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# THE FRANCHISE LAW REVIEW

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FOURTH EDITION

EDITOR  
MARK ABELL

LAW BUSINESS RESEARCH

This book is dedicated to  
**JOHN NELSON-JONES,**  
an exceptional lawyer and mentor,  
who passed the wonder and pleasure of  
practising law from one generation to another,  
with an unsurpassed generosity of spirit.

# THE FRANCHISE LAW REVIEW

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Fourth Edition

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MARK ABELL

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# EDITOR'S PREFACE

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This book is dedicated to my dear, recently deceased mentor, John Nelson-Jones, who took me under his wing and first introduced me to international franchising in the early 1980s. At that time I had no idea what an incredible professional journey I was embarking upon. Without John's immense intellect, keen understanding of the commercial world and enormous generosity of spirit, supporting and encouraging me, I may well have given it up as being far too much of a challenge for a young lawyer. It soon became clear to me that to advise clients upon franchising one needed to have a strong understanding of a wide range of legal disciplines, from competition law and intellectual property through real estate, contract, commercial, corporate, tax and private international law to the boundaries of new and previously undreamed of areas of jurisprudence in jurisdictions far beyond one's own. Who in the early 1980s, for example, had even imagined areas of law such as privacy and data protection, which now play such an important role in how franchising is structured and regulated across the globe? It all seemed an incredible intellectual and professional challenge in respect of an area of commerce that was not even recognised as existing under English law. However, John was gently insistent and understood the role that franchising would play in an increasingly global economy. For John, who was a true legal polymath (having authored several leading textbooks on areas of law as diverse as taxation and package holidays), the breadth and depth of legal knowledge that was required merely made franchising a more interesting and rewarding area of law in which to specialise.

Showing his characteristic altruism and desire to help young lawyers make the most of their talents, John guided and supported me as I struggled to understand the international complexities of franchising, sending me to the United States, where I was able to immerse myself in the dynamic and highly regulated world of American franchising. I also had the pleasure of co-authoring my first chapter in a legal text book on franchising with John, or 'JANJ', as the younger lawyers in the firm referred to him. In his typically gracious and humorous manner, he insisted that my name appear before his in the index and on the first page of the chapter as, in his words, "The 'A' is mightier than the 'N'!"

John was a charming and self-effacing individual, with a kind word for everyone and a genuine interest in everybody who worked with him. I was only one of his protégées, and he steered many other young lawyers to become internationally renowned practitioners in

a number of other areas of law, such as taxation and international travel. John took all of the hard work involved in supporting and shaping the careers of young lawyers easily in his stride, while at the same time successfully managing one of the City's up-and-coming law firms, looking after a large and demanding portfolio of blue-chip clients and making regular Saturday visits to Plough Lane, where he watched his local football club, Wimbledon (aka 'the Crazy Gang'), win the FA Cup in 1988 and then try to defy gravity by vainly battling to avoid relegation from the first division for the rest of the decade.

Thirty-five years on from the time that John introduced me to international franchising, his confidence in the future role and importance of franchising in the world economy has been vindicated. As usual, he was able to see what most others could not – potential, whether it was in respect of people or ways of doing business.

*The Franchise Law Review* is therefore just one small part of John's legacy to the legal profession and it is my great pleasure to dedicate this fourth edition to him.

Since the publication of the third edition of *The Franchise Law Review*, there have been major economic and geopolitical developments that have had a significant impact on world trade, not least the election of Donald Trump as president of the United States and the referendum that resulted in Brexit. The price of oil is still low, China's manufacturing sector is still suffering significant setbacks, Europe faces a further range of challenges, Iran and Saudi Arabia are exacerbating the problems in the Middle East and the Russian economy continues to float in the doldrums. Through all this, however, the apparently inexorable march towards the globalisation of commerce has continued unabated.

Despite the slow emergence of a few economic bright spots, the economy of what was once called the 'developed' world continues to struggle for the most part, while even Brazil (despite the recent Olympics) is still wallowing in recession. As a consequence, businesses are often presented with little choice but to look to more vibrant markets in Asia, the Middle East and Africa for their future growth.

The key word would seem to be uncertainty.

Brexit is set to have an impact on franchising in Europe, but it is as yet unclear what that impact will be. With the fall in the pound against the dollar we have already seen a number of US franchisors buy out their UK master franchisees. However, whether that is a long-term trend remains to be seen. In legal terms, the only potentially significant impact so far has been upon EU trademarks, resulting in many franchisors taking the precaution of also registering UK brands for their marks. On the other side of the Atlantic, the election of Donald Trump to the presidency is another unknown that will most probably have an impact upon franchising during the next few years.

The political uncertainty in continental Europe is also likely to have some impact. With the demise of both Hollande in France and Renzi in Italy, and the general rise of anti-establishment and anti-EU parties, Chancellor Merkel in Germany seems likely to be one of the few strands of continuity over the coming few years.

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

At the same time, the regulation of franchising continues to evolve and the past 12 months have seen the EU Parliament focus on how it might best change the regulatory environment for franchising within the European Single Market.

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

Given the positive role that franchising can make in the world economy, it is important that legal practitioners have an appropriate understanding of how it is regulated around the globe. This book provides an introduction to the basic elements of international franchising and an overview of the way it is regulated in 36 jurisdictions.

As will be apparent from the chapters of this book, there continues to be no homogeneous approach to the regulation of franchising around the world. Some countries specifically regulate particular aspects of the franchising relationship. Of these, a number try to ensure an appropriate level of pre-contractual hygiene, while others focus instead on imposing mandatory terms upon the franchise relationship. Some do both. In certain countries, there is a requirement to register certain documents in a public register. Others restrict the manner in which third parties can be involved in helping franchisors meet potential franchisees. No two countries regulate franchising in the same way. Even those countries that have a well-developed regulatory environment seem unable to resist the temptation to continually develop and change their approaches to regulation – as is well illustrated by the recent changes to the Australian regulations. The inexorable onward march of franchise regulation continues, with countries such as Argentina – which previously had not specifically regulated franchising – adopting franchise-specific laws in the past 12 months.

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

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

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

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

**Mark Abell**

Bird & Bird LLP

London

January 2017

## Chapter 38

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# NETHERLANDS

*Martine de Koning*<sup>1</sup>

### I INTRODUCTION

Franchise fulfils an important role in the Dutch economy. Approximately 750 franchisors are active on the Dutch market. Together, they have almost 30,000 franchise outlets, employ almost 290,000 people and generate a turnover of over €31.6 billion.<sup>2</sup> The biggest franchise formulas in the Netherlands are: Primera (convenience stores), Bruna (bookshops), Albert Heijn and Jumbo (supermarkets).<sup>3</sup>

The Netherlands Franchise Organisation acts as the umbrella branch organisation for franchise businesses and is responsible for the healthy development of franchising in the Netherlands. The Netherlands Franchise Organisation has more than 200 members (franchisors) and is affiliated with the European Franchise Federation and the World Franchise Council.<sup>4</sup>

### II MARKET ENTRY

#### i Restrictions

In the Netherlands, there are neither restrictions on a foreign entity granting a master franchise nor restrictions on foreign franchisors owning equity in a local business or owning real property. However, companies incorporated under foreign law that are not located in a country that is a member of the European Economic Area can be subject to the Companies

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1 Martine de Koning is a partner at Kennedy Van der Laan. The author thanks Renske Sinke and Jelle Blom for their valuable input on this chapter.

2 See 'Franchising in Nederland 2016', research by the Dutch Franchise Association and Rabobank; available at [www.nfv.nl/userfiles/NFV%20Franchise%20statistiek%202016.pdf](http://www.nfv.nl/userfiles/NFV%20Franchise%20statistiek%202016.pdf).

3 <https://denationalefranchisegids.nl/franchisenieuws/primera-grootste-franchiseformule-van-nederland/>.

4 [www.nfv.nl/](http://www.nfv.nl/).

Formally Registered Abroad Act if they want to operate on the Dutch market. On the basis of this Act, companies have to comply with statutory and registration requirements that are applicable to Dutch companies, such as registration in the Business Register.

## ii Foreign exchange and tax

No specific tax rules apply for a foreign franchisor who wants to set up a franchise chain in the Netherlands. Foreign franchisors or franchisees qualify as Dutch resident for tax purposes if they are established in the Netherlands as a Dutch liability company (for example, BV and NV). In that event, foreign franchisors and franchisees will be treated in the same way as Dutch residents for tax purposes.

## III INTELLECTUAL PROPERTY

To exploit a franchise formula successfully, it is, of course, necessary for a franchisee to be entitled to use the franchisor's store concept, business name and logo, and franchisor's know how. In the paragraphs below we will outline different ways for a franchisor to protect its intellectual property rights. Know-how is not protected by intellectual property law.<sup>5</sup> Know-how can be protected by putting in place contractual non-disclosure and non-compete obligations.<sup>6</sup>

### i Brand search

Trademarks can be looked up online in databases. A franchisor can check if a trademark is already registered at EU level on the website of the European Union Intellectual Property Office (EUIPO).<sup>7</sup> Moreover, registered Benelux intellectual property rights can be looked up on the website of the Benelux Office for Intellectual Property (BOIP).<sup>8</sup> International trademark registrations can be looked up in the database of the World Intellectual Property Organization.<sup>9</sup>

### ii Brand protection

Trademarks have to be registered to receive trademark protection. In the Netherlands there are no Dutch national trademarks, but one can apply, through the BOIP, for registration of a Benelux trademark, which is protected under the Benelux Treaty for Intellectual Property. If a trademark is registered in the Benelux trademark register, the registrant has exclusive

---

5 Note that on 14 April 2016 the Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure was adopted by the European Parliament but has not yet been adopted in the Dutch Civil Code (DCC).

6 See, for example, European Court of Justice, 28 January 1986, NJ 1988, 163, par. 16 (*Pronuptia*); District Court Overijssel 22 June 2016, ECLI:NL:RBOVE:2016:2914, par. 5.4. (*X/FBD Franchise*); Court of 's-Hertogenbosch 28 December 2005, ECLI:NL:GHSHE:2005:AU8610 (*Multicopy*).

7 See <https://euipo.europa.eu/ohimportal/en/search-availability>.

8 See <https://register.boip.int/bmbonline/intro/show.do>.

9 See [www.wipo.int/madrid/en/romarin](http://www.wipo.int/madrid/en/romarin).

trademark rights in the Netherlands, Luxemburg and Belgium. Moreover, a trademark can be registered as an EU trademark in the EU trademark register.<sup>10</sup> If the franchisor decides to do so, he or she has the exclusive right to the trademark in the European Union.

The procedure for definitive trademark registration takes about three months at the BOIP and six months at the EUIPO and the registration is valid for a period of 10 years and subsequently can be renewed for an unlimited number of successive 10-year periods. In principle, therefore, a trademark can be protected indefinitely. The registration process consists of the following steps:<sup>11</sup> online application and payment of a fee, publication of the application, examination of the application, possible opposition by third parties and formal registration of the trademark (on condition that no successful opposition was made, possible objections were rejected and the application fulfils the registration requirements).

Formal registration for copyright is not required (and not possible) in the Netherlands. Copyright is granted automatically to works that meet the criteria for copyright protection under the Dutch Copyright Act, because the Netherlands is party to the Berne Convention.<sup>12</sup> A franchise formula can be protected by copyright if the formula qualifies as a product of art, science or literature.<sup>13</sup> Under the Dutch Copyright Act only the original application of a franchise formula is protected. The imitation of a franchise formula does not automatically entail that the similar franchise formula infringes the imitated franchisor's copyright. To determine this, a judge will take into account the degree of similarity between the formulas, the development of the franchise formula and the possibility that imitated elements of the protected formula could be derived independently, were public or previously known.

A trade name does not have to be registered to be protected under the Dutch Trade Names Act; protection is granted to a trade name that is actually used. It is prohibited to use a trade name that is (nearly) identical to an older trade name, if this use can lead to a risk of confusion among the public. The greater the extent to which companies conduct different types of business or conduct business at different geographical locations, the less likely the risk that confusion will be established.

### iii Enforcement

A franchise agreement usually licenses the franchisee to use the intellectual property rights (usually trademarks) of the franchisor. In the event that a dispute arises regarding this right of use, parties may bring legal action against each other, which means that parties can also start summary proceedings to obtain provisional measures. If the trademark licensee (franchisee) is registered in the trademark register, the franchisee is able to step in in counterfeit actions initiated by the franchisor. The franchisee is in this event entitled to bring a claim for

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10 Known as the European Union Office for Harmonization in the Internal Market (OHIM) until 23 March 2016.

11 For the correct order of steps for EUIPO and BOIP, see <https://euipo.europa.eu/ohimportal/en/registration-process> and <https://www.boip.int/wps/portal/site/trademarks/register/how-procedure/>.

12 Berne Convention for the Protection of Literary and Artistic Works.

13 Article 10 Copyright Act.

compensation or remittance for profit.<sup>14</sup> This enables the franchisee to obtain compensation for damage it has suffered because of the infringement. This is only possible if the franchisor has given the franchisee the authorisation to start these proceedings.<sup>15</sup>

Moreover, in cases of major urgency and evident infringement (i.e., where delay would cause irreparable harm), an IP owner can request an *ex parte* injunction from a judge in summary proceedings; this is an injunction granted without notice being given to the infringer.<sup>16</sup>

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

##### *Data protection*

Many franchisors store, use and often share with their franchisees or other parties huge amounts of consumer data, such as for the purposes of loyalty programmes and (digital) marketing. These data can be analysed with big data applications to improve the franchisor's marketing. Consumer data may qualify as 'personal data' in the meaning of the Dutch Data Protection Act (DDPA). If that is the case, the DDPA is applicable to the collection and further processing of such consumer data by franchisors. The DDPA includes the EU-wide recognised data protection principles and regulates – in a nutshell – whether and under which conditions personal data may be used, which precautions need to be taken (e.g., information, consent, notification and pre-authorisation obligations), which rights of the data subject need to be respected (e.g., rights to access, objection, deletion and correction) and which arrangements the parties involved in the processing of the data have to make (e.g., entering into a data processing agreement or implementing data transfer mechanisms).

As of 1 January 2016, two important amendments of the DDPA entered into force. First, the DDPA includes as of this date a legal requirement to notify (serious) data breaches to the Dutch Data Protection Authority (DPA) and to the individuals concerned.<sup>17</sup> The second amendment is that the competence of the DPA to fine organisations for failing to comply with the DDPA has been extended. The DPA can impose fines for almost any violation of the DDPA (except for violating the data processing notification requirement) with a maximum of €820,000 or – if that would not be a suitable punishment – 10 per cent of the controller's yearly revenue.<sup>18</sup>

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14 Article 2.32 (4) Benelux Convention on Intellectual Property. Note that a licensee is not entitled to start an injunction.

15 Article 2.32 (5) Benelux Convention on Intellectual Property.

16 Article 1019e Civil Procedure Code.

17 Article 34a(2) DDPA.

18 Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) will enter into force on 24 May 2016 and will apply from 25 May 2018. The Regulation is directly applicable and aims to ensure the same rules in all Member States. However, the Regulation includes many open norms. It is too early to indicate how these norms will be applied by the different Member States, such as the Netherlands.

According to the Dutch Franchise Code (DFC), the franchise agreement should include arrangements or agreements regarding the collection, use and exploitation of consumer data.<sup>19</sup>

### *Cybercrime, social media and e-commerce*

In the Netherlands statutory laws apply to cybercrime, social media and e-commerce, but none of these are franchise specific. However, if franchisees or franchisors sell products or services through a website to consumers, they are subject to disclosure requirements for distance contracts,<sup>20</sup> requirements for concluding contracts by electronic means<sup>21</sup> and requirements for service providers<sup>22</sup> as set out in the DCC.

## IV FRANCHISE LAW

### i Legislation

In the Netherlands, there is no statutory law on franchising. There is a wide range of case law on franchising from which it is clear that civil law applies, including statutory and case law on contracts, as well as the specific rules on trademarks, trade names, and Dutch and European competition law. In addition, franchisors who are members of the Netherlands Franchise Association have to comply with the European Franchise Federation's European Code of Ethics for Franchising.<sup>23</sup>

On 17 February 2016, the DFC was published. Although the DFC currently only has the status of a self-regulatory code, the Minister of Economic Affairs announced that he wants to give the DFC a statutory basis in the near future, but it is generally expected that the DFC will be based on a 'comply or explain' principle (see also Section VII, *infra*, for an extensive outline of the DFC).

Franchisees are considered to operate as independent and distinct entities and do not act in the name of or on behalf of the franchisor. Most franchisors operate some form of monitoring or control. Dutch case law does not set strict requirements for an agreement to qualify as a franchise agreement. In the landmark case *Paalman/Lampenier*,<sup>24</sup> the Dutch Supreme Court referred to the definition of a 'franchise agreement' as stated in the then applicable Regulation 4087/88:<sup>25</sup> 'A franchise agreement means an agreement whereby one

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19 Article 4.6 sub. j DFC.

20 Article 6:230m Book 6 DCC.

21 Article 6:227b and 6:227c DCC.

22 Article 6:230a–230f DCC.

23 See the Dutch Franchise Association website: [www.nfv.nl/juridisch-franchisegevers/](http://www.nfv.nl/juridisch-franchisegevers/). See the European Franchise Federation website at [www.eff-franchise.com/77/regulation.html](http://www.eff-franchise.com/77/regulation.html).

24 Supreme Court 25 January 2002, ECLI:NL:HR:2002:AD7329 (*Paalman/Lampenier*); District Court Overijssel 8 June 2016, ECLI:NL:RBOVE:2016:2172, par. 7.3. (*Speeleiland Tholen/Otto Simon*).

25 Regulation 4087/88, PbEG 1988, L359/46, Article 3 sub. b (Regulation on the application of Article 85(3) of the Treaty to categories of franchise agreements) However, note that this specific Regulation for franchise agreements is not in place any more; instead, Regulation 330/2010 Block Exemption Vertical Agreements and Guidelines apply now to franchise agreements. This Regulation includes a slightly different description of a 'franchise'.

undertaking, the franchisor, grants the other, the franchisee, in exchange for direct or indirect financial consideration, the right to exploit a franchise for the purpose of marketing specified types of goods and/or services. The agreement includes at least obligations relating to the communication by the franchisor to the franchisee of know-how.’

## ii Pre-contractual disclosure

There are currently no statutory pre-contractual disclosure obligations for franchisors. Based on the general rules of error, a franchisee can annul a franchise agreement if he or she was in error about relevant circumstances on the basis of a statement or information provided (or omission to provide the same) by the franchisor, and if he or she would not have concluded the agreement without that information.

From general contract law, it follows that the franchisor has an obligation to provide relevant information to a franchisee and a franchisee also has a duty to ask questions to get information. The scope of these duties depend on the power and specific position and knowledge of each party. Nevertheless, the duty to inform the other party of relevant information generally outweighs the duty to investigate.

In *Paalman/Lampenier*,<sup>26</sup> the Dutch Supreme Court determined that the doctrine of reasonableness and fairness does not, in principle, place an obligation on franchisors to provide a financial prognosis to a prospective franchisee except in special circumstances. It follows from lower court case law that if the franchisor does provide a profitability assessment to the franchisee, the franchisor has a special duty of care. A financial assessment has to be diligently prepared. This means that the financial assessment must be based on a careful and thorough location survey and market investigation, and must contain a clear substantiation of the figures.<sup>27</sup> If the franchisor, for instance, provides the franchisee with a financial prognosis and is aware that the prognosis contains serious flaws but does not notify the franchisee of those flaws, the franchisor may be found to have acted wrongfully and be held liable for damages.<sup>28</sup> If the franchisee relies on incorrect information (regardless of whether the franchisor knew it was flawed), and proves that he or she would not have entered into the agreement without that information, he or she may nullify the agreement afterwards. Consequently, the franchisee must be placed in a position as if the agreement had not been concluded.<sup>29</sup>

If the revenues of the franchisee turn out lower than the financial prognosis of the franchisor, this does not automatically mean that the financial prognosis was not of the required quality. Disappointing results may also result from unexpected circumstances (i.e., flaws in the exploitation of the store by franchisee or an economic recession).<sup>30</sup> The

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26 Supreme Court 25 January 2002, ECLI:NL:HR:2002:AD7329 (*Paalman/Lampenier*).

27 District Court Overijssel 8 June 2016, ECLI:NL RBOVE:2016:2172 (*Speeleiland Tholen/Otto Simon*).

28 District Court Breda 14 April 1998, Prg 1998/4967 (*Aviti/Kinderparadijs*) and District Court Arnhem, 18 June 1999, Prg. 1999/5211 (*Brown Fashion*); Supreme Court 25 January 2002, ECLI:NL:HR:2002:AD7329 (*Paalman/Lampenier*); Court of Appeals 's-Hertogenbosch 15 September 2015, ECLI:NL:GHSHE:2015:3583 (*ToFuel/Tofuel B.V.*).

29 Article 6:228 DCC.

30 District Court Overijssel 8 June 2016, ECLI:NL RBOVE:2016:2172 (*Speeleiland Tholen/Otto Simon*).

franchisee is also obliged to independently investigate the proposition.<sup>31</sup> Case law confirms that a candidate franchisee must have a critical attitude towards information provided by the franchisor regarding future revenues of a new franchise concept.<sup>32</sup> However, it has also been decided that there is no duty on the franchisee to investigate the correctness of the prognosis in the event that the franchisor is a big professional party, who ensured that the prognosis was conducted with 'great care', and where the franchisor put the franchisee under time pressure to sign the agreement.<sup>33</sup>

According to the DFC, a franchisor should provide the franchisee with 'written, complete and accurate information' within a reasonable time (four to six weeks) before the conclusion of the franchise agreement, so that the franchisee does not feel rushed into the deal.<sup>34</sup> The DFC includes an extensive list of specific information a franchisor has to provide to its (prospective) franchisees.<sup>35</sup> The DFC does not include an obligation to provide a financial prognosis. The DFC states that it is preferable to supply a prognosis and that the prognosis has to be careful and transparently substantiated. As stated earlier, the DFC currently has the status of a self-regulation code.

### iii Registration

There are no specific Dutch registration requirements for franchises in the Netherlands. All companies are obliged to register in the trade register of the Dutch Chamber of Commerce. Zoning and other administrative law requirements may apply depending on the type of franchised business.

### iv Mandatory clauses

There is currently no franchise-specific legislation. For this reason, there are no mandatory clauses that must be included in franchise agreements. However, the DFC provides a list of provisions that have to be included in a franchise agreement. This list contains pretty much all the key provisions of a franchise agreement.<sup>36</sup>

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31 District Court Overijssel 9 March 2014 and 6 June 2015, ECLI:NL:RBOVE:2014:1985 and ECLI:NL:RBOVE:2015:2907 (*X/Otto Simon*); District Court Den Bosch 29 May 2013 (LJN CA1429); District Court Arnhem 15 June 2011 (LJN BR0232).

32 District Court Noord-Holland 21 October 2015, ECLI:NL:RBNHO:2015:8949 (*Uitjethuis/ Tot Straks*).

33 District Court Noord-Holland 3 December 2014, ECLI:NL:RBNHO:2014:11564.

34 Article 3.4 Dutch Franchise Code.

35 This includes, for example, information on the financial position of the franchisor, published annual reports and profit and loss accounts, complete and recent overview of all franchisees including their contact information, whether there has been an earlier franchise business on the location, the reasons for termination of previous franchise agreements and accompanying documents, etc. See Article 3.6. Dutch Franchise Code.

36 For example: a description of the background and intentions of the parties and a description of the franchise concept, rights and obligations of the parties, the use of intellectual property rights, franchise fees, products and services to be delivered by franchisor, payment conditions for the franchisee, exclusivity rights, e-commerce and associated obligations, duration of the agreement, grounds for extension or termination. For the complete list, see Article 4.6. DFC.

v **Guarantees and protection**

In general, a franchisor can enforce a surety that is provided by a franchisee. Based on Dutch family law, a surety provided by a franchisee may be subject to the approval of the franchisee's spouse. This approval is not needed in the event it is performed by a director of a private company with limited liability who alone or jointly with his or her co-directors holds a majority of shares, provided it is made in the normal conduct of the business of the company. Under normal circumstances, this will be the case when a director commits himself or herself as surety or joint and several co-obligor under a franchise agreement.<sup>37</sup>

V **TAX**<sup>38</sup>

i **Franchisor and franchisee tax liabilities**

First, franchisors and franchisees established in the Netherlands are subject to Dutch corporate income tax. The Dutch corporate income tax is 20 per cent for the first €200,000 taxable profit and 25 per cent for the profit that exceeds €200,000.<sup>39</sup>

Second, under Dutch tax law dividend payments and other distributions of profits made by a franchisor or a franchisee are subject to 15 per cent dividend withholding tax. An exemption may be available with respect to distributions to companies that own at least 5 per cent of the shares in the distributing franchisor or franchisee. No withholding tax applies to a Dutch cooperative.

Third, Dutch wage tax is levied against progressive rates and is combined with the levy of social security contributions, which together comprise income tax. The combined tax rate starts at 36.55 per cent for a taxable income up to €19,922, a tax rate of 40.4 per cent applies for a taxable income up to €66,421, and for higher incomes a maximum rate of 52 per cent is applicable. However, the social security contributions are capped at €33,715 for individuals and the tax rate is a flat rate of 28.15 per cent. Individual entrepreneurs can benefit from various tax facilities such as a tax deduction for entrepreneurs and tax advantages for start-ups. Moreover, if a franchisor or franchisee holds more than 5 per cent of the shares in a company, a Dutch income tax of 25 per cent applies to dividends and capital gains received from these shares. If a party holds less than 5 per cent of the shares in a company, 30 per cent income tax applies over a deemed return of 4 per cent on the average value of the parties' investments and savings.

Fourth, the salary paid by franchisors or franchisees to their employers is subject to Dutch wage withholding tax and Dutch social security premiums. Notably, in the Netherlands, tax that is deducted from the salary of an employee can be fully credited against the individual income tax. Moreover, in the Netherlands, attractive tax benefits apply for foreign employers with highly qualified workers with specific, scarce skills.

Fifth, when an undertaking provides services or supplies goods in the Netherlands, it will be subject to Dutch VAT. There are three VAT tariffs: 21 per cent, 6 per cent or

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37 Article 1:88 DCC.

38 The author thanks Crowe Horwath Foederer, Amsterdam, the Netherlands, for their valuable input on this Section.

39 Rates are based on financial year 2016.

zero per cent. The general tariff of VAT is 21 per cent, which applies to most products and services. Certain services are exempted from VAT, such as insurance. Undertakings whose services or goods are subject to VAT can deduct VAT that is charged.

## ii Fiscal climate

The Dutch tax system has a number of features that may be very beneficial in international tax planning, which, for various multinationals, has made the Netherlands a prime location in which to establish their franchise or financing company. One of the most attractive features is the participation exemption. Under this exemption capital gains derived from a qualifying shareholding (generally, holdings of 5 per cent or more) are fully exempt from Dutch corporate income tax. Other advantages are the absence of withholding taxes on interest and royalty payments, the absence of a capital contribution tax, creditability of foreign withholding taxes, the low level of taxable profits and the possibility of obtaining advance certainty in that respect by concluding advance pricing agreements with the Dutch tax authorities. The Netherlands has also entered into a comprehensive network of tax treaties that in most cases reduce withholding taxes on dividend, interest and royalty income received by a Dutch franchisor or franchisee from foreign countries and on dividend distributions made by a franchisor or a franchisee.

## VI IMPACT OF GENERAL LAW

### i Good faith and guarantees

There are three important and regularly invoked legal principles that play a prominent role in Dutch contract law:

- a* the principle of contractual freedom (i.e., the principle that parties are free to draw up a contract according to their own wishes);
- b* the principle of *pacta sunt servanda* (i.e., the principle that each contract, as a rule, must be respected); and
- c* the principle of reasonableness and fairness.<sup>40</sup>

According to the last of these, a contractual provision in a franchise agreement can be set aside if, based on the principle of reasonableness and fairness, the effect of this provision in the circumstances of the case is considered to be unacceptable.<sup>41</sup> Courts adopt a reticent approach to deviating from a written contract based on the principles of reasonableness and fairness, and should always make an assessment on a case-by-case basis.<sup>42</sup> For example, regarding termination of distribution (or franchise) agreements, courts consider a long duration and a high degree of dependency relevant indicators to set aside a (too) short contractual notice period. A limitation of liability, for instance, cannot be invoked if damages are a consequence of wilful misconduct or gross negligence of the debtor itself.

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40 Article 6:2(1) DCC.

41 Article 6:248 (2) DCC.

42 Supreme Court 9 January 1998, ECLI:NL:HR:1998:ZC2540 and JB 1998/27, NJ 1998, 363, RvdW 1998, 17 (*Apeldoorn/Duisterhof*).

A franchisor can have a duty of care towards its franchisees, the presence and level of which depends on a variety of circumstances, such as the type of franchise, the experience of the franchisor, etc. For example, the extent to which the franchise concept covers the total business can be relevant; whether the franchise concept is to be followed strictly (hard franchise); how much the franchisee can influence the operation of his or her own business; and how dependent he or she is in the relationship. The less influence the franchisee has over his or her own business decisions, the higher the level of the duty of care the franchisor will owe to the franchisee. And the higher the level of duty of care, the more quickly the franchisor would need to offer assistance, advice and possibly make changes in the franchise (or retail) concept to overcome any problems the franchisee may face, to avoid responsibility and thus liability for negative results and damages.

## ii Agency distributor model

Unlike franchising or distribution, commercial agency is governed by statutory law, including certain mandatory provisions, implemented on the basis of Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (86/653/EEC). While franchisees and distributors are, as a rule, not entitled to goodwill compensation upon termination, an agent may claim compensation for goodwill provided that the following conditions are met:

- a* the agent has brought the principal new clients or has significantly increased the volume of business with existing clients;
- b* the principal continues to derive substantial benefits from the business with those clients; and
- c* the payment of this compensation is equitable.

The amount can never exceed the equivalent of one year's compensation, based on the average of the previous (five) years, as this is taken to provide an indication of the maximum exposure foreseeable. The commercial and financial risks rest with the principal under an agency agreement.

If, in reality, the franchisee acts not for his own account and risk, but for the franchisor's account and risk, and in particular if it can be said the franchisee concludes contracts with customers in the name of the principal, the agreement may in reality be an agency relationship, which would trigger the applicability of mandatory provisions on termination, commission and goodwill.<sup>43</sup> Therefore, it is important that a franchisee clearly indicates on or in his or her premises both the franchisee's identity (legal entity name) and that the franchisee operates the franchised business in his or her own name and for his or her own account and risk. Usually, a sign in the store and a clear indication on, for example, the receipts that the customer receives upon payment are sufficient.

## iii Employment law

There are three requirements to qualify as an employment agreement under Dutch law. The employee (1) has to perform work for a period (2) in the service of the employer (relationship

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43 Article 7:431, 7:432 and 7:442 DCC.

of authority) and (3) in exchange for a salary.<sup>44</sup> In general, a franchise agreement is not an employment agreement, because a franchisee is an independent entrepreneur who runs his or her business at his or her own expense and risk. In particular, the relationship of authority is missing in most cases. However, the franchisor can be in a relationship of authority to the franchisee if the franchisee has to comply with detailed (and regular or individual) instructions from the franchisor regarding the exploitation of franchisee's business. As a basic rule, no relationship of authority exists if the compelling instructions of a franchisor only relate to the preservation of the uniformity and quality of the franchise concept.<sup>45</sup> Most franchise manuals would thus not create a relationship of authority.

In the event that the relationship between the parties does not correspond with the franchise agreement and is in reality an employment agreement, the franchisee (employee) will be granted all the rights of an employee under Dutch law. This means that the franchisor (employer) is obliged to withhold taxes and national insurance contributions from the employee's salary. Moreover, employees are entitled to salary during the first two years of illness, the accrual of holidays and a holiday allowance. In most cases, the employer requires the permission of the Employee Insurance Agency or the subdistrict court to terminate the employment agreement.

The risk of qualification of the relationship as an employment agreement is very limited if the franchisee contracts with the franchisor through the franchisee's Dutch limited liability company. Until 1 May 2016, a franchisor could provide its franchisees with a 'declaration of independent contractor status'. This declaration served as an indemnification that there was, at least for the tax authorities, no employment relationship between the parties. As of 1 May 2016, this declaration has been replaced by the use of 'model agreements' that form a part of the Employment Relationship (Deregulation) Act 2016. Parties can also submit their own agreement and let the Dutch tax authorities assess the agreement. Because there is a lot of uncertainty regarding the use of these model agreements, the enforcement of the Employment Relationship (Deregulation) Act 2016 has been postponed until 1 January 2018.

As soon as a franchisee hires his or her own personnel, the risk that the franchisor can be seen as the employer of the franchisee's personnel is further reduced. In addition, there is no concept of 'joint employment' under Dutch law. The risk that the employees of the franchisee could be considered to be employees of the franchisor, even though in theory possible, rarely occurs. It could apply if there were a lot of direct contact (instructions, authority, payment of salary) between the franchisor and the employees of the franchisee, and, for example, if for some reason the franchisee could not be held liable (for example, if the franchisee went bankrupt).

#### iv Consumer protection

The DCC defines a 'consumer' as '[a] natural person who does not act in the course of his professional practice or business'.<sup>46</sup> This means that there is a negligible risk that a franchisee will be considered a consumer. However, under the DCC, small businesses may benefit from certain rules that also benefit consumers; for example, relating to the question of whether

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44 See Section 7:610 of the DCC (Dutch Civil Code), which includes the definition of an employment agreement under Dutch law.

45 Asser/Houben 7-X 2014/155.

46 Article 6:193a(1a) DCC.

one's general terms and conditions have been validly declared applicable and have been provided. Based on settled case law and literature, a kind of reflex effect is accepted for small businesses for the lists of terms and conditions that are deemed, or likely to be, unreasonably burdensome (and therefore voidable), meaning that small franchisees or franchisors could also benefit from rules intended to protect consumers under Dutch law.

#### v Competition law

Franchise agreements in the Netherlands are subject to EU and Dutch competition law. The Dutch equivalent of Article 101 of the Treaty on the Functioning of the European Union (TFEU) is included in Article 6 of the Dutch Competition Act (DCA).<sup>47</sup> The European Commission's Guidelines on Vertical Restraints<sup>48</sup> also apply – through a clause in the DCA – to trade in the Netherlands that has no cross-border effect, and include a description of franchising. Specific freedoms (contractual restrictions on the franchisee) in franchising fall outside the cartel prohibition, while outside the context of franchising these are to be assessed under competition law and some are even likely to be impermissible. Furthermore, the European competition laws as set out in the Block Exemption on Vertical Agreements<sup>49</sup> and Article 101 TFEU are relevant to assess the enforceability of exclusivity, pricing, product ties and certain internet sales provisions in franchise agreements.

#### vi Restrictive covenants

Non-compete provisions during the term of a franchise agreement are generally considered to fall outside Dutch and European competition law<sup>50</sup> if they are necessary to protect the know-how and goodwill of the franchisor that is licensed to the franchisee, and to maintain the common identity and reputation of the franchised network.<sup>51</sup>

Franchisees often try to escape from non-compete obligations by arguing that the provision constitutes a restriction on competition and is therefore null and void. Dutch courts, however, appear to have adopted a reticent approach. In the *ANVR c.s./IATA-NL* case,<sup>52</sup> the Dutch Supreme Court ruled that the burden of proof is high. Civil franchise cases such

47 The European Court of Justice (ECJ) has decided in the *Eco Swiss/Benetton* case (ECJ 1 June 1999, C-126/97) that Article 101 TFEU is considered to be a rule of European public policy. By contrast, the Dutch Supreme Court stated that Article 6 of the Dutch Competition Act cannot be qualified as a rule of Dutch public policy (Supreme Court 16 January 2009, LJN BG3582, NJ 2009 (*Gemeente Heerlen/Whizz Croissanterie*)).

48 European Commission, Guidelines on vertical restraints, 2010/C 130/01.

49 Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101 (3) on the TFEU to categories of vertical agreements and concerted practices (European Commission, VBER 2010/330).

50 European Commission, VBER 2010/330, Article 5 and Guidelines on vertical restraints, 2010/C 130/01, No. 190(b); ACM Guidelines on vertical restraints [www.acm.nl](http://www.acm.nl).

51 European Court of Justice, 28 January 1986, NJ 1988, 163, par. 16 (*Pronuptia*); District Court Overijssel 22 June 2016, ECLI:NL:RBOVE:2016:2914, par. 5.4. (*XIFBD Franchise*); Court of 's-Hertogenbosch 28 December 2005, ECLI:NL:GHSHE:2005:AU8610 (*Multicopy*).

52 Supreme Court 21 December 2012, NJ 2013, 155, ECLI:NL:HR:2012:BX0345 (*ANVR c.s./IATA-NL*).

as *Yarden franchise/XI*<sup>53</sup> and *Top 1 Toys/Vedes*<sup>54</sup> show that it is essential that a plaintiff invoking competition law supports his or her arguments with a thorough market definition of the relevant product and geographic market and an in-depth analysis of the market shares of the parties to fulfil the burden of proof, otherwise he or she will not succeed with the claims.

However, a franchisee can also argue that a non-compete provision is unenforceable because the effect of the provision is unacceptable on the basis of the principle of reasonableness and fairness. Relevant circumstances in relation to the enforceability of a post-term non-compete provision (or limitation of the duration thereof) are the duration of the franchise relationship, the duration and the territorial scope of the non-compete provision and the specific situation (knowledge, transfer of know-how,<sup>55</sup> background and bargaining power) of the franchisee.<sup>56</sup> The consequences of the non-compete provision for the franchisee may be taken into account when assessing the enforceability. The mere fact that the franchisee will not be able to generate revenues for some time is not sufficient to render the provision unenforceable. Moreover, if the franchisee has chosen to terminate the franchise agreement, he or she is less likely to be protected against a contractual non-compete provision than in a case where the franchise agreement has been terminated by the franchisor, or the termination has been caused by the franchisor's behaviour.<sup>57</sup> In general, and particularly if the clause does not violate competition law (for example, if the clause is block exempted), courts are reluctant to set aside a non-compete provision.

## vii Termination

Long-term franchise agreements for a definite term end on expiry, and can only be terminated earlier if agreed. If an agreement has been concluded for an indefinite term and the parties have not provided for a contractual regime for termination, the guiding principle is that the agreement can be terminated for convenience, unless the circumstances indicate that a compelling reason for the termination is required. The fact that the termination has a negative impact on the other party is not sufficient to qualify as a serious reason. The principle of reasonableness and fairness is applicable. This generally means that a reasonable notice period will need to be given (sometimes even when the contract states a shorter notice period). In some cases, having regard to the nature and content of the agreement and

53 District Court of Midden-Nederland 11 June 2014, ECLI:NL:RBMNE:2014:7395 (*Yarden franchise/X*).

54 Court of Appeals Arnhem-Leeuwarden 15 October 2013, ECLI:NL:GHARL:2013:7702 (*Top 1 Toys/Vedes*).

55 District Court Overijssel 22 June 2016, ECLI:NL:RBOVE:2016:2914, par. 5.5. (*X/FBD Franchise*).

56 Note that a post term non-compete that applies for the entire territory of the Netherlands is not by definition invalid or unenforceable (we note, however, that competition law may set boundaries); see District Court of Breda 18 April 2012, ECLI:NL:RBBRE:2012:BW4396 (*FietsNed*), confirmed by Court of Appeals Den Bosch, 21 August 2012, ECLI:NL:GHSHE:2012:BX5661 (*FietsNed II*) and District Court Arnhem 5 October 2009, ECLI:NL:RBARN:2009:BK1781 (*Bruna*).

57 District Court Maastricht 17 November 2011, ECLI:NL:RBMAA:2011:BU5153 (*EZL*), District Court Utrecht 23 December 2011, ECLI:NL:RBUTR:2011:BV3058 (*Super de Boer*).

depending on the exact circumstances of the case, compensation (of damages) may need to be offered if the notice period would otherwise be too short.<sup>58</sup> Even though a goodwill or severance payment is normally not required in the event of the termination of a long term agreement (except for commercial agency), a party can be held liable for, among other things, certain investments made by the terminated party if the franchisee made investments at a moment he or she could not have foreseen the termination and it is unlikely that these investments can be recouped before the end date of the collaboration.<sup>59</sup>

In the event that a franchise agreement also contains provisions regarding the lease of premises, the franchisee is protected by Dutch mandatory provisions on rental law. A lease agreement regarding commercial premises (such as restaurants) may be terminated only through a dissolution by the subdistrict court. It is crucial that the franchisor is entitled to terminate the lease when the franchise agreement has ended – and the other way around.<sup>60</sup> Any divergence requires the prior approval of the subdistrict court.<sup>61</sup> This permission can only be granted if the rights of the tenant will be respected and it does not weaken the tenant's position.<sup>62</sup>

### viii Anti-corruption and anti-terrorism regulation

The Dutch Fiscal Information and Investigation Service (FIOD) and the Tax and Customs Administration are in charge of the detection of fraud. The FIOD also has supervisory responsibility regarding anti-money laundering and is able to start criminal investigations together with the Public Prosecution Service.

The Act to Limit Fraud in Acquisitions came into force on 1 July 2016. Based on this Act, fraud in acquisitions is subject to a prison sentence of a maximum of two years. Moreover, the Act entitles a franchisee, in the event it suffered from misleading information, to terminate the contract, whereby the burden of proof is shifted on to the franchisor.<sup>63</sup> Thus, based on the Act, acquisition materials that refer, directly or indirectly, to numbers, results or expected income for the franchisee should be always objective, verifiable and not misleading.

### ix Dispute resolution

#### *Forum choice and choice of law clauses*

A Dutch court will apply a choice of law clause in a franchise agreement if it meets the requirements for a valid and applicable choice of law as set out in the Rome I Regulation.<sup>64</sup> The same applies for a forum clause, if it meets the requirements as set out in the Brussels I *bis* Regulation.<sup>65</sup> It is not uncommon for Dutch franchisees to initiate summary proceedings in cases of (alleged) unlawful termination. Article 35 Brussels I *bis* provides for the possibility of

58 Supreme Court 28 October 2011, ECLI:NL:HR:2011:BQ9854 (*De Ronde Venen/Stedin*).

59 Supreme Court 21 June 1991, ECLI:NL:HR:1991:ZC0291 and NJ 1991, 742, RvdW 1991, 169 (*Mattell/Borka*).

60 Asser/Houben 7-X 2014/176.

61 Asser/Houben 7-X2014/178; Article 7:291(2) DCC.

62 Asser/Houben 7-X2014/178; Article 7:291(3) DCC; see also Article 5(2) VBER.

63 [https://www.eerstekamer.nl/wetsvoorstel/33712\\_initiatiefvoorstel](https://www.eerstekamer.nl/wetsvoorstel/33712_initiatiefvoorstel).

64 Regulation 593/2008 on the law applicable to contractual obligations.

65 Council Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast).

initiating summary proceedings in the Netherlands,<sup>66</sup> even if the parties agreed that another court has ‘exclusive’ jurisdiction. In Dutch summary proceedings a franchisee can, among other things, claim continuation of the agreement arguing that it has been unlawfully terminated. The possibilities of awarding damages as a consequence of an unlawful termination of an agreement in summary proceedings are limited.

### *Mediation and arbitration*

Mediation is not mandatory in the Netherlands, but is widely available. For example, the Netherlands Franchise Association has established its own dispute settlement rules for mediation. Members and non-members of the Netherlands Franchise Association are able to invoke these rules. Moreover, the Netherlands Franchise Association has selected qualified persons to whom parties can be referred when they wish to select a mediator.<sup>67</sup> Moreover, during a court case, a court can recommend (but not oblige) parties to try to mediate their dispute with help of the mediation bureau of the court. During the mediation the court case will normally be put on hold.

Arbitration is a recognised form of dispute resolution in the Netherlands. If a legally valid arbitration agreement is in place, a Dutch judge is not competent to handle the case.<sup>68</sup> However, an arbitration agreement does not preclude a party from requesting protective measures from a judge, or starting summary proceedings to obtain provisional measures (on condition that the requested decision cannot be granted promptly in arbitration).<sup>69</sup> Arbitration proceedings are generally much more expensive than normal litigation before a Dutch court. If the franchisee and franchisor are established in countries that are party to the New York Convention<sup>70</sup> – and to which the Netherlands is a party – arbitral awards are easily enforced.<sup>71</sup> The Netherlands Franchise Association, together with the Netherlands Arbitration Association, has established a list of ‘franchise arbitrators’ from which parties can select an arbitrator to settle a franchise dispute.<sup>72</sup>

### *Procedure*

Civil procedural law in the Netherlands is known for its pragmatic, predictable and expeditious approach. Proceedings in a court of first instance normally take between one and two years. Moreover, it is expected that in January 2018 the Netherlands Commercial Court (NCC) will be established. This court will specialise in ruling on large trade disputes. The proceedings before the NCC will be conducted in the English language.

### *Remedies*

Provisional injunctions in summary proceedings and permanent injunctions in proceedings on the merits can be obtained to prevent a former franchisee from continuing to trade in

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66 Provided that a party has sufficient connection with the Netherlands.

67 [www.nfv.nl/geschillen/](http://www.nfv.nl/geschillen/).

68 Article 1022 Civil Procedure Code.

69 Article 1022a and 1022c Civil Procedure Code.

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

71 Note that it is necessary to request a declaration of enforcement – the *exequatur*.

72 [www.nfv.nl/geschillen/](http://www.nfv.nl/geschillen/).

breach of a non-compete clause or from using a franchisor's trademarks or other IP rights. A claim in summary proceedings requires an urgent interest, and if the case is too complex to handle in summary proceedings, a judge can deny the claim. However, Dutch courts tend to hear all sorts of cases in summary or injunction proceedings, including claims of a terminated franchisee that rejects the termination. It is – compared with certain other countries – relatively easy to obtain a court order in the Netherlands to seize property (including bank accounts) in the Netherlands, even prior to a court case. Such a seizure must, however, be followed by regular proceedings.

In the event of damages for breach of contract, the court will determine the damage in the way that is most consistent with the nature of the damage caused. Where the extent of the damage cannot be assessed exactly, it shall be estimated.<sup>73</sup> Under Dutch law, the only types of damage eligible for compensation are loss to property and other prejudice.<sup>74</sup> Loss to property comprises both the loss incurred and the profit deprived.<sup>75</sup> In commercial cases, the losing party will normally be ordered to pay compensation of the legal costs of the other party. These costs are, however, fixed by the court and are generally much lower than the actual legal costs.

## **VII CURRENT DEVELOPMENTS**

From 2013 onwards, franchisees pressured Dutch law makers to adopt mandatory rules on franchising to better protect the rights of franchisees. For this reason, the Minister of Economic Affairs established in 2014 a committee with representatives of franchisors and franchisees to draft self-regulatory rules. As a result, after a consultation round, the final version of the DFC was published on 17 February 2016. The DFC includes a chapter with definitions, three chapters regarding the obligations of the parties (obligations regarding acquisition, publicity and mutual information facilities, preliminary contracts and the franchise agreement itself) and a chapter regarding dispute resolution. However, some questions arise as to what the practical meaning of the self-regulatory code is. The DFC is based on a 'comply or explain' principle, which indicates that the parties should express why they do not apply certain parts of the DFC relevant to their relationship. In the absence of further 'lawmaking', normal application of Dutch contract law would entail that the DFC cannot be applicable until either the parties declare it applicable or the courts consider it to have become part of 'customs' in the relevant sector of the market.

Franchisors expressed disappointment with several of the DFC's provisions. The DFC includes obligations that are clearly not in line with freedom of contract. For example, on the basis of the DFC, the franchisor cannot unilaterally implement changes if he or she is not able to agree with a 'franchisee representative' on the change. Furthermore, the franchisor is obliged not to reject on unreasonable grounds the conclusion of a 'second' or 'following' franchise agreement with a franchisee. The DFC also states that the agreement has to be drafted in the national language of the franchisee's place of residence. However, in a country where most people speak English or other foreign languages, this is currently not common practice if the franchisor is foreign (nor is it included anywhere else in the DCC, not even

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73 Article 6:97 DCC.

74 Article 6:95 DCC.

75 Article 6:96 DCC.

for employment or agency contracts). Moreover, it can be questioned whether the interests of both parties are equally represented in the DFC, as the DFC includes more, and stricter, obligations for franchisors than for franchisees.

Many franchisors have not adopted the DFC. We expect that courts will be reluctant to apply the DFC if it is not declared applicable by the parties. Courts may perhaps use the DFC in their assessment of the Dutch principle of reasonableness and fairness. Insofar as we are aware, there is no case law yet wherein a court has made reference to the DFC.<sup>76</sup>

At present, The DFC has the status of a self-regulatory code. However, the Minister of Economic Affairs announced in October 2016 that he will give the DFC a statutory basis. The Minister stated that he intends, through the adoption of a general administrative rule, to declare the DFC mandatory, in order 'that franchisor and franchisee pay attention to the DFC'. He also stated that the franchise agreement must become a qualified agreement under the DCC. The Minister promised that he will do his best to present a legislative proposal in the first part of 2017.<sup>77</sup> There is, of course, also a good chance that the proposal for franchise legislation will not be adopted at all.

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76 Note that this chapter was written in December 2016.

77 TK 2016-2017, 32637, No. 267, p. 24.

## Appendix 1

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# ABOUT THE AUTHORS

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Martine de Koning studied law at the University of Utrecht, graduating in 1995. She studied and lectured in the United States and Australia. In 1997, Martine joined Kennedy Van der Laan, where she started in information technology law and has in the past 15 years developed a practice in EU and Dutch competition law and international franchising, agency, distribution, sales, procurement, logistics and other commercial contracts and disputes. Martine has extensive experience with cross-border franchising in the EMEA region and competition law compliance issues in this context. In particular North American clients seek her out for her experience in working with Anglo-American partners. She works for multinationals, as well as strong national players with an international business or ambition. Martine handles the drafting and negotiating of contracts, as well as litigation and (international) arbitration in national and international courts and arbitration institutes. Martine receives praise for her hands-on, pragmatic approach and sharp strategic vision. Martine regularly publishes articles and lectures on competition law, international franchising and related subjects.

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