

Países Bajos - Holanda:

Información aportada por la Sección Económica y Comercial de la Embajada Argentina en LA HAYA.

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Legislación:

By the act of 6 July 1989, S312, the Dutch Commercial Code was amended to conform to the EEC directive concerning independent commercial agents. Thereby it was laid down that as from 1 January 1994 said act would be applicable to agency agreements concluded prior to 1 November 1989.

By the act of 27 May 1993 (most of) the provisions concerning the agency agreement previously laid down in the Dutch Commercial Code were moved to section 5 of part 7 Book 7 of the Dutch Civil Code.

It should be borne in mind that a number of provisions are laid down in section 1 of part 7 and section 3 of part 7 Book 7 of the Dutch Civil Code.

Section 7.7.4 Commercial agency agreement

Article 7:428 Definition of 'commercial agency agreement'

- 1. 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 contracts to be concluded by the principal with third persons and, where appropriate, to conclude such contracts 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.
- 2. The statutory provisions of the present Section (Section 7.7.4) do not apply to a commercial agency agreement to which the Financial Supervision Act*) applies.
- 3. Each of the parties to a commercial agency agreement is, upon the request of the other party, obliged to cooperate in drawing up a signed written contract of their agreement reflecting its content at that moment.

*) The Financial Supervision Act is applicable to agreements under which intermediary services are provided related to:

- a. all activities carried out in the course of a profession or business focused on concluding as a middleman a contract regarding a financial product other than a financial instrument, credit or insurance between a consumer and an offeror;
- b. all activities carried out in the course of a profession or business focused on concluding as a middleman a contract regarding credit between a consumer and an offeror or on assisting in the administration and performance of such a contract; or
- c. all activities carried out in the course of a profession or business focused on concluding as a middleman an insurance between a client and an insurer or on assisting in the administration and performance of such an insurance;

Article 7:429 Liability of the agent

- 1. The agent can only make himself liable towards a third person for obligations, arising from the agreement arranged or concluded for or on behalf of the principal, by means of a written declaration of this content.
- 2. Unless agreed otherwise in writing, the agent who operates under a 'del credere clause'*) shall only be liable for the solvency of the third person.
- 3. The agent meant in the previous paragraph cannot make himself liable for a higher amount than the agreed commission, unless the del credere clause is related to a specific contract or to contracts which the agent has concluded in the name of the principle.
- 4. If there is an apparent disproportion between the risk which the agent has imposed upon himself and the stipulated commission, then the court may cut down the amount for which the agent is liable, as far as this amount exceeds the commission. The court takes into account all circumstances, in particular the way in which the agent has looked after the interests of the principal.

*) A 'del credere clause' is a stipulation in the commercial agency agreement in which the agent guarantees towards the principal that third persons, who will enter into contracts with the principal that have been arranged by the agent or with whom the agent will enter into contracts in the name and on behalf of the principal, shall duly perform those contracts ('del credere agency').

Article 7:430 Caring duty of the principal

- 1. The principal must do everything what, in the circumstances, is required from his side to enable the agent to perform his work.
- 2. The principal must provide the agent with the necessary documentation about the goods and services with regard to which the agent performs intermediary services and provide him with all information that is required for the performance of the commercial agency agreement.
- 3. The principal has the duty to notify the agent immediately if he foresees that contracts with third parties will or may be concluded to a far less degree than the agent was allowed to expect.
- 4. The principal must inform the agent within a reasonable period of his acceptance or rejection or of the non-implementation (non-performance) of a contract which has been put forward by the agent.

Article 7:431 Commission (fee)

- 1. The agent is entitled to a commission for all the contracts concluded with third persons throughout the duration of the commercial agency agreement:
 - a. if the contract has been concluded as a result of his intermediation;
 - b. if the contract has been concluded with someone whom he already had put forward at an earlier stage for the conclusion of a similar contract;
 - c. if the contract has been concluded with someone who belongs to a group of customers (clientele) assigned to him or who is seated in the territory that is assigned to him, unless it has explicitly been agreed that he has not the exclusive right with respect to that group of customers or territory.
- 2. The agent is entitled to a commission for the preparation and arrangement of contracts which the principal has concluded with third persons after the commercial agency agreement has ended:
 - a. if the conclusion of such a contract is for the most part the result of activities which the agent has performed during the time that the commercial agency agreement still was

effective, provided that the contract has been concluded within a reasonable time after the end of the commercial agency agreement, or;

b. if the agent or principal has received, prior to the end of the commercial agency agreement, an order of the third person which is in accordance with the requirements specified in paragraph 1.

- 3. The agent is not entitled to a commission if this commission is indebted to his predecessor by virtue of paragraph 2, unless in the circumstances it is fair that the commission is divided between them both.

Article 7:432 Moment on which a right to commission (a remuneration) arises

- 1. If the involvement of the agent has been limited to the provision of intermediary services which enable the principal to conclude contracts with third persons himself, then the order of the third person, 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 Article 7:426, at the moment that the principal has received it, unless the principal has notified the agent within a reasonable period meant in Article 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 contract between the principal and a third person, 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 person has performed his part of the contract or would have done so if the principal had performed his part of the contract in time.

Article 7:433 Overview of the calculated commission

- 1. After each month the principal must hand over to the agent a written overview of the commission indebted over that month, including the data upon which his calculation is based; this overview must be handed over before the end of the next month. Parties may agree in writing that the overview is handed over every two or three months.

- 2. The agent has the right to inspect the necessary evidence in possession of the principal, but he is not entitled to take it with him. He may, at his own expense, call in the assistance of an expert who has been accepted as such by the principal or, if rejected, who has been appointed, upon the request of the agent, by the provisional relief judge of the District Court.

- 3. Parties may agree in writing that the evidence is inspected by a third party; if this third party does not perform his work, then the provisional relief judge of the District Court shall appoint a substitute.

- 4. When the principal presents the evidence, the agent and the persons mentioned in the previous paragraphs are bound by a duty of confidentiality. The persons mentioned in the previous paragraphs, however, are not compelled to keep their confidentiality in their relation to the agent as far as it concerns the data meant in paragraph 1.

Article 434 Moment on which the commission (remuneration) becomes due and demandable

The commission will, at the latest, be due and demandable at the moment on which the written overview, meant in Article 7:433, must be handed over to the agent.

Article 7:435 No commission, but another remuneration instead

- 1. The agent is entitled to a remuneration if he is prepared to comply with his obligations derived from the commercial agency agreement or if he already has complied with these obligations, but the principal has not made any use of the agent's services or he has made less use of these services than the agent normally was allowed to expect, unless this conduct of the principal is a result of circumstances for which he reasonably is not accountable.
- 2. The amount of the commission earned in the preceding time and all other to be considered factors, 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.

Article 7:436 Continuation of the commercial agency agreement after the expiry of a fixed term

A commercial agency agreement which is continued by both parties after the expiry of the fixed period for which it was entered into, binds parties for an indefinite term under the same conditions.

Article 7:437 Termination of the commercial agency agreement

- 1. 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 by two months after six years.
- 2. 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.
- 3. The commercial agency agreement must be terminated at an effective termination date at the end of a calendar month.

Article 7:438 Death of the agent or principal

- 1. The commercial agency agreement ends when the agent dies.
- 2. At the death of the principal, both, his heirs and the agent, are entitled to end the commercial agency agreement with due observance of a term of notice of four months, provided that the notice of termination is given within a period of nine months after the principal has died. When the estate of the deceased principal is apportioned pursuant to Article 4:13 of the Civil Code [intestate succession], the right of the heirs meant in the previous sentence belongs to the deceased's spouse or registered partner.

Article 7:439 Unlawful termination (compelling reason)

- 1. The party who terminates the commercial agency agreement without respect for its duration or without observing the statutory or agreed term of notice and without the consent of the opposite party to do so, is liable for damages, unless the agreement was terminated for compelling reasons of which the opposite party has been notified immediately.
- 2. 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.

- 3. If the agreement has been terminated for compelling reasons due to circumstances for which the opposite party can be blamed, then the opposite party shall be liable for damages.
- 4. A stipulation which leaves the decision whether a compelling reason exists to one of the parties, is null and void.

Article 7:440 Dissolution of the commercial agency agreement

- 1. Each of the parties may request the Subdistrict Court to dissolve the commercial agency agreement on the basis of:
 - a. circumstances which produce a compelling reason in the sense of Article 7:439, paragraph 2;
 - b. a change in circumstances of such a nature that fairness requires that the agreement has to end without delay or on a short time.
- 2. When the Subdistrict Court dissolves the agreement on a circumstance producing a compelling reason as meant in paragraph 1, under point (a), and the defendant can be blamed for this circumstance, then he is liable for damages.
- 3. When the Subdistrict Court dissolves the agreement on the basis of what is specified in paragraph 1, under point (b), then it may grant a compensation to one of the parties. It may order that this compensation has to be paid in instalments.
- 4. Article 7:685, paragraph 5 up to and including paragraph 11, of the Civil Code [dissolution of an employment agreement] applies accordingly.

Article 7:441 Compensation for damages

- 1. The party who is liable pursuant to Article 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 to be considered factors shall be taken into account in determining this amount
- 2. The court may reduce this amount if it considers it to be too high in view of the circumstances.
- 3. Instead of the compensation meant in the preceding paragraphs, the injured party may also claim full compensation of the real damage, provided he proves its extent.

Article 7:442 Goodwill compensation

- 1. Irrespective of the right to claim a compensation for damages, the agent is entitled to a goodwill compensation at the end of the commercial agency agreement, as far as:
 - a. he has introduced new customers to the principal or he has considerably extended the number or value of the contracts with existing customers and, in both events, the contracts with these customers still produce considerable advantages for the principal, and;
 - b. the payment of this goodwill compensation is fair, in view of all circumstances, in particular of the lost commission from the contracts with these customers.
- 2. The amount of the goodwill compensation cannot exceed the commission and possible remuneration of one year, calculated to the average over the last five years of the commercial agency agreement or, if the agreement has lasted shorter, to the average of the whole duration of it.
- 3. 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.
- 4. The goodwill compensation is not due (indebted) if the agreement has been ended:

- a. by the principal under circumstances which make the agent liable pursuant to Article 7:439, paragraph 3;
- b. by the agent, unless this termination is justified by circumstances which can be attributed to the principal or is justified by the age, invalidity or sickness of the agent on the basis of which he reasonably cannot be expected to continue his activities;
- c. by the agent who has transferred, with approval of the principal, his contractual position under the commercial agency agreement to a third party.

Article 7:443 Non-competition obligation (restraint of trade clause)

- 1. A clause limiting the agent in his freedom to work after the end of the commercial agency agreement, is only valid insofar:

- a. it has been agreed in writing, and;
- b. it is related either to goods or services for which the agent was a representative and a specific territory or to a group of customers and a territory that was entrusted to him.

- 2. Such a clause is only valid for a maximum of two years after the end of the commercial agency agreement.

- 3. The principal can derive no rights from such a clause if the commercial agency agreement has ended:

- a. because the principal has terminated the commercial agency agreement without the consent of the agent and without respect for its duration or without observing the statutory or agreed term of notice and without the existence of a compelling reason of which the agent has been notified immediately;

- b. because the agent has terminated the commercial agency agreement for a compelling reason, of which the principal has been notified immediately and for which the principal can be blamed;

- c. by a court's judgment on the basis of circumstances for which the principal can be blamed.

- 4. 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.

Article 7:444 Prescription

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

Article 7:445 Mandatory law

- 1. It is not possible for parties to derogate from Articles 7:401, 7:402, 7:403, 7:426, paragraph 2, 7:428, paragraph 3, 7:429, 7:430, 7:431, paragraph 2, 7:432, paragraph 2, 7:433, 7:437, paragraph 2, 7:439, 7:440, 7:441, 7:443 and 7:444.

- 2. Neither is it possible to derogate to the disadvantage of the agent from Articles 7:432, paragraph 3, 7:434 and, as long as the commercial agency agreement has not yet ended, from Article 7:442.