)

(a) [same]

Comments:

1. Maskow has distinguished (p.30) three different forms of commercial agency. Draft Art 16 refers to "sole and exclusive" agencies (see sections II-15 and 16). But where the contract between the principal and the agent has no express or implied restrictions on competition, i.e. with respect to customers or area, the agent is still entitled to a commission if there can be established a link between the agent's activities and the transaction. Maskow further notes that this type of agency is not common in international commercial agency but may arise when brokers are involved.

2. Thus, Draft Art 18(1)a would correspond exactly with the EEC Directive. Maskow quotes (p.33) from an ICC arbitral award, case no. 4145: "... 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..."

I-23. Entitlement to commission: previously acquired customers

Dir Art 7(1)(cont)

(b) where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Draft Art 18(1)

(b) [same]

Comments:

Maskow notes (p.33) that Art 18(1)b, although identical to the Directive, "may seem somewhat innovatory for many legislations although they may in fact also encompass such transactions within the activities of the agent."

I-24. Entitlement to commission: sole agents

Dir Art 7(2)

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

-either where he is entrusted with a specific geographical area or group of customers, and where the transaction has been entered into with a customer belonging to that area or group.

Draft Art 18(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

Comments:

1. Maskow notes (p.31) that Draft Arts 16(1) and 16(2) define sole and exclusive agencies in terms of prohibitions on the principal (section II-15 and 16). For this reason the texts of the two paragraphs are not included in this section (or the next) which deal with an agent's entitlement to commission. It should be kept in mind, however, that the underlying principles are related.

2. Maskow notes (p.30) that the distinction between sole and exclusive agency does not usually appear in legislation but is a very important one in commercial practice. See ICC Arts 13.1 and 13.2 (sections II-15 and 16).

3. IUCAB states that the reason for the form of the "sole agency" is undermined, at least in the German Code, if the principal is not obligated to pay the agent commission on sales to customers in the given region or population. It states that the reason for remuneration is that the sole agent has a responsibility to look after and service the needs of the entire area or population.

4. See section II-15 for the definition of sole agency, especially comment 2 with respect to the rationale behind the clause objected to above.

I-25. Entitlement to commission: exclusive agents

Dir Art 7(2) (cont)

[A commercial agent shall also be entitled to commission]:

-or where he has an exclusive right to a specific geographical area or group of customers,
and where the transaction has been entered into with a customer belonging to that area or group.

Member States shall include in their legislation one of the possibilities referred to in the above two indents.

Draft Art 18(2) (cont)

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

(b) where he is an exclusive agent and the transaction has been entered into with a customer belonging to his area or group.

ICC Art 15.1

The Agent is entitled to the commission provided for in Annex VI, §1, on all sales of the Products which are made during the life of this contract to customers established in the Territory.

I-26. Entitlement to commission: after termination of contract

Dir Art 8

A commercial agent shall be entitled to commission on commercial transactions concluded after the agency contract has 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 that contract terminated; or

Draft Art 19(1)

(a) [same]

ICC Art 19.2

No commission is due to the Agent for contracts of sale made on the basis of orders received after the expiry or termination of this contract, save if such transaction is mainly attributable to the Agent's efforts during the period covered by the agency contract and if the contract was entered into within a reasonable period after the expiry or termination of this contract. The Agent must however inform the Principal in writing, before the expiry or termination of this contract, of the pending negotiations which may give rise to commission under this paragraph.

Comments:

1. Maskow notes (p.34) that the right to commission after termination of the contract would have been exceptional, in certain States, before implementation of the Directive.
2. Additionally, Maskow notes (p.34) that Directive Art 8(a) was clearly inspired by the legislation of certain Member States. However, this formulation is perhaps more flexible than specific legislations which may stipulate a certain maximum period (e.g. 3 months). Also, the proposal is more flexible than certain legislations with respect to the requirement of actual negotiation by the commercial agent, as opposed to the concept of being "mainly attributable to the agent's efforts".
3. The response from the USSR suggests that the words "mainly" and "reasonable" are very ambiguous and could lead to dispute. Therefore "more exact criteria" should be found.

I-27. Entitlement to commission: transaction commenced prior

Dir Art 8 (cont)

[A commercial agent shall be entitled to commission after termination of the agency contract]:

(b) if, in accordance with the conditions mentioned in Article 7, the order of the third party reached the principal or the commercial agent before the agency contract terminated.

Draft Art 19(1)

(b) [same, replace "Article 7" by "Article 18"]

ICC Art 19.1

Orders transmitted by the Agent or received by the Principal from customers established in the Territory before the expiry or termination of this contract and which result in the conclusion of a contract of sale not more than six months after such expiration, shall entitle the Agent to commission.

Comments:

1. Maskow notes (p.34) that Directive Art 8(b) and Draft Art 19(1)b relate especially to cases where no direct link between the order and the activity of the agent can be established (in the context of a sole or exclusive agency). This right to commission may encourage the principal to respond in a timely manner to orders, as opposed to ignoring the order until after termination of the contract with the agent in order to avoid the payment of commission.
2. If the order is received after termination of the contract then the provisions of the previous section may apply.
3. Professor Fazzone sees no reason why the agent should not be entitled to commission on orders placed before termination of the agency contract. The construction of Draft Art 19(1)b makes the entitlement to commission dependent on when the principal receives the order. The burden of proving that the order was placed before termination would still lie with the agent.

I-28. Entitlement to commission: prior agents

Dir Art 9

A commercial agent shall not be entitled to the commission referred to in Article 7, if that commission is payable, pursuant to Article 8, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents.

Draft Art 20

[same, replace "Article 7" and "Article 8" by "Article 18" and "Article 19" respectively]

Art 19(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:

Maskow notes (p.35) that Draft Art 20 corresponds to Directive Art 9 in the sense that both articles approach the problem from the viewpoint of the new agent's claims. Draft Art 19(2) approaches the problem from a more neutral viewpoint. The main point of all three provisions is that the principal should not have to pay double commission on the same transaction.

I-29. Commission arises: transaction executed by principal

Dir Art 10(1)

The commission shall become due as soon as and to the extent that one of the following circumstances obtains:

- (a) the principal has executed the transaction; or

Comments:

Maskow suggests (p.35) that one EEC Directive variant for when the claim for commission arises would apply to internal contracts of commercial agency, that is "it takes as a model small intermediaries, the claim for commission arises earlier, namely when the contract with the third party has been concluded ... or where the principal has performed this contract."

I-30. Commission arises: transaction not executed by principal

Dir Art 10(1) (cont)

[The commission shall become due when]:

- (b) the principal should, according to his agreement with the third party, have executed the transaction; or

ICC Art 17.2

If a contract made by the Principal as a result of orders transmitted by the Agent is not thereafter put into effect, the Agent shall be entitled to commission unless non-performance of the contract is due to reasons for which the Principal is not responsible.

I-31. Commission arises: transaction executed by third party

Dir Art 10(1) (cont)

[The commission shall become due when]:

- (c) the third party has executed the transaction.

Draft Art 21(1)

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

ICC Art 16.2 (in part)

The Agent shall acquire the right to commission after full payment by the customers of the invoiced price. In case of partial payment made in compliance with the sales contract, the Agent shall be entitled to a proportional advance payment...

Comments:

Maskow has noted (p.35) that Art 21(1) of the proposal corresponds to one variant of the EEC Directive, as well as to certain aspects of U.S. and other (namely, certain socialist countries) law on agency.

I-32. Commission arises: transaction not executed by third party

Dir Art 10(2)

The commission shall become due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have.

Draft Art 21(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.

ICC Art 17.2

If a contract made by the Principal as a result of orders transmitted by the Agent is not thereafter put into effect, the Agent shall be entitled to commission unless non-performance of the contract is due to reasons for which the Principal is not responsible.

Comments:

1. Maskow notes (p.36): "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. ... 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."

2. Therefore, as taken up by the Directive, the exception to a general right to commission arises when the principal is not to "blame" (e.g. exceptional circumstances, anticipatory repudiation by the other party, etc.) for the non-execution of the transaction.

3. IUCAB finds unconvincing the logic behind Draft Art 21(1) and 21(2). They suggest that the claim to commission should arise "...as in Art 10 para 1 lits. a and b of the EEC Directive - as soon as the principal has executed ... or should have ... subject to the contract." They further state: "The omission of the afore-mentioned events at which the claim for commission arises implies a prepayment by the commercial agent."

I-33. Commission: due date

Dir Art 10(3)

The commission shall be paid not later than on the last day of the month following the quarter in which it became due.

Draft Art 22

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

ICC Art 16.3

The Principal shall provide the Agent with a statement of the commissions due in respect of each quarter and shall set out all the business in respect of which such commission is payable. The commission shall be paid not later than the last day of the month following the relevant quarter.

Comments:

1. The terminological differences according to Maskow (p.36) between the Directive and the proposed Draft with respect to the commission to be paid ("it becomes due" vs. "it arises" and "shall be paid" vs. "it is due") reflect the necessity of collecting the commissions together for periodic lump-sum payments rather than making frequent/multiple international transfers.

2. Maskow also notes (p.37) that this technicality (distinguishing the period between the times when the commission was earned and when it would become due) is also important with regard to the payment of interest which may be required.

3. Professor Routamo notes that CISG contains a provision specifically granting the right to interest payments (with respect to remuneration past due). He questions the absence of such a specific provision in Draft Art 22.

I-34. Derogation by parties: payment schedule

Dir Art 10(4)

Agreements to derogate from paragraphs 2 and 3 to the detriment of the commercial agent shall not be permitted.

I-35. Right to commission extinguished due to non-execution

Dir Art 11(1)

The right to commission can be extinguished only if and to the extent that:

- it is established that the contract between the third party and the principal will not be executed, and
- that fact is due to a reason for which the principal is not to blame.

Draft Art 21(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.

ICC Art 17.1

No commission shall be due in respect of offers or orders transmitted by the Agent and not accepted by the Principal.

Art 17.2

If a contract made by the Principal as a result of orders transmitted by the Agent is not thereafter put into effect, the Agent shall be entitled to commission unless non-performance of the contract is due to reasons for which the Principal is not responsible.

Comments:

Maskow notes (p.36) that, except as provided in the Draft Art 21(2) (section I-32) the commission would generally become due when the third party performs the contract.

I-36. Refund of commission paid

Dir Art 11(2)

Any commission which the commercial agent has already received shall be refunded if the right to it is extinguished.

Draft Art 29(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.

Comments:

The Swedish government suggested that with respect to Draft Art 29(2) an exception should be made "for goods and other property, belonging to the principal, which the agent is entitled to retain as a security for claims founded upon the commission."

I-37. Derogation to detriment of agent

Dir Art 11(3)

Agreements to derogate from paragraph 1 to the detriment of the commercial agent shall not be permitted.

I-38. Statement of commission due

Dir Art 12(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 become due. This statement shall set out the main components used in calculating the amount of commission.

Draft Art 23(I)

[same; replace "become due" by "arisen"]

ICC Art 16.3

The Principal shall provide the Agent with a statement of the commissions due in respect of each quarter and shall set out all the business in respect of which such commission is payable. The commission shall be paid not later than the last day of the month following the relevant quarter.

Comments:

1. Terminological differences, see section I-33.

2. Maskow notes (p.37) that a minor distinction has been drawn between the due date for the commission (the last day) and for the statement (not later than the last day) in order to give the agent time to inspect the statement and make any necessary objections before the commission is paid. It would not be contrary to the rule, however, if the principal sent the statement and transferred the funds together on the last day of the month.

I-39. Agent's right to inspect books

Dir Art 12(2)

A commercial agent shall be entitled to demand that he be provided with all the information, and in particular an extract from the books, which is available to his principal and which he needs in order to check the amount of the commission due to him.

Draft Art 23(2)

[same, delete "and in particular an extract from the books"]

ICC Art 16.4

The Agent is entitled to all the information, and in particular extracts from the Principal's books, in order to check the amount of the commission due to him. The Principal shall permit an independent auditor appointed for that purpose by the Agent to inspect the Principal's books for the purpose of checking the data relevant for the calculation of the Agent's commission. The costs of such inspection shall be borne by the Agent.

Comments:

Maskow (p.37) has simplified the formulation of the relevant Draft provision, compared with the Directive and the ICC, in order to make the convention more universal and less in conflict with existing national legislation.

I-40. Derogation of right to inspect books

Dir Art 12(3)

Agreements to derogate from paragraphs 1 and 2 to the detriment of the commercial agent shall not be permitted.

I-41. National laws: agent's right to inspect books

Dir Art 12(4)

This Directive shall not conflict with the internal provisions of Member States which recognize the right of a commercial agent to inspect a principal's books.

Draft Art 5

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.

CHAPTER 4 - CONTRACT FORMATION

General Comments:

1. Professor Fazzone suggested, with regard to the author's comments at the beginning of Draft Chapter II, that "the problem with leaving formation issues to national law is that there is the inevitable lack of standardisation ..." This result would be contrary to the objective of the convention. He suggested that some "fairly specific provisions be included, at the risk of some overlap with other conventions."

2. Professor Azziman stated that a convention regarding a particular contract should state those rules relating to its formation from the point at which those rules derogate, to a lesser or greater extent, from general laws of formation of international contracts. "Consequently, the problem is that of knowing whether general laws of formation of international contracts exist and if they are known as such ... PICC? ... lex mercatoria? ..."

3. Professor Illescas stated that as Chapter II is dedicated to the formation of the contract the references to the modification and the termination of the contract were inappropriate.

4. Professor Quenaudon has remarked that the attempt to avoid a lack of harmony between instruments such as CISG, CAISG, and the EEC Directive, which have clearly influenced this proposal, may not have been entirely successful with regard to the proposed Art 4. He stated that "... the distinction drawn between formation and validity gives rise to hesitations." and that "... formation must be understood as the form of the agency contract ..." If the form must be in writing then there should perhaps be some sort of sanction specified in the convention for the lack thereof.

He criticised the statement made by Maskow at page 23: "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." Professor Quenaudon stated that it should be the conflict of law rules of the forum state that apply rather than the "national law" ("whose national law?" he queries). By way of example he stated that according to French private international law the parties may choose between the local law (the law based on the subject of the contract) or national common law. According to Art 9 of the 1980 Rome Convention the latter choice would be excluded, and the law of the country where the agent was active would govern.

I-42. Requirement of written contract

Dir Art 13(1)

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. Waiver of this right shall not be permitted.

Draft Art 11(1)

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

Art 11(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.

ICC Art 25.1

This Contract replaces any other preceding agreement between the parties on the subject.

Art 25.2

No addition or modification to this contract shall be valid unless made in writing. However a party may be precluded by his conduct from asserting the invalidity of additions or modifications not made in writing to the extent that the other party has relied on such conduct.

Comments:

1. IUCAB responds that contracts as well as amendments thereto should be in writing. In its opinion however, contrary to that of Maskow, contracts of commercial agency are frequently not in written form.
2. Professor Fazzzone suggests that Draft Art 11(1) may be inconsistent with a provision such as Art 9 which would allow usage and practice to be binding on the parties. He notes that specific reliance may be difficult to prove (as required by Art 11(2)). See section I-3 for his comments on conduct of the parties. Professor Fazzzone suggests that, as in Art 10 of CISG, a provision might be included which would "permit authorisation to exist even in the absence of a writing."
3. Professr Illescas does not believe the requirement of a written contract to be necessary. "The agency contract, in spite of its permanent character and wide sphere of application (international trade), is always a consensual contract which perfects itself by a mere voluntary accord, without the necessity of any constitutive formal requirements." He suggests that the proposal could adopt Art 13(1) of the Directive which would give a

party the inalienable right to demand from the other a writing setting forth the terms of the agreement. Additionally, in cases where the parties cannot agree on the existence of the contract, the proposed Art 8 would offer a solution based upon an interpretation of the conduct of the parties.

I-43. National requirement of written form

Dir Art 13(2)

Notwithstanding paragraph 1 a Member State may provide that an agency contract shall not be valid unless evidenced in writing.

Comments:

1. This section and the preceding one list the two provisions of the Directive which relate to the requirement of written form for the contract. As Maskow points out (p. 24) the Directive does not make written form mandatory. The proposal would. These provisions seem to be inspired by certain legislations which have rules of a similar nature as well as his observation that litigation often occurs regarding the existence of a contract between two parties.

I-44. Prolongation of contract

Dir Art 14

An agency contract for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency contract for an indefinite period.

Draft Art 24

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.

ICC Art 18.1 A

This contract is concluded for an indefinite period and enters into force on ____.

Art 18.1 B

This contract enters into force on the ____ and shall remain in force until ____.

Art 24.1

If the parties have not made a choice between the alternative solutions provided in article...18 under the letters A and B, by deleting one of the alternatives, and provided they have not expressly made a choice by other means, alternative A shall be considered applicable.

Art 18.2 B (in part)

This contract shall be automatically renewed for successive periods of one year, unless terminated by either party by notice given in writing by means of communication ensuring evidence and date of receipt ...

Comments:

1. The Maskow proposal (p.38) has added the last half sentence to the virtually identical Directive Art 14 in order to recognise the common use of clauses in these types of contracts which automatically renew the contract for a fixed period of time.

2. Professor Azziman suggests that the proposed Art 24 is rather out of place as the article (the first in the chapter) deals with prolongation of a contract whereas the chapter is entitled "Termination of agency contract". He would suggest starting the chapter with an article making two main points. First, the article would deal with termination of a contract by expiration of the term (a contract of fixed duration), and second, it would deal with unilateral termination of the contract (contracts of indeterminate duration).

CHAPTER 5 - TERMINATION, REMEDIES AND POST-CONTRACTUAL OBLIGATIONS

General Comments:

1. Professor Azziman suggests that there appears to be a certain lack of homogeneity within Chapter 6 of the proposal (Remedies for breach and post-contractual rights). He has proposed creating two separate chapters: one including Art 28 (other sanctions for breach of the contract) and another chapter dealing with the effects of the termination of the contract (basically Arts 29 and 30).
2. The Introduction (para 3) to the ICC model states that there are countries which either do or do not provide for indemnification of the commercial agent if the contract expires or is terminated for reasons other than default by the agent.
3. The Introduction to the ICC model contract also states that the two solutions incorporated in the Directive (Arts 17.2 and 17.3) in fact have the same purpose and refer to the "goodwill indemnity", in other words to compensation for the agent for the loss of goodwill when the contract is terminated without his fault.
4. The parties to a contract, under ICC Art 21, are given an opportunity to include or to exclude such provisions. The Introduction states: "It is strongly recommended to choose alternative A whenever the right to indemnity is recognised by the law of the agent's country; in particular, as concerns EEC countries, alternative A of article 21 would conflict with mandatory rules of the legislation of the agent's place of business." Additionally, indemnification provisions may be fair in cases where they conform to international trading practices.
5. The EC Directorate-General stated that the absence of such indemnification provisions would not make the proposed legislation incompatible with the Directive. However, the Directorate-General's response stated: "I doubt very much that a Convention leaving out this most important issue would have any very significant effect."
6. The IUCAB response stated that "... the draft of itself has to be rejected merely because the claim for indemnity or compensation (goodwill) has not been laid down."

IUCAB pointed out that many nations have no existing rules which would otherwise provide for such indemnification.

The response referred to the preamble of the proposal, para 1: the aim of the Convention would be to secure a fair balance of interests between both parties. "This aim is disregarded if the goodwill claim is left out."

7. IUCAB stated that since the principal would still continue to derive benefits from the work of the agent above and beyond the duration of the contractual relationship there would be no disadvantage to the principal. The response suggests that eliminating the right to indemnification would create windfall profits for the principal.

8. The final point IUCAB made in response to the issue of the "goodwill indemnification" was that the trend in international development is for nations to incorporate in domestic law such indemnification provisions. Pointing to the EC Directive and other recent developments in Scandinavian countries they stated that a convention which did not include such provisions would be archaic.

9. Professor De Nova, recognising the difficulties involved in achieving unification on this point, states that in his opinion the subject should be included in order to "raise the practical importance of the Convention."

10. Professor Illescas states that rather than ignore the question of the indemnification of the commercial agent it would be better to establish protective standards for the agent. "Thus, inspired by Directive Articles 17 and 18, I believe that a right to indemnification for the agent should be provided in recognition of the clients obtained for the principal, as well as a right to claim damages based on the loss of commission or other expenses which otherwise would have been due under the contract."

11. Professor Illescas would intitle Chapter VI of the proposal "Other remedies for breach ..." since the first remedy already indicated in the proposal would be the cessation of the contract.

12. Professor Quenaudon notes that the distinction drawn between Arts 26 and 27 of the proposal does not add to the clarity of the proposal. The termination of the contract on substantial grounds encompasses that of termination due to breach of contract. As suggested in the commentary by Professor Maskow it would perhaps be appropriate to include a list, albeit not exhaustive, of the most serious reasons for such termination.

I.-45. Termination of contract of indefinite duration

Dir Art 15(1)

Where an agency contract is concluded for an indefinite period either party may terminate it by notice.

Draft Art 25(1)

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

ICC Art 18.2 A (in part)

This contract may be terminated by either party by notice given in writing...

Art 18.2 B (in part)

This contract shall be automatically renewed for successive periods of one year, unless terminated by either party by notice given in writing...

Comments:

1. Maskow has modified the Directive provision to add clarity to such notices. (He distinguishes the notice from a warning, etc. which can only be litigated meaningfully with some type of proof, such as writing.) See section I-43 for a definition of "writing" according to the proposal.

2. The Swedish response states that no writing should be necessary for termination of the contract. The same comment is directed towards draft Arts 26 (Termination on substantial grounds) and 27 (Termination for breach of contract).

3. Professor Illescas states that it is not important to give notice for termination of the contract in writing. Obviously, written form is that most frequently used and is an excellent guarantee that the communication will be effective, but he feels that the parties should be free to communicate by any other means.

I-46. Period of notice requirements

Dir Art 15(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.

Draft Art 25(2)

[same]

ICC Art 18.2 A (in part)

... not less than 4 months in advance. If the contract has lasted for more than five years, the period of notice will be of 6 months.

Art 18.2 B (in part)

... not less than four months before the date of expiry... If the contract has lasted for more than five years, the period of notice will be of 6 months.

Comments:

1. Maskow cites (p.39) several pieces of legislation which provide for longer periods of notice, with other variations. He also cites the case where no distinction is drawn between the mandate and the authority and suggests that in this case, subject only to damages which may or may not be incurred, the contract could be subject to termination at any time.
2. Maskow adds (p.39) that this rule would be of benefit to the agent as well as to the principal (who may be dependent on the activities of his agents).
3. IUCAB states that the purpose of the period of notice is to enable both parties to prepare for future contracts. It suggests that "a longer period of notice would be appropriate in case the contract has run for more than three years".
4. Professor Fazzone suggests that in reality the agent may be highly dependent on the contract (if, for example, the agent has made considerable up-front investments such as facility construction, etc.) and that therefore the periods of notice specified in the proposed Art 25(2) would have little meaning.

I-47. National laws regarding period of notice

Dir Art 15(3)

Member States may fix the period of notice at four months for the fourth year of the contract, five months for the fifth year and six months for the sixth and subsequent years. They may decide that the parties may not agree to shorter periods.

I-48. Derogation from required period of notice

Dir Art 15(4)

If the parties agree on longer periods than those laid down in paragraphs 2 and 3, the period of notice to be observed by the principal must not be shorter than that to be observed by the commercial agent.

ICC Art 18.2 A and B (in part)

The parties may agree in writing on longer periods of notice.

I-49. Notification schedule

Dir Art 15(5)

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

Draft Art 25(3)

[same]

ICC Art 18.2 A (in part)

The end of the period of notice must coincide with the end of a calendar month.

Comments:

Maskow suggests (p.39) that this rule would facilitate bookkeeping and other organisational tasks.

I-50. Effect of prolongation of contract on period of notice

Dir Art 15(6)

The provisions of this Article shall apply to an agency contract for a fixed period where it is converted under Article 14 into an agency 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.

Draft Art 25(4)

[same]

Comments:

Maskow has included this provision, like the corresponding Directive provision, for clarity (p.39). He notes however that this rule is absent from other legislation on agency and suggests that the rule may not be entirely fair in that it imposes on the parties an obligation which was not contemplated at the time of formation of contract.

I-51. Termination: breach of contract

Dir Art 16

Nothing in this Directive shall affect the application of the law of the Member States where the latter provides for the immediate termination of the agency contract:

(a) because of the failure of one party to carry out all or part of his obligations;

Draft Art 27

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.

ICC Art 4.2

The Principal may not however unreasonably reject the orders transmitted by the Agent. In particular, a repeated refusal of orders contrary to good faith (e.g. if made for the only purpose of hindering the Agent's activity) shall be considered as a breach of contract by the Principal.

Art 20.1 (in part)

Each party may terminate this contract with immediate effect, by notice given in writing by means of communication ensuring evidence and date of receipt (e.g. registered mail with return receipt, special courier, telex), in case of a substantial breach by the other party of the obligations arising out of the contract...

Art 20.2 (in part)

Any failure by a party to carry out all or part of his obligations under the contract resulting in such detriment to the other party as to substantially deprive him of what he is entitled to expect under the contract, shall be considered as a substantial breach for the purposes of article 20.1 ...

Art 20.3

The parties hereby agree that the violation of the provisions under _____ of the present contract is to be considered in principle, unless the contrary is proved, as a substantial breach of the contract. Moreover, any violation of the contractual obligations may be considered as a substantial breach, if such violation is repeated notwithstanding a request by the other party to fulfil the contract obligations.

Comments:

1. Maskow has pointed out (p.41) that whereas the Directive has left the question of immediate termination (for reasons which would include exceptional circumstances, next section) up to the law of Member States, the proposal would include a provision expressly allowing such termination.
2. He further suggests that contrary to the model provisions of the ICC, in commercial reality such automatic termination is not generally appropriate. Here the ICC has included, as an Annex, specific indications of substantial breach in a manner which would seem to give adequate notice and definition of these grounds to both parties.
3. Maskow advises parties (p.40) to mention the most important grounds for such termination in their contracts.
4. Maskow also notes (p.41) that, perhaps in contrast to national laws, with long term contracts such as those involved in commercial agency it may not always be possible to foresee circumstances which may arise which, although leading to deviations from the contract, may otherwise be considered to be a breach of contract. For this reason he has included Art 27.
5. The response from the USSR states that it would be desirable to specify in detail the meaning of the expression "a fundamental breach" with respect to Draft Art 27(a).
6. Professor Fazzone notes that Art 27 of the proposal seems to leave a great deal of discretion to the parties to determine when and why to terminate. "Who is to determine, for example, whether a fundamental breach has occurred?"
7. Professor Azziman suggests that if one defines serious reasons in a broad way then the case of breach of contract would be included in this definition. But if one decides to distinguish the serious reasons for termination due to non-performance, as in the case here, one would have to include these distinctions in the definition of serious reasons.

I-52. Termination: exceptional circumstances

Dir Art 16 (cont)

(b) where exceptional circumstances arise.

Draft Art 26

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.

ICC Art 20.1 (in part)

Each party may terminate this contract with immediate effect ... in case of exceptional circumstances justifying the earlier termination.

Art 20.2 (in part)

Circumstances in which it would be unreasonable to require the terminating party to continue to be bound by this contract, shall be considered as exceptional circumstances for the purpose of article 20.1 above.

Art 20.4

Furthermore, the parties agree that the following situations shall be considered as exceptional circumstances which justify the earlier termination by the other party: bankruptcy, moratorium, receivership, liquidation or any kind of composition between the debtor and the creditors, or any circumstances which are likely to affect substantially one party's ability to carry out his obligations under this contract.

Comments:

1. See comment 2 of the previous section with respect to the definition and notice requirements of termination based on exceptional circumstances.
2. Maskow advises (p.40) parties to mention the most important grounds for such termination in their contracts.
3. The Swedish response noted that in the comments on the proposed Art 26 one condition which would entitle either party to terminate immediately the agency agreement would be bankruptcy. In the Swedish view, without elaboration, a future convention should exclude this alternative.
4. The Swedish response likewise suggested that "a party who wants to terminate the contract must give notice to the other party within a reasonable time after the relevant circumstances have occurred." The comment was also directed towards Art 27.
5. Professor Fazzone has suggested that Art 26 is unclear as to the criteria to be applied to the term "substantial grounds". He queries: "Should a party's own mistakes or self-inflicted problems allow it to avoid its contract obligations? Shouldn't that party at least be liable for damages caused to the other party?" In his view, bad business acumen or mere commercial impracticability should not be enough to avoid obligations assumed in the contract.

6. Professor Azziman agrees with Art 26 and the necessity for a party to be able to terminate a contract immediately without notice. However he feels that the article does not sufficiently characterise the circumstances which would justify such termination. He suggests that the article give a few examples of such reasons or at least set some limits. See comments on previous section.

7. Professor Illescas considers that in connection with the termination of the contract for substantial reasons (Art 26 of the proposal) there are a great number of possible reasons encompassed in the expression "such circumstances". He suggests that a clearer construction of the provision setting limits on the termination of the contract without the need for notice might be something like "... exceptional circumstances of a personal nature or which would affect substantially the contract, of such magnitude that one could not reasonably..."

I-53. Right to indemnification or damages

Dir Art 17(1)

Member States shall take the measures necessary to ensure that the commercial agent is, after termination of the agency contract, indemnified in accordance with paragraph 2 or compensated for damage in accordance with paragraph 3.

ICC Art 21.1B

The Agent shall not be entitled to an indemnity for goodwill or similar compensation ("goodwill indemnity") in case of termination of the contract. This provision does not limit the Agent's right to claim damages for breach of contract as far as the termination by the Principal amounts to such a breach, and is not already covered by article 20.6.

Comments:

Maskow has made a major deviation from the Directive by not including allowance for indemnification of the commercial agent. He has stated (p.37): "This question must ... be answered by national law" and refers to the proposed Art 5 regarding Member State reservations (section II-2). As support for the difficulty foreseen in achieving homogeneity with respect to this issue he also refers to Directive Arts 17(6) (section I-61, report to the Council on progress in this area) and 22(3) (section I-74, special time allowances granted to specific Member States for national legal reform). See the next section.

I-54. Indemnification: rationale

Dir Art 17(2)

(a) The Commercial agent shall be entitled to an indemnity if and to the extent that:

- he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

Draft Art 28(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;

ICC Art 21.1 A

The Agent shall be entitled to an indemnity ("goodwill indemnity") if and to the extent that:

(a) he has brought the Principal new customers or has significantly increased the volume of business with existing customers and the Principal continues to derive substantial benefits from the business with such customers, and

Art 21.1 B

The Agent shall not be entitled to an indemnity for goodwill or similar compensation ("goodwill indemnity") in case of termination of the contract. This provision does not limit the Agent's right to claim damages for breach of contract as far as the termination by the Principal amounts to such a breach, and is not already covered by article 20.6.

Comments:

1. It is possible that in spite of the absence in Maskow's proposal of the right to indemnification the commercial agent may be entitled to similar compensation based upon the construction of Draft Art 28(1)a.

2. Professor Fazzone notes that, with respect to the proposed Art 28(1)a: "Under CISG, signatories are allowed not to permit the use of specific performance under their national law as readily as CISG would permit." He suggests that a similar option for reservations by signatories should be provided in the proposed convention.

3. Professor Azziman notes that Art 28 of the proposal (Remedies for breach) is a sort of continuation of Art 27 (Termination for breach of contract). Therefore Art 28 should refer to Art 27 or to its contents. For example, beyond the termination contemplated by Art 27 non-performance by one of the parties of any one of his duties. He queries: may non-performance which reaches a very high degree of seriousness, as per Art 27, justify the award of damages?

4. Professor Illescas notes that the proposed Art 28 should foresee the possibility that the represented party could realize substituted performance of the obligations, at the agent's cost, and always with the reservation that one would not treat the obligations as *intuitu personae*.

I-55. Indemnification: calculations

Dir Art 17(2) (cont)

(a) The Commercial agent shall be entitled to an indemnity if and to the extent that:

- the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Member States may provide for such circumstances also to include the application or otherwise of a restraint of trade clause, within the meaning of Article 20;

ICC Art 21.1 A (cont)

(b) the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the Agent on the business transacted with such customers.

I-56. Indemnification: maximum allowance

Dir Art 17(2) (cont)

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;

ICC Art 21.2 A

The amount of the indemnity shall not exceed a figure equivalent to an indemnity for one year calculated from the Agent's average annual remuneration over the preceding five years and, if the contract lasted for less than five years, the indemnity shall be calculated on the average for the period in question.

Comments:

The author would suggest an alternative solution, one which would reflect the duration of the sales contract, the duration of the agency contract, the length of time that the commission has been paid, or any other permutation which would more closely reflect the actual loss which would be sustained by the agent.

I-57. Indemnification: damages not precluded

Dir Art 17(2) (cont)

(c) The grant of such an indemnity shall not prevent the commercial agent from seeking damages.

Draft Art 28(2)

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

ICC Art 21.5 A

The goodwill indemnity provided for under this article is in lieu of any compensation for loss or damage arising out of the contract expiration or termination (except damages for breach of contract).

I-58. Damages caused by breach

Dir Art 17(3)

The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,

- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

Draft Art 28(1)

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

(b) claim damages.

ICC Art 20.6 (in part)

If a party terminates the contract according to this article, but the arbitrator ascertain that the reasons put forward by that party did not justify the earlier termination, the termination will be effective, but, the other party will be entitled to damages for the unjustified earlier termination. Such damages will be equal to the average commission for the period the contract would have lasted in case of normal termination, unless the damaged party proves that the actual damage is higher (or, respectively, the party having terminated the contract proves that the actual damage is lower) ...

I-59. Effect of agent's death

Dir Art 17(4)

Entitlement to the indemnity as provided for in paragraph 2 or to compensation for damage as provided for under paragraph 3, shall also arise where the agency contract is terminated as a result of the commercial agent's death

I-60. Remedy statute of limitations

Dir Art 17(5)

The commercial agent shall lose his entitlement to the indemnity in the instances provided for in paragraph 2 or to compensation for damage in the instances provided for in paragraph 3, if within one year following termination of the contract he has not notified the principal that he intends pursuing his entitlement.

ICC Art 21.3 A

The Agent will lose the right to indemnity if he does not claim the indemnity in writing within one year from contract termination.

I-61. Progress report for EC Commission

Dir Art 17(6)

The Commission shall submit to the Council, within eight years following the date of notification of this Directive, a report on the implementation of this Article, and shall if necessary submit to it proposals for amendments.

I-62. No right to remedy: breach of contract

Dir Art 18

The indemnity or compensation referred to in Article 17 shall not be payable:

(a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;

Draft Art 29(1) (in part)

Termination of the contract releases both parties from their obligations under it, subject to any claims for compensation which may be due.

ICC Art 21.4 A

The Agent shall have no right to indemnity in the following cases:

(a) where the Principal has terminated the contract according to the conditions set out in article 20;

I-63. No right to remedy: termination by agent

Dir Art 18 (cont)

[There is no right to the Article 17 indemnity]:

(b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he cannot reasonably be required to continue his activities;

ICC Art 21.4 A

(b) where the Agent has terminated the contract, unless the termination is justified under article 20 or on grounds of age, infirmity or illness in consequence of which the agent cannot reasonably be required to continue his activities;

Comments:

Maskow has noted (p. 40) that although a party may terminate an agency contract on substantial grounds connected with himself only, examples of which would be found in these provisions, that party would not be privileged to terminate if those grounds were intentionally created by that party to avoid performance under the contract.

I-64. No right to remedy: agent's rights assigned to another

Dir Art 18 (cont)

(c) where, with the agreement of the principal, the commercial agent assigns his rights and duties under the agency contract to another person.

ICC Art 21.4 A (cont)

(c) where, in accordance with article 26.2, the Agent assigns his rights and duties under the agency contract to another person.

Art 26.2 (in part)

If article 21 A is applicable, and if there has been assignment by the Agent with the Principal's consent according to article 21.4 (c), the goodwill indemnity of the new agent shall be calculated by also taking into account the activity of the old agent, according to article 21.

I-65. Derogation from remedy provisions

Dir Art 19

The parties may not derogate from Articles 17 and 18 to the detriment of the commercial agent before the agency contract expires.

I-66. Restraint of trade: definition

Dir Art 20(1)

For the purposes of this Directive, an agreement restricting the business activities of a commercial agent following termination of the agency contract is hereinafter referred to as a restraint of trade clause.

I-67. Restraint of trade: written form requirements

Dir Art 20(2)

A restraint of trade clause shall be valid only if and to the extent that:

(a) it is concluded in writing; and

Draft Art 11(1)

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

Art 11(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.

I-68. Restraint of trade: general validity

Dir Art 20(2) (cont)

(b) 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.

Draft Art 30

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

I-69. Restraint of trade: limitations

Dir Art 20(3)

A restraint of trade clause shall be valid for not more than two years after termination of the agency contract.

Draft Art 30 (cont)

(b) it does not exceed a period of two years after the termination of the contract of commercial agency.

I-70. Restraint of trade: national laws

Dir Art 20(4)

This Article shall not affect provisions of national law which impose other restrictions on the validity or enforceability of restraint of trade clauses or which enable the courts to reduce the obligations of the parties resulting from such an agreement.

Comments:

1. Maskow points out (p. 44) that national laws on restraint of trade agreements often deal only with the time period during which the contract

for commercial agency is in force as opposed to the period before or after the termination of such contract. Thus Art 30 of the proposal is a simplified and abbreviated version of Directive Article 20.

2. Professor Fazzone considers that the draft proposal may be too broad. Not only might the provision be unfair to the former agent, but national laws limiting trade restraining agreements "might not enforce clauses that preclude former agents from competing in areas or on products that cannot reasonably be covered by the former agent's successor."

3. IUCAB has sharply criticised Draft Art 30: "the obligation on the part of the principal to pay the commercial agent a reasonable indemnification ... during the period of restraint of trade has been omitted." The agent is bound by the restraint of trade clause which creates an affirmative duty, to which a corresponding duty must be created on the part of the principal. After termination of the contract, as IUCAB points out, there is no contractual duty of non-competition which would bind the former agent. Therefore, this additional obligation must be compensated.

4. It is true that parties to a contract are responsible for themselves and that in general they should be left free to contract as they deem necessary. However the purpose of this convention would be to impose certain concepts of fairness and equality (in the bargaining process for the inclusion of certain terms in a contract) upon the parties, concepts which would become law and thus made mandatory upon the parties. To this end IUCAB has suggested that it would seem appropriate to propose a universal solution to this problem within the text of the convention.

5. Professor Illescas states that, with respect to the exceptional character of the activity of the agent and the agreement restricting competition after the contract: "... I believe that one should establish for the principal an exchange obligation to give economic compensation to the agent, compensation which would constitute a condition of validity of the agreement [that restricting competition].

6. Professor Illescas states that the proposed Art 16(3), when speaking of the restraint on competition, should permit the possibility of an express agreement to the contrary. Additionally, the provision should deal with implicit consent by the represented party with respect to this point.

7. Professor Illescas would intitle Chapter VI of the proposal "Other remedies for breach ..." since the first remedy already indicated in the proposal would be the cessation of the contract.

8. Professor Quenaudon notes that the distinction drawn between Arts 26 and 27 of the proposal does not add to the clarity of the proposal. The termination of the contract on substantial grounds encompasses that of termination due to breach of contract. As suggested in the commentary by

Professor Maskow it would perhaps be appropriate to include a list, albeit not exhaustive, of the most serious reasons for such termination.

I-71. State-required disclosure of information

Dir Art 21

Nothing in this Directive shall require a Member State to provide for the disclosure of information where such disclosure would be contrary to public policy.

I-72. EC: Directive compliance

Dir Art 22(1)

Member States shall bring into force the provisions necessary to comply with this Directive before 1 January 1990. They shall forthwith inform the Commission thereof. Such provisions shall apply at least to contracts concluded after their entry into force. They shall apply to contracts in operation by 1 January 1994 at the latest.

I-73. EC: notification to Commission

Dir Art 22(2)

As from the notification of this Directive, Member States shall communicate to the Commission the main laws, regulations and administrative provisions which they adopt in the field governed by this Directive.

I-74. EC: UK, Ireland, Italy

Dir Art 22(3)

However, with regard to Ireland and the United Kingdom, 1 January 1990 referred to in paragraph 1 shall be replaced by 1 January 1994.

With regard to Italy, 1 January 1990 shall be replaced by 1 January 1993 in the case of the obligations deriving from Article 17.

I-75. EC: general

Dir Art 23

This Directive is addressed to the Member States.

CHAPTER 6 - DRAFT/ICC CORRESPONDENCES

II-1. Agent's auxiliary functions

Draft Art 3

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.

Art 12(2)

(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.

ICC Art 6.1

The Agent shall provide an adequate organisation for sales and, where appropriate, after-sale service, with all necessary means and personnel, in order to ensure the fulfillment of his obligations throughout the Territory under this agreement.

Art 6.2 (in part)

The parties may agree on the advertising to be jointly made in the Territory. The contents of any advertising must be approved by the Principal.

Art 6.3 (in part)

The parties shall agree on their participation in fairs or exhibitions within the Territory.

Art 10.2

The Agent shall act as a del credere agent only if, and to the extent, the parties have expressly agreed thereto. In that case they should complete and sign Annex V.

Comments:

1. With respect to Draft Art 12(2)f Maskow suggests (p.26) that the agent would generally be in a much better position to obtain licenses, organise domestic transport, encourage payment by the buyer, etc. than would be the principal. This is one of the reasons why the use of commercial agents in the international sale of goods has become so widespread.

2. See also:

Section I-12	Agent's obligations: disclose/inform
Section III-6	" : customer's financial status
Section III-7	" : use of trademarks, etc.

3. Professor Quenaudon notes that the proposed Art 12(2)f does not seem to be entirely useful. He gives two examples of cases where there is a great lack of specificity of the proposal to show that the above provision does not help in itself and that the contract would have to be more precise. (The first example is the case of delivery of stock by the agent to the customer. The second example is the problem which arises when the agent receives payment by a customer and there is no specification in the contract with respect to the date on which the payment must be changed into the appropriate currency in order to deposit it with the principal.)

II-2. Reservations: mandatory national laws

Draft Art 5

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].

ICC Art 23.3 (in part)

The arbitrators shall in any case consider such mandatory provisions of the law of the country where the Agent is established which would be applicable even if the parties submit the agreement to a foreign law.

Comments:

1. Maskow comments (p.20) that there are two main reasons for allowing reservations regarding mandatory national laws. The first is to inform other Member States: "... 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." The second reason would be to provide Member States with a procedure to limit the application of their mandatory rules to purely domestic relations and this would therefore be a reason not to make a reservation.

2. The USSR response suggests that it would be expedient to add to Art 12 of the Draft (Obligations of the commercial agent) a provision stipulating that national law may impose additional obligations upon the agent.

3. The USSR response suggests that it would be expedient to add to Art 13 of the Draft (Obligations of the principal) a provision stipulating that national law may impose additional obligations upon the principal.

4. Professor Fazzone questions the proposed Art 5 with respect to issues such as the adoption of new domestic legislation in conflict with the convention, domestic legislation indirectly related, etc. He suggests: "At the very least, greater clarification may be necessary to make this provision workable and acceptable."

II-3. Derogation by parties

Draft Art 6

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(2)...., 30....

Comments:

Maskow comments (p.21) that it is obvious that parties should not be allowed to derogate from the mandatory rules legally reserved as per the previous section.

II-4. Interpretation of convention

Draft Art 7(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.

ICC Art 2.2

The provisions of this agreement, as well as any statements made by the parties in connection with this agency relationship, shall be interpreted in good faith.

Comments:

1. Maskow notes (p.21) that the proposed Art 7 (this section and the next) corresponds in principle and language to various other international conventions regarding sales and international transactions and therefore the concepts of the two paragraphs have found wide international acceptance in conventions of this general nature.

2. Professor Azziman suggests that the words in brackets be included in the text of Art 7(1).

II-5. Dispute resolution

Draft Art 7(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.

ICC Art 23.1

Any dispute arising out of or in connection with the present Contract shall be finally settled in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators designated in accordance to said Rules.

Art 23.2

The arbitrators shall apply the provisions contained in this contract and the principles of law generally recognised in international trade as applicable to international agency contracts, with the exclusion - subject to article 23.3 hereunder - of national laws. If the Agent is established within the EEC, the mandatory provisions of the EEC Directive of 18 December 1986 shall also apply.

Art 23.3 (in part)

The arbitrators will take the above provisions into account to the extent they embody principles which are universally recognised and provided their application appears reasonable in the context of international trade.

Comments:

1. The Introduction (para 3) to the ICC model states that the best solution to the problem which would arise from the direct application of conflicting domestic legislation would be international commercial arbitration "which permits a truly international approach and avoids the risk of differentiation which would arise in case of recourse to domestic courts."

II-6. Interpretation of conduct of a party

Draft Art 8

[Article not yet drafted]

ICC Art 2.2

The provisions of this agreement, as well as any statements made by the parties in connection with this agency relationship, shall be interpreted in good faith.

Comments:

1. While Maskow has not drafted any specific text he suggests (p.21) various formulations which could be used in whole or as adaptations from various sources, including international sales and contract formation conventions.
2. Professor Azziman comments that an article which indicates that the interpretation of the behaviour of a party must be seen in the light of the principles governing international commercial contracts would at the same time avoid the convention becoming burdensome or difficult to reconcile with rules applicable to many other transactions and permit the promotion of PICC.
3. Professor Illescas states that the proposed Art 8 would be adequate if it incorporated the CISG provision. He suggests that this would not require the reference to PICC rules and that in his opinion references to other international documents should not as a rule be used in international instruments. Additionally, he feels that the criteria of the CISG provision are the most accurate reflection of international norms which govern related subjects.

II-7. Place of business

Draft Art 10

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.

ICC heading

Between.....
whose registered office is at.....
(hereinafter called "the Principal")

and.....
whose registered office is at.....
(hereinafter called "the Agent")

Comments:

Maskow notes (p.22) that Art 10 relates very closely to international sales and other business transaction conventions and the inclusion herein has therefore become well established in international trade law.

II-8. Reliance

Draft Art 11(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.

ICC Art 25.2 (in part)

...a party may be precluded by his conduct from asserting the invalidity of additions or modifications not made in writing to the extent that the other party has relied on such conduct.

Comments:

1. Maskow suggests (p.24) that the option of Draft Art 11(2) to cure a lack of form (writing) would prevent abuse by the parties. The result would be similar to that foreseen by Directive Art 13 (sections I-42 and 43) where writing would not be required unless requested by one of the parties.
2. The USSR response states that this draft provision "corresponds incompletely to the requirements of Soviet legislation in respect of written form of foreign trade transactions ...". It suggests that it might be expedient to add a clause similar to that incorporated in the 1983 Agency Convention.
3. Professor Routamo states with respect to Draft Art 11(2) that the wording "such a provision" is rather awkward. This provision relates to Art 11(1) which itself establishes the requirement of written form for the contract, amendments or termination agreement.

II-9. Confidential information

Draft Art 12(2) (cont)

[In particular, a commercial agent shall]

(d) keep secret confidential information which he has received by virtue of the contract;

Comments:

Maskow has noted (p.26) that the duty of confidentiality also appears in many national laws. The duty would extend (as drafted) to the period after the contract has been terminated and would include information given to the agent by the principal as well as information emanating from the agent himself (e.g. client lists, etc.).

II-10. Sub-agents

Draft Art 14

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.

ICC Art 8 A

The Agent may engage sub-agents provided he informs the Principal at least one month before the engagement.

The Agent shall be responsible for the activities of his sub-agents.

Art 8 B

The Agent must carry out his activity without recourse to sub-agents.

Comments:

1. Maskow notes (p.28) that, as reflected in the ICC contract, unless the contract were explicitly to prohibit the use of subagents, the contracting agent should be able to appoint subagents to assist the agent. Generally it would be in the best interest of both parties to allow for this. In spite of the fact that it would be provided that the principal's liability would not be increased at all by such appointment the principal is certainly free to forbid any appointment, as seen in ICC version B.

2. It should be noted that in many legislations the obligor is not automatically bound to perform the contract him or herself, as long as the performance is carried out in the manner specified by the contract.

3. The USSR response suggests that a supplement to Art 14 might provide "that an agent bears full responsibility before the principal for the activities of subagents."

4. The Swedish Government would like to see Draft Art 14 omitted from the convention. It states that in various countries, with respect to the appointment of subagents, "the agent does not have such authority, unless [the] principal has agreed to it."

5. Professor Fazzone notes that the proposal is problematic for principals who have no real power over subagents, "yet subagents would be in a position to prejudice the principal's interests."

6. Professor Quenaudon expresses doubt as to the last phrase of Art 14 of the proposal. He states that the lack of legal relationship created by the appointment of a subagent "would constitute a step backwards viv-a-vis the law of States ... recognising a direct right of action by the principal against the subagent [and by the subagent] against the principal." He suggests that, as many legislations may not provide for this solution under agency law, the problem may be resolved by application of a "theory of sub-contract".

II-11. Authority: conclusion of contracts

Draft Art 15(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

ICC Art 3.3

Unless otherwise specifically agreed, the Agent has no authority to make contracts on behalf of, or in any way to bind the Principal towards third parties. He only solicits orders from customers for the Principal, who is free (save as set forth in article 4.2 hereafter) to accept or to reject them.

Comments:

1. See section I-11 regarding an agent's general obligations, in particular comment 1.

2. Maskow notes (p.29) that in general common law countries do not legally recognise a clear distinction between mandate and authority. However in other legal systems (e.g. the German tradition, several socialist countries) there is a distinction which results in the fact that the agent is not allowed to bind the principal unless specifically authorised to do so. "This seems to be international trade practice for the

contracts concerned which is the most important reason for choosing that approach in this proposal."

3. Professor Azziman is not convinced by the idea, taken from the Germanic tradition, that the agent is not able to bind the principal. He suggests, absent an indication of actual international practice, that the ICC Guide would suffice.

4. Professor Quenaudon notes that by setting out the principle of an assumed lack of authority of the agent, the proposed Art 15 is basically aligned upon modern international trade practice. He notes, however, that under French law the agent would have authority to negotiate and conclude contracts for the sale of goods "... in the name of and on behalf of producers, manufacturers or merchants ..." if that is what the professional with that title would normally do. Quenaudon notes that the proposal would not on this point contravene French law.

II-12. Authority: receiving payment

Draft Art 15(1) (cont)

... the commercial agent ... is not entitled:

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

ICC Art 3.5

The Agent is not entitled to receive payments on the Principal's behalf without prior written authorisation from the Principal to that effect. When the Agent has been so authorised, he must transmit them as soon as possible to the Principal and until then hold them separately on deposit on the Principal's behalf.

II-13. Authority: communications from customers

Draft Art 15(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

ICC Art 12

The Agent shall immediately inform the Principal of any observations or complaints received from customers in respect of the Products. The parties hereto shall deal promptly and properly with such complaints. The Agent has no authority to engage in any way the Principal, unless

after he has received a specific written authorisation to such effect.

Comments:

1. Maskow notes (p.29) that this deviation from the norm of a lack of authority is in the preponderant interest both of the customer and of the principal. He cites several legislations which would reflect similar solutions. However, to minimise the danger of involvement in problems relating to authority the proposed rules "have been reduced to a strict minimum."

2. Maskow suggests (p.30) that when notice of non-conformity of goods is given directly to the agent it could be disadvantageous for the agent himself. For example, when there is a period of notice which is specified the third party should not be disappointed by reliance upon such notice and the burden then shifts to the agent to act upon such information.

II-14. Authority: acting for the principal

Draft Art 15(2) (cont)

... the commercial agent is deemed to be authorised...

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

Comments:

1. Maskow states (p.30) that the implied authority to act in the best interests of the principal in this case refers to matters of urgency and would not apply to major or costly decisions such as the possible filing of a claim in court.

2. The Swedish response suggests that this provision be deleted as such a rule would extend the authority of the agent too far. "If the principal wants the agent to perform activities of this kind, it is natural that he/she authorises the agent to do so."

II-15. Principal's rights/obligations: sole agency

Draft Art 16(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).

ICC Art 13.1

The Principal shall not, during the life of this contract, grant any other person or undertaking within the Territory the right to represent or sell the Products.

Art 13.2

The Principal is however entitled to deal directly, without the Agent's intervention (provided he informs the latter) with customers situated in the Territory; in respect of any sales arising therefrom, the Agent shall be entitled to the commission provided for in this contract.

Comments:

1. Maskow states (p.30) that the "differentiation between sole and exclusive commercial agency which is made in the proposal does not normally appear in legislation ... but it does play an important role in commercial practice".
2. Maskow states (p.30) that his proposal is a compromise between the two solutions offered by Directive Art 7(2), namely the agent's entitlement to commission is based on a transaction with a customer in a given geographical location or population group, or where the transaction is with a customer which is part of a geographical location or population group over which the agent has been given an exclusive right to commission from sales thereto. The compromise allows for a third possibility in the above cited provision: the principal himself may have been responsible for procuring the customer, and consequently he would owe a lower commission (or none at all) to any of his agents. This possibility is part of the sole agency agreement.
3. The ICC contract makes this point explicit.

II-16. Principal's rights/obligations: exclusive agency

Draft Art 16(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).

ICC Art 13.1

The Principal shall not, during the life of this contract, grant any other person or undertaking within the Territory the right to represent or sell the Products.

Comments:

1. Maskow notes (p.31) that in this provision and that stated in the prior section "sole agency" and "exclusive agency" are expressed in terms of prohibitions upon the principal. He notes that damages for breach would normally be limited to recovery of commission otherwise due. See Draft Art 27 (section I-51) regarding termination because of breach of contract.

II-17. Competition with the principal

Draft Art 16(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.

ICC Art 5.1

Without the prior written authorisation of the Principal, the Agent shall not represent, manufacture or distribute any products which are in competition with the Products, for the entire term of this contract.

Art 5.2

The Agent may represent, distribute or manufacture any products which are not competitive with the Products, provided he informs the Principal in advance of such activity. However, the above obligation to inform the Principal does not apply if, in consideration: (i) of the characteristics of the products which the Agent wants to represent, and (ii) of the field of activity of the principal for whom the Agent wishes to act, it is unreasonable to expect that the Principal's interests may be affected.

Comments:

1. IUCAB considers that the "restraint of trade of the sole commercial agency and the exclusive commercial agency in para 3 is too far-reaching." It suggests that this restraint should only apply with respect to goods that are directly competitive. In its opinion, if the agent were able to represent different types of products from different principals (manufacturers, distributors, etc.) then the agent would be able better to serve its customers in more of an advisory capacity. It suggests that ultimately this would positively affect sales for the principal.

2. The USSR response states: "... it would be expedient to supplement Art 12 (Obligations of the commercial agent) with the provision that one of the agent's duties would prohibit competition with the principal."

II-18. Remuneration: agent's expenses

Draft Art 17(2)

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

ICC Art 6.2 (in part)

The cost of advertising carried out by the Agent shall be apportioned between the parties as indicated in Annex III, §1.

Art 6.3 (in part)

The cost of the Agent's participation in such fairs and exhibitions shall be apportioned between the parties as indicated in Annex III, §2.

Art 15.4

Unless otherwise agreed in writing, the commission covers any expenses incurred by the Agent in fulfilling his obligations under this contract (such as telephone, telex, office, travel expenses, etc.).

Comments:

1. Maskow notes (p.32) that, as reflected in the ICC contract, parties may always agree upon a different allocation of expenses. However the proposed formulation would allow, absent a formal written declaration, implied consent for reimbursement of the agent in unusual circumstances.
2. Professor Azziman suggests that when differences in the meaning of the term "commission" exist in various legislations (see comments on section I-19) it would be a good idea to define the term as used in the current proposal as Professor Maskow has done in Art 17(2).
3. Professor Azziman agrees with the exclusion of payment for certain expenses of the agent even though various legislations might provide for the contrary to Art 17(2), i.e. expenses of the agent would normally be subject to reimbursement by the principal.

II-19. Post-contractual obligations

Draft Art 29(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.

Comments:

1. IUCAB has suggested that this article is no more than a clarification of the obvious effects of termination, namely that the parties are released from their obligations under the contract without affecting claims for compensation already due.

However it is troubled by the possible implications of this article. It states that post-contractual obligations would still be binding upon the parties. The agent must recognise trade secrets, etc., while there are also post-contractual obligations which would bind the principal as well. IUCAB offers as an example the principal's duty to refrain from giving third parties or previous customers any information which would compromise that agent's position with respect to the other party (for example, a report by the agent criticising the other party or even a bad reference from the principal).

Therefore, it would seem appropriate to include in this article some reference to the post-contractual obligations of the parties which would have special relevance to contracts for commercial agency above and beyond those post-contractual obligations which would follow contracts of a general nature.

II-20. Final provisions

Draft Art _____

CHAPTER 7 - REMAINING ICC PROVISIONS

III-1. Products represented

ICC Art 1.2

If the Principal decides to sell any other products in the Territory, he shall inform the Agent in order to discuss the possibility of including them within the Products defined under article 1.1. However, the above obligation to inform the Agent does not apply if, in consideration of the characteristics of the new products and the specialisation of the Agent, it is unreasonable to expect that such products may be represented by the Agent (e.g. products of a completely different range).

III-2. Customers outside the territory

ICC Art 3.2

The Agent shall not solicit orders from outside the Territory unless permitted to do so by the Principal. Where the Agent negotiates with customers in the Territory business which results in contracts of sale with customers established outside the Territory, article 15.2 shall apply.

III-3. Principal's prerogative in execution of transaction

ICC Art 4.1 (in part)

The Principal may accept or reject any individual order transmitted by the Agent at his own discretion.

III-4. Agent's declaration of representation

ICC Art 5.4

The Agent declares that he represents (and/or distributes or manufactures, directly or indirectly) the products listed in Annex II on the date on which this contract is signed.

III-5. Sales targets

ICC Art 7.1

The parties may agree annually on the sales targets for the forthcoming year.

Art 7.2

The parties shall make their best efforts to attain the targets agreed upon, but the non-attainment shall not be considered as a breach of the contract by a party, unless that party is clearly at fault.

Art 7.3

In Annex IV the parties may agree on a Guaranteed Minimum Target and on the consequences of its non-attainment.

III-6. Agent's obligations: customer's financial status

ICC Art 10.1

The Agent shall satisfy himself, with due diligence, of the solvency of customers whose orders he transmits to the Principal. He shall not transmit orders from customers of which he knows or ought to know that they are in a critical financial position, without informing the Principal in advance of such fact.

III-7. Agent's obligations: use of trademarks, names, symbols

ICC Art 11.1

The Agent shall use the Principal's trademarks, trade names or any other symbols, but for the only purpose of identifying and advertising the Products within the scope of this contract and in the Principal's sole interest.

Art 11.2

The Agent hereby agrees neither to register, nor to have registered, any trademarks, trade names or symbols of the Principal (or which are confusingly similar with the Principal's ones), in the Territory or elsewhere.

Art 11.3

The right to use the Principal's trademarks, trade names or symbols, as provided for under the first paragraph of this article, shall cease immediately for the Agent, on the expiration or termination, for any reason, of the present contract.

III-8. Principal's rights: special customers

ICC Art 13.3

The Principal shall be entitled to deal directly with the special customers listed in Annex VI §2; in respect of the sales to such customers the Agent shall be entitled to the reduced commission

provided for in Annex VI, §2. Paragraph 13.3 shall not apply if §2 of Annex VI (Special customers/Reduced commission) has not been filled in by the parties.

III-9. Remuneration: customers outside of territory

ICC Art 15.2

If the Agent, when dealing with customers established in the Territory, solicits orders resulting in contracts of sale with customers established outside the Territory, and if the Principal accepts such orders, the Agent shall be entitled to receive a reduced commission, the amount of which shall be decided on a case by case basis. Similarly, the Agent's commission shall be reduced when an other agent solicits orders with customers established outside the Territory resulting in contracts of sale with customers established within the Territory.

III-10. Special sales resulting in reduced commission

ICC Art 15.3

A reduced commission may be agreed in advance between the Principal and the Agent in appropriate circumstances where a customer is to be granted terms or conditions which are more favorable than the Principal's standard conditions. If the parties have filled in §3 of Annex VI, the figures indicated therein shall apply in the respective situations.

III-11. Remuneration: regulatory, currency, taxation

ICC Art 16.5

Should any governmental authorisation (e.g. due to exchange control regulations in the Principal's country) be necessary for the Principal to transfer abroad the commission (or of any other sum the Agent may be entitled to receive), then the payment of the amount shall be made after such authorisation has been given. The Principal shall take all necessary steps for obtaining the above authorisations.

Art 16.6

Except as otherwise agreed, the commission shall be calculated in the currency of the sales contract in respect of which the commission is due.

Art 16.7

Any taxes imposed on the Agent's commission in the Territory are for the Agent's account.

III-12. Termination: change in agent's entity

ICC Art 20.5

If the parties have filled in Annex VII, the contract may also be terminated by the Principal with immediate effect in case of change of control, ownership and or management of the agent-company, according to the provisions set forth in Annex VII.

III-13. Termination: arbitration, damages ascertained

ICC Art 20.6

If a party terminates the contract according to this article, but the arbitrators ascertain that the reasons put forward by that party did not justify the earlier termination, the termination will be effective, but the other party will be entitled to damages for the unjustified earlier termination. Such damages will be equal to the average commission for the period the contract would have lasted in case of normal termination, unless the damaged party proves that the actual damage is higher (or, respectively, the party having terminated the contract proves that the actual damage is lower). The above damages are in addition to the indemnity which may be due under article 21.

III-14. Termination: return of principal's goods

ICC Art 22

Upon expiry of this agreement the Agent shall return to the Principal all advertising materials and other documents and samples which have been supplied to him by the Principal and are in the Agent's possession.

III-15. Indemnification: default provision

ICC Art 24.2

If the parties have not made a choice between the alternative solution provided in article 21 (goodwill indemnity in case of termination) under the letters A and B, by deleting one of the alternatives, and provided they have not expressly made a choice by other means, alternative A shall be considered applicable if the Agent is established in a country where a goodwill indemnity in case

of termination is recognised by mandatory law and alternative B shall apply in the opposite case.

III-16. Annexes to the contract

ICC Art 24.3

The annexes attached to this contract form an integral part of the agreement. Annexes or parts of annexes which have not been filled in will be effective only to the extent and under the conditions indicated in this contract.

III-17. Validity of the contract

ICC Art 25.3

The nullity of a particular clause of this contract shall not involve the nullity of the whole agreement, unless such clause is to be considered as substantial, i.e. if the clause is of such importance that the parties (or the party to the benefit of which such clause is made) would not have entered into the contract if it knew that the clause would not be valid.

III-18. Assignment of contract

ICC Art 26.1

The present contract cannot be assigned without prior written agreement between the two parties.

III-19. Official language of contract

ICC Art 27

The English text of this contract is the only authentic text.