

THE NETHERLANDS



The Netherlands

Dutch answers to:

Expanding your business in Europe Questionnaire

Eurojuris International IBG Meeting

at Racine & Vergels Advocaten, Brussels

21 February 2008

Introductory note

Please note, that the answers below are not to be taken as a legal opinion. These answers are merely meant to describe the Dutch legal approach in general.

Part I. Contractual.

Q1. What are the formalities a foreign seller must complete in your jurisdiction in order to make sure that its terms and conditions of sale are binding and enforceable towards local purchasers? Are these conditions enforceable towards non commercial parties?

A1. Sellers must complete the following in order to make sure that his General Terms and Conditions of Sale (hereinafter: GT) are binding and enforceable towards both commercial and non commercial parties:

The other party is bound by the GT even if, at the time of entry into the contract, the seller understood or ought to have understood that the other party did not know their contents. However, if the seller has not given the other party a reasonable opportunity to take note of the GT, then a stipulation in and/or the GT itself may be nullified.

The seller gives the other party a reasonable opportunity to take note of the GT,

1. If he has given the GT to the other party before or at the time of entry into the contract, or

2. If this is not reasonably possible (e.g. due to the size of the GT or the huge amount of transactions), if he has informed the other party before the formation of the contract that he has the GT available for inspection or that they have been lodged with a chamber of commerce indicated by him or at the court and that they will be sent to the other party upon request.
3. Either, where the contract will be concluded by electronic means, the GT have been made available to the other party before or at the time of the conclusion of the contract in a manner allowing him to store them to have them accessible for later perusal, or, where this is not reasonably possible, if prior to the conclusion of the contract the other party is informed where whose terms may be consulted by electronic means and that, upon request, they will be sent by electronic or other means.

Q2: What are the clauses a foreign seller must integrate in a written sales agreement (or his general terms and conditions) and the reasons why.

Q2a. Retention of Title: Is this provided for in your jurisdiction? What are the conditions to make it enforceable towards local third parties?

A2a. Retention of title (“eigendomsvoorbehoud”) is a valid clause in GT applicable in sales contracts towards both commercial and non commercial parties. The conditions to make retention of title enforceable in GT do not differ from the conditions mentioned under A1.

Retention of title may be validly stipulated only with respect to claims for the counter-obligation for things delivered or to be delivered by the seller to the acquirer pursuant to a contract, or for work performed or to be performed pursuant to such a contract for the benefit of the acquirer, as well with respect to claims for failure to perform such contracts.

Q2b. Interest and penalty clause: Are these clauses enforceable in your jurisdiction? Can they be reduced or annulled. What are the consequences if this clause is not integrated in the agreement? What is the legal rate in your jurisdiction?

A2b. Interest and penalty clauses are enforceable under Dutch law. Both interest and penalty clauses may be reduced by the court, upon the demand of the obligee if it is evident that fairness so requires; the court, however, may not award the obligee less than the damages due by law for failure in the performance.

If an interest clause has not been a part of the sales agreement (or the

applicable GT) then the statutory interest may be claimed. Statutory interest is considered to be the damages due on account of delay in the payment of a sum of money. The statutory interest shall be fixed by Regulation.

If a penalty clause is not included in the agreement (or the applicable GT), then a penalty cannot be claimed.

Q2c. Applicable law and competent jurisdiction: are these clauses enforceable in your jurisdiction? What are the consequences if this clause is not integrated in the agreement?

A2c. Applicable law and competent jurisdiction are clauses enforceable under Dutch law.

With regard to clauses on competent jurisdiction we refer to the compulsory restrictions with regard to insurance related cases (articles 8 - 14 Regulation EG nr 44/2001), consumers (article 15 - 17 Regulation EG nr. 44/2001); employees (articles 18 - 21 Regulation EG nr. 44/2001) as well as real estate, corporate matters and validity of intellectual property rights (article 22 Regulation EG nr. 44/2001)

If the parties have not made an explicit choice of applicable law, the contract will be governed as follows:

- the competent jurisdiction is established on the basis of Regulation EG Nr. 44/2001, if both the claimant and defendant are residing in the EU or EES. If one of the parties is not an EU or EES resident, then Dutch law (and international private law) will be applicable to establish the competency of the Dutch courts
- also the European Treaty concerning the law applicable to contracts, effective as of 1 September 1991, the Vienna Convention and international private law will be applicable to establish the applicability of the law.

Q2d. Other clauses?

A2d. the right to increase the price stipulated (e.g. if the prices of raw material rise). Please note that certain clauses may be deemed unreasonably onerous when the other party is an individual not acting in the conduct of a business or profession.

Q.3a.: Distribution agreements. What types of distribution agreements do exist in your jurisdiction: - Agency - Franchising - Concessionaire - other distribution agreements?

A.3a. In the Dutch Civil Code, only agency contracts exist. However, distribution, franchise and concessionaire are governed by general contract law, jurisprudence and EC law.

Q.3b. What are the clauses a foreign seller should integrate in a distribution agreement and the reasons why?

A.3b. The following clauses are important to integrate:

- exclusivity or non-exclusivity
- territory
- contractual liability between the parties and (if products are involved) on product warranty/liability
- duration, termination (and notice period)
- salvatory clause with regard to eventual conflict with competition law.
- clauses on applicable law and competent jurisdiction.

Apart from the Agency Contract, all other kinds of distribution contracts in the Netherlands are governed by general contract law.

Q.3c. Is there any specific legislation in your jurisdiction with regard to the above mentioned types of distribution agreements and what are the main obligations for the foreign seller? (e.g. the Belgian law on the liability of parties when negotiating a contract - the Belgian law on the termination of an exclusive contract)

A.3c. Specific legislation only exists with regard to Agency Contracts. In principle, the agent is entitled to a goodwill compensation.

Under Dutch law, pre contractual liability (breaking of negotiations) is considered to be of a general contractual nature and applicable on all kinds of contracts.

Part II: Branch - office in the target country but no legal personality

Q1. What are in general terms in your jurisdiction the legal consequences of the absence of legal personality of a branch, as opposed tot the setting up of a local company?

A1. A branch is not a legal person and is not a subject of independents rights and obligations. Therefore the foreign company is liable for the branch's acts. The branch must be registered in the local Chamber of Commerce.

Q2. Are there specific formalities to be fulfilled for opening a branch?

A2. For opening a branch of a foreign company in the Netherlands, the following formalities must be fulfilled:

Before registering a Dutch branch the head office must appoint a

representative authenticated through power of attorney to represent and manage the branch. Also a bank account for future transactions must be opened.

In order for the branch to be able to engage in commercial activities, it must register with the Commercial Register at the local Chamber of Commerce. The registration process requires submitting an application which should contain a proof of existence of the foreign parent company, consisting of a certificate of registration from the relevant institution, the articles of association, specimen signatures of the managing directors.

After obtaining the registration certificate the company branch must prepare an application in order to register for tax purposes. The registration form can be filed in one day, but issuance of the required tax numbers may take a few weeks.

Q3. Why would you rather advise a foreign seller to set up a branch rather than a company in your country, or visa versa?

A3. Advantages of a branch:

- there are no costs of setting up a local company, such as the Articles of Association and deed of incorporation of a local company;
- No minimum capital requirements;
- A branch can easily be set up and closed down.

Disadvantages:

The foreign company is liable for the branch's acts and operations.

Q4/Q5. How is a branch legally represented in your jurisdiction and is there an automatic liability of the head office or legal representative of the branch for the operations or acts of the branch?

A4/A5. The branch is legally represented by either a representative authenticated through power of attorney to represent and manage the branch or by the legal representatives of the head office.

Based on the Dutch Civil Code, the head office / foreign company will be liable for the branch's operations or acts. The managing directors of the foreign company and the legal representatives are only liable towards third parties for the branch's operations or acts provided that they acted tortuously towards such third parties.

Q6. Are there imperative linguistic requirements to be respected?

A6. In general there are no imperative linguistic requirements to be

respected. However, registration of a branch at the Dutch tax authorities and Dutch Chamber of Commerce, filing of tax returns at the Dutch tax authorities and filing of the annual accounts of the branch at the Dutch Chamber of Commerce should be made in Dutch. If the annual accounts of the branch / foreign company are not prepared in Dutch, then they may be filed in French, German or English at the Dutch Chamber of Commerce.

Part III: Branch – local company in the target country with legal personality

In the Netherlands the following legal forms with legal personality occur:

- The Private company with limited liability: “Besloten Vennootschap” (BV);
- The company limited by shares: “Naamloze Vennootschap” (NV);
- Foundation “Stichting”;
- Association “Vereniging”;
- Cooperative association “Coöperatie”;

BV

The private company with limited liability “Besloten Vennootschap” (BV) is a legal person, which can be incorporated by one or more (legal) persons. The capital is divided into shares which cannot be freely transferred. The shares are registered by name. The shareholders are not personally liable for acts performed in the name of the BV and are not liable to contribute to losses of the BV in excess of the amount which must be paid on their shares. ..

The authorized and issued capital and paid up part thereof must amount to at least € 18.000.

Please note that the legislation on BV’s will be amended within a few years and will hardly contain any minimum requirements.

NV

The company limited by shares “Naamloze Vennootschap” is a legal person, which can be incorporated by one or more (legal) persons. The capital is divided into shares which may be freely transferred depending on the pre-emption clauses included in the articles of association. The shareholders are not personally liable for acts performed in the name of the BV and are not liable to contribute to losses of the BV in excess of the amount which must be paid on their shares. ..

The authorized and issued capital and paid up part thereof must amount to at least € 45.000. The NV will merely be used by companies listed on the stock exchange.

Foundation

A foundation is a legal person created by a legal act which has no members and whose purpose is to realize an object stated in its articles using capital allocated to such purpose.

The object of the foundation may not include the making of distributions to any founder or to those participating in its constituent bodies or to other parties unless, as regards the latter, the distributions have an idealistic or social purpose.

Association

An association is a legal person with members, formed by a multilateral legal act. An association may not distribute profits among its members.

When the articles of the association are embodied in a notarial deed, the association can acquire registered property and can inherit under a will. However, the association is not obliged to embody its articles in a notarial deed.

Cooperative Association

This is a legal person merely used by banks and insurance companies.

Q1/Q2. Which of the company forms is used most frequently in your jurisdiction and which company form is used most frequently in case of small or family business?

A1/A2. The BV is the legal form which is most frequently used in the Netherlands also in case of small and family business.

Q3. Is there specific legislation with regard tot the liabilities of the founders and directors?

A3. With regard to founders:

Persons who perform a legal act in the name of a company to be incorporated shall, unless the contrary is expressly stipulated in respect of such legal act, be bound jointly and severally thereby until the company has ratified such legal act after its incorporation.

If the company does not perform its obligations arising from such ratified legal act, the persons who acted in the name of the company to be incorporated shall be jointly and severally liable for any loss suffered by a third party as a result thereof, if they were or could be

reasonably have been aware that the company could not perform its obligations, without prejudice to the liability of the directors in respect thereof on account of such ratification. If the company is declared bankrupt within one year after its incorporation, such knowledge that the company could not perform its obligations shall be presumed.

With regard to managing directors:

There are several clauses in the Dutch Civil Code with regard to director's liabilities. The most important are:

- the directors shall be jointly and severally liable, together with the company, for each juridical act binding on the company and performed during their management until (amongst others) the paid up part of the capital amounts to at least the minimum capital prescribed on incorporation; until the filing of the initial registration at the commercial registry accompanied by copies of the documents required to be lodged.
- On the bankruptcy of a company, each director shall be jointly and severally liable to the estate for the amount of the liabilities to the extent that these cannot be satisfied of the liquidation of the other assets, if the management has manifestly performed its duties improperly and if it is plausible that this is an important cause of bankruptcy. If the management has not complied with its obligations to timely file the annual accounts at the chamber of commerce or to keep the books of the company in a right manner, it has performed its duties improperly and it shall be presumed that the improper performance of its duties constitutes an important cause of the bankruptcy.

Part IV. Miscellaneous

Purchase of real estate

Q1. Who do you turn to in order to close a valid purchase agreement?

A1. Regarding the transfer of ownership of real estate the following is relevant:

1. Preparing of the purchase agreement of real estate;
2. The passing of the transfer deed by a civil law notary;

The purchase agreement with regard to real estate may be drafted by a civil law notary. However, this is not compulsory. To transfer real estate, one requires a notarial deed of transfer which can be done by a civil law notary.

- Q2.** What are the costs related to the purchase agreement?
- A2.** there are no fixed rates. In general, the costs of a civil law notary for the purchase of real estate may depend on the purchase price of the real estate, the matter of specialization of the civil law notary and speedy despatch. Please note that besides the notary's fee, one must also pay the costs of land registry and other registry costs. Furthermore, the buyer of real estate in the Netherlands must pay transfer tax amounting to 6% of the purchase price.
- Q3.** Is there in your jurisdiction legislation that can slow down the purchase process?
- A3.** In the Netherlands, administrative legislation regarding environmental pollution may slow down the purchase process of real estate. A so called interested party or the government may under certain circumstances, commence legal action.

Rent a real estate

- Q4.** Is there imperative law in your jurisdiction with regard to the rent of offices, industrial real estate or commercial real estate? Can you give a summary of the major stipulations of the regulations?
- A4.** In the Netherlands the law on lease and hire can be divided in three parts:
- The rent of residential accommodation;
 - The rent of commercial premises;
 - The rent of non residential and non commercial accommodation.

Legislation regarding "residential accommodation" and "business accommodation" consists mostly of imperative law.

In the Dutch Civil Code, "residential accommodation" means a constructed immovable thing, to the extent that it is let as a self-contained or a non-self-contained dwelling or as a static caravan or a pitch and immovable appurtenances.

"Commercial premises" is in the Dutch Civil Code described as a constructed immovable thing which is intended to be used for the operation of a retail business, restaurant or café, , pick or delivery service or a handcraft company, or for the conduct of trade, provided the leased premises contain an area accessible to the public for direct delivery of movable things or for the performance of services.

The lease agreement shall be entered into for five years or, where a longer fixed term is agreed, for such longer term. The lessee or

lessor may terminate the lease agreement at the end of the five years period, taken into account a termination period of one year. No termination is needed, when the lessee and lessor agree upon ending the lease agreement. In most lease agreements a fixed yearly increase of the rent is stipulated amounting to the inflation.

A "non residential and non commercial accommodation" is a premises that is not commercial and/or residential. Legislation regarding "non residential accommodation and non commercial accommodation" is mainly non imperative law. E.g. the term of the lease agreement may be one or two years in stead of an imperative period of five years.

The Dutch Civil Code provides to the lessee of "non residential and non commercial accommodation" protection of eviction after the lease agreement has been terminated.

Q5. Are there any formalities to fulfil in order to enforce the lease agreement towards third parties?

A5. In principle only the lessee and the lessor are bound by the lease agreement. However, if the rented premises is being sold to a third party, the lease agreement will stay in place and will not be automatically terminated.

Environmental issues

Q.6. For what types of activities is an environmental permit required? Can you describe briefly this procedure? How much time will this procedure normally take?

A.6 In principle, it is prohibited to establish or operate a company or business that will cause damage to the environment, unless one has a permit. The Dutch Environmental Management law (Wet Milieubeheer) states that there is no obligation for obtaining such a permit, unless the law indicates otherwise.

Companies that will not cause a risk to the environment or that will only cause a strict limited risk to the environment, do not require a permit. However, there are general rules to be taken into account, such as certain maximum levels of noise, waste and draining allowed.

Other companies that do require a permit, must obtain such permit before starting or before changing the operation of their business. The local authorities issues the permits and may stipulate certain conditions to be met by the company such as conditions with regard to the levels of noise or smell, the times and routes of arriving and departing of traffic, safety, storage of substances under ground.

If a company applies for a permit, any interested party may raise

objections to the application at the local authority within a certain period of time. In some cases during that stage the local authority may demand that "an environmental effects report" is drawn up.

The entire procedure of obtaining a permit may take 6 months or even longer!

* *

*

EUROJURIS INTERNATIONAL BUSINESS GROUP:

who we are

Eurojuris International

Eurojuris was formed in the late 1980s with the objective of providing clients with access to legal advice and representation from local lawyers throughout Europe and worldwide.

Eurojuris is now the leading network of law firms in Europe and worldwide with over 600 member firms and approximately 5000 lawyers. In addition Eurojuris can, through its correspondent firms, provide access to local firms in many other countries throughout the world. Members and correspondents are always well established medium sized independent law firms satisfying the Eurojuris criteria.

Eurojuris aims to provide more than just a reliable directory of legal firms. A permanent headquarters with full time staff to manage the organisation was created in 1993 and its responsibilities include co-ordinating numerous national activities, publishing brochures, newsletters and guides, organizing meetings and congresses, promoting specialist groups and setting up an organisation to provide cohesion among different legal systems and business cultures.

The Eurojuris commitment to quality is paramount and is maintained by ensuring that management procedures and work methods are tailored to match the client needs and are dynamic and open to constant improvement. It is also essential that all Eurojuris International members understand and implement approved work methods and that regular internal and external control procedures are reviewed on a systematic basis.

Eurojuris International Business Group

The Eurojuris International Business Group (Eurojuris IBG) is one of a number of the Eurojuris practice groups. Eurojuris IBG is a proactive, business generating group that was formed to enable a small group of Eurojuris members to focus on the needs of business clients. Members of the Eurojuris IBG are experienced in their practice areas and leaders in the international legal and business community.

Eurojuris IBG members aim to provide a Partner level service to clients and, through close co-operation with European colleagues, to provide a consistent and seamless service.

Eurojuris IBG aims to offer a uniform presentation and mutual legal education schemes with common practices and to develop common services for the clients of member firms.

As more and more businesses find that improved communication and access opens the way to more international trade, the need for legal representation throughout a number of jurisdictions becomes essential. Eurojuris IBG provides access to expert local knowledge through a lawyer in the jurisdiction of the client's head office.

The members of Eurojuris IBG maintain close levels of co-operation and knowledge of each other's firms. This is achieved not only via the usual media of email, fax and telephone, but also through regular meetings, some of which take place in the offices of the member firms to enable members to understand the way in which they can better serve their client's needs.

The members of Eurojuris IBG fulfill very strict criteria: they are business minded, they work with business clients across Europe and overseas, they all work in the English language and have some knowledge of other European languages. Importantly they are equipped with the most up to date information technology systems and maintain substantial Professional Indemnity Insurance.

How to expand **your business** across borders



Board Members of IBG

Chairman

Mr. Lorenzo Bacciardi
lorenzo@bacciardistudiolegale.it
www.bacciardistudiolegale.it

Treasurer

Mr. Stephen Fuller
sfuller@hclaw.co.uk
www.hclaw.co.uk

Marketing

Mr. Joan Dubaere
jdubaere@racine.eu
www.racinevergels.eu

Admin

Mr. Beat Eisner
beat.eisner@lclaw.ch
www.lclaw.ch

Mr. Marcus Pilla

m.pilla@glock-liphart-probst.de
www.glock-liphart-probst.de

