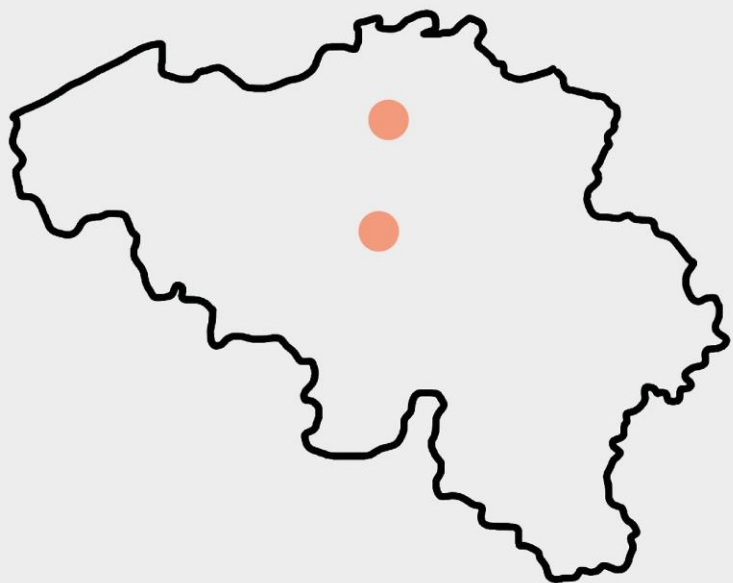


SCHOUPS

International Commercial Agency Contracts

20 January 2022





82 lawyers

26 staff

+30 seminars / webinars



Construction  
&  
Real Estate

Business Law

Public Law

Social Law







# International Commercial Agency Contracts



**Dave Mertens**

m. 0032 478 40 15 35

[Dave.Mertens@schoups.be](mailto:Dave.Mertens@schoups.be)

SCHOUPS

Antwerp

De Burburestraat 6-8 box 5  
2000 Antwerp

Brussels

Regentschapsstraat 58 box 8  
1000 Brussels

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60



## Content

- I. Commercial Agency
- II. Commercial Agency Directive
- III. Scope
- IV. Rights and Obligations
- V. Remuneration
- VI. Conclusion and termination
- VII. Indemnity or Compensation
- VIII. Restraint of Trade
- IX. Delcredere
- X. International Private Law



## Concept

- Negotiates sales and/or purchases
- *May* be authorized to conclude contracts
- If so authorized, *in the name and on behalf of the principal*
- “self-employed sale representative”  
(*handelsvertegenwoordiger/représentant de commerce*)
- *Durable* relationship with principal (“continuing authority”)
- *May* be exclusive
- <> e.g. advertising ‘agency’; estate ‘agent’; government agency; ...



## Commercial Agency and International Trade

- Advantage Principal:
    - Limiting risk
    - Limiting investment (development market & customer base)
    - Maintain control
      - E.g. pricing, network, customer base
        - cf. competition law restraints: “real” agents
    - EU Directive (minimal harmonisation – cf. infra)
- => Useful tool for international trade and entering new markets, also for Small and Medium Enterprises

BUT (mandatory) protection agent + only minimal harmonisation





### Directive 86/653

- Scope: “(...) *a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the ‘principal’, or to negotiate and conclude such transactions on behalf of and in the name of that principal.*”
  - NOT: officer (e.g. director) of company or association; partner who is authorized to commit his partners; a receiver, a liquidator or a trustee in bankruptcy
- *Ratio legis*: differences affect competition, are detrimental to protection of commercial agents + security of commercial transactions and inhibit contract between agent and principal in different Member States
- only sale/purchase of *goods*
- Focus on contractual terms (<> pre-contractual) and protection agent
- Minimal harmonisation



### Minimal harmonisation

- Only agents that negotiate the sale/purchase of goods
- Limit to a number of aspects:
  - Key rights and obligations
  - Right to commission
  - Termination
  - Indemnity (for goodwill) and compensation
  - Restraint of trade
- And not: precontractual; authority agent; subagents; delcredere; costs; grounds for immediate termination; impact of bankruptcy/insolvency; IP; applicable law; jurisdiction; arbitration; ...
- Allows Member States freedom of choice in a number of essential matters, such as:
  - cases of indirect commission
  - length of notice period
  - Compensation in lieu of notice
  - choice between indemnity or compensation
    - Combination possible?
  - amount of compensation and the role of 'equity'.



### Member States

- Belgium: Handelsagentuurwet 1995 (currently: Code Economic Law, Book X, Title 1)
- Germany: art. 84-92c HGB (“*Handelsvertreter*”)
- France: art. L-134-1 t/m 17 CC (“*Des agents commerciaux*”)
- The Netherlands: art. 428-445 Book 7 Civil Code
- UK: UK Commercial Agents Regulations 1993
- Luxembourg: Loi du 3 juin 1994 portant organisation des relations entre les agents commerciaux indépendants et leurs commettants et portant transposition de la directive du Conseil 86/653/CEE du 18 décembre 1986.
- Ireland: Commercial Agents Regulations 1994 en 1997
- Austria: Bundesgesetz über die Rechtsverhältnisse der selbständigen Handelsvertreter (Handelsvertretergesetz - HVertrG 1993)
- Spain: Ley 12/1992, de 27 de mayo, sobre Contrato de Agencia.
- ....





### N.B. Pre-contractual information

- Belgium: Title 2 Book X Code Economic Law (previously: Act of 19/12/05)
  - scope: franchising, BUT broader: “commercial partnership contract” and “commercial formula”.
  - Commercial agency not excluded, except banking and insurance
    - Criteria for application?
  - Extensive information obligation (art. X.27-X.28)
    - ✓ Draft agreement
    - ✓ Separate document : key clauses + information 1 month in advance (cooling-off)
    - ✓ sanction (art. X.30 WER): nullity
    - ✓ (overriding) mandatory provision (loi de police)
  
- Internationally?



## Directive

- **Artikel 2, 2 Directive:** *“For the purposes of this Directive, ‘commercial agent’ shall mean a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the ‘principal’, or to negotiate and conclude such transactions on behalf of and in the name of that principal.”*  
=> only GOODS



## Member States

- Belgium (“*zaken*” / “*affaires*” - art. I.11,1° CEL)
  - => Goods AND services
- Other Member States
  - Mostly : goods and services
    - ✓ E.g. Germany, France, Netherlands, Lux., Austria, Greece, Italy, Spain, Portugal
  - BUT quite often excluding (some) financial services
    - ✓ E.g. France, Netherlands, Lux.
  - Limited to goods
    - ✓ E.g. (UK), Ireland, Sweden, Finland





## Clause

*Subject to all terms and conditions of this Agreement, the Principal hereby appoints the Agent, which accepts, as its **non**-exclusive commercial agent for the promotion of, and solicitation of Customers for, the Products in the Territory.*

*The Agent shall not solicit any orders for the Products:*

- from any person outside the Territory; or*
- from any person in the Territory if the Agent knows or has reason to believe that the Products concerned will be resold outside the Territory.*



### Obligations Agent and Principal

- Article 3 Directive: a commercial agent must look after his principal's interests and act dutifully and in good faith, and must:
  - make proper efforts to negotiate and, where appropriate, conclude transactions;
  - communicate to his principal all the necessary information available to him;
  - comply with reasonable instructions given by his principal.
- Article 4 Directive: a principal must act dutifully and in good faith, and must
  - provide necessary documentation relating to the goods concerned;
  - obtain information necessary for the performance of the agency contract,
  - inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution
- Article 5 Directive: mandatory.



## Clause

*“The Agent shall use its best endeavours to promote and market the Products in the Territory and to seek orders for the Products in the Territory, and generally to assist the Principal in the sale of the Products in the Territory. The Agent shall not be entitled to sell or to enter into any negotiations or contracts for the sale of the Products on behalf of the Principal, or to bind the Principal in any way.”*





## Remuneration: anything goes?

- The rule: contractual freedom; “customary” or “reasonable” as default
- Exceptions (cf. Directive). If commission:
  - right during (art.7 Dir.; X.8, j. 10 CEL) and after (art.8 Dir.; X.9 CEL)
  - due (art.10 Dir.; X.11 CEL)
  - extinguished (art.11 Dir.; X.12 CEL)
  - calculation (art.6 Dir.; X.13,6 CEL)
- Mostly mandatory, but not all (e.g. calculation).
- Specific (Belgium): Unilateral change = breach/termination (X.13, 7 CEL)
  - Solutions?



## Clause

- *The Agent shall be entitled to a commission equal to [XXX] percent of the price (excl. VAT and other taxes and after any deductions, rebates or discounts) of all Products which, at any time during this Agreement, are sold by the Principal in the Territory to Customers, provided that such sale was concluded as a result of the Agent's actions.*
- *The Agent shall be entitled to the commissions set out under Schedule A during the first year of the Agreement. Parties shall agree on a new commission schedule one month before the end of each year.*



## Article 15 Directive

*“1. Where an agency contract is concluded for an indefinite period either party may terminate it by notice.”*

=> internationally generally accepted principle

*“2. The period of notice shall be one month for the first year of the contract, two months for the second year commenced, and three months for the third year commenced and subsequent years. The parties may not agree on shorter periods of notice.”*

*“3. Member States may fix the period of notice at four months for the fourth year of the contract, five months for the fifth year and six months for the sixth and subsequent years. They may decide that the parties may not agree to shorter periods.”*





## Member States

- **Belgium:** 1 month per year, with a maximum of 6 months. Parties may not agree on shorter period. (art.X.16, lid 2 CEL)
- **France:** 1-3 months (art. L134-11 CC)
- **Netherlands** (art. 7:437 Civil Code)
  - default : 4 (Y 1-3), 5 (4-5) to 6 (Y 6) months
  - minimum: 1-3 months
- **Germany:** 1-6 months (§89 HGB)
- **UK:** 1-3 months (art. 15 Regulations)
- **Lux.:** 1-6 months (art. 17)
- **Ireland:** 1-3 months (cf. Directive)
- **Austria:** 1-6 months (§21)



## Clause

*This Agreement shall be effective as per [●] and is concluded for an undetermined period of time.*

*Each party is entitled to terminate this Agreement at any time by giving written advance notice to the other Party.*

*The period of notice shall be one month for the first year of the contract, two months for the second year, three months for the third year, four months for the fourth year, five months for the fifth year and six months for the sixth and subsequent years.*



## Directive

- Two interpretations:
  1. Out of scope // national law
  2. Article 17 Dir.
    - §2, c) *The grant of such an indemnity shall not prevent the commercial agent from seeking damages.*
    - **OR** §3. *The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.*



## Member States

- **Belgium: fixed**
  - “(...) opzeggingsvergoeding te betalen die gelijk is aan de vergoeding die gebruikelijk is en overeenstemt hetzij met de duur van de opzeggingstermijn, hetzij met het resterende deel van die termijn (...)” (art.X.16§3 CEL)
  - NO increase/moderation cf. real damages?
    - ✓ .... Or maybe article X.19 CEL (cf. *infra*)?
- **Other Member States:**
  - fixed, but court may moderate or increase cf. real damages
    - ✓ E.g. Netherlands (art. 7:441 Civil Code); Lux. (art.24)
  - Compensation damages suffered
    - ✓ E.g. France (art. L134-12 CC); Germany: §89a (2); UK (art. 17 Regulations)



## Article 17 Directive

- Option between:
  - §2: indemnity (benefits) ('German' system)
  - §3: compensation (damages) ('French' system)
- Overlap:
  - §2 a) (benefits, but references to damages): 'equitable', cf. commissions lost.
  - §3 (damages, but references to benefits): "*depriving the commercial agent of the commission (...) whilst providing the principal with substantial benefits linked to the commercial agent's activities*"
- Relevance:
  - §2 b): max. one year of average remuneration.
  - §3: no limit, generally two years of remuneration [cf. Cass.(fr.)]
- Mandatory
  - Court of Justice 23 March 2006, nr. C-465/04, *Honyvem Informazioni*: contractual arrangement possible (only) if no less favourable in all cases
  - (Only) within EU?





## Belgium

- “German” system
  - Except “equitable”
- Indemnity for goodwill (*Uitwinningsvergoeding/indemnité d'éviction*):
  - New customer OR increase volume of business; AND
    - ✓ Impact existing customer base?
  - Principal MAY (‘kan’) derive substantial benefits (art.X.18, 1 CEL)
    - ✓ Cass. 15 May 2008: reasonable expectation (“*naar redelijke verwachting (...) hetgeen een zekere bestendigheid van bedoelde aanbreng of uitbreiding impliceert.*”)
- Max. 1 year of remuneration (art.X.18, 3 CEL)
- Additional compensation for actual damages (art.X.19 CEL)
  - CJ 3 December 2015: only other damages ... permitted
  - Cass. 27 May 2016: all other “damages” (subject to causal link) ?
  - Cass. 18 June 2021: only costs made by agent cf. contractual obligation or recommendation of the principal, and not cost made voluntarily and at own initiative.



## Other Member States

- **France:** compensation for damages (art. L134-12, lid 1 CC)
  - ✓ Case law [(Cass. (fr.))]: normally 2y of remuneration
- **Netherlands:** indemnity (benefits), if and insofar “equitable” (art. 442 Book 7 Civil Code)
- **Germany:** indemnity (benefits), „der Billigkeit entspricht.“ (§89b 1 HGB)
- **UK:** Hybrid system
  - The rule = compensation *cf.* art. 17, 3 Dir.
    - House of Lords (2007): *Lonsdale*: (market)value to buyer in given circumstances  
<-> French jurisprudence (2y)
  - Choice possible for indemnity *cf.* art. 17, 2 Dir. (art. 17 Commercial Agents Regulation 1993)
- **Lux.:** indemnity (benefits), if “équitable”, *cf.* loss commissions and non-compete (art. 19)
- **Ireland:** Compensation (damages) *cf.* art. 17 (3) Dir. (later addition)
- **Austria:** ‘German’ system (three conditions)



## Exceptions

- Article 18 Dir.: indemnity/compensation not payable:
  - a) principal terminated cf. default which would justify immediate termination under national law;
  - b) agent terminated, unless justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent;
  - c) agent assigns his rights and duties under the agency contract to another person..
- + loss of rights if within one year following termination not notified the principal.
- Belgium:
  - article X.18, 5-6 CEL
  - ! specific:
    - Expiry date (7 Working days) in case of termination based on material breach (art. X.17 WER)
    - Agent must claim within one year (art. X.24 WER)



## Article 20 Directive

- Not subject to competition law (in case of ‘real’ agents)
- A restraint of trade clause shall be valid only if and to the extent that:
  - it is concluded in writing; and
  - relates to the geographical area/group of customers entrusted
  - relates to the kind of goods covered by the agency.
  - Max. 2 y.

(only) further restrictions permitted



## Member States

- **Belgium** (art.X.18 CEL):
  - ✓ Max. 6 m.!
  - ✓ Sanction: null and void
  - ✓ Max. 1 y. penalty
  - ✓ Mitigation?
- **Netherlands** (art. 7:443 Civil Code)
  - ✓ Max. 2 y. geldig; sanction: mitigation
- **Lux.** (art. 26-27):
  - ✓ Max. 12 months; sanction: nullity or mitigation duration/penalty
- **Austria** (§ 25)
  - ✓ Prohibited





## Clause

*Unless authorized in advance in writing by the Principal, the Agent shall not promote, represent, manufacture, sell or offer for sale or distribute in the Territory or elsewhere (or be involved either directly or indirectly in the promotion, manufacturing, sale, offering for sale or distribution of) any products which in any way compete with the Products during this Agreement. A similar non-competition obligation shall apply for a period of six (6) months after the termination of this Agreement for whatever reason.*



## Belgium – article 23 CEL

*“De handelsagent kan zich voor verplichtingen die voor derden uit een door hem bemiddelde of afgesloten zaak voortvloeien **uitsluitend schriftelijk** aansprakelijk stellen.*

*Tenzij schriftelijk anders is overeengekomen, is de handelsagent krachtens een beding van **delcredere** slechts aansprakelijk voor de gegoedheid van de derde, met uitsluiting van iedere andere tekortkoming van deze in zijn contractuele verplichtingen. Het beding van delcredere kan geen zaak betreffen waarin de agent niet persoonlijk is opgetreden. Wanneer de principaal de leverings- of betalingsvoorwaarden zonder instemming van de agent wijzigt, houdt het op van toepassing te zijn.*

*De handelsagent kan zich niet aansprakelijk stellen voor een hoger bedrag dan de overeengekomen **commissie**, tenzij het beding betrekking heeft op een bepaalde zaak of op zaken die hij in naam van de principaal afsluit.*

*Indien er een **kennelijke wanverhouding** is tussen het risico dat de handelsagent op zich heeft genomen en de bedongen commissie, kan de rechter het bedrag waarvoor de handelsagent aansprakelijk is **verminderen** voor zover dit bedrag de commissie te boven gaat. De rechter houdt met alle omstandigheden rekening, in het bijzonder met de wijze waarop de handelsagent de belangen van de principaal heeft behartigd.”*



## Other Member States

- Several Member States
  - E.g. Netherlands (art. 7:429 Civil Code), Germany, Portugal, Poland
  - As a rule: in writing
- Some Member States: only specific contracts and/or del credere commission
  - E.g. Germany (§86b HGB)
- <-> Directive: not imposed, not excluded (cf. min. harmonisation)



## Jurisdiction – EEX-Regulation

- Choice of forum (art.25): restrictively; framework agreement ≠ sale contracts
- If no choice of forum
  - Domicile of defendant (art. 4)
  - Place of performance (art. 7)
    - agency = services (Gent 28 April 2004; Cass. (fr.) 03 October 2006; CJ 11 March 2010, Wood Floor)
    - primary place of performance (CJ 11 March 2010, Wood Floor)



## Applicable law – Rome I-Regulation

- Art. 3 : implicit or explicit choice of law
- Overriding mandatory provisions (art. 9)
  - = *provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*
  - court must apply lex fori (art. 9.2)
    - ? Commercial Agency Act
    - ! CJ *Unamar* (see further)
  - court may apply foreign law (art. 9.3)
    - (extremely) exceptional => relevance choice of forum !
- Public policy of the Forum (art. 21)
  - => NOT Commercial Agency Act





## Article X.25 CEL

- *“Onverminderd de toepassing van internationale verdragen die België heeft gesloten en niettegenstaande andersluidende bedingen in de handelsagentuurovereenkomst, is elke activiteit van een handelsagent met hoofdvestiging in België onderworpen aan de Belgische wet en behoort ze tot de bevoegdheid van de Belgische rechtbanken.”*
- < EEX-Vo ; < Rome I- Vo
- Self-limiting? (only mandatory for agent with main office in Belgium)?
- If so, express choice for Belgian Act necessary (default = common provisions)



## Clause

### *Governing Law and Jurisdiction*

- 1. This Agreement shall be governed by and interpreted according to the laws of Belgium, including the provisions of Book X, Title 1 (commercial agency agreements) Belgian Code Economic Law (Wetboek van economisch recht/Code de droit économique).*
- 2. In case of disputes arising hereunder, the Parties undertake to seriously pursue a reasonable amicable settlement. If notwithstanding such efforts, no amicable settlement can be reached, any dispute arising hereunder shall be settled under the exclusive jurisdiction of the Courts of the judicial district of Antwerp, Antwerp division.*



## International Arbitration

- New York Convention of 10 June 1958 : *lex contractus* or *lex fori*?
- Cass. 3 November 2011: no arbitration unless:
  - Main offices not in Belgium (cf. art.X.25 CEL); OR
  - Arbiters must apply Belgian law; OR
  - Equivalent protection.
- CJ 17 October 2013, nr. C-184/12, Unamar : “the law of a Member State which meets the minimum protection requirements (...) only if the court before which the case has been brought finds (...) that, in the course of that transposition, the legislature of the State of the forum held it to be crucial (..) to grant the commercial agent protection going beyond that provided for by that directive (...).”
  - Belgian case law: not Belgian Commercial Agency Act => equivalent protection
  - Quid national legislation limited to agents for the sale/purchase of goods (<> services)?
- Can case law be upheld ?
  - After Unamar?
  - After reform rules on arbitration?
  - In view of art. 9, 1 Rome I-Regulation (more restrictive than Rome Convention)



## Clause - Arbitration

*Any disputes arising out of or in relation with this Agreement shall be finally settled under the CEPANI Rules of Arbitration by one or more arbitrators appointed in accordance with those Rules.*

*The arbitral tribunal shall be composed of one arbitrator.*

*The seat of the arbitration shall be Antwerp.*

*The arbitration shall be conducted in the English language.*



Q&A

SCHOUPS

Antwerp

De Burburestraat 6-8 box 5  
2000 Antwerp

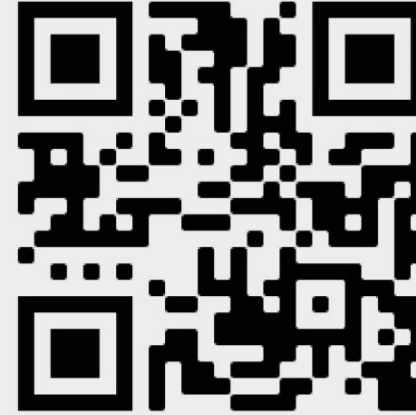
Brussels

Regentschapsstraat 58 box 8  
1000 Brussels

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60



seminars /  
webinars



[www.schoups.be/en/events](http://www.schoups.be/en/events)

SCHOUPS

Antwerp

De Burburestraat 6-8 box 5  
2000 Antwerp

Brussels

Regentschapsstraat 58 box 8  
1000 Brussels

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60

# Thank you for your attention



**Dave Mertens**

m. 0032 478 40 15 34

[Dave.Mertens@schoups.be](mailto:Dave.Mertens@schoups.be)

SCHOUPS

Antwerp

De Burburestraat 6-8 box 5  
2000 Antwerp

Brussels

Regentschapsstraat 58 box 8  
1000 Brussels

[www.schoups.com](http://www.schoups.com)  
t. +32 3 260 98 60