Distribution Law Center
DRIVEN BY CONTRAST

Banning Advocaten

Q&A DOCUMENT | 21 February 2022

Q&A Distribution agreements

Part I: Legislative framework

Q1. Please specify the legislative framework generally applicable to the conclusion and execution of distribution agreements (a)? Please include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and, if available, to the English translation of the legislative framework (c).

a. Legislative framework:

Dutch law does not have a specific legal regime applying to distribution agreements. This means that the general law of contracts applies to distribution agreements, such as:

I. The Dutch Civil Code (hereinafter: "DCC")

- Book VI – General part of the law obligations
  - Title 5 – Agreements in general (amongst which rules on consumer protection)
- Book VII – Particular agreements
  - Title 7 – Contract for the provision of services (amongst which agency agreements)
  - Title 16 – Dutch Franchise Act

III. Comprising the Dutch Competition Act

b. Link(s) to official publication:

The Dutch version of Book 6 DCC is accessible via this link.

c. Link(s) to English translation:

An official English translation of the Dutch Civil Code is not publicly available.

Q2. Other than for agency agreements pursuant to Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents, are there specific rules depending on the distribution format (e.g. franchising, exclusive distribution)?

Yes.

If yes, which specific rules apply (a)? Where available, please also include a link to the official publication of the

applicable rules (b) and, if available, to the English translation of the legislative framework (c).

a. Specific rules depending on distribution format:

Franchise agreements are regulated in the Dutch Franchise Act. The Dutch Franchise Act is applicable since 1 January 2021.

b. Link(s) to official publication:

The Dutch Franchise Act is implemented in Art. 7:911-922 DCC and is accessible via this link.

c. Link(s) to English translation:

The Dutch Franchise Act is implemented in Art. 7:911-922 DCC and is accessible via this link.

Q3. Other than general contract law and competition law, are there other rules which may generally restrict the parties when drafting and concluding distribution agreements (e.g., rules in relation to unfair contract terms in B2B contracts, specific requirements in the context of a prohibition of abuse of economic dependence)?

No.

Part 2: Pre-contractual phase

Q4. Are there mandatory provisions in relation to the disclosure of pre-contractual information prior to concluding and/or executing distribution agreements?

Yes.

If yes, which mandatory provisions apply (a) and which information must be disclosed (b)? Where available, please also include a link to the official publication of the applicable rules (c) and, if available, to the English translation of the regulatory framework (d).

a. Mandatory provisions:

In general: Dutch general contract law does not contain mandatory provisions regarding the disclosure of pre-contractual information. However, during the pre-contractual phase, the principles of fairness and reasonableness apply. As a consequence, the parties are required to take all reasonable measures to prevent the other contracting party to conclude an agreement on the basis of misleading information.

Franchise agreements: the Dutch Franchise Act contains far-reaching disclosure obligations in the pre-contractual phase. This pre-contractual information must be provided in a way that ensures unchanged accessibility for future reference for a period of time adequate for the purposes for which the information was provided. See, Art. 7:913 DCC and Art. 7:917 DCC.

b. Information to be disclosed:

In general: the information that should be disclosed during the pre-contractual phase depends on the circumstances of the case.

Franchise agreements: the pre-contractual information that must be disclosed includes a general obligation for the franchisor to inform the franchisee about *anything* that is or could reasonably be relevant for the conclusion of a franchise agreement. The following information must be provided as a minimum:

- the draft of the franchise agreement, including its appendices;
- a statement of the content and scope of rules regarding fees, surcharges, or other financial contributions to be paid by the franchisee or regarding the investments required from him/it;
- the manner and frequency of consultation between the franchisor and the franchisees and, if available, the contact details of the body representing the franchisees;
- the extent to which and the manner in which the franchisor can enter into competition with the franchisee, whether or not by means of a derived formula; and
- the extent to which, the frequency with which, and the manner in which the franchisee will have access to turnover-related data relating to the franchisee or relevant to his/its business operations.

In addition, the franchisor will provide the prospective franchisee with the following information in a timely manner, in so far as it is available to him, to a subsidiary, or to a group company affiliated with him/it, and is reasonably relevant to conclusion of the franchise agreement:

- information about his/its financial position; and
- financial data regarding the intended location of the franchise enterprise or, if such is lacking, financial data of one or more enterprises considered by the franchisor to be comparable, with the franchisor making clear the reasons why he/it considers them to be comparable.

c. Link(s) to official publication:

In general: Not applicable

Franchise agreements: The franchise agreements are accessible via this link.

d. Link(s) to English translation:

In general: Not applicable

Franchise agreement: Not applicable

Q5. Is there a standstill obligation linked to the requirements imposed for the pre-contractual phase?

Yes.

If yes, what does this standstill obligation entail (how long, specific procedural requirements, etc.)?

Franchise agreements: See, Art. 7:914 DCC. A minimum standstill obligation applies of four weeks between the disclosure of the mandatory pre-contractual information and the conclusion of the franchise agreement. During this standstill period, the franchisor may not:

- amend the draft of the franchise agreement, unless such amendment is to the benefit of the franchisee;
- conclude with the franchisee the franchise agreement or any agreement considered inseparable therefrom, with the exception of a confidentiality agreement for the prospective franchisee to keep secret the confidential information provided by the franchisor for the purposes of concluding the franchise agreement; or
- induce the prospective franchisee to make payments or investments associated with the franchise agreement that is yet to be concluded.

The standstill period is not required for concluding a subsequent franchise agreement between the same parties regarding the same franchise formula.

Q6. Does the relevant regulatory framework impose sanctions if the pre-contractual obligations are not (fully) respected?

Yes.

If yes, which sanctions apply (e.g., nullity of contract, penalty payment)?

In general: the sanction of not respecting pre-contractual obligations depends on the circumstances of the case. Amongst others, a sanction may be that the agreement is voidable as the agreement might be entered into under the influence of an error or that a party has an action arising from a wrongful act against the party in breach.

Franchise agreements: the Dutch Franchise Act does not contain specific sanctions for breach of the pre-contractual obligations. Hence, the sanctions of general civil law must be invoked in case of a breach.

Q7. Can a party be held liable if it terminates the pre-contractual negotiations?

Yes.

If yes, on what grounds (a); under what conditions (b); and what consequences are generally linked to such liability (c)?

a. Grounds for pre-contractual liability:

Parties must behave towards each other in accordance with the requirements of reasonableness and fairness / good faith. This obligation may result in liability of a party when terminating the pre-contractual negotiations. This is not explicitly regulated in the DCC, but is based on settled case law.

b. Conditions for pre-contractual liability:

Whether a negotiating party is under a legal obligation to continue negotiations or alternatively to pay damages for withdrawing from negotiations will depend on the stage of the negotiations. The more extensively the parties have negotiated and discussed the details of the proposed contractual relationship, the more difficult it will be for a party to break-off the negotiations.

c. Consequences of pre-contractual liability:

Unlawful termination of pre-contractual negotiations may result in the other party being entitled to compensation or performance of the agreement.

Q8. Are there other relevant rules and/or restrictions that apply during pre-contractual negotiations between supplier and distributor?

Yes.

If yes, what do these specific rules and/or restrictions entail?

Franchise agreements: the franchisee has an obligation to investigate during the pre-contractual phase in order to prevent entering a franchise agreement on the basis of incorrect assumptions. See, Art. 7:915 DCC. The prospective franchisee will take measures, within the bounds of reasonableness and fairness, that are necessary to prevent him from concluding the franchise agreement under the influence of the incorrect assumptions.

Part 3: Contractual phase

A. Form of distribution agreements

Q9. Must a distribution agreement be executed in writing to be valid and enforceable?

No, never.

Q10. Are there any (other) requirements as to the form of the distribution agreement for it to be valid and enforceable?

No.

B. Content of distribution agreements

Q11. Other than restrictions imposed by EU competition law (including Regulation (EU) 330/2010), do specific rules and/or restrictions apply in distribution agreements with respect to

- the territory in which or the customers to whom the goods/services will be sold;
- an exclusivity granted to the distributor;

- (exclusive) sourcing/purchasing obligations;
- resale prices;
- non-compete clauses?

Yes, specific rules apply with respect to non-compete clauses.

If yes, what do these specific rules and/or restrictions entail?

Franchise agreements: See, Art. 7:920, paragraph 2, DCC. A non-compete clause which restricts the franchisee's power to operate in a certain manner after the end of the franchise agreement is only valid if:

- it is set out in writing;
- the restriction on performance of activities concerns only goods or services that compete with the goods or services to which the franchise agreement relates;
- the restriction is indispensable to protect the know-how transferred by the franchisor to the franchisee;
- it does not exceed one year after the end of the franchise agreement; and
- the geographic scope is not broader than the area within which the franchisee has operated the franchise formula under the franchise agreement concerned.

Q12. Do specific rules and/or restrutions apply in distribution agreements with respect to

- obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor;
- obligations of the distributor vis-à-vis the supplier or vice versa;
- a non-solicitation clause during and/or after the term of the distribution agreement;
- minimum sales quota imposed on the distributor;
- specific sector rules?

Yes, specific rules apply with respect to (i) obligations of the supplier vis-à-vis the distributor, including in relation to the remuneration of the distributor and (ii) obligations of the distributor vis-à-vis the supplier or vice versa.

If yes, what do these specific rules and/or restrictions entail?

Franchise agreements: The franchisor and the franchisee will behave towards one another as befits a good franchisor and a good franchisee. See, Art. 7:912 DCC.

The franchisor is obliged to provide the franchisee with the assistance and commercial and technical support that may reasonably be expected by the franchisee in regard to the operation of the franchise formula. On the other hand, the franchisee is obliged to notify the franchisor if, in the opinion of the franchisee, a certain kind of

assistance of support is necessary for the operation of the franchise formula. See, Art. 7:919 DCC.

The franchise agreement must contain provisions regarding (i) whether any goodwill is present in the franchisee's enterprise, (ii) to what extent the goodwill is present, and (iii) how goodwill reasonably attributable to the franchisee will be reimbursed to the franchisee upon termination of the franchise agreement if the franchisor takes over the franchise enterprise from the franchisee in question in order to continue this enterprise independently or to transfer it to a third party with whom/which the franchisor concludes a franchise agreement (Art. 7:920, paragraph 1, DCC). A clause contrary to Art. 7:920 DCC is null and void.

Furthermore, the franchisor must seek prior written consent of a majority of the franchisees established in the Netherlands if the franchisor wants to make changes to the formula or operate a derived formula and the costs or loss of turnover associated with such a change exceeds the threshold as agreed between the parties in the agreement. See, Art. 7:921 DCC.

C. Term and termination

1. Term

Q13. Is an oral or written distribution agreement that does not specify the term always considered to be an agreement of indefinite duration?

No.

If only in certain instances, please explain when a distribution agreement that does not specify the term is considered to be a contract of indefinite duration.

The question of whether the agreement is of definite or indefinite duration must be determined by interpretation. The wording of the agreement is very relevant in this respect, especially in commercial relationships, as well as the following points of view:

- The nature and scope of the agreement;
- The commercial purpose of the agreement;
- Common business practices and generally prevailing opinion; and

The likelihood of the legal consequences of a particular interpretation.

Q14. Does a distribution agreement of definite duration that is continued after its expiry turn into a distribution agreement of indefinite duration?

Yes.

If yes, what is meant by 'continuation' (a) and what should a party do to avoid this (b)?

a. What is meant by 'continuation'?

In the absence of general legislation on the termination of distribution agreements, this area belongs to the domain of judicial adjudication generally applicable to continuing agreements.

A distribution agreement of definite duration shall in principle be assumed to be continued for indefinite duration if parties continue the performance of the agreement (tacitly) after the expiry date of the agreement, without agreeing on a new definite duration.

b. What should a party do to avoid this?

The party must oppose the continued performance of the expired distribution agreement by the other party.

2. Termination

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of definite duration

Q15. Can a distribution agreement of definite duration be terminated for convenience?

Yes.

If yes, is an express provision allowing for termination for convenience necessary?

Yes.

Q16. Must a reasonable notice period be observed in order for the termination to be valid even if the distribution agreement provides for the immediate termination for convenience?

Only in certain instances.

If only in certain instances, please explain when a reasonable notice period is in any case required?

The standards of reasonableness and fairness may entail that, given the relevant facts and circumstances of a particular case, an immediate termination is considered unlawful, even if the distribution agreement provides for the immediate termination for convenience. The judgment could be either:

- The method of termination requires further requirements to be met – a certain notice period should have been observed and/or certain damages must be compensated – given the complementary effect of the standards of reasonableness and fairness under Art. 6:248 (1) DCC ("*aanvullende werking van de redelijkheid en billijkheid*"), for the termination to be lawful; or
- Invoking a specific termination provision in the distribution agreement is unacceptable, given the derogatory effect of the standards of reasonableness and fairness under Art. 6:248 (2) DCC ("*derogerene werking van de redelijkheid en billijkheid*").

Q17. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

The termination shall be considered unlawful (See, also Q16.). Depending on the circumstances of the case and the claims initiated by the terminated party, the consequence can either be:

- The termination continues to have effect, but damages have to be paid. For example, a termination that does not comply with the prescribed notice period can be converted into a 'valid' termination, if the terminated party is compensated for not observing the notice period that is deemed reasonable; and/or
- The termination shall be without effect and the distribution agreement shall continue to remain in full force and effect.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

The terminated party may be entitled to damages for the loss suffered by the terminated party, consisting of losses incurred ("*geleden verlies*") and loss of profit ("*gederfde winst*") under Art. 6:96 DCC.

The terminated party (irrespective of whether this is the supplier or the distributor) will be entitled to an indemnity payable for the number of months falling short of what is considered to be a reasonable notice period. In determining the damages, a Dutch court shall place itself at the time of the termination of the agreement and take into account, among other things, the duration of the agreement, the specific investments made, and costs incurred by the terminated party in the context of the (termination of the) distribution agreement.

The termination of a franchise agreement and/or the facts and circumstances under which a franchise agreement ends (e.g. because it expires), may require the franchisee to pay the franchisor a compensation in the form of goodwill. For example, if the franchisor acquires the franchisee's business in order to continue that business independently, or to transfer the business to a third party. In that context, Art. 7:920 (1) sub a DCC requires the franchisor to include in the franchise agreement provisions on methods used to determine whether goodwill is present in the franchisee's business and, if so, the scope of that goodwill and the extent to which it is attributable to the franchisee.

Termination for convenience (irrespective of any default or exceptional circumstance) of distribution agreements of indefinite duration

Q18. Can a distribution agreement of indefinite duration be terminated for convenience even if the agreement does not provide for termination for convenience?

Yes.

If yes, must a reasonable notice period be observed?

Yes.

If a reasonable notice period must be observed, how is this reasonable notice period calculated (e.g. 1 month per year) (a)? Should a minimum notice period be observed (b), is there a maximum notice period (c)?

a. How is this reasonable notice period calculated (e.g. 1 month per year)?

There is no fixed method for determining the duration of the notice period for agreements with a (definite or indefinite) duration. The notice period must be determined considering the specific circumstances of the case, amongst which:

- The duration of the cooperation;
- The specific investments made by the terminated party in the context; and
- The amount of time needed for the terminated party to adjust to the new situation.

On the basis of case law, the literature provides for two principles to calculate the notice period:

- Duration of agreement is 10 years or longer – 1 to 2 years notice period;
- Duration of agreement is 4 to 10 years – 8 to 12 months notice period;
- Duration of agreement is 2 to 4 years – 6 months notice period; and
- Duration of agreement is 0 to 2 years – 3 months notice period.

or

- 1 month notice per contractual year, with a proposed maximum of 3 years.

b. Should a minimum notice period be observed? If yes, how long is this minimum notice period and are the parties allowed to contractually deviate from this minimum notice period

No.

c. Is there a maximum notice period? If yes, how long is this maximum notice period and are the parties allowed to contractually deviate from this maximum notice period?

No.

Q19. Is a contractual notice period always legally valid and enforceable?

No.

If not, which rules of mandatory law can have an impact on this?

Distribution agreements of indefinite duration can in principle be terminated for convenience. However, lawful

termination may require that: (i) there is a compelling reason for termination; (ii) a reasonable notice period is observed; and/or (iii) compensation (for damages) is paid. The (exact scope of) the applicable requirements depend on the facts and circumstances of the case.

A contractual notice period that does not comply with the standards of reasonableness and fairness can be declared null and void. Whether or not the notice period is considered unreasonable will depend on the specific context, taking into account e.g. the duration of the cooperation, whether or not the terminated party is (specifically) dependent on continuation of the agreement; the commercial practices in the relevant sector and the nature of the products and services. No specific mandatory rules apply to certain types of distribution agreements of indefinite duration.

Q20. What are the consequences for the terminating party if it does not comply with prescribed (statutory, contractual, case law) rules for termination (e.g. in relation to the notice period)? Does the termination continue to have effect (a)? Will damages have to be paid and, if yes, how are those damages calculated (b)?

a. Will the termination continue to have effect?

In this context, the principles applicable to agreements of definite duration do not differ from those applicable to agreements of indefinite duration. See, Q17.a.

b. Will damages have to be paid, and, if yes, how are those damages calculated?

See, Q17.b.

Q21. Must the terminating party comply with certain formalities?

Only in certain instances.

If yes or only in certain instances, when is a written notice required (a), must the notice contain a motivation in order for the termination to valid (b) and what are the consequences if any of the formalities are not observed (c)?

a. Is a written notice required? If yes, is a registered letter (or similar) required?

No. A written notice is not a statutory requirement. However, as it is required that the will to terminate the distribution agreement is unambiguous and clear, a written termination notice is recommended (also to be able to proof that the notice was indeed served).

b. Must the notice contain a motivation in order for the termination to valid?

No. However, if there is a risk that the termination could be challenged, a (non-exhaustive) motivation may be considered.

c. What are the consequences if any of the formalities are not observed?

Not applicable.

Q22. Can the parties stipulate the formalities in the distribution agreement?

Yes.

If yes, what are the consequences if those formalities are not observed?

Either no consequences (the termination is nevertheless considered lawful) given the minor significance of the failure to observe a certain formality, or the consequences as set out in Q20.a. and Q20.b.

Q23. Is the terminated party entitled to damages or another type of compensation even if the correct notice period has been observed?

Only in certain instances

If yes, does this concern goodwill compensation or another type of compensation? Do the legal consequences vary depending on the type of agreement (definite/indefinite duration; exclusive/non-exclusive; franchise etc.)?

See, Q17.b. The legal consequences do not vary depending on whether the agreement is of definite or indefinite duration.

Immediate extrajudicial termination on account of serious breach or exceptional circumstances

Q24. Is immediate extrajudicial termination possible even if the distribution agreement does not provide for early termination?

Yes.

If yes, on what grounds (a)? Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement (b)?

a. On what grounds?

The immediate termination of a distribution agreement of indefinite duration on account of serious breach or exceptional circumstances shall in principle end the (obligations arising from an) agreement of indefinite duration, unless the serious breach or exceptional circumstances do(es) not justify immediate termination and a certain notice period should be observed.

A distribution agreement of definite duration that does not provide for early termination can in principle not be terminated prematurely, except:

- In the event of unforeseen circumstances ("*onvoorziene omstandigheden*"). The circumstances must be unforeseen (i.e., not included in the agreement), not be for the account of the terminating party, and must be of such a serious nature that the standards of reasonableness and fairness dictate that the other party cannot be expected to continue the performance of the agreement until the agreed expiry date.

or

- When the complementary effect of reasonableness and fairness may entail that a distribution agreement of definite duration can nevertheless be terminated without unforeseen circumstances. The following elements should be taken into account:

  - The agreed duration of the agreement: The shorter the term, the more unlikely that the agreement will be assumed to be terminable;
  - The other circumstances of the case, such as the applicable regulations, the nature and content of the agreement and the (compelling) reason(s) for early termination; and
  - Whether (iii) further notice requirements should be considered under the (complementary and derogatory effect of the) standards of reasonableness and fairness.

b. Can parties exclude these grounds for immediate extrajudicial termination in their distribution agreement?

No.

Q25. Will an (extrajudicial) termination continue to have effect if the court rules that the agreement was wrongfully terminated on account of serious breach and/or exceptional circumstances?

Only in certain instances.

If not or only in certain instances, what are the consequences of the termination not being upheld?

See, Q17.a. and Q17.b.

Q26. Does the terminated party have a right to compensation if it appears that the agreement was wrongfully terminated or dissolved on account of serious breach and/or exceptional circumstances?

Yes.

If yes, is this right based on statute or case law (a) and how is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill) (b)?

a. Is this right based on statute or case law and what this right entail?

In some cases, the terminated party can have a right to compensation. This right is based on Art. 6:248 (1) DCC (See, Q16.) and case law. See, Q17.a. and Q17.b.

b. How is that compensation calculated and will the terminated party have a claim for any additional compensation in those circumstances (for example, goodwill)?

See, Q17.a. and Q17.b.

Q27. If a party believes that the distribution agreement has been wrongfully terminated or dissolved, can it apply to the judge in interim relief proceedings to have the effects of the termination suspended?

Yes.

Part. 4: Post-contractual phase

Q28. Is the supplier required to repurchase the stock that is still at the distributor's disposal when the distribution agreement ends?

No.

Q29. Are there other post-contractual obligations that generally apply to either of the parties in the context of the termination of the distribution agreement?

Yes.

If yes, which obligations apply?

During the notice period for termination, the agreement must be executed as far as is reasonably possible. Among other things, placing customary orders should remain possible, even if delivery were to take place after the end of the agreement. When assessing what will be considered a customary order, the starting point must be what was customary between the parties during their cooperation under a distribution agreement. This is not explicitly regulated in the DCC, but is based on settled case law.

Part 5: Dispute resolution

Q30. Do specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction?

Yes.

If yes, what do these specific rules and/or restrictions entail?

Franchise agreements: See, Art. 7:922 DCC. No derogation from the Dutch Franchise Act may be made to the detriment of franchisees established in the Netherlands, irrespective of the law governing the franchise agreement.

Q31. Can the parties opt for arbitration?

Yes.

If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in distribution agreements?

No.

Q32. What is the statute of limitations applicable to claims regarding the performance of a distribution agreement?

A right of action to claim performance of a contractual obligation to give or to do something becomes prescribed on the expiry of five years from the day following the one on which the claim has become due and payable (Art. 3:307, paragraph 1, DCC).