



Prepared by a member firm of Lexwork International, this document is part of a series on trade law reports. This document is part of a collaboration between Lexwork International law firms and globalEDGE.

This overview is intended as general information. This information is not legal advice. The reader should consult an attorney with knowledge in this area of law to determine how the information applies to any specific situation.

Disclaimer: Lexwork International is an association of law firms and is not a legal body separate from its constituents. All member law firms subscribe to the objectives appearing on the Lexwork International [website](#). However, neither Lexwork International nor any member firm has any control over the services provided by any other member law firm, and therefore, has no responsibility for their acts.

URL: <http://globaledge.msu.edu/resourceDesk/tradeLaw.asp>

Höcker Advocaten  
30 March 2009

Van Eeghenstraat 98  
1071 GL Amsterdam  
Netherlands  
Telephone: +31 (0)20 5777 700  
Fax: +31 (0)20 6719 710  
Email: [uijen@hocker.nl](mailto:uijen@hocker.nl)

## **AGENCY, DISTRIBUTION AND SALES REPRESENTATIVE CONTRACTS (THE NETHERLANDS)**

### **General**

In terms of legislation, Dutch law treats distribution, agency and sales relationships fairly differently. On the one hand there is minimal regulation of distribution agreements, whereas on the other Book 7 of the Dutch Civil Code devotes a host of dedicated sections to agency and sales representative agreements. For all three types of relationships the general rule is that parties are free to contract, but the terms they agree will be subject to limitations as set out in the Dutch Civil Code or otherwise implied by law (*see Freedom of Contract, below*).

Distribution, agency and sales agreements do not have to be in writing. Although oral contracts are legally enforceable, it is prudent to have a written contract to record the terms agreed between the parties which can then be used for evidential purposes if necessary. This is especially true for distribution agreements, given that the parties do not have a body of pertinent legislation that they may fall back upon if they omit to set out the terms of their agreement in writing. Under the Dutch statutory provisions with regard to agency there is a somewhat unusual obligation for each party to make available, if so requested, an executed instrument describing the then prevailing terms of the agency relationship.

### **Freedom of Contract**

As pointed out above, under Dutch law, parties generally have freedom to agree the terms of their distribution, agency or sales representative contracts. However, this freedom of contract is subject to the restrictions imposed by, amongst other factors, public policy as well as legislation; furthermore, there is a duty for all parties involved to negotiate in good faith and terms which have not been expressly agreed by the parties may be implied into the contract in various ways. The following exceptions to the parties' general freedom of contract warrant particular attention.

#### Reasonableness and fairness

A key characteristic of Dutch commercial law is the ubiquity of the principles of reasonableness and fairness. Application of the principles may result in contract terms being declared inoperative or being specifically implied into the contract. With distribution contracts in particular, the principles may greatly impact on the parties' rights and obligations, as they could, for example, make it unlawful to terminate a distribution contract without cause or without notice.

## Unfair Contract Terms

Dutch law does not allow any exclusion or limitation of liability for damages caused by wilful misconduct or gross negligence. Moreover, the Dutch Civil Code blacklists a number of standard terms which are considered unreasonably onerous and contractual clauses containing such terms will normally be voidable.

## Sale of Goods

International sales of goods, whether relating to distribution or trading through agents or sales representatives, will be subject to the United Nations Convention on Contracts for the International Sale of Goods if Dutch law applies.

## Product Liability

Under the Dutch Civil Code, liability for the supply of defective products is, in the first instance, imposed — regardless of fault — on manufacturers, suppliers of 'own-label' products and importers into the EC. If these persons are not identified, then the further suppliers of such products (e.g. distributors or agents) have secondary liability and it is not possible to exclude this liability by contract. The Netherlands is a party to the 1973 Hague Convention on the Law Applicable to Products Liability.

## Specific rules for commercial agents

Like in most other European jurisdictions, Dutch statutory rules regarding agency relationships derive from Council Directive 86/653, which was implemented in the Netherlands on 5 July 1989. The rules apply to commercial agents in the Netherlands who sell or buy goods on behalf of the principal; they apply to any commercial agent — whether an individual, partnership or a company — and to all agency contracts.

It is important to note that the Dutch Civil Code provides for rights of agents to compensation or indemnity on termination of the agency contract. Indemnity is payable to the agent regardless of whether the principal is in breach of contract or not and even if the agent has no right to damages in respect of the termination. Under the Dutch Civil Code, compensation and indemnity are not alternatives but parallel remedies, which basically means that the agent is entitled to claim both if the circumstances so justify. While the indemnity rights are capped at a sum of one year's commission based on the agent's average annual remuneration over the preceding five years (or the period of the agreement, if shorter), no maximum amount is specified for compensation rights.

The above rules do not apply to a distribution contract or to a sales representative contract. Sales representatives do, however, enjoy a fairly hefty level of termination protection as it is, since Dutch law qualifies them as employees — which in Dutch legal practice basically means that termination will usually trigger rights to compensation or indemnity.

## Choice of law

For agency and distribution relationships, parties are free to choose the system of law which is to govern their contract, even if so-called supermandatory provisions of Dutch law (i.e. provisions which expressly or by implication apply, irrespective of the choice of some other system of law) will in any event override the choice of law clause. The specific rules for commercial agents summarised above are examples of such supermandatory provisions. Therefore, if the principal, who is based outside the European Economic Area (e.g. in the United States), appoints an agent to act on its behalf in the Netherlands, the fact that the agency agreement is expressed to be governed by the law of another jurisdiction is immaterial for the purposes of assessing the agent's compensation and indemnity rights (which will at all times be at least those set out in the Dutch Civil Code).

For sales representatives — who qualify as employees — the situation is similar in that the parties cannot evade the restrictions imposed by Dutch statutes with regard to employment. Dutch private international law does not permit that by choosing another system of law the sales representative is robbed of the protection afforded by Dutch employment law.

In the absence of an express choice of law clause, the applicable law is the law with which the contract is most closely connected (which, if the agent or distributor is based in the Netherlands and performs the contract there, is most likely to be Dutch law).

## Competition law issues

The principal pieces of legislation are the Dutch Civil Code and the Dutch Competition Act 1998.

The Dutch Civil Code sets clear limits to the principal's possibilities to impose non-competition covenants on agents and sales representatives. For commercial agents, the duration of such covenants may, for example, never exceed two years from the date of termination and any restriction will be unlawful to the extent it prevents the agents from selling goods or services outside the territory specified in the contract.

The Competition Act creates prohibitions which are closely modelled on the corresponding prohibitions contained in the European Community Treaty. Under the competition rules, provided certain conditions are met, distribution agreements may benefit from a block exemption afforded to vertical agreements and thus fall outside the scope of the prohibition on anti-competitive agreements. (A vertical agreement is one that is entered into between businesses operating at different levels of the economic supply chain and includes, therefore, agency and distribution contracts.) Parties may also be able to benefit from the "*de minimis*" exemption (where the contract is of 'minor importance' and is deemed not to appreciably restrict competition). Exclusive agency or distribution contracts raise further competition law issues. Exclusive contracts raise the risk of reduced intra-brand competition and market partitioning, which may in particular lead to price discrimination — where most/all of the suppliers in a particular market apply exclusive distribution, this may facilitate collusion both at the suppliers' and distributors' levels. Competition law issues are complex and it is strongly recommended that principals (as well as agents) obtain expert advice on the particular arrangements relating to the agency or distribution relationship in question.

## **Tax**

### Corporate income tax

The possible implications for corporate income tax with regard to the various types of agency and distribution contracts are set out below.

#### *Sales agents*

A non-resident company (i.e. not incorporated in the Netherlands) is chargeable to corporate income tax on income arising in the Netherlands, subject to the provisions of any applicable double taxation convention. Also, it is important to note that a non-resident principal may be chargeable to corporate income tax on the profits attributable to its agent's activities.

#### *Marketing agents*

Depending on the nature of the arrangements in the agency contract, it may be that the non-resident principal will not be trading within the Netherlands, which would mean that it will incur no liability to Netherlands tax on sales of its products.

The question to consider is: "where do the operations take place from which the profits in substance arise?". In cases where the non-resident principal uses a marketing agent, this fact alone is unlikely to cause the tax authorities to regard it as trading within the Netherlands, since the agent is unlikely to have authority to enter into contracts on its behalf. If the marketing agent runs an office on behalf of the principal in the Netherlands, it is likely that this creates a taxable presence of the principal in the Netherlands. In such case it is likely that only a small portion of the sales profits can be allocated to the Netherlands for tax purposes. In order to obtain certainty the tax authorities may be requested to issue tax rulings.

#### *Distributor*

As with a marketing agent (above), the liability of an overseas manufacturer/supplier to Dutch tax will depend on whether the profits arise inside or outside the Netherlands. Ultimately, the question of liability will be determined by the facts of the case but suffice to say that the use of an independent distributor will not of itself render the overseas manufacturer/supplier chargeable to Netherlands corporate income tax.

### Other taxes

Other taxes that might be charged in the cases described above are VAT and customs duties (if the trading involves shipping through Dutch territory). In addition, sales representatives and agents might under certain circumstances be deemed to be employed by the principal, thus creating the risk for the principal to be liable to payroll taxes.

## **International Conventions**

The Netherlands is a party to both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (in force since 23 July 1964) the United Nations Convention on Contracts for the International Sale of Goods (in force on 1 January 1992).

## DUTCH TRADE LAW WEBSITES

### 1. Chamber of Commerce

The Netherlands Chamber of Commerce is the agency which manages the Dutch trade register. Their website contains company information and guidance on doing business in the Netherlands.

<http://www.kvk.nl/English/>

### 2. NMa

The NMa is the Netherlands' competition authority. This government website contains details of Dutch antitrust legislation and other information and resource tools for use by various market participants (including consumers).

<http://www.nmanet.nl/engels/home/Index.asp>

### 3. SER

The SER or Social and Economic Council of the Netherlands is an advisory and consultative body of employers' representatives, union representatives and independent experts. The SER is the main advisory body to both government and parliament on national and international social and economic policy.

<http://www.ser.nl/en/home.aspx>