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Werner Vanderhaeghe

Mark L. Jones

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Current Developments in European Agency Law

The purpose of the Note is to draw the reader's attention to two pending changes in European law which are of special concern to those who have concluded or will be concluding agency agreements in the countries of the European Economic Community.

On the one hand a Benelux Treaty on independent commercial agents was signed at The Hague on November 26, 1973 and is presently being implemented in the Benelux States (Belgium, Luxemburg and the Netherlands). On the other hand, the EEC Council is currently discussing a proposed Directive on the same subject, the provisions of which, when adopted, will have to be implemented in all nine EEC Member States (the three Benelux countries, Denmark, France, the Federal Republic of West Germany, Ireland, Italy and the United Kingdom) as of the middle of 1980.

Both these instruments, which are similar in all major respects, are intended to harmonize the presently divergent rules governing commercial agency contracts in the various Member States and thereby to afford greater protection to self-employed commercial agents. Hence they deal with such matters as the respective rights and duties of principal and agent, the commercial agent's limited liability in *del credere* agreements, the commissions payable to the agent, the conditions governing termination of the agency and the payment of a goodwill indemnity upon such termination. Most of these provisions are compulsory public policy provisions which will therefore apply to the agency contract notwithstanding any express stipulation of the parties to the contrary.

The Benelux Treaty

The Netherlands is the only country of the three Benelux States which has implemented thus far the provisions of the Benelux Treaty. They were enacted

*Licentiaat rechten, State University of Ghent, 1974; MCJ, University of Texas at Austin, School of Law, 1975. Member of the Brussels Bar.

†B.A. Oxon, 1974.

and incorporated into the Dutch Commercial Code as articles 74 and 75 by the law of March 23, 1977 on the adaptation of the Commercial Code and the Bankruptcy Act to the Benelux Treaty on Agency Contracts and Annex, signed at The Hague on November 26, 1973 (published in the "Staatsblad van het Koninkrijk der Nederlanden," 1977, 153).

In *Luxemburg*, on the other hand, no legislative action whatsoever has been taken up until now.

In *Belgium* there never was any special legislation protecting self-employed commercial agents so that, when the Treaty was submitted to the Belgian Parliament for ratification during the 1975-1976 term, the Belgian government simultaneously tabled a bill to enact the Treaty provisions into Belgian law.

On June 3, 1976 the Belgian House of Representatives ratified the Treaty and approved the bill, both of which are now pending before the Senate. According to unofficial government statements it seems that the government would like to see the bill become law by the end of the 1977-1978 parliamentary session.

As to the impact of the new legislation on existing agency contracts, in Belgium the government is presently preparing an amendment to the [bill of] law to the effect that all existing contracts will be subject to the new law. As for the Netherlands, the law of March 23, 1977 explicitly provides that all existing agency contracts, as of July 1, 1977 are subject to the new regulations (Article III of the law of March 23, 1977). As a result thereof both in Belgium and in the Netherlands the existing agency agreements should be modified, where clauses are in violation of public policy provisions. Hence, the compulsory public policy provisions are of particular interest to companies doing business through agencies under Belgian and Dutch law. Those provisions may be summarized as follows.

Article III of the Treaty provides that an agent can only be held liable for the execution of the obligations by the clients he solicited or their solvency if an agreement was made thereto in writing. If so, the liability cannot exceed the commission agreed upon.

Article V stipulates when the commission is due to the agent; and section 2 of Article V, *which constitutes public policy*, explicitly states that the agent is entitled to a reasonable compensation for the soliciting of orders which turn into a sale only after the termination of the agency contracts. Also Article VI, section 3, provides that the clause which makes the payment of the commission dependent on the completion of the sale must specifically so state. According to this section of Article VI, *only* when the principal submits evidence that it cannot be held responsible for the nonexecution of the obligation will the agent not be entitled to the commission.

Article VII secures the agent's control over the payment and the calculation

of the commission and creates the opportunity for the agent to rely on the assistance of an expert acceptable to the principal or, if not, who is appointed by the president of a Court of competent jurisdiction at the agent's request.

Article XI handles the procedure of termination of the agency agreement. Section 1 of this article, *which is not public policy*, indicates that if an agency agreement is entered into for an indefinite period of time, or for a definite period of time with the right of early termination, each of the parties has the right to terminate by respecting the agreed notice period.

If no agreement exists thereon, the notice period will be *four months*, increased by one month if the contract has been in force for three years and by two months after six years. However, section 2 of Article XI *which is public policy* and must be observed in any event, states explicitly that the notice period cannot be less than one month.

Article XIII regulates the termination of the agency agreement before the expiration of the time agreed upon or without taking into account the legal or contractual notice period. In such case, the terminating party must pay damages *unless* the termination takes place for motives which are urgent and which were communicated immediately to the other party. Section 4 of this article declares as null and void any clause giving discretionary power to one of the parties to decide whether an urgent motive exists or not.

Article XIV, regulating the procedure for requesting the termination of the agency agreement before a Court, also constitutes public policy, while Article XV states that in case termination of the agency agreement is wrongful, the terminating party must pay an indemnity equal to the remuneration due for the period remaining in case of normal termination. This indemnity will be determined considering, among others, the commissions which were earned in the course of the agreement. Finally, upon termination of the agency agreement for whatever reason, the agent may ask for an indemnity which may not exceed the amount of one year's remuneration if he has brought in clientele and accordingly created a goodwill for his principal's enterprise. This indemnity is calculated on the average of the remuneration for the past five years or on that of the entire duration of the contract if the contract has been in effect for less than five years (Article XVI).

Finally, Article XVII determines the validity of the noncompetition clauses for agents after the termination of their agency agreements. As a matter of public policy, such a clause is valid only if in writing. It has no validity at all, even if done in writing, if the agreement was terminated at will and without notice or for urgent motives in which there is fault on the part of the principal.

It is also prescribed as a matter of public policy that the statute of limitations for claims arising out of violations of Article XIII, XIV and XVI (termination of agency contract, granting of a clientele indemnity) is one year.

The Proposed EEC Directive

The proposed EEC Directive is presently under discussion in the EEC Council following its submission to that body by the EEC Commission on December 17, 1976 (text published in the Official Journal of the European Communities of January 18, 1977, No. C 13, page 2). Experience of the Community legislative process would indicate that the proposal is unlikely to be adopted by the Council before the middle of 1978, while the end of 1978 is a more probable prognosis.

The proposal itself stipulates that the nine Member States (including of course the three Benelux countries) must adopt and publish the necessary implementing measures before January 1, 1980 and must apply them as of July 1, 1980.

For those *Benelux* countries which will already have enacted the provisions of the Benelux Treaty this could mean two changes in agency law within a short time since, although the proposed Directive is essentially the same as the Treaty (indeed the latter provided much of the inspiration for the proposal), there nevertheless exist various differences in detail between the Treaty and the text of the proposal as it now stands.

When the Directive is implemented in the various national legal systems, any commercial agency contract which is governed by the law of one of the EEC Member States will be subject to its provisions. As far as the possible retroactive application of the Directive to existing contracts is concerned, EEC officials indicate that this question would be left to the individual Member States to solve in accordance with their own national rules. The parties would be at liberty to derogate from the compulsory public policy provisions "in relation to those activities which the commercial agent carries on outside the Community" (article 35 of the proposal).

Furthermore, in the case of certain specified provisions derogation would always be possible where the commercial agency is undertaken by a company or legal person with a paid-up capital exceeding the equivalent of 100,000 European units of account (more or less 157,000 US dollars) (article 33 of the proposal).

Conclusion

European law relating to independent commercial agents will undergo considerable modification in the near future when the provisions of the Benelux Treaty and more especially those of the proposed EEC Directive are implemented in the various national legal systems. Indeed, after implementation agency contracts will be subject to the same compulsory public policy provisions, affording a minimum protection to the commercial agent, in all nine Member States. One consequence of this is that there will be less to be gained

by the parties choosing a law to govern their contract which may previously have been more favourable towards the principal.

Given these pending changes and their probable retroactive application to existing contracts, companies doing business in Europe through agents will no doubt consider it essential to keep their agency contracts under review and to monitor closely developments in this area.

