



# Dutch Law on Termination of Franchising and Distribution Agreements

*Teresa Charatjan*  
*charatjant@gtlaw.com*

## Introduction

- Dutch Law on the termination of franchising and distribution agreements contribution by:

Hans E. Urlus and Teresa Charatjan



- Greenberg Traurig LLP, Amsterdam
  - Commercial Contracting, Competition law, Intellectual Property, Corporate M&A/Litigation, Banking & Finance, Real Estate

# Outline

1. Dutch law on Franchise and Distribution
2. General features Franchise in the Netherlands
3. General features Distribution in the Netherlands
4. Commercial agreements
  - Duration
  - Termination
  - Compensation

## Dutch Law on Franchise and Distribution

- Specific (mandatory) legislation on these two legal commercial concept is non-existent in Dutch law.
  - *note: Dutch law does contain specific mandatory legislation on agency*
- Subject to general provisions of:
  - Dutch contract law;
  - competition law;but predominantly contractual freedom
- Legal aspects (termination and consequences) are developed in Dutch case law

## Franchise – General Features

- Definition according to the Netherlands Franchise Association:  
*“system for **distributing** products and services or **exploitation** of technology, based on close and lasting cooperation between legally and economically **independent business**”*
- Key: licensing IP and providing know-how under franchisor’s business model
- The general rights and obligations are:
  - Franchisor:
    - provides a license; and
    - technical & commercial assistance
  - Franchisee:
    - is interdependent; and
    - pays a franchise fee for the use of the business method

## Franchise – General Features

- Dutch Franchise Code introduced on 17 February 2017
  - best practices on conduct (both franchisor & franchisee); comply or explain model
  - no best practices on termination
- A statutory basis for the Franchise Code is envisaged
  - 12 April 2017: draft bill
  - 25 May 2017: internet consultation finished
  - 2017 - 2021: coalition agreement to adopt additional legislation to strengthen the position of franchisees

## Distribution – General Features

- According to the Dutch courts distribution is an agreement in which:  
*“Supplier has a contractual obligation to deliver certain products or services to distributor for an onward supply to customers of the distributor in distributor’s name and at the risk and expense of distributor”*
- Resale of supplier’s products on the basis of a distribution model:
  - (non-)exclusive distribution; or
  - selective distribution
- Distributor operates:
  - independent from supplier;
  - in its own name;
  - with its own business model and makes its own (commercial) decisions

# Summery

- Franchise and distribution are commercial agreements for which:
  - Dutch law does not provide mandatory laws governing those legal commercial concepts;
  - rules of competition law on (a.o.) duration and exclusivity apply;
  - EU and national codes of conducts (only for franchise) apply; and
  - the substantive law aspects are developed in Dutch case law
- Main topics in practice are the legal aspect on the duration, termination and compensation obligations



# Commercial Agreements - Duration

- Contractual freedom brings about that parties decide on the duration of their relationship
- Dutch law makes a distinction between:
  - open-ended agreements (for an indefinite term); and
  - fixed term agreements (entailing an agreed specific definite term)
- Fixed term agreements are usually entered into for a term of 5 years, without tacit renewal, because of:
  - art. 5(a) of Block Exemption on Vertical Agreements)
  - alignment with customary lease term commercial real estate in the Netherlands
- Parties negotiate a potential continuation at end of a term if there no agreement is reached for continuation then the agreement terminates *ipso jure*

## Commercial Agreements – Termination

- In practice the most contested aspects relate to:
  - an early termination; and
  - the consequences of an (early) termination
- Basic principles developed in case law, depending on the duration of the agreement:
  - fixed period agreement: cannot be early terminated unless parties agreed otherwise; and
  - open-ended agreement: can be early terminated if the following is met:
    1. a cause of termination is present;
    2. a sufficient notice is provided to the terminated party; and
    3. the terminating party observes a reasonable notice period

## Termination – Cause

- Examples of compelling (good) reasons for termination are:
  - continuation of the commercial relationship jeopardizes the continuity of the terminating party
  - continuation of the commercial relationship is a risk to the reputation of the terminating party
- Termination on the other hand could be contrary to the principle of good faith if:
  - the terminated party made considerable investments upon request of the terminating party
  - the terminated party had legitimate expectations that the relationship would be continued

## Termination – Reasonable Notice Period

- Terminating party must observe a reasonable notice period
  - reasonableness is viewed from the perspective of the terminated party
  - total term of the commercial relationship is a significant factor in determining the reasonableness
  - the dependency of the terminated party on the commercial relationship has an upward pressure on the notice period
- Rule of thumb

Duration commercial relationship	Notice period
> 2 years	3 months
2 – 4 years	6 months
4 - 10 years	8 -12 months

# Commercial Agreements - Compensation

- Compensation can be based on either:
  - an agreement thereto between parties; or
  - the (additional effect of the) principle of reasonableness and fairness (in equity)
- Compensation could be reflected in (either):
  - the total period of notice; and/or
  - a compensation of the actual investments made by the terminated party for its assumption of continuation of the agreement; and/or
  - any goodwill payments.
- The principle of reasonableness and fairness could lead to compensation in addition to a reasonable notice period
  - For example if the impression was given that the relationship will be continued
- If the terminated party does not suffer damages then no compensation is required. Terminated party carries the burden of proof.

## Commercial Agreements - Compensation

- Dutch case law does not recognize analogous application of the termination indemnity as applicable to commercial agents as applied in Germany
- Method for determining the amount of compensation
  - Net profit achieved during the period of notice which should have been observed if a reasonable notice period was observed
  - Deduction of costs and further operating expenses
- If investments were made that were not adequately recovered then those investments can rise a claim for compensation

Any Question?

**Grazie per  
l'attenzione**