Prof. Dennis Campbell (ed.)

International Handbook on Comparative Business Law

Kluwer

INTERNATIONAL HANDBOOK ON COMPARATIVE BUSINESS LAW

Edited by

Prof. Dennis Campbell

Director, Center for International Legal Studies,
Salzburg, Austria, and director of European Programs,
University of the Pacific, McGeorge School of Law

1979

KLUWER · DEVENTER/THE NETHERLANDS
ANTWERP · BOSTON
FRANKFURT(M) · LONDON

Distribution in USA and Canada
Kluwer Law and Taxation
160 Old Derby Street
Hingham MA 02043
U.S.A.

Library of Congress Cataloging in Publication Data
Main entry under title:
International handbook on comparative business law.
Includes index.
1.Commercial law. 2. Business enterprises, Foregn. I. Campbell, Dennis.
K1005.4.I58 346.07 79-16210
ISBN 90-268-1074-1

The Center for International Legal Studies is a non-profit and non-stock organization incorporated under the laws of the State of California and with headquarters in Salzburg, Austria. The Center is devoted to the promotion of international legal education, research, information exchange and understanding. It coordinates and supervises various law seminars in Europe and sponsors research in areas of Comparative and International Law.

Inquiries concerning the activities of the Center should be directed to the Center for International Legal Studies, Box 59, A5033 Salzburg, Austria.

THE AUTHORS

Karl Arnold: partner in the firm of Pestalozzi & Gmuer, Zurich, Switzerland; doctor of jurisprudence, University of Fribourg; diplôme de droit comparé, University of Luxembourg; member, Zurich Bar Association, International Bar Association, New York City Bar Association.

Federico Bianchi: Studio Legale Bianchi ed Associati, Milan, Italy; doctor of jurisprudence, Catholic University of Milan; LLM, Harvard Law School; member, Legal Committee, American Chamber of Commerce for Italy; Panel of Arbitrators, American Arbitration Association and Associazione Italiana Arbitrato; member, Italian Bar.

Dennis Campbell: Director, Center for International Legal Studies; director, European Programs, University of the Pacific, McGeorge School of Law; doctor of jurisprudence, University of the Pacific, McGeorge School of Law; graduate diploma in comparative law, Stockholm University; member, Iowa State Bar and International Bar Association; Associate Member, New York State Bar.

Denis Debost: Debost, Borel & Carpentier, Paris, France; LLB, Harvard Law School; licence en droit, University of Paris; member, Association Nationale des Avocats; member, New York State Bar and Paris Bar.

Bodo Haggeney: Gleiss, Lutz, Hootz, Hirsch & Partner, Stuttgart, Federal Republic of Germany; doctor of jurisprudence, University of Cologne; member Stuttgart Bar and International Bar Association.

Sigwart Hübner: Gleiss, Lutz, Hootz, Hirsch & Partner, Stuttgart, Federal Republic of Germany; education, Universities of Bonn and Kiel, Academy for Administrative Science, Speyer, and Berlin Institute of Industrial Management; member, Essen Bar, International Fiscal Association, and Tax Committee of the World Association of Lawyers.

Mads Marstrand-Jørgensen: Holm-Nielsen, Plesner, Holm-Nielsen & Dyekjaer-Hensen, Copenhagen, Denmark; doctor of jurisprudence, University of Copenhagen; assistant professor, Faculty of Law, University of Copenhagen; admitted before the High Court.

Donald Prinz: Member of the faculty, University of the Pacific, McGeorge School of Law; doctor of jurisprudence, University of Michigan Law School; member California State Bar and Nebraska State Bar.

A.H. Puelinckx: Denys & Puelinckx, Brussels, Belgium; doctor of jurisprudence, University of Louvain; master in comparative economic law,

University of Cologne; master in comparative law, University of Chicago School of Law; member, Brussels Bar.

Claude Rohwer: Member of the faculty, University of the Pacific, McGeorge School of Law; doctor of jurisprudence, University of California, Berkeley; Order of the Coif; member, California State Bar.

Henri Swennen: Member of the faculty, University of Antwerp; doctor of jurisprudence, Catholic University of Leuven; doctor of legal science, University of Leuven.

Peter Summerfield: Partner in the firm of Herbert Oppenheimer, Nathan & Vandyk, London, England; MA (Hons.) degree in jurisprudence, Pembroke College, Oxford; qualified as solicitor with honors.

Terry Wittler: Associate, Center for International Legal Studies; doctor of jurisprudence, University of Nebraska College of Law; master in economics, University of Nebraska; member, Nebraska State Bar.

The Editor gratefully acknowledges the assistance of Mr. *Thomas Frame*, Mr. *Keith D. Nunes* and Mr. *Walter Spak*, all interns during 1977 at the Center for International Legal Studies, for their assistance in the preparation of materials upon which the hypothetical case is based.

PREFACE

More than a decade has passed since economist Richard N. Cooper reflected upon the trend toward increasing economic interdependence in the international community:

> During the past decade there has been a strong trend toward economic interdependence among the industrial countries. This growing interdependence makes the successful pursuit of national economic objectives much more difficult. Broadly speaking, increasing interdependence complicates the pursuit of national objectives in three ways. First, it increases the number and magnitude of the disturbances to which each country's balance of payments is subjected, and this in turn diverts policy attention and instruments of policy to the restoration of external balance. Second, it slows down the process by which national authorities, each acting on its own, are able to reach their domestic objectives. Third, the response to greater integration can involve the community of nations in counter-acting motions which leave all countries worse off than they need be . . .[1]

Nothing has occured in the 1970s to suggest that Cooper's assessment is inaccurate. Indeed, the process which he identified has accelerated. By the mid-1970s, if one is to mention but one example, exports accounted for twenty per cent of the combined gross national product of the Member States of the European Communities, and exports provided seven per cent of the gross national product of the United States.[2]

Concurrent with the emergence of international economic interdependence—in fact, as a result thereof—legal systems have stepped forward with a process of transnationalization, a movement recognized now by many commentators[3]. In its most telling impact on the legal profession, this linked development of international economic interdependence and the transnationalization of law has resulted in the fact that more enterprises are 'doing business abroad' and involving their domestic lawyers, at the least peripherally, in the complexities of foreign legal systems.

The purpose of this handbook is not to set out a detailed topography of the business law of Belgium, Denmark, England, France, the Federal Republic of Germany, Italy, Switzerland and the United States as each applies to the foreign enterprise. Rather, the intention is to offer a 'core' sample of each of these legal systems as a means of providing a starting point from which the foreign practitioner might attempt a preliminary definition of the legal environment which his client-enterprise seeks to enter.

The authors represent an impressive range of practical legal experience in

1. Cooper, "National Economic Policy in an Interdependent World Economy", 76 *Yale Law Journal* (1967), p. 1273.
2. 80 OECD Observer 19, "The OECD Member Countries", March-April 1976.

their respective countries. To make the most of that experience, it was determined that a two-tier approach to extracting our 'core' samples would be most effective. First, each author has been allowed great latitude in preparing an introductory essay within which he sets out those issues which he believes currently most relevant to the foreign enterprise contemplating entry into his respective domestic market. The breadth of that latitude encompasses the form of the essay as well as its substance, the belief being that the format and approach employed by each author also suggest clues to the nature of the legal system which he represents. Second, each author has been presented a hypothetical case for analysis. These analyses represent a unique opportunity for the practitioner to compare the substantive law of a variety of jurisdictions against a common set of facts molded around the entry and function of a foreign enterprise into a domestic market.

These essays and analyses are prepared under the terms of laws and regulations prevailing in the respective jurisdictions as of July 1979. It has been said that it is the nature of government to create laws and regulations with the inexorability of a rapid and great river. Thus, the December 1978 qualification is a vital one in reference to any particular law or the resolution of any particular issue set out here. However, the essential character of even the swiftest river changes only gradually. Legal systems being of similar nature, it is believed that the essays and analyses contained here will provide a useful basis for examination of the respective jurisdictions.

Dennis Campbell
Salzburg, Austria

3. See, e.g., Macdonald, Morris and Johnston, "The New Lawyer in a Transnational World", 25 *University of Toronto Law Journal* (1975), p. 344; Note, "Foreign Branches of Law Firms: The Development of Lawyers Equipped to Handle International Practice", 80 *Harvard Law Review* (1967), p. 1285.

TABLE OF CONTENTS

INTRODUCTORY CHAPTERS

ANALYSIS OF HYPOTHETICAL CASE

Belgium

A.H. PUELINCKX

HENRI SWENNEN

Introduction

Since the late 1950s, Belgian public policy toward foreign investment has been to welcome and encourage it. There are very good reasons for such a policy. The country is a small one; it has practically (apart from coal) no natural resources and national industry is not, on its own, able to provide for the full employment social policy demands. On the other hand, the country is well-situated within the European Common Market, and it is therefore very attractive to those foreign investors who wish to enter that market.

The Changing Environment for Enterprise

The certain decline which, brought about by the present-day economic crisis, has shown up with regard to investment, and particularly foreign investment, led to increased efforts in governmental action relating to business incentives. In 1977–1978, for example temporary tax provisions permitted depreciation *ad libitum* for specific investments carried out during that period.

But the crisis itself, and the large amount of money needed for helping enterprises in financial difficulties, also led to a reconsidering of the government's industrial policy. The main objectives of the 'new industrial policy', as outlined in the government's 1978 addresses to the Parliament, are as follows:

(a) Continuation of efforts regarding the overall policy and the policy toward separate industrial sectors; the government's industrial policy henceforth also shall aim at specific business areas and business opportunities;

(b) special aid shall be given to small and medium-sized business which was until now somewhat set aside with regard to business incentives;

(c) as to new investments, the government will act as a promoter and a business partner.

In fact, it is felt that the Ministry of Economic Affairs thus far has been merely a ticket office, 'selling' state aids to investors who might show up but leaving it too much up to private enterprise to decide what and where to invest.

Recent legislation has provided the government with the necessary legal instruments for playing a more active role in the national economy. The Law of 30 March 1977, concerning 'the organization of public industrial initiative' has set up the legal framework. The National Investment Company (NIC),

which already existed as a semi-public investment bank, has now become the so-called public holding company, the share capital of which will be entirely subscribed by the state. The law provides that the NIC, on its own or in cooperation with other enterprises—either public or private—may take the initiative to found companies and thus create business facilities, if and when the government's economic policy requires it. The address supporting the bill announces initiatives in such areas as energy supply and pipe-lines. It also was announced that a specialized NIC daughter-company will be founded, the object of which shall be to prospect for (foreign) spearhead-technology, patents, and know-how, in order to make it available for licensing to Belgian licensees. Moreover, the bill provides that the NIC shall act in close cooperation with some other government agencies and public financial institutions (including the Regional Investment Companies now to be founded), this cooperation being embodied in a 'Coordination Council'.

It is, of course, too early to judge, but experience in other European countries shows that public enterprises may appear to be good and loyal business partners. The only danger which now appears is that the managers of a public investment company might not be independent enough to resist political pressure and, for the purpose of avoiding politically unacceptable unemployment, might decide to take over out-of-date industries and keep them alive artificially. In fact this is a danger for the public investment company itself. Competitive distortions resulting from such a policy would be prohibited by the European Economic Community (EEC) Treaty provisions concerning state aid. Moreover, European competition law equally applies to both private and public enterprises.

For the government, being in business means having a greater opportunity to take part in the major decisions affecting economic and social structure (for example, the potential development of atomic energy). And this, from that point of view, completes the comprehensive organization of consultation and coordination with private industry and employees' organizations which has been set up since 1945. Consultation, coordination and control are indeed the keywords of much legislation regarding economic and financial policy. Although this concerns first of all the employers' federations, it should be emphasized here that invitations to consult and act in concert with each other reflect the basic attitude of the Belgian government toward private enterprise whenever decisions are to be taken which may affect long-range planning. One might say that in many cases where official authorization to commence business, filing with a government agency or authorization to carry out important business projects is required by law, this is, in fact to be read as an invitation to consult with the government.

This attitude also bears evidence of the government's awareness that carrying on its ambitious social and economic policies is not possible without the cooperation of private enterprise. Therefore, it is merely a matter of course that a 1978 government bill, commonly referred to as the 'crisis-law', apart from provisions relating to the public industrial initiative, also contains provisions which, on the one side, aim to help private industry catching its

second breath and, on the other, adjust social security expenditures to what the country now can afford.

As regards relations with the government, one would have to reckon with the regionalization which, as provided by the constitutional reform of 1971 and by the government's program, is to be carried into effect during the next years. Some regionalization already exists. Secretaries of State for each of the three regions handle the economic expansion dossiers. But they are politically responsible to the national Parliament and, though regional bodies advise with regard to relevant aspects of economic policy, legislation concerning regional economic affairs is still to be voted upon in Parliament. Now devolution of powers to institutions representing the cultural (linguistic) communities and the regions must complete this reform. Regional councils will be competent for such matters as, among others, economic expansion and industrial policy. The councils will have some legislative power, and the regions will have a limited financial autonomy.

Matters of national economic interest still will be dealt with at the national level and the Ministry of Economic Affairs' administration has not been divided. Moreover, financial and monetary policy, labor relations and, in some aspects, education are not to be 'regionalized'. Yet the proposed reform must enable each regional executive to carry out its own policy. There are, indeed, significant differences between the two main regions with regard to industrial structure and development and there are different needs to be met. Regional economic policies thus being clearly outlined, direct investment opportunities also will be better profiled.

For many years Belgium has had the reputation of being one of the most open countries for direct foreign investment. Recently, by putting the *Badger* case before the Organization for Economic Cooperation and Development (OECD) Committee, the government has shown its firm will not to make allowances if a multinational corporation, having established itself in the country, does not comply with OECD guidelines.

Entering the Belgian Market

Foreign enterprises wishing to conduct business in Belgium may do so without significant restrictions. As far as authorizations to commence business are required, no distinction is made between foreign and national enterprises.

As regards commercial agency and distribution agreements, the Exclusive Sales Concessionaire Act of 1961 and the Commercial Representative Act of 1961 are to be mentioned. The first act aims at guaranteeing that a reasonable notice or a fair compensation be given to the sales concessionaire (either an individual or a company) when a contract of indeterminate duration is terminated unilaterally by the other party. This notice or compensation is to be agreed upon by the parties at the moment of termination. No notice need be given in the event of serious default of the concessionaire. Not reaching

sales quotas reasonably set forth is looked upon by the courts as a serious default. If the contract is terminated for a reason other than a serious fault of the concessionaire or if it is terminated by the concessionaire because of a serious fault of the other party, an additional compensation can be claimed by the concessionaire. The 1961 act related to exclusive dealer contracts of indeterminate duration and regarding products manufactured by the other party. After ten years, new provisions had to be enacted to prevent parties from avoiding the principles of this law by tactics such as subsequent renewal of fixed-term contracts and exclusive dealerships for less than 'all' of the other party's products. Since 1971, the law furthermore applies to concessionaire contracts the termination of which would cause serious losses to the concessionaire, due to important obligations which had been imposed upon him and which were strictly and specially connected with the 'concession'. The act also provides that, notwithstanding any competence-of-court clause, the concessionaire always may sue before a Belgian court, which must apply this compulsory legislation. (It should be noted, however, that, as far as contracts between EEC nationals are concerned, the provisions of the EEC Convention relating to competence-of-court and execution-of-court decisions apply.)

The second act deals with 'commercial representative' contracts. Like a 'commercial agent', a so-called 'commercial representative' has powers of representation, acting in the name and on behalf of a principal. The difference is that an agent is engaged in an independent activity whereas a commercial representative is an employee, soliciting orders from prospective customers by calling on them at the time and in the manner determined by his employer. The main purpose of the 1963 act was to provide a legal presumption that a representative is an employee unless it is proved by the principal that he is not. It may be noted that this presumption, as it is a part of labor relations law, can apply only to individuals.

Foreign enterprises wishing to establish in Belgium may open a Belgian branch, found a Belgian company or seek acquisition of such a company. When opening a branch, which is not a separate legal entity, the foreign company must comply with the company-law provisions regarding 'publicity'. A certified copy of its instrument of incorporation, its articles of association, the decision to open the branch and, furthermore, all decisions relating to delegation of powers to the Belgian branch managing director(s), and the annual accounts must be deposited in the company's file at the Commercial Court's Register. Most of these documents, in whole or in part, shall be published in the Annexes to the official gazette.

When founding a Belgian subsidiary, foreign enterprises in most cases prefer the form of the joint-stock company. This company can be formed either directly by the founding shareholders (at least seven) or by way of public subscription. In fact, the first method is generally adopted, the second being rather complicated. If the shares are to be offered to the general public, this can be done after incorporation, usually by a group of banks who act as an underwriting syndicate. The capital of the joint-stock company, at least Belgian Francs 1,250,000, must be subscribed upon incorporation and the

shares representing that capital must be paid up at not less than twenty per cent. The company is managed by a board of directors, acting jointly; the day-to-day management may be entrusted to one or more managers, acting jointly or severally according to the provisions of the company's statutes. The powers of these management 'organs' are specified in the company law. Limitations of powers, arising under the company's statutes, cannot be relied upon against third parties even if these provisions have been disclosed. A company, however, can make special agreements with third persons (a bank) concerning representation powers of its directors.

Prior to the public issuance of securities (also prior to an admission to official stock exchange quotation and prior to a public exchange or purchase offer), a prospectus checked by the Banking Control Commission must be published. The Banking Control Commission was created (1935) to control banking activities and to ensure that correct information is given in the course of a public issue of securities. The Commission will see to it that the public is not misled about the nature of the operation and the rights attaching to the securities. The Commission has the power to postpone the operation for three months if the issuers do not comply with its recommendations. In fact, these recommendations not only deal with correct information but also refer to principles of financial ethics not expressly set forth in the company law (such as the shareholders' right of pre-emption in the course of an increase in subscribed capital).

A foreign company seeking acquisition of a Belgian company, the shares of which are held by the general public, may need the authorization of the Minister of Finance. Such authorization is required for a public exchange or purchase offer with respect to Belgian securities by or for the account of non-EEC nationals. Two other rules regarding acquisitions apply to both national and foreign enterprises. First, prior to every operation involving the transfer of shares representing one third or more of the capital of a Belgian company, the shareholders' equity of which amounts to one hundred million Belgian Francs or more, information must be given to the Ministers of Finance, Economic Affairs and Regional Economic Affairs. Second, there is a recommendation practice of the Banking Control Commission regarding so-called 'private transfers' of a package of shares offering to the holder the opportunity to control a company, the shares of which are held by the general public. The conditions of such transfer may not contravene the principles of equality of all shareholders.

A major reform of the company law is to be carried out during the next years. New provisions will have to be enacted following the EEC directives concerning the harmonization of national laws with regard to mergers and take-overs, the structure of the joint-stock company and prospectuses. In addition, a draft of a new company law has been prepared and is to be considered in Parliament. The draft bill aims at adjusting the legal provisions to the needs of modern business and finance. As an example, it may be mentioned here that a new type of company, the company with variable capital, will be provided for, thus offering a suitable form for organizing multilateral business cooperation. Furthermore, the private limited-liability company, which now is looked upon as the small

business' organization (only individuals can be share holders and the shares are not freely transferable) will be converted into an attractive company form for those companies the shares of which are not to be offered to the general public.

Investment incentives, which may be granted to both national and foreign enterprises (either existing or newly established) are provided for by the Economic Expansion Acts of 1959 and 1970. The 1970 act, known as the Regional Expansion Act, provides for two types of state aid: regional aid and additional regional aid. Advantages available as regional aid are interest-rate rebates on loans contracted to carry out investments, state guarantee to back the repayment of such loans, cash grants, employment grants and various tax benefits. These advantages may be granted when investments are carried out in so-called development areas. Additional aid, consisting of additional advantages of the same type, such as additional interest-rate rebates, may be given when warranted by the general economic circumstances. Apart from these incentives, the 1970 act provides for 'contractual planning'. This means that state aid may be granted to an enterprise which, in return, binds itself to fulfill certain obligations implementing targets of the National Five Year Economic Plans. The types of contracts are as follows: progress contracts (covering a long-range development program), management promotion contracts, technological promotion contracts and reorganization contracts.

The 1959 act, known as the General Expansion Act, while regarding investments anywhere in the country, provides for almost the same types of advantages as are mentioned above. Other advantages are: state aid for vocational training, such as cash grants covering part of the remuneration of foreign instructors; assistance of the National Employment Agency with regard to selection and training of personnel, and, last but not least, the infrastructure offered by the government and the local authorities.

As regards the selection of investment projects for which state aid may be granted, priority now is given to:

(a) Investments leading to savings in energy consumption;

(b) Non-material investments (acquisition of know-how, market studies, improvement of management methods), and

(c) Investments leading to new employment.

Labor Relations Aspects

Collective bargaining, 'social peace' and protective legislation are the main features of Belgian Labor Relations Law. Collective labor contracts, agreed upon between the representatives of employers and trade unions in the National Labor Council or, at the sectoral level in the Joint Representatives Committees, can be converted into compulsory provisions and, in the hierarchy of sources of labor law, such contracts come second to the legislation itself, which may supercede the written individual labor contracts.

Usually, these collective agreements provide for so-called social peace, the avoidance of strikes, and the settlement of disputes. This system has proved to be efficient. The major reasons are the high rate of trade union membership

and the fact that the three unions present a common front in negotiations with the employers. The employers' acknowledgment of the stability that is brought about by trade-unionism has taken, in some industrial sectors, the form of so-called advantages for trade union members, meaning that the employer pays the employees' contributions to the trade unions.

Another important factor making for stability in industrial relations is the automatic and continuous adjustment of wages and salaries to the cost of living through 'indexation', the linkage between wages and salaries on the one side and the consumer price index on the other.

Protective legislation deals with such matters as hours of work, trial period, and termination of contracts. Except in the event of a serious fault of the other party, contracts of indeterminate duration cannot be terminated unilaterally without giving notice or fair compensation.

In July 1978, a new Labor Contracts Act was voted upon in Parliament. Two major innovations are to be mentioned. First, the new act provides that essential changes in labor conditions are to be agreed upon by both parties. Second, new provisions are enacted with respect to duration, 'places' and functions which such clauses (to be in writing) may cover. A separate provision, however, regards non-competition clauses 'imposed upon' an employee of an enterprise operating in the international market or an enterprise having its own research department. If the employee has special knowledge about the company's business, and if the use of this knowledge outside the enterprise may cause damages to the employer, the specific limitations mentioned above do not apply.

The Belgian social security system covers health care insurance, sickness and disability insurance, pensions and prepension schemes, family allowances, unemployment benefits and holiday benefits. For historical reasons, work-accident risks are not included in the social security system; such risks must be covered by the employer through policies with authorized insurance companies. The social security system is financed by employer's and employees' contributions. Eventual deficiencies are made up by state subsidies.

Tax Considerations

The basic rate of Belgian corporation tax is fixed at forty-eight per cent. A reduced rate, thirty-three per cent or forty per cent, is applied when the company's taxable income does not exceed one million Belgian Francs. It must be noted here that income tax is to be paid in advance. If such prepayments fail to be made, a penalty will be due. This may lead to a surcharge rate of maximum 20.25 per cent.

Taxable income consists of distributed and retained profits, non-allowable expenses, such as abnormal or benevolent advantages granted to a foreign company belonging to the same group, and remuneration of directors. Remuneration of executive directors, exercising real and permanent functions, are allowable expenses in so far as these remunerations exceed bonuses paid