The Franchise Law Review

Second Edition

Editor
Mark Abell

Law Business Research

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EDITOR'S PREFACE

Since the publication of the first edition of *The Franchise Law Review,* there have been some significant economic and geopolitical developments that have had a significant impact on world trade. The apparently inexorable march towards the globalisation of commerce, however, has again continued unabated despite, or perhaps even because of, these changes.

Despite the slow emergence of a few economic bright spots, the economy of what was once called the 'developed' world continues on the most part to struggle, while even Brazil – one of the much-vaunted BRICS nations – has fallen into recession. As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

At the same time South–South trade is on the increase, perhaps at the expense of its North–South counterpart. All of this, coupled with the unstable wider geopolitical landscape, presents business with only one near certainty: there will be continued deleveraging of businesses in the coming years and, thus, growing barriers to international growth for many of them. All but the most substantial and well-structured of such businesses may find themselves facing not only significant difficulties due to their reduced access to funding to invest in their foreign ventures, but also challenges arising from their lack of managerial experience and bandwidth.

Franchising, in its various forms, continues to present businesses with one way of achieving profitable and successful international growth without the need for either substantial capital investment or a broad managerial infrastructure. In sectors as diverse as food and beverages, retail, hospitality, education, health care and financial services, it continues to be a popular catalyst for international commerce and makes a strong and effective contribution to world trade. We are even seeing governments turning to it as an effective strategy for the future of the welfare state as social franchising gains still more traction as a way of achieving key social objectives.

Given the positive role that franchising can make in the world economy it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way that it is regulated in 32 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogenous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors to meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches to regulation – as is well illustrated by the new changes in the Australian regulations.

Many countries do not have franchise-specific regulation, but nevertheless strictly regulate certain aspects of the franchise relationship through the complex interplay of more general legal concepts such as antitrust law, intellectual property rights and the doctrine of good faith. This heterogeneous approach to the regulation of franchising presents yet another barrier to its use as a catalyst for international growth.

This book certainly does not present readers with a full answer to all the questions they may have about franchising in all the countries covered – that would require far more pages than it is possible to include in this one volume. It does, however, try to provide the reader with a high-level understanding of the challenges involved in international franchising in the first section and then, in the second section, explain how these basic themes are reflected in the regulatory environment within each of the countries covered.

I should extend my thanks to all of those who have helped with the preparation of this book, in particular Graeme Payne, Victoria Hobbs, Caroline Flambard and Melissa Murray, who have invested a great deal of time and effort in making it a work of which all those involved can be proud.

It is hoped that this publication will prove to be a useful and often-consulted guide to all those involved in international franchising, but needless to say it is not a substitute for taking expert advice from practitioners qualified in the relevant jurisdiction.

Mark Abell
Bird & Bird LLP
London
February 2015

Chapter 35

NETHERLANDS

Hans E Urlus[1]

I INTRODUCTION

The Netherlands is home to a thriving franchise market with over 700 franchise organisations, more than 30,000 franchise outlets, between 200,000 and 250,000 employees, and over €32 billion in annual turnover.

To promote and accommodate franchising's healthy development in the Netherlands, franchisors in the Netherlands have an umbrella organisation – the Netherlands Franchise Association. Over 200 franchisors are members.

Given the size and pervasiveness of franchises in the Netherlands the relevant legal landscape is significant.

II MARKET ENTRY

i Requirements for foreign entities

Companies incorporated outside the European Union, and that are not members of the European Economic Area Agreement (EEA), wishing to operate in the Netherlands (including operating a franchise) are subject to the Companies Formally Registered Abroad Act (the CFRA Act).

As a condition to being active in the Dutch market, the CFRA Act requires that these foreign companies comply with a number of registration and statutory requirements applicable to Dutch companies. These include, *inter alia*, registering in

1 Hans E Urlus is a principal shareholder of Greenberg Traurig, LLP. For their valuable contribution to this publication, the author thanks Kees Bothof; Ilana Haramati, an attorney at Greenberg Traurig Amsterdam licensed to practise law in the state of New York; and Jacomijn Christ, law clerk.

the Commercial Register, filing annual accounts with the Commercial Register and maintaining statutorily required minimum capital.

ii Tax on foreign entities

Currently, there is no tax for setting up a business in the Netherlands. And upon establishing a business in the Netherlands, entities that were originally foreign will be treated like ordinary Dutch entities for tax purposes.

III INTELLECTUAL PROPERTY

Intellectual property rights and know-how are often at the heart of the franchise formula. All or part of the franchise formula centres on use of the franchisor's trademarks, trade name, models, know-how and the like, in a manner that does justice to the reputation of the franchise chain.

Franchisors can take a variety of measures to protect their intellectual property, including their trademarks, trade names, franchise formula, copyright information and know-how.

However, unlike trademarks and copyrights, know-how is not protected by intellectual property law. Rather, know-how may be protected contractually and through the Dutch unfair competition law (including civil tort).

i Brand search

Among the types of intellectual property typically involved in franchising, only trademarks are registered.

Trademarks

In the Netherlands, the Benelux Convention for Intellectual Property Rights (BCIP) protects trademarks registered in the Benelux Office for Intellectual Property. Registration gives the registering party exclusive rights to use the trademark in relation to certain classes of goods, or services in Belgium, the Netherlands and Luxembourg.[2]

Furthermore, registration of the trademark with the European Union's Office for Harmonization in the Internal Market (OHIM) ensures that the registering party has exclusive rights to the trademark throughout the EU. A party wishing to register a trademark may conduct a preliminary trademark search on the OHIM's website.

Copyright

Copyright is granted automatically; formal registration is not required in the Netherlands, as it is party to the Berne Convention.[3]

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2 Other means may be used to inform third (infringing) parties of the existence of the licence, but that will not always be sufficient to be effective on third parties: see Amsterdam Court of Appeal, 14 December 1984, BIE 1985, 360 (*Caterpillar*) and the Commercial Court Brussels, 12 July 1991, *Ing.-Cons.* 1991, 436 (*A cause des garçons v. A cause des galeçons*).

3 Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

ii Brand protection

Because multiple types of IP are involved in franchises, several types of registration and protection processes may be involved in protecting a franchise's brand, including trademark rights and franchise formula (which may qualify for copyright protection).

Trademark rights

Franchise agreements include licences for intellectual property rights (usually trademark rights) for the use and distribution of goods or the performance of services. A franchise agreement will normally incorporate as an annex an overview of all the trademarks covered when the franchise is granted.

In principle, a trademark licence must be registered under the relevant trademark in the trademark register if it is to have third-party effect.[4] If the trademark licence is registered in the trademark register, the licensee may intervene in the event of infringement in an action brought by the trademark proprietor for compensation or profit remittance. This will enable the licensee to obtain compensation for the damage it has suffered or to claim a proportionate share of the profits earned by the infringing party.[5] A licensee may only bring an independent claim for compensation or profit remittance (but not an injunction)[6] if it has been authorised to do so by the proprietor.[7]

Franchise formula (copyright protection)

A (franchise) formula only qualifies for copyright protection if it meets the criteria of 'product in the field of literature, science or art' and 'own original character and personal stamp of the creator'.[8] Ideas, without any particular elaboration, are in any event not protected by copyright.[9] The situation changes, however, if the idea is elaborated into a (comprehensive) strategy. A detailed and specifically elaborated concept with a unique structure (selection and ranking) of elements[10] is protected by copyright,[11] in which case the copyright protection applies only to that specific elaboration of the franchise formula. The more comprehensively the franchise formula is described, the stronger the

4 Article 2.33 of the Benelux Convention on Intellectual Property (BCIP).

5 Article 2.32(4) of the BCIP.

6 The Benelux Court held that the exhaustive nature of Article 2.32(4) and (5) of the BCIP (formerly Article 11D of the Benelux Trademarks Act) implies that the licensee has no injunction, even if the licensee is acting in conjunction with the trademark proprietor. See Benelux Court, 7 June 2002, NJ 2003, 426 (*Adidas/Marca*).

7 Article 2.32(5) of the BCIP.

8 See Article 10 of the Copyright Act and Supreme Court, 4 January 1991, NJ 1991, 608 (*Van Dale v. Romme*).

9 For example, see Amsterdam Court of Appeal, 1 February 2001, BIE 2003/6 (*Autodrop v. Schadegevalletjes*) and Interlocutory Court of the District Court of The Hague, 9 October 2009 LJN: BK6373.

10 District Court of The Hague, 27 April 2005, BIE 2007/145 (*Stemwijzer v. Referendumstemwijzer*).

11 Example of non-acceptance of copyright: Amsterdam Court of Appeal, 14 February 2002, IER 2002/32 (*Hemel op paarden*).

copyright protection will be. It is important in this context to determine whether the franchise formula exhibits sufficient original characteristics to distinguish it clearly from existing franchise formulae.

iii Enforcement

As elaborated, franchisors have at their disposal a variety of means of protecting their franchise's intellectual property.

Copyright infringement

Franchise formulas may be protected by copyright. However, the Copyright Act does not protect all intangible ideas and styles.[12] Thus, the mere fact that a work resembles that of a protected franchise[13] does not necessarily mean that the imitation work is unlawful under the Copyright Act.

To determine whether an imitation franchise formula infringes on a franchisor's copyright, a court will look at the franchise formula's development, the degree of similarity between the protected and imitation franchise formulas,[14] and whether some of the imitated elements of the protected franchise formula were previously known, public, or could have been derived independently.

Trade name law

Article 5 of the Trade Name Act prohibits use of a trade name that is significantly similar to another trade name (or trademark),[15] raising a risk of confusion. This 'risk of confusion' test includes the general public impression, taking into account several factors, such as the nature and geographic location of both companies.[16]

12 The Copyright Act protects only the original expression, or the original application of an idea. The test for originality as applied in case law is whether the work 'reflects an original expression and the personal imprint of the author' (*Van Dale v. Romme*).

13 See for example District Court of Amsterdam, 13 June 2002, IER 2003/55 (*DNA Hot v. Publicis*).

14 The mere fact that there are points of agreement between a work in respect of which copyright protection is invoked and a product that is contested as infringing it is not sufficient to warrant the presumption that the latter is the product of intentional or unintentional borrowing. This requires a degree of conformity whose nature and extent is such that if the aforesaid presumption is not rebutted, it must be ruled that this is an unauthorised reproduction in terms of copyright law (cf. Supreme Court, 21 February 1992, NJ 1993, 164 and Supreme Court, 29 November 2002, IER 2003/17 (*Una Voce Particolare*).

15 Article 5(a) of the Trade Name Act.

16 Court of Appeal, Den Bosch, 23 March 2010, case No. HD 200.035.393 (*Café Bolle Jan v. Skihut Bolle Jan*).

Because a foreign franchisor will not generally use its own trade name in the Netherlands, franchise agreements should contain provisions: (1) requiring the franchisee to register the franchise trade name in the Commercial Register; and (2) authorising the franchisee (either together or in consultation with the franchisor) to take action in the event of infringement.

Trademark infringement (competitive advantage)

A former franchisee could conceivably want to piggyback its new business on the (successful) image of the franchise chain with which it was previously affiliated. In principle, a franchisor can oppose 'an unjustified advantage' if the image of its trademark is unjustifiably 'transferred' to the former franchisee's goods or services, boosting the former franchisee's business and trademark.[17]

Article 2.20(1)(d) of the BCIP,[18] and the European Court of Justice's relevant rulings govern.[19] Under the BCIP, the franchisor must demonstrate that the franchisee is 'gaining an unjustified advantage from the distinctive character or repute of the mark'. This carries a heavy burden of proof, including showing that use of the trademark has changed the economic behaviour of the average consumer or that there is a good chance that this behaviour will change in the future.[20]

An award based on infringement of an intellectual property right may include all legal costs for the purpose of Article 1019(h) of the Dutch Civil Code of Procedure (CCP).[21]

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17 ECJ 18 February 2009, C-487/07, No. 107 (*L'Oréal SA and Others*).

18 Article 2.20(1)(d) of the BCIP is based on Article 5(5) of the Trade Mark Directive. See First Directive (89/104/EEC) of the Council of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1) (the Directive). Although the trademark is largely harmonised at European level on the basis of the Trade Mark Directive and the Community Trade Mark Regulation (see Regulation (EC) No. 40/94 of the Council of 20 December 1993 on the Community Trade Mark (CTMR)). Article 5(5) of the Trade Mark Directive is an optional provision, which means that EU Member States are free to choose whether to adopt this provision in their national legislation – consequently, in principle, the concept of 'unjustified advantage' falls outside Community harmonisation. See ECJ, 21 November 2002, LJN: AK2863. The mere fact that only 'well-known brands' have recourse to Article 2.20(1)(c) of the BCIP, does not alter this, according to the District Court of Leeuwarden, 29 April 2009, HA ZA 08-96 (*Huis & Hypotheek Nederland BV et al v. DSB Leeuwarden*). As far as we are aware, the only countries to have implemented this Article of the Trade Mark Directive in the BCIP are the Benelux countries.

19 ECJ 27 November 2008, IER 2009/7 (*Intel v. Intelmark*).

20 See, for instance, Interlocutory Court of the District Court of The Hague, 15 December 2008, IER 2009/9, ground 4.10.

21 On the grounds of Article 14 of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157 of 30 April 2004) (Enforcement Directive), implemented in Article 1019h of the Dutch CCP.

Slavish imitation (wrongful act)

Moreover, under Article 6:162 of the Dutch Civil Code, generally a former franchisee may not mimic the franchisor's name or product. Profiting from the performances of others, without making similar efforts, is wrongful in principle, except in exceptional circumstances. According to established case law, for example, it is not wrongful to profit from the market position of a competitor.[22]

Thus the former franchisee is required to take reasonable action to prevent the similarity of the products leading to or increasing confusion.[23] The extent of preventative action required depends on the investment necessary to prevent confusion and the effect on the former franchisee's marketing.[24]

However, because there is no general prohibition against slavish imitation (in contrast to copyright, for example),[25] the doctrine only protects against competitor's improper actions that create public confusion.[26] If the imitator ensures that customers are not misled, the imitation is, in principle, allowed.[27]

Currently, the slavish imitation doctrine applies only to products. To date, as far as we know, slavish imitation of a format (or a franchise formula) has not been protected by court decisions.[28]

Know-how

Know-how is supplied to the franchisee for marketing purposes. Know-how is the 'package of non-patented practical information, resulting from experience and testing by the supplier which is secret, substantial and identified'.[29] As discussed below, know-how can be protected through confidentiality agreements.

One way of effectively protecting know-how against disclosure is a statement of confidentiality by the franchisee (which is also imposed on any of its affiliates and its

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22 For example, see Amsterdam Court of Appeal, 1 February 2001, BIE 2003/6 (*Autodrop v. Schadegevalletjes*) and Amsterdam Court of Appeal, 14 February 2002, IER 2002/32 (*Hemel op paarden*); District Court of The Hague, 5 November 1991 BIE 1993/108 (*Subsidiedisk v. Subsidiewijzer*).

23 Supreme Court, 26 June 1953, NJ 1954, 90 (*Hyster Karry Krane*); Supreme Court, 21 December 1956, NJ 1960/414 (*Drukasbak*); Supreme Court, 8 January 1960, NJ 1960/415 (*Scrabble*).

24 Supreme Court, 21 December 1956, NJ 1960/414 (*Drukasbak*); Supreme Court, 15 March 1968, NJ 1968/268 (*Stapelschalen*); Supreme Court, 7 June 1992, NJ 1992/392 (*Rummikub*); Supreme Court, 29 December 1995, NJ 1996/546 (*Decaux v. Mediamax*); Supreme Court, 29 June 2001, IER 2001, p. 227 (*Impag v. Milton Bradley*).

25 Spoor/Verkade/Visser, *Auteursrecht* [Copyright], Deventer: Kluwer 2005, p. 581.

26 Supreme Court, 31 May 1991, NJ 1992/391 (*Borsumij v. Stenman*).

27 FW Grosheide, 'Hoe slaafs mag men nabootsen?'[How slavish can be imitation be?], IER 2005/64.

28 Examples where invocation of slavish imitation was dismissed: District Court of The Hague, 26 May 1999, BIE 2000/109 (*John Lewis or Hungerhorf v. King Chapel Kitchens*); Amsterdam Court of Appeal, 1 February 2001, BIE 2003/6 (*Autodrop v. Schadegevalletjes*).

29 Article 1(g) of the Block Exemption on Vertical Agreements.

employees), which can be reinforced by a penalty clause. This confidentiality provision often 'survives' the franchise agreement, binding the franchisee after the term of the franchise agreement. In addition, the franchisee must return to the franchisor at the end of the franchise all documentation and materials relating to the shared know-how and the franchisee must refrain from further use thereof.

iv Data protection, cybercrime, social media and e-commerce

Data protection

The Netherlands implemented the European Union Data Protection Directive[30] in the Dutch Data Protection Act.[31]

Under the Dutch Data Protection Act, there are several legal requirements for processing personal data. The law defines 'personal data' as any information relating to a person who is either identified or identifiable. And the law defines 'processing' as anything that can be done to personal data. Thus, processing includes storing, erasing, using or retrieving personal data, as well as transferring personal data to foreign countries.

Thus, as applied to franchises, the Dutch Data Protection Act could be applicable whenever a franchisee collects its customers' personal data.

E-commerce

Each franchisee must be free to use the internet to advertise or sell products. A restriction on internet use by franchisees is only permissible to the extent that internet promotion or sales results in active sales, for instance, in the exclusive territories or customer groups of other franchisees.[32]

The use of the internet is generally considered passive selling. Because it is a reasonable method of reaching customers in general, e-commerce is not considered active selling in other franchisees' exclusive territories. Moreover, the language used on the website does not generally affect internet sales' status as passive selling. As a rule, a website is not a form of active selling to certain customers unless the site is specifically aimed at those customers. The Commission does consider online advertising that specifically targets certain customers as a form of active selling to customers.[33]

However, a franchisor can impose quality standards for the use of an internet site for the resale of its goods or services, just as it can for a retail outlet or for advertising and promotion in general.[34] In no circumstances, however, may the franchisor reserve the exclusive right to sell or advertise on the internet for itself.

30 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, No. L 281/31.

31 Dutch Data Protection Act, 6 July 2000.

32 Guidelines on Vertical Restraints, paragraph 52.

33 Guidelines on Vertical Restraints, paragraph 54.

34 The latter can be particularly important for selective distribution, where the supplier may require that its distributors have a physical retail outlet or showroom before they are permitted to proceed with online distribution.

Furthermore, the Commission considers the following e-commerce measures to be hard-core restriction of passive sales:

a the obligation on a franchisee to prevent customers who are located in a different (exclusive) territory from visiting its website, or to automatically forward customers to the websites of the manufacturer or other (exclusive) franchisees;[35]

b the obligation to break off internet transactions with customers as soon as it becomes clear from the credit card data that the address of the customer falls outside the franchisee's (exclusive) territory;

c the obligation on a franchisee to limit the proportion of internet sales in relation to overall sales. This does not preclude the supplier from requiring the purchaser to sell a certain absolute minimum volume of products (in terms of either value or volume) offline in a physical location to safeguard the effective functioning of its physical retail outlet, without limiting the distributor's online sales. This minimum volume for offline sales may be the same for all purchasers or may be established for each individual purchaser on the basis of objective criteria such as the size of the purchaser within the network or its geographical location; and

d the obligation on a distributor to pay a higher price for products resold online than for products resold offline.

Moreover, in the *Pierre Fabre* decision, the European Court of Justice held that in the context of a selective distribution network, an absolute ban on internet sales constitutes restrictive competition by object, which, in the absence of objective justification, is impermissible under the Treaty on the Functioning of the European Union (TFEU).

Cybercrime and social media

The Netherlands does not have any franchise-specific laws relating to cybercrime and social media.

IV FRANCHISE LAW

i Legislation

Like most EU Member States, the Netherlands does not have a specific law dealing with franchises.[36] Franchising generally is not covered by specific legislation outside the EU.[37]

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35 It is possible (and not uncommon) that a consumer is compelled to select a language or a country on the home page of a website before being able to proceed.

36 Countries within the EU/EEA with specific franchise legislation are Lithuania and Italy. In Spain and France there are regulations on pre-contractual disclosure obligations. See, for example, Odavia BuenoDiaz, *Franchising in European Contract Law*, Munich: Sellier 2008; Philip F Zeidman, *Getting the Deal Through: Franchise 2008*, London: Law Business Research 2007. Countries within the EU/EEA without specific franchise legislation include Austria, Finland, Germany, Greece, Poland, Portugal, Netherlands, Switzerland and the UK.

37 Countries outside the EU with franchise legislation include Australia, Canada, China, Korea, Malaysia, Mexico and Russia. Countries outside the EU without specific franchise legislation

Although until 2000 franchise was recognised in EU competition law as a discrete legal entity (Block Exemption on Franchise Agreements),[38] this (specific) block exemption expired on 1 January 2000 and was incorporated into the, more general, Block Exemption on Vertical Agreements (No. 330/2010),[39] which will be examined below.

Thus, the Netherlands has neither a legal definition of a franchise, nor a regulatory framework specifically applicable to franchises.

However, while the law does not provide a definition of franchise, the Netherlands Franchise Association's guidelines define franchising as 'a system for distributing products and services or exploitation of technology, based on close and lasting cooperation between legally and economically independent businesses'.[40]

Furthermore, although there is no regulatory framework specifically applicable to franchises, franchises are subject to a number of laws and guidelines. These include: (1) the provisions of the Dutch general contract law; (2) the regulations of the Dutch competition authority, which ensures national compliance with European competition law; and (3) for franchisors that are members of the Netherlands Franchise Association, the European Franchise Federation's European Code of Ethics for Franchising,[41] which, in addition to being a codified best practice, constitutes a guideline on the assessment of disputes between franchisors and franchisees.

ii Disclosure

Pre-contractual disclosure

Generally, parties to a franchise agreement are permitted to rely on their counterparty's disclosures, and are bound by their counterparty's reasonable expectations.

However, recent developments in Dutch case law and other non-statutory law have imposed pre-contractual obligations on both parties to a franchise agreement: the franchisor has a disclosure obligation and the franchisee has an investigation obligation.

The franchisor's disclosure obligation requires that the franchisor provide a prognosis regarding the expected success of a new franchise location, based on a thorough

include India, Japan, Kuwait, New Zealand, Philippines, Puerto Rico, Singapore, South Africa and Ukraine.

38 Regulation No. 4078/88 on the application of Article 85(1) to franchise agreements, OJ 1988. L 359/46.

39 Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Block Exemption Regulation on Vertical Agreements). However, the validity of the Block Exemption Regulation on Vertical Agreements expired on 31 May 2010 and it was replaced by Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (OJ L 142 of 23 April 2010) and its Guidelines on Vertical Restraints, which entered into force on 1 June 2010. As this chapter will appear after that date, the references below will relate solely to Regulation No. 330/2010 (Block Exemption on Vertical Agreements); see http://ec.europa.eu/competition/antitrust/legislation/vertical.html.

40 www.nfv.nl/juridisch-over-franchising/.

41 www.nfv.nl/images/stories/brochures/europese%20erecode.pdf.

and careful assessment of the market and the new location. An assessment of the primary competitors in the area and the estimated turnover should be included. Furthermore, the franchisor is obliged to provide the franchisee with advice and assistance, and it will need to make available to the franchisee its financial data and the terms of the licence under which the franchisee will operate.

Typically, in the Netherlands the franchisor will provide the franchisee with a handbook containing, along with other information, the following franchise information: know-how, instructions regarding use of the franchise's intellectual property, and the franchise's aesthetic.

A misinformed franchisee can bring a claim for nullification of the franchise agreement based on factual error if the franchisee can prove it would not have entered into the contract had it properly understood the factual situation.[42]

Continuing disclosure

Because there is no specific franchise statute, franchisors are not under a statutory obligation to make continuing disclosures to the franchisee. However, parties may contractually bind themselves to make continuing disclosures.

In cases of breach of contract, the franchisee can obtain full compensation for damage, including both actual losses and consequential damage such as to profits. The franchisee bears the burden of proving its claim for damages.

iii Registration

Every company, or other legal entity in the Netherlands must register in the trade register.[43] Any organisation that performs an activity for economic gain must register with the Trade Register at the Chamber of Commerce in the district in which the business is located.

iv Mandatory clauses

Because the Netherlands does not have a specific franchise statute, there are no clauses that must be included in franchise agreements specifically. However, franchise agreements often include an exclusivity clause, a clause on protection of IP rights and know-how, and clauses on development obligations, training and assistance.

v Guarantees and protection

Typically, guarantees provided by a franchisee to a franchisor are enforceable. Guarantees provided by a franchisee who is a private individual may be subject to the approval of the franchisee's spouse, unless the guarantee is provided strictly within the scope of the franchisee's regular business enterprise. This exception is generally applied restrictively.[44]

42 HR 25 January 2002, NJ 2003/31 (*Paalman/Lampenier*).

43 www.kvk.nl/englishwebsite/starting-a-business/.

44 Dutch Civil Code 1:88.

V TAX

i Tax residency for corporate income tax

Once established in the Netherlands as Dutch limited liability companies (for example, BVs and NVs), franchises of foreign origin qualify as residents of the Netherlands for tax purposes and are subject to Netherlands corporate income tax at a rate of 20 per cent for the first €200,000, and 25 per cent for all profits in excess of that amount.

Thus corporate income tax may apply equally to franchisors and franchisees alike that are established in the Netherlands.

ii Tax on dividends

Dividends are generally also taxed in the Netherlands. A 15 per cent dividend withholding tax applies to most dividends distributed by a company that is a Dutch tax resident company. However, if a tax treaty is applicable, the percentage withheld may be reduced. Moreover, dividends received by an EU shareholder with more than a 5 per cent interest in the company are exempt from the Dutch withholding text.

Additionally, capital gains, and dividends acquired through shareholding covered by the Dutch participation exemption, are exempted from Dutch corporate income tax.

iii Employee tax withholdings

Wages paid by a Dutch employer are subject to withholdings for Dutch taxes and social security. However, it is important to bear in mind that tax withheld from employees' wages may be fully credited against the employees' individual tax liabilities. In addition, the Netherlands offers attractive tax reductions for highly qualified foreign employees in the Netherlands.

iv VAT

Value added tax (VAT) in the Netherlands is levied at a rate of 21 per cent. However, certain products are subject to a reduced VAT of 6 per cent, or zero per cent.

Exports from the Netherlands are not subject to VAT. Imports to the Netherlands, however, are subject to VAT, although the importing agent may receive a tax credit or a refund on the VAT paid on the imported goods.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

Under Dutch law, parties are required to deal with each other in good faith. General civil law in the Netherlands includes the principles of reasonableness and fairness. The franchisor is bound by a duty of good faith the franchisee.

Dutch courts may set aside contractual provisions that are extremely one-sided in favour of a stronger party, at the expense of a weaker party. Dutch courts may use this reasonableness gloss to protect weaker parties from inequitable contractual terms. In so doing, courts will consider parties' relative economic power, the contract's duration, parties' investments in the contract and parties' reasonable expectations. For example, the Dutch provisional relief court ruled in favour of the franchisee in a recent case in which the franchisor had charged the franchisee above-market prices, the franchisee then stopped franchise fee payment and the franchisor subsequently suspended delivery. Protecting the franchisee, the court found that because of the franchisee's dependence on the franchisor, suspension of delivery by the franchisor was disproportionately harmful to the franchisee. Furthermore, the court also ruled that the franchisee was entitled to suspend payment of the franchise fees. The court thus resoundingly decided in favour of the franchisee, considering the franchisor–franchisee relationship to be disproportionate.[45]

Moreover, case law interprets this duty of good faith potentially to require the franchisor to provide a struggling franchisee with ongoing advice and assistance. The franchisor and franchisee have an obligation to comply with the letter and spirit of the franchise agreement such that both parties benefit from the franchise agreement.

ii Agency distributor model

A franchise agreement may be considered an agency agreement under certain conditions; for example, if the franchisee does not have commercial independence, or the franchisee has insubstantial commercial or financial risks.

Parties should be aware of the possible consequences of a franchise agreement's construal as an agency agreement. These include possible Dutch and EU regulatory consequences, as well as competition law consequences (an ordinary, genuine agency agreement is substantially exempt from European competition law prohibitions, whereas a franchise agreement may qualify as an agency agreement for agency law purposes but may not be a sufficiently genuine agency agreement to qualify for the competition law exemption).

Relevant Dutch agency law provisions include paying the franchisee termination indemnity upon termination of the agency. However, Dutch law permits parties with sufficient justification to contract out of Dutch agency law. Nevertheless, if the agency agreement is substantially connected to EU territory, EU agency law will apply irrespective of parties' attempts to contract out of mandatory EU agency law.[46]

When a franchise agreement is considered an agency agreement, a franchisee may be considered the franchisor's employee if the franchisee does not bear sufficient risk to qualify as an independent entrepreneur.

iii Employment law

Generally speaking, Dutch law does not consider a franchisee to be an employee of the franchisor. When the franchisor–franchisee relationship in practice does not conform to the franchise agreement, and instead has the markings of an employment relationship, then Dutch law will consider the franchisee an employee. For example, this will be the case when the franchisor–franchisee relationship is so clearly and grossly unequal that it is proper to deem the franchisee to be the franchisor's employee.[47] When in doubt, it is

45 Court Northern Netherlands, 28 August 2014, ECLI:NL:RBNNE:2014:4715.

46 Case 281/98, *Ingmar Eaton*, 9 November 2000, ECR 2009 I-09305.

47 CRvB, 26 February 1998, LJN AA8795.

advisable to seek a ruling from the tax authorities regarding the franchisee's status as an independent entrepreneur.

Once a franchisee is legally considered an employee of the franchisor, then the franchisee will receive a variety of rights under Dutch law – including holiday and sick pay, and termination protections – and the franchisor will be required to withhold taxes and social security benefits from the franchisee's wages. Dutch mandatory law protects employees, including franchisees or commercial agents that are deemed employees, against termination without prior government approval.[48]

If the franchisee contracts with the franchisor through the franchisee's Dutch limited liability company, the risk of the relationship being considered an employment relationship is excluded in principle.

iv Consumer protection

Generally, Dutch law will not treat franchisees as consumers. However, certain general conditions of the franchise may be annulled under consumer protection laws to protect small franchisees.[49]

v Competition law

Since, on a European level franchising has mainly been regulated under competition law, European competition law is generally the framework for assessing the substantive aspects of an international franchise agreement. Moreover, because of their direct national impact, European regulations affect even strictly national agreements, although national provisions (for example the Dutch *de minimis* regime, exempting horizontal arrangements up to market share of 10 per cent) remain significant.

The relevant European legislation includes Articles 101(1) and 101(3) of the TFEU (formerly the EC Treaty),[50] and the Block Exemption on Vertical Agreements.[51] The European competition law framework may be relevant to the following franchise activities: pricing policy, protection of territory, purchase or sales policy, internet sales, financial compensation, the franchise outlet, intellectual property rights and know-how, change of control, and (post-contractual) non-competition clauses.

Broadly speaking, Article 101(1) of the TFEU prohibits agreements appreciably restricting or distorting competition, and Article 101(3) of the TFEU provides an

48 6 Besluit Buitengewone Arbeidsverhoudingen 1945.

49 Dutch Civil Code 6:236-238.

50 Since 1 December 2009, the date on which the Treaty of Lisbon entered into force, the Treaty establishing the European Community (EC Treaty) has been known as the Treaty on the Functioning of the European Union (TFEU) (see Article 2(1) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of 13 December, 2007, OJ C 306).

51 See footnote 39, *supra*.

exemption for agreements that offer sufficient benefits to offset the anti-competitive effects.[52]

Furthermore, the Block Exemption on Vertical Agreements is also applicable to franchise agreements.[53] It exempts certain restrictions on competition in vertical agreements and outlines the framework in which the automatic exemption of Article 101(3) of the TFEU applies. The Block Exemption on Vertical Agreements applies only to agreements that are: (1) covered by the scope of Article 101(1) of the TFEU;[54] and (2) directly related to the use, sale or resale of goods or services by a buyer or its customers.

vi Restrictive covenants

(Post-contractual) non-competition clause

In addition to an obligation to maintain confidentiality, a franchise agreement will usually contain a (post-contractual) non-competition clause, to protect the interests of the franchisor (i.e., protection of indispensable know-how) during and after the franchise agreement. Provided it is necessary and proportionate, the parties may contractually prohibit the franchisee from performing competing activities from the relevant franchise locations for (a maximum of) one year after the franchise agreement has ended.

Judges tend to interpret poorly drafted and badly formulated non-competition clauses in favour of the franchisee or to disregard them entirely.[55] However, even if the text of a post-contractual non-competition is clear, generally a judge will not uphold an overly strict non-competition clause that prevents a former franchisee from 'earning a crust' by prohibiting a former franchisee from engaging in comparable activities after the franchise relationship's termination.[56]

For example, the Court of Utrecht held that for up to one year after termination of a franchise agreement, a post-contractual non-compete clause prevents competition with a member of the franchise network in an area within a reasonable distance from the former franchise location (in this case a radius of 3km).[57] Such competition does

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52 With regard to the general methods employed by the Commission and its interpretation of the conditions for the application of Article 81(1) (old) and in particular Article 81(3) (old) of the EC Treaty, see the Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27 April 2004, pp. 97–118.

53 The Block Exemption Regulation on Vertical Agreements (No. 2790/1999) replaced the earlier Block Exemption Regulation on Franchise Agreements (No. 4078/88 on the application of Article 85(1) to franchise agreements, OJ EC 1988 L 359/46), and has in turn been superseded by the Block Exemption on Vertical Agreements (see footnote 39).

54 With the exception of the conditions established in the *de minimis* notice (OJ C 368, 22 December 2001, pp. 13–15), on nuclear restrictions (hard-core restrictions) and cumulative effects, it is generally assumed that vertical agreements concluded by non-competing companies whose individual market shares do not exceed 15 per cent fall outside the scope of application of Article 101(1). For agreements between competing companies, a *de minimis* threshold of 10 per cent applies for the combined market share in each relevant market.

55 Pres. District Court of Breda, 16 January 1996, PRG 1996, 4468.

56 AE van Zoest, *Franchising*, Alphen aan den Rijn: Kluwer 2001, p. 54.

57 District Court of Utrecht, 15 April 2009, LJN: BI1190 (*Run2Day Franchise BV v. defendant*).

not exist if no other franchise outlet is located within this area. The court found no justification for applying the post-contractual non-competition clause in cases where the former franchisee continues with a similar activity (immediately after the date on which the franchise agreement is terminated) in the same location.

According to the European Court of Justice, the one year post-term non-compete obligation in a franchise agreement must be limited to a particular building or parcel of land used during the franchise agreement. It will not fall within the Block Exemption on Vertical Agreements if the buyer (former franchisee) is prohibited from selling the contract goods or services outside the premises or parcel of land on which the franchisee operated during the contract.[58]

Confidentiality

Confidentiality covenants in franchise agreements are enforceable under Dutch law. Typically a confidentiality agreement will require franchisees to protect franchise's unpatented know-how during and after the term of the confidentiality agreement, or face contractually delineated financial penalties.

Although Dutch courts will often enforce the financial penalties for violation of confidentiality agreements, the courts may mitigate the harshness of these penalties. Parties cannot contract around courts' ability to mitigate these financial penalties.

vii Termination

Ipso jure

A franchise agreement is usually entered into for a fixed term (up to a maximum of five years, pursuant to Article 5(a) of the Block Exemption on Vertical Agreements), without the possibility of tacit renewal for a similar term or an indefinite extension. The franchisor and franchisee must, therefore, negotiate the franchise relationship's potential continuation at the end of each term. If the parties have not made any agreements or if they are unable to reach agreement on continuing the franchise relationship, the franchise agreement ends *ipso jure* after the agreed contract term.

Premature termination

When the franchise agreement requires a negotiated extension, premature termination is permissible in the event of failure, in spite of numerous attempts by the franchisee, to negotiate the agreement's possible extension.[59]

In international franchise agreements, parties should check whether the contract can be rescinded out of court (as in the Netherlands) or whether judicial intervention is necessary.[60]

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58 ECJ, 7 February 2013, Case 117/12: 2013, para. 34 (*La Retoucherie de Manuele v. La Retoucherie de Burgos*).

59 District Court of Utrecht, 15 April 2009, LJN: BI1190 (*Run2Day Franchise BV v. defendant*).

60 For example, in France a contract can only be rescinded by a court ruling, unless the parties agree otherwise.

Compensation for termination

There is no general legislation addressing franchise agreement termination and the required notice period. In principle, continuing performance contracts may be terminated at will, but that right is not without restrictions. The agreement, the law, the standards of reasonableness and fairness or customary practice may impose constraints on termination. Assessing whether or not termination of the franchise agreement is legally valid will depend on the circumstances.[61]

Generally, in the absence of special circumstances, a continuing performance contract that has lasted for a reasonable number of years may usually be terminated, provided that: (1) there is cause to terminate; (2) sufficient notice is given; and (3) a reasonable notice period is observed.[62] Compelling reasons (cause) for termination would include, for example, a situation in which continuing the relationship would jeopardise the existence of the terminating party,[63] or where there was a risk to its reputation.[64]

However, terminating the agreement may be contrary to good faith if the franchisee has made considerable investments at the franchisor's request, and which it has yet to recoup.[65] Generally, reasonable compensation of the franchisee for termination of the franchise agreement is required. The compensation may take the form of a period of notice, compensation for investments or payment for the client database built up by the franchisee (goodwill payments) or a combination thereof.[66]

viii Anti-corruption and anti-terrorism regulation

If fraud is suspected, the Dutch Fiscal Information and Investigation Service (FIOD) and the Tax and Customs Administration assess whether fraud is being committed. If it is, the FIOD, in consultation with the Public Prosecution Service, may bring a criminal investigation. The FIOD also performs supervisory activities in the area of anti-money laundering legislation.[67]

By analysing a franchisee's data, these authorities can discover any fraudulent practices.

61 Supreme Court, 3 December 1999, NJ 2000, 120 (*Latour v. De Bruijn*).

62 Court of Appeal, Arnhem, 10 February 1998, set out in Supreme Court, 3 December 1999, NJ 2000, 120 (*Latour v. De Bruijn*), District Court of Utrecht, 18 April 2007, LJN: BA3564 (ground 4.9) and Interlocutory Court of the District Court of Haarlem, 25 May 2004, LJN: AP0057.

63 Interlocutory Court of the District Court of Almelo, 10 May 2006, LJN: AX1494.

64 Interlocutory Court of the District Court of Utrecht, 2 September 2004, LJN: AQ8799.

65 Court of Appeal, Amsterdam, 26 January 1989. The judgment was upheld in the Supreme Court, 30 November 1990, NJ 1991, 187.

66 Barendrecht/Peursem, Distributieovereenkomsten [Distribution agreements], Recht en Praktijk (Serie), Deventer: Kluwer 1997, p. 152.

67 www.belastingdienst.nl/wps/wcm/connect/bldcontenten/standaard_functies/individuals/organisation/organisational_structure/fiod/.

ix Dispute resolution

Court system

Franchise agreements will often include choice of law, forum or arbitration provisions.

However, when the franchise agreement does not include these provisions, the courts of the Netherlands will have jurisdiction over a dispute, as follows:

a a sub-district court is competent for small claims (under €25,000), as well as for employment and rent disputes; and

b a district court civil judge hears claims over €25,000.

Moreover, the Netherlands Franchise Association can assist in mediating disputes for parties seeking out-of-court remedies.

Choice of forum and choice of law

International franchise agreements often contain clauses on choice of law[68] (which law applies to the franchise agreement) and choice of forum (which authority is competent in any country). For instance, the parties can agree that all disputes arising under the franchise agreement must be settled by arbitration. For international franchise agreements, arbitration is often preferred over the courts because of the advantages that arbitration offers, including: (1) shorter procedures; (2) free choice of law and language; (3) options in relation to (the number of) arbitrators, place of arbitration, procedural rules (ICC, NAI, WIPO, etc.); (4) secret and informal procedures; and (5) arbitral awards can be implemented relatively easily if the parties are established in countries that are parties to the New York Convention.[69]

The Netherlands Franchise Association has assisted the Netherlands Arbitration Association in compiling a list of franchise experts willing to serve as arbitrators, including in small franchise disputes.

VII CURRENT DEVELOPMENTS

There is a recent trend in Dutch courts to use the reasonableness and fairness requirements in Dutch law to require longer notice periods for termination if a franchisor terminates a franchise agreement.

Whereas previously courts typically required notice periods of between six and 12 months, recently some courts have started requiring notice periods of between two and three years. This is the case even when the franchise agreement provides for shorter notice periods. It is less often the case in respect of non-renewals than in respect of agreements entered into for an indefinite period.

68 If no choice of law is stipulated in the franchise agreement, the franchise agreement will be governed by the law of the country in which the franchisee has its habitual residence (Article 4(e) of EC Regulation No. 593/2008 of the European Parliament and Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)).

69 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

Dutch law's fairness, reasonableness and good faith requirements may continue to be used by courts in future to further disqualify contractual provisions that they consider inequitable to franchisees with lesser bargaining power.

In addition, the need for more directly applicable rules and guidelines for franchise has recently received more attention on both the European and national levels. European Commissioner Elżbieta Bieńkowska has promised to set up an action plan focusing specifically on franchising, potentially with an eye to protecting the position of franchisees.[70] Furthermore, the Dutch cabinet and the Dutch 'competence centre' for franchise, which consists of franchisees, franchisors, lawyers, interest representatives, experts and consultants among others, are discussing the possibility of setting up a franchising 'code of conduct', which is likely to resemble the current Code of Ethics for Franchising of the Netherlands Franchise Association.[71] Both the Dutch cabinet and the competence centre for franchise are also considering establishing a dispute resolution committee dedicated to enforcing the envisioned code of conduct for franchising. However, they have yet to agree on the practical mechanisms for the potential committee, including how it would function.[72]

70 Elżbieta Bieńkowska made this promise at her confirmation hearing at the European Parliament, 2 October 2014.

71 The European Franchise Federation prepared the European Code of Ethics for Franchising in 1972 in cooperation with the European Commission. The Code of Ethics applies to the relationship between the franchisor and its individual franchisees and provides a standard for behaviour. The organisations (franchise associations) that incorporate the European Code of Ethics in their articles of association stipulate that their member-franchisors are required to apply this code of practice. Moreover, the Code of Ethics also applies to the relationship between master-franchisee and franchisees. The Code of Ethics is a code of conduct, not formal law. However, courts sometimes take the Code of Ethics into consideration when ruling on a franchise dispute.

72 See letter from the Dutch Prime Minister Rutte and Vice Prime Minister Asscher to the President of the House of Representatives, 16 September 2014, and the brainstorm sessions on franchising with the Ministry of Economic Affairs and the competence centre for franchise, 8 September 2014. In the letter and the brainstorm sessions, the code of conduct for franchising and its accompanying dispute resolution committee are discussed.

Appendix 1

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Hans E Urlus is a principal shareholder of Greenberg Traurig LLP. He is active in respect of franchise, commercial agency and distribution law, with a focus on competition law. Mr Urlus heads the franchise team of Greenberg Traurig Amsterdam.

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