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# The Termination of Agency and Distributorship Agreements: A Comparative Survey\*

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*The termination of agency agreements in most EEC Member States is regulated by statute, while the termination of distributorship agreements, with the exception of Belgium, is governed by case law. Messrs. Puelinckx and Tielemans first survey the state of the law governing the termination of agency and distributorship agreements in the EEC Member States and then discuss the efforts of the EEC to harmonize the national laws of the Member States in the area of commercial representation. The authors conclude by supporting the EEC harmonization effort relating to the laws regulating agency agreements and by calling for further efforts to harmonize the laws governing distributorship agreements.*

## INTRODUCTION

In the area of commercial representation, one should distinguish between agents and distributors. This maxim is particularly true when examining terminations of agency and distributorship agreements.<sup>1</sup> A

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\* This article is an adaptation of a presentation delivered by Mr. Puelinckx during a conference on Agency and Distributorship Agreements in Europe, sponsored by OYEZ IBC Ltd. on Nov. 13, 1980 in Brussels.

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<sup>1</sup> See generally H.J. MAIER & H. MEYER-MARSILIUS, *LE REPRÉSENTANT DE COMMERCE DANS LE MARCHÉ COMMUN* (Paris, 1961); P. COUSI & G. MARION, *LES INTERMÉDIAIRES DE COMMERCE* (Paris, 1963); UNION INTERNATIONALE DES AVOCATS, *LA REPRÉSENTATION COM-*

distributor can be described as a person or an entity who or which buys goods for his own account and resells them to several outlets. His profit arises from the difference between the buying price of the goods and the resale price. There are two sets of invoices, one covering the sale and one covering the resale. Generally a distributor operates at his own risk and in his own name. An agent, on the other hand, is an intermediary who procures business for another enterprise and who acts for the account of that enterprise. Usually the agent receives a percentage commission as compensation. The invoice covering the sale of the product is established not by the agent but by the supplier and sent to the customer.

In most EEC Member States,<sup>2</sup> agency agreements are regulated by specific statutes.<sup>3</sup> Germany was the first Member State to enact such legislation, followed shortly by the Netherlands, France and Italy. These statutes cover all aspects of the agency relationship, including the termination. They usually provide for a notice period prior to termination and indemnity for the terminated agent, unless the agent has committed a serious breach of duty justifying the termination.<sup>4</sup>

Distributorship agreements, on the other hand, have not received much attention from the legislatures of the various Member States. Only Belgium<sup>5</sup> has enacted a domestic statute regulating distributorship agreements. In at least one Member State, France, there were un-

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MERCIALE INTERNATIONALE (Brussels, 1971); A. DE THEUX, *LE DROIT DE LA REPRÉSENTATION COMMERCIALE* (Brussels, 1975); W. VAN GERVEN & F. LUKOFF, *COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS AND RELATED PROBLEMS OF LICENSING IN THE LAW OF THE EEC COUNTRIES AND OF THE EUROPEAN COMMUNITIES* (Brussels, 1970); Jones, *Practical Aspects of Commercial Agency and Distribution Agreements in the European Community*, 6 INT'L LAW. 107 (1973). The reader should be made aware that the area of agency and distributorship agreements is evolving. Older materials should be used with utmost caution.

<sup>2</sup> The European Economic Community, established by the Treaty of Rome in 1957, currently consists of ten Member States. Germany, France, Italy, Belgium, the Netherlands, and Luxembourg were the original members. The United Kingdom, Ireland, and Denmark joined in 1973, and Greece joined on Jan. 1, 1981. For the text of the Rome Treaty, see the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered in force* Jan. 1, 1958) [hereinafter cited as EEC Treaty].

<sup>3</sup> Belgium and the United Kingdom are exceptions. See notes 45 and 76 *infra*. The following are the main legislative provisions: Germany, *HANDELSGESETZBUCH* [HGB] arts. 84-92(c) (German Commercial Code, W.Ger.) and the more general provisions contained in *BÜRGERLICHES GESETZBUCH* [BGB] arts. 164-181, 611-630, 662-676 (German Civil Code, W. Ger.); France, *CODE CIVIL* [C.Civ] arts. 1984-2010 (French Civil Code) and the Decree n°. 58-1345 of Dec. 23, 1958; Italy, *CODICE CIVILE* [C.c.] arts. 1742-53 (Italian Civil Code); Netherlands, *WETBOEK VAN KOOPHANDEL* [W.v.K.] arts. 74-745 (Dutch Commercial Code).

<sup>4</sup> This requirement no longer exists in Italy. See text accompanying note 229 *infra*.

<sup>5</sup> Law of July 27, 1961 on the Unilateral Termination of Exclusive Distributorship Agreements of Indefinite Duration, *MONITEUR BELGE* Oct. 5, 1961, as amended by the Law of Apr. 13, 1971, *MONITEUR BELGE* Apr. 21, 1971.

successful legislative attempts made to regulate these types of agreements. This area, however, remains generally untouched by legislation.<sup>6</sup>

In view of the almost complete lack of specific legislation on the issue, courts have played an unusually important role in devising solutions to meet the exigencies of disputes arising from distributorship contracts. Their task in this area is far from accomplished. As one eminent author in the field observes, "the courts have so far been able to do little more than decide the immediate practical issues which have come before them."<sup>7</sup> A substantial part,<sup>8</sup> and by no means the easiest part of the questions facing the courts, relates to the termination of distributorship agreements.

The relationship between manufacturer and distributor(s) is extremely complex. In legal terms the distributor is an independent merchant.<sup>9</sup> Several courts have ruled that a distributor freely assents to the terms of the agreement, acting in his own name and on his own behalf when selling the manufacturer's products.<sup>10</sup> Economically, however, the distributor is subordinated to the manufacturer whose products he is selling. Under the provisions of a typical distributorship agreement, the manufacturer usually determines the resale price of the goods, the distributor's commercial policy and his own profit margin. The brand or product which the distributor sells is the element that attracts customers, much more than his personal skill or reputation. This puts the distributor, to a very large extent, at the mercy of the manufacturer. If the latter decides to terminate or no longer renew the

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<sup>6</sup> In France, a number of bills have been introduced in Parliament to deal with the regulation of distributorship agreements. The following bills have been introduced thus far: the Daladier-Cupper Bill of 1956, the Lochèvre Bill of 1957, the Glon Couste Bill of 1973 and the Turco Bill of 1974. For a detailed discussion of the substantive elements of these legislative proposals, see Guyenot, *L'immixtion des règles du droit de travail dans les rapports entre concédants et concessionnaires*, 2 GAZETTE DU PALAIS, DOCTRINE 457, 459 (1976); J. GUYENOT, THE FRENCH LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS [hereinafter cited as FRENCH LAW OF AGENCY] 263-273 (London, 1976). None of them have been passed by Parliament. This is the result of the lobbying groups of supporters of the manufacturers. See Carbonneau, *Exclusive Distributorship Agreements in French Law*, INT'L & COMP. L.Q. 28 (1979).

<sup>7</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 186.

<sup>8</sup> Another important problem area for exclusive distributorship agreements is their legal validity under Community antitrust law. See EEC Treaty, *supra* note 2, at arts. 85 and 86. See generally COMPETITION LAW IN WESTERN EUROPE AND THE U.S.A. (D. Gylstra man. ed. 1976); GIDE-LOYRETTE-NOUEL, DICTIONNAIRE DU MARCHÉ COMMUN (with supps., 1968); A. BRAUN, A. GLEISS & M. HIRSCH, DROIT DES ENTENTES DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE (Brussels, 1977).

<sup>9</sup> See, e.g., Carbonneau, *supra* note 6, at 93 n.15.

<sup>10</sup> *Id.*

contract, the distributor is placed in a very precarious position.<sup>11</sup>

The distributor, because of his status as an independent merchant, has few, if any, legal remedies available to him. This discrepancy between the distributor's independence in legal terms and his almost total economic dependence on the manufacturer, coupled with the almost complete lack of legislative guidelines in this area, has caused distributors to turn to the courts for protection. As will be examined in greater detail in the following sections, most EEC Member State courts have worked out minimum protective measures for distributors against the manufacturer.

The degree of protection provided for the distributor, as well as the underlying reasoning of the courts vary widely among the various Member States. German courts, for example, have in certain circumstances applied the statutory provisions regarding agency agreements<sup>12</sup> to distributorship agreements.<sup>13</sup> French courts, on the other hand, have as yet refused to act as *de facto* legislative bodies on these issues and have confined themselves to applying traditional principles of contract law, especially the doctrine of abuse of right.<sup>14</sup>

The difference between distributors and agents, although important, is not the only difference which should be kept in mind. Within the category of agents, one should also differentiate between self-employed agents and "agents-employees."<sup>15</sup> The former are legally independent from the principal, while the latter are on the principal's payroll. This distinction is especially important in the labor law field regarding the termination of the agency relationship. Agents-employees fall under the Labor Codes of the respective Member States and, hence, enjoy the same labor law protection as regular employees upon termination of the contract.<sup>16</sup> Self-employed agents, on the other hand,

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<sup>11</sup> As Guyenot explains it:

[W]hen a distribution agreement terminates, a distributor's business is usually very different from what it was before the agreement was entered into and the distributor is often unable to maintain himself in business on his own, without established suppliers and deprived of his customers, including those he had before he joined the manufacturer's network.

FRENCH LAW OF AGENCY, *supra* note 6, at 235.

<sup>12</sup> HGB arts. 89, 89(a) and 89(b) (W. Ger.).

<sup>13</sup> See text accompanying notes 70-74 *infra*.

<sup>14</sup> See Carbonneau, *supra* note 6, at 92 and text accompanying notes 119-137 *infra*.

<sup>15</sup> For a brief description of the different names under which the agent-employees operate in the various Member States as well as of the regulation and statutes applicable to them, see A. DE THEUX, *supra* note 1, at 17-97.

<sup>16</sup> Labor law codes in Europe are very protective of the employee upon termination of the employment contract by the employer. For a good general overview, see A. TRINE, *LES PRINCIPALES OBLIGATIONS DES EMPLOYEURS EN MATIÈRE SOCIALE DANS LES SIX PAYS DE LA C.E.E.* (Brussels, 1970).

do not enjoy the protection offered to employees by the Labor Code.

When speaking of a commercial agent, therefore, one should specify whether the agent is a self-employed or employee agent. However, in some countries these two categories are not clearly distinguishable. One category may present characteristics which are normally found only with the other category. In Italy, for example,<sup>17</sup> a self-employed agent<sup>18</sup> enjoys most of the rights granted by Italian law to employees. Under Italian law self-employed agents are fully incorporated in the social security system. Under the Italian system, the principal enrolls his agent with ENASARCO,<sup>19</sup> a public agency charged with the administration of social security benefits for agents. ENASARCO mainly controls three funds: 1) severance payments available upon termination of the agent's authority; 2) agent's disability or old age pension fund; and 3) substitute remuneration in case of the agent's illness. The money necessary to effectuate these payments is raised by mandatory contributions by both principal and agent to ENASARCO at a fixed percentage of the agent's commissions. On the basis of these contributions, an Italian self-employed agent can claim social security benefits, such as disability and old age pensions, which are normally associated with the legal category of "employees."

The similar legal treatment in Italy of self-employed agents and employees regarding their relationship with their principals is governed, not only by statutes,<sup>20</sup> but primarily by collective agreements<sup>21</sup> entered into between representatives of the agents' unions and the principals' associations, thus demonstrating that it is not always easy to differentiate between self-employed agents and agents-employees.<sup>22</sup>

This article will focus on the self-employed agent and the distributor. In order to present a general picture, this article will first briefly outline the legal position of agents and distributors upon termination of their respective contracts in a number of EEC Member States. On the basis of this outline, the similarities and differences between the Mem-

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<sup>17</sup> See G. LA VILLA & M. CARTELLA, *THE ITALIAN LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS* (London, 1977).

<sup>18</sup> In Italian "agente di commercio."

<sup>19</sup> L'Ente Nazionale di Assistenza per Agenti e Rappresentati di Commercio (ENASARCO), with its headquarters in Rome and several branches throughout Italy, was established in 1938. It has recently been restructured under Decree n° 756 issued by the President of the Republic on Aug. 4, 1971 and by Law n° 12 of Feb. 2, 1973 prescribing the character and function of ENASARCO. See G. LA VILLA & M. CARTELLA, *supra* note 17, at 123-133.

<sup>20</sup> C.C. arts. 1742-53 (Italy). See text accompanying notes 210-232 *infra*.

<sup>21</sup> The so-called "Accordi Economici Collectivi" or EACS. See note 214 *infra*.

<sup>22</sup> For an in-depth and comparative analysis of this issue, see A. DE THEUX, *supra* note 1, at 333-609.

ber States will be discussed, considering in addition the latest EEC Draft Directive on the harmonization of the law relating to Commercial Agents.<sup>23</sup> The EEC Commission, in preparing this draft, relied heavily upon the present German law on Commercial Agents.

## GERMANY<sup>24</sup>

### *Agency*

Germany enacted the first specific legislation protecting commercial agents in 1897.<sup>25</sup> This legislation underwent several changes over the years<sup>26</sup> reaching its present form in August, 1953.<sup>27</sup>

Under German law, the main grounds for terminating an agency contract are: mutual agreement of principal and agent; expiration of the contract's term; death of the agent; bankruptcy of the agent; notice; or an urgent reason. An agency contract entered into for a definite period of time terminates upon the expiration of its term.<sup>28</sup> If, however, the agent continues the relationship after the initially agreed upon period, and the principal is aware of this and does not immediately object to it, then the agency contract will be deemed prolonged.<sup>29</sup> Moreover from that point on, the agency contract will be deemed a contract of unlimited duration.<sup>30</sup>

The change of qualification from a contract for a definite period of time to a contract of indefinite duration, is of crucial importance for the applicability of the provisions of the HGB on commercial agents. Sev-

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<sup>23</sup> Proposal of Dec. 17, 1976 for a Council Directive to coordinate the laws of the Member States relating to Commercial Agents, 20 O.J. EUR. COMM. (No. C 13) 2 (1977), as amended Jan. 19, 1979, 22 O.J. EUR. COMM. (No. C 56) 5 (1979). See text accompanying notes 255-300 *infra*.

<sup>24</sup> For more details, see Cohn, *An Introduction to the German Law on Agents and Sale Distributors*, COMMERCIAL AGENCY AND DISTRIBUTION AGREEMENTS IN EUROPE 1-23 (London, 1964); H. EBERSTEIN, *DER HANDELSVERTRETER VERTRAG* (Heidelberg, 1978); M. SCHLEGELBERGER, *HANDELSGESETZBUCH* 626-900 (München, 5th ed. 1973); H. SCHROEDER, *RECHT DER HANDELSVERTRETER* (1973); W. KUESTNER, *DER AUSGLEICHANSPRUCH DES HANDELSVERTRETERS* (Heidelberg, 1979); F. STAUBACH, *THE GERMAN LAW OF AGENCY AND DISTRIBUTORSHIP AGREEMENTS* (London, 1976); H. STUMPF, *DER VERTRAGSHÄNDLERSVERTRAG* (Heidelberg, 1979).

<sup>25</sup> HGB of May 10, 1897, effective Jan. 1, 1900. See A. DE THEUX, *supra* note 1, at 56.

<sup>26</sup> For an overview of these changes, see A. DE THEUX, *supra* note 1, at 56-62.

<sup>27</sup> Gesetz zur Änderung des HGB, Bundesgesetzblatt [BGBI] at 771 (1953). It is contained in articles 84-92(c) of the Handelsgesetzbuch [HGB] (German Commercial Code). In addition, the more general provisions of articles 164-181, 611-630, and 662-76 of the Bürgerliches Gesetzbuch [BGB] (German Civil Code) dealing with, respectively, agency, contracts for services, and mandate, are applicable.

<sup>28</sup> BGB § 620 ¶ 1 (W. Ger.).

<sup>29</sup> BGB § 625 (W. Ger.).

<sup>30</sup> *Id.*

eral of the HGB provisions are only applicable to contracts of indefinite duration.<sup>31</sup> Hence, as the HGB provisions are very favorable for agents, a tacit prolongation of an agency contract initially concluded for a limited duration, is very beneficial for the agent involved. The principal would, however, be able to avoid this change of qualification and yet in practical terms reach the same result, by inserting a so-called renewal clause in the agreement. Such clauses typically call for a prolongation of the agreement for a fixed number of years, unless either principal or agent has given notice three to six months before the date of expiration. The number of possible prolongations is usually unlimited.

Renewal clauses have been frequently inserted in agency contracts of limited duration, however the German Legislature has remained silent on the issue of the nature of these agency contracts after the first prolongation. Thus, parties have on several occasions turned to the courts to determine whether their agreement remained an agreement of limited duration notwithstanding the prolongation.<sup>32</sup>

The Landesgericht in Dortmund answered this question negatively.<sup>33</sup> The facts underlying the case were as follows: an agency contract was signed to be executed from June 13, 1969 through June 12, 1971. The parties agreed that the contract would be renewed for an unlimited additional amount of two-year periods unless either principal or agent gave notice six months prior to the date of expiration. Notice of termination was given by the principal on December 11, 1972. The agent claimed the notice was void because the notice was not given by the end of a quarter year as prescribed by Section 89 HGB for agency contracts of unlimited duration.<sup>34</sup> The Landesgericht of Dortmund followed the agent's reasoning. The Court pointed out that the renewal clause and the use that has been made of it, rendered the true length of the agency contract highly uncertain since a positive action, namely the giving of notice, was required to terminate the contract. Since no one could predict if and when parties would give notice to one another, from the first renewal on, the contract was a contract of unlimited duration.

In 1974, however, the Federal Supreme Court reversed the deci-

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<sup>31</sup> See, e.g., the text of article 89 of the HGB which explicitly refers to contracts of indefinite duration.

<sup>32</sup> See, e.g., Judgment of Sept. 17, 1973, 1973 DER BETRIEBS BERATER 1504; Judgment of Sept. 10, 1973, 1973 DER BETRIEBS BERATER 1233; Judgment of Dec. 12, 1974, 1975 DER BETRIEBS BERATER 194.

<sup>33</sup> Judgment of Sept. 17, 1973, 1973 DER BETRIEBS BERATER 1504.

<sup>34</sup> See text accompanying notes 42-47 *infra*.



sion of the Landesgericht of Dortmund.<sup>35</sup> In a very cryptic decision, the Court pointed out that the parties had agreed on "a way to organise the duration of the contract" and, hence, the contract remained a contract of limited duration, notwithstanding one or more prolongations. The decision of the Federal Supreme Court has been severely criticized by German scholars<sup>36</sup> for its definition of the "definite duration" concept. The rationale of the Court has been questioned, with at least one scholar suggesting that the decision may not hold up for very long.<sup>37</sup>

The death of an agent forms a second ground for termination of the agency contract.<sup>38</sup> The principal's death, on the other hand, has no impact on the agency contract, unless the parties have agreed otherwise.<sup>39</sup>

Section 23 of the Federal Bankruptcy Act<sup>40</sup> stipulates that agency contracts terminate upon the principal's bankruptcy. Note that the agency contract in theory remains in effect when the agent goes bankrupt. This may, however, justify the immediate termination of the agreement by the principal.<sup>41</sup>

Agency contracts concluded for an indefinite period of time may at all times be terminated by either principal or agent on the condition that the statutory or contractual notice period be respected.<sup>42</sup> The Commercial Code contains notice periods which will automatically apply unless other notice periods have been provided for contractually.<sup>43</sup> An agency contract may be dissolved during the first three years by a six week notice period, which must be given by the end of a quarter year.<sup>44</sup> Parties may agree on a shorter notice period. A one month notice period, however, is the strict minimum. In such a case, notice may only be given by the end of the month.<sup>45</sup> After three years, an agency contract may only be dissolved upon a six-month notice period to be given by the end of a quarter year. Parties cannot deviate from this rule.<sup>46</sup> The notice period to be observed by principal and agent

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<sup>35</sup> Judgment of Dec. 12, 1974, 1975 DER BETRIEBS BERATER 194.

<sup>36</sup> See, e.g., Kuestner, *Case Comment*, 1975 DER BETRIEBS BERATER 195, 196, who speaks of "an astonishing judgment"; see also H. EBERSTEIN, *supra* note 24, at 66.

<sup>37</sup> H. EBERSTEIN, *supra* note 24, at 66.

<sup>38</sup> BGB arts. 673, 675 (W. Ger.).

<sup>39</sup> BGB arts. 672, 675 (W. Ger.).

<sup>40</sup> KONKURSORDNUNG [KO] art. 23 § 2 (W. Ger.).

<sup>41</sup> H. EBERSTEIN, *supra* note 24, at 71.

<sup>42</sup> HGB art. 89 (W. Ger.).

<sup>43</sup> *Id.*

<sup>44</sup> HGB art. 89 § 1 (W. Ger.).

<sup>45</sup> HGB art. 89 § 2 (W. Ger.).

<sup>46</sup> HGB art. 89 § 1 (W. Ger.).

should be equal; in case of inequality, the longer notice period will prevail.<sup>47</sup>

Agency contracts of both definite<sup>48</sup> and indefinite duration may be terminated by either the principal or the agent for "urgent reasons."<sup>49</sup> No notice is then required. The HGB does not define the term "urgent reasons." However in 1955 the Bundesarbeitsgericht<sup>50</sup> stated that:

an urgent reason for termination of an agency contract exists if, based on all aspects of a particular case, one party can not possibly be required to continue its relationship with the other party, not even during the notice period. A fault of the terminated party is thereto not required.

The Bundesarbeitsgericht's definition has been applied over the years in a great number of cases by several legal scholars.<sup>51</sup> Examples of agent's activities allowing the principal to immediately terminate the agreement include: (1) attempts to induce a fellow agent, working for the same principal, to leave his present job and start work for another principal.<sup>52</sup> The latter does not necessarily have to be a competitor of his predecessor;<sup>53</sup> (2) constant and gross negligence in the commercialization of the principal's product;<sup>54</sup> (3) unauthorized sale of competing brands;<sup>55</sup> and (4) noncompliance with the principal's instructions,<sup>56</sup> *e.g.* on advertising.

A particularly troublesome problem is whether the mere fact of poor sales performances by the agent justifies termination of the agency agreement without notice. The question has as yet not been answered by the Bundesgerichtshof, however, several Oberlandesgerichten answered it negatively. Unless the principal can point to a specific breach on the agent's part, poor performance in itself would not constitute an urgent reason to terminate the agreement.<sup>57</sup>

The terminated party, whether principal or agent, has a right to claim damages for all losses suffered as a result of the abrupt and unplanned termination of the contract unless the termination of the

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<sup>47</sup> HGB art. 89 § 3 (W. Ger.).

<sup>48</sup> The text of HGB art. 89a relating to immediate termination for urgent reasons makes no distinction between agency contracts of limited and unlimited duration.

<sup>49</sup> HGB art. 89a (W. Ger.).

<sup>50</sup> Judgment of Nov. 3, 1955, A.R. Blattei, Kündigung IX, Entsch. 7/8.

<sup>51</sup> See, *e.g.*, M. SCHLEGELBERGER, *supra* note 24, at 665; H. EBERSTEIN, *supra* note 24, at 68.

<sup>52</sup> Judgment of Mar. 11, 1977, 1977 DER BETRIEBS BERATER 1170.

<sup>53</sup> *Id.*

<sup>54</sup> Judgment of Feb. 28, 1963, 1963 DER BETRIEBS BERATER 447.

<sup>55</sup> Judgment of Dec. 13, 1962, 1963 DER BETRIEBS BERATER 203; Judgment of Feb. 23, 1972, 1972 DER BETRIEBS BERATER 467.

<sup>56</sup> Judgment of June 9, 1960, 1960 DER BETRIEBS BERATER 956.

<sup>57</sup> Judgment of Dec. 2, 1970, 1971 DER BETRIEBS BERATER 572; Judgment of Feb. 28, 1963, 1963 DER BETRIEBS BERATER 447.

agency contract was caused by the terminated party's own behavior.<sup>58</sup> Moreover, the agent is entitled to claim a specific compensation for the loss of goodwill.<sup>59</sup> The purpose of this claim is to compensate the agent for the benefit which accrues to the principal from the agent's labor and, furthermore, the benefit that will continue to accrue from the goodwill established by the agent as long as the principal remains in business.<sup>60</sup> An agent is entitled to compensation for the loss of goodwill pursuant to Section 89b HGB if the agent can establish the following three conditions: (1) the principal derived considerable benefits from the contacts which the agent has established with new clients; (2) the agent has lost or will lose commissions due to the termination of the agency contract; and (3) the payment of compensation is just and fair. Compensation is limited to the amount of one year's gross commissions, calculated at an average of the commissions of the last five years, or, if the contractual relationship was shorter, the period of agency.<sup>61</sup>

The agent's right to initiate a claim cannot be contracted out in advance.<sup>62</sup> The claim, however, must be initiated within three months from the termination of the agency contract. The claim will not be successful if the agent has been dismissed for an "urgent reason."<sup>63</sup> Similarly, an agent will not be entitled to compensation if the agent has terminated the contract, unless the principal's behavior has forced him to do so<sup>64</sup> or the termination was caused by the agent's age or illness.<sup>65</sup>

### Distributorship

In Germany, there are presently no specific legislative provisions governing distributorship agreements.<sup>66</sup> The Bundesgerichtshof has characterized these agreements as *sui generis*, i.e., not classifiable within

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<sup>58</sup> HGB art. 89a § 2 (W. Ger.).

<sup>59</sup> The so-called "Ausgleichsanspruch," HGB art. 89b (W. Ger.).

<sup>60</sup> For an overview of the latest case law on this subject, see Laum, *Der Ausgleichsanspruch des Handelsvertreters in der Rechtsprechung des Bundesgerichtshofes*, 1967 DER BETRIEBS BERATER 1359; Kuestner, *Neue Rechtsprechung zum Ausgleichsanspruch des Handelsvertreters nach § 89b HGB*, 1972 DER BETRIEBS BERATER 1300-06. For a detailed analysis on the calculation methods used, see Hohn, *Wirtschaftliche Anspruchsfaktoren beim Ausscheiden des Handelsvertreters*, 1972 DER BETRIEBS BERATER 521-25.

<sup>61</sup> HGB art. 89b (2) (W. Ger.).

<sup>62</sup> *Id.*

<sup>63</sup> HGB art. 89b (3) (W. Ger.).

<sup>64</sup> *Id.*

<sup>65</sup> The latter exception was expressly added to the law in 1976. See Kuestner, *Neufassung des 89b Abs. 3 HGB bei alters- oder Krankheitsbedingter Handelsvertreters*, 1976 DER BETRIEBS BERATER 630-33.

<sup>66</sup> F. STAUBACH, *supra* note 24, at 230.

existing categories.<sup>67</sup> An important question which German courts, including the Federal Supreme Court have dealt with in this area, is whether Sections 89, 89a and 89b HGB, relating to the termination of agency contracts, apply by analogy to distributorship agreements. In other words, are distributors entitled to a notice period and goodwill indemnification in the same manner and under the same conditions as agents?

The Bundesgerichtshof answered this question positively with respect to exclusive distributors. In a leading decision of April 5, 1962<sup>68</sup> the Court held:

As already stated many times by the courts, the legal relationship between a manufacturer and a distributor who are exclusively bound to each other by the manufacturer's distribution network gives rise to an association of interests which is usually intended to last for a long period. This relationship is in many respects similar to that between a manufacturer and a commercial representative. It is therefore right to apply to such a distributor those provisions of the law governing commercial representatives which are justified by the basis and purpose of the provisions. . . . It must therefore be presumed that the defendant (manufacturer) could only terminate the contract between the parties by giving six weeks' statutory notice to expire at the end of a quarter.<sup>69</sup>

Hence, under German law an exclusive distributorship agreement can only be terminated in compliance with the statutory notice periods for agents unless the manufacturer can justify a reason for termination without notice as provided for in Section 89b HGB. This decision has been approved by leading German scholars. They, however, emphasize that the application by analogy is only then accepted if justified on the basis and the purpose of the Commercial Code provisions.<sup>70</sup> At least one author maintains that this application by analogy can only take place if parties to a distributorship agreement have not stipulated to a longer or shorter notice period in the agreement.<sup>71</sup> The distributor is in less need of protection than the agent and therefore it would be unnecessary to apply the notice provisions for agents if parties have agreed or otherwise provided in the agreement.<sup>72</sup>

An equally important question German courts have dealt with is whether distributors are entitled to compensation for their goodwill in

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<sup>67</sup> Judgment of Dec. 11, 1958, 1959 DER BETRIEBS BERATER 7; see also F. STAUBACH, *supra* note 24, at 230.

<sup>68</sup> Judgment of Apr. 5, 1962, 1962 DER BETRIEBS BERATER 543.

<sup>69</sup> *Id.*

<sup>70</sup> See H. STUMPF, *supra* note 24, at 26.

<sup>71</sup> *Id.* at 106.

<sup>72</sup> *Id.*

the same way as agents.<sup>73</sup> The Bundesgerichtshof answered this question in several cases<sup>74</sup> with the result demonstrating an interesting evolution in the Court's reasoning. In the earliest Supreme Court case on this issue,<sup>75</sup> a manufacturer of branded products entered into a distributorship agreement with a local distributor. The latter was granted the exclusive right to sell the manufacturer's products in a designated area. The distributorship agreement required the distributor to promote the manufacturer's interests and agree to the following terms: maintain a minimum annual sales figure; abide by the resale prices fixed by the manufacturer; follow the manufacturer's instructions regarding advertisements; notify the manufacturer of every sale made; and give the manufacturer, after termination of the distributorship agreement, all invoices, business papers and addresses of customers. The manufacturer terminated this agreement and chose another distributor for the area. The terminated distributor claimed compensation on the basis of Section 89b HGB.

The Bundesgerichtshof granted the distributor compensation. The court held that a distributor is entitled to goodwill compensation if the relationship between the distributor and the manufacturer encompasses more than a simple seller-buyer relationship. According to the Court, this will generally be the case with an agreement between a manufacturer of branded products and an exclusive distributor within a specific territory. In light of the many requirements placed upon the distributor under a typical distributorship agreement for branded products, a distributor can hardly be characterized as an ordinary buyer of the manufacturer's products. On the contrary, the distributor is part of the manufacturer's sales organization performing tasks which are normally performed by an agent. For example, a distributor's duties under a typical distributorship agreement are identical to the duties the Legislature has stipulated for agents, such as notification of sales, closely following manufacturer's directives, price fixing, etc. Thus, the Bundesgerichtshof felt it only natural to apply to distributors by analogy the indemnity provisions of the Commercial Code relating to agents.

The Court, in early decisions was willing to grant a goodwill compensation to a distributor if the latter was in need of protection because

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<sup>73</sup> HGB art. 89(b) (W. Ger.).

<sup>74</sup> Judgment of Feb. 11, 1977, 1977 NEUE JURISTISCHE WOCHENSCHRIFT 896; Judgment of Dec. 19, 1966, 1967 DER BETRIEBS BERATER 95; Judgment of Apr. 5, 1962, 1962 DER BETRIEBS BERATER 542; Judgment of Dec. 11, 1958, 1959 DER BETRIEBS BERATER 7.

<sup>75</sup> Judgment of Dec. 11, 1958, 1959 DER BETRIEBS BERATER 7.

of his weaker position vis-a-vis the manufacturer. But, the distributor was only entitled to a goodwill compensation if he could show that he was completely dependent upon the principal, similar to a typical commercial agent. The Bundesgerichtshof changed its position on this issue by overruling a court of appeals case in which goodwill compensation to a terminated distributor of branded products was denied on the ground that the latter had partly run his business with his own capital and was, hence, in no real need of protection upon termination of the agreement, since his invested capital had grown with the business.<sup>76</sup> The Court, in overruling the appellate decision, held that the distributor's need for protection is irrelevant to his right to goodwill compensation.<sup>77</sup> This right exists from the moment the relationship between manufacturer and distributor becomes more than a seller-buyer relationship and the distributor is contractually obligated to perform tasks and live up to standards normally applicable to agents. However, under German law, goodwill compensation can be explicitly contracted out if the agent or distributor is a foreigner with no place of business in Germany.<sup>78</sup>

## FRANCE<sup>79</sup>

### *Introduction*

French legislative bodies, as in Germany, have provided specific protective measures for agents<sup>80</sup> but have remained completely silent regarding distributors. There is as yet no French domestic statute directly regulating distributorship agreements.<sup>81</sup> Similar to Germany, the task of devising solutions to meet the exigencies of disputes result-

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<sup>76</sup> The Court of Appeals reached this conclusion because, *inter alia*, the distributor granted the customers longer terms of payment than he himself obtained from the manufacturer. It should be added that upon termination of the agreement the distributor had to transfer all his clients to the manufacturer.

<sup>77</sup> Judgment of Feb. 11, 1977, 1977 NEUE JURISTISCHE WOCHENSCHRIFT 896.

<sup>78</sup> HGB art. 92(c) (W. Ger.).

<sup>79</sup> For a general overview, see FRENCH LAW OF AGENCY, note 6 *supra*; Guyenot, *Concession Exclusive*, ENCYCLOPÉDIE DALLOZ (1980); P. DIDIER, DROIT COMMERCIAL (1970); Serna, *Agent Commercial*, *Encyclopédie Dalloz* (1980); Carboneau, note 6 *supra*; A. ROLLAND, LA SITUATION JURIDIQUE DES CONCESSIONNAIRES ET DES FRANCHISEES MEMBRES D'UN RÉSEAU COMMERCIAL (Paris, 1976); Buhagiar, *Doit-on créer un Statut légal des Concessionnaires de Vente Exclusive*, [1975] JURISCLASSEUR PÉRIODIQUE, éd. C.I. 11659; Buhagiar, *L'avenir des Contrats de Concessions de Vente Exclusive*, [1976] JURISCLASSEUR PÉRIODIQUE, éd. C.I. 12138; Guyenot, *L'immixtion des Règles du Droit du Travail dans les Rapports entre Concédants et Concessionnaires*, [1976] 1 GAZETTE DU PALAIS, DOCTRINE 457; Threard, *Le Statut Légal du Concessionnaire*, [1977] 2 JURISCLASSEUR PÉRIODIQUE, éd. C.I. 12536.

<sup>80</sup> CODE CIVIL [C. CIV.] arts. 1984-2010 (Fr.).

<sup>81</sup> Carboneau, *supra* note 6, at 91.

ing from distributorship contracts has been placed upon the courts.<sup>82</sup> The French courts, however, refuse to apply to distributors by analogy the statutory provisions for agents. They instead confine themselves to applying traditional principles of contract law.<sup>83</sup>

### Agency

The rights and duties of agents and principals under French law are set forth in Articles 1984-2010 of the French Civil Code and in Decree n° 58-1345 of December 23, 1958.<sup>84</sup> There are basically five reasons for terminating agency contracts: expiration of the term of the contract; the death of the principal or agent; deprivation of civil rights; insolvency or bankruptcy;<sup>85</sup> or urgent reasons.<sup>86</sup>

Agency contracts entered into for a limited period of time normally terminate upon the expiration of their term. The agent is not entitled to claim indemnification from the principal if the latter decides not to renew the contract.<sup>87</sup> If after the expiration of the term the parties continue their commercial relationship, the French courts presume that the parties have tacitly renewed their old agreement under the same terms, except for the duration clause. The new agreement, therefore, is an agreement of unlimited duration.<sup>88</sup>

Parties can avoid this automatic change of character of their agreement by inserting in the original agreement a tacit renewal clause of limited duration. This was decided by the Cour de Cassation in the *Brocvielle v. Soc. Francio Hoval* case.<sup>89</sup> In that case, the parties had signed an agency contract on April 7, 1966 for a two year period. At the end of that period the contract was to be automatically prolonged for another two years unless one of the parties expressed a wish to terminate the agreement at least six months before the term of the contract. The tacit prolongation could take place as many times as the parties wanted, but the term was limited to consecutive two-year periods, thus leaving parties free to terminate the contract every two years.

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<sup>82</sup> *Id.* at 92.

<sup>83</sup> *Id.*; FRENCH LAW OF AGENCY, *supra* note 6, at 237.

<sup>84</sup> Decree n° 58-1345 du 23 décembre 1958 relatif aux agents commerciaux, 1958 Journal Officiel de la République Française [J.O.] 11947.

<sup>85</sup> C. civ. art. 2003 (Fr.).

<sup>86</sup> Decree n° 58-1345, 1958 J.O. 11947, art. 3 § 2.

<sup>87</sup> Judgment of May 22, 1964, Cour d'appel, Paris, [1964] 2 Gazette du Palais 230; Judgment of Oct. 15, 1973, Cour de Cassation [Cass. civ. com.], 1973 Bulletin Civil IV [Bull. Civ. IV], no. 277.

<sup>88</sup> Judgment of Feb. 16, 1970, Cass. civ. com., 1970 Recueil Dalloz-Sirey Sommaires [D.S. Som.] 135.

<sup>89</sup> Judgment of Apr. 24, 1974, Cass. civ. com., 1975 D.S. Som. 764.

The Cour d'appel de Rouen<sup>90</sup> held that despite automatic prolongation clauses, agency contracts are considered contracts of limited duration. This decision was affirmed by the Cour de Cassation in a cryptic and rather poorly reasoned decision.<sup>91</sup> These decisions met with severe criticism because of their definition of the "definite duration" concept. French legal scholars emphasize that a contract can only be of limited duration if its termination is caused by a future and objective event that takes place without any intervention by one of the parties. A contract of unlimited duration, on the other hand, terminates only upon a unilateral decision of one of the parties.<sup>92</sup> This test was clearly not followed by the Cour de Cassation in the *Brocvielle* case.<sup>93</sup> In contracts with automatic prolongation clauses, intervention by at least one of the parties is necessary to terminate the agreement.

Agency contracts, whether of definite or indefinite duration, may be terminated anytime by the principal. This rule is laid down in Article 2003 of the Code Civil and is not affected by the Decree of 1958.<sup>94</sup> However, a leading French author noted that this rule "loses a great deal of its value as a result of the principal's correlated obligation to pay compensation to the agent."<sup>95</sup> Article 3 of the Decree of 1958 indeed provides that unilateral termination of the agency agreement by the principal, unless justified by a fault of the agent, entitles the agent to compensation for the loss he suffered, notwithstanding any contrary agreement.<sup>96</sup>

Two conditions must be fulfilled before a terminated agent may claim indemnity from the principal. These conditions are: (1) an effective and unilateral termination of the agreement by the principal and (2) a total absence of fault by the agent justifying the principal to terminate the agreement. If these two conditions are met, the terminated agent is entitled to claim "compensation for the loss he has suffered" as a result of the principal's termination of the agreement.<sup>97</sup>

With respect to the first condition, as mentioned earlier,<sup>98</sup> the mere non-renewal of an agency contract of limited duration does not entitle

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<sup>90</sup> Judgment of Nov. 10, 1972, Cour d'appel, Rouen, unpublished.

<sup>91</sup> Judgment of Apr. 24, 1974, Cass. civ. com., 1975 Recueil Dalloz-Sirey, Jurisprudence [D.S. Jur.] 764.

<sup>92</sup> See, e.g., Delaporte, *Case Comment*, 1975 D.S. Jur. 765, 766; G. PUOLAIN, LA DISTINCTION DES CONTRATS À DURÉE DÉTERMINÉE ET INDÉTERMINÉE, no. 25 (Paris, 1971).

<sup>93</sup> Judgment of Apr. 24, 1974, Cass. civ. com., 1975 D.S. Jur. 764.

<sup>94</sup> Serna, *supra* note 79, at n.111.

<sup>95</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 67.

<sup>96</sup> 1958 J.O. 11947, art. 3.

<sup>97</sup> *Id.* at art. 3, § 2.

<sup>98</sup> See text accompanying notes 87-88 *supra*.



the agent to claim an indemnity. The agreement terminates by expiration and not by an act of the principal.<sup>99</sup> This is not true, however, if the principal previously promised a renewal of the agreement, yet decides not to keep his promise. This amounts to a unilateral termination by the principal.<sup>100</sup>

The second condition for an agent's claim for indemnity is the absence of fault on the part of the agent which would justify termination of the agreement by the principal.<sup>101</sup> The law does not specify the required degree of misconduct which would justify a termination without compensation. The Cour d'appel de Paris has held that the following events do justify termination without compensation: an agent offering competing brands to the principal's customers;<sup>102</sup> an agent knowingly canvassing in territory allocated to other agents;<sup>103</sup> or an agent damaging the principal's reputation by making malicious remarks concerning the principal beyond reasonable criticism.<sup>104</sup>

Similar to German laws, the mere fact that lower sales figures were realized in comparison with previous years, would not justify the immediate termination of the agency contract, provided the realized figures are not "ridiculously low."<sup>105</sup> It is uncertain whether shortcomings on the agent's part due to illness, fatigue or even old age would justify termination of the agency contract.<sup>106</sup>

Since the Decree of 1958<sup>107</sup> the burden of proof in this area lies on the principal; he has to prove the agent's misconduct.<sup>108</sup> Prior to the Decree of 1958, the agent had to demonstrate that the termination was improper. The agent's position under the present law is thus considerably more comfortable. A leading French author on this subject<sup>109</sup> classifies an agent's possible claims in the following catch-all formula: (1) a claim for the loss of the immatriculation card;<sup>110</sup> (2) a claim for material, commercial and moral losses; and (3) an additional claim in

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<sup>99</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 67.

<sup>100</sup> *Id.* at 68.

<sup>101</sup> Decree n° 58-1345, art. 3 § 2, 1958 J.O. 11947.

<sup>102</sup> Judgment of Mar. 7, 1964, Cour d'appel, Paris, [1964] 2 Gazette du Palais 131.

<sup>103</sup> Judgment of Oct. 23, 1964, Cour d'appel, Paris, 1965 D.S. Som. 36.

<sup>104</sup> *Id.*

<sup>105</sup> Judgment of Jan. 30, 1965, Cour d'appel, Paris, 1965 REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 925.

<sup>106</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 69.

<sup>107</sup> 1958 J.O. 11947.

<sup>108</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 70.

<sup>109</sup> See Serna, *supra* note 79, at n.137.

<sup>110</sup> In France admission to the profession of commercial agent is subject to registration in a special register kept at the Commercial Court. The registration is valid for 5 years but renewal is possible. If the agent ceases his practice or if he no longer satisfies the conditions for being a

case of abusive termination, (*e.g.*, an abrupt termination after many years of commercial relationship whereby the agent could not have foreseen this termination). This classification unfortunately does not shed much light on the problem.

Whatever the legal qualification of the elements of the statutory indemnification may be, courts tend to fix the amount of compensation at twice the average commission the agent earned under the agency agreement during the preceding three years.<sup>111</sup> Depending upon the circumstances of each case, other elements may be added to this amount. In particular, an extra indemnity may be added to remedy an abusive or unexpected termination.<sup>112</sup> Furthermore, the Decree n° 58-1345 does not provide a specific compensation for the loss of goodwill. This claim should, therefore, be incorporated in the general indemnity claim which covers, as mentioned, several types of prejudice.

### *Distributorship Agreements*

As previously mentioned,<sup>113</sup> France does not have a domestic statute regulating distributorship agreements. Several attempts to enact such legislation have been made, but none have been successful.<sup>114</sup> In light of the complete lack of statutory protection, the distributors in France have requested courts to give them a right to a reasonable notice period and compensation for losses suffered upon termination of the distributorship agreement similar to agents. French courts have been until recently more reluctant than German courts to honor this request.<sup>115</sup> The most recent case law on the issue shows an evolution in favour of the distributor.<sup>116</sup>

French courts, in the absence of legislation authorizing them to apply by analogy the articles of the Code Civil and the Decree of 1958 on commercial agents to distributors, abide by the rule that distributorship agreements are governed by general rules of contract law.<sup>117</sup> The

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registered commercial agent, he must cancel his registration. See FRENCH LAW OF AGENCY, *supra* note 6, at 73-84.

<sup>111</sup> See Serna, *supra* note 79, at n.137.

<sup>112</sup> See, *e.g.*, Judgment of Nov. 6, 1975, Cour d'appel, Paris, 1976 D.S. Jur. 344; Judgment of May 2, 1975, Cour d'appel, Aix en provence, 1976 D.S. Jur. 344; Judgment of Apr. 20, 1972, Cour d'appel, Paris, 1973 D.S. Som. 105; Judgment of Jan. 3, 1973, Tribunal de Commerce, Paris, 1973 D.S. Som. 137.

<sup>113</sup> See note 6 and accompanying text *supra*.

<sup>114</sup> *Id.*

<sup>115</sup> See Carbonneau, *supra* note 6, at 92 and 110.

<sup>116</sup> See text accompanying notes 124-137 *infra*.

<sup>117</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 237; Carbonneau, *supra* note 6, at 92 and 110.

distributor is an independent merchant and therefore free to negotiate the terms of the distributorship agreement. Under basic contract law,<sup>118</sup> a distributor is bound by the negotiated terms and cannot claim entitlement to a notice period or goodwill indemnification if such things are not provided in the contract. The only escape for the distributor is to demonstrate that the manufacturer either breached the contract, in which case he would be liable to the agent for all losses caused by this breach, or that the manufacturer's refusal to renew the contract or his decision to unilaterally terminate the contract, constitutes an abuse of rights.<sup>119</sup> However the latter will not be the case if the possibility of non-renewal or unilateral termination is negotiated in the agreement.

The French courts have strictly applied this rule,<sup>120</sup> first utilized in the leading case of *Soc. Therdynelec v. Soc. General Motors*.<sup>121</sup> In that case, the plaintiff was a distributor in the defendant's distribution network for four years. Their commercial relationship had been established by a series of annual contracts which were not tacitly renewable, beginning in 1949 and ending in 1952. On December 30, 1952, the defendant notified the plaintiff that he would not renew the contract for 1953. The plaintiff sued the defendant for damages on two grounds. First, the plaintiff claimed that in 1952 the defendant had given him implicit but unequivocal assurances that the contract would be renewed for another year. Secondly, in view of the length of their dealings, the defendant's abrupt termination of their dealings constituted an abuse of right.

The Cour d'appel de Paris<sup>122</sup> rejected the plaintiff's claim. The court emphasized that the terms of the agreement may result in hardship on one of the parties, but these terms constituted a valid agreement entered into by two independent merchants. The plaintiff was perfectly aware of the non-renewal clause in the agreement and the risks he was incurring under the agreement. The defendant's non-renewal of the contract was therefore not an abuse of right, but merely an exercise of a contractual right. This decision was upheld by the Cour de Cassa-

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<sup>118</sup> C. CIV. art. 1134 (Fr.). This article reads as follows: "The terms of an agreement have force of law for the parties."

<sup>119</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 241; Guyenot, *Concession Exclusive*, 1980 *ENCYCLOPÉDIE DALLOZ*, nn. 182-213, with references to case law.

<sup>120</sup> Guyenot, *supra* note 119 at nn.182-213.

<sup>121</sup> Judgment of June 28, 1958, Cour d'appel, Paris, [1958] 2 *Gazette du Palais, Jurisprudence* 253, *aff'd* Judgment of July 5, 1962, Cass. civ. com., [1962] 2 *Gazette du Palais, Jurisprudence* 161.

<sup>122</sup> *Id.*

tion.<sup>123</sup> The courts thus applied the maxim *dura lex said lex* and continued to apply it for a number of years.

Courts over the years<sup>124</sup> came to appreciate the disastrous effects on the distributor's business of unjustified and abrupt termination of an exclusive distributorship agreement by the principal.<sup>125</sup> The Courts were caught between their desire to help the distributor and their duty to apply Article 1134 of the Code Civil which stipulates that parties to a valid contract are bound by its terms.<sup>126</sup>

Several solutions have been tried but so far none of them seems widely accepted by either courts or legal scholars. Some courts<sup>127</sup> have continued to apply the abuse of right doctrine; however they have shown themselves less demanding than the Cour de Cassation in the *Therdynelec* case. These courts more easily accept the existence of an abuse of right on the manufacturer's part. Other courts<sup>128</sup> have tried mitigating the present hardships for distributors, by applying the theory of the "mandate of common interest"<sup>129</sup> to distributorship agreements. The notion of "mandate of common interest" was developed several years ago by French courts in order to provide a means for them to deviate from the rules normally applied upon termination of an agency contract.<sup>130</sup> Unlike a normal mandate, a "mandate of common interest can only be revoked by mutual consent of the parties or for an urgent reason."<sup>131</sup> The Cour d'appel d'Amiens applied the theory of "mandate of common interest" in the case of *S.A. Application des Gaz v. Soc.*

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<sup>123</sup> *Id.*

<sup>124</sup> With the exception, however, of the Cour de Cassation, which up to this date regularly refuses to qualify a termination as abusive. *See, e.g.*, Judgment of Feb. 20, 1979, Cass. civ. com., 1979 Recueil Dalloz-Sirey, Informations rapides 316, in which the Court held that termination of a distributorship agreement of unlimited duration, several months after the manufacturer had informed the distributor of his disappointment of the sales figures reached and offering the distributor to continue to be the importer of his products, does not constitute an abuse of right. *See also* Judgment of May 3, 1979, Cass. civ. com., 1979 D.S. Jur. 364, in which the Court held that the termination of a distributorship agreement does not constitute an abuse of right where the term of the agreement was for one year, nonrenewable, and the manufacturer terminated three days after the expiration of the term.

<sup>125</sup> *See* note 11 *supra*.

<sup>126</sup> *See* note 118 *supra*.

<sup>127</sup> *See, e.g.*, Judgment of May 23, 1977, Cour d'appel, Limoges, [1978] 2 CAHIER DE DROIT DE L'ENTREPRISE 15; Judgment of Oct. 9, 1963, Cour d'appel, Paris, 1963 Juris classeur Périodique, éd. C.I. 72907.

<sup>128</sup> *See, e.g.*, Judgment of Dec. 13, 1973, Cour d'appel, d'Amiens, 1975 D.S. Jur. 452; Judgment of Jan. 29, 1964, Cour d'appel, Lyon, 1965 D.S. Jur. 185.

<sup>129</sup> For more details on this notion, see FRENCH LAW OF AGENCY, *supra* note 6, at 9-16. *See also* Ferrier, *L'intérêt Commun dans de la Contrat de Concession*, [1979] CAHIER DE DROIT DE L'ENTREPRISE 12.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

*des Etabl. Debrie*.<sup>132</sup> In this case, the defendant was the exclusive distributor for plaintiff's branded products for over eighteen years. Defendant was fully integrated in the plaintiff's distribution network and strictly controlled by him. Defendant could not sell other products, and was required to follow plaintiff's instructions regarding the quantity and price at which the product could be sold. The distributorship agreement had been entered into for an indefinite duration. Plaintiff terminated this agreement, by registered letter of November 5, 1971, to take effect on January 1, 1972. Plaintiff had never before showed any dissatisfaction with the defendant's work. Instead, he claimed that a reorganization of his distribution network forced him to terminate defendant's agreement.

The defendant, distributor and original plaintiff sued the principal, for damages. The Tribunal de Commerce de Beauvais<sup>133</sup> honored the claim on the ground that principal and distributor were bound by a "mandate of common interest" which the manufacturer could not terminate without just cause. On appeal, the Cour d'appel d'Amiens affirmed the decision, thereby explicitly adopting the lower court's reasoning.<sup>134</sup> The decision was confirmed by the Cour de Cassation<sup>135</sup> which, however, based its confirmation on the notion of abuse of rights and rejected the Cour d'appel's recourse to the "mandate of common interest." The Cour de Cassation ruled that the termination was abusive in light of the longstanding commercial dealings between the parties and the short notice period. The distributor would have an extremely hard time finding a suitable replacement for the terminated agreement and, furthermore, the distributor could not survive on his own since his customers were attached to the brand name he represented rather than to the distributor's personal skills. Hence, he was entitled to damages. Thus, the Cour de Cassation explicitly rejected the theory of "mandate of common interest" as a legal basis for a distributor's damage claim and reaffirmed the applicability of the abuse of right doctrine.

The constant recourse to the theory of abuse of right as the sole legal remedy for a distributor is criticized by several legal scholars who claim that a liberal application of this principle boils down in practical terms to an abolition of the manufacturer's contractual right to termi-

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<sup>132</sup> Judgment of Dec. 13, 1973, Cour d'appel, d'Amiens, 1975 D.S. Jur. 452.

<sup>133</sup> Unpublished decision.

<sup>134</sup> Judgment of Dec. 13, 1973, Cour d'appel, d'Amiens, 1975 D.S. Jur. 452.

<sup>135</sup> Judgment of Mar. 9, 1976, Cass. civ. com., 1976 D.S. Jur. 338.

nate or not renew the contract.<sup>136</sup> These scholars would prefer a clear legislative or judicial recognition of the economic subordination of the distributor. One way to achieve this goal would be to discard the traditional notion of the distributor as an independent merchant and adopt the view that he is an "employed merchant" which would bring him within the scope of the French labor laws.<sup>137</sup> However their efforts have so far remained unanswered by either legislative bodies or courts. The latter have as yet preferred to stay within the classical concepts of civil law, primarily the abuse of right doctrine and to a much lesser extent the "mandate of common interest" doctrine.

### BELGIUM

Belgium's position in this survey is unique in two respects: first, it offers no statutory protection to its agents; second, it is the only Member State that has enacted specific legislation for distributors.<sup>138</sup>

#### *Distributorship*<sup>139</sup>

The rights and duties of distributors under Belgian law are governed by the Statute of July 27, 1961, as amended on April 13, 1971.<sup>140</sup> Originally, this Statute covered only exclusive distributorship agreements. However, in 1971, its scope was expanded to include two kinds of non-exclusive distributorship agreements:<sup>141</sup> (1) distributorship agreements whereby the distributor sells not all but nearly all of the manufacturer's products in the conceded territory; and (2) distributorship agreements whereby the manufacturer imposes on the distributor

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<sup>136</sup> See, e.g., Souleau, *Case Comment*, 1978 D.S. Jur. 693, 696. See also Rolland, *Case Comment*, 1975 D.S. Jur. 453, 457; FRENCH LAW OF AGENCY, *supra* note 6, at 236; Carbonneau, *supra* note 6, at 95.

<sup>137</sup> See FRENCH LAW OF AGENCY, *supra* note 6, at 255; Carbonneau, *supra* note 6, at 95 and 111.

<sup>138</sup> Loi du 27 juillet 1961 relative à la résiliation unilatérale des concessions de vente exclusive à durée indéterminée, comme modifiée par la loi du 13 avril 1971 (Law of July 27, 1961 on the unilateral termination of Indefinite Exclusive Distribution Agreements, as amended by the Law of Apr. 13, 1971), MONITEUR BELGE Oct. 5, 1961, and MONITEUR BELGE Apr. 21, 1971 (Belg.).

<sup>139</sup> The leading Belgian treatise on this issue is G. BRICMONT & J.M. PHILIPS, COMMENTAIRE DES DISPOSITIONS DE DROIT BELGE ET COMMUNAUTAIRE APPLICABLES AUX CONCESSIONS DE VENTE EN BELGIQUE (Brussels, 1977). For an overview of recent case law, see Sunt, *Overzicht van de Belangrijkste Rechtspraak met Betrekking tot de Wet van 27.07.61 Betreffende Eenzijdige Beëindiging van de voor Onbepaalde Tijd Verleende Concessies van Alleenverkoop, zoals Gewijzigd door de Wet van 13.04.71*, 1981 Jurisprudence Commerciale de Belgique 431.

<sup>140</sup> MONITEUR BELGE Oct. 5, 1961, MONITEUR BELGE Apr. 21, 1971 (Belg.).

<sup>141</sup> Law of July 27, 1961, MONITEUR BELGE Oct. 5, 1961, as amended by Law of Apr. 13, 1971, MONITEUR BELGE Apr. 21, 1971 (Belg.).

important obligations that are so onerous that termination of the concession would cause the distributor an important loss.

The Statute is highly protective of distributors. For example, unlike other European countries, under Belgian law, a distributorship agreement of limited duration does not terminate upon the expiration of its term.<sup>142</sup> Such distributorship agreement is terminated only if the party wishing to terminate the agreement sends a registered letter to the other party notifying him of his desire to terminate. This letter must be sent at the earliest, six months, and at the latest, three months, before the initially agreed upon date of expiration of the contract.<sup>143</sup> Absent such a letter, the agreement will be deemed to have been renewed, either for an indefinite period of time, or for the period of time stipulated in the renewal clause.<sup>144</sup> Furthermore, if the agreement has been renewed twice, from the third renewal on, the agreement is automatically converted into an agreement of unlimited duration. This will be the case even if the original agreement was amended by the parties.<sup>145</sup> Thus, unlike France<sup>146</sup> and Germany,<sup>147</sup> under Belgian law there is no possibility of escaping the protective measures for distributors by constantly prolonging the original agreement for limited periods of time.

Aside from termination by mutual consent, distributorship agreements concluded for an indefinite period of time may be terminated unilaterally if one of the parties commits a serious fault.<sup>148</sup> In that case no notice period is required.<sup>149</sup> Unfortunately the Statute does not specify what is meant by a "serious fault." According to the Commercial Court of Brussels, a "serious fault" is a fault, the nature and gravity of which exclude every possibility of carrying on the commercial relationship.<sup>150</sup> This immediately explains why no notice period is required since a notice period theoretically presupposes further cooperation between the parties.

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<sup>142</sup> *Id.* at art 3(b.5).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See text accompanying notes 89-93 *supra*.

<sup>147</sup> See text accompanying notes 32-37 *supra*.

<sup>148</sup> Law of July 27, 1961, *MONITEUR BELGE* Oct. 5, 1961, as amended by Law of Apr. 13, 1971, *MONITEUR BELGE* Apr. 21, 1971, art. 2 (Belg.).

<sup>149</sup> See Judgment of Mar. 8, 1977, Tribunal de Commerce, Brussels, 1977 *Jurisprudence Commerciale de Belgique* [JCB] 409; Judgment of Oct. 1, 1975, Cour d'appel, Brussels, 1975-76 *Rechtskundig Weekblad* [RW] 2150. See also G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 31.

<sup>150</sup> Judgment of May 18, 1978, Tribunal de Commerce, Brussels, 1978 JCB 485. This definition is identical to the one used under German law, see text accompanying note 50 *supra*, and the one incorporated into the Dutch law, see note 247 and accompanying text *supra*.

The concept of "serious fault" has produced an abundance of case law<sup>151</sup> in an attempt to refine this general guideline. It was held, for example, that the fact that a distributor did not sell a single product over a one and a half year period and furthermore never offered proof that he had made serious attempts to create a market for the products, constituted a "serious fault," thus allowing the manufacturer to immediately terminate the agreement.<sup>152</sup> Other less extreme or self evident examples of "serious faults," include: a distributor's constant failure to pay the manufacturer's bills, notwithstanding several promises to that effect;<sup>153</sup> a distributor's poor financial situation; failure on the part of a distributor to publish the company's annual accounts; distributor abuse regarding the products entrusted to him; and in general negligence by the distributor in the performance of his duties under the contract.<sup>154</sup>

Absent mutual consent or serious faults by one of the parties in the fulfillment of his obligations, an agreement of unlimited duration can only be terminated either by giving an appropriate notice term or by paying an adequate indemnity.<sup>155</sup> Notice term or amount of indemnity can only be agreed upon after notice is given. However, if the parties cannot reach an agreement, the court will decide on the basis of equity and, if available, local customs.<sup>156</sup> The terminating party has a choice between a notice period or an indemnity. The Statute does not contain minimum notice periods. Parties are completely free to negotiate this issue after termination of the distributorship agreement, but recourse to the courts is open to the terminated party if the notice period proposed by the terminating party seems insufficient.<sup>157</sup> It is dangerous to give general guidelines as to what notice period would be deemed reasonable in a given case. The published case law shows little or no logic and great divergence exists.<sup>158</sup> The one element courts do agree on is that the purpose of the notice period is to allow the distributor to find a similar distributorship agreement as the terminated one.<sup>159</sup> Starting

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<sup>151</sup> For a recent overview of the published case law, see Sunt, note 139 *supra*. For an overview of unpublished case law, see G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 241-352.

<sup>152</sup> Judgment of Oct. 1, 1975, Cour d'appel, Brussels, 1975-76 RW 2150.

<sup>153</sup> Judgment of Nov. 26, 1966, 1967 JCB 229; Judgment of Mar. 4, 1965, 1966 JCB 32.

<sup>154</sup> Judgment of Apr. 5, 1966, Rechtbank van Koophandel, Leuven, 1969 Belgische Rechtspraak Handelszaken [BRH] 286.

<sup>155</sup> Law of July 27, 1961, MONITEUR BELGE Oct. 5, 1961, as amended by Law of Apr. 13, 1971, MONITEUR BELGE Apr. 21, 1971, art. 2 (Belg.).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See, e.g., G. BRICMONT & J.M. PHILIPS, note 139 *supra*.

<sup>159</sup> Judgment of Oct. 1, 1975, Cour d'appel, Brussels, 1975-76 RW 2150; Judgment of Apr. 26, 1969, Cour d'appel, Brussels, 1969 JCB 327; Judgment of June 18, 1965, Cour d'appel, Brussels, 1965 Journal de Tribunaux [JT] 464; Judgment of May 19, 1978, Tribunal de Commerce, Brussels,



from this general idea, courts usually take into account the following elements in fixing a reasonable notice period: the duration of the agreement;<sup>160</sup> the profits realized by the distributor at the time of the termination;<sup>161</sup> the magnitude of the conceded territory;<sup>162</sup> the difficulties for the distributor to find a suitable replacement for the terminated agreement;<sup>163</sup> the distributor's promotional expenses;<sup>164</sup> the reputation of the manufacturer's brand;<sup>165</sup> and, the repercussion of the termination on the distributor's total activity.<sup>166</sup> A survey of the case law<sup>167</sup> indicates that notice periods may range from as little as three months for a concession that lasted four months and was never successful<sup>168</sup> to three years for a concession that lasted twenty-two years and was moderately successful with a salesfigure of BF 1.400.000.<sup>169</sup>

Absent a reasonable notice period, the terminated party is allowed to claim an equitable indemnity.<sup>170</sup> The purpose of this indemnity is to compensate the terminated party for the losses suffered because it did not receive a notice period.<sup>171</sup> Hence, the main element courts take into account in calculating this indemnity is the amount of profit the

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1978 JCB 485; Judgment of Apr. 16, 1976, Tribunal de Commerce, Brussels, 1976 JCB 436; Judgment of Oct. 29, 1965, Tribunal de Commerce, Brussels, 1966 JT 81; Judgment of Oct. 27, 1962, Tribunal de Commerce, Brussels, 1963 JCB 26.

<sup>160</sup> Judgment of June 18, 1965, Cour d'appel, Brussels, 1965 JT 464; Judgment of May 19, 1978, Tribunal de Commerce, Brussels, 1978 JCB 485; Judgment of June 11, 1974, Tribunal de Commerce, Brussels, 1974 JT 641; Judgment of May 28, 1974, Rechtbank van Koophandel, Ghent, 1974 BRH 397; Judgment of June 4, 1971, Tribunal de Commerce, Brussels, 1971 JT 595; Judgment of June 22, 1965, Tribunal de Commerce, Brussels, 1966 JT 44; Judgment of Oct. 27, 1962, Tribunal de Commerce, Brussels, 1963 JCB 26.

<sup>161</sup> Judgment of May 19, 1978, Tribunal de Commerce, Brussels, 1978 JCB 485; Judgment of May 28, 1974, Rechtbank van Koophandel, Ghent, 1974 BRH 397; Judgment of Mar. 8, 1963, Tribunal de Commerce, Brussels, 1963 JT 513.

<sup>162</sup> *Id.*

<sup>163</sup> Judgment of May 19, 1978, Tribunal de Commerce, Brussels, 1978 JCB 485; Judgment of June 11, 1974, Tribunal de Commerce, Brussels, 1974 JT 641; Judgment of Jan. 26, 1972, Tribunal de Commerce, Brussels, 1972 JT 269.

<sup>164</sup> Judgment of May 19, 1978, Tribunal de Commerce, Brussels, 1978 JCB 485; Judgment of Oct. 27, 1962, Tribunal de Commerce, Brussels, 1963 JCB 26.

<sup>165</sup> Judgment of May 28, 1974, Rechtbank van Koophandel, Ghent, 1974 BRH 397; Judgment of Dec. 23, 1964, Rechtbank, Hasselt, 1965-66 RW 635; Judgment of Mar. 8, 1963, Tribunal de Commerce, Brussels, 1963 JT 513; Judgment of Oct. 27, 1962, Tribunal de Commerce, Brussels, 1963 JCB 26.

<sup>166</sup> *Id.*

<sup>167</sup> See G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 44-47.

<sup>168</sup> Judgment of May 3, 1963, Rechtbank van Koophandel, Antwerpen, 1964-65 RW 542.

<sup>169</sup> Judgment of June 4, 1971, Tribunal de Commerce, Brussels, 1971 JT 595.

<sup>170</sup> Law of July 27, 1961, MONITEUR BELGE Oct. 5, 1961, as amended by Law of Apr. 13, 1971, MONITEUR BELGE Apr. 21, 1971, art. 2 (Belg.).

<sup>171</sup> Judgment of May 3, 1977, Cour d'appel, Mons, 1977 JCB 348; Judgment of June 18, 1965, Cour d'appel, Brussels, 1965 JT 464; Judgment of May 3, 1963, Rechtbank van Koophandel, Antwerpen, 1964-65 RW 542.

distributor could have realized during the notice period.<sup>172</sup> If the territory in which the distributor operated included several countries, then overall profits should be taken into consideration and not just the profits realized in Belgium.<sup>173</sup> In addition, the courts, when calculating the amount of indemnity, often consider the overhead expenses attached to the terminated agreement<sup>174</sup> and the nature of the salesfigures the distributor realized.<sup>175</sup>

Article 3 of the Statute<sup>176</sup> stipulates that in addition to the notice period or equitable indemnity, the distributor may be entitled to an indemnity for: (1) the increase in turnover he realized, to the extent that this increase benefits the manufacturer after the agreement is terminated; (2) the costs sustained, to the extent that these costs benefit the manufacturer after termination; and (3) the redundancy payments the distributor must pay to his personnel resulting from termination of the agreement. These additional indemnities may be applicable even when a reasonable notice period has been given.<sup>177</sup> Courts very regularly grant the distributor all three indemnity items, thus illustrating that Belgian law provides favorable treatment for distributors.

The many mandatory benefits granted to the distributor under Belgian law inevitably leads one to describe Belgium, in comparison with other European countries, as "the paradise for distributors." Yet manufacturers dealing with Belgian distributors should not lose all hope. For example in *S.A. Vandebosch v. S.A. Hart an Cooley*,<sup>178</sup> the Belgian Cour de Cassation ruled that manufacturers may include an express resolute clause in the agreement allowing them under certain conditions to terminate the agreement with a short notice period and without paying any indemnities to the distributor.

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<sup>172</sup> Judgment of June 18, 1968, Cour d'appel, Brussels, [1968] 2 Pasiricrie 264; Judgment of Apr. 16, 1976, Tribunal de Commerce, Brussels, 1976 JCB 436; Judgment of June 11, 1974, Tribunal de Commerce, Brussels, 1974 JT 641; Judgment of Dec. 5, 1966, Tribunal de Commerce, Brussels, 1966 JCB 327; Judgment of May 3, 1963, Rechtbank van Koophandel, Antwerpen, 1964-65 RW 542.

<sup>173</sup> Judgment of June 11, 1972, Tribunal de Commerce, Brussels, 1974 JT 641.

<sup>174</sup> Judgment of June 18, 1968, Cour d'appel, Brussels, [1968] 2 Pasiricrie 264; Judgment of Apr. 16, 1976, Tribunal de Commerce, Brussels, 1976 JCB 436; Judgment of June 11, 1974, Tribunal de Commerce, Brussels, 1974 JT 641; Judgment of Dec. 5, 1966, Tribunal de Commerce, Brussels, 1966 JCB 327; Judgment of May 3, 1963, Rechtbank van Koophandel, Antwerpen, 1964-65 RW 542.

<sup>175</sup> Judgment of June 18, 1965, Cour d'appel, Brussels, 1965 JT 464; Judgment of June 28, 1973, Tribunal de Commerce, Verviers, 1973 JCB 421.

<sup>176</sup> Law of July 27, 1961, MONITEUR BELGE Oct. 5, 1961, as amended by Law of Apr. 13, 1971, MONITEUR BELGE Apr. 21, 1971, art. 3 (Belg.).

<sup>177</sup> *Id.*

<sup>178</sup> Judgment of Apr. 19, 1979, Cour de Cassation, 1980 JCB 440.

In the *S.A. Vandenbosch* case, the manufacturer, a Belgian subsidiary of an American company, entered into a distributorship agreement of unlimited duration in 1965. The agreement contained a clause granting the manufacturer the right to terminate the agreement with a thirty day notice period in case the distributor's orders for a given year did not reach a minimum of B.F. 7.500.000,-. The orders for 1970 remained below the agreed minimum and the manufacturer terminated the agreement in May of 1971 with a thirty day notice period. The distributor questioned the validity of this termination and sued for damages before the Tribunal de Commerce of Brussels.<sup>179</sup> The court rejected plaintiff's claim and gave full effect to the resolutive clause of the agreement, which according to the court, constituted the law between the parties.

Hence, the thirty day notice period was sufficient and no additional indemnity was due. The decision was upheld by the Cour d'appel of Brussels<sup>180</sup> and by the Cour de Cassation.<sup>181</sup> The latter ruled, on the basis of Article 1134 of the Belgian Civil Code,<sup>182</sup> that parties are free to insert an express resolutive clause in their agreement unless the agreement pertains to a subject for which the Legislature has restricted or forbidden the use of such clauses.<sup>183</sup> However, the court held that this was not the case for exclusive distributorship agreements.<sup>184</sup> Parties are thus completely free to insert such clauses in their agreement.

One of the most controversial and most interesting aspects of the Belgian Statute on distributorship agreements concerns its scope and application.<sup>185</sup> The many advantages granted to distributors under

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<sup>179</sup> Unpublished decision.

<sup>180</sup> Unpublished decision.

<sup>181</sup> Judgment of Apr. 19, 1979, Cour de Cassation, 1980 JCB 440.

<sup>182</sup> Code Civil [C. civ.] art. 1134 (Belg.). This article states that the terms of an agreement have the force of law for the parties. Cf. C. civ. art. 1134 (Fr.) and note 118 *supra* (an identical provision in the French Code Civil).

<sup>183</sup> Judgment of Apr. 19, 1979, Cour de Cassation, 1980 JCB 440.

<sup>184</sup> *Id.*

<sup>185</sup> See Malherbe, *Les concessions de vente en droit belge et communautaire*, 1973 JCB 53; Ledoux, *L'Application de l'Article 5, 1° et 5° de la Convention de Bruxelles en Matière de Concession de Vente*, 1975 JT 581; Ledoux, *Les Concessions de Vente en Belgique et les Règles de Compétence de la C.E.E.*, 1975 JT 217; Bricmont & Philips, *De la Compétence Territoriale du Juge Belge, d'après la Convention Communautaire du 27 septembre 1968, en Matière de Résiliation, avec Préavis, d'un Contrat de Concession de Vente à Durée Indéterminée*, 1975 JT 475; Van Der Elst, *Concessions de Vente en Belgique et Règles de Compétence de la convention C.E.E. du 27 septembre 1968*, 1976 JT 733; Weser, *L'article 5, alinéa 1<sup>er</sup> de la Convention de Bruxelles du 27 septembre 1968 et la concession de vente exclusive*, 1976 JT 323; Hayward, *Jurisdiction under the Belgian Law of Termination of Exclusive Distributors: an Exercise in Conflicts of Law and Jurisdiction*, 1979 INT'L LAW. 128.

Belgian law may urge manufacturers to try to avoid this application by inserting a choice of foreign law clause in their agreements.

To counter such attempts, Article 4 of the Statute stipulates that whenever a distributorship agreement produces effects, even partly, on Belgian territory, then the terminated distributor is allowed to maintain an action against the manufacturer in Belgium, either before the court of his own domicile or the court of the grantor's domicile, if the latter is located in Belgium. The Belgian judge must apply Belgian law.<sup>186</sup> Thus, a foreign manufacturer cannot evade the Belgian Statute simply by inserting a choice of foreign law clause in the distributorship agreement. The Belgian distributor can always bring an action against the manufacturer in Belgium, in which case Belgian law will apply, notwithstanding the choice of foreign law clause.

Belgium has signed a number of bilateral and multilateral treaties containing clauses that may be incompatible with Article 4 of the Statute, which requires application of Belgian law. In particular, the so-called Brussels Convention of 1968<sup>187</sup> stipulates in Article 17, that parties to an agreement, of whom at least one is domiciled in a state that signed and ratified the Convention,<sup>188</sup> can confer *exclusive* jurisdiction regarding all disputes arising from the agreement, to the courts of a signatory state. In view of Belgium's international obligations under the Brussels Convention, Belgian courts should therefore decline jurisdiction if the distributorship agreement contains an express choice of forum clause in favor of the courts of the manufacturer's domicile, provided the latter is located in a signatory state.<sup>189</sup>

The next question to address is what happens if a contract between a Belgian distributor and a foreign manufacturer does not contain a choice of foreign forum clause and the manufacturer has his domicile in a signatory state? Should the Belgian Court then hold that it has no jurisdiction to hear claims against foreign suppliers for termination indemnities? This issue has long been debated by Belgian legal scholars.<sup>190</sup> Two theories have been advanced. The first theory holds that since the manufacturer must eventually pay indemnities to the distribu-

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<sup>186</sup> Law of July 27, 1961, MONITEUR BELGE Oct. 5, 1961, *as amended by* Law of Apr. 13, 1971, MONITEUR BELGE Apr. 21, 1971, art. 4 (Belg.).

<sup>187</sup> Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 21 O.J. EUR. COMM. (No. L 304) 36 (1978) (*entered into force* on Feb. 1, 1973).

<sup>188</sup> As of this date, the Convention has been ratified by all of the EEC Member States, *see* note 2 *supra*, except for the United Kingdom, Denmark, and Greece.

<sup>189</sup> Judgment of Dec. 9, 1975, Cour d'appel, Mons; Judgment of Jan. 15, 1976, Tribunal de Commerce, Brussels, 1976 JT 210. *See also* G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 113.

<sup>190</sup> *See* note 185 *supra* and G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 95-116.

tor and further since Article 1247 of the Belgian Civil Code states that a claim for payment of a sum of money must be asserted in the domicile of the debtor, then the courts of the debtor's country would be competent under Article 5, 1° of the Brussels Convention. This article regarding contractual obligations stipulates that the defendant who is domiciled in a signatory state may be validly sued before the courts of another signatory state in which the obligation is to be performed. According to Article 1247 of the Belgian Civil Code, this would be the manufacturer's domicile. Hence, under Article 5, 1° of the Brussels Convention, jurisdiction would lie with the courts of the manufacturer's domicile. The latter might then apply local law.<sup>191</sup> Under the second theory, the distributorship agreement would be considered as a whole and the obligation to pay indemnities could only arise after a Belgian judge ruled on the issue.<sup>192</sup> Hence only Belgian courts would be competent.

On April 6, 1978, the Cour de Cassation resolved the issue. The Court ruled that the obligation to pay a termination indemnity is not an autonomous obligation, but a compensatory obligation that replaces a reasonable notice term.<sup>193</sup> This notice term must be executed in Belgium. Thus, Belgium is the place of execution for the principal obligation, namely to give a notice term. It is, therefore, also the place of execution for the replacing obligation to pay an equitable indemnity. Hence, Belgian courts are competent under Article 5(1) of the Brussels Convention unless the contract contains an express choice of foreign forum clause.<sup>194</sup>

In the *AUDI-N.S.U. v. Adelin Petit* case,<sup>195</sup> the Cour de Cassation ruled that parties to a distributorship agreement producing effects in Belgian territory, cannot escape the application of Belgian law by inserting in their agreement both a clause providing for arbitration abroad and a choice of foreign law clause.<sup>196</sup> The foreign award will not be granted recognition and enforcement by Belgian courts. Article 5(2) of the New York Convention of June 10, 1958 on Recognition and

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<sup>191</sup> Judgment of May 30, 1974, Tribunal de Commerce, Brussels, 1974 JT 676. See also Ledoux, note 185 *supra*.

<sup>192</sup> Judgment of May 26, 1970, Tribunal de Commerce, Brussels, 1970 JT 532. See G. BRICMONT & J.M. PHILIPS, *supra* note 139, at 105; Vander Elst, *supra* note 185, at 737.

<sup>193</sup> Judgment of Apr. 8, 1978, Cour de Cassation, 1978 Arresten van Hof van Cassatie 898.

<sup>194</sup> *Id.*

<sup>195</sup> Judgment of June 28, 1979, Cour de Cassation, 1979 JT 625.

<sup>196</sup> E. Hayward observes in this respect that in the absence of a choice of foreign law clause, the arbitrators might themselves find Belgian law to be applicable. See Hayward, *supra* note 185, at 135.

Enforcement of Foreign Arbitral Awards<sup>197</sup> as well as Article 6(2) of the European Convention on International Commercial Arbitration,<sup>198</sup> both of which are in effect in Belgium,<sup>199</sup> stipulate that a judge will hold an arbitration clause invalid if, according to the law of the forum (that is, his own law), the dispute is not arbitrable. According to the Cour de Cassation, the issues relating to the termination of distributorship agreements producing effects in the Belgian territory are not arbitrable.<sup>200</sup> Hence, foreign arbitration awards will not be granted recognition and enforcement in Belgium.

### *Agency*

Belgium does not have specific legislation regarding agents. Attempts to pass such legislation have been made in the past.<sup>201</sup> There is a consensus among Belgian lawyers that the Belgian Legislature is apparently awaiting the passage of the EEC Directive on Commercial Agents which will be discussed later in this article.<sup>202</sup> Due to the complete lack of statutory guidance on the issue, questions relating to the termination of an agency agreement under Belgian law are highly uncertain.<sup>203</sup>

The greatest termination problem arises when an agency contract is concluded for an indefinite period of time. According to some courts, such contracts may be terminated *ad nutum*, i.e., without a notice period and without an indemnity for the terminated agent unless the contract provides otherwise.<sup>204</sup> Other courts require the principal to give the agent a reasonable notice period, unless the termination is

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<sup>197</sup> 21 U.S.T. 2517, T.I.A.S. No. 6997.

<sup>198</sup> 484 U.N.T.S. 349.

<sup>199</sup> The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, note 197 *supra*, took effect in Belgium on Nov. 26, 1975; the European Convention on International Commercial Arbitration, note 198 *supra*, took effect on Jan. 7, 1976. See Ledoux, *La Convention de New York et la Convention Européenne sur l'arbitrage international et les concessions de vente en Belgique*, 1976 JT 305.

<sup>200</sup> Judgment of June 8, 1979, Cour de Cassation, 1979 JT 625.

<sup>201</sup> The Cudell, Verbaanderd and Drèze Bill was introduced in Parliament in 1962, 1961-62 Parlementaire Documenten, Kamer van Volksvertegenwoordigers nr 217. The Cudell, Radoux, Gillet and Saint-Rémy Bill was introduced in Parliament in 1966, 1965-66 Parlementaire Documenten, Kamer van Volksvertegenwoordigers nr 272. The Government (Minister of Justice) also introduced a bill into Parliament in 1969, 1968-69 Parlementaire Documenten, Kamer van Volksvertegenwoordigers nr 283-1. All these bills provide a minimum notice period in case of unilateral termination of an agency contract of unlimited duration.

<sup>202</sup> See text accompanying notes 255-300 *infra*.

<sup>203</sup> See Taquet, *La Rupture du Contrat d'Agent Commercial*, 1969 JT 165.

<sup>204</sup> See, e.g., Judgment of Apr. 20, 1961, Cour d'appel, Liege, [1961] II Pasirisie 254; Judgment of Feb. 3, 1960, Cour d'appel, Brussels, 1960 JCB 279.

justified by a serious fault of the agent.<sup>205</sup> In the absence of a notice period, the agent would be entitled to an indemnity covering the loss of commissions which he normally would have earned during the notice period.<sup>206</sup> The Court of Appeals of Antwerp, in a recent and as yet isolated decision, awarded the terminated agent compensation for the loss of clients.<sup>207</sup> The maximum notice period that has ever been granted or taken into account for the calculation of the indemnity is one year.<sup>208</sup>

#### ITALY<sup>209</sup>

##### *Agency*<sup>210</sup>

Agency contracts in Italy are governed by Articles 1742-1753 of the Italian Civil Code<sup>211</sup> and the provisions of several so-called Collective Economic Agreements.<sup>212</sup> The Collective Economic Agreements (AEC) are the result of collective bargaining between Associations composed of respectively, representatives of agents and principals. They complement the provisions of the Civil Code, which is formulated in very broad terms. There are two sets of Collective Economic Agreements, one for Agents of Industrial Enterprises and one for Agents of Commercial Enterprises.<sup>213</sup> Both have been periodically modified resulting in a progression of more favorable conditions for the

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<sup>205</sup> Judgment of Jan. 16, 1956, Cour d'appel, Ghent, 1957 *Revue Critique de Jurisprudence Belge* 310.

<sup>206</sup> Judgment of Feb. 4, 1980, Cour d'appel, Antwerp, 1980 JCB 456.

<sup>207</sup> The amount was fixed *ex aequo et bono* on B.F. 75,000. *Id.*

<sup>208</sup> See Taquet, *supra* note 203, at 165.

<sup>209</sup> For a more detailed discussion, see G. LA VILLA & M. CARTELLA, note 17 *supra*; R. BALDI, *IL CONTRATTO DI AGENZIA* (Milan, 1971); F. BORTOLOTTI, *GUIDA ALLA STIPULAZIONE DI CONTRATTI CON AGENTI E CONCESSIONARI ALL' ESTERO* (Turin, 1976).

<sup>210</sup> In Italian, *agenzia*.

<sup>211</sup> In Italian, *Codice Civile* or *C.c.* The old Italian Commercial Code of 1882 had no specific provisions on commercial agency contracts. Except for a number of local customs, parties to agency contracts were completely free to regulate their respective rights and duties in the individual agency contracts. In 1908 the Italian Federation of Commercial Agents worked out a Regulation on Commercial Agency. From 1920 on, the Legislature worked out several drafts to insert provisions in the commercial code relating to agents. These drafts are known under the names of the Vivante Draft (1925), D'Amelio Draft (1925) and the Grandi Draft (1940). They were incorporated in the Civil Code instead of in the Commercial Code. In 1942 the Italian Legislature decided to abolish the distinction between the Commercial Code and the Civil Code. The provisions of the Commercial Code were incorporated into the Civil Code. See A. DE THEUX, *supra* note 1, at 71. For more details on the historic evolution of the Italian legislation on commercial agency, see A. FORMIGGINI, *IL CONTRATTO DI AGENZIA 2* (Turin, 1958); Rotondi, *Contratto di agenzia, ausiliari dipendenti dell' impresa e mediazione*, 1961 *Riv. Dir. Com.* 241-270.

<sup>212</sup> In Italian, *Accordi Economici Collectivi*, usually abbreviated as AEC or AEI.

<sup>213</sup> See A. DE THEUX, *supra* note 1, at 72.

agent.<sup>214</sup>

A distinction should be made between those agreements declared effective *erga omnes* by Presidential Decree and those agreements which are only binding on members of the Associations which have concluded them. The basic agreements for both categories of agents, industrialized and commercial, have been approved by Presidential Decree<sup>215</sup> but subsequent amendments have as yet not been declared binding *erga omnes*.<sup>216</sup> A careful examination of the exact scope of the agreement on which an agent in a particular case bases his claim, is therefore essential.

Agency contracts in Italy may be entered into for a limited period of time or indefinitely. The former contract terminates upon the expiration of the agreed upon term. Neither a notice period nor goodwill compensation to the terminated agent is required unless the parties have expressly so agreed.<sup>217</sup> The underlying rationale for this rule is that, in agency contracts of short duration, agents tend to create less goodwill than in contracts of unlimited duration.<sup>218</sup>

The AEC of December 18, 1974 prescribes that in contracts for a fixed period of time, exceeding six months, the principal must inform the agent at least sixty days before the expiration of the contract whether he intends to extend the contract's duration.<sup>219</sup> The collective agreements further specify that upon renewal a contract of limited duration is converted into a contract of unlimited duration.<sup>220</sup> Advanced

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<sup>214</sup> For agents of commercial enterprises, the basic AEC dates from June 30, 1938, approved by the Decree no. 1784 of Nov. 17, 1938. It is presently still in force. It has been modified by the AEC of Oct. 13, 1958, Mar. 19, 1964 and July 1, 1971. The AEC of June 30, 1938 is also the basic AEC for agents of industrial enterprises. It has, however, been replaced by the AEI of June 20, 1956, which has been slightly modified by the AEI of Aug. 2, 1965 and of Dec. 18, 1974.

<sup>215</sup> The basic AEC of Nov. 17, 1938 has been approved by a Presidential Decree issued on the basis of Law no. 369 of Nov. 23, 1944 (art. 43). The AEC of Oct. 13, 1958 has been approved by Presidential Decree no. 1842 of Dec. 26, 1960, issued on the basis of Law no. 741 of July 14, 1959. The AEI of June 20, 1956 has been approved by Presidential Decree no. 145 of Jan. 16, 1961, issued on the basis of Law no. 741 of July 14, 1959.

<sup>216</sup> The AEC of Mar. 19, 1964 as well as the AEI's of Aug. 2, 1965, June 30, 1969 and Dec. 18, 1974 have not been approved by the Presidential Decree. They are therefore not applicable *erga omnes*. Their application is limited to parties who adhere to the Associations that have signed the AEC or AEI.

<sup>217</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 109.

<sup>218</sup> *Id.*

<sup>219</sup> AEC of Dec. 18, 1974, at art. 3.

<sup>220</sup> Note that the AEC's applicable to representatives of *commercial* enterprises differ from those applicable to representatives of *industrial* enterprises. The former rule is contained in an AEC which only applies to parties who are members of the trade association adhering to it (AEC of March 19, 1964 at art. 1). In the case of representatives of industrial enterprises, the rule in the AEC of June 30, 1969, at art. 3, is applicable to all contracts. See G. LA VILLA & M. CARTELLA, *supra* note 17, at 110.



termination is permitted if one of the parties has committed a fault of such gravity that it renders continuation of the commercial relationship impossible.<sup>221</sup> The innocent party, whether principal or agent, is then entitled to claim damages.<sup>222</sup>

According to Article 1750 C.C., agency contracts for an unlimited duration may be terminated by either party by either giving notice to the other party within the time limits set forth in the AECs or paying a corresponding indemnity. The length of the notice period is not fixed by the Civil Code but by the AECs. The latter typically require a three month notice period.<sup>223</sup> However, parties are free to deviate from this period in the individual contract as long as the deviation is in favor of the agent. Hence, the contract may impose a longer notice period on the principal and/or may allow the agent to give a shorter notice period than required under the AECs.<sup>224</sup>

The Civil Code allows the terminating party to replace this notice period by an indemnity<sup>225</sup> consisting of one-half the amount of commissions paid to the agent during the preceding twelve months for each month of notice eliminated.<sup>226</sup>

In addition to a notice period or replacing indemnity, upon termination of a contract of unlimited duration, the principal must pay the agent a special indemnity "in the amount established by the AECs, by collective contracts or by usage, or, lacking these, by the judge on an equitable basis."<sup>227</sup> This indemnity is also due when the agency relationship is terminated because of an agent's permanent and total disability or even his death. In the latter case, the heirs should receive the agent's indemnity.<sup>228</sup>

The original text of Article 1751 of the Civil Code, as enacted in 1942, provided that the granting of this special indemnity was conditioned on a finding that the relationship had not been terminated for reasons imputable to the agent, such as an agent's unjustified withdrawal from a contract. This requirement was eliminated by Statute 911 of October 15, 1971. Presently, compensation to the agent upon termination of a contract of indefinite duration is *always* due, even if the termination is caused by a fault of the agent. Under those circum-

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<sup>221</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 113.

<sup>222</sup> *Id.* at 114.

<sup>223</sup> See, e.g., AEC of June 30, 1938, at art. 7; AEC of June 20, 1956, at art. 8.

<sup>224</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 116.

<sup>225</sup> C.C. art. 1750 (Italy).

<sup>226</sup> AEC of June 30, 1938, at art. 7; AEC of June 20, 1956, at art. 8.

<sup>227</sup> C.C. art. 1751 (Italy).

<sup>228</sup> *Id.*

stances, however, the principal may be awarded damages. The amount of these damages, though, must be fixed by the court and consequently, cannot be deducted by the principal from the termination indemnity that has to be granted to the agent.<sup>229</sup>

The statutory indemnity of Article 1751 C.C. is paid out of funds collected by means of obligatory payments made by the principal to ENASARCO.<sup>230</sup> ENASARCO pays the indemnity directly to the agent or his heirs upon termination of the agency relationship. The amount of the terminal compensation payable to an agent is calculated according to detailed regulations contained in the AECs on the basis of a certain percentage of the commission paid each year during the existence of the contract. The greater the amount of annual commission earned the lower the percentage.<sup>231</sup>

The AECs also provide for disability and old age pension treatment for agents, regardless of whether their contracts were for a limited or an unlimited period of time. However both principal and agent must contribute to that fund. The principal must pay to ENASARCO a certain percentage of all sums payable to the agent under the contract. The principal is liable for the amount of the agent's contributions, if the agent fails to make these payments. Consequently, in order to ensure payment, the principal may withhold the agent's share of contributions from the amounts payable to the agent and send both his and the agent's withholdings to ENASARCO.<sup>232</sup>

In addition to the statutory indemnity of Article 1751 C.C., which is *always* due to an agent, a supplementary indemnity of three percent of the total amount of commissions earned by the agent during the entire period of the contract, must be granted to the agent in case of termination of a contract of indefinite duration without any fault on the agent's part. This indemnity, which was introduced for the first time by Section 10 of the AEC of December 18, 1974, applies only to transactions concluded after December 18, 1974. This indemnity is compensation for goodwill or increase in clientele brought about by the agent, and is to be paid directly to the agent by the principal, in addition to the statutory indemnity of Article 1751 C.C., which is being paid through ENASARCO.

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<sup>229</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 121.

<sup>230</sup> See text accompanying note 19 *supra*.

<sup>231</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 121 and 132.

<sup>232</sup> BUSINESS GUIDE TO EUROPE, COMM. MKT. REP. (CCH).

### *Distributorship*

Italy does not have a specific statute regulating distributorship agreements.<sup>233</sup> The prevailing opinion among Italian scholars is that a distributorship agreement is a contract *sui generis* and involves elements of the law of sale, mandate and supply-contracts.<sup>234</sup>

Distributorship contracts may be terminated unilaterally, even if parties have not expressly agreed to this possibility.<sup>235</sup> The terminating party should, however, observe the notice period agreed upon in the contract or notice period established by usage, or if neither of these standards apply, a reasonable length of notice taking into consideration the nature of the supply.<sup>236</sup> The Court of Appeals of Genoa held in this respect, that a reasonable length of notice is the same for agents and distributors.<sup>237</sup>

Both manufacturer and distributor may terminate the agreement *ad nutum*, i.e. without a notice period, in case of breach of contract by the other party. The terminating party (manufacturer or distributor) can claim damages for the loss it suffered.<sup>238</sup> However, the distributor is not permitted to claim compensation for the goodwill he created for the manufacturer's products.<sup>239</sup>

### OTHER EEC MEMBER STATES

In the previous sections, we examined the statutes and case law on agency and distributorship agreements in four EEC Member States: Germany, France, Belgium and Italy. The case law regarding agency and distributor agreements in the other EEC Member States will be briefly discussed in the following sections.

#### *United Kingdom*

In the United Kingdom there is no specific legislation governing the status of agents or distributors.<sup>240</sup> The contracted terms consequently constitute the law of the agreement. The main grounds for termination of an agency and distributorship agreement are:

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<sup>233</sup> See A. DE THEUX, *supra* note 1, at 310-11.

<sup>234</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 180; A. DE THEUX, *supra* note 1, at 310-13.

<sup>235</sup> See G. LA VILLA & M. CARTELLA, *supra* note 17, at 188.

<sup>236</sup> C.C. art. 1569 (Italy).

<sup>237</sup> Judgment of July 14, 1955, cited by G. LA VILLA & M. CARTELLA, *supra* note 17, at 188.

<sup>238</sup> *Id.* at 189.

<sup>239</sup> *Id.* at 190.

<sup>240</sup> See HALSBURY'S LAWS OF ENGLAND 529 (1973).

(1) expiration of the agreement's term; (2) agent's or principal's death; and (3) the principal's bankruptcy. Agency and distributorship agreements concluded for an indefinite period of time may be terminated at any moment by either principal or agent without observing a notice period. A reasonable notice period, however, would be required if the relationship between the parties is analogous to that between employer and employee.

In the case of *Martin Baker Aircraft Ltd., Canadian Flight Equipment Ltd., Martin Baker Aircraft Co. Ltd. v. Murison*, the Queen's Bench Division held that a reasonable notice period is required if the agent must spend a great deal of time and money on the contract and is subject to restrictions as to the sale of competing brands.<sup>241</sup> However, no goodwill compensation is required if not stipulated in the contract.

### *Netherlands*

Dutch law does not have any specific provisions regarding distributorship agreements.<sup>242</sup> The general law of contracts applies and in theory all clauses of a distributorship agreement are freely negotiable.<sup>243</sup>

Agency contracts, on the other hand, are subject to Articles 74-74s of the Dutch Commercial Code.<sup>244</sup> Agency contracts concluded for a definite period of time terminate upon expiration of the term. However, a right of anticipated notice may be provided contractually. If the relationship is tacitly continued after expiration of the term, the contract is deemed to be prolonged by operation of law on the same terms and for a period of time not to exceed one year.<sup>245</sup>

Agency contracts concluded for an indefinite period of time, or for a fixed period with a contractual right of anticipated termination, may be terminated with observance of a notice period. If no shorter term of notice has been agreed upon by the parties, the notice term shall be four months for agreements which have been in force three years or less; if the agreement has been in force for four to six years, the term of notice shall be five or six months respectively. In no event may the contractual term of notice be less than one month.<sup>246</sup>

Summary termination is possible but gives rise to a claim for in-

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<sup>241</sup> [1955] 2 Q.B. 556.

<sup>242</sup> S. SCHUIT, J. VAN DER BEEK & B. RAAP, DUTCH BUSINESS LAW 119 (1978).

<sup>243</sup> *Id.*

<sup>244</sup> Wetboek van Koophandel [W.v.K.] Boek I, Titel 4, art. 74-74(s) (Neth.).

<sup>245</sup> W.v.K. art. 74(i) (Neth.).

<sup>246</sup> W.v.K. art. 74(j) (Neth.).

demnification to the terminated party unless justified by "urgent reasons."<sup>247</sup> The concept of "urgent reasons" is defined in the law as "circumstances of such a nature that the terminating party cannot reasonably be required to continue the agreement, even not temporarily."<sup>248</sup> In such an event notice of termination should be given immediately, but a period of notice is not required. If indemnification is due, it will be given either in the form of an amount equal to the commission which would have been earned during the term of notice and this amount may be mitigated by the court, or in the form of compensation for actually incurred damages,<sup>249</sup> in which case the party demanding compensation must prove the extent of such damages. If the agent has increased the value of the principal's business by creating or developing the goodwill for the principal, then the agent is entitled to a "suitable compensation" for his efforts.<sup>250</sup> Unless a higher amount has been agreed upon, compensation shall not exceed the equivalent of one year's commission, calculated on the basis of the average commission earned during the last five years or the average of the entire contract period, if this period is shorter than five years.<sup>251</sup> The relevant provision of law thus only indicates a maximum. It is likely that in the event of disputes regarding the amount of compensation due, Dutch courts will grant the agent the maximum amount.<sup>252</sup>

Compensation is in principle due regardless of whether the agent or the principal terminated the relationship.<sup>253</sup> Only equitable considerations can exclude an award of a compensation. However, claims for goodwill compensation or for indemnification expire one year after the occurrence of the circumstances from which the claim originates.<sup>254</sup>

### *Denmark*

Denmark does not have a specific statute regulating the termination of agency and distributorship agreements. This matter is left completely to the discretion of the contracting parties. However, Danish courts do require the terminating party to give a reasonable notice to the terminated party. A notice period of three to six months is usually

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<sup>247</sup> W.v.K. art. 74(1) (Neth.).

<sup>248</sup> *Id.*

<sup>249</sup> W.v.K. art. 74(n) (Neth.).

<sup>250</sup> W.v.K. art. 74(o) (Neth.).

<sup>251</sup> *Id.*

<sup>252</sup> See S. SCHUIT, J. VAN DER BEEK & B. RAAP, *supra* note 242, at 118.

<sup>253</sup> *Id.*

<sup>254</sup> W.v.K. art. 74(a) (Neth.).

considered sufficient in this respect. The terminated party has no right to damages for loss of clientele.

### *Greece*

Greece, which recently joined the Common Market, does not have any specific legislation regarding distributorship agreements. Agency contracts are governed by provisions of the Greek Civil Code, which provides a reasonable notice period and an equitable indemnity for the terminated party.

### EEC HARMONIZATION EFFORTS<sup>255</sup>

Having completed an overview of the national laws regulating the termination of agency and distributorship agreements in a number of EEC Member States, this article will next examine current attempts by European authorities<sup>256</sup> to approximate the national laws of the Member States in the area of commercial representation. These efforts go back to 1976,<sup>257</sup> when the EEC Commission presented a proposal to the Council of Ministers for an EEC Directive to approximate the laws of the Member States relating to self-employed commercial agents. The Draft Directive has been amended over the years by the Commission; the latest draft was completed on January 29, 1979.<sup>258</sup> It is this draft that will be examined.

At this very moment the Council of Ministers is in its first reading of the Draft. A second and possibly even a third reading will follow. It will take at least another six to twelve months before the Directive is finally issued. Member States will then have another eighteen months

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<sup>255</sup> See Di Marco, *Prospettive di un armonizzazione del contratto di agenzia della Comunità Europea*, 16 DIR. COMMENTARIO E DEGLI SCAMPI INT. 445-55 (1977); Vanderhaeghe & Jones, *Current Developments in European Agency Law*, 12 INT'L LAW. 671-75 (1978); Lando, *The EEC Draft Directive relating to self-employed commercial agents, the English Law Commission versus the EC Commission*, 1980 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1-16.

<sup>256</sup> For EEC approximation matters the Council of Ministers has the authority to issue Directives under article 100 of the EEC Treaty. The Council decides on a proposal of the Commission after gaining advice from the European Parliament and the Economic and Social Committee. Member States are given a limited period of time to bring their domestic legislation in line with the Directive, either by amending existing legislation or by introducing new legislation. The Council decision to issue a Directive must be unanimous.

<sup>257</sup> Proposal of Dec. 17, 1976 for a Council Directive to Coordinate the Laws of the Member States Relating to Commercial Agents, 20 O.J. EUR. COMM. (No. C 13) 2 (1977), *amended by* the Proposal of Jan. 29, 1979, 22 O.J. EUR. COMM. (No. C 56) 5 (1979) [hereinafter cited as Draft Directive].

<sup>258</sup> *Id.*

to bring their national laws into line with the Directive.<sup>259</sup>

The proposed Directive covers only self-employed commercial agents. Article 2 defines such a person as "a self-employed intermediary who has continuing authority . . . to negotiate and/or to conclude an unlimited number of commercial transactions in the name and for the account of another person (. . . the principal). The agent may arrange his activities and use his time as he thinks fit." Thus, agent-employees and distributors are excluded from the scope of the proposed Directive.<sup>260</sup>

As delineated in the Preamble of the Draft Directive,<sup>261</sup> the Commission presented this proposal to the Council because of the present differences in the degree of protection granted to commercial agents, which creates inequality in competition and results in the development of barriers for commercial representation in the Community. This result contravenes the EEC Directive 64/224 of February 25, 1964, whereby restrictions on the freedom of establishment and the freedom to provide services relating to activities of intermediaries in commerce, industry and small craft industries, were abolished.<sup>262</sup> The Draft Directive therefore provides for rules of protection which each Member State must guarantee, in order to establish a uniform minimum level of protection. Most provisions of the Draft Directive regulate the relationship between the commercial agent and the principal. They set out the respective rights and duties of both parties and contain detailed rules regarding remuneration, commissions, and termination.

The Draft Directive provides four grounds for the termination of agency contracts: (1) expiration of the contract's term;<sup>263</sup> (2) notice by one of the parties;<sup>264</sup> (3) a serious fault by one of the parties or behavior seriously inconsistent with the party's obligations;<sup>265</sup> and (4) circumstances which make it impossible to perform the contract or which substantially undermine the commercial basis of the contract.<sup>266</sup>

Agency contracts entered into for a fixed period of time terminate upon the expiration of that period.<sup>267</sup> The Draft Directive further pro-

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<sup>259</sup> *Id.* at art. 36.

<sup>260</sup> *Id.* at art. 3, which provides that "[t]his Directive does not apply . . . to intermediaries who are wage or salary earning employees . . . (or) to intermediaries who act in their own name . . . ."

<sup>261</sup> *Id.* at art. 5.

<sup>262</sup> 7 J.O. COMM. EUR. (No. L 56) 869 (1964).

<sup>263</sup> Draft Directive, *supra* note 257, at art. 25.

<sup>264</sup> *Id.* at art. 26(1).

<sup>265</sup> *Id.* at art. 27(1)(a).

<sup>266</sup> *Id.* at art. 27(1)(b).

<sup>267</sup> *Id.* at art. 25.

vides that a contract for a fixed period, which continues to be performed after expiration of that period, is deemed to be converted into a contract of unlimited duration.<sup>268</sup> Under the original 1976 version of the Directive, parties could deviate from this rule by stipulating in their agreement, that the contract would remain a contract of limited duration. However, this option was deleted in the 1979 version.<sup>269</sup>

Unlike many EEC Directives which contain an extensive list of definitions, the Draft Directive on self-employed agents does not define the concept "contract for a fixed or determinable period." It is therefore unclear whether under the Directive contracts with renewal clauses for fixed periods of time are considered contracts of limited duration or contracts of indefinite duration. This lack of precision is rather unfortunate since this issue is controversial in at least two Member States, namely France and Germany.<sup>270</sup> In both these countries decisions by the respective highest courts<sup>271</sup> which hold that such contracts remain contracts of limited duration, have been severely criticized by legal scholars.<sup>272</sup>

The Belgian Legislature adopted an equitable solution for the question of when a renewed agreement becomes a contract of unlimited duration under the Belgian Law of July 27, 1961. On termination of distributorship agreements, under this law, contracts of limited duration automatically convert into contracts of unlimited duration after the second renewal, notwithstanding the fact that the original agreement was amended.<sup>273</sup> This solution would give the principal the opportunity to test the agent during a number of years without a final commitment. At the same time it would guarantee to the agent the benefits of protective statutory provisions once he has gone through what could be characterized as a "trial period." Furthermore, the Belgian solution would be consistent with the Commission's general policy against the practices of indefinite renewals of contracts of limited duration, as indicated by the deletion of the words "unless otherwise agreed on" in Article 25 of the 1979 version of the Draft Directive.<sup>274</sup> Regardless of whether the Belgian solution is adopted, a clear explanation of the Council's viewpoint on this issue is greatly needed.

A second and traditional method for terminating an agency con-

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> See text accompanying notes 32-37 and 88-93 *supra*.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> See text accompanying notes 142-45 *supra*.

<sup>274</sup> Draft Directive, *supra* note 257, at art. 25.



tract, is by giving notice. Article 26 of the draft distributorship agreement stipulates that when the agency contract is concluded for an indefinite period of time, either the principal or agent may terminate it by giving notice within the legally or contractually fixed notice period. German and Dutch influence on the wording of Article 26 is obvious. Similar to the national laws of Germany<sup>275</sup> and the Netherlands,<sup>276</sup> the Draft Directive contains a required minimum notice period, including detailed instructions on how and when notice is to be given.<sup>277</sup>

Under the Draft Directive, the notice period must be at least one month during the first year of the contract. This period increases by fourteen days for each additional year the contract is fulfilled.<sup>278</sup> Member States, however, may prescribe a maximum period, which cannot under any circumstances be less than six months. Notice must be given in writing. In addition, the notice period must be the same for both parties and coincide with the end of a calendar month.

A third method for terminating an agency agreement is by immediate termination without notice. Article 27 of the Draft Directive provides that a principal or agent may terminate the contract without observing the contractual or legal notice period, if any of the following circumstances arise: (1) the other party's conduct is seriously inconsistent with his obligations; (2) the other party has committed a fault; and (3) the performance of the contract has become either impossible, or seriously impaired, or the commercial basis of the contract is undermined due to unexpected circumstances. Under these circumstances, the party at fault is held liable in damages to the other party.<sup>279</sup>

In the original 1976 version of the Draft Directive, only two grounds were provided for immediate termination of the agency agreements, namely (1) a fault by one of the parties; and (2) unexpected circumstances seriously impairing the performance of the contract or rendering it impossible or undermining the commercial basis of the contract.<sup>280</sup> By adding a third ground for immediate termination, namely that a party's behavior is inconsistent with his obligations under the contract, the Commission apparently intended to emphasize that a fault by the terminated party is not a strict prerequisite for the possibility of immediate termination of the agreement. This change reflects the German influence of the concept of "urgent reason," which

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<sup>275</sup> See text accompanying notes 42-48 *supra*.

<sup>276</sup> See text accompanying note 246 *supra*.

<sup>277</sup> Draft Directive, *supra* note 257, at art. 26.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at art. 27.

<sup>280</sup> *Id.*

under German law is not a synonym for fault.<sup>281</sup> However, this distinction seems rather academic since in practice the dividing line between fault and "behaviour inconsistent with a party's obligation under the contract" is extremely difficult to determine and the Draft Directive contains no guidelines on that issue.

Both the principal and agent are liable to the other party in damages<sup>282</sup> if either has not observed the proper notice period provided for in the contract or by law. If the principal does not observe the notice period, the agent is entitled to claim a lump-sum indemnity instead of damages.<sup>283</sup> The indemnity is calculated on the basis of the agent's average remuneration during the preceding twelve months. The indemnity covers the unexpired period of the contract, subject to a maximum period of two years.<sup>284</sup>

The Draft Directive also provides compensation for the loss of goodwill for the agent or his heirs if the following three conditions are met:<sup>285</sup>

- (1) the agent brought in new customers to the principal or appreciably extended the volume of business with the existing customers;
- (2) substantial benefit will continue to accrue to the principal as a result of the agent's efforts;
- (3) termination of the contract results in the agent's not receiving remuneration for transactions negotiated after the contract ended.<sup>286</sup>

A minimum and a maximum goodwill compensation is prescribed by the Directive. The minimum compensation should amount to one tenth of the agent's annual remuneration, calculated on the basis of the agent's average earnings during the preceding five years. The maximum compensation should be the agent's average annual remuneration.<sup>287</sup> In the original 1976 draft this maximum was twice the agent's average annual compensation.<sup>288</sup>

The Directive further provides that the right to goodwill indemnity cannot be contracted out or restricted.<sup>289</sup> This right must be exercised within a period of three months following termination of the contract.<sup>290</sup> However, the agent has no right to goodwill compensation if

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<sup>281</sup> See text accompanying note 50 *supra*.

<sup>282</sup> Draft Directive, *supra* note 257, at art. 28.

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at art. 30.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

(1) the principal terminated or could have terminated the contract under Article 27(1)(a) of the Directive;<sup>291</sup> (2) the principal maintains the contract with the agent's successor, who was introduced by the agent himself or by his heirs;<sup>292</sup> and (3) the agent himself has terminated the contract without giving the appropriate notice and without being able to justify this on the basis of Article 27.<sup>293</sup>

The original 1976 draft provided that starting January 1, 1980, Member States were to adopt the changes in their domestic legislation necessary to comply with the Directive.<sup>294</sup> The changes were to be applicable on July 1, 1980.<sup>295</sup> It is clear that this deadline has not been met. The Directive will be issued with at least two years delay. One reason for this delay is the severe criticism that the 1976 draft Directive received from the English Law Commission.<sup>296</sup> Not only do the concepts in the Directive have a different meaning on the Continent than in the United Kingdom,<sup>297</sup> but in a report on the proposed Directive submitted by the English Law Commission and presented to Parliament, the Draft Directive is described as "badly drafted, unclear, ambiguous, and internally inconsistent."<sup>298</sup>

The Law Commission questions the need for the protection provided in the draft for agents. According to the Commission, agents in England are in no need of such protection. The Commission states:

We do not know whether the present law sufficiently protects the social and economic needs of manufacturers' agents. It may be that they often have unequal bargaining power as compared with their principals, although it must be remembered that in English commerce and industry not all manufacturers are large corporations of great bargaining power and not all manufacturers' agents are one-man business [sic] of poor financial standing. It may of course be that there is a mischief, and that manufacturers' agents do, as they contend, require special protection from English law. Such limited consultations as we have been able to engage in leave us in doubt as to whether this is so . . . .<sup>299</sup>

As one commentator pointed out,<sup>300</sup> the first criticisms concern differences in legal concepts and poor drafting techniques which can be remedied. However, differences in social conditions, for example,

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<sup>291</sup> *Id.* at art. 31. See text accompanying notes 279 and 280 *supra*.

<sup>292</sup> Draft Directive, *supra* note 257, at art. 31.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at art. 36.

<sup>295</sup> *Id.*

<sup>296</sup> See Lando, note 255 *supra*.

<sup>297</sup> For an explanation of the differences in the concept of "agent," see *id.* at 4.

<sup>298</sup> Partly reprinted in Lando, *supra* note 255, at 3.

<sup>299</sup> *Id.* at 6.

<sup>300</sup> *Id.*

determining the need or desirability of proposed legislation, is a harder task to overcome.

### CONCLUSION

The field of agency and distributorship agreements in the EEC Member States is in an evolutionary stage. With respect to agency contracts, the Member States must shortly bring their legislation in line with the proposed EEC Directive<sup>301</sup> on this subject. This will not pose any substantial problem for Germany, since the present German legislation regarding agents,<sup>302</sup> was to a large extent a model for the Directive. Italy,<sup>303</sup> France<sup>304</sup> and the Netherlands<sup>305</sup> presently have legislation on the books which is more or less similar to the proposed Directive and is easily adaptable to the new proposal. Belgium<sup>306</sup> and Denmark,<sup>307</sup> on the other hand, will have to issue completely new legislation in order to comply with the Directive. The United Kingdom faces the hardest task of all Member States in complying with the Directive because not only is the Draft Directive a typical product of Continental European civil law,<sup>308</sup> but mainly because the English authorities believe that social conditions in the United Kingdom are such that English agents are in no need for such broad protection as provided by the Directive.<sup>309</sup>

Regarding distributorship agreements, there is common belief in most Member States that distributors are entitled to protection upon termination of the distributorship agreement. Hence, the courts of most Member States have attempted to mitigate the hardships that follow from a lack of specific legislation regarding distributors. A number of different legal techniques are presently being used to reach this goal. Harmonization of the laws in the different Member States seems highly desirable. The Belgian Law of July 27, 1961<sup>310</sup> could provide a workable starting point for a common EEC approach in this field. One can only hope that this harmonization will come about in the near future. For as one author has stated in connection with the Draft Directive on

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<sup>301</sup> Draft Directive, note 257 *supra*.

<sup>302</sup> See text accompanying notes 24-65 *supra*.

<sup>303</sup> See text accompanying notes 209-232 *supra*.

<sup>304</sup> See text accompanying notes 79-112 *supra*.

<sup>305</sup> See text accompanying notes 242-254 *supra*.

<sup>306</sup> See text accompanying notes 201-208 *supra*.

<sup>307</sup> See text following note 254 *supra*.

<sup>308</sup> See Lando, *supra* note 255, at 3-15. See also notes 296-300 and accompanying text *supra*.

<sup>309</sup> *Id.*

<sup>310</sup> See text accompanying notes 139-200 *supra*.

commercial agents.<sup>311</sup>

The aim of the Directive is to prevent distortion of competition. But by covering only one group of selling intermediaries, the independent agents, the Directive may very well aggravate an already existing distortion of competition.<sup>312</sup>

May these words of wisdom incite the Commission to soon present to the Council a proposal for a Directive to coordinate the laws of the Member States relating to distributors.

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<sup>311</sup> Draft Directive, note 257 *supra*.

<sup>312</sup> See Lando, *supra* note 255, at 7.