LEXOLOGY®
Getting The Deal Through

Distribution & Agency

in Netherlands

Report generated on 08 February 2021

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GOVERNING LAW AND CHOICE OF FORUM

UPDATE AND TRENDS

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Netherlands

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DIRECT DISTRIBUTION

Ownership structures

May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

A foreign supplier may establish its own entity to import and distribute its product in the Netherlands. Approval or permission by the relevant Dutch authorities may in some cases be required, depending on the sector and the products that the foreign suppliers wish to import and distribute.

For foreign businesses looking to expand, the Netherlands will generally prove to be a reliable and financially rewarding choice. According to the Forbes 'Best Countries for Business' ranking, the Netherlands is in the top five of the best countries for business worldwide, and in 2020, a record number of foreign companies choose to move their headquarters to the Netherlands.

The popularity of the Netherlands with foreign businesses is the result of several factors, including the strong business climate, favourable tax climate and strong focus on foreign trade, innovation, sustainability and digitalisation.

May a foreign supplier be a partial owner with a local company of the importer of its products?

A foreign supplier may be a partial owner with a company in the Netherlands of the importer of its products. A foreign supplier may also create a joint venture in the Netherlands with a local company and use that joint venture to import its products.

What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

A company with limited liability would be best suited for an importer owned by a foreign supplier. With a limited liability company, the shareholders' liability is limited to the equity investment in the case of bankruptcy.

The most common business entities in the Netherlands are both limited liability companies: the 'Besloten Vennootschap' (private limited company (BV)) and the 'Naamloze Vennootschap' (public limited company (NV)). Both entities have legal personality, issue shares and provide limited liability for their shareholders, and are governed by Book 2 of the Dutch Civil Code.

The main difference between NVs and BVs is that a BV can only issue registered shares, whereas an NV can issue both registered and (freely transferable) bearer shares. For this reason, only the shares of an NV can be listed on a stock exchange. Another important difference is the paid-in capital: a BV can be incorporated with a paid-in capital of only €0.01. The incorporation of a NV requires a paid-in capital of €45,000.

The Dutch BV in particular has proven to be an extremely popular option with foreign businesses expanding to the Netherlands, due to the (extremely) low minimal capital requirements, as well as the low costs associated with incorporating a BV and the amount of flexibility afforded to businesses in establishing the structure of their BV, for instance with regards to voting rights.

Russell Advocaten has extensive expertise in setting up BV's for foreign businesses. More information can be found on https://www.startingabusinessnl.com/ .

Restrictions

Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Dutch law does not restrict foreign businesses from operating in the Netherlands, or limit foreign investment in or ownership of domestic business entities. The Netherlands is known for its outstanding international business climate.

Equity interests

May the foreign supplier own an equity interest in the local entity that distributes its products?

A foreign supplier may own equity interest in the Dutch entity that distributes its products.

Tax considerations

What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Generally, the tax regime in the Netherlands is considered to be extremely advantageous to foreign businesses, adding to the popularity of the Netherlands with foreign businesses.

The many benefits related to the Netherlands tax policy include:

- A wide network of nearly 100 bilateral tax treaties to avoid double taxation and to provide, in many cases, reduced or no withholding tax on dividends, interest and royalties.
- Clarity and certainty in advance on the tax consequences of proposed major investments in the Netherlands.
- A broad participation exemption (100 per cent exemption for qualifying dividends and capital gains), which is vital for European headquarters.
- An efficient fiscal unity regime, providing tax consolidation for Dutch activities within a corporate group.
- No statutory withholding tax on outgoing interest and royalty payments.

For companies looking to bring employees from abroad, the 30 per cent ruling allows employers to offer 30 per cent of employee salaries tax-free to compensate for the extra costs international employees incur when moving to the Netherlands. Furthermore, various tax reductions, allowances and compensations are available for businesses that invest in innovations and sustainable energy.

The taxes that may be applicable to foreign businesses and individuals that operate in the Netherlands or own interest in a business in the Netherlands are income tax, dividend tax, corporate tax, value added tax and import tax.

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

What alternative distribution relationships are available to a supplier?

The alternative distribution relationships to a supplier are:

- Distribution agreement: a foreign supplier sells its products to the distributor in the Netherlands, who then imports the products sells the products to its customers, adding a margin to cover its own costs and profit. The distributor has a contract with the customer.
- Agency agreement: a foreign supplier appoints an agent who is an intermediary to negotiate and, if required, conclude contracts with customers on behalf of the foreign supplier. So the foreign supplier has a contract with the customer. Agents are paid commission on the sales they make, usually on a percentage basis.
- Franchise agreement: a foreign supplier can act as a franchisor by having a contractual relationship with one or more franchisees in the Netherlands, which usually allows the franchisees to use the trade name, trademarks and brands of the franchisor. The franchisee is required to make initial and continuing payments to the franchisor. Usually the franchisor exercises a much greater level of control over the franchisee and its operations than a supplier would over the distributor or agent.
- Licence agreement: a foreign supplier can license its intellectual property rights or know how to, for example, another manufacturer in the Netherlands to enable that manufacturer to manufacture or sell goods. Such a licence agreement allows the licensee to make use of the intellectual property right, and, depending on the scope of the agreement, to grant licences to third parties. A distribution agreement will typically also involve a licence given by the supplier to the distributor, for instance a licence to use a trademark.
- Joint venture: the foreign supplier can make a business arrangement with another company in the Netherlands in which they agree to pool their resources for the purpose of accomplishing a specific task. This task can be a new project or product or any other business activity. The joint venture is an entity in itself, separate from the participants' other entities.

It is of crucial importance to seek legal advice before entering into any kind of distribution relationship in the Netherlands.

Legislation and regulators

What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

The distribution agreement as such is not regulated under the Dutch Civil Code. Hence, only the general contract law provisions apply.

The commercial agency agreement is regulated under Book 7 of the Dutch Civil Code, which contains provisions regulating, among other things, the commission the commercial agent is entitled to, the termination of the agreement and the goodwill owed by the principal upon termination of the agreement.

Both Dutch and European competition law must be complied with and are enforced by the Dutch Competition Authority and the European Commission to, inter alia, prohibit restrictive practices and the abuse of a dominant market position.

Contract termination

Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

In principle, there are there are no restrictions on a supplier's right to terminate a distribution agreement without cause if permitted by contract, provided such a termination does not constitute a breach of any of the fundamental principles of Dutch contract law as laid down in provisions of the Dutch Civil Code. Normally, a notice of termination must be given. The notice period may be contractually agreed upon. In the absence of a contractual provision, the notice period will depend on the nature and circumstances of the distribution agreement and termination. Dutch courts have found a notice period of three months to be reasonable; however, a (much) longer or shorter notice period may be warranted depending on the circumstances. The distribution agreement will automatically be terminated upon expiration of the contract term, unless otherwise agreed.

Commercial agency agreements may too be terminated without cause if permitted by contract, subject to the restrictions of the general principles of Dutch contract law. Where no notice period has been agreed upon, the notice period that will need to be adhered shall be four months for a commercial agency agreement of no more than three years, five months for a commercial agency agreement with a duration of more than three years and six months for agreements with a duration of more than six years. The length of the notice period contractually agreed upon must be at least one month for agreements that have lasted less than a year, two months for agreements with a duration of less than two years and three months for agreements lasting more than three years.

Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

A distinction must be made between a commercial agency agreement and a distribution agreement.

Commercial agency agreement

If the principal terminates the agency agreement without cause, no compensation for termination will in principle be due, provided such a termination is not in violation of the agreement or the principles of Dutch contract law. A goodwill indemnity might however be due, if the agent is able to show that the principal will continue benefit from the agreement after the termination. In certain circumstances compensation for incurred costs might be due.

If the principal terminates the agency agreement without cause and without abiding the minimum period of notice, the agent shall be entitled to compensation for undue termination, unless the agent is able to show that the not abiding of the notice period is due to compelling reasons. This compensation will normally will be equal to the agent's remuneration, calculated on the basis of the average amount of commissions earned during the 12 months prior to the termination, which would have been received by the agent if the notice period had been adhered to. The aforementioned goodwill indemnity might also be due.

Distribution relationship

If the supplier terminates the distribution agreement without a cause, normally no compensation shall be due, again provided such a termination is not in violation of the agreement or the principles of Dutch contract law. In certain circumstances, compensation for incurred costs might be due.

If the supplier terminates the distribution agreement without a cause and without granting the agreed period of notice, the supplier must pay a termination fee (compensation for damages) to the distributor, unless the termination was due to compelling reasons. This is normally (part of) the loss of profits due to the premature termination. The supplier is not legally obliged to pay goodwill indemnity to the distributor.

Transfer of rights or ownership

Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

A distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party is in principle valid and enforceable under Dutch law.

REGULATION OF THE DISTRIBUTION RELATIONSHIP

Confidentiality agreements

Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

In principle, there are no limitations in the Netherlands to the extent to which confidentiality provisions in distribution agreements will be enforced. However, the mandatory provisions of general contract law do apply and limit the freedom of contract of the parties. Hence, parties will not be able to include, for instance, provisions that are held to be a violation of morality or breach the principle of reasonableness and fairness, an overriding principle of Dutch contract law.

Competing products

Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

Again, a distinction must be made between a commercial agency agreement and a distribution agreement.

Commercial agency agreement

In general, a non-compete clause limiting the agent in its freedom to conclude commercial agency agreements with competitors of the principal during the term of the agency agreement is valid. But a non-compete clause limiting the agent in its freedom to work after the end of the agency agreement, is only valid:

- if it has been agreed in writing;
- if 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 or her;
- as the clause is only valid for a maximum of two years after the end of agency agreement; and
- if the agreement has not ended by undue termination of the principal, court decision on the basis of circumstances for which the principal can be blamed or by the agent due to compelling reasons for which the agent cannot be blamed.

Furthermore, the general principles of Dutch contract law, such as reasonableness and fairness, will apply to both the agent and the principal. Where a non-compete clause violates these principles, the clause will be nullified by the Dutch

courts.

Distribution agreement

A non-compete clause limiting the distributor in his or her freedom to work for other suppliers directly competing with the supplier during the term of the distribution agreement and after the end of the distribution agreement is valid, as long as it is not in violation of the general principles of Dutch contract law.

With regard to competition law it is advisable to only impose non-compete obligations on the distributor – during the term of the distribution agreement – insofar as it is imposed for a fixed term of no more than five years. It is also advisable to only impose non-compete obligations on the distributor – after the end of the distribution agreement – if it is limited to the goods or services and the specific territory that was entrusted to the distributor and if it is limited to one year after the end of the distribution agreement.

Prices

May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

A supplier may not impose fixed or minimum prices at which the distributor resells its products or in any other way control or determine the prices, margins applied by the distributor or the discounts offered. The supplier may however impose a maximum or recommended sales price. As these restrictions are imposed by national and European competition law, enforcement takes place through national and European competition authorities.

As opposed to the supplier, the principal is able to determine the sales price offered by an agent to the customers, as contracts will be concluded directly with the principal.

May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

In principle, the supplier may not, directly or indirectly, impose fixed or minimum prices at which the distributor resells its products nor in any other way control or determine the sales prices, the margins applied by the distributor or the discounts offered. The supplier may, however, impose a maximum or recommended sales price, and may even establish a minimum advertised price policy, but may not impose on the distributor the obligation to not deal with customers who do not follow this policy.

The supplier's inability of establishing a resale price policy does not affect the supplier and distributor's ability to enter into a selective distribution agreement. Under such a selective distribution agreement, the supplier will typically enter into agreement with a limited number of selected distributors. Those distributors will in turn agree to only distribute the products to a select number of their distributors that meet certain criteria. Selective distribution agreements are quite common where high-end luxury products are concerned.

May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

In principle, a distribution agreement may specify that the supplier's price to the distributor (the purchase price) will be

no higher than its lowest price to other customers.

Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

In principle, the distributor may charge different prices to different customers on the basis that the customers are based on different locations, are different types of companies, purchase different quantities, etc.

Geographic and customer restrictions

May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

A supplier may restrict the geographic areas or categories of customers to which the distributor resells. Exclusive territories are permitted. However, only active sales outside these area or customer base may be restricted. Passive sales – wherein the distributor responds to a spontaneous request from a customer outside its own area – may not be restricted. The supplier may not prohibit the distributor form supplying this customer or require the distributor to refer this customer to the supplier or another distributor.

There is no clear boundary between active and passive sales, especially when a website is used that allows online orders to be placed.

If geographic and customer restrictions are prohibited, how is this enforced?

If geographic and customer restrictions are agreed upon in the distribution agreement or agency agreement, the restrictions may be enforced by civil legal action. Depending on the infringement, it is possible that Dutch or European competition authorities would be involved.

A civil court may order the infringing party to comply with the restrictions as agreed upon (cease and desist), or to pay damages.

Online sales

May a supplier restrict or prohibit e-commerce sales by its distribution partners?

In the case of non-exclusive distribution, e-commerce sales in principle cannot be prohibited by the supplier. But it can in some ways be restricted by imposing certain obligation. The supplier can, for example, in certain cases, forbid the distributor to sell its products on online marketplaces (third-party platforms).

In case of exclusive distribution, it possible to prevent the distributor from having active e-commerce sales outside its assigned territory. Active e-commerce selling may occur where the distributor actively seeks out online customers, for instance through advertising on foreign websites. The prohibition of active selling only applies to the distributor who is the direct counterparty of the supplier. The supplier may not require this of any sub-distributor (intermediaries). In practice it will not often happen that the distributor tries to avoid the prohibition of having e-commerce sales outside its assigned territory by using e-commerce intermediaries.

It is not possible to prevent the distributor from having passive e-commerce sales outside its assigned territory. E-

commerce sales generally regarded as passive sales. This means that in principle a distributor is allowed to sell products via the internet to customers outside the exclusive designated area, although it may not actively approach customers. The supplier may not demand the distributor (automatically) forward customers from outside the exclusive area to the distributor's website in the country where the customer resides, or prevent payment for these customers.

May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?

In the case of an exclusive distributor or agent, the distributor or agent may restrict a supplier's sales, also through e-commerce intermediaries, into the territory of the distributor or agent. The actions that the distributor or agent can take in case of infringement by the supplier depend on what has been agreed upon in the contract.

If this has not been arranged in the contract, the distributor or agent may to court and request the court to order the supplier to comply with the exclusivity provision and order the supplier to pay suffered damages due to the infringement (loss of commission or profit).

Refusal to deal

Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

Distributors should, in principle, not be subject to restrictions to deal with particular customers. A restriction of that freedom is in principle a hardcore restriction on the basis of competition law. The (exclusive) assignment or exclusion of particular customers or specific sales channels is, therefore, not permitted. But in case the supplier has objective reasons, it may be possible to restrict the distributor's ability to deal with particular customers. A supplier may for example restrict the sales to end users (customers) by a distributor that is operating at the wholesale level of trade.

A supplier could refuse to deal with (sell to) particular customers if there is an objective reason to refuse. Such a reason could for example be a bad financial position of the customer that cannot provide sufficient security, or the full use of the supplier's production capacity. The refusal to sell can be unlawful if it:

- violates a specific law that impose an obligation to supply;
- violates competition law because the supplier has a dominant position on the relevant market;
- constitutes an abuse of law because the supplier has no reasonable interest or there is too great imbalance between the interests of the parties.

Competition concerns

Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

Generally speaking, it is highly unlikely that distribution or agency agreements will be deemed a reportable transaction under merger control rules, for two reasons.

First of all, under both Dutch and European competition law, certain transactions will be deemed reportable transactions insofar as they can be considered to constitute a concentration of businesses. Under Dutch and European

competition law, such a 'concentration of businesses' can consist of a merger, an acquisition or a joint venture. Although it would theoretically be possible that an agency or distribution agreement would indirectly result in the acquisition of control by the supplier or principal of the distributor or agent, resulting from the terms of the agreement, this would be highly unlikely. Terms in the distribution or agency agreement that would allow the supplier or principal to acquire (indirect) control over the distributor or agent are uncommon and atypical in distribution or agency agreements. Additionally, such clauses in the distribution or agency agreement might be set aside by the Dutch courts for violating the principle of reasonableness and fairness in contract law.

Second, even if an agency or distribution agreement were to qualify as a concentration of businesses, such a concentration of businesses will only be considered a reportable transaction if a certain financial threshold is met. Concentrations of businesses need to be reported only where the businesses involved have a combined global revenue of more than €150 million, and at least two of those businesses have a revenue of at least €30 million in the Netherlands.

Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

The relationship between the distributor and supplier is governed by Dutch and European antitrust rules. As a general rule, distribution agreements may not contain clauses that aim at or result in, directly or indirectly, the restriction of competition. For distribution agreements between parties whose market shares do not exceed 30 per cent of the relevant market and do not contain any 'hardcore restrictions', a safe haven is provided, meaning the antitrust rules do not apply. Hardcore restrictions of competitions include clauses regulating resale prices.

The antitrust rules do not apply to the relationship between the agent and principal.

The Netherlands is generally considered an extremely advantageous jurisdiction for private enforcement of competition law. Remedies that are available include damages and injunctions.

Parallel imports

Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

As a general principle, the owner of any intellectual property right shall be entitled to take action against any infringement on his or her right. However, as the distributor and agent are not the owner of the intellectual property rights of the supplier and distributor, but, in most cases, merely the licensee of for instance trademarks, they are unable to take action against such infringements independently. Depending on the intellectual property right in question, they may be able to take action if granted permission by the holder of the intellectual property rights. Such permission may be granted in the distribution or agency agreement itself for all present and future infringement in the territory of the distributor or agent.

Advertising

What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

When advertising and marketing products, the distributor and agent will have to adhere to the Unfair Competition Act as well as the Dutch Advertising Code. Such advertisements may not be, amongst other things, misleading, in violation of the law or morality, or harmful to the public health. Any advertising violating the Unfair Competition Act or the Dutch Advertising Code may be prohibited by the courts, or may result in the court ordering a rectification.

The supplier and distributor may agree in the distribution agreement for the advertising costs to be paid in whole or in part by the distributor.

Intellectual property

How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

For a supplier to safeguard its intellectual property rights, it is highly recommended that the supplier register its intellectual property rights in the territory of the distributor or supplier. With regard to trademarks, it is recommended that the supplier apply for an EU-trademark, which offers protection against infringement throughout the European Union. Technology-transfer agreements are quite common.

Consumer protection

What consumer protection laws are relevant to a supplier or distributor?

When distributing products to consumers in the Netherlands, both the distributor and the supplier will need to take into account the mandatory provisions of the Dutch Civil Code regarding consumer protection. These mandatory provisions regulate, for instance, which clauses may be included in the terms and conditions offered to the consumer and under which circumstances the distributor, as the seller, will be required to provide extra information to the consumer, for instance, where the purchase is made over the internet or over the phone. Furthermore, the consumer purchasing a product over the internet or the phone may, within 14 days of the purchase, terminate the contract and undo the purchase.

Additionally, any defect of the distributed product discovered within the first six months after delivery will assumed to be the result of non-conformity of the product for which the distributor, as the seller, will be held responsible. The distributor will then be obliged to either complete, repair or replace the defect, and the consumer may under some circumstances be entitled to terminate the contract. Damages may also be owed to the consumer.

As the seller of the defective product, the distributor will in principle be the party from which consumers shall claim performance or damages. The distributor shall in turn be entitled to claim compensation from the supplier.

Product recalls

Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

The recall of distributed products is regulated under the Dutch Commodities Act, which specifies under which circumstances distributors will be able to recall distributed products. In accordance with the Commodities Act, the supplier or distributor must, upon discovery that the supplied product is dangerous, inform the competent authority immediately. The supplier or distributor must also inform the authorities of the measures that will be taken or are being taken to ensure the safety of the buyers of the product. The measures expected from the supplier or distributor in the

context of this recall will vary depending on, amongst other things, the nature of the product, the level of risk of the product and the gravity of the consequences. Specific requirements may apply depending on the product.

In principle, the parties shall be free to delineate which party is responsible for carrying out the recall and which party shall bear the costs. However, this will not alter the fact that both parties may be held responsible for any damages caused by the dangerous product.

Warranties

To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

In principle, the supplier can limit the warranties it provides to its distribution partners to a great extent, subject to the limitations set out under the Dutch Civil Code. A clause limiting the warranties provided by the supplier may not exclude liability of the supplier for damage resulting from gross negligence or fault of the supplier. A clause limiting the warranties provided by the supplier to its distribution partner – and consequently the liability of the supplier – will typically be upheld by Dutch courts.

To avoid such a limitation of liability being set aside by the Dutch courts, legal advice should be sought in advance.

Data transfers

Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

The exchange of information between a supplier and its distribution partner is regulated and restricted by the Dutch General Data Protection Act (GDPR), which implements the European General Data Protection Regulation. Under the GDPR, the distribution partner may only proceed with the storage and processing of personal data of customers if there is sufficient ground for such processing. Furthermore, a number of obligations apply regarding the way the personal data shall be stored.

Exchange of personal data of customers between the supplier and the distributor may only occur where such an exchange is compatible with the objective under which the personal data was initially obtained. Furthermore, such an exchange is only permitted where there is sufficient legal basis, as well as appropriate safeguards for the personal data. A legal basis for exchange of personal data may consist of, for instance, consent of the subject, performance of a contract to which the subject is party or an obligation under national legislation.

To ensure compliance with the Dutch General Data Protection Act, it is strongly recommended that parties seek legal advice before engaging in an exchange of personal data of customers.

What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

The requirements set out in the General Data Protection Act shall apply, requiring the supplier and its distribution party to process the customer data in a lawful, fair and transparent manner and in a manner that ensures the appropriate security of the personal data. The parties shall be obliged to provide adequate protection against unauthorised or unlawful processing, accidental loss, destruction and damages, in doing so using appropriate technical means. Pseudonymisation and encryption of personal data are recommended, but not required.

Furthermore, both the supplier and distributor are required to be able to demonstrate compliance with the requirements as set forth in the General Data Protection Act.

Employment issues

May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

As the distribution agreement is concluded between the supplier and the distributor, two independent parties, the supplier will not be able to exert control over the individuals employed by the distribution parties, or terminate the employer–employee relationship between the distributor and one of these employees.

A supplier may in principle include a clause in the agreement stipulating that he will be able to approve or reject important management personnel or to demand from his distribution partner that the relationship with certain management personnel has to be terminated by its distribution partner in specific situations. However, it will always be up to the distributor to enforce these provisions, and the normal labour law provisions would apply. Clauses of such a nature are quite uncommon in the Netherlands.

Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

A distinction must be made between distribution or agency agreements concluded by a supplier or principal with a distributor or agent that is a natural person, and distribution or agency agreements concluded by a supplier or principal with a distributor or agent that is a legal entity.

Under Dutch law, agreements concluded between legal entities cannot be qualified as employment agreements. Where the distributors or agents concerned are legal entities no employment agreement can be held to exist and the distributor or agent cannot be considered the employee of the supplier or principal, as under Dutch law.

Agreements concluded with distributors or agents that are natural persons may, depending on the circumstances, be qualified as employment agreements, whereupon the agent or distributor would be considered an employee of the supplier or principal. Where the distributor or agent is found to be more or less inferior to the supplier or principal, for instance where this supplier or principal is able to make important business decisions for the agent or terminate relationships with employees of the agent, the may be found to constitute an employment agreement. This will have important consequences. The agent or distributor will in that case be entitled to a holiday allowance, payment during sickness, and in some cases to a compensation for overtime. Furthermore, mandatory provisions concerning the termination of the agreement shall apply, and the supplier or principal shall be obliged to make a severance payment upon termination.

Commission payments

Is the payment of commission to a commercial agent regulated?

In principle, the agent and principal are free to agree on the amount of commission due to the commercial agent and the contracts on which commission shall be due. Agent and principal may, for instance, agree that commission shall only be due on contracts concluded as a direct result of the agent's activities.

In the absence of any contractual provisions in this regard, the Dutch Civil Code stipulates that the commercial agent shall be entitled to a commission on contracts concluded during the period of the commercial agency agreement, insofar as these contracts:

- Have been concluded mainly as a result of the activities of the agent;
- Have been concluded with a third party previously put forward by the agent for conclusion of a similar contract;
- Have been concluded with third parties belonging to a specific group of customers, or residing in a specific geographical area, which has been assigned to the agent, provided that the agent and principal have not explicitly agreed to the non-exclusivity of said group or geographical area.

The commercial agent shall furthermore be entitled to a commission on contracts concluded after the termination of the commercial agency agreement, insofar as:

- The conclusion of the contract is mostly due to the agent's activities during the commercial agency agreement and within a reasonable time after the end of the agreement;
- The order preceding the contract has been received, by either the agent or the principal, prior to the termination of the commercial agency agreement.

The provision regarding the right to payment of commission on contracts concluded after termination of the commercial agency agreement between the principal and the agent is mandatory. Additionally, the Dutch Civil Code stipulates, in another mandatory provision, that the successor of this agent shall not be entitled to a commission on these contracts, except insofar as this would be deemed reasonable.

The parties are furthermore free to agree on the moment the commission becomes due and payable. In the absence of any contractual provision between the parties, the commission shall become due and payable when the principal provides the agent with the monthly written overview of the commission owed to the agent over the contracts concluded that month.

Good faith and fair dealing

What good faith and fair dealing requirements apply to distribution relationships?

As mentioned before, the distribution agreement as such is not regulated under the Dutch Civil Code. Consequently, there are no good faith or fair dealing requirements that are specific to this relationship. However, the general principles of contract law do apply. In accordance with these principles, both the supplier's and the distributor's behaviour towards each other is subject to the standard of reasonableness and fairness, which encompasses both the good faith and the fair dealing requirement. As a result, neither the supplier nor the distributor will be allowed to act in a way that would be evidently harmful to the justifiable interests of the other party or not in good faith.

Although the commercial agency agreement is regulated under the Dutch Civil Code, there are no specific stipulations dealing with good faith or fair dealing requirements. The standard of reasonableness and fairness applies to the commercial agent and principal as well.

Registration of agreements

Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There is no obligation under Dutch law to register either distribution agreements or intellectual property license agreements, nor any obligation to have these agreements approved by a government agency in advance. It is, however, advisable to register a licence agreement, due to the fact that only a registered licence agreement has third-party effect.

Anti-corruption rules

To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

The Dutch criminal code contains both anti-bribery and anti-corruption clauses, which are applicable to suppliers as well as their distribution partners. Insofar as either the supplier or the distributer were to engage in either of these acts, this would constitute a crime under Dutch law.

Prohibited and mandatory contractual provisions

Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

As it stands, the Dutch Civil Code does not contain any restrictions on provisions or limitations on enforceability specifically relating to distribution agreements. As regards a commercial agency agreement, the Dutch courts will set aside and therefore render unenforceable any contractual stipulations not in accordance with the mandatory provisions set out in the Dutch Civil Code.

Furthermore, the general provisions regarding contract law apply to both distribution and commercial agency agreements. Under the general provisions of contract law, distribution and commercial agency agreements may be rendered void or voidable, in whole or in part, where they, for instance, violate the standard of reasonableness and fairness, are in violation of mandatory provisions or were entered into as a result of fraud. Agreements that are void or have been voided cannot be enforced.

GOVERNING LAW AND CHOICE OF FORUM

Choice of law

Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

In accordance with international and European law, parties are free to choose the law applicable to the contract. Such a choice of law notwithstanding, certain mandatory provisions of the Dutch Civil Code will apply where all relevant elements of the contractual relationship between the parties at the time of the choice of law are solely connected to the Netherlands.

In the absence of any choice of law by the parties, the law of the country where the agent or distributor is located will apply. An exception is made for agency agreement where the agent is located in one country, but primarily operates in

the country of the principal. In that case, the law of the country where the principal is located will apply.

Choice of forum

Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

The parties to a distribution or commercial agency agreement are free to make a contractual choice of courts or arbitration tribunals. However, in doing so they are subject to a number of restrictions.

Where international commercial parties are involved, Dutch courts will generally uphold a choice of forum, provided the requirements set out in the applicable international treaties and under European law are met. The court will assess the validity of such a choice of forum in accordance with the applicable law. In this regard, it is of importance to note that under Dutch law, the wording of a contract is not always necessarily decisive, and all relevant circumstances will be taken into account. Consequently, even if a choice of forum was included, the courts might still find that no agreement was reached in this regard based on the relevant circumstances.

The parties may also choose either arbitration of mediation. Both choices will generally be upheld by the Dutch courts, provided the requirements set out in international treaties, such as the Arbitration Convention of New York, are met. The validity of such contractual choices will be assessed in accordance with Dutch law.

Litigation

What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

Disputes concerning distribution agreement will typically be heard by one of the eleven Dutch first instance commercial court. Where agency agreements are concerned, disputes will initially be heard by the Dutch cantonal court. Appeals against these decisions will be heard by one of the four Court of Appeals. The highest court in the Netherlands, the Supreme Court, is qualified to hear appeals in cassation against the decision of the Court of Appeal.

Dutch procedural law is generally considered to be efficient, pragmatic and cost-effective. The fact that civil proceedings would have to be conducted in the Dutch language, however, may constitute a disadvantage to foreign businesses.

Foreign businesses may also turn to one of the many specialised arbitration tribunals or to the Netherlands Commercial Court. This court, located in Amsterdam, specialises in international commercial disputes and allows parties to litigate in English.

Foreign businesses are in no way restricted in their ability to make use of the Dutch court system or any of the arbitration tribunals and can expect fair treatment. Disclosure of certain documents can be ordered by the judge insofar as the party requesting disclosure can be considered to have a justifiable interest in such disclosure, and a testimony from the adverse party may be requested whenever deemed necessary.

Alternative dispute resolution

Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Generally, Dutch courts will look favourably upon arbitration agreements and will enforce such agreements. Arbitration can be agreed upon both in the agreement itself and outside of the agreement, for instance in later communications, as well as in terms and conditions, although arbitration agreements included in general terms and conditions have been deemed not to be binding where agreements between commercial parties and consumers were concerned.

Arbitration may take place in one of the various specialised arbitration institutes throughout the Netherlands, each of which have their own set of rules and are governed by the Dutch Arbitration Act.

Foreign businesses may benefit from arbitration in the Netherlands, in particular since the entering into force of the New Dutch Arbitration Act, quite flexible and user-friendly. Arbitration can be conducted in several languages, for instance in English, and both parties may appoint an arbitrator. Generally, these arbitrators will have specific experience in the field concerned, resulting in a more suitable, tailored solution than if the matter had been brought to court.

UPDATE AND TRENDS

Key developments

Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

There are currently no proposals for new legislation or regulation, nor to revise existing legislation or regulation.

In recent case law, the Dutch courts have provided clarification on which agreements can be qualified as commercial agency agreements. Confirming that the wording of the agreement itself is not necessarily decisive, courts have found that a contractual relationship wherein the commercial agent concluded agreements in its own name, and payment was made to the principal through the commercial agent, does not qualify as a commercial agency agreement in spite of the parties labelling it as such.

The company Airbnb, meanwhile, was found to act as a commercial agent, primarily owing to the fact that potential renters had no way of communicating with subletters other than through Airbnb. In restricting access to subletters, the company was found to act as more than ‘merely’ a digital platform where renters and subletters could connect.

In practice, whether a contractual relationship will qualify as a commercial agency agreement will depend on a large number of circumstances.