Nordic law - A survey of commercial agency

Lidgard, Hans Henrik

Published in:
A Survey of Commercial Agency

1984

A SURVEY OF COMMERCIAL AGENCY

Edited by:
Hans Henrik Lidgard
Claude D. Rohwer
Dennis Campbell

Kluwer

NORDIC LAW
AND
SWEDEN

GENERAL INTRODUCTION

In Denmark, Finland, Norway and Sweden the "commercial agency" notion is to a large extent used in a similar way. Iceland, which also forms part of the Nordic cooperation, has rules that differ substantially from a systematic point of view, but the concepts in Iceland are similar to those of its neighbouring countries. There are good reasons for the Nordic uniformity: a considerable Germanic influence on economic legislation in all countires and internordic cooperation in the legal field.

Despite the title and the basic uniformity in law, this report will concentrate on the situation in Sweden as a Nordic example. Denmark is the subject of a separate national report. The development in other Nordic countries will be briefly dealt with to point out difference of major importance[1].

1. Development of a National System

The roots of the Swedish/Finnish rules on commercial agency can be traced back to the first national legislation in the year 1734. Chapter 18 in the "Commercial Section" (Handelsbalken) deals with "Middlemen" (sysslomaen) and their authority to bind a principal. Although special legislation has been introduced, the rules from 1734 still operate in an amended version.

Influenced by a tendency in continental Europe, the legislators in Denmark, Norway and Sweden initiated a joint Nordic cooperation to establish harmonized national rules on "Factors" (Kommissionaerer), "Commercial Agents" (handelsagenter) and "Commercial Representatives" (handelsresande) in the beginning of this century[2]. Legislation was introduced around 1915 in all three countries with similar wording and common preparatory work. Finland did not enact legislation until the 1960s. As in other European countries, the driving force behind the legislation was mainly to protect the weaker middleman against a strong and powerful principal. The rules aimed at protecting the agent in case no express agreement was reached between the parties. The provisions were not mandatory and accordingly the parties could derogate for them.

In 1974 Sweden and Norway introduced mandatory provisions, which Finland more or less copied in 1975. Denmark did not follow - due to ongoing discussions in the Common Market. In

Sweden this new legislation is embodied in the Factors Act.

Apart from the Factors Act, attention must also be paid to the general "Law on Contracts" (SFS 1915:218)[3]. Within the Contracts Act no legal requirement exists in any Nordic country that an agreement between a principal and a commercial agent must be in writing. Oral agreements or even agreements "in fact" may be binding on the parties. However, in the new Finnish Act there is a mandatory provision that the agreement shall be in writing if requested by either party. A written agreement can be amended either orally or "in fact". Any unreasonable stipulation contained in an agreement may be set aside by the court according to Article 36 of the Contracts Act (compare Article 4 of the Finnish Act on Commercial Agents).

Furthermore, when dealing with commercial agents regard must be paid to the "Law on Purchase" (SFS 1905:38 p.1) with respect to the relation to the buyer. Of vital importance is the "Law on Protection of Employment" (SFS 1982:80). Agents who are too tied to and protected by the Principal may, irrespective of written agreements to the contrary, be regarded as employees of the Principal. As will be elaborated further below, the consequence could be substantial.

Finally, with respect to the "Law on Competition" (SFS 1982:729), all Nordic countries mainly work under an abuse principle. The "per se prohibitions" are limited and do not directly

concern the relations between principal and commercial agent. In case of an abuse fulfilling the requirements of the law, it cannot be taken for granted that the law is not applicable. Limited experience exists to this end at present.

For the past couple of years, a parliamentary Lawcommission has been working on a total revision of the 1914 law. This work has been done independently from other Nordic countries. It was largely initiated to keep Sweden in line with the European Economic Community development. Although the latter is presently at a standstill, rumours are that Sweden may very well finalize its work within the not too distant future.

2. The Notion of "Commercial Agency"

2.1 Commercial Agents and Other Middlemen

As in several other countries the terms and definitions used in the Nordic Countries are unclear when dealing with "middlemen". The word "agent" is used in all possible connections: e.g., exclusive distributors, brokers, employed persons, representatives, proxies, etc. Lately there has been a tendency - most likely influenced by the development in the Common Market - to make a clear distinction between the different categories.

The Factors Act (Article 65) defines the commercial agent as

> a person, who has accepted a commission for the account of another (the principal) to work for the sale of

> goods by soliciting orders for the principal or concluding contracts of sale in his name, provided that such commercial agent is not in the principal's service but conducts his activity as an independent business with his own office or other accommodation of his own for such business, to which communications concerning the business may be sent[4].

It is generally believed that the relationship between the commercial agent and the principal has an on-going life[5].

It is important to distinguish commercial agents from other types of middlemen.

a) Factors

The rules on commercial agency form part of the Factors Act. In the Act a clear distinction between commercial agents and factors has been made in the sense that a factor, according to Article 4, acts "in his own name" on behalf of the principal. The factor has goods consigned to him, which is rarely the case with the commercial agent.

b) Commercial Travelers

In the Factors Act a clear distinction is also made to commercial travelers. According to Article 85 the latter is not carrying on an independent business, but, rather, "accepts the charge to travel from place to place for the merchant's account...". The commercial traveler is thus in several respects to be regarded as an employee of the principal and the Act for Protection of Employment applies. One effect is that the cooperation may only be ter-

minated under certain circumstances with far reaching responsibility for the principal. Furthermore, the principal is normally required to pay social security fees based on the salary to the commercial traveler and to make tax deductions from the gross salary.

Thus, considerable attention should be paid by a principal who wishes to enter into a relationship with a commercial agent[6]. It is of little importance how the parties identify the relationship themselves. The question is whether the middleman is independent or not. Has he got an office of his own; can he mainly decide his own performance; is he covering his own ordinary costs; is he working under a separate legal entity and not personally bound; is he operating with a certain risk and not entirely covered by guarantees, etc.? All of the requirements need not be present in each case. On the contrary, the authorities have made a balance of all the factors pointing in favour of one or the other solution[7]. These facts must all be considered in depth before appointing a commercial agent, and they should be reasonably well covered in any agreement.

c) Distributors

Ordinarily the choice for the principal is between operating through a commercial agent or an independent distributor (aterfoersaeljare). The distinction is of considerable importance. No specific legislation governs the relations between a principal and his distributor. By

appointing distributors rather than commercial agents, the parties may avoid mandatory legislation.

Again, little does it matter how the parties denominate their relationship. It is the facts that count. As distinguished from the commercial agent, the distributor buys from the principal directly and sells to the market in his own name and for his own account. The distributor controls his work independently. His remuneration is the margin he can make between his purchase price and the price to the market.

Care should be taken by the principal so that he will have the kind of relationship that he wants. Usually courts have a tendency to interpret in favour of the "weaker" party.

During the last decade the case law, especially in Norway, but also in Sweden and Denmark, has permitted interpretation by analogy to a limited extent, thereby affording the protection given to commercial agents to small distributors[8].

d) Brokers and Other Categories

There is a great variety of other types of "agents" working for a principal in one way or another. The Factors Act may well be applicable to such middlemen. However, the group of "brokers" working in the interest of both buyer and seller and quite often receiving remuneration from both sides, is not regarded as falling directly under the Act (see Larsson, p. 14).

2.2 Authority

As is clear from Article 65, the defined authority of the commercial agent is to work for the sale of goods by soliciting orders and concluding contracts of sale. The authority is, however, dependent on a proxy from the principal. From Article 77 it is clear that the commercial agent is not entitled to conclude any contracts binding upon the principal without specific permission. In the case NJA 1920, p. 385, the fact that the principal entrusted the commercial agent with binding order forms was regarded as written confirmation that the latter was entitled to conclude agreements on behalf of the principal. Similarly, possession of goods on consignment is often regarded as giving the commercial agent a wider authority to enter into sales agreements on behalf of the principal (Tiberg, p. 84).

3. Obligations of the Commercial Agent

3.1 Information

The obligations of the commercial agent have been set out throughout the Act, without being listed in any logical order. Rather, the logic in the Act lies in the fact that it lists situations as they appear timewise.

The major task of the commercial agent is, according to Article 65 (Article 5 of the Finnish Act), "to protect the principal's interests when performing his duty". Especially,

he shall inform the principal of any possible business opportunities.

This definition is indeed vague and wide. It underlines the need for a contract giving clear guidelines with respect to what will be expected from the commercial agent. This must, however, be done in a way that the commercial agent is not entirely deprived of his freedom independently to plan his own activities.

In general, nothing prevents a principal and a commercial agent from being fairly detailed in their agreement when establishing activities to be undertaken in the territory. Accordingly, the parties may agree on certain activities, which the commercial agent shall undertake before and during the marketing of the products. He may be obligated to make up detailed plans for launching, marketing and other activities, which shall be approved by the principal. They can also forecast sales levels and obligations to undertake minimum sales. It may even be stipulated in the contract that failure to adhere to such criteria will be a breach of agreement, which entitles the principal to terminate. Likewise, seen from the perspective of the commercial agent, he may ask for substantial support from the principal during the launch period and thereafter, and also require that the principal guarantee a certain sales level. As long as the parties act within reasonable limits and are not in conflict with the commercial agent's general right to control his

business, the law does not prevent detailed stipulations.

3.2 Loyal Activity

In the absence of a detailed agreement, it may be debated whether the principal can only expect reports on potential business arrangements from the commercial agent during the term of the agency. This is not the case. Even if the law does not state expressly, as in the German Act, that the commercial agent shall sell actively, it is the prevailing opinion that the commercial agent has to work with reasonable efforts to obtain orders for the principal. Failure to engage in any activity would amount to a breach of agreement (see Tiberg, p. 83).

It is also generally believed, that the notion "protect the principal's interest" obligates the commercial agent to act loyally towards the principal. This notion contains several aspects:

a) Self-intervention

The commercial agent is not allowed to intervene in a transaction and buy the goods directly or indirectly from the principal and then sell them on the market for his own account. In the Act it is stated, with respect to factors, that they need permission from the principal before they can deal in the principal's goods for their own account (Article 40). There has been no reason to believe that the same rule does not apply to commercial agents[9]. Normally, however, a commercial agent who sees a

business opportunity must inform the principal and allow him to benefit. The agent will be rewarded by receiving a commission, normally based on the sales achieved.

b) Dual Remuneration

A commercial agent is not entitled to receive any remuneration from the other side. He should act loyally towards the principal and protect the principal's interests. Remuneration from the buyer would jeopardize the loyalty of the commercial agent and is accordingly not acceptable (see Lando p. 217). The situation here is different from that of brokers, who often receive payments from both sides.

c) Trade Secrets

A commercial agent may be entrusted with trade secrets of vital interest to the principal. To the extent they are not to be passed on to the market they must - as a part of the loyalty obligation - be guarded by the commercial agent. He may not use them for his own purpose, nor pass them on to third parties (see Law on Unfair Competition. SFS 1931:152).

d) Competing Products

Apart from the reference to protecting the interest of the principal, none of the above situations are described in the law. Irrespective of this, they are probably accepted facts in all Nordic Countries. More questionable is

whether a commercial agent is entitled to deal in competing products. The law is also silent on this matter. During the preparatory work, the question was considered by the experts. Their conclusion was that "competing clauses" were fairly rare in agency agreements and that there was no need for any specific legislation (see Prop. 1974:29, p. 29). Segerfors (p. 23) holds that the commercial agent is not prevented from working with commpeting products. There is not even a requirement under normal conditions that the commercial agent must inform the principal of the fact that he is dealing in competing products. Whether there is a limit where the silence can amount to a disloyal act is debatable. Thus the Nordic legislation differs from rules in at least continental Europe with respect to competing products.

The Law on Contracts contains in Article 38 a stipulation which limits the effects of an unreasonable prohibition on competition. Normally it is not regarded as unreasonable if the parties agree on a competition clause during the term of the agreement and for a limited period thereafter (see Lando, p. 219 and Segerfor, p. 30). It is likely that a non-competition clause would lose its effect if the agreement was breached by the principal or prematurely terminated by the principal for reasons other than breach by the commercial agent (see Lando, p. 220).

3.3 Del credere

The commercial agent has a general obligation to inform the principal of all relevant circumstances of interest. In this respect any information regarding the economic status of the buyer is essential. There is no doubt that the commercial agent has an obligation to provide the principal with all information he has. The risk of nonpayment, however, stays with the principal, and he must undertake whatever is required to protect his interest with respect to payments for goods sold.

In cases where the commercial agent has accepted the responsibility to receive payments from the customer, or in cases where the commercial agent has agreed to stand del credere, he will be responsible for the payment from the buyer. This obligation is not enforceable unless the parties have agreed upon specific compensation. Normally, the commercial agent shall be entitled to an additional commission. (In Finland the rules on del credere are mandatory). While the law, as in most other countries, permits a del credere agreement, it is rarely used. The reasoning is not because it is a burdensome stipulation for the principal. He may always add it to the contract and at the same time divide the commission into two parts, one for sales achieved and one for del credere. Rather, it is the commercial agent who has good reason to fear an obligation of this type.

4. Rights of the Commercial Agent

4.1 General Support

The law does not afford any rights to the commercial agent to claim support from the Principal in terms of samples, promotional material and similar services. Such questions have to be dealt with in the individual agreement or are left to the discretion of the principal. Normally, it is in the interest of the latter to provide the commercial agent with such material to improve his marketing activity.

Once the commercial agent has been entrusted with goods belonging to the principal he receives certain rights. With respect to the goods intended for sale which have been consigned to the commercial agent, he has a lien on these, should the principal not pay any sums due. Similarly, he has a limited right to profit from any other material provided by the principal in case of non-performance on the part of the latter.

4.2 Remuneration

The statutory rights of the commercial agent, during the term of the agreement are almost entirely confined to the time and extent to which the commercial agent shall be rewarded for work undertaken.

a) How Much?

Of course, the law does not define the magnitude of the remuneration. Lacking an agreement, reasonable compensation should be awarded

based on standards set in the ordinary business life (see also Handelsbalken 18:5). A comparison could be made to case NJA 1957, p. 204 where a lawyer was approached by a potential client and gave certain preliminary advice and asked the client to submit the file. Nothing happened and the lawyer charged the client an amount of ten Swedish kronor (approximately 1 dollar and 25 cents). The amount was not regarded as unreasonable.

b) On what?

1° Ordinary Commission

If the commercial agent is operating on a non-exclusive basis, he is entitled to a commission on contracts where he has been actively involved. The commercial agent carries the burden of proof, which he normally fulfills by having the buyer sign the order form and reporting this order to the principal. It is clear that the mere formation of a contract between a buyer and a seller is not sufficient for a valid claim by the commercial agent. It is important that the commercial agent has actively participated (see case AD/Arbetsdomstolen 1977:15). On the other hand it is not required that the commercial agent participate in all negotiations. If he has been actively involved in trying to obtain the order, the commercial agent is entitled to his remuneration (see cases NJA 1933, p. 282 and NJA 1939, p. 640)

2° "Exclusive" Commission

As to exclusive agents, Article 70 of the Factors Act establishes that commercial agents are entitled to compensation on any transaction with a buyer residing in his district whether or not he has been involved in the individual transaction. The underlying philosophy is that the exclusive agent is not only selling directly to the buyers, but also spending general pro motional costs in his district which are furthering sales (see NJA 1952, p. 333).

3° Commission on "Follow-up-orders"

The different Nordic Laws are silent with respect to the commercial agent's right to receive commission on repeat business with a buyer who was originally introduced by the commercial agent. There is no doubt that the exclusive agent is entitled to such compensation. More questionable, however, is whether the non-exclusive agent, who cannot prove that he has been involved in follow-up-relations can still demand compensation. The preparatory work in 1913 indicated that the commercial agent was not entitled to compensation under such circumstances. Article 68 states that the commercial agent is entitled to a commission on business transactions which have been "brought about through his (the commercial agent's) efforts during the period agreed upon." A repeat business would normally fall within this wide notion. In the ordinary business life it is

commonly anticipated that commercial agents are entitled to such compensation.

4° Deferred Commission

The notion "deferred commission" (efter-provision) was introduced in 1974/1975 as a new concept in the legisla tion in Finland, Norway and Sweden. It awards the commercial agent a right to a commission if the contract of sale can be regarded as having been brought about through the efforts of the commercial agent during the term of the contract. This right to deferred commission will be further elaborated under the subsequent section dealing with the termination of the contract. The notion can partially be compared with such internationally well known institutes as the "Ausgleich-compensation" in Germany or the "Indemnité de clièntele" in France.

c) Basis for calculation

The basis for calculation should be all the transactions entered into by the principal where he will earn money. Should the buyer not fulfill, or only partly fulfill the purchase contract, then the commission should be reduced proportionately. If the lack of transaction is due to an omission on the part of the principal, or on occurrence which the principal cannot adduce against the buyer to avoid liability, the commercial agent is entitled to full compensation according to Article 69. (See NJA 1952, p. 333)

The commercial agent is entitled to receive a commission notice concerning sales achieved or sales which should have been achieved, as well as particulars of the commission due under each transaction. Such commission notice shall report on transactions during the preceding calendar quarter and shall be in the hands of the commercial agent, at the latest, one month after the end of each calendar quarter.

d) Payment

The commission is due and shall be paid as soon as the transaction is performed or should have been performed by the principal according to Article 69:3. This means that payment shall be made by the principal, irrespective of whether he has received money from the buyer, as soon as the principal has delivered the goods to the buyer. If the buyer ultimately fails to pay and this is not due to any fault or omission on the part of the principal, he is entitled to reclaim whatever has been paid to the commercial agent.

It should be pointed out that these stipulations are not mandatory (see Prop. 1974:29, p. 76). In agency agreements the parties often stipulate that commission is not due until the principal has received payment from the buyer. Seen from the principal's point of view, this solution would mean that the commercial agent has a shared interest in having the buyer per form and the principal will thereby reduce his

risks by avoiding "prepayment" to the commercial agent.

4.3 Other Compensation

The commission is supposed to cover the ordinary costs of the commercial agent and yet allow him a reasonable profit for work undertaken. He is normally not entitled to claim compensation for costs related to the ordinary running of his activities, such as office-rent, phone, stamps, etc. according to Article 73 of the Act (Art. 17 of the Finnish Act). The commercial agent is, however, entitled to "a special compensation for expenses required for the necessary performance of transactions." This wide statement should be intepreted in a narrow sense to cover costs which are specific to the assignment.

5. Term and Termination

The "raison d'être" of the Nordic legislation on commercial agency - like in most other countries - lies in a wish to grant the commmercial agent reasonable security against a powerful principal. It is mainly the question of preventing the principal from terminating the agreement in an improper manner. A commercial agent who has spent time, effort and funds to build up a market for the goods he is represent ing, should be protected from sudden or wrongful termination or substantial alteration of the conditions of the agreement. This concern made

the legislators in Finland, Norway and Sweden adopt mandatory stipulations in 1974/1975. Denmark and Iceland have no provisions of this kind.

5.1 Ordinary Term and Termination

The parties may establish whatever term they reasonably desire for their agreement. It could either be for a fixed period of time with prompt termination or successive extensions or for an indefinite period of time with termination after certain notice.

a) Fixed Period

The parties are free from the beginning to define clearly the term of their agreement in an exact way, so that it lasts for a specific number of months/years or to a certain date. Such a "fixed agreement" is similar to giving immediate notice of termination. Unless otherwise agreed neither party will, after the ordinary termination, have any claim for specific notice or compensation (see Prop. 1974:29, p. 67). On the contrary, both parties will from the very start of their agreement be aware of the term and have a possibility to balance their respective investments to achieve an opti mal result. The law does not specifically protect a commercial agent working under a "fixed agreement".

b) Indefinite period

The system provided for in the agency legislation aims at agreements with undecided

termination dates. These include the agreement with no specific term and the agreement which has a specific term, but which is automatically prolonged for successive periods of time if not terminated by either party.

If the agreement is valid until after notice of termination is given, Article 50 of the Factors Act stipulates that for agreements with shorter duration than one year, one month notice of termination should be given. If the agreement has been running for a longer period, a three months' notice should be given. Any agreement which reduces the period of notice to the detriment of the commercial agent, is null and void. According to Articles 46 and 51 either party may terminate without giving notice to the other party, but he is then liable to pay damages.

5.2 Breach and Consequenses

It is an ancient rule that any relation may be prematurely terminated due to a breach by the other party. Such a termination does not give rise to any liabilities, but on the contrary, the breach by the other party may give rise to a right to claim compensation. This rule has been confirmed in the Factors Act (Article 51). If the commercial agent to a "considerable extent" has neglected his duties or if he declares bankruptcy, the principal is entitled to terminate. In the preparatory work the notion "considerable extent" has been exemplified by reference to specific situations; the assignment was en-

trusted to the commercial agent due to misleading information regarding himself or his activities, or that he - outside the scope of the agreement - has been found guilty of breach of trust, embezzlement or other criminal activities which impairs confidence in him (Prop. 1974:29, p. 24). In case of breach on the part of the principal, the commercial agent has a right to terminate the agreement and claim damages under the general rules on damages.

5.3 Economic Compensation

In addition to the rights of economic compensation referred to above under 5.1. and 5.2., the Act also contains provisions providing certain economic compensation when an agreement is terminated.

a) Follow-up-business

The right of the commercial agent to a commission on work undertaken during the term of the agreement but having its effects thereafter, has been dealt with above under section 4.2.b.

b) Investment Coverage

During the term of the cooperation, the commercial agent is entitled to receive compensation for costs incurred which are not related to his ordinary business, but rather to specific activities on behalf of the principal. Whenever the agreement expires, the commercial agent is entitled to have losses in buildings, stock, machinery, means of transportation, etc.

covered to a reasonable extent by the principal if such investments were made with the consent of the principal. If the agreement is terminated by the commercial agent or due to his breach, he is normally not entitled to compensation (see Lando, p. 245).

c) Deferred Commission

The law does not provide for any damages to the commercial agent for the loss of customers or as a compensation for the building up of a business. In the preparatory work to the amendment adopted in 1974 (see Prop 1974:29, p. 25), it is repeatedly mentioned that a reason for not introducing a system of general "good will indemnity", as is done in continental Europe, was that the growth of the business is not only a result of the activities of the commercial agent, but is also largely dependent upon the quality, pricing, development, guarantees, service, etc., undertaken by the principal. In cases where the achievment was due to efforts by the principal, it would be unfair to compensate the commercial agent. Likewise it was held that the good will indemnity would also - according to the experts - prevent termination of a relationship even where economics made such termination appropriate. Finally, a good will indemnity is predicated upon a different basis of compensation than remuneration during the term of the agreement. The logic of this reasoning was disputed even before the law was enacted.

However, the provisions in Article 68:2 (Article 10:2 of the Finnish Act) give the commercial agent a right to a deferred commission. This protection is in reality similar in object and effect to the type of compensation awarded in other countries (see Prop. 1974:29, p. 53). Deferred commissions are due when the contract of sale can be regarded as resulting from efforts by the commercial agent during the term of the agreement even if the sale is not concluded before the termination of the agency agreement. The second sub-paragraphs of Article 68 provides:

> If a detailed statement of the size of the deferred commission is not presented and the period agreed upon has lasted for at least one year, the deferred commission shall be payable with an amount corresponding to three months commission as an average of the monthly commission during the last year of the agreement. This rule is not applicable if at least six months' notice of termination has been given.
>
> Before the termination of the agreement the agent cannot with legal validity give up his rights to compensation....

This Article 68, read in conjunction with the requirements for notice, gives the commercial agent a minimum compensation equaling half a year's commission or at least six months' notice of termination. In cases in which the commercial agent has not been active at all or where it can be proved that no business after the termination is due to his efforts, the three

months' commission may be reduced (see Lando, p. 242).

Compared to the situation in several other countries the protection of the commercial agent in Nordic law is not as significant. The mandatory provisions did, however, introduce a substantial change in Finland, Norway and Sweden. In fact, case law in Norway has even been more favourable towards the commercial agent than what is explicitly stated in the mandatory provisions and frequently granted the commercial agent a deferred commission in the range of 3 - 12 months. There are good reasons to believe, as will be developed in the next chapter, that the protection of the commercial agent will be expanded in future Nordic legislation.

6. New developments

The work in the Common Market has inspired the legislature in Sweden to carry out a parallel examination of the Factors Act. In 1979 a Lawcommission was appointed for that purpose. In the directives to the commission one objective of the revision was to harmonize Swedish law with the development in the Common Market with additional consideration being given to the Nordic cooperation (Dir. 1978:94, Oeversyn av Kommissionslagen m.m.).

Partly due to the lack of progress in the Common Market, the work of the Lawcommission did not initially develop rapidly. The Commission has, however, changed its method and is today

working independently from the EEC in order to present its final conclusions during 1984. As yet, no similar committees have been set up in Finland or Norway, but it is suggested that the cooperation between the Nordic countries remain close in order that a similar development may be realized in all three countries.

So far no official statements have been made by the Commission. However, speeches given and remarks made "off the record" give an idea of what to expect. Mr. Josefson, Secretary of the Commission, summarized at an early stage an outline of the new law in the following words:

> Chapter one in the proposal of the new law deals with the scope of application. Chapter two will contain mutual provisions for all kinds of parties. There will be provisions about common duties, information duties, duty to account and to take care of the goods and so on. These provisions will be valid for all kinds of agents. Furthermore, chapter two will comprise provisions about the agent's remuneration, guarantee del credere and cessation of the contract. The committee has not reached this point of work yet. The following chapters are intended to contain special provisions for the different kinds of agents. Accordingly there will be one chapter about self-employed commercial agents, perhaps one chapter about employed commercial agents and one chapter about commission agents. At last, if possible, there will be a chapter of final provisions.[10]

Today it does not look as if the Lawcommission will proceed on the terms discussed in 1980, which would have lead to a more radical

change in the legislation. Rumors are that the present structure will be upheld, but emphasis will be put on commercial agents rather than on factors as the case is presently. It has further been said that the law will:

- not cover Commmercial Travelers,
- not deal directly with independent distributors. (An analogous interpretation may still be left open. It has been said that unions involved will make "guidelines" which are supposed to govern relations between distributors and their principals - an "interesting" and new way of making cooperative legislation),
- not include the notion of "deferred commission". The commercial agent will be entitled to compensation on any order initiated by him, whether made during or after the termination of the agreement,
- give the commercial agent a binding right to a good will indemnity along the same lines as has been practiced in Germany for a number of years.

Even if the conclusion of the Lawcommission is presented during 1984, it seems unlikely that the work will lead to any immediate legislative enactment. The very reason for the work was to harmonize the Swedish development with that of other important countries. The reasoning behind this reevaluation was not due to any major complaints raised with the old Factors Act. If the lack of progress in the European

Economic Community is taken into account, it would be somewhat surprising if Sweden went its own way to adopt new laws on the subject. The advantage with the work undertaken by the Lawcommission rather lies in the fact that Sweden will be prepared to amend its legislation on commercial agency with minimal delay if required by developments in the Common Market or the interest of Nordic uniformity.

7. Conclusions

Conclusions have to be made with respect to the existing system, which is to a large extent similar in Finland, Norway and Sweden. It is far too premature for contracting parties to anticipate the adoption of specific rules as an outcome of the activities of the Lawcommission. When working with commercial agents and drafting commercial contracts under Nordic law a foreign partner should consider the following aspects:

1. Commercial agents are directly covered under the Factors Act. The law may also be applicable to small distributors who are working as if they were an integrated part in the distribution network of the principal.

2. Certain care should be given to avoid the appearance that the commercial agent is regarded as an employee of the principal. This is mainly a risk when the principal has his own establishment within Sweden.

3. The law does not specify in any detail what a commercial agent is required to do in order to fulfill his obligations. Nothing prevents the parties from making up at the very outset of their agreement, detailed marketing plans and plans regarding other activities in the territory. The advantage with such a discussion is normally that the principal then clearly sees where his assistance will be required in order to obtain optimal results.

4. If the commercial agent must not deal in competing products, this should be clearly stated in the agreement because the law does not contain any provision to prevent such competing business. However, the need for such a stipulation should be carefully considered. Sometimes it is in the interest of both parties that the commercial agent is at liberty to work with other products as he will then be better accepted by potential customers.

5. It is normally practical and provides increased security to the principal to establish that the commission of the commercial agent will be due and accounted for when the principal has received payment from the buyer.

6. If a fixed term for the agreement is established from the beginning, the parties may derogate from the mandatory provisions in the law regarding notice of termination and deferred commission. Clearly, this is not a very

common way to establish the term in a commercial relationship. It deprives the commercial agent of the incentive he needs during the final part of the agree ment. Then he would probably only make minor efforts and collect whatever was collectible.

7. If the agreement is to be terminated by notice, there are good reasons to make such notice resonably long. Six months does not seem to be an excessive period. The six months' period has an advantage in that the principal thereby may derogate from the mandatory provision regarding three months deferred commission. It has been suggested that the principal should even be entitled to derogate from any remuneration after the termination of the agreement. This is, however, not very likely. The way the law reads, the commercial agent probably can not, in any legally binding way, forego his right to deferred commission on sales entered into after the termination which are due to his efforts during the term. With a reasonable period of notice, the courts would most likely be less inclined to award the commercial agent any arbitrary compensation, but rather would be expected to follow strictly what has been proven to be accurate compensation. However, no legal basis has been found for this assumption.

8. As regards the Nordic uncertainty with respect to follow-up business, it may be

advisable to clarify what either party can expect in this regard.

9. With respect to choice of law, the Nordic laws can hardly be considered as more "harmful" to the principal or the commercial agent than the legislation in any other industrialized country. Nothing, though, prevents the parties from making another choice, even if the commercial agent should operate in any of the Nordic countries. It has been suggested that it should not be possible to avoid mandatory provisions in the Finnish, Norwegian and Swedish Acts by referring to other laws (see Landsdorff p. 38, 108 and 148 and Segerfors p. 32.). There exists no case law in either country to confirm such a statement and it must, at least from a Swedish point of view, be regarded as highly questionable (see Larsson p. 108).

10. A stipulation referring any dispute to arbitration is normally considered to be a burdensome stipulation for the "weaker" party. In order to be enforced it has to be clear and precise. Even so, it may be set aside by the ordinary courts if it should be found to give an undue advantage to either party.

FOOTNOTES

(1) A good view of different national legislations is available in Europeisk Agentrett written by J. Landsdorff, D. Rigault, E. Thuesen and B. Villard, Oslo 1983, hereinafter referred to as "Landsdorff". It will be translated to other languages during 1984.

(2) Finland: Lag om handelsrepresentanter 30.5. 1975/389,

Norway: Loven om kommisjon, handelsagenter og handelsreisende (lov nr. 1 av 30 juni 1916 amended through lov nr. 30 av 1 juni 1973 and

Sweden: Lag av den 18 april 1914 (SFS 1914:45) om kommission, handelsagenter och handelsresande, amended through Lag av den 10 maj 1974 (SFS 1974:219). The Swedish law will be referred to as the "Factors Act".

(3) The following official abbreviations will be used:

a) "SFS" for Svensk foerfattningssamling = Official Journal.

b) "Prop" for prosposition from the Government to the Parliament.

c) "NJA" for Nytt Juridiskt Arkiv = Casereport from the Supreme Court.

(4) Unofficial translation into English edited by the Federation of Commercial Agents of Sweden 1975.

(5) See Tiberg, H., Mellanmansraett, Uppsala 1967 p. 16, hereinafter referred to as "Tiberg".

(6) See Larssonn, A., Millqvist, G., Swanstein, J., Handelsagentlagstiftningen i ett internationellt perspektiv, Lund/Teckomatorp 1979, p. 59-78. It will hereinafter be referred to as "Larsson".

(7) See: Foerslag till lag om kommission, handelsagenter och handelsresande, Stockholm 1913, p. 185 f., Segerfors, N.E., and Fischler, J., Agentavtalet (Exportratt 3), Stockholm 1968, p. 19, hereinafter referred to as "Segerfors".

(8) See Thuesen, E., Erstattning og godgorelse ved ophor af mellemmansforhold i Skandinavisk ret. Nyt om Markedsret fra Institut for Europeisk Markedsret Nr 4, juni 1980, p. 11 ff and Gundersen, F.F., Agenters og Forhandleres stilling ved oppsigelse, Kapital nr 14/1980 p.43.

(9) See Lando, O., Udenrigshandelns Kontrakter. Copenhagen 1981, p. 217, hereinafter referred to as "Lando".

(10) Josefson B., Lecture published by the Federation of Commercial Agents of Sweden in connection with the IUCAB-meeting in Stocholm on May 29, 1980.