

Q&A DOCUMENT | 4 October 2021

Q&A on Agency Agreements

Part 1: Introduction

Council Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents (the “Directive”) harmonizes the laws, regulations and administrative provisions of Member States governing the relations between the parties to commercial agency agreements.

As the Directive constitutes a minimum harmonization, the Member States are free to set higher standards applicable to agency agreements. In addition, on various aspects the Directive leaves room for further elaboration in national law.

In order to facilitate the use of this Q&A, for each relevant issue the position under the Directive is compared with the position under the relevant implementing rules of Dutch law (“Dutch Agency Law”). The starting point is always the minimum harmonisation reflected in the Directive. The Q&A then aims to identify any deviations or additions from the regime reflected in the Directive.

Part 2: Legislative framework

Q1. Which rules constitute the transposition of the Directive into Dutch Agency Law (a)? Where available, please also include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and to the English translation of the regulatory framework (c).

a. Legislative framework:

Commercial agency is regulated in Art. 7:7.4 Dutch Civil Code (hereinafter: “DCC”), Art. 7:428 – 7:445 DCC.

b. Link(s) to official publication:

The Dutch version of the Dutch agency law is accessible via [this link](#).

c. Link(s) to English translation:

There is no official English translation available. A free translation will be provided by the Distribution Law Center on a later date.

Part 3: Scope

Q2. The Directive (Art. 1(2)) defines a commercial agent as a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person (the “principal”), or to negotiate and conclude such transactions on behalf of and in the name of that principal. Is the definition in Dutch Agency Law the same?

No. The Dutch agency law does not contain a definition of a commercial agent. However, the Dutch agency law defines the commercial agency agreement. See Art. 7:428 DCC: “A commercial agency agreement is an agreement in which one of the parties ('the principal') instructs the other party ('the agent'), who has engaged himself to this instruction on payment of a commission (remuneration), to provide intermediary services in arranging agreements to be concluded by the principal with third parties and, where appropriate, to conclude such agreements in the name and for account of the principal, without being his subordinate; the commercial agency agreement may be effective between the principal and the agent for a fixed term or for an indefinite term.”

In the view of the Dutch legislator, amending this definition was not necessary since the definitions are closely aligned.

Q3. Do other intermediaries fall within the scope of Dutch Agency Law?

Yes. Commercial agents who provide intermediary services in arranging (service) agreements to be concluded by the principal with third parties fall within the scope of the Dutch Agency Law as well.

Q4. The Directive (Art. 2(2)) entitles the Member States to exclude from the scope of application persons whose activities as commercial agents are considered secondary in nature. Has the Netherlands made use of this possibility?

No.

Part 4: Contractual phase

A. Form of agency agreements

Q5. The Directive (Art. 13) provides that, as a minimum, each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency agreement including any terms subsequently agreed. Does Dutch Agency Law provide for such obligation?

Yes. See Art. 7:428, paragraph 3, DCC.

Q6. Are there any (other) requirements under Dutch Agency Law as to the form of the agency agreement in order for it to be valid and enforceable?

No.

B. Content of agency agreements

B.1 - RIGHTS AND OBLIGATIONS OF PRINCIPAL AND COMMERCIAL AGENT

Q7. The Directive (Art. 3) provides that a commercial agent has the following minimum obligations:

- to look after his principal's interests and to act dutifully and in good faith;
- to make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- to communicate to his principal all the necessary information available to him;
- to comply with reasonable instructions.

Are these minimum obligations provided for in Dutch Agency Law?

Yes. See Art. 7:445 paragraph 1 DCC in conjunction with Art. 7:401 – 7:403 DCC.

Please note that under Dutch agency law, the commercial agent must be independent. As a consequence, the obligation for the commercial agent to comply with reasonable instructions of the principal is limited to instructions necessary to comply with the objective of the agency agreement. The instructions may not undermine the independence of the commercial agent.

Q8. Does Dutch Agency Law explicitly impose any other obligations on the commercial agent that go beyond the aforesaid minimum?

No.

Q9. Does Dutch Agency Law provide that a commercial agent may appoint sub-agents?

Yes. Dutch Agency Law does not prohibit the appointment of sub-agents. Therefore, it is, in principle, allowed to appoint sub-agents. However, the agent will be liable for the appointed sub-agents (see Art. 6:76 DCC). Such liability shall not apply if the agent and the principal have explicitly agreed that a specific third party (i.e. sub-agent) will carry out the performance of the agreement.

Q10. The Directive (Art. 4) provides that a principal has the following minimum obligations:

- to act dutifully and in good faith;
- to provide his commercial agent with the necessary documentation relating to the goods concerned;
- to obtain the information necessary for the performance of the agency agreement;
- to notify the commercial agent within a reasonable period once he anticipates that the volume of commercial

transactions will be significantly lower than that which the commercial agent could normally have expected;

- to inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

Are these minimum obligations provided for in Dutch Agency Law?

Yes. See Art. 7:430 DCC.

Q11. Does Dutch Agency Law explicitly impose any other obligations on the principal that go beyond the aforesaid minimum?

Yes. Art. 7:430, paragraph 3, DCC states that the principal has the duty to notify the agent *immediately* if he foresees that agreements with third parties will or may be concluded to a far lesser degree than the agent was entitled to expect. This obligation to inform the commercial agent goes beyond the minimum as the directive states that the principal has to inform the agent *within a reasonable period*.

B.2 - LEVEL AND CALCULATION BASIS OF RENUMERATION

Q12. Are there mandatory rules under Dutch Agency Law that limit the freedom of the parties to fix the level of the remuneration of the commercial agent?

Yes. For the application of the Dutch Agency Law, the commercial agent has to receive a (partly) variable remuneration. It is not sufficient that the parties have agreed a fixed remuneration (only). However, Dutch case law is ambiguous to what extent a remuneration can be variable.

On the one hand, the Court of appeal of Amsterdam has ruled that it is distinctive that the commercial agent receives only a remuneration if and to the extent that an agreement between the principal and the third party is concluded as a result of these intermediary activities (ECLI:NL:GHAMS:2015:3847). In other words, only a variable remuneration.

On the other hand, the Court of appeal of 's-Hertogenbosch ruled that an agreement is an agency agreement in cases where there is both a variable and a fixed remuneration agreed between the parties. In that case, the Court of appeal stated that it is implied in Art. 6 of the Directive that the fact that part of the remuneration is not based on commission, does not preclude an agreement from being an agency agreement (ECLI:NL:GHSHE:2017:5386).

Q13. The Directive (Art. 6(1)) provides that, in the absence of an agreement on the level of the remuneration, the commercial agent is entitled to the remuneration that is customarily allowed in the place where he carries on his activities and, in the absence of such customary practice, to a reasonable remuneration taking into account all the aspects of the transaction. Do these principles also represent the default regime under Dutch Agency Law?

Yes. See Art. 7:405, paragraph 2, DCC.

Q14. The Directive (Art. 6(2)) provides that any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission. Does this principle also represent the regime under Dutch Agency Law?

Yes. Dutch agency law is based on a broad concept of commission, which must be interpreted in accordance with the Directive.

Q15. Does Dutch Agency Law impose any criteria with regard to the type of the agent's remuneration (i.e. fixed amount or commission)?

No.

Q16. Does Dutch Agency Law impose any criteria with regard to the calculation of the agent's remuneration?

No.

B.3 - REMUNERATION BY MEANS OF A COMMISSION (DURING AGENCY AGREEMENT)

Q17. According to the Directive (Art. 7(1)) a commercial agent is entitled to a commission during the period covered by the agency agreement:

- where the transaction has been concluded as a result of his action; or
- where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Are both cases reflected in Dutch Agency Law?

Yes. See Art. 7:431, paragraph 1, DCC.

Q18. The Directive (Art. 7(2)) provides for an additional case of entitlement to a commission and has left it to the Member States to choose between two options:

- Option 1: the transaction is entered into with a customer belonging to a specific geographic area or group of customers entrusted to the commercial agent; or
- Option 2: the transaction is entered into with a customer belonging to a specific geographical area or group of customers in respect of which the commercial agent enjoys exclusive rights.

Which option has been retained in Dutch Agency Law?

Option 2. See Art. 7:431, paragraph 1 under c, DCC. Please note that, because of the word 'unless', there is a presumption of an exclusive right if the commercial agent has been allocated a certain group of persons or a certain territory.

B.4 - RENUMERATION BY MEANS OF COMMISSION (AFTER TERMINATION OF AGENCY AGREEMENT)

Q19. According to the Directive (Art. 8) a commercial agent is entitled to a commission after the agency agreement has terminated if:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and if the transaction was entered into within a reasonable period after that agreement terminated; or
- the order of the third party reached the principal or the commercial agent before the agency terminated and the conditions applicable to entitlement during the term of the agency are met.

Are both cases reflected in Dutch Agency Law?

Yes. See Art. 7:431, paragraph 2, DCC.

Q20. Are there any additional cases provided for in Dutch Agency Law?

No.

Q21. According to the Directive (Art. 9) a commercial agent is not entitled to the commission, if that commission is payable, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents. Do these principles also represent the regime under Dutch Agency Law?

Yes. See Art. 7:431, paragraph 3, DCC.

Q22. According to the Directive (Art. 10(1)) the commission shall become due as soon as and to the extent that one of the following circumstances obtains:

- the principal has executed the transaction; or
- the principal should, according to his agreement with the third party, have executed the transaction; or
- the third party has executed the transaction.

Are these circumstances reflected in Dutch Agency Law?

No. Dutch Agency law deviates from the Directive. The Directive takes the execution of the agreement as the point that the commission shall become due, whereas the Dutch Agency Law provides the commercial agent with more protection as the commission becomes due earlier.

See Art. 7:432 DCC:

1. If the involvement of the agent has been limited to the provision of intermediary services which enable the

principal to conclude agreements with third parties himself, then the order of the third party, as offered by the agent to his principal, is presumed to have been accepted by the principal, as far as it concerns the right to commission as referred to in Art. 7:426, at the moment that the principal has received it, unless the principal has notified the agent within a reasonable period meant in Art. 7:430, paragraph 4, that he rejects the order or accepts it under reservation. Where the commercial agency agreement does not indicate which period is reasonable for this purpose, this period shall be one month from the moment on which the order has been offered to the principal.

2. A stipulation making the right to commission dependent on the implementation (performance) of the agreement between the principal and a third party, must be made explicitly.

3. Where a stipulation as meant in paragraph 2 has been made, the right to commission arises no later than the moment on which the third party has performed his part of the agreement or would have done so if the principal had performed his part of the agreement in time.

Q23. Are there any additional circumstances provided for in Dutch Agency Law?

Yes. See answer to Q22.

Q24. The Directive (Art. 10(2)) provides that the commission shall be due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have. Does Dutch Agency Law apply the same deadline?

Yes. See Art. 7:432, paragraph 3, DCC.

Q25. The Directive (Art. 10(3)) provides that the commission needs to be paid no later than on the last day of the month following the quarter in which it became due. Does Dutch Agency Law apply the same deadline?

Yes. See Art. 7:434 DCC, in conjunction with Art. 7:433 DCC.

Q26. The Directive (Art. 10(4)) stipulates that parties cannot by agreement derogate from the principles included in Art. 10(2) and 10(3) to the detriment of the commercial agent. Does Dutch Agency Law impose the same restriction on the parties?

Yes. See Art. 7:445 DCC.

Q27. According to the Directive (Art. 11(1)) the right to commission can be extinguished only if and to the extent that:

- it is established that the agreement between the third party and the principal will not be executed; and
- that fact is due to a reason for which the principal is not to blame.

Does Dutch Agency Law impose these cumulative conditions?

Yes. See Art. 7:426, paragraph 2, DCC in conjunction with Art. 7:445, paragraph 1, DCC.

Q28. Does Dutch Agency Law allow for other cases where the agent's entitlement to commission is extinguished?

No.

Q29. According to the Directive (Art. 11(2)) any commission which the commercial agent has already received must be refunded in case the right to it is extinguished. Does Dutch Agency Law also provide for such an obligation of restitution?

Yes. See Art. 6:203 et seq. DCC.

Q30. The Directive (Art. 12(1)) provides that the principal must supply his commercial agent with a statement of the commission due. This statement must be supplied no later than the last day of the month following the quarter in which the commission has become due, and shall set out the main components used in calculating the amount of the commission. Do these principles also represent the default regime under Dutch Agency Law?

Yes. See Art. 7:433, paragraph 1, DCC. Please note that under Dutch law, the statement must be supplied before the end of the next month. Parties may agree in writing that the overview is handed over every two or three months. Hence, the Dutch Agency Law deviates from the Directive in favour of the commercial agent.

Q31. Does Dutch Agency Law impose that the parties cannot by agreement derogate from the principles included in Art. 12(1) of the Directive to the detriment of the commercial agent?

Yes. See Art. 7:445, paragraph 1, DCC and Art. 7:433, paragraph 1, DCC.

Q32. Does Dutch Agency Law impose any additional requirements with regard to the statement of the commission due?

Yes. See answer to Q30.

Q33. The Directive (Art. 12(2)) entitles the commercial agent to demand to be provided with all the information, and in particular an extract from the books, which he needs to check the amount of the commission due to him. Does Dutch Agency Law grant the commercial agent the same right?

Yes. See Art. 7:433, paragraph 2-4, DCC.

Q34. Does Dutch Agency Law broaden this right to information of the commercial agent?

No.

Q35. Does Dutch Agency Law impose any criteria with regard to the calculation of the commission?

Yes. See Art. 7:435, paragraph 2, DCC: The amount of the commission earned in the preceding time and all other factors to be considered, like the costs which the agent has saved because he did not have to work, shall be taken into account in determining the remuneration meant in the previous paragraph.

Q36. Do specific rules and/or restrictions apply to:

- non-solicitation clauses;
- minimum sales quota;
- specific sectors?

Specific sectors. The Dutch Agency Law does not apply to a commercial agency agreement to which the Financial Supervision Act applies (see Art. 7:428, paragraph 3 DCC).

B.5 - NON-COMPETE CLAUSE

Q37. The Directive (Art. 20(2)) provides that a non-compete clause shall only be valid if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by the agency agreement.

Does Dutch Agency Law impose these cumulative criteria?

Yes. See Art. 7:443, paragraph 1, DCC.

Q38. Does Dutch Agency Law impose any additional criteria in order for a non-compete clause to be valid?

No.

Q39. The Directive (Art. 20(3)) provides that a non-compete clause shall be valid for not more than 2 years after termination of the agency agreement. Does the same maximum period apply under Dutch Agency Law?

Yes. See Art. 7:443, paragraph 2, DCC.

Q40. The Directive (Art. 20(4)) provides that national law may impose other restrictions:

- on the validity or enforceability of non-compete clauses, or
- which enable the courts to reduce the obligations on the principal or the commercial agent.

Does Dutch Agency Law impose any such restrictions?

Yes, Dutch Agency Law imposes restrictions which enable the courts to reduce the obligations on the principal or the commercial agent. See Art. 7:443, paragraph 4, DCC: The court may, upon demand of the agent, nullify such a clause in full or in part on the ground that it is unfairly disadvantageous for the agent in proportion to the interests of the principal that it intends to protect.

Q41. Does Dutch Agency Law provide any criteria with regard to the calculation method of the indemnification in case of a violation of the non-compete clause?

No.

B.6 - LIABILITY

Q42. Under Dutch Agency Law, can the parties agree that the commercial agent shall be liable (in whole or in part) for the breach of third party-customers with whom he/she has negotiated and/or concluded an agreement on behalf of the principal, by including a so-called del credere clause?

Yes. See Art. 7:429 DCC.

Q43. If yes, are such clauses subject to certain rules and/or restrictions?

Yes. A del credere clause must be agreed in writing (Art. 7:429, paragraph 1, DCC in conjunction with Art. 7:445, paragraph 1, DCC). The liability as agreed in a del credere clause is limited to the solvency of the third party, unless agreed otherwise in writing (Art. 7:429, paragraph 2, DCC). However, the commercial agent cannot make himself liable for a higher amount than the agreed commission, unless the del credere clause is related to a specific agreement or to agreements which the agent has concluded in the name of the principle (Art. 7:429, paragraph 3, DCC). Finally, the court may cut down the amount for which the agent is liable in case of an apparent disproportion between the risk which the agent has imposed upon himself and the stipulated commission (Art. 7:429, paragraph 4, DCC).

Q44. Are there liability-related clauses that must be mandatorily included in agency agreements?

No.

C. Term and termination

C.1 - TERM

Q45. According to the Directive (Art. 14) an agency agreement for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency agreement for an indefinite period. Does this principle also represent the default regime under Dutch Agency Law?

Yes. See Art. 7:436 DCC.

Q46. Does Dutch Agency Law contain particular rules and/or restrictions in relation to the term (incl. renewal) of agency agreements?

No.

C.2 - TERMINATION BY NOTICE

Q47. According to the Directive (Art. 15(1)) an agency agreement that is concluded for an indefinite period may by either party be terminated by notice. Does this principle also represent the regime under Dutch Agency Law?

Yes. See Art. 7:437 DCC.

Q48. According to the Directive (Art. 15(2)) the notice period is 1 month for the first year, 2 months for the second year commenced, and 3 months for the third year commenced and subsequent years. Do these notice periods also represent the regime under Dutch Agency Law?

Yes. See Art. 7:437, paragraph 2 DCC.

Q49. According to the Directive (Art. 15(3)) the notice period for the fourth, fifth and sixth year and subsequent years may be respectively 4, 5 and 6 months. Do these notice periods also represent the regime under Dutch Agency Law?

No. Dutch law has chosen for a slightly different notice period. See Art. 7:437, paragraph 1, DCC: If the commercial agency agreement has been entered into for an indefinite term or for a fixed term under the right of premature termination, then each of the parties is entitled to terminate the agreement with due observance of the agreed term of notice. When the commercial agency agreement does not provide an agreed term of notice, the term of notice will be four months, extended by one month when the agreement has been effective for three years and extended by two months after six years.

Q50. If yes, can the parties agree to a shorter notice period?

Yes. Parties can agree to a shorter notice period in derogation from Art. 7:437, paragraph 1, DCC. However, parties may not deviate from the notice period as stated in Art. 7:437, paragraph 2, DCC (i.e. the term of notice cannot be shorter than one month in the first year of the agreement, two months in the second year and three months in the next years. If parties agree upon longer periods, then the term of notice which the principal has to observe may not be shorter than the term of notice that is to be observed by the agent). See Art. 7:445, paragraph 1, DCC in conjunction with Art. 7:437, paragraph 2 DCC.

Q51. According to Dutch Agency Law, if no notice period has been agreed, is there a notice period that always applies irrespective of the duration of the agency agreement?

Yes. See Art. 7:437, paragraph 1 and 2, DCC. If the commercial agency agreement does not provide an agreed term of notice, the term of notice will be four months, extended by one month when the agreement has been effective for three years and extended by two months after six years (Art. 7:437, paragraph 1, DCC).

Q52. According to the Directive (Art. 15(4)), if a principal and commercial agent agree on longer notice periods than those laid down in Art. 15(2) and (3) of the Directive, the notice period to be respected by the principal must not be shorter than that to be observed by the commercial agent. Does the same default regime apply under Dutch Agency Law?

Yes. See Art. 7:437, paragraph 2, DCC.

Q53. According to the Directive (Art. 15(5)), unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month. Does the same default regime apply under Dutch Agency Law?

Yes. See Art. 7:437, paragraph 3, DCC.

Q54. Does Dutch Agency Law provide how the termination notice must be notified to the other party?

No.

Q55. According to the Directive (Art. 15(6)), the answers to questions 47 to 53 also apply to agency agreements having a fixed term if they are converted to agency agreements having an indefinite term due to the continuation of the agreement beyond the fixed term, provided that the earlier fixed period must be taken into account in the calculation of the notice period. Does the same default regime apply to agency agreements having a fixed term under Dutch Agency Law?

Yes. See Art. 7:437, paragraph 1, DCC in conjunction with Art. 7:436 DCC.

C.3 - TERMINATION FOR CAUSE

Q56. According to the Directive (Art. 16) an agency agreement may immediately be terminated:

- because of the failure of one party to carry out all or part of his obligations; or
- where exceptional circumstances arise.

Are both termination grounds reflected in Dutch Agency Law?

Yes. See Art. 7:439, paragraph 1 and 2, DCC. Each party may terminate the commercial agency agreement for compelling reasons of which the opposite party has been notified immediately. Compelling reasons are circumstances of such a nature that the party who has terminated the agreement reasonably could not be expected to continue it, not even temporarily. Please note that whether a failure to carry out parts of his obligations results in compelling reasons for termination, depends on the circumstances of the case.

Q57. Are there additional termination grounds provided in Dutch Agency Law?

Yes. As the 'compelling reason' as mentioned in the previous question is a broad term, additional grounds to terminate the commercial agency agreement may be possible.

Q58. Does Dutch Agency Law provide that the parties may not derogate from the regime on termination for cause to the detriment of the commercial agent before the agency agreement is terminated?

Yes. See Art. 7:445, paragraph 1, DCC.

Q59. Is it possible to terminate the agency agreement based on certain grounds for termination (breach or other) included in the agency agreement?

Yes. Please note that it is not allowed to include in the agency agreement a stipulation which leaves the decision whether a compelling reason exists to one of the parties (Art. 7:439, paragraph 4, DCC).

Q60. If yes, is prior judicial intervention required in order for the termination of the agreement to take effect?

No.

Q61. Are there any other particular rules and/or restrictions as regards the termination of the agency agreement (e.g. trial period, etc.)?

Yes. The agency agreement will end when the agent dies (Art. 7:438, paragraph 1, DCC).

C.4 - INDEMNIFICATION

Q62. The Directive (Art. 17(2)(a)) provides that the commercial agent is entitled to an indemnification if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. Does Dutch Agency Law provide for this criterion?

Yes. See Art. 7:442, paragraph 1 under a, DCC.

Q63. The Directive (Art. 17(2)(a)) also provides that the commercial agent is entitled to an indemnification if and to the extent that the payment of this indemnification is equitable having regard to all circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Does Dutch Agency Law provide for this criterion?

Yes. See Art. 7:442, paragraph 1 under b, DCC.

Q64. Is under Dutch Agency Law the application of a non-compete clause a circumstance on the basis of which the commercial agent is presumed to be entitled to an indemnification (cfr. Art. 17(2)(a), second indent of the Directive)?

No.

Q65. Other than the criteria set forth in Art. 17(2)(a) of the Directive, are there any specific rules or precedents derived from Dutch case law on the basis of which the indemnification is calculated?

Yes.

The rules regarding the calculation of the indemnification are set out in Dutch case law (ECLI:NL:HR:2012:BW9865). For the calculation of the indemnification, three phases can be distinguished:

1. quantify the benefits that the principal derived from the customer relations that were established or strengthened by the commercial agent;
2. assess whether, in the light of fairness and all the circumstances of the case, there are grounds for adjusting

the amount that is determined in the first phase (for instance the commission lost by the commercial agent);

3. assess whether the amount of the first two phases does not exceed the maximum amount as set out in Art. 7:442, paragraph 2, DCC. This maximum amount is equal to the commercial agent's remuneration for one year, based on an average of the last five years.

Please note that to be eligible for indemnification, the commercial agent must first of all make it plausible (i) that the commercial agent has brought customers to the principal, or has significantly expanded agreements with existing customers, and (ii) that the agreements with these customers will continue to provide substantial benefits to the principal after the agency agreement has ended (ECLI:NL:HR:2017:935).

Q66. The Directive (Art. 17(2)(b)) provides that the amount of the indemnification may not exceed a figure equivalent to an indemnification for 1 year calculated from the commercial agent's average annual remuneration over the preceding 5 years, and if the agreement goes back less than 5 years the indemnification shall be calculated on the average for the period in question. Does the same regime apply under Dutch Agency Law?

Yes. See Art. 7:442, paragraph 2, DCC.

Q67. According to the Directive (Art. 18), indemnification or compensation for damage is not payable where

- the principal has terminated the agency agreement because of default attributable to the commercial agent which would justify immediate termination of the agency agreement;
- the commercial agent has terminated the agency agreement, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he/she cannot reasonably be required to continue his/her activities; and/or
- with the agreement of the principal, the commercial agent assigns his rights and obligations under the agency agreement to another person.

Do these principles also represent the default regime under Dutch Agency Law?

Yes. See Art. 7:442, paragraph 4, DCC.

Q68. According to the Directive (Art. 17(5)), a commercial agent may lose his/her entitlement to the indemnification or compensation for damage if within 1 year following termination of the agency agreement he/she has not notified the principal of his/her intention to pursue the entitlement. Does this principle also represent the default regime under Dutch Agency Law?

Yes. See Art. 7:442, paragraph 3, DCC.

C.5 - ADDITIONAL COMPENSATION

Q69. The Directive (Art. 17(2)(c)) provides that the commercial agent, in addition to the indemnification, is entitled

to seek damages for breach of contract, failing to respect the notice period, etc. Does the same regime apply under Dutch Agency Law?

Yes. See Art. 7:442, paragraph 1, DCC.

Q70. If yes, do specific rules and/or restrictions apply to the damage that can be compensated in addition to the indemnification under Art. 17(2) of the Directive?

No. No specific rules and/or restrictions apply to the damage that can be compensated in addition to the indemnification. However, it is a general rule under Dutch law that only the damage suffered is eligible for compensation. The right to compensation is not punitive in nature.

Q71. The Directive (Art. 17(3)) provides that the commercial agent is entitled to compensation for damage suffered as a result of the termination of the agency agreement. Does the same default regime apply under Dutch Agency Law?

Yes. See Art. 7:442, paragraph 1, DCC.

Q72. According to the Directive (Art. 17(3)) such damages shall be deemed to occur particularly when the termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency agreement would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities; and/or
- which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency agreement on the principal's advice.

Does Dutch Agency Law take the same circumstances into account?

Yes. See Art. 7:442, paragraph 1, DCC.

Q73. Are there any other specific rules or precedents, than the criteria set forth in Art. 17(3) of the Directive, derived from case law on the basis of which the compensation is calculated?

No.

Q74. The Directive (Art. 17(4)) provides that a commercial agent is entitled to indemnification or compensation for damage where the agency agreement is terminated as a result of the commercial agent's death. Is this default entitlement available under Dutch Agency Law?

Yes.

Q75. The Directive (Art. 19) stipulates that the parties may not derogate from Art.17 and 18 to the detriment of the commercial agent before the agency expires. Does Dutch Agency Law impose the same restriction on the

parties?

Yes. See Art. 7:445, paragraph 2, DCC.

Q76. Are the parties under Dutch Agency Law free to opt for either indemnification or compensation?

Yes. See Art. 7:441, paragraph 3, DCC.

Q77. Must the commercial agent under Dutch Agency Law claim the indemnification or compensation within a certain period of time after termination of the agency agreement?

Yes. See Art. 7:442, paragraph 3, DCC: The right to goodwill compensation ceases to exist if the agent has not notified the principal within one year after the end of the commercial agency agreement that he claims this compensation.

In addition, see Art. 7:444 DCC: A right of action based on Art. 7:439 or 7:440 becomes prescribed one year after the fact that gave rise to it has occurred.

Q78. Are there other specific rules with respect to compensation or indemnification following the termination of the agency agreement?

No. See Art. 7:441, paragraph 1, DCC: The party who is liable pursuant to Art. 7:439 or 7:440, paragraph 2, has to pay to the opposite party an amount equal to the commission and possible remuneration for the period that the agreement would have been continued if it would have been ended in a regular manner. The commission earned in the preceding time and all other factors to be considered shall be taken into account in determining this amount.

Part 5: Dispute resolution

Q79. Do any specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction under Dutch Agency Law?

No. No specific rules and/or restrictions apply as regards to the choice of forum and/or jurisdiction under Dutch Agency law. However, please be aware that it is apparent from case law of the Court of Justice (ECLI:EU:C:2000:605) that a commercial agent working within the EU must be able to claim the protection of the Directive. This means, among others, that the right of the commercial agent to claim a remuneration cannot be excluded by a choice of law of a non-Member State.

Q80. Can the parties opt for arbitration?

Yes.

Q81. If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in agency

agreements?

No.

Q82. Does Dutch Agency Law provide for a statute of limitations that is applicable to claims regarding the performance of agency agreements?

Yes. See Art. 7:444 DCC: A right of action based on Art. 7:439 or 7:440 becomes prescribed one year after the fact that gave rise to it has occurred.