

# The Agency Contract: THE NETHERLANDS



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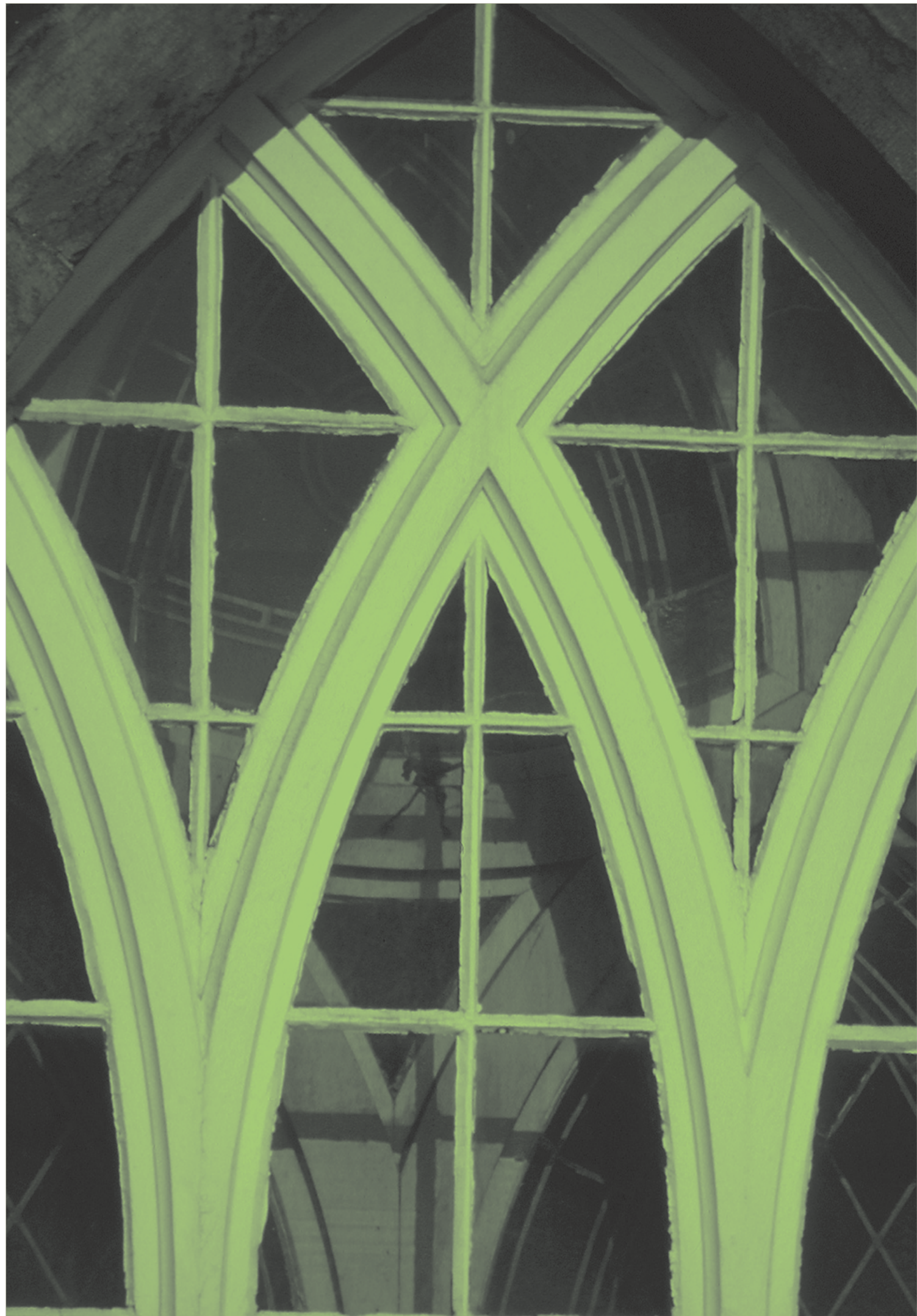
# 1 Introduction

## THE NETHERLANDS



The Dutch have traditionally been commercial travellers. In fact, there were regulations for the protection of commercial travellers and commercial agents long before the creation of the Benelux Agreement in 1977 on the agency agreement and the Directive on the coordination of the legislation of the member states with regard to independent commercial agents in 1986 (86/653/EEC). Since 1936 commercial agents and commercial travellers have been protected by the Dutch Commercial Code. Following the adaptation of this legislation to the Benelux Convention in 1973 and to the Benelux Agreement in 1977, the legislation on agencies was transferred to the Dutch Civil Code.

European community law is supranational for EU members, and consequently Directive 86/653/EEC has a direct effect in Dutch law. The incorporation of this directive in 1989 did not lead to any far-reaching changes in the national law for the Netherlands, as the directive was largely inspired by the Dutch legislation on agency agreements.



## 2 Applicable legislation

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### 2.1

The Dutch Supreme Court provided that according to the rules of private international law the relations between the principal and the commercial agent are governed by the law of the land where the agent is established, unless there are circumstances leading to points of contact with another country in such a way that the law of another country should govern the agreement.

### 2.2

If Dutch law applies, the regulations can be found in the Civil Code, book 7, section 4, Articles 428 to 445. Article 428 provides a definition of the Dutch agency agreement: an agency agreement is an agreement in which one party, the principal, instructs the other party, the commercial agent, to act as a mediator in the creation of agreements, and that party undertakes the obligation to do so for a specific period and for payment, and these agreements are concluded in the name and at the expense of the principal without being subordinate to him. No procedural requirements apply for entering into an agency agreement, and it can be agreed either verbally or in writing. However, the act does contain a provision (7:428, paragraph 3) which obliges each party to submit a document revealing the content of the agreement, at the request of the other party. The parties are free to determine the duration of the agreement; however, rules are imposed on its termination.

## 3 The Agent

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#### 3.1

If the content and the practical execution of the agreement lead to the conclusion that there is an agency, the rules of section 4 of book 7 of the Civil Code apply to the commercial agent. As Dutch law is not based on the identity of the party (the agent), but on the type of agreement (agency), it does not make any difference whether the agent is a natural person or a legal person. This is also expressed in Article 7:438 of the Civil Code, which states that the agency agreement is terminated upon the death of the agent.

#### 3.2

A number of legal obligations are imposed on the agent. The Civil Code provides that the agent must promote his principal's interests with due diligence. Amongst other things, this entails that he must carry out an examination into the solvency of the third party with which he is doing business. Furthermore, the agent is obliged to negotiate, and possibly to conclude the negotiated agreement. Finally, he is obliged to refrain from competitive activities in relation to the principal. His legal obligations do not go any further. However, the agent can assume liability for the obligations which arise for the third party from the agreement that was negotiated or concluded. This is the so-called decredere clause.

#### 3.3

The agent has the right to a commission as soon as an agreement is concluded through his negotiation, even if he did not conclude the agreement himself. If the agent is prepared to observe his obligations (or has already done so), but the principal does not make use of this, or does so to a significantly lesser than might be expected, the agent also has the right to payment.



## 4 The end of the agreement

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### 4.1

The agency agreement comes to an end with the expiry of the period for which it was entered into, with the termination of the agreement on the basis of mutual consultation, or if it is terminated by one party for 'urgent reasons'. These options will be discussed in more detail below.

### 4.2

Therefore the starting point is that the agreement is lawfully terminated upon the expiry of the period for which it was entered into. If the agency agreement is continued after the expiry of the period agreed upon between both parties, it is lawfully converted into an agreement for an indeterminate period under the same conditions.

An agency agreement for an indeterminate period, or for a specific period with the right of interim termination, can be terminated by either of the parties, taking into account the agreed period of notice. If no period of notice has been agreed, there is a legal period of notice of a minimum of four months. The legal period is five months if the agreement has lasted at least three years. After a duration of six years the period of notice is six months.

If the parties wish to come to an agreement about a period of notice, they must take into account the following minimum periods. The periods depend on the duration of the agreement in the follow-

ing way: one month after a duration of a maximum of one year; two months for a duration between one and two years and three months for the following years. If longer periods are agreed, these may not be shorter for the principal than for the commercial agent. Notice is given for the end of the calendar month.

### 4.3

The parties can terminate the agreement after mutual consultation at any time by means of a termination agreement. In addition, the agreement can be lawfully terminated by the entry into effect of an agreed-upon resolute condition, or as the result of the death of the commercial agent.

### 4.4

As already indicated, every agency agreement can be terminated with immediate effect if there is any question of an urgent reason. In that case the other party must be immediately informed of that reason. When is a reason an urgent reason? Urgent reasons are circumstances such that the party terminating the agreement cannot reasonably be required to continue the agreement (even temporarily). If the termination of the agreement for such reasons is based on circumstances for which the other party is at fault, the latter is liable for damages.

### 4.5

Urgent reasons for the principal could, for example, concern a declaration of bankruptcy of the commercial agency, the acceptance of bribes by the agent, or the violation of provisions in the contract which prohibit the agent from doing business on his own account or acting as a representative of competing companies.

### 4.6

For the commercial agent urgent reasons could concern the situation in which the principal has a second agent in the territory in which the agent has sole rights on the basis of the agreement, or the principal does not make use of the services of the agent or makes use of them to a significantly lesser extent than the agent could normally expect.



## 5 Compensation for damages and goodwill payment

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#### 5.1

In principle, a party which terminates an agency agreement without respecting its duration, or without observing the legal period of notice or the period of notice that was agreed upon, and without the other party's agreement to the termination, is liable for damages. However, it is not liable for damages if it terminates the agreement for an urgent reason of which the other party has been immediately informed. If the court has pronounced the dissolution of the agency agreement on the basis of a change in circumstances, and the defendant is at fault in this respect, he is also liable for damages.

#### 5.2

The party which has become liable for damages with regard to the termination owes the other party a sum equal to the payment for the time that the agreement would have continued if it had come to an end in a regular manner. In that case, there is a legally determined compensation for damages based in principle on the salary for the period of twelve months preceding the termination. If this does not lead to a desirable result, which could be the case, for example, if the agency is concerned with rare activities and there has not been a single transaction in the last year, other factors may also be important. Examples which spring to mind in this respect are expenses which have been saved, future developments, and the average number of transactions over a longer period prior to the termination.

## 5 Compensation for damages and goodwill payment

### 5.3

The court is competent to reduce the sum of the fixed compensation for damages if it appears to be too high, in view of the circumstances. On the other hand, if the beneficiary thinks that the sum is too low, he can claim the entire payment of his damages, instead of the fixed compensation for damages. In that case he is obliged to prove those damages.

### 5.4

In addition to the right to compensation for damages, the agent has the right to a so-called goodwill payment at the end of the agency agreement if his work has led to significant increases in turnover in the principal's company or to goodwill or an increase in goodwill. In that case there must be significant profit for the principal and the payment of the compensation must be fair. In this respect significant profit means that the agent has either extended the principal's clientele or has exploited this clientele to a greater extent than it was before his intervention. The increase in value of the company resulting from this must have a lasting character. The fairness of the payment relates to the size of the payment. This takes into account all the circumstances, in particular the commission that is lost from the agreements with these clients. For example, if it is established that the agent would not lose any commission, e.g., in connection with a relevant clause in the agreement, this could be an obstacle to awarding (complete) payment. The payment amounts to a maximum of one year's average commission, calculated over the last five years of the agreement.

There are a number of cases in which there is no right to a goodwill payment. In the first place, this applies if the agreement has been terminated under circumstances which make the agent liable for damages (urgent reasons). Secondly, if the agent has terminated the agreement, unless this termination is justified by circumstances which can be attributed to the principal or justified by the age, invalidity or sickness of the agent on the basis of which he cannot reasonably be expected to continue his activities. In the third place, if the agent transfers his position to a third party with the agreement of the principal.





## CONTACT

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