

PANORAMIC

**DISTRIBUTION &
AGENCY**

Netherlands



LEXOLOGY

Distribution & Agency

Contributing Editor

Andre R Jaglom

Tannenbaum Helpern Syracuse & Hirschtritt LLP

Generated on: March 28, 2024

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Contributors

Netherlands

BUREN



IJsbrand Uljée

Philip ter Burg

Sam Amrani

i.uljee@burenlegal.com

p.terburg@burenlegal.com

s.amrani@burenlegal.com

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 in the Netherlands.

Law stated - 26 January 2024

Ownership structures

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

A foreign supplier may be partial owner of a company that is importer of its products.

Law stated - 26 January 2024

Ownership structures

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

The most common business entities in the Netherlands are the private limited liability company (Besloten Vennootschap, or BV) and the public limited liability company (Naamloze Vennootschap, or NV). Both entities have legal personality and provide limited liability for their shareholders. The managing directors run the business on a day-to-day basis. A BV or NV may appoint a supervisory board to monitor their board of directors (two-tier board) or the supervisors may be part of the board of directors (one-tier board). A BV or NV must be incorporated by notarial deed. All businesses active in the Netherlands must be registered in the Business Register of the Netherlands Chambers of Commerce.

On 1 January 2024, the Act on the Online incorporation of private limited liability companies came into force, implementing EU Directive 2019/1151 in the Netherlands. The act facilitates the establishment of a Dutch BV entirely online for EU nationals and EU legal entities, eliminating the need for physical presence at the notary's office and enabling the electronic signing of documents. The act further permits the drafting of the notarial deed and subsequent articles of association amendments in English, provided the initial incorporation was done through an electronically notarised English document without subsequent language changes.

Law stated - 26 January 2024

Restrictions

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

The Netherlands has an investment screening regime that focuses solely on national security concerns. The new investment screening regime entered into force on 1 June 2023 and applies retroactively to investments completed after 8 September 2020. The regime is a general investment control regime that equally applies to non-EU, EU and Dutch investors. It primarily targets the investment's target rather than the investor's identity, and it aims to protect sensitive infrastructure and technologies. Otherwise, Dutch law does not restrict foreign businesses from operating in the Netherlands or limit foreign investment in or ownership of Dutch business entities.

Law stated - 26 January 2024

Equity interests

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

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

Law stated - 26 January 2024

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?

The main Dutch taxes levied from a foreign supplier or a Dutch limited liability company owned by a foreign supplier are corporate income tax, dividend withholding tax and personal income tax, VAT and import duties.

Dutch tax-resident companies are subject to corporate income tax based on their worldwide income. Non-Dutch tax-resident companies are subject to corporate income tax from certain Dutch sources, including Dutch permanent establishments or permanent representatives, shareholdings of at least 5 per cent in Dutch companies that cannot pass certain anti-abuse tests and other specific sources, including Dutch real estate, directorship services and the exploration of natural resources. The Dutch corporate income tax rate in 2024 is 19 per cent for taxable profits up to and including €200,000, and 25.8 per cent for taxable profits exceeding this amount.

Non-Dutch tax-resident individuals are subject to Dutch personal income tax on income from certain Dutch sources (box 1 income) or shareholdings of at least 5 per cent in Dutch companies (box 2 income).

Income tax in box 2 is levied at a rate of 24.5 per cent for taxable income up to and including €67,000 (€134,000 for tax partners) and 33 per cent for taxable income exceeding this amount in 2024. In many cases, if a Dutch BV is held by a qualifying foreign-resident legal

entity, no tax is due upon distribution. In the case of a private individual shareholder, Dutch taxation is mostly limited to the Dutch dividend withholding tax, which may be reduced by virtue of a tax treaty. The most efficient setup depends on all facts and circumstances, including local taxation in the home jurisdiction of the entrepreneur.

Furthermore, businesses are, in principle, required to file VAT returns and are entitled to a refund of (input) VAT charged, provided they are engaged in VAT-taxable transactions. These requirements also apply if the non-Dutch supplier has a fixed establishment for VAT purposes in the Netherlands.

Law stated - 26 January 2024

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

What alternative distribution relationships are available to a supplier?

Freedom of contract exists in the Netherlands for commercial contracts in principle, meaning that parties have freedom to structure their relation as they wish. Distribution agreements, commercial agency or sales representatives agreements, and franchising are most common, although private label agreements, trademark licensing and joint ventures also occur.

Law stated - 26 January 2024

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?

Distribution agreements, under which the distributor acts as an independent reseller of the supplier, are governed by the common statutory rules on commercial contracts and a body of case law. There are no specific statutory rules on distribution agreements.

EU Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the member states relating to self-employed commercial agents as implemented in Title 7 of Book 7 of the Dutch Civil Code applies to commercial agents (ie, self-employed intermediaries who negotiate sale agreements on behalf of the supplier). The statutory rules include mandatory provisions on minimum notice periods for termination and a right to a goodwill indemnity due upon termination.

Since 1 January 2021, franchisors and franchisees must conform to the Dutch Franchise Act. From this date, franchise agreements with franchisees in the Netherlands must comply with the provisions of this Act as implemented in Title 16 of Book 7 of the Dutch Civil Code. The transition period of two years, within which existing franchise agreements had to be aligned with the new Act, expired on 1 January 2023. Agreements concluded after 1 January 2021 must comply with the new Act, including the mandatory provisions on the

pre-contractual four-week stand-still period, the goodwill indemnity due upon termination, and consent requirements for interim amendment of the franchise agreement or formula.

Law stated - 26 January 2024

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?

Under Dutch law, agreements can be entered into for a fixed or indefinite period. Fixed-term agreements generally cannot be terminated prematurely, unless:

- otherwise agreed;
- this follows from reasonableness and fairness which – pursuant to Article 6:248 of the Dutch Civil Code – always applies to agreements concluded between the parties; or
- there are unforeseen circumstances as referred to in Article 6:258 of the Dutch Civil Code.

Agreements for an indefinite term are, in principle, always terminatable. However, reasonableness and fairness and the nature and content of the contract may imply that termination is only possible if a sufficiently serious ground for termination exists or provided a certain minimum notice period is observed or the termination is accompanied by an offer for compensation.

For distribution agreements, in the absence of an agreed notice period, the following rules of thumb regarding the notice period to be observed can be distilled from case law:

- for contracts of 0–2 years: three months' notice;
- for contracts of 2–4 years: six months' notice;
- for contracts of 4–10 years: 8–12 months' notice; and
- for contracts of 10–20 years: 1–2 years' notice.

However, what constitutes a reasonable notice period remains dependent on the circumstances of the case. The reasonable notice period serves to give the other party the opportunity to prepare for the moment when the agreement is actually terminated and to take the necessary measures, such as finding a new supplier. Other relevant circumstances for determining the length of the notice period may therefore include, inter alia, the extent to which investments have been made, the time needed to recoup them and the possibility of finding an alternative.

A commercial agency agreement for an indefinite term may in general also be terminated without cause if permitted by contract. If there is no notice period agreed upon, the notice period to be adhered to shall be four months for an agreement of no more than three years,

five months for an agreement with a duration of more than three years and six months for agreements with a duration of more than six years. A notice period contractually agreed upon must be at least one month for agreements with a duration of less than one year, two months for agreements with a duration of less than two years and three months for agreements with a duration of more than three years.

Law stated - 26 January 2024

Contract termination

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

In general, a distributor has no right to compensation, indemnity or goodwill upon the regular termination of a distribution agreement. In certain circumstances, compensation for incurred costs may be due (eg, if the distributor with knowledge of the supplier has made investments with a view to the continuation of the agreement that cannot be recouped in the notice period). If the supplier terminates the agreement without cause and without applying the agreed period of notice, the supplier must normally pay compensation for damages to the distributor. Usually, this is an amount equivalent to the loss of profits due to premature termination.

Termination of a commercial agency agreement without cause in accordance with the contract generally does not cause a right to damages. However, in case of termination, the agent will be entitled to a goodwill indemnity if the principal will continue to benefit from the contract after termination. The amount of the indemnity may not exceed commissions over one year, calculated from the commercial agent's average annual remuneration over the preceding five years. Termination without cause and without observing the notice period entitles the agent – besides goodwill indemnity – to compensation unless the termination is a result of compelling reasons. The compensation normally equals the agent's remuneration, calculated based on the average amount of commission earned during the 12 months prior to the termination that would have been received by the agent if the notice period had been respected by the principal.

Law stated - 26 January 2024

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 non-transferability clause is in principle legally valid, binding and enforceable.

Law stated - 26 January 2024

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 regarding confidentiality clauses in distribution and commercial agency agreements.

Law stated - 26 January 2024

Competing products

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

In the Netherlands, both EU and Dutch competition law apply. EU competition law applies to distribution agreements that have an effect on the EU internal market. Otherwise, the Dutch Competition Act, which is materially similar to EU competition law, applies.

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits all agreements and concerted practices that have as their object or effect the restriction or distortion of competition within the internal market, and in particular those that:

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 101(3) TFEU allows for certain exemptions to the prohibition of article 101(1) TFEU. The EU Vertical Block Exemption Regulation (VBER), enacted under article 101(3) TFEU, allows certain exemptions from the prohibition of article 101(1) TFEU provided that the market share held by the supplier does not exceed 30 per cent of the relevant market on which it sells the contract goods or services and the market share held by the buyer does not exceed 30 per cent of the relevant market on which it purchases the contract goods or services. Above the market share threshold of 30 per cent, in principle no agreements that have as their object or effect the prevention, restriction or distortion of competition within the internal market are allowed.

The VBER defines 'non-compete obligation' as any direct or indirect obligation causing the distributor not to manufacture, purchase, sell or resell goods or services that compete with the contract goods or services, or any direct or indirect obligation on the distributor to purchase from the supplier or from another undertaking designated by the supplier more than 80 per cent of distributor's total purchases of the contract goods or services and their

substitutes on the relevant market. The exemption provided for by the VBER does not apply to:

1. direct or indirect non-compete obligations with an indefinite term or exceeding five years;
2. direct or indirect obligations for the distributor, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services;
3. direct or indirect obligations causing the members of a selective distribution system not to sell the brands of particular competing suppliers;
4. any direct or indirect obligation causing a buyer of online intermediation services not to offer, sell or resell goods or services to end users under more favourable conditions via competing online intermediation services.

The restriction under (2) does not apply to any direct or indirect obligation causing the distributor, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services provided all of the following conditions are fulfilled:

- the obligation relates to goods or services that compete with the contract goods or services;
- the obligation is limited to the premises and land from which the buyer has operated during the contract period;
- the obligation is indispensable to protect knowhow transferred by the supplier to the buyer; and
- the duration of the obligation is limited to a period of one year after termination of the agreement.

Law stated - 26 January 2024

Prices

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

EU and Dutch competition law prohibit both direct and indirect forms of price fixing, including fixing margins, setting a maximum discount, requiring that distributors obtain supplier's consent to revise their prices, the use of price reporting and monitoring systems putting pressure on distributors to deter discounting, warnings and similar practices. This prohibition does not apply to commercial agents or sales representatives, as these only intermediate between the supplier and the buyer and the sales agreement is executed directly between the supplier and the buyer.

The EU Commission and the Dutch Authority for Consumers and Markets are responsible for the administrative enforcement of the EU and Dutch competition rules and may levy fines. Depending on the circumstances, these fines may be substantial. In addition, buyers that have been harmed by the fixed prices may file civil (follow-on) claims for compensation for the damage they suffered.

Law stated - 26 January 2024

Prices

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?

EU and Dutch competition law do allow recommended and maximum resale prices (the latter act as a ceiling for prices, thereby benefiting consumers).

Law stated - 26 January 2024

Prices

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

Most-favoured-nation (MFN) clauses have caused growing concern among competition authorities. In particular, price comparison tools and online marketplaces have been the target of a number of antitrust enforcement cases and market studies in Europe.

Two main types of MFN clauses have been considered by competition authorities across Europe:

- 'wide' MFNs: these typically require suppliers and retailers to publish on a price comparison tool or online marketplace the same or better price and conditions as those published on any other sales channel; and
- 'narrow' MFNs: these typically require suppliers and retailers to publish on a price comparison tool or online marketplace the same or better price and conditions as those published on their own (direct) website.

In respect of wide MFNs, European competition authorities have held that they soften competition between platforms, and impede innovation, entry and expansion by new platforms.

Outside the area of price comparison tools and online marketplaces, there seem in principle to be few objections to MFN clauses.

Law stated - 26 January 2024

Prices

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?

Article 102 TFEU stipulates that any abuse of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between EU member states. Such abuse may, in particular, consist in applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

A supplier has a dominant position where it has the ability to behave independently of its competitors, customers, suppliers and the final consumer.

In the absence of a dominant position in the market, no obligation to charge uniform rates exists under European or Dutch competition rules.

Law stated - 26 January 2024

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?

Provided that the market share held by the supplier and the distributor does not exceed 30 per cent of the relevant market on which they respectively sell and purchase the contract goods or services, the VBER allows the supplier to restrict:

- active sales by the distributor and its direct customers into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively to a maximum of five other exclusive distributors; and
- active or passive sales by the distributor and its customers to unauthorised distributors located in a territory where the supplier operates a selective distribution system for the contract goods or services.

The VBER defines active sales as actively targeting customers (eg, by visits, emails or through targeted advertising and promotion, offline or online). Passive sales are defined as sales made in response to unsolicited requests from individual customers.

A selective distribution system is a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system.

Law stated - 26 January 2024

Geographic and customer restrictions

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

The EU Commission and the Dutch Authority for Consumers and Markets are responsible for the administrative enforcement of the EU and Dutch competition rules and may levy fines. Depending on the circumstances, these fines may be substantial. Also, buyers that have been harmed by the fixed prices may file civil (follow-on) claims for compensation for the damage they suffered.

Law stated - 26 January 2024

Online sales

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

Provided that the market share held by the supplier and the distributor does not exceed 30 per cent of the relevant market on which they respectively sell and purchase the contract goods or services, the VBER allows restrictions of online sales and online advertising, provided that they do not, directly or indirectly, in isolation or in combination with other factors controlled by the parties, have the object of preventing the effective use of the internet by the distributor or its customers to sell the contract goods or services to particular territories or customers, or of preventing the use of an entire online advertising channel, such as price comparison services or search engine advertising.

Law stated - 26 January 2024

Online sales

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?

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

Law stated - 26 January 2024

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?

A supplier may restrict its distributor's ability to deal with particular customers unless this would qualify as abuse of a dominant position within the internal market or in a substantial part of it as prohibited within the meaning of article 102 TFEU.

Law stated - 26 January 2024

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?

It is unlikely that a distribution or agency agreement would be classified as reportable transaction under the merger control rules.

Under Dutch and European competition laws, transactions are deemed reportable under the merger control rules if it is considered a concentration of businesses, encompassing mergers, acquisitions or joint ventures. Although it is theoretically plausible for an agency or distribution agreement to indirectly lead to the acquisition of control by the supplier or principal over the distributor or agent, such scenarios are highly uncommon. The inclusion of terms in distribution or agency agreements that permit the supplier or principal to acquire (indirect) control over the distributor or agent is unconventional. Furthermore, these clauses in the agreement might be invalidated by the Dutch courts for contravening the principle of reasonableness and fairness in contract law.

In the unlikely scenario that an agency or distribution agreement were to meet the criteria of a concentration of businesses, it would only be considered a reportable transaction if it surpasses a specified financial threshold. Under the Dutch Competition Act, reporting obligations arise only when the combined global revenue of the businesses involved exceeds €150 million, and at least two of these businesses generate revenues of at least €30 million in the Netherlands.

Law stated - 26 January 2024

Competition concerns

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 interaction between the distributor and supplier falls under the purview of Dutch and European antitrust regulations. In principle, distribution agreements are prohibited from incorporating clauses that intentionally or indirectly lead to the limitation of competition. Distribution agreements involving parties with market shares below 30 per cent that do not contain 'hardcore restrictions,' are exempt from antitrust regulations under the EU Vertical Block Exemption Regulation (VBER). Hardcore restrictions encompass clauses governing resale prices, market sharing and production restrictions.

Companies that act in violation of competition laws risk being fined by national competition authorities such as the Authority for Consumers & Markets (ACM) or the European Commission.

The Netherlands is widely regarded as a highly favourable jurisdiction for the private enforcement of competition law. In private enforcement of competition law, it is private

entities that invoke competition law in disputes or legal proceedings. This typically involves cases seeking damages, where the claiming party alleges to have suffered harm due to a violation of competition rules by other parties. For instance, this may occur when a group of businesses forms a price cartel and, over an extended period, charges consumers or buyers an excessively high price for their products. Consumers harmed by a violation of competition rules may file a claim for damages in court as a collective in a so-called class action.

The antitrust and competition laws do not extend to the relationship between the agent and principal.

Law stated - 26 January 2024

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?

Within the EU and EEA, the doctrine of exhaustion of intellectual property rights applies. This means that once the intellectual property owner has placed the goods up for sale (either itself or has given consent for another to sell the products within the EU and EEA), in relation to these goods its rights are exhausted, and it cannot prevent others from importing the goods and reselling them in any other EU member state. This leaves the possibility that the intellectual property owner may oppose importing goods incorporating its intellectual property rights into the EU and EEA from third countries.

Law stated - 26 January 2024

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?

A supplier is free to pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising.

Law stated - 26 January 2024

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?

Patents, trademarks and designs may be protected by registration in the relevant national, Benelux or EU registers. Copyrights are protected in the Netherlands under the Berne Convention for the Protection of Literary and Artistic Works. A supplier may safeguard its intellectual property rights (including trade secrets and know-how) from infringement

by its distribution partners by making appropriate contractual arrangements. EU Directive 2004/48/EC on the enforcement of intellectual property rights as implemented in the Dutch Code on Civil Procedure provides for effective tools to combat the infringement of intellectual property rights by third parties. This Directive provides a minimum set of measures, procedures and remedies allowing effective civil enforcement of intellectual property rights across the EU, ensuring a standardised level of protection throughout the internal market. Technology transfer agreements are common.

Law stated - 26 January 2024

Consumer protection

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

Most consumer protection laws consist of EU legislation implemented in Dutch law. EU Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees was implemented in Book 7 of the Dutch Civil Code. The most important rule of this Directive is that the seller must deliver goods to the consumer that are in conformity with the contract of sale. Consumer goods are presumed to be in conformity with the contract if they:

- comply with the description given by the seller;
- are fit for any particular purpose for which the consumer requires them and which was made known to the seller at the time of conclusion of the contract and which the seller has accepted; and
- are fit for the purposes for which goods of the same type are normally used.

EU Directive 93/13/EEC on unfair terms in consumer contracts, as implemented in Book 6 of the Dutch Civil Code, has introduced a blacklist of that which may not be used in contracts with consumers and a grey list of terms that are presumed to be unreasonable. The EU Unfair Commercial Practices Directive defines unfair business-to-consumer commercial practices that are prohibited in the European Union. In particular, misleading commercial practices (by action or omission) and aggressive commercial practices are considered unfair. Further, restrictions exist for the (tele)marketing of products (eg, a ban on unsolicited telesales).

Law stated - 26 January 2024

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?

Product recalls are aimed at preventing unsafe products from entering or remaining on the market. The required measures will vary from recall to recall. In some cases, a single warning to intermediaries will suffice, but often a producer will be confronted with a diverse range of measures to be taken, aimed at preventing further use and recall of the product. A product recall in general involves significant costs (eg, costs for investigating the extent and cause of

the product's unsafety, replacement costs and the retrieval and destruction of these unsafe products), as well as lost sales and damages, and reputational damage. In general, parties are free to delineate which party is responsible for bearing the cost of a recall.

Law stated - 26 January 2024

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?

The supplier is, in principle, free to limit the warranties it provides to its distribution partners. In case of serious fault, wilful misconduct or gross negligence a contractual limitation of warranties could be set aside by the Dutch court. The warranties to downstream customers may be equally limited, except for the statutory warranties to consumers.

Law stated - 26 January 2024

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?

Data about the distributor's customers and end-users are in principle owned by the distributor. The EU General Data Protection Regulation (GDPR) applies to all processing of personal data (ie, information relating to an identified or identifiable natural person (data subject)). Exchange of personal data is only allowed to the extent the data subject has given consent or this is necessary for:

- the performance of a contract to which the data subject is party or to take steps at the request of the data subject prior to entering into a contract;
- for compliance with a legal obligation;
- to protect the vital interests of the data subject or of another natural person; or
- for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by interests of the data subject that require the protection of personal data.

No special requirements apply to data transfers from the Netherlands to other EEA countries. Transfers of personal data to countries outside the EEA, however, require – with a few exceptions – either a decision of the European Commission that the destination country ensures an adequate level of protection (this is the case for the United Kingdom, Switzerland, Canada, Israel and Japan, for example), or appropriate safeguards to protect the data subjects' rights (such as the Commission's standard contractual clauses (SCCs) or binding corporate rules approved by a supervisory authority).

On 16 July 2020, the Court of Justice of the European Union (CJEU) issued its decision in *Data Protection Commissioner v Facebook Ireland, Maximilian Schrems (Schrems II)*, invalidating the EU–US Privacy Shield Framework, which provided a mechanism for transferring personal data from the European Union to the United States.

On 25 March 2022, the European Commission and the United States announced an agreement in principle on a new Trans-Atlantic Data Privacy Framework. On 7 October 2022, President Biden signed the Executive Order On Enhancing Safeguards For United States Signals Intelligence Activities, outlining the implementation steps the United States will undertake in furtherance of the EU–US Data Privacy Framework (DPF). On 10 July 2023, the European Commission formally adopted a new adequacy decision on the EU-US Data Privacy Framework. The decision concludes that the United States ensures an adequate level of protection – comparable to that of the European Union – for personal data transferred from the EU to companies in the United States under the new framework. On the basis of the new adequacy decision, personal data can flow safely from the EU to US companies participating in the Framework, without having to put in place additional data protection safeguards.

Schrems II also dealt with SCCs. The SCCs are a standard set of contractual terms and conditions that require both the exporter and importer of personal data to offer an equal level of protection for EU personal data. The CJEU decided that, while SCCs are still valid, they require additional work. Companies must ensure that the recipient country has equivalent data protection to that of the EU. They cannot rely on SCCs alone.

On 4 June 2021, the European Commission issued modernised SCCs. These modernised SCCs replace the three sets of SCCs adopted under the previous Data Protection Directive 95/46. It is no longer possible to conclude contracts incorporating these earlier sets of SCCs and on 27 December 2022, the grace period for using contracts incorporating these earlier sets of SCCs expired.

Law stated - 26 January 2024

Data transfers

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

The GDPR requires that personal data shall be retained no longer than is necessary for the purposes for which the personal data are processed and are processed in a manner that ensures appropriate security of the personal data, using appropriate technical or organisational measures.

Law stated - 26 January 2024

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?

The distribution partner is an independent party and, as such, a supplier is not entitled to control who is employed by the distributor, nor is a supplier able to terminate the employment agreement between a distributor and an employee. Theoretically, while it is not considered common practice in the Netherlands, it is possible to agree that the supplier may influence (in certain scenarios) hiring and firing decisions with regard to (key) personnel. However, mandatory Dutch employment law would still apply, including the regulations regarding termination of employment.

Law stated - 26 January 2024

Employment issues

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?

Under Dutch employment law, an agreement qualifies as an employment agreement if the following criteria as laid down in article 7:610 of the Dutch Civil Code are met: personal performance of work under the authority of the company, in return for remuneration. If an agreement qualifies as an employment agreement, (mandatory) Dutch employment law and regulations apply.

If an individual claims in court that their agreement with a company qualifies as an employment agreement, a judge will assess that claim based on all relevant circumstances of the case. This includes not only the wording of the agreement, but also the way in which the parties execute the agreement in practice. If the agreement qualifies as an employment agreement, all aspects of (mandatory) Dutch employment law (retroactively) apply to the agreement. This includes the entitlement to holiday pay and payment during sickness, as well as the applicability of the mandatory regulations regarding termination of employment and payment of statutory severance upon termination of the employment agreement. The qualification of the agreement as an employment agreement may also have significant tax consequences.

Law stated - 26 January 2024

Commission payments

Is the payment of commission to a commercial agent regulated?

In general, the commercial agent and principal are free to agree on the commission due. In the absence of a contractual arrangement, article 7:431 sub 1 Dutch Civil Code stipulates that the agent is entitled to commission for contracts concluded during the term of the commercial agency agreement if 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; or

- have been concluded with third parties belonging to a specific group of customers or residing in a specific geographical area that 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.

Law stated - 26 January 2024

Good faith and fair dealing

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

There are no specific good faith and fair dealing requirements concerning distribution agreements and commercial agency agreements. Nevertheless, the general rules of Dutch contract law (such as the standard of reasonableness and fairness stipulated in articles 6:2 and 6:248 Dutch Civil Code) are applicable to distribution agreements and commercial agency agreements.

Law stated - 26 January 2024

Registration of agreements

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

No laws require registration or approval of distribution agreements or intellectual property licence agreements by any government agency exist. However, registration of a licence agreement with the relevant patent, trademark or design register has the advantage that third parties must respect the licence.

Law stated - 26 January 2024

Anti-corruption rules

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

Bribery in commercial relations is prohibited under article 328ter of the Dutch Criminal Code. Employees accepting or requesting gifts, promises or services in response to what they have done or omitted to do or will do or omit to do in breach of their duty in their employment or in the performance of their duty, are punishable with imprisonment up to four years or a fine with a maximum of €103,000. The same sanctions apply to the person offering the gift, promise or service. Acting in breach of duty shall in any case include concealing from the employer or principal, contrary to good faith, the acceptance or solicitation of a gift, promise or service.

Law stated - 26 January 2024

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?

Distribution agreements may not violate public order and good morals and must comply with EU and Dutch competition laws, but in principle no other restrictions exist.

Law stated - 26 January 2024

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?

The applicable law on agency contracts is determined by the Hague Convention of 14 March 1978 on the Law Applicable to Agency. The applicable law regarding distribution agreements is determined by the EU Rome I Regulation (Regulation (EC) No 593/2008). Both the Rome I Regulation and the Hague Agency Convention provide that parties may choose which law applies. However, they may not evade the protective provisions of EU law by choosing the law of a non-member state. If no choice of law is made, the law of the country where the commercial agent or distributor has its habitual residence applies. Under Dutch Private International Law, there is an exception for agency contracts: if the agent mainly operates in the country where the principal resides, the law of that country applies.

Law stated - 26 January 2024

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?

Under the EU Brussels I bis Regulation and the Dutch Code on Civil Procedure, parties are in general free to make a contractual choice of courts or arbitration tribunals, whether within or outside the Netherlands.

Law stated - 26 January 2024

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?

Dutch courts have jurisdiction if the defendant is domiciled in the Netherlands or if the parties have elected a Dutch court to judge any disputes arising from their legal relationship.

In the Netherlands, there are two main types of civil proceedings: proceedings for ordinary civil suits initiated by summons and less formal proceedings initiated by an application for suits on specific topics (eg, employment, leases, family, and certain corporate matters). In general, for commercial disputes the proceedings by summons is used. In first instance, disputes are resolved by the competent District Court. It is possible to file an appeal with the competent Appeal Court. From judgments of the Appeal Court, appeal is possible to the Dutch Supreme Court. The Supreme Court does not examine the facts but purely observes whether the court of appeal has correctly applied the law.

A party with a sufficiently urgent interest in injunctive relief may initiate summary proceedings. The requested injunction will be granted if it is sufficiently likely that the court in the proceedings on the merits will come to an identical decision. The injunction applies until a decision is reached in the proceedings on the merits. The range of possible injunctions is broad. For example, the court may order the prejudgment attachments to be lifted, the execution of a ruling to be suspended or an agreement to be performed.

There exist no restrictions on foreign businesses' ability to make use of these courts and procedures, except that upon request of the other party a foreign business may be required first to provide security for the costs of the proceedings and damages which they could be sentenced to pay (the *cautio iudicatum solvi*). The *cautio iudicatum solvi* does not apply if this is excluded by treaty (eg The Hague Convention on Civil Procedure and the Dutch American Friendship Treaty).

In the Netherlands, there is no jury system. The judiciary is independent and judges can only be removed from office for malfeasance or incapacity. The Netherlands is a small country with an open economy, and the Dutch courts are accustomed to dealing with foreign parties; foreign businesses can expect fair treatment.

In principle, court hearings in civil cases are public. Under special circumstances, the court may decide to conduct hearings behind closed doors – for example, in case of a dispute about trade secrets or if public policy or morality so demands.

The judge has a passive role in determining the scope of the dispute; this is determined by the parties and the claims they bring before the court.

It is up to the parties to sufficiently substantiate their claims using any legal means necessary. In civil lawsuits, all forms of evidence are permissible unless the law provides otherwise. No discovery procedures comparable to those in common law systems exist. Under article 843a of the Dutch Code on Civil Procedure parties may request inspections or copies of certain documents (production of exhibits) from the other party. Cumulative conditions must be satisfied for the request for the production of exhibits. The court can refuse the request pursuant to substantial reasons or if a proper administration of justice can be guaranteed without the requested information.

There are various awards available to a successful claimant (eg, specific performance, damages, an application for an order or injunction, a declaratory decision, rescission or

annulment). Final judgments or judgments with immediate effect may be enforced after being served by the bailiff.

In principle, parties must pay their own litigation costs. However, the losing party is usually ordered to pay the litigation costs of the prevailing party. The costs that the losing party must pay are based on fixed amounts for certain standard activities but are also dependent on the value of the claim. The actual litigation costs incurred by the prevailing party are often not fully covered by the amount awarded.

Court litigation in the Netherlands has the advantages that legal proceedings tend to be time and cost efficient and that the Dutch courts are accustomed to deal with international disputes. In the event recourse is sought outside the EU and EEA, a judgment of a Dutch court may have little use due to the absence of treaties on the mutual recognition and enforcement of judicial awards with most countries outside the EU and EEA.

Law stated - 26 January 2024

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?

If the parties have executed an arbitration agreement in which the place of arbitration is in the Netherlands, the arbitration is subject to the Dutch Arbitration Act. There are in principle no limitations (such as the arbitration tribunal, the location of the arbitration or the language of the arbitration) on the terms of an agreement to arbitrate, except that matters not at the discretion of the parties (eg, matters of public policy, criminal law and intellectual property law) cannot be dealt with in arbitration.

An appeal against an arbitral award cannot be lodged with the Dutch civil court. However, arbitral appeal is possible if the parties have expressly included this in the arbitration agreement. In specific circumstances and on specific grounds it is possible to revoke or set aside an arbitral award.

The party that wants to enforce the arbitral award must obtain prior judicial leave (exequatur) from the provisional relief judge of the competent Dutch district court. The Netherlands is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore, the Netherlands cannot impose more onerous conditions for the recognition or enforcement of Convention awards than are imposed on the recognition or enforcement of arbitral awards rendered under Dutch law.

Given the absence of treaties on the mutual recognition and enforcement of judicial awards with most countries outside the EU and EEA, arbitration is the preferred option for dispute resolution if one of the parties resides outside the EU and EEA.

There are no specific statutory rules on mediation. The parties are free to agree to mediation. Mediation clauses entered into by the parties constitute legally binding contracts. However, the legal implications of a mediation clause are very limited. It has been established by decisions of the Dutch Supreme Court that parties who have agreed to resolve a dispute

by way of mediation will always be free subsequently to decline to mediate. Consequently, a mediation clause does not have an impact on the jurisdiction of national courts to hear the dispute.

A mediator is appointed by the parties prior to or pending legal proceedings before an arbitral tribunal or national courts. Parties may also be assisted by an institution that facilitates mediation proceedings to choose a mediator. When court proceedings are pending, a Dutch court can refer the dispute to mediation in accordance with the 'mediation alongside litigation' procedure.

Any settlement agreement resulting from a mediation process is considered to be a legally binding agreement. However, the settlement agreement is not (directly) enforceable until established as such in court.

Law stated - 26 January 2024

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?

Data protection developments

The European Data Governance Act 2022 (the DGA), a central part of the European strategy for data, entered into force on 24 September 2023. The act focuses on 'data intermediaries' (such as data marketplaces) and aims to make greater data available and facilitate data sharing across sectors within the European Union in order to leverage the economic potential of data for the benefit of European citizens and businesses. The DGA encompasses both personal and non-personal data.

The DGA is complemented by the European Data Act (the Data Act), another component of the European strategy for data. On 11 January 2024, the Data Act entered into force, with the main provisions to be fully applicable from 12 September 2025. The Data Act seeks to establish a single market for industrial data by imposing new obligations for cloud service providers on access and the use of data generated through the use of connected products (Internet of Things) across all economic sectors, as well as facilitating customers to switch to other cloud providers.

ESG Developments for suppliers to consider

Pending formal adaptation by the European Council and the European Parliament, the Corporate Sustainability Due Diligence Directive (CSDDD), aims to enhance environment and human rights protection within the EU and globally. Companies falling under its scope are required to conduct due diligence on their operations and of their suppliers to identify, prevent and mitigate adverse impacts on human rights and the environment. Recently, on 14 December 2023, the European Council and the European Parliament reached a provisional

agreement that outlines the scope of the directive, clarifies liabilities for non-compliant companies, better defines the different penalties, and completes the list of rights and prohibitions that companies must adhere to. The CSDDD proposal is still in the legislative pipeline, and further changes are anticipated before the regulation is finalised.

The Dutch bill on the Responsible and Sustainable International Corporate Act (the Bill) is pending before the Dutch House of Representatives. It introduces a broad duty of care applicable to Dutch entities, establishing a general due diligence obligation for all Dutch legal entities that are aware or reasonably should be aware that their activities or those of their business relations may have adverse effects on human rights, labour rights or the environment in a country outside the Netherlands. In addition, the Bill mandates that specific large companies conduct due diligence throughout their entire supply chains, encompassing all activities, business, conduct of their business relations, such as suppliers, and necessitates the submission of accompanying reports on their policies and measures for due diligence.

Law stated - 26 January 2024