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The Commercial Agency: Colombia

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NOTE

THE COMMERCIAL AGENCY: COLOMBIA

The new Commercial Code of the Republic of Colombia (Decree 410, 1971), which entered into force January 1, 1972 with a few exceptions implemented on the date the Decree was issued, i.e., March 27, 1971, established in Chapter V, Title XIII, Volume IV, a new juridical entity known as the Commercial Agency, legally recognized as of the date of issuance of the Code, but not contemplated in the previous Commercial Code.

Under the agency contract a merchant undertakes, independently and permanently, to promote or carry on business in a certain field and in a pre-determined sector of the national territory, as representative or agent of a national or foreign entrepreneur or as a manufacturer or distributor for one or more of the products of the said entrepreneur.

Although the juridical entity in question was not envisaged or covered by regulations in the previous Commercial Code, it frequently arose in the natural course of business, when a certain national or foreign firm, particularly the latter, charged a national distributor and/or manufacturer, with the manufacture and sale of its products, under rigid supervision and disclosure of technology by the grantor of the concession.

According to the Civil Code's established rules, either of the parties could terminate the contract, and this was usually done by merely complying with the notification of termination requirement, within a reasonable period of time of thirty, sixty or ninety days.

Through the regulations of the new Commercial Code, and under the name of Commercial Agency (Art. 1.324) there is established a right in behalf of the Agent and against the entrepreneur, upon termination of the contract, under which the Agent may claim a sum equivalent to one twelfth of the average commission, bonus or profit distributed during the last three years, for each year that the contract has been in force, or an average of all sums received should the contract run for a lesser period. In addition to the aforementioned payment, should the entrepreneur unilaterally rescind the contract, without proven just cause, an indemnification in favor of the Agent is established, to be determined by experts, as compensation for his efforts in promoting the trademark and introducing the product into the market. The same rule shall apply whenever the Agent terminates the contract for just cause attributable to the entrepreneur.

The question may then arise as to the date on which these norms become effective, and whether or not the indemnifications set forth in Art. 1.324 are workmens' indemnifications or originate in the agreement between the parties, i.e., whether they are simply commercial in nature.

In the first instance we would find, in accordance with the current labor laws of the country, that such indemnifications — in the same manner as all those relating to the protection of the worker — are of a public nature and, as such, cannot be waived, even in the case where the opposite is stipulated in the particular contract.

On the other hand, should the indemnifications be strictly commercial in nature, for they arise from such relations, they could well be waived in the contract without violating economic public order norms covering the relations between the employer and the employee.

Unfortunately, our Courts have not yet ruled on a subject of such vital interest to national, and particularly foreign entrepreneurs even though this type of contract is very common, as previously stated, between foreign firms and Colombian manufacturers and distributors.

However, the Superintendency of Companies, in Official Communication 13534 of October 4, 1971, has already given its opinion regarding certain aspects and effects of Art. 1.324 of the new Commercial Code, in the sense that the provision in question is not retroactive, i.e., that it is not applicable to contracts entered into prior to March 27, 1971 (date of issuance of the Code) nor to previous contracts, still in force, by virtue of Art. 30 of the National Constitution and the provisions of Art. 2036 of that Code.

Moreover, the Superintendency's opinion admits that the Agent may agree, in the Commercial Agency contract, to waive the benefit referred to in the first part of Art. 1.324 or that he is willing to receive a lesser or higher benefit than the one established therein, inasmuch as the norm is simply nonmandatory-supplementary in nature, and thus is applicable only in the absence of a contractual stipulation to the contrary. Therefore, the Superintendency is of the opinion that the right granted by the Commercial Agency is not of the irrenounceable type established in labor legislation.

This live and important issue merits treatment in greater depth. However, the need for brevity mandates only brief and summary coverage at this time.

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