

Franchise

Contributing editor
Philip F Zeidman



2019

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Franchise 2019

Contributing editor
Philip F Zeidman
DLA Piper LLP (US)

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2007
Thirteenth edition
ISBN 978-1-78915-025-4

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between June and July 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

The president of the company just left a message for you...	5	Korea	89
Philip F Zeidman DLA Piper LLP (US)		Sun Chang and Terry Kim Lee & Ko	
Franchise M&A	7	Malaysia	96
Edward (Ned) Levitt Dickinson Wright LLP		Jin Nee Wong Wong Jin Nee & Teo	
Australia	10	Mexico	103
Alicia Hill and Raynia Theodore MST Lawyers		Jorge Mondragón González Calvillo SC	
Brazil	19	Netherlands	110
Paulo Shiguero Yamaguchi and Marco Mello Cunha Tess Advogados		Tessa de Mönnink De Grave De Mönnink Spliet Advocaten	
Canada	24	New Zealand	117
Bruno Floriani, Marissa Carnevale and Tanya Nakhoul Lapointe Rosenstein Marchand Melançon LLP		Stewart Germann Stewart Germann Law Office	
Chile	32	Norway	122
Cristóbal Porzio Porzio Rios Garcia		Kjetil Vågen and Eline Thorsrud Advokatfirmaet CLP DA	
China	37	Poland	128
Claudio d'Agostino DLA Piper UK LLP (Shanghai) Reking Chen DLA Piper UK LLP (Beijing)		Magdalena Kowalczyk-Szymańska and Olga Szejnert-Roszak SWKS Szejnert, Winnicka, Kowalczyk, Sosnowska	
Denmark	45	Russia	134
Mikkel Friis Rossa and Dan Bjerg Geary Bech-Bruun		Vladimir Biriulin and Sergey Medvedev Gorodissky & Partners	
Finland	50	Switzerland	139
Patrick Lindgren Advocare Law Office		Mario Strebel, Christophe Rapin and Renato Bucher Meyerlustenberger Lachenal	
France	56	Thailand	146
Emmanuel Schulte Bersay & Associés		Pattama Jarupunphol and Phatuthip Jaismut DLA Piper (Thailand) Limited	
Germany	63	Turkey	152
Karsten Metzloff and Tom Billing Noerr LLP		Hikmet Koyuncuoğlu Koyuncuoğlu & Köksal Law Firm	
India	70	Ukraine	158
Sharanya G Ranga and Aditi Rani Advaya Legal		Anna Tsirat Jurvneshservice	
Indonesia	76	United Kingdom	163
Norma Mutalib, Richard Cornwallis and Reagan Roy Teguh Makarim & Taira S		Damian Humphrey and John Chambers Ashtons Legal	
Japan	83	United States	169
Etsuko Hara Anderson Mōri & Tomotsune		Richard Greenstein and Philip F Zeidman DLA Piper LLP (US)	

Preface

Franchise 2019

Thirteenth edition

Getting the Deal Through is delighted to publish the thirteenth edition of *Franchise*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the Netherlands, Poland and Ukraine.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Philip F Zeidman of DLA Piper LLP (US), for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Netherlands

Tessa de Mönnink

De Grave De Mönnink Spliet Advocaten

Overview

1 What forms of business entities are relevant to the typical franchisor?

Franchises may be subject to any form of business entity existing under Dutch law, in particular:

- private limited liability companies (BVs);
- public companies (NVs);
- sole proprietorships;
- general partnerships; and
- limited partnerships.

BVs and NVs are legal entities. General partnerships, limited partnerships and sole proprietorships are non-legal entities. The question of whether a business entity is a legal entity or not affects the franchisor's personal liability.

2 What laws and agencies govern the formation of business entities?

The formation of business entities is, in particular, governed by:

- book 2 of the Dutch Civil Code for legal entities;
- book 7A of the Dutch Civil Code; and
- the Commercial Code.

There are also several specific laws, for example:

- the Works Councils Act;
- the Commercial Register Act 2007; and
- the Commercial Register Decree 2008.

All business entities must be duly registered in the Commercial Register of the Dutch Chamber of Commerce. Further information can be found at <https://www.kvk.nl/english/>.

3 Provide an overview of the requirements for forming and maintaining a business entity.

The requirements for forming and maintaining a business entity depend on what form of business entity is incorporated. In the event that a private limited liability form is used by the franchisor, the following requirements apply:

- a statement of no objection from the Dutch Ministry of Justice; and
- a notarial deed of incorporation including the articles of association.

On 1 October 2012, the Act for simplification and flexibilisation of private company law entered into force, making important changes to Dutch law applicable to BVs. From this date, the laws with respect to BVs became simpler and more flexible. As a result, it is now possible to deviate more from statutory rules in the articles of association of the company and a minimum capital of €18,000 is no longer necessary. Furthermore, the mandatory bank and accountants' statements with a contribution in kind have been abolished. A notarial deed of incorporation is still required. The Act has entered into force with immediate effect. This means that from 1 October 2012, the Act immediately applies to all BVs. The Act introduces a couple of possibilities to deviate from the provisions of the law in the articles of association, which offers foreign investors quite some freedom to incorporate or structure their BV as they deem appropriate.

4 What restrictions apply to foreign business entities and foreign investment?

Business entities that are incorporated under foreign law, but are active on the Dutch market rather than within their own country, are subject to the Companies Formally Registered Abroad Act (CFRA Act). The CFRA Act does not apply to members of the European Union (EU members) and countries that are members of the European Economic Area Agreement. All other entities will have to comply with certain requirements, which also apply to Dutch entities (registration in the Commercial Register, statutory minimum capital and the filing of annual accounts with the Commercial Register where the business entity is registered).

5 Briefly describe the aspects of the tax system relevant to franchisors. How are foreign businesses and individuals taxed?

In principle, taxable profits realised by corporate entities that are for tax purposes resident in the Netherlands – for example, Dutch limited liability companies (BVs and NVs) – are subject to the Dutch corporate income tax rate of 25 per cent insofar as their taxable profit is in excess of €200,000. The first €200,000 of taxable profit is taxed at a reduced rate of 20 per cent. Dividends received and capital gains derived from a shareholding to which the Dutch participation exemption applies are exempt from Dutch corporate income tax.

Dividends distributed by a Dutch tax-resident company are generally subject to 15 per cent Dutch dividend withholding tax. A reduced rate or an exemption from Dutch dividend withholding tax may be available; for example, as a result of the application of a tax treaty or if the Dutch participation exemption applies. In principle, dividends distributed to an EU shareholder holding more than five per cent are also exempt from Dutch dividend withholding tax. In general, Dutch corporate taxpayers can credit dividend tax withheld against corporate income tax due.

Individual shareholders holding more than five per cent in the nominal share capital of a company (substantial interest) are generally subject to Dutch individual income tax in respect of dividends received and capital gains derived from such substantial interest at a flat rate of 25 per cent. Individual shareholders holding less than five per cent in the nominal share capital of a company are generally subject to Dutch individual income tax at a flat rate of 30 per cent calculated over a deemed return of 4 per cent on the average value of such shareholder's total amount of savings and investments.

Individuals performing franchise activities in the Netherlands, either in the form of tax transparent partnerships or as sole entrepreneurs, are generally subject to income tax at progressive rates, up to a maximum rate of 51.95 per cent. Dutch individual entrepreneurs may apply a number of beneficial tax facilities.

No taxes are levied upon the set-up of a business in the Netherlands. Dutch capital tax, which was due on the incorporation of a company with capital divided into shares, was abolished from 1 January 2006.

The acquisition of Dutch houses is currently subject to a 2 per cent Dutch real estate transfer tax. For real estate business premises, a 6 per cent Dutch real estate transfer tax applies. In certain circumstances, the acquisition of more than 33.33 per cent of a Dutch real estate company is also subject to Dutch real estate transfer tax.

Wages paid by a Dutch employer are subject to Dutch wage withholding tax and Dutch social security premiums. Dutch wage withholding tax is creditable against the Dutch individual income tax liability in full. Attractive tax benefits are available for foreign employees if these employees have certain specific skills that are scarce in the Netherlands.

Dutch value added tax (VAT) currently amounts to 21 per cent. Reduced VAT rates of 6 per cent and zero per cent apply in respect of certain supplies, such as the supply of agricultural products. Imports performed by Dutch entrepreneurs generally are subject to Dutch VAT. In principle, the importing entrepreneur may credit or refund the VAT paid on the imported supplies. Exports from the Netherlands are generally exempt from Dutch VAT.

6 Are there any relevant labour and employment considerations for typical franchisors?

In principle, franchisees are deemed independent entrepreneurs. Hence, no labour and employment considerations apply. However, franchisees may qualify as 'employees' on the basis that the relationship between the franchisor and franchisee does not correspond with the franchise agreement as it is in fact an employment relationship. Case law shows that this is often the case with self-employed persons such as driving instructors and door-to-door salesmen.

If the agreement is considered an employment agreement, the franchisee is, inter alia, entitled to holiday allowance and payment during illness. Also, laws regarding termination of the employment agreement apply. According to tax law, the franchisor is required to withhold income tax and social security benefits in case the tax authorities deem the relationship between parties a (fictitious) employment relationship.

Each 'cooperation agreement', such as a franchise agreement, is considered on its own merits. The name and wording of the contract between the parties is not decisive. The courts look at the intention of the parties when entering into the franchise contract, as well as the way in which the parties have given substance to their relationship. If it is established that the franchisee is obliged to perform the agreed duties in person, that the franchisor pays the franchisee, directly or indirectly, for these duties and that a relationship of authority can be established that manifests itself in the right of the franchisor to give instructions that the franchisee must follow, an employment relationship can be assumed. Particularly in franchise relationships, the following criteria prove to be decisive: equivalence of the contracting parties, the ability of the franchisee to let someone else perform the duties (for example, third parties or employees of the franchisee), the franchisee bearing the business risk and economic independence of the franchisee.

As long as the franchisee is truly a franchisee, pursuant not only to the contract but also to its day-to-day activities, no employment relationship should be deemed to exist. Particularly if the franchisee is contracted via his or her Dutch limited liability company, the risk of an employment relationship is limited, at least from a civil law perspective. The tax authorities have a different view on this. However, to minimise the risk from a tax law perspective, the franchisor could ask the franchisee to submit a declaration of independent contractor status, which the franchisee can obtain through the Dutch tax authorities. Such a declaration is valid for one calendar year. If a franchisee can produce such a declaration, the tax authorities will, in principle, not assume a (fictitious) employment relationship for that year.

7 How are trademarks and know-how protected?

Registered trademarks are protected by the Benelux Treaty for Intellectual Property. The registrant of a Benelux trademark has exclusive rights for specific classes of goods or services in Belgium, the Netherlands and Luxembourg if a trademark is registered in the public trademark registry of the Benelux Office for Intellectual Property (BOIP). In addition, the registrant has exclusive rights for specific classes of goods or services in the European Union if a trademark is registered as a community trademark in the public trademark registry of the Office for Harmonisation of the Internal Market of the European Union. A preliminary trademark search can be conducted on the BOIP website, <http://register.boip.int/bmbonline/intro/select.do?language=en>.

In principle, know-how is not protected by any intellectual property right. However, know-how may be protected under the general provisions of Dutch unfair competition law (including civil tort). Know-how could be contractually protected by including confidentiality

(non-disclosure) obligations in an agreement (eg, a franchise agreement). See question 35.

8 What are the relevant aspects of the real estate market and real estate law?

In the Netherlands, there are no restrictions on the acquisition of real estate by foreigners. Therefore, foreign franchisors would not face difficulties should they wish to purchase real estate to lease to franchisees. However, franchisors will have to take the protection of lessees under the semi-mandatory Dutch lease law into account, even if the properties have been made available to the franchisees in the franchise agreement and no specific lease agreement has been drawn up.

In the Netherlands, there are two different tenancy regimes for the lease of commercial premises: the lease of retail space (including shops, restaurants and takeaways) and the lease of the other commercial premises (including travel agencies, cinemas, the ticket offices of lotteries and bank branches). Under the retail space regime, lessees are protected by various conditions of semi-mandatory lease law, including but not limited to:

- a minimum lease term of two times five years and limited grounds for termination by the lessor;
- termination or rescission can in principle only be effectuated judicially (also in the event of breach of contract); and
- the turnover rent may be affected by market rent review.

Under the regime of other commercial premises, the lessees only get protection of vacation. The lessees are entitled (within two months after the date of vacation) to request the court to extend the term of vacation.

The court can be requested to approve a deviation from semi-mandatory law.

Laws and agencies that regulate the offer and sale of franchises

9 What is the legal definition of a franchise?

There is no legal definition of a franchise in the Netherlands, as franchise has not been defined in Dutch legislation, but the concept of franchising has been described in the EC Guidelines to Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the applicability of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, paragraph 189, as follows:

Franchise agreements contain licences of intellectual property rights relating in particular to trademarks or signs and know-how for the use and distribution of goods or services. In addition to the licence of IPRs, the franchisor usually provides the franchisee during the life of the agreement with commercial or technical assistance. The licence and the assistance are integral components of the business method being franchised. The franchisor is in general paid a franchise fee by the franchisee for the use of the particular business method. Franchising may enable the franchisor to establish, with limited investments, a uniform network for the distribution of its products. In addition to the provision of the business method, franchise agreements usually contain a combination of different vertical restraints concerning the products being distributed, in particular selective distribution and/or noncompete and/or exclusive distribution or weaker forms thereof.

10 Which laws and government agencies regulate the offer and sale of franchises?

Franchising is, from a civil law point of view, not specifically regulated in Dutch law. Instead, the general laws of contract apply as well as Dutch court decisions. Book 6 of the Dutch Civil Code sets out the requirements relating to the formation of contracts. These provisions must be read in conjunction with the more general rules regarding juridical acts; that is, acts intended to invoke legal consequences provided in book 3 of the Dutch Civil Code. In the Dutch legal literature and jurisprudence, certain rules of law in relation to franchise have been developed. In recent years there have been initiated actions that, so far, have resulted in a Dutch franchise code to which parties may voluntarily apply.

At the beginning of 2015, the Ministry of Economic Affairs appointed a drafting committee for a Dutch franchise code, consisting of two members representing franchisee interests, two members representing the interests of franchisors, and assisted in this by two members provided by the Ministry of Economic Affairs. The activities of the Drafting Committee initially led to the presentation on 16 June 2015 of a consultation version of the Dutch Franchise Code, after which stakeholders were given a period of (only) six weeks to submit their input to this code. This procedure has led to a great deal of criticism on the part of franchisors, who felt they were not consulted and who had given no mandate for the far-reaching obligations contained in the particular code. Other parties too, such as branch associations and similar organisations, objected to the draft code. The Minister then decided work on the franchise code should be continued, with greater support from the Ministry. This has led to the present version of the Dutch Franchise Code, presented to the Minister by the Drafting Committee on 17 February 2016. In October 2016, the Minister stated he was in favour of transforming the current Dutch Franchise Code into franchise law in the Dutch Civil Code, and this has led to the publication of a draft franchise bill for consultation. During the consultation, many objections were raised against the draft bill. In the meantime, a new government has been installed and the draft bill has been put on hold. It is very uncertain what the new government is going to do. As the definition of 'franchise' in the Dutch Franchise Code is rather broad, those developments could, besides franchise relationships, also affect distribution and licence relationships in the Netherlands.

Besides the civil law aspects, in franchising (as well as distribution and all other vertical agreements) competition laws play an important role and should be kept in mind. The EC Guidelines to Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the applicability of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices is very important, as well as the EC Guidelines thereto. The Dutch Competition Authority (NMa) ensures compliance with European and Dutch competition laws (for more details see questions 39 and 40).

Franchisors that are members of the Dutch Franchise Association (NFV) are bound by the rules in the European Code of Ethics for Franchising (Code) drawn up by the European Franchise Federation (www.eff-franchise.com).

There are currently no specific government agencies that regulate the offer and sale of franchises.

11 Describe the relevant requirements of these laws and agencies.

As franchise agreements are not yet specifically regulated in the Netherlands, such agreements are primarily governed by the freedom of contract principle; respective rights and obligations are defined by the will of the parties, as set out in the agreement.

All contracts concluded under Dutch law are subject to the general requirements of reasonableness and fairness (see question 36).

12 What are the exemptions and exclusions from any franchise laws and regulations?

There are currently no specific franchise laws or regulations in the Netherlands.

13 Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

As there are currently no specific franchise laws or regulations in the Netherlands, there are no specific requirements to be met before a franchisor may offer franchises.

14 Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

No, such restrictions are not applicable in the Netherlands. However, all contracts are subject to the general requirements of reasonableness and fairness (see question 36).

15 What is the compliance procedure for making pre-contractual disclosure in your country? How often must the disclosures be updated?

Pre-contractual disclosure requirements stem from unwritten law and case law, which dictate the duty to inform (on the part of the franchisor) and the duty to investigate (on the part of the franchisee). Parties are entitled to rely on the accuracy of each other's information and must always bear in mind each other's reasonable expectations.

16 In the case of a sub-franchising structure, who must make presale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

The allocation of respective responsibilities between the franchisor and the sub-franchisor towards a (prospective) sub-franchisee will depend on what has been agreed between them. This is not specifically regulated by Dutch law. If nothing has been agreed, in principle, the sub-franchisor (assuming that this will be the contracting party of the sub-franchisee) shall be responsible for presale disclosures towards the sub-franchisee.

17 What information must the disclosure document contain?

Consistent case law indicates that when a franchisor presents a prognosis regarding the expected success of a new franchise location to a franchisee, the franchisor is liable if at a later stage such prognosis turns out to be faulty. Therefore, a franchisor should be very careful when submitting any prognosis to a (potential) franchisee. It is not mandatory to provide a franchisee with a prognosis, but the franchisor will need to make available the terms of the licence and financial obligations under which the franchisee will operate. In the Netherlands, a franchisor will typically have a handbook containing know-how, instructions on the use of intellectual property, the look and feel of the franchise and other information relating to the franchise chain, which will be given to the franchisee before or upon conclusion of the contract.

18 Is there any obligation for continuing disclosure?

The obligation for continuing disclosure will mainly depend on what has been agreed in the contract between the franchisor and franchisee. Case law indicates that the franchisor has a duty of care, which means that if a franchisee does not reach the forecast turnover, the franchisor may have the continuing obligation to provide the franchisee with advice and assistance. Parties will have to reach a situation that is as far as possible in accordance with the spirit and purport of the franchise agreement, meaning that the franchisor and franchisee both benefit from the franchise.

19 How do the relevant government agencies enforce the disclosure requirements?

Not applicable – see question 10.

20 What actions can franchisees take to obtain relief for violations of disclosure requirements? What are the legal remedies for such violations? How are damages calculated? If the franchisee can cancel or rescind the franchise contract, is the franchisee also entitled to reimbursement or damages?

The actions and legal remedies available to franchisees for violations of disclosure requirements vary as set out below.

A misinformed franchisee can base a claim for nullification on error if the franchisee can prove that the contract has been entered into under the influence of an error and would not have been concluded had there been a correct understanding of the facts. Such a claim for nullification will only succeed where the misinformation is of a sufficiently serious nature. An alternative would be to base a claim on deceit, but in this instance the franchisee would have to prove intent on the part of the franchisor, which is generally very difficult to prove. Nullification has a retroactive effect. If the actions or omissions of the franchisor also qualify as a civil tort, the franchisor is obliged to compensate all of the franchisee's damages. On the basis of error, the contract may, upon request, be modified by a judge (for example, the franchisee's contract price may be reduced).

An alternative course of action is to base a claim for (partial) rescission or specific performance on breach of contract if the franchisee can prove that the franchisor has failed in the performance of an obligation. In the case of rescission for breach of contract, the defaulting party may be required to compensate the damages that the other party suffers as a result, unless the failure is not attributable to the defaulting party. If the franchisee can prove that the franchisor, by misinforming the franchisee, has committed a breach of contract, it can claim either rescission, alternative compensation or specific performance, all combined with losses because of delay.

In the case of breach of contract or tort, the franchisor has an obligation to compensate all damages of the franchisee. These damages include both losses and lost profits. The main principle is that the breaching party should bring the franchisee into the position it would have been in had the civil tort or breach of contract not been committed. The burden of proof regarding damages is on the franchisee. If damages cannot be assessed precisely, the Dutch court may estimate the amount of damages according to the general principles of reasonableness and fairness. In doing so, the Dutch courts have a large margin of discretion. The damages awarded will depend on the circumstances of the individual case.

21 In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

See also question 15. The potential liability of the franchisor or sub-franchisor will depend on what has been contractually agreed regarding responsibilities towards sub-franchisees. If nothing has been agreed, in principle the sub-franchisor (assuming that this will be the contracting party of the sub-franchisee) will be liable to the sub-franchisee. However, the franchisor may be liable to the sub-franchisor if the franchisor, in its turn, has neglected its obligations.

Under Dutch law, the private company with limited liability and the public company limited by shares both have legal personality (see question 1). In principle, therefore, liability rests with the business and not with individual officers, directors or employees. Individual officers or directors will only be exposed to liability in the event of improper management on their part that amounts to personal culpability of the directors. The burden of proof will rest on the franchisee.

22 In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

See questions 10, 11 and 36.

23 Other than franchise-specific rules on what disclosures a franchisor should make to a potential franchisee or a franchisee should make to a sub-franchisee regarding predecessors, litigation, trademarks, fees, etc, are there any general rules on presale disclosure that might apply to such transactions?

No, except as indicated in question 16 (the duty to inform and the duty to investigate).

24 What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises? How does this protection differ from the protection provided under franchise sales disclosure laws?

If a franchisor engages in fraudulent or deceptive practices, the franchisee may base a claim for annulment of the contract against the franchisor on the basis of deceit or error (misrepresentation). If the actions or omissions of the franchisor also qualify as a civil tort, which is always accepted in case of deceit, the franchisor has an obligation to compensate all of the franchisee's damages. See question 20 for an explanation regarding damages.

There is no distinct difference in legal protection when the franchisor has violated its disclosure obligations.

Legal restrictions on the terms of franchise contracts and the relationship between parties in a franchise relationship

25 Are there specific laws regulating the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

The ongoing relationship between the parties after the contract comes into effect will primarily be governed by the terms of the agreement concluded between them. The principles of reasonableness and fairness will also play an important role. See question 36.

26 Do other laws affect the franchise relationship?

Yes, competition laws applicable to vertical relationships are very important. For details of competition laws that have an impact on franchise relationships, see questions 39 and 40.

Also, from 25 May 2018, the General Data Protection Regulation (GDPR) applies. The GDPR (EU) 2016/679 is a regulation in EU law on data protection and privacy for all individuals within the European Union and the European Economic Area. It also addresses the export of personal data outside the EU and EEA. The GDPR aims primarily to give control to citizens and residents over their personal data and to simplify the regulatory environment for international business by unifying the regulation within the EU. The GDPR was adopted on 14 April 2016 and, after a two-year transition period, became enforceable on 25 May 2018. Because the GDPR is a regulation, not a directive, it does not require national governments to pass any enabling legislation and is directly binding and applicable throughout the EU.

27 Do other government or trade association policies affect the franchise relationship?

The Code (referred to in question 10) may affect the franchise relationship where the franchisor is a member of the NFV. For example, the Code provides that the franchisor shall provide the franchisee with initial training and continuing commercial and technical assistance during the entire life of the agreement.

28 In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Either party may terminate the franchise agreement for cause in the case of serious breach by the other party of its obligations. The criteria for what constitutes a serious breach should be carefully considered before actually terminating, because Dutch courts will have the discretion to decide that a certain circumstance does not qualify as a sufficiently serious breach, notwithstanding the fact that this may have been agreed by the parties in the franchise agreement.

In the case of termination of the franchise agreement by the franchisor without cause, a legal distinction should be made between contracts concluded for a definite and an indefinite duration. Contracts of definite duration can generally not be terminated before the end of the contract term unless the possibility to terminate early – without cause – has been specifically agreed upon. Early termination will, in most situations, result in liability of the terminating party. If a franchisor terminates a contract for a definite term prematurely (without cause), the franchisee can claim continued performance or damages. The damages could consist of lost profits calculated over the remaining term of the contract and costs and investments that the franchisee was not able to redeem owing to the premature termination.

In the case of a contract for an indefinite duration, the contract may in principle be terminated by either party. This is the leading view, recently affirmed by the Dutch High Court. However, under certain circumstances a franchisor may have to come up with a 'good reason' to be able to terminate the agreement. Besides this, the franchisor will have to respect a reasonable notice period, the length of which depends on the circumstances of the matter. While until recently it was quite usual that courts granted termination periods of up to a maximum of six to 12 months, currently there are a couple of higher court decisions in which notice periods of two to three years have been granted, even when contractually the parties agreed to a shorter notice period.

Furthermore, the franchisor may have to compensate the franchisee upon termination for investments or costs the franchisee may not be able to earn back as a result of the termination, as well as for over-stock (eg, taking back stock against a reasonable purchase price).

Update and trends

The draft franchise bill, on which an internet consultation was held in 2017, was put on hold by the new Dutch government in October 2017. In the coalition agreement, Rutte III, which the new Dutch government presented on 10 October 2017, says about franchise: 'There will be additional legislation in the field of franchise in order to strengthen the position of franchisees in the pre-competitive phase.'

In doing so, the new government appears to distance itself from the previously presented draft franchise bill and to opt for franchise legislation in the pre-contractual phase. However, it is unclear at the moment (May 2018) what direction the new government will take.

So far, no (high) court has granted a franchisee payment of a goodwill or customer compensation, even though this has sometimes been suggested in literature.

If the franchisor terminates a contract without cause or does not respect a reasonable notice period, the franchisee could claim continued performance during the period that should have been respected by the franchisor, or instead claim a financial compensation for damages.

29 In what circumstances may a franchisee terminate a franchise relationship?

Either party may terminate the franchise agreement for cause in the case of serious breach by the other party of its obligations. The criteria for what constitutes a serious breach should be carefully considered before actually terminating, since the Dutch courts will have the discretion to decide that a certain circumstance does not qualify as a sufficiently serious breach, notwithstanding the fact that this may have been agreed by the parties in the franchise agreement.

In the case of termination of the franchise agreement by the franchisee without cause, a legal distinction should be made between contracts concluded for a definite and an indefinite duration. Contracts of definite duration can generally not be terminated before the end of the contract term, unless the possibility to terminate early – without cause – has been specifically agreed upon. Early termination will, in most situations, result in liability of the terminating party. If a franchisee terminates a contract for a definite term prematurely (without cause), the franchisor can claim continued performance or damages. The damages could consist of lost profits calculated over the remaining term of the contract and costs and investments that the franchisor was not able to redeem owing to the premature termination.

In case of a contract for an indefinite duration, the contract may, in principle, be terminated by either party. This is the leading view, recently affirmed by the Dutch High Court. However, the franchisee will have to respect a reasonable notice period, the length of which depends on the circumstances of the matter.

If the franchisee terminates a contract without cause or does not respect a reasonable notice period, the franchisor could claim continued performance during the period that should have been respected by the franchisee, or instead claim a financial compensation for damages.

30 May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

Whether a franchisor may refuse to renew the franchise agreement with a franchisee depends primarily on the content of the contract. If nothing in this respect has been arranged in the contract, case law indicates that a franchisor may refuse to renew a relationship where unforeseen circumstances have occurred that are of such a serious nature that the franchisee could not reasonably have expected the contract to be renewed. Furthermore, where the franchisor can prove that the franchisee is in breach of its material obligations, the franchisor may refuse to renew the agreement on the basis of breach of contract. In certain circumstances, the franchisor may be obliged to compensate the franchisee upon termination; for example, if the franchisor takes over the franchise at that location or at a new location within a short distance. Another example is when the franchisee has incurred significant costs in justified reliance on continued cooperation. In this circumstance, the franchisor may be required to compensate the franchisee. Finally, a franchisor may be able to terminate the relationship by not renewing the

franchise agreement if it complies with the conditions set out in question 28 (a reasonable notice term, sometimes compensation of costs and investments and, in exceptional circumstances, a 'good reason').

31 May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

A general provision regarding contract transfers is laid down in the Dutch Civil Code. A contracting party may, only with the consent of the other party, transfer its rights and obligations under the contract to a third party. Therefore, a franchisee may only transfer the franchise with the franchisor's consent. A franchisor will not normally refuse such a transfer where the third party meets the selection criteria. It can be contractually arranged that the franchisee should first offer the business to the franchisor on the same terms as those that the franchisee would offer to the third party.

32 Are there laws or regulations affecting the nature, amount or payment of fees?

Franchising fees are not regulated by law. In practice, however, different types of fee can be distinguished: firstly, an entrance fee, which is a one-off payment that the franchisee pays to the franchisor. It represents a contribution towards the costs that the franchisor has incurred in the expansion of its chain and establishment of goodwill. Secondly, a continuing franchising fee, which is a regular fee for the use of the franchise system. This is usually a percentage of profits that the franchisee has realised within a given term. A regular fee may also be due as a contribution towards advertising costs or promotional activities.

33 Are there restrictions on the amount of interest that can be charged on overdue payments?

Under freedom of contract between professional parties, in principle the parties are free to agree on the interest rates to be applied. If the parties did not agree on any interest rate, Dutch statutory (trade) interest shall apply automatically in the event of late payment (if no payment term has been agreed, then automatically 30 days after having received the invoice).

On 16 March 2013, a new Act entered into force, implementing EU regulation 2011/7/EU to prevent payment delays in commercial agreements. This Act gives creditors more possibilities to recover their claims. Even though professional parties can agree upon payment terms, in the Act it has been laid down that only in exceptional circumstances can a payment term longer than 60 days be agreed upon. When acting with governmental agencies, the maximum payment term should be 30 days and only in exceptional circumstances can it be longer than this (however, never exceeding 60 days). Based on this Act, a creditor can claim as a minimum a compensation of €40 for the costs of recovery. Under this Act, the statutory trade interest is increased by 1 per cent. This Act does not apply to transactions with consumers (private persons).

The Dutch legal interest rate in commercial matters as of 1 July 2017 amounts to an annual percentage of 8 per cent. For transactions with consumers, a lower interest rate is applicable. As of 1 January 2015, this annual rate is 2 per cent.

34 Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?

Freedom of contract dictates that parties may agree to whichever terms they find mutually suitable, subject to the points in question 36.

35 Are confidentiality covenants in franchise agreements enforceable?

Confidentiality covenants in franchise agreements are enforceable. The franchisee typically commits itself for the duration of the contract, as well as following its termination, to keeping all details of the franchisor's business operations confidential. This will typically extend to non-patented know-how materials.

Franchising contracts in the Netherlands may include a financial penalty provision that can be invoked in the event of the other party violating the confidentiality clause. The courts shall have the right to mitigate such penalties. This mitigation right cannot be contractually excluded.

36 Is there a general legal obligation on parties to deal with each other in good faith? If so, how does it affect franchise relationships?

There is a general legal obligation on parties to deal with each other in good faith. In the Netherlands, general civil law is governed by the principles of reasonableness and fairness. Franchise agreements are therefore also governed by reasonableness and fairness.

The principles of reasonableness and fairness may not only supplement the existing contract and relationship (based on article 6:248(1) of the Dutch Civil Code), but may also derogate from the contract that the parties agreed upon at an earlier stage, in the event such provision is, in the given circumstances according to the principle of reasonableness and fairness unacceptable (based on article 6:248(2) of the Dutch civil code). The standard to derogate from an agreed provision is high. Very large franchisors in particular should be aware that a provision in an existing contract that is very one-sided (eg, a provision that the franchise relationship may be terminated by the franchisor at any given moment, respecting a notice term of only 30 days), especially when dealing with a very small franchisee, could be set aside by the principle of reasonableness and fairness, if such provision is unacceptable in the given circumstances. It is not possible to predict what kind of provisions may be set aside, if any, as the court will consider all relevant circumstances, including the economic power of each party, the dependency of the parties from each other, the duration of the contract, the investments made by either party, what each party could reasonably expect from the other party and all other relevant circumstances.

As a general rule, Dutch courts generally tend to protect 'weaker' (smaller) parties at the expense of economically stronger (larger) parties. However, this certainly does not mean that simply by being a weaker party, certain clauses will be set aside. This depends on all the circumstances in the matter.

37 Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

When dealing with a very small franchisee, there is a possibility that general conditions – this could even include a standard franchise agreement, or part thereof – may be annulled because of reflex action of articles 6:236–238 of the Dutch Civil Code. Those articles deal with the 'black' and 'grey' lists, listing prohibited clauses in general conditions for consumers. In certain situations, a small franchisee may claim it should benefit from the reflex action of those articles. For an explanation of the principle of reasonableness and fairness in the Dutch Civil Code, see question 36.

38 Must disclosure documents and franchise agreements be in the language of your country?

Freedom of contract dictates that parties may agree to draw up contracts in whichever language they choose. However, on the basis of the principle of reasonableness and fairness one could argue that disclosure documents and agreements should be made available in a language that the other party understands.

39 What restrictions are there on provisions in franchise contracts?

As in all other EU member states, Commission Regulation 330/2010 provides the relevant framework for the competition law assessment of all franchise agreements with an effect on trade between the member states. The EC Guidelines to the Commission Regulation can be found at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:pdf>.

This Regulation, inter alia, prohibits resale price maintenance as well as certain restrictions regarding the territory or group of customers that can be served. It is prohibited to limit 'passive sales' by a franchisor, which includes sales via the internet. It also restricts the duration of a contract in the case that it contains a noncompete clause.

As regards purely domestic franchising agreements, the Commission Regulation equally applies by virtue of article 13a of the Dutch Competition Act (DCA). There are no additional Dutch competition laws relating to franchising agreements.

40 Describe the aspects of competition law in your country that are relevant to the typical franchisor. How are they enforced?

Franchising agreements that do not meet the criteria set forth in Regulation 330/2010, and to which no de minimis thresholds apply, will be prohibited on the basis of article 6.1 of the DCA or article 10 of the Treaty on the Functioning of the European Union (TFEU), unless the four criteria of the legal exception of article 6.3 DCA or article 101(3) TFEU apply.

Competition laws in the Netherlands are enforced both administratively and by means of civil litigation (private enforcement). The NMA can impose fines if a franchising agreement would disregard what is set forth in Regulation 330/2010, in particular if the agreement would contain any hard-core restrictions (eg, resale price maintenance). The maximum statutory fine is 10 per cent of the undertaking's worldwide turnover.

A party to a franchising agreement claiming that the agreement infringes article 6.1 of the DCA or 101(1) TFEU can invoke the nullity of the agreement (in whole or in part) before a Dutch court. The court will have to decide on the applicability of Regulation 330/2010 or the legal exception of article 6.1 DCA or article 101(1) TFEU. If it decides in the affirmative, it will subsequently have to determine whether this leads to partial nullity (nullity of only the infringing clauses) or nullity of the agreement in its entirety. The latter will be the case if the court determines that without the infringing clause, the agreement would not (or would not on similar terms) have been concluded. In a few instances the court has nullified a franchising agreement in its entirety, notably because the franchisor engaged in resale price maintenance.

41 Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

Franchise agreements will generally contain a dispute resolution clause, in which a competent court or a form of arbitration is explicitly chosen.

de grave
de mönnink
spliet
advocaten

Tessa de Mönnink

demonnink@gmsadvocaten.nl

Willemsparkweg 84
1071 HL Amsterdam
Netherlands

Tel: +31 20 820 3350
Fax: +31 20 820 3359
www.gmsadvocaten.nl

In the Netherlands, Netherlands Arbitration Institute (NAI) arbitration (www.nai-nl.org) is well regarded and is in general less expensive than the more internationally well-known International Chamber of Commerce (ICC) arbitration.

In cases where there is no valid arbitration provision, the sub-district court is competent in smaller claims (under the amount of €25,000) and for particular issues, such as employment and rent-related disputes. Larger claims may be brought before the civil judge of the district court.

The Dutch Franchise Association can assist with mediation for parties seeking out-of-court remedies.

42 Describe the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction.

The principal advantages of arbitration include:

- arbitration offers a choice regarding the language of proceedings - the regular courts in the Netherlands only accept the Dutch language;
- it offers the possibility of agreeing on the country and area in which the proceedings will be conducted;

- it offers the possibility of choosing the number of arbitrators and the time limitations;
- it is, generally speaking, concluded more quickly than regular court procedures;
- it may be dealt with by appointed experts instead of or in addition to lawyers; and
- parties can agree to observe secrecy in arbitration. Regular court proceedings are public.

The principal disadvantages of arbitration are:

- in general, it is much more expensive than regular court proceedings;
- regular court proceedings offer the possibility of appeal; and
- the quality of arbitration may not always be secured, depending on the actual arbitration forum, although NAI and ICC arbitration in general should be of good quality.

43 In what respects, if at all, are foreign franchisors treated differently from domestic franchisors?

In principle, there is no difference in the treatment of foreign and domestic franchisors.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com