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Legal aspects of doing business in the Netherlands

LOYENS & LOEFF SERIES



Editor

Thomas L. Claassens

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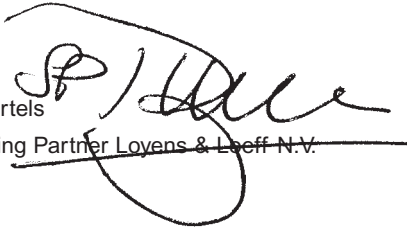
Preface

The objective of this booklet is to provide foreign investors and their advisors with a basic understanding of the main areas of Dutch business law, and to facilitate the communication with their Dutch counsel. Obviously, the book does not cover all aspects of Dutch business law and it contains simplifications and generalizations.

In addition, the reader should be aware that the law is constantly changing and that this booklet reflects the law in force at the time of publication. The reader should take specific advice from a qualified professional in each particular case. Needless to say, the lawyers of Loyens & Loeff N.V. would be pleased to provide such specialized legal advice and they look forward to working with you.

On a final note I would like to thank the following people for their contribution to this booklet: Ilan Spinath, Serge Zwanen, Marcel Buur, Vincent Bettonville, Marc Custers, Sabine Kerkhof, Jorn van Beckhoven, Remco Bäcker and Tom Claassens. Their knowledge and experience is reflected in many sections throughout.

Pim Bertels
Managing Partner Loyens & Loeff N.V.

A handwritten signature in black ink, appearing to read 'P. Bertels', is written over a horizontal line. The signature is stylized and cursive.

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1 The legal framework for a business

1.1 Introduction

One subject to contemplate when establishing a business in the Netherlands is the legal framework. It is possible (for example, for cost reasons) to opt not to establish a separate legal entity or to create a legal partnership and, instead, to operate only through a branch office. Most foreign investors, however, opt to establish a separate legal entity or to enter into a partnership. Although there are other legal structures that could be considered as a legal framework, the most commonly used by far are:

- (i) The public limited liability company (*naamloze vennootschap* or 'N.V.'), and
- (ii) The private limited liability company (*besloten vennootschap met beperkte aansprakelijkheid* or 'BV').

In view of the fact that the NV and the BV are used in the vast majority of all cases, the main focus below is on these two features of Dutch corporate law. Furthermore, the statutory provisions relating to a specific type of large company constituting a two-tier status company (*structuurvennootschap*), i.e. a company which in any three consecutive years meets the requirements of (i) having equity, of at least, a share capital in excess of a specified amount (currently € 16,000,000); (ii) having employees in the Netherlands in excess of 100; and (iii) having a Works Council, are not dealt with in the scope of this booklet.

Section 1.10 contains a short description of the main features of partnership law.

1.2 Main Differences between an NV and a BV

An NV is more commonly used for a company which is to be listed on a stock exchange, or which is to engage in the business of banking or insurance activities, but it is not restricted to such use. A BV is mainly privately owned, and is frequently used for smaller businesses or for group holding or finance purposes.

The main differences between an NV and a BV are as follows:

NV	BV
<ul style="list-style-type: none">– bearer shares or registered shares	<ul style="list-style-type: none">– registered shares only
<ul style="list-style-type: none">– share certificates (optional for registered shares)	<ul style="list-style-type: none">– no share certificates
<ul style="list-style-type: none">– shares may be freely transferable (limitations on transferability optional)	<ul style="list-style-type: none">– shares are not freely transferable
<ul style="list-style-type: none">– minimum paid-in capital € 45,000	<ul style="list-style-type: none">– minimum paid-in capital € 18,000
<ul style="list-style-type: none">– subject to certain restrictions, 10% of the outstanding shares may be repurchased by the company	<ul style="list-style-type: none">– subject to certain restrictions, 50% of the outstanding shares may be repurchased by the company
<ul style="list-style-type: none">– it may not give financial assistance for acquisitions by third parties of its own shares	<ul style="list-style-type: none">– in principle, no financial assistance for acquisitions by third parties of its own shares, however, subject to certain restrictions loans may be granted for such acquisition

The corporate tax treatment of a company does not differ solely on the basis of whether the company is an NV or a BV.

1.3 Establishing an NV or a BV

1.3.1 *Incorporators*

The founders of an NV or a BV, who may be one or more individuals and/or legal entities, may be of any nationality and may be domiciled anywhere. The founders may be represented at incorporation by means of a written power of attorney. The founders may or may not be the first shareholders of the company. In this chapter the first shareholders are referred to as the 'incorporators', so as to distinguish them from shareholders in general.

1.3.2 *Incorporation procedure*

A company is incorporated by means of the execution by a civil law notary of a notarial Deed of Incorporation (*akte van oprichting*), which contains the Articles of Association (*statuten*). Once incorporated, the Articles of Association may only be amended by notarial Deed of Amendment.

Prior to incorporation of a company or, for that matter, amendment of the Articles of Association taking effect, approval of the Ministry of Justice must be obtained. This

approval is granted in the form of a Statement of No Objections (*verklaring van geen bezwaar*, or the 'Statement'). The Statement is required by law in order to ensure, amongst others, that there is no obvious likelihood that the company will be used for unlawful activities or that the corporate form will be abused. Accordingly, the Ministry of Justice must be provided with certain details regarding the incorporators, the ultimate beneficial owner and the first managing (and supervisory) directors of the company. If the company is not incorporated within three months from the date of issue of the Statement, the Statement expires and the procedure must be restarted, unless a request for prolongation of its validity is submitted. It normally takes about five to fifteen business days after submission of the documents of application to the Ministry of Justice. For certain qualifying incorporators, a fast-track procedure for obtaining the Statement is available.

A further requirement is that a bank statement evidencing the payment of the minimum paid-in capital (if in cash) or a description of the contribution and an accountant's certificate attesting to such payment (if in kind) must be available at incorporation (see paragraph 1.5.2).

The Deed of Incorporation can be executed as soon as the civil law notary has all the required documents at his disposal.

The Deed of Incorporation, which must be in the Dutch language, establishes the company as a separate legal entity.

1.3.3 *Shareholders' register*

If the company's shares are in registered form, which for a BV is always the case and for an NV may be the case, the company must maintain a register of the shareholders.

Upon the incorporation of the company, the civil law notary will prepare the register of the shareholders. The shareholders' register should be kept by the Management Board at the office of the company. Its contents must include the name and address of each shareholder, the type and number of shares held by each of them, the denomination and date of issue of the shares, the amount paid-in on each share, and pledges and other encumbrances. Any change in the above-mentioned data must be up-dated in the register. Each entry and change made must be countersigned by or on behalf of the Management Board.

1.3.4 *Registration*

Within eight days after incorporation, certain information regarding the company must be registered in the Trade Register of the Chamber of Commerce in the district of the company's official seat and with the Trade Register of the Chamber of Commerce in the

District of the company's office address (i.e. its principal place of business), if this differs from that of its registered office. Certified copies of the Deed of Incorporation and the bank statement or accountant's certificate(s) must be deposited. Each of the managing directors is jointly and severally liable, in addition to the company, for all legal actions undertaken on behalf of the company during the period from incorporation until due registration in the Trade Register of this Chamber of Commerce. Accordingly, it is advisable to arrange for registration as soon as possible after the incorporation has been completed.

Companies are required to file details of all their managing directors, supervisory directors, and proxy holders, if any. In the case of the latter, such details must include the scope of their powers. If all issued and outstanding shares in the company are held by one individual or legal entity, certain data regarding this sole shareholder must also be registered.

The filing must also include an estimate of the costs to be borne by the company in connection with the incorporation (capital tax, fees for civil law notary and advisors, et cetera). Separate registration requirements apply to branches.

1.3.5 *Pre-incorporation transactions*

Prior to incorporation, a Dutch company may enter into contractual commitments, provided that it is in the process of being incorporated and is referred to as a company in incorporation (*in oprichting* or 'i.o.'). During this stage, the company's name and status is indicated thus: '___ BV i.o.'

Under the Dutch Civil Code, persons who represent themselves as authorized to bind the company may execute agreements on behalf of the company i.o., and third parties may rely on this, subject to the following. All persons who perform legal acts in the name of the company i.o., unless the contrary is expressly stipulated in such authorization, will be jointly and severally bound by such act until ratified by the company. Such ratification may be included in the deed of incorporation or by resolution of the Management Board after incorporation (or may be implied by conduct).

Even in the case of ratified acts, the persons who acted on behalf of the company i.o. will remain jointly and severally liable for a third party's loss if they knew, or should reasonably have known, that the company would not perform its obligations. If the company is involuntarily liquidated within one year of its incorporation, such knowledge will be presumed. This non-release is also without prejudice to the liability of the managing directors of the company for ratifying transactions which the company could not perform.

1.4 Articles of Association

1.4.1 *General*

The Articles of Association contain the provisions pursuant to which the company will be governed after incorporation. The main issues to be considered when preparing the Articles of Association are the following.

1.4.2 *Name; name search*

The proposed name or trade name of the company should be sufficiently distinguishable from existing trade names, whether or not registered, and should not be such as to cause confusion to the public.

To ensure that the proposed name does not infringe upon, or conflict with, existing names, a name search should be undertaken at the Trade Register of the Chamber of Commerce. Three name alternatives may be submitted to the Chamber of Commerce at one time against payment of a nominal fee. At the same time, an investigation as to possible infringement of trademarks registered with the Benelux Trademark Office (see section 7.3) may also be commenced, upon request. If requested, the trade name can also be registered as a trademark with the Benelux Trademark Office.

Requirements for the name of the company are that it should have some distinctive character and must not be too general. The characters 'NV' or 'BV', as the case may be, must be included in the name, either at the beginning or at the end of the name.

1.4.3 *Official seat and registered address*

The official seat is the city in the Netherlands identified as such in the Articles of Association. In addition to the official seat, the company must have an office address to be registered with the Trade Register of the Chamber of Commerce. This office address can be anywhere in or outside the Netherlands. For tax or other reasons it may be preferable that the company's office address is in the Netherlands. If such office is not (yet) available, the company may be domiciled with a 'trust company', specialized in providing services in the field of management and administration of companies.

1.4.4 *Corporate objects*

The objects clause in the Articles of Association provides a general description of the company's proposed business activities. Its activities will be limited to those stated in the objects clause.

1.4.5 Share capital

Dutch company law distinguishes between three types of capital, namely: (i) the authorized capital, which sets the limit beyond which no shares may be issued other than by amending the Articles of Association; (ii) the issued capital, which is the issued amount of the authorized capital and reflects the aggregate nominal value of the issued shares; and (iii) the paid-in capital, which is the amount of the issued capital for which payment has been received by the company.

In principle, each issued share must be fully paid upon its issuance. The Articles of Association may provide that the company and its shareholders shall agree that up to 75% of the nominal value of an issued registered share needs to be paid only after the company has called such unpaid portion of the nominal value.

The aggregate nominal value of the issued and paid-in capital must amount to (at least) € 45,000 for an NV or € 18,000 for a BV. Furthermore, the ratio between authorized and issued capital cannot exceed 5 to 1. Payment on the shares may be made in cash or in kind. There are no legal limits on the debt/equity ratio.

1.5 Shares

1.5.1 Types of shares

The shares in the capital of a BV may only be issued in registered form, whereas the shares in the capital of an NV may be in registered or bearer form. In the case of registered shares, the shareholdings should be registered and kept up to date, in the Shareholders' Register of the company.

Different types and classes of shares may be provided for in the Articles of Association: (i) ordinary shares, which normally provide equal rights to each shareholder (although the ordinary shares may be subdivided into different classes with different corporate rights, such as special reserves, voting rights and separate redemption rights); (ii) preference shares, which have preference over other types of shares with respect to distribution of dividends and distributions upon liquidation of the company (preference shares may be cumulative or non-cumulative with regard to distribution rights); and (iii) priority shares, which may confer a specific authority on the holders, such as the authority to make binding recommendations with respect to appointment of supervisory and/or managing directors.

It is not possible for an NV or a BV to issue non-voting shares. However, a similar result may be obtained by way of issuing shares to a Trust Foundation (*Stichting*

Administratiekantoor), which, in its turn, issues depositary receipts representing the economic rights accruing to such shares.

1.5.2 *Payment for shares*

Shares in a company may be subscribed for by payment in cash and/or in kind, in accordance with the following provisions:

In cash

If payment for the shares to be issued upon incorporation is made in cash, the funds must be paid into a bank account in the company's name at a bank in the Netherlands or the EU, provided that such bank is subject to governmental control. A company cannot be incorporated until a bank statement with respect to such payment has been issued to the civil law notary executing the Deed of Incorporation. The bank statement must state that a specified amount (the amount which, at incorporation, is to be paid in on the issued share capital): (i) will be at the disposal of the company immediately upon its incorporation; or (ii) has been paid, on a date preceding the date of incorporation by not more than five months prior to incorporation, into a separate account of the company which, after incorporation of the company, will be at the company's exclusive disposal, provided that the company expressly accepts these payments in the Deed of Incorporation. If the statement referred to in (ii) above is used, it is possible to withdraw (part of the) funds deposited in the name of and on behalf of the company prior to its incorporation.

In kind

If, at incorporation, payment on the issued shares will be made in kind, a description of the contribution must be drawn up and signed by the incorporators. The description must include a statement of all incorporators as to the value of the contribution in kind and the valuation methods used and may not predate the date of incorporation by more than five months. For a BV, the description must be made available for inspection by the shareholders at the offices of the company. For an NV, the description must be attached to the Deed of Incorporation.

In addition, a certificate of an auditor confirming that the value of the contribution in kind, as set forth in the description, is at least equal to the amount to be paid on the issued shares, is required. The auditor's certificate must be attached to the Deed of Incorporation.

Share capital in excess of the aggregate nominal value may be provided by way of payment of share premium (*agio*) on the issued shares.

1.5.3 *Transfer of shares*

Shares in an NV are freely transferable. The Articles of Association, however, may provide for restrictions on transfer with respect to registered shares in the capital of the NV.

The shares in a BV are not freely transferable. The Articles of Association must contain a transfer restriction in the form of a right of first refusal to the other shareholders or a right of approval. Pursuant to the right of first refusal in the event of a contemplated transfer of shares, the shares must first be offered to the other shareholders. On the basis of the right of approval the General Meeting of Shareholders, the Management Board, or another corporate body must grant its prior approval to the contemplated transfer of the shares. The Articles of Association can also provide for a combination of the two transfer restrictions.

The transfer of registered shares in the capital of an NV (provided that the shares of such NV are not listed on an official stock market) and in the capital of a BV, requires the execution of a notarial deed of transfer between the transferor and the transferee. Unless the company itself is party to the notarial deed of transfer, the rights pertaining to such shares can only be exercised after the company has acknowledged the transfer of the shares or the notarial deed of transfer has formally been served on the company by a bailiff.

Different requirements apply to a transfer of registered shares in the capital of an NV that are listed on an official stock market and for a transfer of bearer shares in the capital of an NV.

1.6 Corporate Bodies

1.6.1 *General*

Dutch corporate law provides that a Dutch company should at least have two corporate bodies, i.e. (i) the Management Board (*bestuur*) consisting of managing directors (*bestuurders*), and (ii) the General Meeting of Shareholders (*algemene vergadering van aandeelhouders*). It is possible, but not required, for most Dutch companies to have a Supervisory Board (*raad van commissarissen*).

1.6.2 *Management Board*

The Management Board is the executive body of the company. Accordingly, it is the corporate body charged with the day-to-day affairs of the company. Its members can be compared to the executive members of the Board of Directors of a US or a UK company.

The members of the Management Board, the managing directors, are appointed and dismissed by the General Meeting of Shareholders (except for the first members of the Management Board, who are appointed by the incorporators and identified in the Deed of Incorporation). It is possible to grant corporate bodies other than the General Meeting of Shareholders or third parties the right to make a binding nomination for the appointment of one or more members. The General Meeting of Shareholders, acting with a two-thirds majority of the votes cast for shares representing over half of the issued capital of the company at such time may, however, at any time override such nomination.

The Management Board may consist of one managing director only. There are no requirements as to the nationality or residence of managing directors. A legal entity may also act as managing director. A local trust company can be charged with the management of the company.

Dutch corporate law provides that the Management Board is authorized to represent and bind the company towards third parties and that each managing director is also authorized to represent the company. If the Management Board consists of two or more members, instead of each managing director being authorized to represent the company, the Articles of Association may provide for a system of joint representation by, for example, two managing directors, or by providing that only one specific managing director, for example, the President Director, is individually entitled to represent the company. Such provisions will be effective vis-à-vis third parties after publication at the Chamber of Commerce.

Restrictions in the Articles of Association which state, for example, that certain specific decisions of the Management Board are subject to prior approval of another corporate body, will, in general, only have internal effect and cannot be invoked against third parties (see the following paragraph).

The most flexible arrangement for control of the General Meeting of Shareholders or the Supervisory Board over the company's management is that, instead of listing all those management decisions that require the approval of the General Meeting of Shareholders or the Supervisory Board, the Articles of Association merely provide that the General Meeting of Shareholders (or the Supervisory Board) may from time to time designate such decisions in a resolution. A combination, consisting of a list of management decisions for which prior approval is required coupled with the possibility to enlarge such list, is often preferred.

When providing that certain management decisions require prior approval of either the General Meeting of Shareholders or the Supervisory Board or another corporate body, the

difference between the authority and the duties of such corporate bodies should be taken into account (i.e. Supervisory Board must act in the interests of the company, and the shareholders may act in the shareholders interests). An internal restriction with regard to the authority of the managing directors to represent the company may also be effected by providing that the Management Board is obliged to comply with instructions given by the General Meeting of Shareholders or another corporate body regarding the general guidelines of the financial, social, economic and employment policies of the company or other general guidelines as provided in the Articles of Association.

The Management Board may hold its meetings wherever it deems appropriate, unless the Articles of Association provide otherwise. Fiscal considerations, however, may necessitate that there be managing directors resident and/or that Management Board meetings be convened and held in the Netherlands.

Decisions of the Management Board may be adopted either by resolutions passed and recorded in the minutes of an actual meeting, or in the form of written resolutions duly signed by all members of the Management Board in office at such time.

1.6.3 General Meeting of Shareholders

All corporate powers not granted by law or by the Articles of Association to any other corporate body of the company are vested with the General Meeting of Shareholders. By law, certain matters must be within the authority of the General Meeting of Shareholders, such as the appointment, suspension and removal of managing directors and supervisory directors, the amendment of the Articles of Association, the adoption of the annual accounts, and the voluntary liquidation of the company. When exercising its powers, the General Meeting of Shareholders may focus primarily on the interests of the shareholders.

In principle, every General Meeting of Shareholders must be held in the Netherlands, at the location or locations specified in the Articles of Association. Meetings may be held elsewhere, including outside the Netherlands, provided that the entire share capital issued and outstanding at such time is present or represented. The Articles of Association may provide for the possibility to adopt resolutions in writing without holding a General Meeting of Shareholders provided, however, that those resolutions are adopted by unanimous vote representing the entire share capital issued and outstanding at such time. The annual General Meeting of Shareholders must always be held within six months of the end of the company's financial year.

Every shareholder may at all times appoint a proxy to vote on his behalf at a General Meeting of Shareholders by granting him such voting right in a written power of attorney.

Resolutions of the General Meeting of Shareholders are, in general, adopted by an absolute majority of votes validly cast, unless the law or the Articles of Association provide otherwise.

1.6.4 Supervisory Board

The members of the Supervisory Board are appointed and dismissed by the General Meeting of Shareholders (with the exception of the initial members, who are appointed by the incorporators and identified in the Deed of Incorporation), albeit that the Articles of Association may provide that up to one third of the total number of members of the Supervisory Board are appointed by a third party. A shareholder or a representative of a shareholder may be appointed as supervisory director. The Articles of Association usually provide for the number of members of the Supervisory Board, which should consist of at least one member. Legal entities cannot act as supervisory directors.

The principal tasks of the Supervisory Board are (i) to supervise the Management Board and the company's general course of affairs and business; and (ii) to advise the Management Board in connection therewith. In doing so, the Supervisory Board must at all times act in the interests of the company and its business. The Supervisory Board does not have the authority to represent or bind the company vis-à-vis third parties. The Articles of Association may provide that certain specific decisions of the Management Board are subject to the prior approval of the Supervisory Board.

1.7 Annual Accounts

The Management Board of a company must prepare annual accounts and must deposit these annual accounts, duly signed by each member of the Management Board (and by each member of the Supervisory Board, if any), for inspection by the shareholders at the company's office within five months after the end of each financial year, unless by reason of special circumstances this period is extended by the General Meeting of Shareholders. The extension may not exceed six months. Within the same period, the Management Board must also submit the annual accounts for adoption to the General Meeting of Shareholders.

Once adopted, the Management Board must file the annual accounts with the Trade Register of the Chamber of Commerce for publication within eight days. If the General Meeting of Shareholders has not adopted the annual accounts of the company within 13 months after the end of the financial year, the Management Board must still file without delay and with notification that these accounts have not (yet) been adopted.

The members of the Management Board of a company in bankruptcy can be held liable in person for the deficit of the bankrupt estate, if it is established that the bankruptcy is due to 'evidently improper management' during the last three years preceding the bankruptcy. Failure to timely file the annual accounts with the Trade Register of the Chamber of Commerce in one or more of these preceding three years constitutes a *per se* presumption of evidently improper management.

The annual accounts must consist of a balance sheet, a profit and loss account, and the explanatory notes thereto, and must be drawn up in accordance with the Dutch Civil Code.

The company must appoint an auditor to audit the annual accounts and issue an auditor's report. If the company qualifies as a 'small company' it is exempted from the audit obligation. A company qualifies as a small company if it meets at least two of the three following criteria, on both the opening and closing balance sheet dated of two consecutive financial years:

- (i) The value of the assets according to the balance sheet with explanatory notes amounts to less than € 4,400,000;
- (ii) The net annual turnover amounts to less than € 8,800,000;
- (iii) The average number of employees in the financial year is less than 50.

In addition, a company forming part of a group of companies may draw up its annual accounts in a much more limited form, provided that the terms and conditions of section 2:403 of the Dutch Civil Code have been met. The most important of these terms and conditions is the issuing by the parent company of a written declaration that it accepts joint and several liability for debts of the company arising from (past, present and future) legal acts (the '403 liability statement' as discussed in section 2.5).

If the aforementioned section applies, (i) the content of the balance sheet and the profit and loss account may be limited; (ii) the content of the explanatory notes thereto may be limited; (iii) no auditor's statement is required and (iv) the annual accounts do not have to be filed with the Trade Register of the Chamber of Commerce.

1.8 Liquidation

1.8.1 General

This section provides an overview of the statutory provisions relating to the liquidation procedure for a company. Although there can be various legal causes for the liquidation of a company, here we confine ourselves to discussing the liquidation on the basis of a

resolution to that effect by the General Meeting of Shareholders. Three types of procedures are described: the standard procedure, the 'turbo' liquidation, and the 'accelerated' liquidation.

1.8.2 *The standard procedure*

The procedure of liquidation of a company has two stages: the dissolution of the company, and the winding up of its assets and liabilities. The dissolution reduces the objects of the company: it continues to exist only in so far as is required for the purpose of the liquidation of its assets and liabilities and it may not transact any business other than is necessary for the winding-up. The winding-up consists of the settlement of the accounts (including paying the company's creditors), and the realization of the non-cash assets for the purpose of making a final distribution of the liquidation proceeds to the shareholders and other possible parties entitled thereto by virtue of the Articles of Association.

The liquidation procedure starts with a resolution of the General Meeting of Shareholders to dissolve the company and to liquidate its assets, to appoint the liquidators, and to appoint a custodian for the corporate books and records.

If the company has a Supervisory Board, it needs to be checked whether pursuant to the Articles of Association of the company this corporate body should approve the shareholders' resolution of the General Meeting of Shareholders to dissolve the company.

In the absence of a provision in the Articles of Association stating otherwise, or failing a specific appointment of another person or persons in the shareholders' resolution to dissolve the company, the members of the Management Board in office at the time of adoption of the shareholders' resolution will act as liquidators. If a specific appointment is made in the shareholders' resolution, the Trade Register of the Chamber of Commerce should be notified of the resignation of those members of the Management Board not appointed as liquidators. Finally, the provisions contained in the company's Articles of Association regarding the appointment of members of the Management Board must be observed with respect to the appointment of a liquidator who is not a member of the Management Board, unless the Articles of Association provide otherwise.

The resolution to dissolve and liquidate must be registered with the Trade Register of the Chamber of Commerce. From the moment of the dissolution, the Dutch words '*in liquidatie*' should be added to all publications, letters and announcements of or by the company. The period of winding-up commences as of the moment of the dissolution.

The liquidators have the same powers, obligations and liabilities as the former members

of the Management Board; they decide autonomously upon the way in which the assets are liquidated, although their authority may be subject to some of the same constraints (possible statutory limitations or conditions, approval by other corporate bodies) as were imposed on the Management Board before the dissolution. If the assets of the company are not sufficient to settle all of the debts, the liquidators should apply for bankruptcy of the company, unless all creditors agree to the continuation of the liquidation outside of bankruptcy.

The liquidators prepare a final account of the liquidation, as well as a 'plan of distribution' (*plan van verdeling*), providing for the distribution of the balance of the liquidated company to the parties entitled thereto (shareholders and other parties which, according to the Articles of Association, are entitled to a part of the balance). If there is only one interested party (a sole shareholder) the plan of distribution is not necessary. The final account and the plan of distribution must be deposited at the company's office address, if such office address still exists, and must be filed with the Trade Register of the Chamber of Commerce at which the company is registered. The liquidators must publish a notice in a nationally distributed daily newspaper, indicating the location where the final account and the plan of distribution are available for public inspection. Upon publication of this notice a two-month period commences during which any interested person may file objection to the final account and/or the plan of distribution. Upon expiration of the two-month period, distribution of the liquidation proceeds in accordance with the plan of distribution may take place, unless objections have been filed.

Upon termination of the liquidation procedure, the company's books and records must remain stored with the custodian for a period of seven years. The Trade Register of the Chamber of Commerce must be notified of the termination of the liquidation procedure, and of the name and address of the custodian of the corporate books and records.

Should it appear at a later date that an asset still remains to be liquidated, or that a creditor or beneficiary has not been taken into account, the liquidation procedure may be 'reopened' by court decision. In such case, the company 'revives', but solely for the purpose of re-liquidating the balance; to the extent that the beneficiaries have received a distribution of liquidation proceeds that, as it appears in the reopened procedure, was too high, the liquidator is authorized to reclaim the balance of the excess.

1.8.3 The 'accelerated' liquidation and 'turbo' liquidation

The standard liquidation procedure may be accelerated if, after the shareholders' resolution to dissolve has been adopted, the registration with the Trade Register of the Chamber of Commerce that the company is in liquidation has taken place, and the (then

known) debts of the company have been settled, the liquidator is willing to distribute the remaining assets of the company among the beneficiaries by way of a 'distribution in advance'. In the event that such a distribution takes place during the period of two months referred to above in section 1.8.2, prior approval of the appropriate district court is required in order to make such distribution. Such distribution in advance may be attractive from a fiscal point of view, for instance, because the distribution will then still fall within the current book year.

Since the possibility exists that the assets distributed in advance may have to be (partly or wholly) recovered to effect a redistribution (see below), an 'accelerated liquidation' is only warranted if (i) the liquidator has reason to assume that all creditors are known to him; (ii) the beneficiaries of the final balance of the company are few in number; and (iii) the beneficiaries ensure, for instance by way of a guarantee, that they will reimburse (part of) the distribution in advance if it would appear that a creditor was by-passed or would contest the distribution.

Although in practice little or nothing remains to be liquidated, the liquidators still need to prepare a final account of the liquidation, as well as a 'plan of distribution' (*plan van verdeling*). Normally, this is a mere formality, but the possibility still remains that an unknown creditor can be identified as a result of the publication or that an objection may be filed during the two months' period following the publication. In such case, as mentioned, the assets distributed in advance may have to be (partly or wholly) recovered to effect a re-distribution. Should recovery not be possible and should one or more creditors thus remain unsatisfied, the liquidator(s) will be personally liable for the loss or losses thus incurred.

Notwithstanding the aforementioned, the company ceases to exist at the very moment of the resolution of the General Meeting of Shareholders to dissolve the company, if it does not have any assets or liabilities at such moment. In such case, there will be no winding-up procedure and consequently, no liquidators have to be appointed. This is usually referred to as a 'turbo' liquidation. The Management Board must file the ending of the company with the Trade Register of the Chamber of Commerce. The company's books and records must be kept with the custodian for a period of seven years.

1.9 Proposed Simplification and Flexibility of BV Law

1.9.1 General

On May 31, 2007, a bill was introduced in the Dutch parliament with the purpose of simplifying the legislation pertaining to, and increasing the flexibility of, a BV. This bill was

introduced after various substantial consultation procedures with drafted after extensive consultation rounds with legal practitioners. The main focus of the revisions contained in the bill to create a more flexible legal form by significantly increasing the ability to tailor the governance structure of a BV, as well as the legal and financial relationship between shareholders and the company and between shareholders themselves, to individual needs.

1.9.2 *Some proposals with regard to the capital of a BV*

Existing minimum capitalization requirements will be deleted or amended as follows:

- (i) No minimum issued share capital will be required (currently € 18,000). At all times at least one voting share must be issued and outstanding with a third party other than the company or its subsidiaries.
- (ii) Unless the Articles of Association provide for an authorized capital, an unlimited number of shares can be issued without amendment of the Articles of Association.
- (iii) The shares must have a nominal value, which may be expressed in Euros or in any other currency.
- (iv) Bank statements or auditors' statements confirming the value of any contribution on shares in cash or in kind will no longer be required upon issuance of shares, whether issued at the time of incorporation or thereafter.
- (v) Financial assistance restrictions and certain existing formalities to be observed in respect of transactions between shareholders or incorporators and the company within two years after the company's initial registration with the Trade Register of the Chamber of Commerce (*'nachgründung'*), will no longer apply.
- (vi) Individual shares may be cancelled without prior repurchase of such shares.
- (vii) The two months' objection period for creditors in the event of a reduction of capital shall no longer apply.
- (viii) Distributions to shareholders in any form (including dividend distributions, distributions out of the company's reserves, and distributions resulting from capital reductions or repurchases of shares) are subject to prior approval of the Management Board. Prior to any distribution, the Management Board will need to perform a 'distribution test' and it will not grant its approval to a contemplated distribution if the company would no longer be able to satisfy its due and payable debts as a result of the contemplated distribution. Should the Management Board nevertheless grant its approval to such distribution, the members of the Management Board (and other qualifying policymakers) may be held personally liable towards the company for the amount of the distribution (increased with statutory interest). If the company goes bankrupt within one year after a distribution in any form, shareholders and any other recipients of such distribution may have to return the distribution received, if at the time of the distribution they did not act in good faith.

1.9.3 Some proposals to increase the flexibility of the BV

The following new features will be introduced in the law governing BVs when the bill is approved and adopted by the Dutch parliament:

- (i) Non-voting shares and shares without profit rights may be introduced. The voting rights that may be cast per share will no longer need to be related to the nominal value of the shares, and multiple voting rights will be allowed.
- (ii) Individual shareholders may be given the authority to directly appoint members of the Management Board and the Supervisory Board.
- (iii) Share transfer restrictions in the Articles of Association will be optional. If share transfer restrictions are included in the Articles of Association the statutory provisions that such restrictions will need to comply with are much more limited.
- (iv) Transfer of shares may be prohibited for a certain period as specified in the Articles of Association (lock-up), provided that all shareholders agree with the adoption of such lock-up provision.
- (v) The Articles of Association may attach specific obligations to shares, but incorporation of a shareholders' agreement into the Articles of Association by reference will not be allowed.
- (vi) The Articles of Association may provide that a General Meeting of Shareholders can be held outside of the Netherlands.
- (vii) The position of minority shareholders is protected by introduction of unanimous vote requirements for certain shareholders resolutions (e.g. any change in the voting rights attached to shares and the introduction of a lock-up period) and certain specific provisions in the Articles of Association will not apply to shareholders that voted against the introduction of such provisions in the Articles of Association (e.g. provisions regarding obligations attached to shares, deprivation of profit rights and the waiver of the right to claim intervention of an expert to determine the value of shares on sale).

1.9.4 Conclusion

The revision of the statutory provisions pertaining to BVs is considered to be an urgent matter in Dutch politics. Both the business community and the legal practice are in favor of simplification and flexibility. It is therefore likely that some, if not all, of the above proposals will become law in the not too distant future.

1.10 Dutch Partnership Law

1.10.1 General characteristics

The two most common forms of a Dutch partnership are the general partnership (*vennootschap onder firma* or 'v.o.f.'), i.e. a partnership between two or more general partners, and the limited partnership (*commanditaire vennootschap* or 'CV'), i.e. a partnership between one or more managing partners and one or more limited partners.

A partnership created under Dutch law is created by means of a partnership agreement for the purpose of durable cooperation between one or more partners (*vennoten*). The general partners in a v.o.f. and the managing partner(s) (*beherend vennoten*) in a CV each have unlimited liability, whereas the liability of the limited partners in a CV (*commanditaire* or *stille vennoten*) is, in principle, limited to the amount of their capital contribution. A Dutch partnership is an agreement between its partners and does not constitute a separate legal entity. However, a Dutch partnership can sue and be sued and enter into contracts in its own name.

Since the partnership is an agreement, statutory provisions of contract law, of both a general and of a partnership-specific nature, apply to the v.o.f. and to the CV in so far as these provisions are of a mandatory nature, or if the partnership agreement contains no provisions regulating a certain matter. It should be noted that the number of these statutory provisions is limited.

1.10.2 Legal requirements

A partnership is established only if the following conditions are met:

- (i) The agreement must have been entered into with the intention to create and regulate a durable cooperation (*samenwerking*) between the parties;
- (ii) The partners enter into the agreement in order to obtain common benefits by establishing a business enterprise (*bedrijf*) for the common account of the partners and under a common name. Although the law does not provide a definition of a 'business enterprise', the prevailing view among legal commentators in the Netherlands is that a 'business enterprise' exists only in the case of a durable and public economic activity with the purpose of making a profit. If the cooperation between the parties is not durable, but is limited to a sole transaction or business project, the partnership agreement will not constitute a partnership. In order to act in a public manner, a partnership must conduct its economic activities in a manner that is clearly notable to third parties. It must, therefore, conduct its activities under a common name.
- (iii) Each partner (including the managing partner or managing partners of a CV) is under

- an obligation to make a contribution to the partnership. The contribution may be of a nominal nature, and may also consist of services or know-how;
- (iv) A v.o.f. must at least have two general partners, whereas a CV must have at least one managing partner and one limited partner. Without limited partners, a CV qualifies between the managing partners as a general partnership;
 - (v) In order to qualify as a Dutch partnership, the v.o.f. or the CV must have a minimal nexus with the Netherlands. In any event, the partnership agreement has to be governed by Dutch law. If the partnership has a business address abroad and is to perform all its business activities abroad, it should appoint its seat or registered office in the Netherlands.

1.10.3 Formation and management of a Dutch partnership

A Dutch partnership is formed by an agreement between two or more partners, each of which may be an individual or a corporation, either for a limited or an unlimited period of time. The partners are not required to be Dutch citizens, a corporation or residents of the Netherlands.

In principle, there are no formal requirements (such as a notarial deed or government approval) with respect to the formation of a Dutch partnership. As far as the terms and conditions of the partnership agreement are concerned, generally, the concept of ‘freedom of contract’ applies. It should be noted that the absence of a written partnership agreement does not necessarily imply that a Dutch partnership does not exist. If partners wish to prove that their relationship qualifies as a Dutch partnership, however, a written agreement is beneficial.

The v.o.f. is, in principle, managed by all of its partners and may be represented by all of its partners. The partnership agreement may contain specific divisions of tasks and/or authorities, but these only have an internal effect. A CV is managed by its managing partner(s). A managing partner is responsible for the day-to-day affairs of the CV. In addition, the managing partner is authorized to represent and validly bind the CV to third parties. If there are more managing partners, each managing partner has the power and authority individually to represent and bind the C.V., unless the partnership agreement provides otherwise.

The limited partner(s) in a CV may not represent (directly or by proxy) the CV or act or appear to act on behalf of the CV. Also, their names may not appear in the partnership’s name. If the limited partner represents the CV or otherwise acts on behalf of the CV or his name appears in the partnership’s name, such limited partner becomes jointly and severally liable for all debts and obligations of the CV as if he were a managing partner.

1.10.4 Capital, assets and annual accounts of a Dutch partnership

Unlike the rules applicable to a BV or an NV, Dutch law does not prescribe any statutory minimum capital for a partnership and no provisions under Dutch law require that a certain minimum amount of capital be retained in the partnership. The interests in the capital of a partnership may not be referred to as shares.

Since a Dutch partnership is not a legal entity, it is not capable of having the legal ownership of the partnership's assets. Contribution of an asset to the partnership by the partners at the time of formation or otherwise is considered to have a contractual basis (*verbintenrechtelijke grondslag*). The combined contributions of the partners form, in principle, a community of property (*goederenrechtelijke gemeenschap*) between the partners.

Contribution of assets may be effected by contribution to the community of property of (a) full (i.e., legal and beneficial) title to the assets (*volledige eigendom*); (b) the beneficial title to the assets (*economische eigendom*); and (c) the right of use with respect to the assets (*gebruiksgenot*). To avoid any uncertainty as to the form and legal consequences of contribution, the partnership agreement should provide for detailed provisions with respect to initial and future contributions of assets by the partners.

Dutch legal doctrine holds the general that movable assets (*roerende zaken*) which are acquired by the general partners of a v.o.f. in their capacity as such or by the managing partner, acting on behalf of the CV, during the lifetime of the CV become automatically part of the partnership's estate, i.e. the community of property that exists between all partners. With respect to such movable assets, the (managing) partner is assumed to act as agent (*middelijke vertegenwoordiger*) on behalf of the partnership and thus, movable assets acquired by him will belong to the partnership's estate unless otherwise provided in the partnership agreement and effected in a particular transaction.

Immovable assets (*onroerende zaken*) which are acquired by the managing partner during the lifetime of the partnership will not automatically form part of the community of property pursuant to the concept of agency. Such immovable assets will only form part of the community of property if the (managing) partner transfers the immovable assets to the limited partnership in joint ownership and in compliance with applicable transfer formalities.

Dutch law contains no special requirements as to the contents of the annual accounts of a Dutch partnership, unless all managing partners are corporations incorporated under foreign law, in which case the partnership is subject to Dutch financial reporting

requirements.

1.10.5 Revisions of Dutch partnership law

A bill to introduce a new book 7:13 to the Dutch Civil Code has been approved by the lower house of the Dutch parliament and is now under consideration in the upper house. The expectation is that the bill will be enacted early in the foreseeable future. The bill introduces the term 'public partnership' (*openbare vennootschap* or 'OV'), of which the limited partnership or CV is a particular form. The major difference from current partnership law is that the partners may opt, at the time of formation or during the existence of the partnership, to have the partnership either constitute a separate legal entity or not, i.e. the partners may create a partnership or adopt a resolution to amend an existing partnership agreement such that the partnership either will, or would not or would no longer, constitute a separate legal entity. A public partnership with separate legal personality will be referred to in Dutch as an *openbare vennootschap met rechtspersoonlijkheid* or 'OVR', and if such partnership is constituted in the form of a limited partnership with separate legal personality, it will be referred to as a *commanditaire vennootschap met rechtspersoonlijkheid* or 'CVR'. There is a formal requirement that the partnership agreement of an OVR including a CVR, or the amendment thereto whereby the partnership is changed into an OVR including a CVR, is entered into by means of a notarial deed.

A result of a partnership being a separate legal entity is that it would be the legal owner of its assets and not the community of property constituted by the partners. Another new feature is that it will become possible to convert the OVR into a BV or vice versa.

2 Miscellaneous corporate issues

2.1 Introduction

In this chapter, we provide a brief outline on various provisions of Dutch law with respect to liability, in particular, director's liability, shareholders' liability for the debts of a company, the 'ultra vires' issue, and the '403 statement'.

2.2 Director's Liability

2.2.1 General

A distinction can be drawn between the contractual and the non-contractual liability of managing directors. The contractual liability exists towards the company and arises from the contractual relationship between the managing directors and the supervisory directors (if any) on the one hand and the company on the other. The non-contractual liability is a liability towards third parties, such as creditors of the company or the tax authorities.

Under Dutch law, the principle of reasonableness and fairness underlies interactions of the managing directors, the supervisory directors (if any), the company and other persons involved in the company in such way that they should act towards each other in accordance with this principle. This general provision has little independent significance next to the more specific provisions to be discussed below.

2.2.2 Internal liability, i.e. managing director(s) vis-à-vis the company

Under Dutch law, each managing director is obligated towards the company to perform his duties properly. If it concerns a matter that pertains to the field of activities of two or more managing directors, each of them is jointly and severally liable for a shortcoming, unless a managing director proves that the improper performance of duties is not attributable to him, and he has not been negligent in taking measures to prevent the consequences thereof. As a general rule, a managing director is liable for improper performance of duties only in the case of serious culpability (*ernstig verwijt*). Improper performance of duties can consist of acting (or refraining from acting) in violation of the law or the Articles of Association, or acting in a clearly unreasonable way. The answer to the question of whether a managing director has improperly performed his duties and was seriously negligent depends on the specific circumstances of the case.

The General Meeting of Shareholders (and in specific cases, the Supervisory Board) may grant discharge to the managing directors. As a rule, discharge granted to a managing

director for management performed during a specific period, prevents the company from holding him liable for his management in the relevant period. In principle, a discharge can only release a managing director from liability for matters apparent from the annual accounts or which are otherwise notified to shareholders. Discharge does not release the managing director from liability for acts which the shareholders could not reasonably have had knowledge about. In principle, discharge prevents contractual liability, but it does not prevent non-contractual liability.

2.2.3 Liability in bankruptcy (Third Abuse Act)

On the basis of the Third Abuse Act each managing director is jointly and severally liable for the shortfall of the bankrupt's estate if the Management Board has evidently improperly performed its duties and the improper management was an important cause of bankruptcy. An individual managing director can exculpate himself, if he proves that he has not been negligent in so far as the improper management is concerned and he has not been negligent in taking measures to prevent the consequences thereof. Any situation where no reasonably thinking managing director would have acted in such manner under the same circumstances would constitute improper management.

The Third Abuse Act attaches special importance to the obligation of maintaining a proper administration and the obligation to prepare, adopt and publish annual accounts. If one of these obligations is violated, the act contains two statutory presumptions, namely, an irrefutable presumption that the managing director has improperly performed his duties, and a refutable presumption that the violation of these obligations was an important cause of the bankruptcy. As a rule, the managing director must give prima facie evidence that other, external factors than improper management were an important cause of bankruptcy. Unless the trustee in bankruptcy can give prima facie evidence that the improper management was also an important cause of bankruptcy, the management is exculpated.

The claim against the managing director(s) can only be instituted by the trustee in bankruptcy and is instituted on behalf of the collective creditors. Only improper management in the three-year period prior to bankruptcy can serve as a basis for a claim. The court has the power to reduce the amount for which the managing directors are liable on a collective basis or on an individual basis. The 'policy maker', i.e. the person who determined the policy of the corporation as if he were a managing director, is liable on the same footing as the managing director.

2.2.4 Misleading annual accounts, annual report and interim accounts

If the annual accounts, the annual report or the interim accounts published by the

company contain a misleading presentation of the financial situation of the company, the managing directors are jointly and severally liable towards third parties for the damage suffered as a result thereof. A managing director who proves that the misleading presentation is not attributable to him is not liable.

2.2.5 Liability for tax debts and premiums of social security and premiums for pension funds (Second Abuse Act)

On the basis of the Second Abuse Act a managing director can be held jointly and severally liable for income tax and VAT, for social security premiums and for pension fund contributions owed by the company, in the case of non-compliance with the obligation of the company (and of each managing director) to notify the competent authorities forthwith in writing in the event of an inability on the part of the company to make a payment with respect to these obligations.

2.2.6 Tort

A managing director can be liable on the basis of tort. In particular actions that are prejudicial to creditors, cause environmental pollution, or give a misleading presentation in a prospectus may result in liability for tort attributed to such managing director.

Prejudice to creditors

Pursuant to case law, a managing director is liable if he entered into a contract on behalf of the company while at the time of the conclusion of such contract he knew or had reason to know that the company would not, or would not within a reasonable period of time, be able to fulfill its obligations and would not have (sufficient) assets against which the creditor could take recourse. The burden of proof rests, in principle, on the prejudiced creditor.

Environmental damage

A managing director can be liable towards third parties (including the government) in the case of environmental damage (soil and water pollution) caused by the company. Case law relating to environmental pollution tends to more easily attribute liability to managing directors than case law regarding tort in general. Personal liability is attributed if it was within the power of the managing director to prevent the environmental damage and he was negligent in taking action.

Prospectus liability

A managing director can be liable towards third parties for a misleading presentation of the financial position of the company in a prospectus. The relevant rules shift the burden of proof with respect to the misleading presentation to the issuer of the prospectus.

2.2.7 *Registration with Trade Register and payment on shares*

Each managing director is jointly and severally liable with the company towards third parties for each legal act which is performed during his management period and by which the corporation is bound in the period of time before (i) the initial registration with the Trade Register of the Chamber of Commerce has taken place; or (ii) the paid-up capital amounts to at least the statutorily required minimum capital (see again section 1.4.5); or (iii) at least 1/4th of the nominal issued capital has been paid up.

2.2.8 *Liability in case of legal entity as managing director*

If a company is managed by a legal entity, each person who is a managing director of this legal entity at the time that a certain liability arises is jointly and severally liable for such liability in addition to the legal entity which manages such company.

2.3 Liability of a Shareholder for Debts of a Company

2.3.1 *General*

The following describes the most significant ways in which a shareholder can involuntarily become liable for debts and obligations of a company. Voluntary assumptions of liability for the debts of a company (e.g. by way of contracts, guarantees or otherwise) are not discussed here.

2.3.2 *Main rule and exceptions*

A shareholder is, in principle, not personally liable for acts performed in the name of the company, and he is under no obligation to contribute to the losses of the company in excess of the amount to be paid on his shares.

Relevant Dutch case law, however, has recognized various grounds which, under exceptional circumstances, can lead to a liability of a shareholder for debts and obligations of the company. The main ones are (i) a tort (*onrechtmatige daad*) committed by the shareholder, and (ii) an alter ego situation (*vereenzelviging*) as regards the shareholder and his company. Both can be categorized under the heading 'lifting or piercing the corporate veil'.

A shareholder may be held liable for the debts and obligations of a company if the existence of such debts and obligations constitutes a tort on the part of the shareholder. This would be the case, for example, if the shareholder creates a misleading appearance of solvability of the company. Another example of how this liability in tort is construed is the case where the shareholder, either as a creditor of the company or in capacity as shareholder, creates an unjust 'edge' for itself in comparison with the company's other creditors.

Furthermore, Dutch courts have held shareholders liable in tort for actions of the company if and when such court found that a shareholder and a company are insufficiently independent. In such case of *alter ego* the court will not respect the corporate separateness of the company and will, instead, hold that the shareholder and the company are to be viewed as one and the same as far as debts and obligations vis-à-vis third parties are concerned. In general, the Supreme Court is highly reluctant to draw this conclusion and only does so under special circumstances. Needless to say, numerous independent facts can be considered that together result in a situation in which a court is likely to hold that a disregard for the corporate separateness is warranted on the grounds of identification. In its determination, the court will examine many factors under a 'balancing test'. This typically means that no specific weight will be given to any particular 'piercing factor', and the court will have broad discretion in deciding each case according to its particular facts. It is therefore often difficult to predict the outcome of a challenge to the corporate separateness of a shareholder and his company, particularly if the corporate group operates in a highly integrated fashion.

2.4 Ultra Vires

2.4.1 General

Under relevant Dutch law, a legal transaction entered into by a company can be nullified in the event that the corporate objects of the company as laid down in its Articles of Association were exceeded by this transaction (*ultra vires*) and the other party to the transaction knew or should have known this without further investigation. Most authoritative writers take the view that the acts of a company should be in its best interests, in the sense that such acts must be conducive to the realization of the objects of the company as laid down in its Articles of Association. Only the company itself or a trustee in bankruptcy is entitled to invoke the nullification of the transaction.

2.4.2 *Ultra vires in the event of issuance of security*

The issuance of security by company to a lender raises the question whether this issuance might be voidable under the *ultra vires* concept. Especially in respect of the financing of a group of companies (or one company out of a group of companies) whereby a security interest is granted in order to secure the obligations of an affiliate, the *ultra vires* doctrine is complex, with many grey, undecided, areas.

Downstream security (a parent granting a security interest in its assets in order to secure the obligations of a subsidiary) does not in most cases cause a problem since the granting of a security interest for the obligations of a subsidiary is usually considered to be within the corporate objects of the (parent) company. Assuming that the entering into the

transaction in respect of which a security interest is granted is in the interest of such subsidiary - which is normally the case - the granting of the security interest is in the best interest of the (parent) company because the (continued) wellbeing of its subsidiary ensures the wellbeing of the (parent) company.

As for upstream security (a subsidiary issuing security for the obligations of a parent company) the Dutch courts have in a limited number of cases accepted the nullification of the granting of such security interest on the basis of the *ultra vires* doctrine. This, however, always occurred in fairly specific circumstances, for example, because the granting of the security interest was not provided for in the corporate objects clause of the company. The opinions in literature differ considerably as to the question of whether and, if so, under what particular circumstances, the granting of an upstream security interest can be nullified.

Furthermore, with respect to upstream security or lateral security interests, a distinction can generally be drawn between a group financing pursuant to which all subsidiaries are borrowers under the credit facilities or are entitled to use the credit facility extended to the parent or a group finance company (group financing), on the one hand, and the financing of one particular borrower for the purpose of its own activities on the other. Although the legal *ultra vires* test would be no different, group financing gives rise to less risk because in all likelihood the interests of the companies involved in the financing would be more clearly served, and therefore the issuance of security would be equally in the interest of the companies.

2.5 403 Statement

A parent company may voluntarily assume joint and several liability for any liabilities arising from legal acts performed by one or more of its direct or indirect subsidiaries (with the exception of liability arising from tort) in the form of a '403 statement', i.e. a statement issued by a parent company, pursuant to Section 2:403 of the Civil Code. The main reason for issuing this kind of statement is that the annual accounts of the subsidiaries are governed by less strict rules than would otherwise apply, provided that certain other criteria are also met. Consequently, the creditors may rely on the information and liability of the parent company. From the above, it follows that the annual accounts of the parent company and the subsidiary must be presented on a consolidated basis.

Although the language of Section 2:403 Dutch Civil Code is clear, it has been argued that creditors of a subsidiary should first take recourse against those assets of the subsidiary and only if the assets prove insufficient for settlement of the claim, should the parent become liable. However, the doctrine holds that the creditors of the subsidiary can take

action either against the parent or against the subsidiary. If one of the debtors, parent or subsidiary, has settled the claim, they both are discharged from liability. The Dutch Supreme Court has confirmed that the creditors of a subsidiary can simultaneously hold the parent company and its subsidiary liable pursuant to a 403 statement. Consequently, it is not a pre-requisite to first take recourse against the subsidiary before taking action against the parent.

3 Main regulatory and antitrust issues

3.1 Introduction

This chapter serves to discuss the main regulatory issues that come to bear when deciding to invest in the Netherlands, including those regulatory rules which must be observed in the preparation and the effectuation of mergers, acquisitions and change of control transactions regarding Dutch companies. Furthermore, we provide a (very general) outline of Dutch antitrust law.

3.2 Main Regulatory Issues

3.2.1 *Foreign investments regulations*

The Dutch government follows a policy aimed at creating a positive environment in which to do business. There are no special rules that apply exclusively to foreign-owned companies as far as investing in or exploitation of (real) property is concerned, nor are there special rules that apply to holding shares in a public or private company, or for trading in the Netherlands in general. There is, however, a certain measure of control on all investments in the Netherlands whether or not made by foreign investors. This is discussed in section 3.2.4.

National investment incentives are available to foreign and Dutch industrial and commercial companies, including substantial subsidies, services, and tax exemptions (see chapter 4). State development and state venture capital companies may provide risk-bearing capital or reimburse losses. The Ministry of Economic Affairs provides grants, loans, and credit guarantees. National incentives include energy grants (e.g. the Decree on Tender Offers Industrial Energy Savings), environmental tax allowances (e.g. the Environmental Investment Allowance) and subsidies, labor subsidies, subsidies to encourage innovations, and finance schemes. In addition, at a regional level there are investment premium regulations for industrial projects in 'stimulus areas' such as in the north and south of the Netherlands.

3.2.2 *Exchange control*

The Foreign Financial Relations Act 1994 (*Wet financiële betrekkingen buitenland 1994*) permits Dutch exchange transactions with few administrative restrictions.

Existing restrictions, which may be imposed by the Dutch Central Bank (*De Nederlandsche Bank* or DNB) or the Ministry of Finance as the Dutch monetary authorities, are explicitly

formulated in their policies. The Dutch Central Bank requires that any Dutch company of which the shares are owned by, or which is controlled by, a foreign person or legal entity, which engages in the obtaining of funds from non-residents of the Netherlands in order to transfer these funds to non-residents of the Netherlands, complies with certain notification and reporting requirements to the Dutch Central Bank in order to supply it with relevant information regarding its ownership and activities.

In the context of the fight against money laundering, the European Parliament adopted a Directive at the end of 2001 which extends the identification obligation and the reporting obligation in respect of unusual transactions. As a result of this extension, the Disclosure of Unusual Transactions Act (*Wet melding ongebruikelijke transacties* or 'WMOT') and the Identification regarding Provision of Services Act (*Wet identificatie bij dienstverlening* or 'WID') also applies to services rendered by lawyers (attorneys and civil law notaries), tax advisors and accountants as of 1 June 2003. The obligations as imposed by law entail that these advisors are required to identify a client before they may provide their advisory services. Dutch legal entities or foreign legal entities operating in the Netherlands and registered as such at the Chamber of Commerce will be identified by means of a certified extract from the Chamber of Commerce and a copy of a valid ID or of an official document that proves the identity of the representative of such legal entity. Foreign legal entities not registered in the Netherlands are required to submit a certified extract from the country where they have their registered office. The actual implications of the new legislation are as yet unclear in a number of respects.

According to the WMOT, certain transactions have to be reported by the financial institution and/or the advisors to the Office for the Disclosure of Unusual Transactions (*Meldpunt Ongebruikelijke Transacties*), if and when the institution and/or advisor has reason to suspect the legality of a transaction on the basis of a number of factors included in the Act. The reporting obligations constitute an infringement on the privileged attorney-client relationship explicitly provided for in this legislation. Advisors are forbidden to inform a client that they will be making or have made a report. The reporting obligation does not apply to initial meetings and to certain services provided during or to prevent legal proceedings.

3.2.3 *The main regulatory rules regarding mergers, acquisitions and change of control transactions*

The preparation and the effectuation of mergers, acquisitions and change of control transactions between Dutch companies only, or between Dutch and foreign companies, are almost exclusively regulated in the SER Decree Merger Code of Conduct 2000 (*SER-besluit Fusiegedragsregels 2000*: the 'SER Merger Code') and the Securities Transactions

Supervision Act 1995 (*Wet toezicht effectenverkeer 1995* or 'Wte').

The SER Merger Code applies to mergers and acquisitions resulting in the direct or indirect control over the activities of a company or part thereof and involving a company or group of companies established in the Netherlands regularly employing 50 employees or more (or to companies with less than 50 employees pursuant to a collective bargaining agreement (*collectieve arbeidsovereenkomst* or 'CAO') (see section 5.5). Each of the (foreign) companies involved has a duty to comply with the SER Merger Code in order to protect the employees involved. The SER Merger Code is not applicable (i) in the event that all companies involved in the merger are affiliates; or (ii) in the event that the company over which control is transferred as a result of a merger, employs less than ten employees on a regular basis; or (iii) in the event that the merger has no connection with the Netherlands.

According to the SER Merger Code, when negotiations reach a stage that justifies the expectation that an agreement can be reached, both the trade unions involved, if any, and the Social Economic Council (*Sociaal-Economische Raad* or 'SER'), must immediately be notified (on a confidential basis) of certain detailed information regarding the merger. In principle, such notification must take place prior to the signing of a letter of intent or a memorandum of understanding.

Upon this notification, the trade unions may exercise their right to obtain further confidential information, such as (i) an explanation of the reasons for the merger; (ii) the intentions of the company policy to be pursued; (iii) the anticipated social, economic and legal consequences and the proposed measures to be taken in connection therewith.

Whenever a dispute arises as to whether or not the information provided is adequate, the Dispute Committee for the SER Merger Code (*Geschillencommissie Fusiegedragsregels*) will decide upon such request by the companies concerned or the trade unions.

The trade unions must be given the opportunity to express their opinion of the merger from the viewpoint of the employees, before the parties involved have agreed on the basic terms of the envisaged transaction. Their consent, however, is not required. The trade unions must also be informed in advance of the content of any public announcement in connection with the preparation or effectuation of a merger.

The SER Merger Code does not have the force of law. In the case of violation of the SER Merger Code, however, the Dispute Committee for the SER Merger Code may issue either a public statement concerning the non-observance of the SER Merger Code or a reprimand.

The Securities Transactions Supervision Act 1995 (*Wet toezicht effectenverkeer 1995* or *Wte*) and the Securities Transactions Supervision Decree 1995 (*Besluit toezicht effectenverkeer 1995*) contain specific provisions for the protection of shareholders to be observed with respect to a public offer for shares listed on Euronext Amsterdam, or regularly traded on the over-the-counter market. By means of provisions regulating the timing, accuracy, and completeness of the information to be provided to the public with respect to the offer, these rules purport to establish a level playing field for all shareholders of the target, enabling them to make a proper judgment as to whether or not to accept the offer, thereby also avoiding insider dealing.

The Authority for the Financial Markets (*Autoriteit Financiële Markten* or *AFM*) monitors compliance with the rules regarding the public offer. Any announcement to the public should be sent to the AFM prior to such announcement. The Minister of Economic Affairs may also request information on the reasons and background of the merger and the expected economic and social consequences thereof. Moreover, the offer documentation must be reviewed by Euronext Amsterdam, which may also require additional information.

In addition to the aforementioned regulations, the Works Council Act as discussed in section 5.7, and the Competition Act as discussed in section 3.3 may be applicable.

3.2.4 Other regulations

On 1 January 2007 the Act on Financial Supervision (*Wet financieel toezicht* or *Wft*) entered into force. The Wft consists of six parts: General, Market Access for Financial Enterprises, Prudential Supervision of Financial Enterprises, Supervision of the Conduct of Financial Enterprises, Supervision of Financial Markets and Supervision of Clearing and Settlement Systems. The part on Supervision of Clearing and Settlement Systems will be added to the Act at a later date.

The Wft charges the Authority for the Financial Markets (*Autoriteit Financiële Markten* or *AFM*) with the supervision of the financial markets. This supervision is focused on orderly and transparent financial market processes, integrity of relations between market players and due care in the provision of services to clients.

The part on the Supervision of the Conduct of Financial Enterprises in the Wft contains rules which financial enterprises have to observe when providing their services, such as the rules for informing consumers (transparency) and the financial enterprises' duty of care. The supervision is focused on orderly and transparent financial market processes, integrity of relations between market players and due care in the provision of services to clients. The Wft is amongst others relevant for the following financial market players:

Banks: For the purposes of supervising the conduct of banks, the AFM makes a distinction between various categories of banks. This distinction is based upon the scope of application of the laws under which the AFM exercises supervision. The categories that the AFM distinguishes between are: (a) banks that function as securities institutions, collective investment schemes and/or credit providers; and (b) banks that do not function as the aforementioned institutions, but are active on the securities markets. The AFM is the licensing body for banks as referred to in the Wft.

Investment firms: Under the Wft investment firms are securities brokers and portfolio managers. The AFM is the licensing body for investment firms as referred to in the Wft.

Collective investment schemes: Under the Wft collective investment schemes are investment companies and unit trusts. The AFM is the licensing body for (the management companies of) collective investment schemes as referred to in the Wft.

Financial service providers: Under the Wft a financial service provider is the party that provides a financial product other than a financial instrument (this therefore includes: banks and insurers), or that advises, mediates (including in respect of reinsurance), or acts as an authorized agent granted a power of attorney or an authorized agent granted a sub-power of attorney. An advisor in financial instruments that also provides investment services is not only designated an investment firm, but also a financial service provider. Investment firms that advise on financial instruments therefore fall into the category of financial service providers. The Wft Exemption Regulation entirely or partially excludes a number of financial service providers from compliance with the Wft rules.

On 31 December 2006 the Act on the Supervision of Financial reporting (*Wet toezicht financiële verslaggeving* or Wtfv) entered into force.

Under the Wtfv, the AFM must maintain a register which includes, among other things, the companies' financial reports. With this in mind, companies have to submit their annual reports and annual accounts to the AFM within eight days of the annual accounts being adopted. Companies can submit the data as a hard copy or in digital form. Digital versions of the annual reports and annual accounts can be submitted easily via the AFM service desk. Companies submitting digital versions are required to use a DigiD access code. The AFM incorporates financial reports into the public register within five days following the working day on which it received said reports. This register can be consulted on the AFM website (http://www.afm.nl/registers_en/).

The AFM only supervises compliance with the applicable standards for reporting. It does not

perform any prior audits of financial reports. The Wtftv is based on retrospective supervision by the AFM, that is, *after* the annual accounts have been adopted. Until and unless the AFM brings a case before the Enterprise Section of the Court of Appeal (*Ondernemingskamer*), the supervision will not be public. During this phase, the AFM and the company will have to reach agreement together, wherever such an agreement is possible. This will involve the AFM pointing out to the company its responsibility for the correct application of the appropriate reporting regulations. It is up to the company to actually take up this responsibility. If necessary, the AFM will initiate annual accounts proceedings at the Enterprise Section of the Court of Appeal based on its independent authority.

Imports into and exports out of the Netherlands of goods may be subject to registration or license requirements by virtue of the various regulations and decrees issued on the basis of the Import and Export Act of 1963 (*In- en Uitvoerwet*). In addition, imported products may be subject to various regulations regarding safety, quality, packaging and selling of products, by virtue of the Consumer Goods Act (*Warenwet*) and the various regulations and decrees based thereupon.

As of 1 January 1998, the Companies Formally Registered Abroad Act (*Wet op de formeel buitenlandse vennootschappen*) entered into force. With this Act, the legislator aims to apply certain requirements relating to (minimum) capitalization, administration and publication to foreign corporations which are operating (almost) exclusively in the Netherlands and have no real connection with their country of incorporation. The Act constitutes an exception to the Dutch law rule of doctrine that as to its establishment, existence and corporate governance a company is governed by the laws of the country in which it is established (*'incorporatie-leer'*). As a result of recent European Court of Justice case law, the Act was amended with effect on 1 June 2005, which amendment exempts companies formed under the laws of members states of the European Union or the European Economic Zone from the provisions contained in the Act.

3.3 National Antitrust Issues

3.3.1 General

The Competition Act (*Mededingingswet*), which entered into force on 1 January 1998, is based on European competition law (in particular, Sections 81 and 82 of the EC Treaty and the EC Merger Regulation). Many definitions used in the Competition Act have the same meaning as that given in European competition law. European competition law remains applicable to acts that may influence trade between the European Union (the 'EU') Member States. The Competition Act applies to acts that restrict competition within the Netherlands. The most important articles of the Competition Act are discussed briefly below.

3.3.2 *Agreements affecting competition*

The Competition Act prohibits agreements and concerted practices between (associations of) companies that may restrict competition in the market in the Netherlands. In as far as they are binding upon the parties, contractual agreements affecting competition are automatically null and void. Accordingly, it is not possible to enforce such agreements in court.

The exceptions to this prohibition are laid down in the Competition Act.

The prohibition does not apply to *inter alia*:

- (i) Agreements affecting competition which comply with the conditions of an EC group exemption (for instance, the group exemptions for vertical agreements, research and development and technology license agreements);
- (ii) Agreements affecting competition which have been exempted from this prohibition because they fall within the scope of a Dutch group exemption to be determined by a Ministerial Decree. Currently, three such Decrees are in force exempting (i) combination agreements with respect to tendering; (ii) branch protection agreements between retailers and new shopping malls; and (iii) certain cooperation agreements concerning retail trade. These Decrees expire on 1 January 2008;
- (iii) Agreements concluded by public service companies, to the extent that the application of the prohibition would frustrate the performance of the public service tasks entrusted to these companies;
- (iv) Agreements affecting competition which are of minor importance. For this category of agreements, the Competition Act contains a *de minimis*-exemption (*bagatelvrijstelling*). This exemption is applicable to agreements affecting competition involving no more than eight companies whose combined annual turnover does not exceed € 4,540,000 (if the companies concerned are active mainly in delivering goods) or € 908,000 (in all other cases).

If an agreement affecting competition cannot be categorized under one of these exceptions, it will still be exempted from the aforementioned prohibition if the economic benefits of the agreement outweigh the restrictions on competition. This will only be deemed the case if the agreement contributes to improving the production or distribution of goods or services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and without imposing restrictions which are not indispensable to the attainment of these objectives and without eliminating competition in respect of a substantial part of the products or services in question

3.3.3 *Economic dominance*

The Competition Act prohibits companies from abusing a dominant position (*economische machtspositie*). A dominant position is defined as a position of one or more companies that enables them to prevent effective competition from being maintained on the Dutch market or a part thereof, or giving them the means to act to a great extent independently from competitors, suppliers, customers or consumers. To establish such dominance requires an economic analysis for which a definition of the relevant market is essential. Having a dominant position is in itself not prohibited. Only the abuse thereof is prohibited. Unjustified refusals to supply, charging unreasonable prices, or other unreasonable terms and conditions and tie-ins are examples of abuse. Public service companies may request an exemption from the prohibition in the event that the application thereof would prevent these companies from carrying out the public service task entrusted to them.

3.3.4 *Merger control*

The Competition Act also provides for merger control. Concentrations (mergers, takeovers and certain types of joint ventures) have to be reported to the Competition Authority, prior to their becoming effective, in the event that (i) the combined worldwide annual (group) turnover of the companies concerned exceeds € 113,450,000, and (ii) at least two of the companies concerned each have an annual (group) turnover within the Netherlands of € 30,000,000. The Competition Authority has to decide within four weeks of receipt of a notification whether a permit is required for the concentration (first phase decision). During said period the concentration may not become effective. The Competition Authority will require a permit if it is likely that a dominant position may be created or strengthened on the Dutch market. The Competition Authority must decide on the application for a permit within thirteen weeks (second phase decision). During this period, the concentration will be suspended. The Competition Authority will refuse to grant a permit if the investigation that is carried out in this period shows that the planned concentration would indeed lead to the creation or strengthening of a dominant position on the Dutch market. In such event, the concentration may not be implemented. Decisions will only be taken upon payment of a filing fee of € 15,000 (first phase decision) and € 30,000 (second phase decision).

The Dutch Competition Act does not apply to concentrations that fall under the EU Merger Control Regulation, which regulation applies to mergers that comply with the following criteria:

- A. (i) The combined aggregate worldwide (group) turnover of the companies concerned exceeds € 5 billion;
- (ii) At least two of the companies concerned have an annual (group) turnover in the EU exceeding € 250 million, and

(iii) Not all of the companies concerned realize two-thirds or more of their (group) turnover in the EU within one and the same Member State.

or

- B. (i) The combined aggregate worldwide (group) turnover of all the companies concerned exceeds € 2.5 billion;
- (ii) In each of at least three EU Member States, the combined aggregate (group) turnover of all the companies concerned exceeds € 100 million;
- (iii) In each of the three Member States included for the purpose of (ii), the aggregate (group) turnover of each of at least two of the companies concerned exceeds € 25 million, and
- (iv) The aggregate Community-wide (group) turnover of each of at least two of the companies concerned exceeds € 100 million, and
- (v) Not all of the companies concerned realize two-thirds or more of their (group) turnover in the EU within the same Member State.

3.3.5 Enforcement

The enforcement of the Competition Act is entrusted to the Dutch Competition Authority (*Nederlandse mededingingsautoriteit* or 'NMa'). The Competition Authority operates independently from the Ministry of Economic Affairs. .

In the event of a violation of the prohibition on agreements affecting competition or the prohibition on abuse of a dominant position, the Competition Authority may impose an order under penalty or a fine. Such penalty or fine may not exceed € 450,000 or 10% of the annual turnover of the company, whichever is the greatest. Fines may also be imposed in the event of a violation against the rules regarding merger control. The Competition Authority has extensive investigative powers comparable to those of the European Commission. The decisions of the Competition Authority are open to appeal before the administrative section of the District Court of Rotterdam and further appeal before the Court of Appeal for Trade and Industry (*College van beroep voor het bedrijfsleven*).

Companies that suffer from acts that restrict competition may file a complaint with the Competition Authority. They may also go to court. The court may determine that the agreements affecting competition are null and void and may issue an injunction against the companies concerned, requiring them to cease the anti-competitive behavior and to pay damages. However, the courts do not have the power to impose fines, grant exemptions, or examine mergers. These are the exclusive powers of the Competition Authority.

4 Tax aspects

4.1 Introduction

Traditionally, the Netherlands has played an important role in the international tax arena, primarily as a result of the following advantageous features of the Dutch tax system:

- (i) The 'participation exemption' which provides for a full exemption of all income from qualifying subsidiary companies: i.e., dividends received and capital gains realized upon the alienation of shares;
- (ii) The beneficial and extensive tax treaty network which provides for low or no withholding taxes on dividends, interest and royalties paid to Dutch residents;
- (iii) The absence of Dutch withholding tax on interest and royalties paid from the Netherlands;
- (iv) The possibility of obtaining advance confirmation on various tax issues from the Dutch tax authorities; and
- (v) The lack of profit distribution requirements.

This chapter provides a brief overview of the main Dutch taxes that US companies may encounter when either investing in the Netherlands or routing their investments through the Netherlands.

4.2 Income Tax

4.2.1 General

Individuals living in the Netherlands (resident taxpayers) and individuals from outside the Netherlands receiving income from the Netherlands (non-resident taxpayers) are subject to Dutch income tax (*inkomstenbelasting*). Non-resident taxpayers can in certain situations opt to be taxed as residents. Dutch income tax is levied together with a taxpayer's social security contributions. Resident taxpayers are subject to tax on their worldwide income. Non-resident taxpayers are only subject to Dutch income tax on the part of their income that originates from the Netherlands.

On 1 January 2001, the Netherlands has adopted a new income tax system. In this system, distinction is drawn between three different types of income. These three types of income are referred to as Box 1, Box 2 and Box 3 income, and each have a different tax rate.

4.2.2 *Box 1: taxable income from work and home*

Income belonging to Box 1 is subject to a progressive tax rate that is divided into four scales, the highest scale having a rate of 52%. The elements of Box 1 income are:

- (i) Taxable profits from business activities. Taxable profits from business activities are the aggregate amount of profits the taxpayer receives as entrepreneur from one or more enterprises, reduced by the entrepreneurial reduction;
- (ii) Taxable wages. Taxable wages are wages, reduced by the employee's reduction;
- (iii) Taxable income from other activities. Taxable income from other activities is the aggregate amount of the income from one or more activities that do not generate taxable profits from business activities or taxable wages;
- (iv) Taxable income from periodic payments. Examples of periodic payments are annuities, certain social security payments, and pension payments. The aggregate amount of such income is reduced by costs that are made for the acquisition, collection and preservation of such periodic payments;
- (v) Taxable income related to the taxpayer's self-occupied house. Taxable income related to the taxpayer's self-occupied house is the benefits from a self-occupied house and the benefits from a capital redemption insurance that is related to a self-occupied house, reduced by the deductible costs that weigh upon the benefits from a self-occupied house. A fixed progressive percentage of the value of the self-occupied house is deemed to be a benefit in this respect, whereas (part of the) mortgage interest is considered to be a cost;
- (vi) The negative expenditure for income provision. For instance surrendered annuities are considered such negative expenditure;
- (vii) The negative personal allowance. Such negative allowance is, for instance, a refund for expenses that have been deducted in a previous year as personal allowance.

To be reduced with:

- (viii) Expenditure for income provision. Examples of such expenditures are premiums for retirement annuities and premiums for bridging annuities;
- (ix) Deduction for little or no mortgage on self-occupied house, to the extent the taxable income related to the taxpayer's self-occupied house would exceed the related tax deductible expenses, a deduction could be claimed for the difference;
- (x) The personal allowance. The personal allowance is the aggregate amount of certain expenses as defined in law, such as gifts, maintenance expenses and exceptional expenses.

Negative income of one of the elements mentioned above may be set off against positive income of another element in this box. Losses may be carried back for three years or may be carried forward for nine years, after which they expire.

4.2.3 *Box 2: taxable income from substantial interest*

Income derived by the taxpayer from a company in which he has a substantial interest is taxed in Box 2 at a rate of 22% on the first € 250,000 and 25% on the excess (2007 rates). In general, a taxpayer has a substantial interest if he, either alone or together with his partner (directly or indirectly):

- (i) Holds either shares, (call-)option rights on shares, or a usufruct on shares (directly or indirectly) that constitute at least 5% of the paid-up capital of a resident or non-resident company;
- (ii) Owns profit-sharing certificates which entitle to at least 5% of the year profit and/or liquidation surplus of the resident or non-resident company.

Taxable income from substantial interest consists of regular benefits (such as dividends or deemed income from foreign investment companies) and alienation benefits (capital gains at disposal) and is calculated by balancing the income from substantial interest with the losses to be settled from substantial interest. Alienation benefits are calculated by subtracting the acquisition price of the shares from the transfer price of the shares.

4.2.4 *Box 3: taxable income from savings and investments*

In Box 3, a rate of 30% is levied on a deemed fixed return of 4% of the one-year average (positive) balanced total of a taxpayer's assets (such as saving deposits, rental property and shares) and his debts. Certain assets such as works of art, investments in listed green funds or investments in environmental projects are exempt.

Assets (and debts) that generate Box 1 or Box 2 income are not included in this balanced total. The balanced total is reduced by the personal tax allowances. Examples of personal tax allowances are expenses for child or partner maintenance and study costs, and they can only be applied by resident taxpayers. For the year 2007, the first € 20,014 (double for married couples) of the balanced total is exempted.

The income tax payable is the aggregate amount of the separately calculated tax due per box reduced by a personal fixed tax credit of € 2,043 (in 2007).

4.3 Wage Withholding Tax

4.3.1 General

Wage withholding tax (*loonbelasting*) is an advance tax payment for income tax and consists of wage tax and social security contributions. The rate of wage withholding tax equals the income tax rate of Box 1. Social security contributions are withheld over the first two scales. Employers are obliged to withhold wage withholding tax on the wages they pay to their employees. Employees may credit the withheld wage tax to their income tax. Wage withholding tax is calculated on the remuneration an employee receives for his work.

Wage withholding tax is also due on pension benefits and benefits such as annual bonuses, stock options, and 'free' meals. Employers are allowed to make certain tax-free reimbursements to their employees up to a given limit. Such reimbursements include compensation for travel expenses, work clothing, and specialized literature.

4.3.2 The '30% facility'

Employees coming from outside the Netherlands (expatriates) who temporarily work for a Dutch employer and satisfy certain conditions may benefit from the '30% facility'. On the basis of this facility, the employer may grant the expatriate employee a tax-free lump sum allowance for the extra costs that relate to his temporary stay in the Netherlands (extraterritorial costs). This tax-free allowance equals a maximum of 30% of the sum of the employee's wages and the allowance. In addition, the employer may also reimburse free of tax the school fees the employee pays for his children to attend an international school. The 30% facility may be applied for a maximum of ten years.

4.4 Corporate Income Tax

4.4.1 General

Dutch corporate income tax (*vennootschapsbelasting*) is levied at a progressive basis, divided into three scales. The first € 25,000 of a company's taxable profits is taxed at a rate of 20%, profits exceeding € 25,000 but less than € 60,000 at a rate of 23,5% and 25.5% on the excess (in 2007).

Corporate income tax is levied from, among others, NVs and BVs, cooperatives, and open limited partnerships (*open commanditaire vennootschap*). A closed limited partnership (*besloten commanditaire vennootschap*) is transparent for Dutch corporate income tax purposes. A limited partnership is considered to be 'closed' if explicit, unanimous and unconditional prior consent is required from all partners at admission and/or replacement of a new limited partner. This consent is not required for open limited partnerships.

Corporate income tax is levied over the taxable profits reduced by deductible losses. Losses may be carried back one year and forward nine years. However, carry forward of losses will be restricted if over 30% of the shares (or interest) in the taxpayer are transferred to a third person. Some other restrictions also apply for holding and financing companies.

Determination of profits takes place according to the principle of 'sound business practice'. This principle is very general and has been widely developed in case law. In accordance with this principle, in general, unrealized losses may be taken into account in a certain year, whereas unrealized profits may be disregarded.

Deductible costs for corporate income tax purposes include interest on loans and annual depreciations on assets used in the business enterprise of the taxpayer.

Some types of interest are not deductible. These types include interest on loans that are considered to be equity for the taxpayer, and interest paid in the form of shares or option rights on shares in the taxpayer or a related entity. Interest on intercompany loans that are taken up for certain specifically defined transactions is not deductible or is deductible only if the taxpayer demonstrates valid business reasons for the transaction and the related company loan, or demonstrates that the interest is subject to an effective tax rate of at least 10% over a taxable profit calculated in accordance with Dutch standards.

Further, restrictions could apply to the deductibility of interest due on a loan if the taxpayer is affiliated with other entities in a group, and would be in an excess debt position (thin capitalization rule). The taxpayer will be in an excess debt position if the average balance of the (interest bearing) loans payable less the loans receivable is more than three (or a factor which coincides with the debt-to-equity ratio of the group) times the average tax equity (excluding tax reserves) plus € 500,000. If and to the extent a taxpayer has excess indebtedness, no deduction will be allowed for an amount of interest (including costs of indebtedness) which is equal to the proportion of excess indebtedness over the average indebtedness, but not exceeding the amount of interest directly or indirectly due to entities which are related to the taxpayer, reduced with the amount of interest with respect to loans extended to such entities.

Various systems of depreciation are allowed provided that they are used consistently and in accordance with sound business practice. The annual amount of depreciation depends on the historical cost price, the service life of the asset, and the residual value. Goodwill may also be depreciated. As from 2007, depreciation on real estate, which is used as a portfolio investment, is denied to the extent the book value would drop below the market value of the property. For real estate held as business assets, depreciation is denied to the

extent the book value would drop below 50% of the market value of the property.

Dutch companies are allowed to file their tax returns in a foreign currency if their annual reports are drawn up in this foreign currency. In this way, currency results between the euro and the foreign currency in question will not lead to taxable profits. The taxpayer will have to file a request with the tax authorities in the year preceding the year in which the taxpayer wants to begin filing tax returns in the foreign currency. The taxpayer is then obliged to file tax returns in that foreign currency for at least ten years.

Foreign entities are subject to corporate income tax in the Netherlands if they either derive income from a business carried on through a permanent establishment or a permanent representative in the Netherlands or they derive income from a substantial shareholding held in a company established in the Netherlands (including interest income on a loan granted to a company established in the Netherlands in which the foreign entity holds a substantial interest (*meesleepregeling*), which is not part of its business enterprise. Foreign entities that hold Dutch real estate are deemed to carry on a business in the Netherlands. Furthermore, a foreign entity will generally be considered to have substantial shareholding in a Dutch entity if it holds shares, option rights on shares, or a usufruct on shares (directly or indirectly) that constitute at least 5% of the paid-up capital of such company.

4.4.2 Group interest box

As an alternative to the finance company regime in the Netherlands which the European Commission judged as not in line with the internal market, the Dutch government introduced the group interest box to (re)attract foreign capital. The group interest box is applicable upon request of the taxpayer, but an election applies to all Dutch group members. An election applies for a period of at least three years.

During the application of the group interest box, the balance of qualifying group interest income and expense will be effectively taxed at a reduced rate of (at least) 5%. The amount eligible for the 5% rate is capped at the legal interest rate (currently set at 5.25%, 3rd quarter 2007 rate) on the average equity of the taxpayer in the relevant year. Therefore, interest on group loans may be taxed at a higher effective rate than 5%. Income from short term investments held for future acquisitions (so-called war chest) qualifies for inclusion in the group interest box. Foreign exchange fluctuations and other results realized on group loans and debts are subject to the ordinary taxation rules and are excluded from taxation in the group interest box.

However, the group interest box will not become effective before the European Commission approves the group interest box under a pending State Aid procedure. If the

Commission approves the provision, the application of the group interest box will take place with retro-active effect as of January 1st of the year in which the approval has been granted. It is expected that before the end of 2007 it will become clear whether the group interest box is approved or not.

4.4.3 Patent box

To encourage investment in research and development (“R&D”), costs of producing self-developed intangible assets can be immediately charged to the taxable result instead of being capitalized. Furthermore, the patent box has been introduced which will be applicable upon request of the taxpayer. Under the patent box, the ‘net earnings’ derived from a self-developed intangible asset may be taxed at a decreased rate of 10%. The amount of net earnings under the patent box regime is capped at four times the total amount of the R&D costs of the intangible assets included in the patent box. The patent box only applies to net income from intangible assets exceeding the R&D expenses deducted earlier.

The patent box is not applicable to self-developed brands, images or other similar assets. The patent box has become effective as of 1 January 2007.

4.4.4 Participation exemption

Pursuant to the participation exemption, dividends received from, and capital gains (including currency exchange gains) realized on, the alienation of a qualifying shareholding may be exempted. Generally, the participation exemption applies if the following requirements are met:

- (i) The taxpayer owns a shareholding of at least 5% of the nominal paid-in share capital (or under circumstances, of the voting rights) of a subsidiary company;
- (ii) The subsidiary does not qualify as a low taxed passive investment subsidiary (“LTPI”).
A company is a passive subsidiary when more than 50% of its assets, directly or indirectly, are of a passive nature. Under certain circumstances, intra-group loans are deemed to be of a passive nature. A company is subject to a low tax when its tax burden is less than 10% of the profits calculated in accordance with Dutch tax standards.

The participation exemption also applies when, on a consolidated basis, 90% or more of the assets of a subsidiary consist of real property, provided the subsidiary company is not a Dutch “portfolio investment institution” (“real estate company”) subject to a 0% tax rate. If the shareholding drops below the 5% threshold and the participation exemption has been applicable for a continuous period of at least one year, the participation exemption will continue to apply for a period of three years. Under transitional rules, this exception to

the 5% shareholding test is also applicable to shareholdings which qualified for the participation exemption regime before 1 January 2007. The 5% shareholding test does not have to be met if an affiliated entity already owns 5% or more.

An investment in an LTPS qualifies for a credit for underlying tax as opposed to the exemption, provided the subsidiary (the LTPS) is subject to a tax on its profits.

An annual mark-to-market revaluation applies to a substantial (25% or more) investment in passive low taxed subsidiaries provided that its assets consist, directly or indirectly, for 90% or more of passive portfolio type of investments.

If a qualifying participation is held, hybrid loan receivables and profit participating certificates will be 'dragged-along'. If a taxpayer has issued a hybrid loan to a company which is a qualifying participation for an affiliated company of the taxpayer, the participation exemption will apply to the hybrid loan receivables.

4.4.5 Fiscal unity

Profits and losses of a parent company can be consolidated with the profits and losses of one or more of its subsidiaries if these companies form one tax group (fiscal unity). A fiscal unity can be formed upon request of the companies involved. Requirements for establishing a fiscal unity are that the parent company must have the full ownership (including the attached voting rights) of at least 95% of all shares of all share class in the subsidiary and both these companies must have their residence in the Netherlands. Further, the companies must have similar financial years, and profits must be calculated according to the same tax regulations. During the existence of a fiscal unity, the companies involved must observe certain conditions that are laid down in the Corporate Income Tax Act. The fiscal unity can be terminated upon request, or will be terminated automatically if any of the conditions are no longer met.

In anticipation of the final decision in the *Marks and Spencer* case the fiscal unity regime was extended to allow the inclusion of non-Dutch resident group companies. The result of this rule is that a non-Dutch resident company can be a parent or a subsidiary in a fiscal unity if the non-resident carries on a business through a permanent establishment in the Netherlands and the profits derived from the permanent establishment are taxable in the Netherlands.

4.4.6 Mergers

Dutch civil law provides for three kinds of mergers: the stock merger (*overdracht van aandelen*), the enterprise merger (*activa/passiva transactie*) and the legal merger

(*juridische fusie*). Corporate income tax is not usually due in the event of a stock merger, as the participation exemption is applicable. If certain conditions are satisfied, taxes will also not be levied over profits arising from an enterprise or legal merger.

4.4.7 Advance certainty tax authorities

It is possible to obtain advance certainty from the Dutch tax authorities regarding the fiscal treatment of income received by corporate taxpayers. Advance Tax rulings can be obtained in order to obtain advance certainty regarding, amongst others, the application of the participation exemption.

Until 1 April 2001, the Dutch tax authorities also issued standard rulings to companies engaged in intermediary financing arrangements, confirming the arm's-length character of earnings received by them. On the basis of the ruling policy of that time, such companies' income was considered at arm's-length if they reported in their profits a certain (marginal) standard spread.

As criticism of the EU Code of Conduct discussion against this ruling policy grew, the Dutch tax authorities introduced a new policy on 1 April 2001. Intermediary financing companies must now obtain an 'Advance Pricing Agreement' ('APA') to confirm the arm's-length character of income earned by them. APAs are only issued by the tax authorities on a case-by-case basis, provided certain substance, risk and equity requirements are fulfilled.

4.4.8 Incentive regulations

Companies subject to Dutch corporate income tax may apply a number of beneficial regulations when determining the taxable base. Examples of these regulations are:

- (i) Accelerated depreciation of certain assets that have environmental value, certain assets that relate to research and development, and assets used for activities in certain regions appointed by the government;
- (ii) Certain investment deductions such as a general investment deduction of 25% to 1% from the total amount of investments in new assets up to € 232,000 (2007 amount), an investment deduction of 44% from the total investment in a new asset that is in the interest of high energy efficiency (to be appointed by the government) up to € 110,000,000 (2007 amount), and investment deductions of up to 40% from the total amount in new 'environmental' investments, and
- (iii) Certain tax-free reserves such as the reinvestment reserve. Taxation of capital gains on the sale of certain assets can be deferred if the sale proceeds are added to the reinvestment reserve. When a new similar asset is obtained, the amount added must be set off against the cost price of the new asset.

4.5 Withholding Tax

4.5.1 Dividends

General

Dividends paid by a Dutch company are subject to 15% dividend withholding tax (*dividendbelasting*). The distributing company is obliged to file a dividend withholding tax return and withhold this tax and remit it to the tax authorities. For individuals, just like wage withholding tax, dividend withholding tax can be offset against the income tax payable. Non-residents receiving dividends from the Netherlands will often be subject to a lower rate if a tax treaty is concluded between their country of residence and the Netherlands (see below in paragraph 4.10.2).

Dividend withholding tax could also be due if a company repurchases its own shares and the repurchase price exceeds the amount of fiscally recognized capital (depending on how such repurchase is booked in the annual accounts). Reimbursement of paid-up share capital and share premium following a capital decrease is generally exempt from dividend withholding tax, unless such reduction takes place without the approval of the general meeting of shareholders and without having the nominal value of the shares reduced for a same amount through an amendment of the bylaws. Furthermore, liquidation distributions, in so far as they exceed the amount of fiscally recognized capital, are also subject to dividend withholding tax.

Parent-Subsidiary Directive

The implementation of the Parent-Subsidiary Directive in Dutch tax law provides for an exemption of withholding tax on dividends paid to a qualifying EU parent company. Generally, the exemption applies if at the time of the dividend distribution, the EU parent company has held at least 5% of the shares in the Dutch company.

4.5.2 Interest and royalties

Interest arising in the Netherlands is not subject to withholding tax, unless the interest is paid in connection with loans that function as equity. Royalties are also not subject to withholding tax in the Netherlands.

4.6 Value Added Tax

4.6.1 General

Value added tax (*Omzetbelasting*: 'VAT') is levied at each stage in the chain of production and distribution of goods and services. The tax base is the total amount charged for the transaction excluding VAT, with certain exceptions. Due to deductions in previous stages of the chain, VAT is not cumulative. Every taxable person is liable for VAT on his or her turnover (the output tax), from which the VAT charged on expenses and investments (the input tax) may be deducted. If the balance is positive, tax must be paid to the tax authorities. If the balance is negative, a refund is received. The tax paid by the ultimate consumers of the goods or services is not tax deductible. The tax is based on the VAT rate applicable to the price, exclusive of VAT, of the goods or services received.

4.6.2 Taxable persons

Taxable persons are the persons conducting a business, who are defined as those who conduct independent business, including amongst others individuals, corporate entities, partnerships and associations. Combinations of entities that are closely bound to one another by financial, organizational, and economic links can be considered as a single taxable person, being a fiscal unity for VAT purposes. As such, the supply of goods and services within the fiscal unity is not subject to VAT. A public body can also act as a taxable person if its activities do not involve public duties.

4.6.3 Tax base

There are four taxable activities:

- (i) The supplying of goods;
- (ii) The rendering of services;
- (iii) The acquisition of goods by businesses (since 1 January 1993), and
- (iv) The importation of goods.

The term 'supplying of goods' (goods are all physical objects, but also include amongst others electricity, heating and cooling) is widely interpreted. Services are defined as all activities performed for a remuneration that are not classified as the supplying of goods.

4.6.4 Exemptions

Several types of transactions are exempt from VAT. An exemption means that tax for the transactions should not be charged, and that prepaid VAT attributable to those transactions cannot be deducted.

4.6.5 Tax rates

The general rate is 19%. A reduced rate of 6% is applicable to the supply, import, and acquisition of goods and services mentioned in Annex 1 to the Turnover Tax Act. The reduced rate is mainly applicable to foodstuffs and medicines. A zero percent rate applies to goods that are transported to another EU Member State. These goods will be subject to VAT in the EU Member State to which they are transported.

4.6.6 VAT on imported goods

Goods are considered to be imported if they are imported from countries outside the EU to the customs territory of the EU. The VAT rates to be applied are the same as those applicable to the supply of goods in the Netherlands.

VAT will be levied either in the same way as import duties or, after the appropriate license has been granted, in accordance with a 'deferred payment system'. If no license is granted, the VAT due must either be paid by the person submitting the import declaration or such person must provide security for the VAT due. If the appropriate license is granted, the VAT due is collected from the business for which the goods are destined. As such, the time of payment is deferred until such business has submitted its periodic domestic VAT tax return. As a result, the time of payment coincides with the business entitlement to deduct the input VAT.

4.7 Import Duties

4.7.1 General

Import duties have to be paid when goods are imported from a country outside the EU to the customs territory of the EU. No duties are levied on the import of goods from EU Member States to the Netherlands or on the export of goods from the Netherlands to other EU Member States. Import duties generally have to be paid by the person submitting the customs declaration for importing the goods in the EU. Import duties are calculated by taking into account the following criteria: (i) the determination of the customs value of the imported goods; (ii) the assignment of the customs tariff to the goods; and (iii) the origin of the goods.

The rates on import duties vary from one product to another and depend mainly on the types of products imported.

4.8 Capital Tax

4.8.1 General

Capital tax has been abolished as of 1 January 2006.

4.9 Transfer Tax

4.9.1 General

Transfer tax (*overdrachtsbelasting*) is levied on the acquisition of both the legal and beneficial ownership and certain rights, for example, usufruct on immovable property located in the Netherlands. The tax is levied at a rate of 6%.

The taxable base is the higher of (i) the fair market value of the immovable property transferred; and (ii) the consideration received. A consideration is deemed to be the compensation received by the transferor and whatever is agreed by the parties transferring the immovable property.

Transfer tax is also levied on the acquisition of shares or similar rights in a real estate company provided that after such transfer the transferee will hold in such real estate company a direct or indirect shareholding representing at least one third or more of the paid-up capital of the company. A company is considered to be a real estate company for transfer tax purposes if its purpose is to invest in immovable property and its assets consist for 70% or more of immovable property situated in the Netherlands or similar rights to such property.

The transfer of immovable property is not subject to transfer tax if such transfer takes place within three months after a previous transfer to the extent the transfer price does not exceed the transfer price of the previous transfer. Except for the transfer of shares in a real estate company, no transfer tax is levied on the transfer of shares, debentures or other securities.

The main transfers that are exempt from transfer tax are the following:

- (i) The transfer of newly built real estate that is subject to (non-recoverable) VAT;
- (ii) The transfer of immovable property in connection with the contribution of an enterprise to a company that does not have a capital divided into shares; the transfer of immovable property in connection with the conversion of a company into an NV or a BV;
- (iii) The transfer of immovable property in connection with the winding up of a company; and
- (iv) The transfer as a result of a merger, division or internal reorganization within a corporate group, provided certain holding period requirements are met.

4.10 International Aspects of Taxation in The Netherlands

4.10.1 Avoidance of double taxation

As discussed, individuals that are resident in the Netherlands are subject to Dutch income tax on their worldwide income. Likewise, companies that are considered resident in the Netherlands are subject to Dutch corporate income tax on their worldwide profits. In order to avoid that part of this worldwide income is subject to tax twice (i.e., in the state of source and in the Netherlands) measures have been taken to avoid such double taxation. There are basically two ways in which residents of the Netherlands can avoid this double taxation on their foreign income. First, the Netherlands has concluded a substantial number of bilateral tax treaties with other jurisdictions which provide for the avoidance of double taxation. Second, the Netherlands has created unilateral provisions for situations of double taxation in which a tax treaty is absent or does not contain a provision with regard to a certain type of income. These unilateral provisions are contained in the 2001 Double Taxation (Avoidance) Decree (*Besluit voorkoming dubbele Belasting 2001*). Only residents can apply for this unilateral relief.

In general, there are three methods for the avoidance of double taxation:

- (i) The exemption via the progression method;
- (ii) The tax credit method, and
- (iii) The deduction of foreign tax as a business expense.

The first two methods are used under the 2001 Double Taxation (Avoidance) Decree and, with a few exceptions, under the Dutch tax treaties. The third method is granted under the Corporate Income Tax Act in the situation in which no arrangements for avoidance of double taxation apply.

The exemption via the progression method is generally granted for business income derived via a foreign permanent establishment, employment income and income derived from foreign real estate. The qualifying income should be subjected to any income tax levied in the country of source. In general, foreign source income is exempt on a country-per-country basis. The relief granted cannot exceed the amount of Dutch tax due. If the foreign source income exceeds the resident's total income in a given year, the 'excess' of the exemption will be provided in subsequent years. As such, the Dutch tax liability will be reduced in these subsequent years. Foreign losses incurred reduce the resident's taxable income in a given year. However, for the calculation of the relief in any subsequent years these losses have to be deducted from the foreign source income.

The tax credit method is usually granted for foreign withholding taxes on investments such as dividend, interest and royalty income. Pursuant to the tax credit method, the relief granted is equal to the foreign tax levied or by the Dutch tax payable on the foreign source income. If the Dutch tax is not sufficient to provide credit for the foreign tax levied, the excess of foreign tax may be carried forward indefinitely.

The deduction of foreign tax as a business expense can be claimed if no other provision for the avoidance of double taxation applies. Residents may, however, opt to claim the deduction of foreign tax instead of claiming avoidance of double taxation pursuant to the tax credit method. This might be preferred in situations in which the foreign tax cannot be fully credited.

4.10.2 The Dutch tax treaty network

As the Dutch economy is a very open and internationally orientated economy, it has always been one of the objectives of the Dutch government to remove any obstacles that could hinder the international flow of goods and capital. As such, the Dutch government's policy has been to encourage international investments by way of minimizing withholding taxes on dividend, interest and royalty income. In line with this policy, the Netherlands does not withhold any tax on interest and royalty payments leaving the Netherlands.

Based on the above, the Netherlands has concluded a large number of bilateral tax treaties for the avoidance of double taxation with respect to taxes on income. Currently, the Dutch tax treaty network consists of tax treaties with the following countries:

Albania, Argentina, Armenia, Australia, Austria, Bangladesh, Belarus (White Russia), Belgium, Brazil, Bulgaria, Canada, China, Croatia, Czechoslovakia (this treaty applies to both the Czech Republic and the Slovak Republic), Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Great Britain and Northern Ireland, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Kazakhstan, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Macedonia, Malawi, Malaysia, Malta, Mexico, Moldavia, Mongolia, Morocco, New Zealand, Nigeria, Norway, Pakistan, the Philippines, Poland, Portugal, Romania, the Russian Federation, Singapore, Slovakia, Slovenia, South Africa, the Soviet Union (the treaty applies to the former member states of the Soviet Union with the exception of Armenia, Azerbaijan, Georgia and Moldavia, and with the exception of those former member states of the Soviet Union to whom a new treaty now applies), Spain, Sri Lanka, Surinam, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, Uganda, Ukraine, the United States of America, United Arab Emirates, Uzbekistan, Venezuela, Vietnam, Yugoslavia (this treaty applies to Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia, Serbia and Montenegro, and Slovenia), Zambia, Zimbabwe. Furthermore, the

Netherlands Trade and Investment Office in Taipei and the Taipei Representation Office in the Netherlands have entered into an agreement pursuant to which avoidance of double taxation is also provided. In addition, the Netherlands, the Netherlands Antilles and Aruba have entered into the Tax Agreement of the Kingdom of the Netherlands (*Belastingregeling voor het Koninkrijk der Nederlanden*) pursuant to which their fiscal relationship is regulated.

5 Employment law

5.1 Introduction

Below, we address various questions which may arise for investors concerning the hiring of employees in the Netherlands, specific issues of Dutch employment law, such as, e.g., minimum wage requirements and the minimum number of vacation days, the influence of employees on the company's management decisions, and the rules governing the termination of employment agreements.

5.2 Employment Agreement

5.2.1 *The existence of an employment agreement*

The rules regarding employment agreements are mandatory, regardless of the form of the agreement (in other words: 'substance over form'). Whether the employment can be classified as an employment agreement or as, for example, a service or management contract depends on the particular factual circumstances. In this respect crucial factors in determining whether an employment agreement exists are:

- (i) Whether the employer has the right to give instructions which must be followed by the employee;
- (ii) Whether the employee has an obligation to carry out the work personally, and
- (iii) Whether the employer pays salary to the employee for carrying out the work.

As a result, a contract for rendering personal services by self-employed persons, for example, may qualify as an employment agreement to which the rules regarding employment agreements apply.

The occurrence of certain factual circumstances may, according to statutory provisions, create the legal assumption that an employment agreement exists. For example, in the event that an employee has, in any consecutive three-month period, performed work every week, or performed work for at least 20 hours per month, an employment agreement is presumed to exist between the parties. The employer, however, may try to refute this legal assumption. Another statutory provision creates a legal assumption that, if the employment agreement does not specify the number of hours that the employee must work, this number will be presumed to be the average number of hours that the employee has worked during the preceding three months.

There are no formal requirements for concluding an employment agreement, but certain provisions are only valid if they are in writing and signed by all parties thereto. This is, for example, true for an arrangement on the probationary period and a non-competition clause. Furthermore, the employer must inform the employee of certain essential terms of the employment.

5.2.2 *Choice of law*

Foreign companies should be cautious when contemplating a choice of law provision for a Dutch employee to the effect that the employment agreement will be governed by the laws of another country, which may be less protective of employees than Dutch employment law.

In this regard all EU courts, including the Dutch courts, will refer to the 'Rome Convention' when determining which law will apply to an international employment agreement. The main rule of the Rome Convention is freedom of choice: Article 3 paragraph 1 explicitly stipulates that a contract shall be governed by the law chosen by the parties thereto. This choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable either to the whole agreement or only to a part thereof.

The Rome Convention, however, contains certain limitations as regards this freedom of choice. Article 6, for example, deals with individual employment agreements and provides that, notwithstanding Article 3 (freedom of choice), a choice of law made by the parties to an employment agreement will not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 of Article 6 in the absence of a choice of law.

Pursuant to paragraph 2 of Article 6, in the absence of a choice of law, an employment agreement will be governed:

- (i) By the law of the country in which the employee normally carries out his work (even if he is temporarily employed in another country); or
- (ii) If the employee does not normally carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is located (unless it appears from the circumstances as a whole that the employment agreement is more closely connected with another country, in which case the agreement will be governed by the law of that country).

This means that, for employees who are to perform their work in the Netherlands, an employer cannot simply set aside any mandatory provisions of Dutch employment law that are meant to protect the employee by inserting a provision in an employment agreement stating that it will be governed by the laws of another country, which are less protective of employees.

5.2.3 *Duration and working time*

An employment agreement may be entered into for a definite period or for an indefinite period. If no choice is made, the agreement is deemed to be for an indefinite period.

In accordance with the Dutch Working Hours Act (*Arbeidstijdenwet*) an employee may not work for more than 12 hours a day and for no more than 60 hours a week with an average of 48 hours a week during every period of consecutive 16 weeks. In most cases the normal working hours vary between 36 and 42. Deviation is only valid when incorporated in a collective bargaining agreements (*collectieve arbeidsovereenkomst* or 'CAO') (see also below in paragraph 5.5) and the Works Council (see also in section 5.7) or the employees' representation must consent to such deviation. Additional compensation for shift work and overtime work is generally agreed upon either by CAO or individually.

The maximum length of a nightshift is 10 hours. For people who work regular night shifts, the average maximum working week over a period of 16 weeks may not exceed 40 hours. The number of actual nightshifts is limited to a maximum of 36 in a 16 week period. This can be increased to 140 nightshifts a year by CAO or with consent of the works council.

5.2.4 *Probationary periods*

A probationary or 'trial' period has to be agreed upon in writing in order to be valid, and its duration must be the same for both parties. Furthermore, the length of the trial period depends on the duration of the employment agreement in the following fashion:

- (i) With regard to an employment agreement for an indefinite period or for a definite period of two years or more the probationary period may not exceed two months;
- (ii) With regard to an employment agreement for a definite period shorter than two years the probationary period may not exceed one month.

During the trial period, either party may terminate the contract at will, with or without cause and without prior notice. The reason for the termination must be given. It is noted, however, that reasons of a discriminatory nature are prohibited. Thus, for example, if an employee becomes pregnant during the probationary period, the employer cannot terminate the employment agreement for that reason.

5.2.5 *Non-competition clause*

The parties can validly agree in writing to a non-competition clause by virtue of which the employee is restricted in his ability to accept other employment for a certain period of time after the termination of the employment agreement. The clause should accurately describe the duration, the scope of the jobs concerned and the geographical territory. The restrictions may not be unfair or disproportionate towards the employee. If such is the case, the court may limit the scope of the non-competition clause or rescind it altogether. The court can also mitigate the penalties for non-compliance or fix a sum to be paid by the employer to the employee by way of compensation if the employer holds the employee to the non-competition clause. If the employer changes the employee's position within the company, as a result of which the non-competition clause has a larger impact on the employee, which is usually the case as the result of a substantial promotion, a new non-competition clause must be agreed upon in writing, failing which, the non-competition clause becomes invalid.

Employment agreements usually also contain clauses pertaining to confidentiality, inventions and copyright and exclusivity. Penalty clauses in employment agreements are only enforceable to a limited extent.

5.3 Wages, Vacation and other Benefits

5.3.1 *Wages and vacation allowance*

Pursuant to the Act on Minimum Wages and Minimum Vacation Allowance (*Wet minimumloon en minimumvakantiebijslag*) all employees between the ages of 23 and 65 are entitled to a minimum wage. This minimum wage is reviewed yearly and is currently set at around € 1,317 gross a month. For employees under the age of 23, a statutory minimum wage applies based on a varying percentage of the wage for those over 23.

Moreover, all employees, regardless of their age, are entitled to a statutory minimum vacation allowance of 8% of their gross annual wage.

Most CAOs (see section 5.5) provide for minimum wages and their automatic (bi-) annual indexation. Employer and employee can agree upon a higher wage than the minimum provided for in the CAO, unless this is prohibited by the CAO. Non-CAO wages are agreed upon individually. Indexation is either agreed upon separately or follows the prevailing practice within the industry or enterprise.

There is also a minimum wage claim for 'on-call' employees. For each period that an 'on-call' employee works less than three hours, he will be entitled to receive a minimum of three hours wages, in the following situation:

- (i) In the case of on-call contracts in which the number of working hours is less than 15 per week, while the actual working hours are not determined in the agreement; or
- (ii) The working hours are not, or not unequivocally, determined by the parties.

5.3.2 *Vacation*

The statutory annual minimum vacation period is four times the number of working days per week. Regular wages are paid during the vacation. In most cases this will be (4 x 5 =) 20 days. A CAO or individual employment agreement can provide for more vacation days and more detailed provisions. For example, large companies like ABN AMRO Bank, ING Bank, Philips Electronics and Royal Dutch Shell often grant their employees more than 30 vacation days per year. The employer is obliged to enable the employee to take the statutory minimum vacation. The dates on which the employee will actually take his vacation days are determined jointly by the employer and employee in accordance with the wishes of the employee, unless these are detrimental to the vital interests of the employer. Accrued but untaken vacation days lapse only after expiration of a five-year period from the last day of the year in which the holidays have accrued.

5.3.3 *Profit-sharing and stock option plans*

By issuing depository receipts of shares (*certificaten*, see paragraph 1.5.1 above) or granting profit sharing certificates (*winstbewijzen*) the employees can obtain a financial interest in the company but have no voting rights in the general meeting. The Dutch Civil Code allows a BV to a certain extent, to provide loans to the employees for participation in the stock purchase plans. An NV is also entitled to provide financial assistance to employees in order to facilitate their participating in a stock option or stock purchase plan. For this type of company no restrictions apply in this respect.

Various Dutch companies, including companies listed on Euronext Amsterdam, have some form of employees' savings, profit sharing or stock option plans although such plans are not nearly as common in the Netherlands as they are in the US.

The offering of securities by a company to its employees is generally exempted from the prospectus and other information requirements of the Securities Transaction Supervision Act 1995. In general, such exemption is also considered to be applicable in the event of a foreign parent company offering its securities to employees of its Dutch subsidiary.

The savings plan is funded by the employee, whereby the employee pays a part of his gross salary (up to a certain limit) into a savings account. No wage tax is due on such payments.

As to qualifying stock option plans, as from 1 January 2005, the stock option right is subject to wage tax upon exercise. The actual gain realized from exercising the option is subject to wage tax (Prior to that date a stock option right would be taxed once the right was vested. The wage tax would then be levied on the value of the right). The value of the right is determined by a formula published by the Dutch tax authorities and depends on the nominal value of the stock option, the exercise period and the value of the underlying shares. Furthermore, if the stock option right was exercised or sold within three years after it being granted, the capital gain will be taxed. The exercise of the right after three years of it being granted and the subsequent sale of shares was under the old regime generally not a taxable event provided the employee has an interest of less than 5% in the share capital of the company.

5.3.4 Sick pay

Pursuant to Dutch employment law an employer is under the obligation to continue paying 70% of an employee's salary during the first two years of sickness with a maximum of 70% of the statutory day wage (currently € 172), which then amounts to ((21.75 days x € 172) x 70% =) € 2,619 per month. However, on the basis of contractual supplementary arrangements, for example CAOs, employers very often are under the obligation to continue to pay the sick employee 100% of his actual salary during the first year of sickness.

After the first two years of sickness, this obligation ceases and benefits are paid under the Work and Income according to Labor Capacity Act (*Wet Werk en Inkomen naar Arbeidsvermogen* or 'WIA'). The WIA provides for employees entitled to occupational disability benefit upon full and permanent occupational disability. Those still able to work partially, will receive a supplement to their wage.

If an employee is fully and permanently occupationally disabled, he will receive occupational disability benefit. He has to be at least 80% occupationally disabled with no prospect or only a small chance of recovery. He will then become eligible for benefit on the basis of the Income Provision Scheme for People Fully Occupationally Disabled (IVA) of 75% of the daily wage (maximum daily wage € 172 as of 1 January 2007).

If an employee is between 35% and 80% occupationally disabled, he will be entitled to benefit on the basis of the Return to Work Scheme for the Partially Disabled (WGA).

- If the employee is not in work, he will first receive a wage-related benefit of 70% of the daily wage. This benefit lasts for at least half a year and for a maximum of five years, depending on the number of years in employment.
- If the employee is in work, on top of his new wage he will receive a benefit of 70% of the difference in comparison with the daily wage.
- After the wage-related benefit has ended, the amount the employee earns is taken into account. In the event that this is at least 50% of the remaining earning capacity, the WGA will supplement the wage by 70% of the difference between the daily wage and the remaining earning capacity or the new wage.
- If the employee is not in work after the wage-related benefit has ended, or if he earns less than 50% of the remaining earning capacity, he will receive benefit based on a percentage of the minimum wage.

5.3.5 *Various other emoluments*

Additional emoluments are sometimes paid, for example, an extra annual payment of one month's gross salary (the 'thirteenth month'), profit sharing, sales commissions above the regular wages and additional compensation for overtime work.

5.4 Residence permit and work permit

Persons of the nationality of one of the countries within the European Economic Area, which comprises European Union Member States except for Romania and Bulgaria, as well as Norway, Iceland and Liechtenstein, do not need a residence or work permit.

Foreign nationals (from non-EU member states) must obtain a work permit (*tewerkstellingsvergunning*) from the Centre for Work and Income (*Centrum voor Werk en Inkomen* or 'CWI'). The prospective employer must apply to the CWI in the district where the employee is to be employed. In order for a work permit to be granted, there must be no equally competent (unemployed) national of the European Economic Area (the 'EEA') available for the job. However, there are certain exemptions to this rule, amongst others, in the case of an inter-company transfer.

The work permit is valid throughout the duration of the employment agreement. If the employer wishes to extend the employment agreement within a period of three years, the employee must obtain a new work permit from the CWI. After three consecutive years of legal employment in the Netherlands, a foreign employee no longer needs a work permit provided an endorsement is stamped on his/her residence permit.

Foreign nationals (from non-EU member states) who wish to reside in the Netherlands for

a period exceeding three months must obtain a residence permit (*verblijfsvergunning*), which is to be obtained from the Immigration and Naturalization Services (*Immigratie- en Naturalisatiedienst* or *IND*) in Rijswijk and which is granted after a work permit is granted.

Those wishing to obtain a residence permit must first request an entry visa ('*MVV*'). This is a special type of travel visa in sticker form that is put in the passport and allows the foreign national to enter the Netherlands.

An *MVV* can only be obtained from the Dutch embassy or consulate in the country in which the foreign national resides, or in the closest neighboring country where the Netherlands has representation. Once granted, within three days of entering the Netherlands, the foreign national must apply for a residence permit to the Police Station Aliens Department in his new place of residence. If he meets all the requirements for staying in the Netherlands a residence permit will be granted.

As of 1 January 2005, 'knowledge migrants' no longer need a separate work permit and a residence permit to legally work in the Netherlands. These two permits will be replaced by one single permit, to be requested from the *IND* in Rijswijk. Knowledge migrants will, however, still need an *MVV*. The only remaining criterion of importance is that the person is lawfully present in the Netherlands, which is tested by the *IND*.

Knowledge migrants are employees (in other words: no self-employed persons) whose income lies above a certain level. This income is currently € 46,541 gross for persons over the age of 30 and € 34,130 for persons under the age of 30. These employees must have either an employment agreement or an appointment as a civil servant.

The employer has to sign a declaration for the admission of highly skilled migrants. This is a non-recurring declaration, which will apply to all applications the employer makes in the future in the context of the highly skilled migrant procedure. Furthermore, the employer must supply the *IND* with a guarantee that this particular person will not be living off the Dutch state. There are no other requirements. It does not matter what level of education the person has, as the level of education does not necessarily have any bearing on the productivity or innovativeness of the knowledge migrant.

Furthermore, people working on a Ph.D. can qualify for knowledge migrant status. In those cases no age or income limitations apply. Also postdoctoral or university professors who are below the age of 30 are to be considered knowledge migrants, regardless of their income.

It is furthermore noted that the activities of a knowledge migrant do not need to be limited to his activities for one particular employer. As long as the income criterion is met, the migrant can stay and work for any employer in the Netherlands. Provided that this employer has also signed a declaration for the admission of highly skilled migrants and that the employer must always be able to supply the above-mentioned guarantee. This means that, if the migrant's income were to fall below this level - for instance because he or she decides to work part-time - then he or she loses the status of knowledge migrant. The employer is required to report this and to request a work permit for this employee.

5.5 Collective Bargaining Agreements

Collective bargaining agreements (CAOs) are written agreements between employers, or an association of employers, and one or more trade unions. Employers are free to negotiate a CAO. Although there is no statutory obligation thereto, employers often enter into a collective bargaining agreement voluntarily for reasons of influencing the labor conditions and costs and preventing labor conflicts. A CAO is usually in force for one or two years. A CAO governs the terms of employment for such categories of employees that fall within the scope of the CAO (e.g. employees with a working week of at least 13 hours, up to a certain salary level). Management is always, and high-ranking staff members are often, excluded from the CAO. The CAO is binding on the parties thereto and their members. An employer who is a member of the association of employers to the CAO must apply the terms thereof to non-unionized employees as well.

The CAO may cover all kinds of benefits, such as wages, the indexation of wages, notice periods, vacation days, schooling/training, social plans in case of a mass lay-off, voluntary early retirement, and shop-floor union activities. The CAO must provide for the statutory minimum regulations, but often contains improvements thereto. An individual employee may negotiate terms in his employment agreement which exceed the CAO terms, unless prohibited by the CAO.

5.6 Termination

5.6.1 *Termination of an individual employment agreement*

An employment agreement for an indefinite period can be terminated in five different ways, namely:

- (i) By mutual consent without any formalities
- (ii) During the probationary period without any formalities (apart from a letter);

- (iii) Upon notice (with CWI permit);
- (iv) For urgent cause; and
- (v) By a court decision.

(i) By mutual consent without any formalities

Parties can agree to the termination of an employment agreement. Usually, this involves the employer paying the employee some kind of severance package.

(ii) During the probationary period

See again section 5.2.4.

(iii) Upon notice (with CWI permit)

Under Dutch law all classes of employees are protected against dismissal in the sense that, in order to unilaterally terminate the employment agreement by giving notice, an employer must first obtain a permit from one of the circa 150 Centers for Work and Income (*Centrale Organisatie voor Werk en Inkomen* or CWI). There is one exception: if an employee is a member of the Management Board of an NV or a BV, no permit is required. A termination notice to an employee without a permit from the CWI is simply invalid.

An application for a CWI permit must state the reasons for the unilateral termination of the employment agreement. The employee is given the opportunity to give a response, on which the employer can comment. Occasionally the parties are heard in person. The procedure may take between two and four months, during which period the employment agreement remains in force and, thus, also the obligation of the employer to pay the employee's salary. The three most common reasons for the CWI approving the issuance of a permit are:

- (i) A reduction of the labor force for economic and financial reasons;
- (ii) Incompetence of the employee; and
- (iii) The relationship between employee and employer is so damaged that continuation is impossible.

The decision of the CWI cannot be appealed. Refusals are not uncommon. The only solution then is to request a rescission of the employment agreement by court decision (see below under (v)).

The statutory notice period to be observed by the employer will only depend on the length of service of the employee in the following way:

- (i) Less than 5 years of service: 1 month;
- (ii) From 5 to 10 years of service: 2 months;
- (iii) From 10 to 15 years of service: 3 months; and
- (iv) From 15 years of service and more: 4 months.

The notice period to be observed by the employee is one month. Longer notice periods can only be agreed upon in writing. It is noted, however, that a contractually agreed upon notice period of the employer should be twice as long as that of the employee, with a maximum of 12 months for the employer and six months for the employee.

Once the permit of the CWI has been issued, the termination notice can be given, preferably in writing, sent by certified mail. Termination by notice is not possible if:

- (i) The employee is on sick leave at the time the notice is given (unless for more than two years);
- (ii) The employee is pregnant, and during the period up to and including the 16th week after childbirth;

Giving notice during illness is not prohibited if the illness of the employee commenced after the employer applied for the permit from the CWI. If the employer has obtained a CWI permit to give notice, the CWI may deduct one month from the applicable notice period, provided that a one-month period remains.

In addition, a prohibition to terminate the employment agreement applies in the event an employee is a member of a Works Council, a European Works Council, for reasons of being a member of a trade union, or for reasons of attending meetings of representative bodies (city councils, et cetera) as a member.

For a number of employees the prior approval of the court is required before their employment can be terminated, e.g. official candidates for membership of a works council, and employees who were members of a Works Council or one of its committees within two years after their membership has terminated. Having received approval, the employer must still apply afterwards for a CWI permit.

NB: It is not unusual to enter into fixed-term contract in order to avoid the issues described above. Fixed-term contracts terminate automatically upon the expiration of the agreed period. However, in the event that more than three fixed-term contracts are entered into within successive periods of not more than three months, or exceed a total period of 36 months, CWI permission is required for giving notice of termination.

Also, dismissal before a fixed-term contract has expired is only possible if this is explicitly agreed upon in the employment agreement. However, in such case CWI permission is required.

(iv) For urgent cause

The employment can also be terminated immediately for urgent cause, without notice and without a CWI permit being required. The Dutch Civil Code gives a non-exhaustive list of examples for urgent cause, such as theft, fraud, divulging trade or professional secrets, or for having made false or misleading statements while applying for the job.

Although this sounds fairly straightforward in theory, it is not in practice. In fact, the dismissal for urgent cause is a risky undertaking for an employer.

First of all, quick action is required. This means in practice that, as soon as an employer becomes aware of an urgent cause, he must take immediate action. This is not to say that an employer cannot take the time to properly investigate the facts and to allow the employee to give his/her side of the story. And if an external investigation is required – for example by forensic accountants – the employer is advised to order the same to take place and to await the outcome thereof. In most cases it is best to suspend the employee pending the outcome of such an investigation.

Furthermore it is noted that, although certain of facts and circumstances might warrant a dismissal for urgent cause in the eyes of an employer, they might not be deemed serious enough in the opinion of a Dutch court. It is also noted that in 1999 the Dutch Supreme Court held that as regards the validity of an immediate dismissal for urgent cause other factors also weigh in, such as the length of the employee's service and his/her job performance over the years. A couple of years later the Dutch Supreme Court ruled that personal circumstances that are completely in the employee's personal sphere – and which the employer often is unaware of - are also to be taken into account when judging whether an immediate dismissal for urgent cause is warranted.

This must all be seen in light of the severe consequences for an employee if a court agrees that there is indeed an urgent cause: the employee automatically loses all unemployment benefit rights he may have.

In view of the above, an employer is advised to always abide by the following rules when considering an immediate dismissal for urgent cause:

- (i) Always and immediately seek legal advice;
- (ii) Always carefully gather and review (a) all relevant facts and circumstances and (b) evidence of the same (if need be with external help – police, private investigators, accountants, et cetera);
- (iii) Always grant the employee the right to be heard;
- (iv) As soon as the employer has gathered all relevant facts and circumstances he must immediately take a decision;
- (v) Once the employer has taken the decision to go ahead with the dismissal for urgent cause he must inform the employee immediately and confirm his decision and the underlying reason(s) in writing; and
- (vi) The employer must never show any hesitation, for example by putting the process on hold (not even for one day).

(v) By a court decision

Each party may request the court to rescind the employment agreement on the basis of a “serious cause”. A serious cause may be an urgent cause that has not previously been invoked to terminate the employment agreement, or “a change in the circumstances of such a nature that the employment reasonably should be terminated instantly or on short notice”. If the court grants the request, it sets a date for the termination. No further notice is required.

The court may – and often does - award the employee compensation (or a severance payment) to be paid by the employer. There are no statutory rules regarding severance payments, but in general courts tend to use the so-called ‘cantonal judge formula’, which is as follows:

- (i) 1 monthly salary for every year of service under the age of 40;
- (ii) 1.5 monthly salary per year of service between the age of 40 and 49; and
- (iii) 2 monthly salaries for every year of service above the age of 49.

‘Monthly salary’ in this regard means 1/12th of the employee’s yearly income, consisting of monthly (base) salary, holiday allowance of 8%, fixed 13th month benefits, fixed bonuses, shift payments and any structural overtime payments. In exceptional cases other benefit components may be taken into account. However, the result of this formula may be increased or decreased by the court, depending on the specific circumstances of the case.

In the case of a so-called “neutral” termination, this type of severance payment shall be awarded. “Neutral” termination is understood as a termination which cannot be blamed on the employer or on the employee (e.g. redundancy). The courts commonly apply a

correction to the calculation. Depending on the circumstances of the case, court awards may therefore be (considerably) lower or (also considerably) higher than the “neutral version” of the cantonal judge formula described above.

The decision of the court cannot be appealed.

Since serious cause is also understood to mean urgent cause (see above), sometimes the court procedure is used when the risks of terminating without any formalities for urgent cause are considered too high, but the cause in itself is serious enough to warrant termination on short notice. The court procedure takes about one to three months.

5.6.2 Reorganizations

When an employer intends to terminate the agreement of 20 or more employees, working in the area of one CWI, within a period of three months, in any case the following Acts must be complied with: the Works Council Act (*Wet op de ondernemingsraden*), the Act on Notification of Mass Layoff (*Wet melding collectief ontslag*), and the Decree on Labor Relations (*Buitengewoon Besluit Arbeidsverhoudingen 1945 or BBA*).

Pursuant to the Works Council Act, the advice procedure may be applicable (see section 5.7).

Pursuant to the Act on Notification of Mass Layoff, prior notification and detailed information of the proposed lay-offs must be given on a confidential basis to the CWI and the trade unions in the branch. Generally, a social plan shall be drawn up regarding the financial consequences and facilities for employees involved. Such plans may include severance payments as negotiated with the trade unions.

The procedure regarding the issuance of permits by the CWI for the termination of the employment agreement will not start until one month after the notification referred to above. This waiting period of one month need not be observed if the trade unions give their consent. The CWI will investigate for each employee whether the request for termination is reasonable. After permits have been granted, notice of termination must be given.

5.7 Co-Determination; Works Council

The legislation regulating co-determination in a Dutch company is mainly provided for in the Works Council Act (*Wet op de ondernemingsraden*). The Works Council Act provides that an enterprise with 50 employees or more is obliged to establish a works council, which consists of employees elected thereto. In a company with more than 10 employees but

less than 50 employees no works council has to be established, only a personnel representative body. This body has less power than a works council.

The following discusses the works council for enterprises with more than 50 employees.

Before the company gives the works council the opportunity to render advice, it should inform the works council about decisions that it is preparing with regard to issues on which the works council has the right to render advice. The information should pertain to issues that will come up in the next six months.

The works council convenes with the management board or a member thereof in consultation meetings at least six times a year. These meetings are held during working hours. The works council is also entitled to hold its own meetings during working hours. The members are entitled to full pay of their salaries during said meetings. Management and works council have to agree on the extra hours that the works council can spend on consultation with the employees and on its own training/education. If they do not agree, the Works Council Act imposes five days for training and sixty hours for consultation per year.

The powers of the works council can be generally divided into those pertaining to the rendering of advice and the right to give approval regarding proposed decisions.

Advice Procedure

The company must give the works council the opportunity to render advice on any decision it proposes to make concerning:

- (i) Transfer of control of the enterprise or any part thereof;
- (ii) The establishment, take-over or relinquishment of control of another enterprise or the setting-up, substantial modification, or discontinuation of long-term cooperation with other enterprises, including the setting-up, substantial modification or discontinuation of a substantial financial participation by or on behalf of such an enterprise;
- (iii) Discontinuation of the activities of the enterprise or a major part of these activities;
- (iv) Substantial change in the activities of the enterprise;
- (v) Substantial change in the organization of the enterprise or in the allocation of responsibility within the enterprise;
- (vi) Change of the location where the enterprise carries on its activities;
- (vii) Recruitment or hiring of groups of workers;
- (viii) Any major capital investment on behalf of the enterprise;
- (ix) Seeking of substantial credit on behalf of the enterprise;

- (x) Granting of an important credit facility and providing security/collateral for important loans to another company, unless this is a normal activity in the company;
- (xi) Introduction or amendment of an important technological facility;
- (xii) Taking of an important environmental measure for the company, including the taking or amendment of a policy measure, organizational and administrative, with respect to the environment;
- (xiii) Appointment of and formulation of terms of reference for an outside expert to provide advice on any of the foregoing matters.

The management must inform the works council in writing and in a timely fashion of its decision. In the event the management has set aside the works council's advice, in whole or in part, it must give the reasons for its decision. In that case, or if information which became subsequently available would have led the works council to render a different advice, the management must furthermore suspend the implementation of its decision for a period of at least one month in order to allow the works council to appeal against the decision before the Enterprise Section of the Amsterdam Court of Appeal (*Ondernemingskamer*).

The sole ground for such an appeal by the works council is that the management of a company "*when weighing the relevant interests could not reasonably have reached its decision*". This quite broadly formulated touchstone gives the Enterprise Section a substantial amount of latitude as far as the deciding on the appeal of a works council is concerned and the Enterprise Section is notorious for exercising that freedom. That said, the Enterprise Section is not supposed to do an in dept analysis of the financial and economic merits of a transaction. Only when it is quite obvious that a transaction is not in the benefit of the company involved can the Enterprise Section be expected to grant the appeal on such grounds. The majority of the works council appeals that have been successful, were granted on *formal* grounds, i.e. where the management did not seek any advice at all, did so in such a late stage that the advice could not really be of any influence, did not comply with the works council's reasonable requests for information, et cetera.

Unlike in many other jurisdictions, the Enterprise Section has far reaching powers for if it grants the works council's appeal. It can actually order the management of the company to withdraw the decision in whole or in part and even to reverse any specified consequences thereof. In other words: the Dutch court has the powers to actually block a decision.

Consent Procedure

The company must obtain the Works council's prior consent on any decision it proposes to make concerning:

- (i) Arrangements concerning pension insurance, a profit-sharing plan or savings plan;
- (ii) Rules pertaining to working hours or vacation policy;
- (iii) A remuneration or job classification system;
- (iv) Rules pertaining to safety, health or welfare in connection with work;
- (v) Rules pertaining to hiring, dismissal or promotion policies;
- (v) Rules pertaining to employee training;
- (vi) Rules pertaining to employee performance review;
- (viii) Rules pertaining to industrial social work;
- (ix) Rules pertaining to work consultation;
- (x) Rules pertaining to the handling of complaints;
- (xi) Rules pertaining to a personnel registration system and the handling and protection of personal data of the employees in the company, and
- (xii) Rules pertaining to a system of registration and control of the attendance, behavior and performance of the employees.

If the works council's approval to a proposed decision is not obtained, the company may request the district court (cantonal section) to approve the decision. The district court (cantonal section) shall only grant permission if the works council's refusal to grant approval is unreasonable or the company's proposed decision is based on important business-organizational, business-economic or business-social reasons.

Any decision made by the company without the required approval of the works council or the district court (cantonal section) shall be null and void if the works council invokes this nullity to the company in writing within one month of either the company having notified the works council of its decision or, in the absence of any such notification, within one month of becoming aware that the decision is being implemented or applied by the company. The works council may request the district court (cantonal section) to oblige the company to refrain from any actions that would involve implementing or applying a decision of which the works council has invoked the nullity. If the company believes that the nullity of the decision has been unjustifiably invoked, it may, within one month, petition the district court (cantonal section) for a decision on the matter.

5.8 Dealing with Discrimination

5.8.1 *Equal treatment in general*

The ban on discrimination in the Dutch Constitution is implemented in various specific laws, such as the General Act on Equal Treatment, the Act on Equal Treatment Men and Women, the Act Equal Treatment on Working Hours, the Act Equal Treatment for Temporary and Permanent Contracts, the Act Equal Treatment of Disabled and

Chronically ill People and the Act Equal Treatment on Age in Employment. In addition, the Dutch Civil Code and the Central and Local Government Personnel Act contain several provisions that prohibit discrimination between men and women in the workplace.

Moreover, in recent years many new equal treatment rules and regulations have been drawn up at the European level, such as the Racial Equality Directive, the Framework Directive and the Amended Second Directive M/Ff.

5.8.2 Discrimination on the basis of sex

According to the specific Act Equal Treatment of Men and Women (*Wet gelijke behandeling van mannen en vrouwen*), it is forbidden to discriminate between men and women in a labor relationship. The Act considers a labor relationship as a situation in which an employee is working under supervision, and its meaning is broader than that of an employment agreement. The Act applies to the government/municipalities as employers and to the private sector.

Direct and indirect discrimination is prohibited with regard to a job offer or the filling of a vacancy, during the course of the labor relationship and in case of termination. One requirement is that vacancy announcements must mention specifically that men and women can apply (with the indication: 'm/w'). It is permissible to make a distinction between men and women for certain professions or jobs that are mentioned in a special decree (for example: opera singers). Women and men within the same enterprise must receive equal compensation if they do practically the same work.

Sexual discrimination can be dealt with under the Act for Equal Treatment of Men and Women only when the discrimination has been a violation of its provisions (i.e., refusal to promote, threat of being fired, et cetera). Having said that, unlike for example the United States or the UK where sexual discrimination law suits have become big topics this is not yet the case in the Netherlands.

5.8.3 Sexual harassment

Claims alleging harassment can be brought under the Equal Opportunities Act. Recently the Dutch government has amended the existing legislation to the effect that the burden of proof in regard to sexual harassment cases is being shifted from the accuser to the accused employer. In other words: the accused employer will have to demonstrate that it was not a matter of sexual harassment.

In addition the plaintiff can base its his/her suit on general provisions of the Dutch Civil Code, such as termination by court decision for serious cause, the obligation to act as a good employer, protection of decency, and against danger.

The Work Conditions Act (*Arbeidsomstandighedenwet*) contains clauses which oblige the employer, apart from taking measures in the interest of the health and work conditions of the employee, to protect the employee as much as possible against sexual harassment and its consequences. This Act compels the employer to focus enterprise policy on the maintenance and improvement of safety, and the health and well-being of the employees within the enterprise. In this respect he also has to take measures that prevent sexual harassment.

The government has initiated a number of measures that are aimed at preventing sexual harassment. Trade and industry are encouraged by the government to actively prevent and to suppress sexual harassment. As a consequence thereof, some CAO's include provisions regarding preventing sexual harassment and include procedures for complaints.

5.8.4 Age discrimination

The Act re Equal Treatment on Age in Employment provides legislation prohibiting age discriminating in employment, professions and vocational training. Age discrimination is permitted only in cases in which setting an age limit is objectively justified. This law entered into effect on May 1st, 2004.

The law applies to the public sector and to the private sector. Direct and indirect discrimination is prohibited. In the Equal Treatment in Employment Act discrimination means discrimination on the grounds of age or on the grounds of other characteristics, or conduct that results in discrimination on the grounds of age. An instruction to discriminate is also deemed to be discrimination. Furthermore, the prohibition on discrimination also includes a prohibition on harassment i.e. conduct related to age that has the purpose or effect of violating the dignity of a person and creating an intimidating hostile degrading, humiliating or offensive environment.

Age discrimination is unlawful among others with regard to the recruitment, selection and appointment of personnel; job placement; entering into or terminating an employment agreement; appointment or dismissal of public servants; conditions of employment; education and training during or prior to an employment relationship; promotion; and working conditions.

The prohibition on age discrimination shall not apply if the discrimination:

- (i) Is based on employment or labor market policies to promote employment in certain age categories, provided such policies are laid down by or pursuant to an Act of Parliament;

- (ii) Relates to the termination of an employment relationship because the person concerned has reached pensionable age under the General Old Age Pensions Act (AOW) or a more advanced age laid down by or pursuant to an Act of Parliament or agreed between the parties; or
- (iii) Is otherwise objectively justified by a legitimate aim and the means used to achieve that aim are appropriate and necessary.

In conclusion, the main rule is that age discrimination is prohibited, unless an age limit is objectively justified.

5.8.5 *Compulsory employment of disabled persons*

The Employment of Disabled Employees Act (*Wet arbeid gehandicapte werknemers*) imposes on employers, organizations of employers and unions, the obligation to provide equal opportunities for the employment of disabled and non-disabled employees and to take measures to improve working conditions for the disabled. Among other things, it provides for mandatory hiring of between three and seven disabled persons per 100 employees.

5.9 Miscellaneous

5.9.1 *Strikes and plant occupations*

Strikes and related matters are not subject to special legislation in the Netherlands. The European Social Charter (ESC), which recognizes the right to undertake collective action (including strikes), was ratified by the Netherlands in 1980. In 1986, the Dutch Supreme Court held that the provisions of the ESC are directly applicable.

A strike is considered legitimate if it is used as an ultimate measure in negotiations for a CAO and if these negotiations have resulted in a serious deadlock. The ESC affords some protection to the freedom of third parties, the protection of public interest, national security or public health. Political strikes aimed at influencing governmental legislation have been considered to be permissible if this legislation is related to issues that are typically subject to collective bargaining between employers and employees. Other political strikes are not covered by the ESC and seem to not be regarded as legitimate under Dutch law. Sympathy and solidarity strikes of a political nature have in the past been considered unlawful by the courts.

The employer does not have to pay wages to the striking employees. If the strike has been initiated by a trade union, the employer cannot fire these employees. Blockades, closing off the entrance and forms of intimidating other employees are considered unlawful. The same applies to plant occupations. Employees who do not participate in the strike and are

willing to work do not have to be paid if they have an interest in the purpose of strike. Most employers, however, pay wages to employees who are willing to work. Many CAOs contain a provision that the trade unions will not strike during the term of the CAO, at least not with a view to amend agreements made.

5.9.2 Court system

The territory of the Netherlands is divided into nineteen judicial districts (*arrondissementen*) each of which has one district court (*rechtbank*). Each district court also has a cantonal sector (*sector kanton*) comprising of so called 'cantonal judges' (*kantonrechters*). Cantonal judges have – amongst others - jurisdiction over all matters regarding employment agreements and all matters regarding CAOs. If a case involves the dismissal of a managing director the district court – not the cantonal court - is competent to hear the case.

Decisions of cantonal judges in so-called 'rescission cases' (see section 5.6.1(v)) are basically not subject to appeal. In cases where an appeal is possible, one ends up with the district court for an appeal against cantonal court decisions and with one of the five Dutch courts of appeal (*gerechtshof*) for appeals against district court decisions.

At the top of the hierarchy is the Supreme Court of the Netherlands (*Hoge Raad der Nederlanden*) which also hears employment law cases, but only as far as matters of law are concerned. The factual matters of a case are irrevocably established by the lower courts.

Where the representation of parties before the various Dutch courts is concerned it is noted that parties do not need an '*advocaat*' (attorney at law) for proceedings before a cantonal judge. In practice, however, most employers prefer that anyway. Employees are sometimes represented by a lawyer of their legal cost insurer or by a lawyer of their union, if they are a union member.

Proceedings before the district courts, courts of appeal and the Supreme Court always require the representation through an '*advocaat*'.

5.9.3 Evidential burden

In Dutch legal proceedings a fact is considered proven when the truth of this fact has been demonstrated to the court. Not all facts need to be proven. For example, facts that are stated by one party and that are not or insufficiently denied by the opposing party are deemed to be proven. Likewise, facts that are considered to be common knowledge – if you walk in the rain without an umbrella, you will get wet – also do not require any proof.

The most important issue if it comes to evidence is, no doubt, the burden of proof. Section 150 of the Dutch Code on Civil Procedure stipulates that the party who contends that certain facts or rights result in a particular legal consequence (*rechtsgevolg*) bears the burden of proof in regard to those facts or rights, unless a special legal rule – which may be written or unwritten – or the rules of equity and fairness (*redelijkheid en billijkheid*) require another distribution of the burden of proof.

In practice this means: he who alleges certain facts and circumstances, will have to prove the same. In the Netherlands it generally will not do for the employer to just prove that he could genuinely believe in the guilt of the employee and that he had reasonable grounds to sustain that belief. For example, if an employer alleges that one of his employees has committed theft, he should see to it that he is able to provide conclusive evidence to prove his allegations. After all, in case of doubt, the benefit will usually go to the employee, not the employer.

All sorts of evidence may be used. Documents, witness statements (whether sworn or not), audio tapes, video tapes, surveillance reports, police records, et cetera. However, as far as the use of hidden cameras is concerned, it is noted that pursuant to a fairly recent amendment of the Dutch Criminal Code it is in principle permissible for an employer to use hidden cameras provided that he informs his employees of the possibility of such cameras being used. If the employer fails to do so he runs not only the risk of the evidence gained through such cameras being declared inadmissible, but also of criminal prosecution.

6 Commercial agency, distributorship and franchise

6.1 Introduction

Contracts with commercial agents (*handelsagenten*) and distributors (*distributeurs* or *wederverkopers*) and regarding franchise agreements may be concluded with individuals or companies. These persons/companies are not required to reside or maintain an office or be incorporated in the Netherlands.

6.2 Commercial Agency

6.2.1 Definition

In general, an agency relationship exists when the following requirements are met:

- (i) The agent acts on behalf of, and for the account of the principal in the conclusion of contracts for his principal;
- (ii) The agent is entitled to remuneration (i.e. commission);
- (iii) The agent is self-employed, and
- (iv) The relationship between the agent and the principal is not of an incidental nature.

Most agency law is mandatory and laid down in the Civil Code, which reflects the provisions of EC Directive 86/653.

6.2.2 General

The contract need not be in written form. However, for reasons of evidence, such is advisable.

The commission payable is negotiable. If no provision is inserted with regard to commission, the commercial agent is entitled to a reasonable commission.

A non-competition clause in the agent's contract is permitted, provided it is in writing and restricted to the goods or services and the territory of the commercial agent. Such a clause is valid for a maximum period of two years after termination of the agency agreement. The courts can annul or mitigate the non-competition clause of the agency agreement if it is unfair or disproportionate towards the commercial agent.

A *delcredere* provision, i.e., an arrangement regarding the risk of default by a third party, is valid provided it is in writing. Furthermore, in such case the commercial agent's liability vis-à-vis the principal is limited to the agreed commission.

If the commercial agent conducts his business in the Netherlands and the contract contains no choice of law clause, the courts will generally apply Dutch law. If the choice of law has no connection with the parties or the contract, the courts will set aside that choice of law. The district courts (cantonal section) have jurisdiction with respect to disputes over commercial agency issues.

A commercial agent must register with the Trade Register of the Chamber of Commerce. The commercial agent is also required to register a principal who has no business organization in the Netherlands. A principal who has a business organization in the Netherlands must register himself and his commercial agents.

6.2.3 Termination

A commercial agency agreement may be entered into for a fixed period or for an indefinite period. In the case of a fixed period, a provision allowing for intermediate termination must be explicitly included in the contract. If the contract continues after the expiration date without any further arrangements, it becomes an indefinite contract under the same conditions as before by operation of law.

A commercial agency agreement entered into for an indefinite period may include a clause providing for termination, often under observance of a notice period. The minimum notice period varies from one to three months, depending on the duration of the contract. If parties have not agreed on a notice period, this period varies from four to six months, also depending on the duration of the contract. In the case of unilateral termination of a contract with an agent who is an individual (as opposed to a legal entity), not for urgent cause, the labor laws in certain cases require that the principal first obtains a permit from the CWI (see section 5.6.1). The procedure for obtaining such approval may take several months.

Under certain conditions, the principal may be obliged to pay goodwill compensation upon termination. In the absence of a contractual arrangement, the goodwill compensation amounts to a maximum of one year's compensation based on the average compensation of the five previous years (or if the period of service is less, the actual period).

Immediate termination for urgent cause (without notice) is permitted but is subject to strict requirements, and damages may be payable if the court deems there was no justifiable cause for termination.

6.2.4 Antitrust law

Until a few years ago, there was no Dutch regulation covering antitrust issues relating to

agency agreements. On 1 January 1998, however, the Act on Economic Competition was replaced by the Competition Act (see section 3.3).

This Act closely resembles European competition law (as laid down in, and by virtue of, Section 85 through 90 of the EC Treaty). Many definitions used in the Competition Act have the same meanings as those in European competition law. According to European competition law, Section 85 of the EC Treaty may apply to agency relationships which have an appreciable effect on trade between EU Member States if the agent in fact operates vis-à-vis the principal as an independent trader. It depends on the specific circumstances whether or not in a given situation a commercial agent should be considered an independent trader. The fact that a commercial agent accepts financial risks for his own account, that he also carries on a business of his own, or that he acts for several competing principals may be relevant to the issue of whether he is an independent trader.

Consequently, the Competition Act may apply to agency relationships under the same circumstances as set out above, provided that the Competition Act only applies if an agreement has an appreciable effect on trade on the Dutch market.

6.3 Distributorship

6.3.1 *Definition*

In a distribution relationship:

- (i) The distributor buys goods from his supplier in his own name and for his own account, and
- (ii) He resells those goods to third parties in his own name and for his own account.

The distribution contract is not subject to any specific Dutch legislation. General contract law is applicable.

6.3.2 *General*

There are no formalities, but a contract in writing is advisable. A distribution agreement must be carefully drafted, since inaccuracies can result in the application of mandatory provisions of commercial agency law (see above) which are generally more advantageous to the commercial agent than to the principal.

All elements of a distribution agreement are freely negotiable. Special attention should be given to the termination clauses. In case of a contract for an indefinite period that does not contain a termination clause, a reasonable notice period, together with a statement containing the grounds on which the termination is based, is required.

All persons who conduct a business in any form in the Netherlands are obliged to register this business with the Trade Register of the Chamber of Commerce. There is no specific obligation for the supplier of the distributor in this respect.

6.3.3 Termination

Under Dutch law, a distribution agreement entered into for an indefinite period of time can, generally speaking, be terminated by the supplier at any time provided that:

(i) *The supplier serves a reasonable notice period:*

There are no hard and fast rules as far as determining a reasonable notice period. However, the following rule of thumb can serve as a useful guideline:

- during the first 10 running years of the agreement : 1.2 months per year;
- during the next running years up to termination : 0.8 months per year;

this all with a maximum of three years.

(ii) *The nature of the agreement is not incompatible with its termination:*

The nature of the agreement, for example, a concession-agreement under public law, could counter the termination of a distribution agreement entered into for an indefinite period, although such is rare.

(iii) *Compensation for damages:*

Within the scope of a distribution agreement the supplier can, upon termination, become liable towards the distributor for damages.

Damages, if any, include (i) profit lost over the period due to premature termination; and (ii) loss of return on investments recently made due to premature termination. These investments concern costs made within the scope of the agreement and the expected undisturbed continuation thereof.

Dutch case law distinguishes between two situations (i) the supplier observes a reasonable notice period (see above) and (ii) the supplier does not observe a reasonable notice period.

Generally, if a reasonable notice period is observed, there is no liability to compensate future lost profits. This is different, however, with regard to the liability for compensation of (recent) investments. The Supreme Court has determined that the party who terminates a continuing performance contract as a distribution agreement can be liable for investments made by the distributor despite his having observed a reasonable notice period.

The aforementioned liability does not arise easily. It will only arise if the distributor has made these investments with a justified expectation of continuation of the agreement. Relevant circumstances in this respect are whether the supplier has stated at an earlier stage that the agreement will be continued for a long term, whether he has encouraged the distributor to make investments, or whether he has not prevented the distributor from making investments while already having the intention of termination. Furthermore, of further relevance is whether (large) investments still have to be made within the scope of the period the agreement still has to run.

If a reasonable notice period has not been observed, the supplier can be held liable for damages of the distributor for both lost profits and recent investments. Lost profit is generally calculated from the date of premature termination as the lost turnover over the remaining period minus the costs to be incurred in connection with the prematurely terminated contract.

With regard to recent investments (if any), needless to say, it should be taken into account that the less reasonable the notice period observed by the supplier is, the more investments will be made by the distributor on which it will be unable to gain a return at the termination.

There is no published case law that holds that a distributor should be compensated for the goodwill he built up for his supplier. Most scholars argue that this is only logical, because the customers remain with the distributor to whom they 'belong'. If the distributor can easily obtain substitute products through another supplier, this seems fair. One could wonder, however, what the value is for the distributor in keeping his customers if he is no longer able to sell them the products they want because it is impossible for him to obtain substitute products through another supplier (which, for example, will be the case in the event of very special products that nobody else manufactures or in the event of brand products). It is held by some scholars that in such cases it is fair to award the distributor compensation for goodwill.

6.3.4 *Antitrust law*

The Competition Act may apply to distribution agreements that have an appreciable effect on trade on the Dutch market, especially if the distributorship is exclusive or if the distributor's freedom to sell to certain customers or to determine resell prices is restricted.

Furthermore, Section 85 of the EC Treaty may also apply to distribution agreements which have an appreciable effect on trade between EU Member States. Section 85 of the EC Treaty is applied directly by Dutch courts.

6.4 Franchise

6.4.1 *Definition*

A franchise contract usually contains the following elements:

- (i) The owner of a trade mark or trade name (franchisor) permits another (the franchisee) to sell that product or service under that name or mark;
- (ii) The franchisee undertakes to conduct a business or sell a product or service in accordance with the methods and procedures prescribed by the franchisor, and
- (iii) The franchisee is self-employed.

6.4.2 *General*

There are no statutory regulations concerning this type of contract. General contract law is applicable.

There are no formalities, but a contract in written form is advisable. Extensive supervision by the franchisor may lead to an employment relationship to which mandatory regulations apply.

All elements are freely negotiable. Most franchise contracts are entered into for a fixed period with a possibility for renewal.

6.4.3 *Antitrust law*

Franchise agreements that have an appreciable effect on trade on the Dutch market are subject to the scope of the Competition Act.

Franchise agreements that have an appreciable effect on trade between EU Member States are subject to Section 85 of the EC Treaty. This provision is applied directly by the Dutch courts.

Franchise agreements that comply with the condition of the EU Block Exemption for franchise agreements may benefit from an exemption of both the Dutch and the EU competition rules.

7 Intellectual property rights

7.1 Introduction

In this chapter, we address various questions which may arise with investors considering the protection of their intellectual property rights, such as patents, trademarks, copyrights and the protection of models and designs and maintenance of intellectual property rights in general.

7.2 Patents

7.2.1 Registration

The Patent Act 1995 (*Rijksoctrooiwet* 1995) is harmonized with the provisions of the European Patent Convention ('EPC') and the Patent Cooperation Treaty ('PCT') and contains the statutory regulations with respect to the exclusive right of the inventor of a new product or process. The application for a patent may be for a small patent or for a regular patent. If the applicant for a patent does not request a novelty search by the Bureau for Industrial Property (*Bureau voor de Industriële Eigendom*), a small patent will be granted. Such novelty search is, however, mandatory in application proceedings for a regular patent. The outcome of this search does not determine whether a patent will be granted. The patent will also be granted in case of a negative outcome of the search if the applicant so requests. Validity or invalidity of a patent is decided upon by the courts. An interested party may request the Bureau for Industrial Property to issue an invalidity report, which can be used in proceedings as evidence. The claimant in infringement proceedings is required to provide the court with a report from the Bureau for Industrial Property. There are no requirements with respect to the nationality of the applicant for a patent.

7.2.2 Patentability

There are four main requirements for patentability. First, there has to be an invention. The Patent Act 1995 does not define what an invention is although it does describe what is not deemed to be an invention. A discovery, methods and computer programs as such are, for instance, not considered inventions.

The second requirement for patentability is novelty of the invention. The definition of novelty is negative in the sense that everything that is not considered to be part of the prior art is considered to be new. The prior art is, in general, anything that is published or made public before the day of filing of the application, anywhere in any way.

For patentability of the invention, the invention must furthermore be the result of an inventive activity.

If for an expert in the relevant field the invention does not obviously follow from the prior art, the invention is in general assumed to be the result of inventive activity. Inventive activity is an objectified criterion in that the invention can be created by coincidence or through research.

Finally, the invention should be industrially applicable. If the invention is a working process, industrial applicability implies that the method should be repeatable. If the invention is a product, industrial applicability implies that this product should be reproducible. Section 83 EPC stipulates that any average expert should be able to apply the invention without undue burden. It depends on the kind of invention whether or not efforts should be considered an undue burden.

Industrial applicability is understood also to include any agricultural use. Biological processes by which plants or animals can be created are not patentable. However, microbiological methods and products are patentable.

7.2.3 Duration

A regular registration patent is valid for twenty years from the day of filing at the Bureau for Industrial Property. An extension of five years can be obtained for patents relating to medicines. A small patent is valid for six years from the day of filing at the Bureau for Industrial Property.

7.2.4 Assignment; license

Patents may be assigned or licensed. For an assignment or license to be effective vis-à-vis third parties, entry into the patent register is required. The owner of a patent may, also on behalf of the licensees, take (legal) action in the case of an infringement by third parties. If the owner consents, a licensee may itself take an action for damages.

7.2.5 Employee rules

According to the Patent Act 1995, an employer is entitled to the patent rights with respect to any invention made by an employee within the scope of his employment agreement. The employee is entitled to a fair remuneration if his salary is not an adequate compensation for the invention. If the employee made the invention outside the scope of his employment agreement, the employer has no patent rights. A provision may be included in the employment agreement, providing that the employer will be entitled to patent rights for any invention created by the employee, if such inventions are in any way connected with his job.

7.2.6 *European Patent Convention*

It should be noted that the majority of patent applications in the Netherlands are filed under the terms of the EPC. Since 1977 this convention provides a central application procedure for Europe. A patent issued under this procedure consists of a bundle of national patents on which each national law is applicable. If a third party succeeds in an opposition procedure against such patent, all national patents will be revoked. A European patent is valid for twenty years. A small patent cannot be obtained under the EPC.

7.2.7 *Patent Cooperation Treaty*

International patents can be obtained under Patent Cooperation Treaty ('PCT'). The applicant can designate the countries in which he wishes to obtain a patent. A patent application filed under the PCT is in each of the designated countries considered a national application. In the Netherlands, however, such a national application is considered to be a request for a European patent. Therefore, it is not possible to apply for a small patent under the PCT. The applications in all designated countries are dated on the day of acceptance of the first application.

7.2.8 *EC Treaty*

The national exercise of intellectual property rights may contravene the provisions of the EC Treaty regarding the free movement of goods. For example, the exercise of intellectual property rights, especially patent rights, may amount to an abuse of a dominant position within the meaning of Section 86 of the EC Treaty. Furthermore, the freedom to enter into agreements concerning these rights (e.g. license agreements and settlements of alleged infringements) is limited by the EU principles of free competition laid down in Section 85 of the EC Treaty.

7.3 Trademarks

7.3.1 *Registration*

The Benelux Treaty on Intellectual Property Rights (*Benelux-verdrag inzake de intellectuele eigendom*) ('BTIP') provides trademark protection for Belgium, the Netherlands and Luxemburg. A right to a trademark for products and/or services is established by registration of the trademark with the Benelux Office for Intellectual Property Rights (*Benelux-Bureau voor de Intellectuele Eigendom*: the 'Office') for a Benelux right. The BTIP does not impose any restrictions on the nationality of the applicant.

The application procedure is as follows. Any applicant must fill out an application form and file it with the Office. The Office will subsequently publish the application and undertake a

search regarding prior corresponding registrations. The Office can, amongst others, refuse registration if:

- (i) The trademark does not comply with the definition of a trademark;
- (ii) The trademark conflicts with public order or morality;
- (iii) The registration concerns a product for which the use of a trademark could be misleading to the public.

An appeal against such a refusal to register is possible.

Third parties can object to an application within two (2) months of the publishing thereof. Such objection must be based either on the fact that the opposing party holds an earlier trademark or because the trademark for which the application is made can cause confusion with a commonly known trademark of the opposing party. If grounds for objection are upheld, registration of the trademark applied for will be denied by the Office. Appeal against such denial is possible.

7.3.2 *Protection*

All denominations, drawings, prints, stamps, typefaces, figures, forms of products or packaging and all other signs capable of being represented graphically and capable of distinguishing products and services may serve as trademarks. A family name may also be used as a trademark.

In spite of registration no right to a trademark is obtained if, amongst others:

- (i) The trademark conflicts with public order or morality;
- (ii) The trademark contains a national flag or a coat of arms;
- (iii) The trademark concerns a product for which the use of a trademark could be misleading to the public;
- (iv) The trademark is similar to a collective trademark for a similar product that expired no longer than three years ago;
- (v) The trademark is similar to a registered trademark for similar products that expired no longer than two years ago;
- (vi) The trademark can cause confusion with a common known trademark;
- (vii) The registration has been done in bad faith;
- (viii) The trademark relates to wines and/or spirits and contains a geographical indication in spite of a different origin.

Any interested party, including the Public Prosecutor, can invoke the invalidation of a trademark if, amongst others:

- (i) The trademark does not comply with the requirements for a trademark;
- (ii) The trademark lacks distinctive character;
- (ii) The trademark has become the name of goods in general terms;
- (iv) The trademark consists solely of wording that has become common language;
- (v) Any of the eight above-mentioned grounds upon which no right to a trademark is obtained, apply.

7.3.3 Termination

Trademark protection terminates in the following cases:

- (i) Voluntary cancellation or the expiration of the period of validity;
- (ii) Non-use of the trademark during a period of five years following to the date of registration;
- (iii) If a trademark has become the name of goods in general terms;
- (iv) If a trademark can be misleading with regard to the kind, quality or geographical origin of the product.

7.3.4 Duration

The registration of a trademark is valid for ten years and can be renewed every ten years, provided the request for the renewal is made within six months prior to the expiration date.

7.3.5 Assignment; license

A trademark may be assigned or licensed irrespective of the transfer of the owner's business or a part thereof. An assignment is invalid if it has not been done in writing or if it does not apply to the whole territory of the Benelux. A trademark license does not need to be granted in writing. However, in order for a license to have effect vis-à-vis third parties, registration of such a license with the Office is mandatory.

The owner of a trademark can invoke his trademark right against a licensee who acts in contravention of the conditions of the license agreement with respect to the duration of the agreement, the type of goods for which the license was granted, the quality thereof and the form in which and the territory in which the trademark is used.

A licensee may join the owner of the trademark in a claim for damages in the case of an infringement on the trademark in order to claim damages it suffers. A licensee can only claim damages independent of proceedings initiated by the owner of the trademark, if the licensee has been granted this right by the owner of the trademark.

7.3.6 Collective trademarks

A separate section of the BTIP is dedicated to the collective trademark. A collective

trademark serves to distinguish common features of products or services originating from different enterprises that use the trademark under supervision of the 'holder' of the trademark. A well-known example of a collective trademark is the wool logo. The 'holder' of the collective trademark is usually an association of enterprises in a particular branch of trade. The holder cannot use the collective trademark for products or services that originate from its own enterprises.

The use of a collective trademark is governed by a set of regulations, drawn up by the 'holder' of the collective trademark. Such regulations and any changes thereto, must be filed with the Office.

Only the 'holder' of the collective trademark can initiate proceedings. The holder can be joined in such proceedings by the users of the collective trademark.

7.3.7 Community trademarks

A single EU trademark registration can be obtained by applying for such a registration at the OHIM (Office for Harmonization in the Internal Market). Any third party may oppose to such a registration based on, for instance, a national trademark. If that third party succeeds, the EU trademark will be denied for the entire EU as it is a single registration.

The EU trademark registration is valid for ten years and can be renewed every ten years. Everyone entitled to a national registration has a priority right for an EU registration valid for six months after registration of the national trademark.

7.4 Copyright

7.4.1 Registration

The Dutch Copyright Act (*Auteurswet*) ('CA') is based on the Berne Convention. The inception date of the copyright is the date of creation of the literary, scientific or artistic work. No formal requirements, such as registration, deposit, notice or any other formality has to be met in order to establish or maintain a copyright in the Netherlands.

7.4.2 Protection

The CA grants the author of a literary, scientific, or artistic work the exclusive right to make the work available to the public, to reproduce it and therefore to prevent third parties from unauthorized publication or reproduction. Copyright comes into existence when a work exists in a form that can be noticed by the human eye or ear. The contents of announcements such as historical facts, news or geographical facts are not protected and can be freely used. An idea itself cannot be protected if it is not embodied in a work.

The law gives a non-exhaustive list of examples of works that are eligible for copyright. Some examples are books, brochures, newspapers, theatrical, choreographic or musical works, topographical charts, paintings, sculptures and computer programs.

The work must meet the requirement of originality. It is not required to have literary, scientific or artistic value. In this respect, the following examples of works eligible for copyright are mentioned: advertisements, puzzles, directories, and leaflets. Another requirement is that the work is published or is intended to be made available to the public. The Netherlands Supreme Court has ruled that a work is original if it has an original character of its own (*'een eigen, oorspronkelijk, karakter'*) and bears the personal mark of the maker (*'persoonlijk stempel van de maker'*). Titles of books, et cetera, may be under copyright protection, but they must contain some originality. Slogans are sometimes protected by virtue of case law. Computer programs and derivative works such as translations, dramatizations for theatre or movie and musical arrangements are protected, as are compilations of works such as an encyclopedia.

7.4.3 Duration

Copyright protection continues for 70 years after the author's death. A work of a foreign author not living in a Member State of the EU or the EEA that is protected on the basis of the Berne Convention and not directly on the basis of the CA is not protected in the Netherlands once the copyright protection in the country of origin has expired.

7.4.4 Assignment; license

Assignments must be in writing. An assignment does not affect the author's *droit moral*, which means the right to be named as the author and the right to oppose any modification or deformation of the work that could harm his reputation. Licenses may be granted in writing, but this is not required.

7.4.5 Employee rules

Unless otherwise agreed, the employer/principal is considered to be the author of the work if the employment consists of the creating of a literary, scientific or artistic work.

7.4.6 Miscellaneous

It is forbidden to act as an intermediary in matters of copyright of musical works unless permission has been granted by the Minister of Justice. This permission has only been given to the authors' copyright collection society, BUMA (*Bureau voor muziek-auteursrechten*), which represents most of the world's authors of musical works in the Netherlands.

7.5 Protection for Models and Designs

7.5.1 Registration

The Benelux Treaty on Intellectual Property Rights (*Benelux-verdrag inzake de intellectuele eigendom*) ('BTIP') protects the appearance of a product provided this appearance is new and has an individual character. The exclusive right to a design or a model is acquired by the first registration thereof with the Benelux Designs Office in The Hague for a right within the Benelux, or with the International Bureau in Geneva for an international right. If the application meets all formal requirements, registration is accepted without further examination.

7.5.2 Protection

As mentioned above the appearance is protected. Originality is not required, but the design or model must be new.

A design or model is considered new if no identical design or model has been made available to the public before the date of filing of the application for registration or, if priority claimed, the date of priority. Designs or models are deemed to be identical if their features differ only in immaterial details.

A design or model is considered to have individual character if the overall impression it has on the informed user differs from the overall impression it has on such a user by any design or model that has been made available up to the date of filing of the application for registration, or - if priority is claimed - the date of priority.

On the aforementioned grounds, if not met, any interested party can invoke the nullity of the registration. Nullity can *inter alia* also be invoked if:

- (i) The design or the model is necessary to obtain a technical effect;
- (ii) The design or model is contrary to public order or morality;
- (iii) The design or model is contrary to a design or model that was registered prior thereto;
- (iv) The design or model contains an older trademark that is used without the consent of the holder of such trademark;
- (v) The design or model contains work that is protected by copyright, which work is used without the consent of the copyright owner;
- (vi) The design or model contains a flag or a coat of arms;
- (vii) The registration does not sufficiently evidence the distinguishing features of the design or model.

Moreover, the nullity can be invoked if it is not the actual or fictitious designer who has registered the design or the model.

7.5.3 Duration

The protection under the BTIP continues for a period of five years and can be renewed for four consecutive periods of five years. The maximum is therefore 25 years protection.

7.5.4 Assignment; license

An assignment must be in writing and must refer to the whole Benelux. The only permitted limitation to a license may concern the duration. Licenses may be granted in writing, but such is not required. In order to have effect on third parties, however, the license must be registered with the Office. The latter also applies in case of seizure and/or pledge of a design or model.

7.5.5 Employee rules

Unless otherwise agreed, the employer is considered to be the creator if the design or the model is created in the course of employment.

7.5.6 Copyright

A design or a model may also be protected by copyright if it meets the requirements of the Copyright Act (see again paragraph 7.4 above).

7.5.7 Community designs

A design or model may be protected as an 'unregistered Community Design', or as a 'registered Community Design'. As under the BTIP, the design or model has to be new and has to have an individual character in order to be protected as a Community Design. Both Community Designs grant protection throughout the EU.

A design or model is protected as an 'unregistered Community Design' if it is made available to the public. Such is the case if the design or model has been published, exhibited, used in trade, or otherwise disclosed. The duration of the 'unregistered' protection is three years from the date the design or model was first made public within the EU. The protection constitutes a right only to prevent copying.

A Community Design registration can be obtained at the OHIM (Office for Harmonization in the Internal Market). This registration is valid for five years and can be renewed for four consecutive periods of five years. The holder of a registered Community Design has the exclusive right to use it and to prevent any third party not having his consent from using it. A Community Design may also (cumulative) be protected by copyright.

7.6 Maintenance of Intellectual Property Rights

The maintenance of the several intellectual property rights that can be obtained under Dutch law is laid down in the specific regulations on intellectual property rights and in the Dutch Civil Proceedings Code (*Wetboek van Burgerlijke Rechtsvordering*) and the Dutch Criminal Code (*Wetboek van Strafrecht*). However, the possibilities to act against counterfeiting and other infringement of intellectual property rights were often considered insufficient. On 29 April 2004 the Directive 2004/48/EG, Pb 30 April 2004 L157/45 concerning the maintenance of intellectual property rights has been adopted (the "Maintenance Directive"). The Maintenance Directive purports to harmonize the civil maintenance of intellectual property rights and does not concern any criminal actions or prosecution. The Maintenance Directive applies to any infringement of intellectual property rights, not only infringement on a commercial scale. All intellectual property rights addressed above fall within the scope of the Maintenance Directive, as well as protection for databases, topographies of semiconductors and geographic designations and plant breeder's rights and neighboring rights.

The implementation of the Maintenance Directive in Dutch law entered into force on 1 May 2007 and entailed changes of and additions to the Dutch Civil Proceedings Code and the specific regulations on intellectual property rights. The most important changes for the benefit of owners of intellectual property rights pursuant to the implementation of the Maintenance Directive are the following:

- extension of the possibilities to obtain information and evidence (goods and documents) regarding infringements;
- extension of the possibilities to levy a conservatory attachment on evidence (*bewijsbeslag*), as long as confidentiality of confidential information such as trade secrets is ascertained.
- injunction proceedings *ex parte*, i.e. in urgent cases an injunction can be obtained without the (alleged) infringer being heard by the court. Permission to levy a conservatory attachment to protect evidence can in urgent cases also be obtained *ex parte*;
- instead of a fixed-rate compensation of legal costs, the winning party in proceedings regarding the infringement of intellectual property rights can claim compensation of all legal costs incurred, including attorneys' fees and costs of experts. The compensation must be paid by the party that has been put in the wrong. Please note that this can also be the owner of the intellectual property right if the court judges that its rights are not infringed. The court has the right to mitigate the amount of legal costs claimed by the winning party.

8 Spatial planning and the environment

8.1 Introduction

In this chapter we discuss some of the key legal aspects regarding spatial planning and the environment that can come into play when erecting or changing an industrial facility in the Netherlands. We do not intend to provide an exhaustive overview. This would be impossible, given the broad variety of the applicable national laws, decrees, rules, regulations, policies and European Directives.

Spatial planning and environmental law are closely related, as they should be, especially in a country as densely populated as the Netherlands. The possible environmental impact of industrial facilities on (sensitive) surrounding areas is a matter of concern in both the adoption of a Zoning Plan in which land is designated for industrial purposes and the granting of environmental permits for the erection and operation of industrial facilities. In this respect, aspects such as industrial noise (including noise associated with traffic movements to and from the industrial area) external risk and odor nuisance are of major importance.

8.1.1 Legislative framework

The general legal framework for spatial planning and related (permit) requirements is embodied in the Spatial Planning Act (*Wet op de Ruimtelijke Ordening*) ('SPA') and the Housing Act (*Woningwet*). Environmental matters, including the related permit requirements, are regulated by the Environmental Control Act (*Wet milieubeheer*) ('ECA'), the Surface Waters Pollution Act (*Wet verontreiniging oppervlaktewateren*) ('SWPA') and the Soil Protection Act (*Wet bodembescherming*) ('SP').

8.1.2 European Union law

European Union law has gained increasing importance with respect to spatial planning. For instance, European nature conservation law, such as the European Birds and Habitat Directives have a direct influence on spatial planning and other project procedures, if projects are (to be) located in or near Special Protection Areas or Special Areas of Conservation, designated by virtue of these Directives. Lately, the European Directives on the limit values of certain substances in ambient air have become important factors in (case law relating to) the adoption and amendments of Zoning Plans.

To a large extent, national environmental legislation is also influenced by European Union law, examples of which can be found in legislation on waste management, including cross-

border waste shipments, Integrated Pollution Prevention and Control ('IPPC') and handling of hazardous substances. The European Union is aiming at a pan European level playing field, particularly in the areas of waste and secondary raw materials trading. Air emission trading was added to that recently. Air emission trading legislation has recently been implemented in the Netherlands as a direct result of the European Directive establishing a scheme for greenhouse gas emission allowance trading within the European Community.

8.1.3 Policy trends

Spatial planning and environmental law are constantly changing. These changes find their basis not only in European law developments but also in national developments. For instance, the interest of Dutch policymakers in fire prevention and external safety aspects has intensified after some major deadly fire and explosion incidents that have occurred in the Netherlands some years ago. These developments all lead to intensified legislative activity and law enforcement.

8.1.4 Environmental management

In the last two decades, environmental management has grown to a relatively high level in the Netherlands industrial sector. In this period, many Netherlands organizations were listed according to the European Environmental Management and Audit Scheme ('EMAS') and many industrial facilities were certified according to the ISO 14001 standard for environmental management systems. A decade ago, Netherlands environmental policymakers developed an incentive program in order to enhance the implementation of environmental management systems in the Netherlands. This program boils down to an Environmental Control Act permit with less permit conditions (only stating the environmental goals that should be achieved and not the means that the facility should apply in order to reach these goals) and less governmental inspections under the condition that ISO 14001 certification is awarded to the facility and that it has a pro-active approach with respect to environmental compliance. The side effect of this is that the permit provides more flexibility with respect to changes that are necessary to achieve the environmental goals.

Some ten years ago, the Administrative Court of the Council of State rendered a number of verdicts from which it became clear that the application of this policy resulted in environmental permits that did not meet the legal requirements. Since then competent authorities have become somewhat hesitant in the granting of these permits, but they have in all events continued to focus on the implementation of environmental management systems in industrial facilities. Environmental management systems are now commonly used in the Netherlands industrial sector.

8.1.5 Annual environmental report

Currently around 250 industrial facilities in the Netherlands with potential significant environmental impact are bound by law to publish an annual environmental report. These facilities do not have the legal obligation to implement an environmental management system. However, without a sound environmental management system, they would simply not be able to produce the data required in order to draft the report.

8.1.6 Specific environmental aspects

The possible presence of soil or groundwater pollution, asbestos or ozone-depleting chemicals in buildings and installations has always required special attention in the acquisition of existing real estate or industrial businesses. This will certainly not change in the coming years.

Below, we describe the building permit and environmental permit procedures in general terms and touch on the Netherlands legislative framework relative to soil and groundwater pollution and asbestos removal.

8.2 Building Permits and Zoning Plans

8.2.1 General

Zoning Plans are the lowest level source of spatial rules and regulations that contain binding conditions on the nature and location of buildings and activities in the area in question. These conditions can include maximum building plot dimensions and environmental zoning requirements.

A Building Permit is required for the construction of most industrial facilities. Only minor modifications to buildings and small constructions are exempted from this requirement. A Building Permit has to be filed with and granted by the Municipal Executive.

8.2.2 Building permit procedure

Various Building Permit procedures apply. The period the procedure will take depends on the nature of the building or construction and on whether there are grounds to suspend the decision on an application for a Building Permit. The Municipal Executive must decide on an application for a simple or a regular Building Permit within six or twelve weeks respectively after receipt of the application. Regular Building Permits may be granted in one or two phases. The Municipal Executive is allowed to defer its decision on a regular Building Permit for another six or twice six weeks, depending on whether it concerns a one-phase or a two-phase procedure.

The Municipal Executive has limited discretion in deciding whether a Building Permit should be granted or not. The grounds for refusing a Building Permit are limited to (i) incompatibility with the Building Decree (*Bouwbesluit*); (ii) incompatibility with the Municipal General Building Regulations (*Bouwverordening*); (iii) incompatibility with the Zoning Plan and; (iv) incompatibility with reasonable standards of external appearance. The Building Decree and the Municipal General Building Regulations contain conditions related to construction, strength, materials and fire safety.

If the Municipal Executive fails to decide within the applicable period, the Building Permit is deemed to have been granted by law, unless there is a ground to suspend the building permit. Apart from incompatibility of the building or construction with the Zoning Plan that should not lead to denial of the Building Permit, grounds for suspension are, amongst others, the requirement of a Monuments Act Permit (*Monumentenwetvergunning*), the requirement of an Environmental Control Act Permit (*Wet milieubeheervergunning*), or the presence of a serious case of soil pollution on the subject location.

If it does not concern a simple or a regular Building Permit, the period that the total procedure takes will largely depend on the other procedures that must be followed before the suspension of the decision on the application for a Building Permit ends.

The Building Permit enters into force on the day the decision to grant the Permit is sent to the applicant. Interested parties can file their objections against the Building Permit with the Municipal Executive and petition for preliminary relief with the competent division of the District Court. Appeal can be filed against the decision on the objection.

8.2.3 *Exemption procedure in the case of incompatibility with the zoning plan*

Specific project exemptions can in some cases be granted on the basis of article 19 SPA. These exemption procedures are followed parallel to the Building Permit procedure and are independent of any intention to revise the Zoning Plan. Article 19 procedures can only be followed if there is a well-founded spatial justification for the project (*een goede ruimtelijke onderbouwing*), which is preferably either a municipal plan or an inter-municipal structure plan. The justification must discuss the relation between the project and the existing Zoning Plan or substantiate why the project fits in with the future designation of the area concerned. An informal municipal plan or policy document may form sufficient spatial justification, if no structure plan is available.

8.2.4 *Building permit and environmental permit procedure interference*

If a certain project requires an Environmental Permit (see section 8.3), the Municipal Executive must suspend its decision on the application of the Building Permit if there is no

reason to deny the Building Permit. This suspension will in general last until the expiration of the six-week appeal period after granting of the Environmental Permit.

8.2.5 *Transferability of permits*

Building Permits can be transferred from the applicant to another party by lodging a transfer request with the Municipal Executive.

8.3 Environmental Permits

8.3.1 *Environmental Control Act permit and waste water discharge permit*

A permit by virtue of the ECA is generally required for the erection of or changes to an industrial facility. An exemption from the ECA permit requirement applies if the facility is subject to a specific environmental decree. In such case, advance notice of the erection of the facility must be given to the competent authority instead of a permit. Environmental Permits for industrial facilities may contain conditions regarding emissions to air, water and soil, as well as to noise emissions, waste management and external safety.

A wastewater discharge permit by virtue of the SWPA is furthermore required for the discharge of wastewater from most industrial facilities.

8.3.2 *Environmental permit procedure*

The majority of the procedures related to the application and granting of environmental permits are laid down in the ECA and the General Administrative Law Act (*Algemene wet bestuursrecht*) ('GALA'). These procedures are applicable to, amongst others, permits by virtue of the ECA and the SWPA.

In most cases, the Municipal or the Provincial Executive is the competent authority for the Environmental Control Act Permit. Permits by virtue of the SWPA are dealt with by the Water Boards (*Waterschappen of Hoogheemraadschappen*) or the Minister of Transport, Public Works and Water Management (*Minister van Verkeer en Waterstaat*), depending on whether it concerns a discharge into regional water or State surface water.

The relevant procedures are governed by the GALA and the ECA. These Acts contain rules on the filing of the application with the competent authorities, the handling thereof, the involvement of other authorities in the procedure, and a public inspection period of six weeks during which objections can be lodged against the draft decision on the application. A public hearing during which oral objections may be presented can be held at the request of any person (*actio popularis*).

The application for an Environmental Permit is usually preceded by informal consultations between the competent authority and the applicant. These consultations are probably the most important phase in the permitting procedure. In general, it is effective to start these consultations with the competent authority even before the permit application is drafted. This can both enhance the drafting of the permit application and result in an application that is in line with the expectations of the competent authority.

The decision must be taken within six months after receipt of the application (and receipt of the Environmental Impact Statement ('EIS') if required; see below paragraph 8.3.4). This is however a procedural period, implying that there are only limited means to hold the competent authority responsible for a delay in the permitting procedure. In practice, the total procedure may take up to 9 or 10 months and up to 18 months if the drafting of an EIS is required, all excluding possible appeal proceedings and preliminary relief proceedings.

8.3.3 *Transferability of Environmental Permits*

Most Environmental Permits are of a facility-bound nature. These Environmental Permits stay with the facility and remain valid after transfer of the facility to another entity. The Environmental Permit must be complied with by any operator of the facility, regardless of whether it was the applicant for the Permit itself. Often, the Environmental Permit conditions require that a transfer of ownership of the facility be reported to the competent authority. Even without requirement, such notification is advised in order to prevent enforcement problems.

8.3.4 *Environmental Impact Statement (EIS)*

On the basis of the Decree on Environmental Impact Statements 1994 (*Besluit milieu-effectrapportage 1994*), an EIS may be required either prior to the determination of a Spatial Plan that allows for the erection of the industrial facility or in advance of the application for an Environmental Permit for such facility.

The requirement of an EIS could also arise from the Provincial Environmental Policy (*Provinciale Milieu-Verordening*). A Provincial Environmental Policy may contain other criteria than the Decree, resulting in the requirement of an EIS.

8.3.5 *Birds and Habitat Directive, SPAs and SACs*

The two most relevant obligations imposed on the EU Member States by the Birds Directive and the Habitats Directive are, first, the obligation to designate Special Protection Areas ('SPAs') (Birds Directive) and Special Areas of Conservation ('SACs') (Habitats Directive). The second relevant obligation is to protect these SPAs or SACs.

Any plan or project likely to have a significant impact on these areas in terms of deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated are subject to an appropriate assessment of implications for the area.

The definition of 'Plan or Project' is broad. Decisions for which such assessment as to the implications for the area is required are in any event, the determination of a spatial plan that is likely to have a significant impact on a designated area. It may not be excluded that the decision to grant, for instance, a Building Permit will also be subject to an assessment obligation.

The competent authorities are only allowed to agree to the plan or project after having ascertained that it will not adversely affect the integrity of the area concerned.

8.3.6 Other protection areas

In addition to the SPAs and the SACs, Provincial Spatial Plans or Provincial Environmental Regulations may have designated other environmental conservation areas, silent areas or environmental protection areas, in which certain activities are forbidden or restricted and to which specific requirements apply. The regime that applies varies according to the area concerned and can differ per location.

8.4 Soil and Groundwater Pollution

8.4.1 General

The applicable rules for prevention, investigation and remediation of soil pollution are embodied in and/or based on the Soil Protection Act ('SP').

By virtue of the SP, the Provincial Executive (or in some cases the Municipal Executive) is vested with the authority to issue orders to investigate, to take temporary control measures or to remediate a case of serious soil pollution, on certain persons owning real rights or personal rights relative to a polluted site.

8.4.2 Seriousness and urgency

The SP lays down the procedure for the remediation of a specific pollution. Remediation can only take place after the Provincial Executive has determined the degree (i.e. the seriousness and the urgency) of the pollution and has approved the remediation plan.

Pollution qualifies as serious if the functional properties that the soil and groundwater have for man, flora and fauna are in danger or seriously impaired. This is deemed to be the case

if the intervention values are exceeded and if the extent of the pollution exceeds certain volumes.

The urgency is determined by the associated actual risks to which man and ecosystems are exposed and by the designated use of the polluted site.

8.4.3 Remediation costs

The party ordered by the competent authority to investigate, remediate or to take certain control measures relative to a certain case of soil pollution must, in principle, also bear the costs thereof. In most cases this is the owner of the polluted property or the long lease holder. A possibility for recourse against the party who has caused the soil pollution or one of the previous owners of the polluted real estate may in some cases be found in general civil law or the purchase agreement relative to the polluted real estate.

In the late 1980's and the early 1990's, local authorities carried out a number of large soil remediation projects themselves because they had no legal instruments to force private parties to execute the remediation works. The Soil Pollution Act currently provides the State with specific recourse possibilities in relation to these remediation projects. If certain conditions are met, the State has the authority to recover the costs it incurred for the investigation and remediation of a seriously polluted site from the person(s) responsible for the pollution, even if that person was at the time not responsible for the damages arising there from against the State on the basis of general civil law.

8.5 Asbestos

Currently, there is no general legal requirement to remove asbestos from an existing building. The legal requirement to remove asbestos depends on the question of whether it affects the working conditions in the relevant working area (i.e. the likelihood of employee exposure). The possibility to claim damages after exposure is dealt with in general civil law.

The rules for the execution of asbestos surveys and the removal of asbestos from buildings, constructions and objects are embodied in and/or based on the Working Conditions Act (*Arbeidsomstandighedenwet*) and the associated Decrees, including the Working Conditions Decree (*Arbeidsomstandighedenbesluit*) and the Asbestos Removal Decree (*Asbestverwijde-ringsbesluit*). These Decrees contain a number of safety requirements and stipulate that asbestos surveys and asbestos removal activities are performed by certified companies only.

A demolition permit is required if the demolition works entail the removal of asbestos from a building or if asbestos is present in the subject construction.

9 Insolvency

9.1 Introduction

Although not the first thought that comes to mind when contemplating establishing a new business in another country, it is only realistic to dwell on the event that things may not turn out as anticipated and, perhaps, even an insolvency is unavoidable. This chapter gives an overview of insolvency proceedings as they exist under the laws of the Netherlands.

9.2 Types of Insolvency Proceedings

The Bankruptcy Act provides for two types of proceedings applicable to business enterprises: (i) bankruptcy, in which the debtor's assets are liquidated and the proceeds thereof are distributed to creditors (*faillissement*), and (ii) legal moratorium or suspension of payments (*surséance van betaling*), in which the debtor is given temporary relief from pressing creditors in order to achieve, by way of reorganization, continuation of his/her business and ultimately, partial satisfaction of creditors.

Equal treatment of creditors, whether domestic or foreign, is the leading principle of Dutch (bankruptcy) law. Thus, the primary aim is to ensure that all creditors are ultimately satisfied, rather than providing for a re-start of the debtor by way of a general discharge of debts, as is the case under the liquidation provisions of the US Bankruptcy Reform Act.

Bankruptcy in the Netherlands is somewhat similar to Chapter 7 of the US Bankruptcy Reform Act (liquidation): suspension of payments or moratorium is - to a certain degree - comparable to relief under Chapter 11 of the applicable US law (reorganization). No debtor can be granted discharge as a result of either bankruptcy or suspension of payments proceedings unless he pays the amount of his debts in full or offers a settlement or reorganization plan to his creditors which is accepted by a qualified majority.

Suspension of payments can be converted easily into a bankruptcy if it is obvious that the suspension will not lead to satisfaction of creditors. A suspension of payments and a subsequent bankruptcy can be considered as a whole; the moratorium trustee usually remains in control as bankruptcy trustee. Bankruptcy, on the other hand, cannot be converted into a suspension of payments. Many provisions of the Bankruptcy Act regarding bankruptcy are also applicable to suspension of payments. Both proceedings are summarized below.

9.3 Initiating a Bankruptcy Action

9.3.1 Introduction

Bankruptcy can be petitioned for by one or more of the creditors of the debtor (involuntary filing), by the debtor himself (voluntary filing), or in exceptional cases, by the public prosecutor if the public interest so requires. Any creditor, including a foreign creditor, may file a bankruptcy petition with the competent court located in the jurisdiction where the debtor resides.

For a voluntary filing of a corporation, a shareholders' resolution is generally required.

The bankruptcy can be declared once it has been summarily indicated that the debtor is in the position of having ceased to pay his debts (i.e. is in a state of equitable insolvency). The courts require that the debtor have at least two creditors (one of them being the filing creditor if the filing is involuntary) and that at least one of these two debts be currently due and payable. It should be noted that the law does not require other creditors to support the petition.

The petition must be filed at the court of the district in which the debtor resides, or, if the debtor is a corporation, in which the corporation has its registered offices as stated in its Articles of Association.

9.3.2 Bankruptcy trustee

If a petition for bankruptcy is granted, the court will appoint a bankruptcy trustee (*curator*), who is usually a member of the local bar, together with a bankruptcy judge, who supervises the actions of the trustee. In larger bankruptcies it has become standard practice to appoint two or three trustees. The bankruptcy judge is, for example, empowered to examine witnesses and order an inquiry by such experts as accountants.

9.4 Procedure in Bankruptcy

The bankruptcy trustee is charged with the administration and liquidation of the bankrupt's estate. Immediately upon his appointment, the trustee must take all necessary steps to preserve the estate. All creditors' actions and claims are automatically stayed. After consultation with the bankruptcy judge, the trustee decides whether or not he will temporarily continue any part of the bankrupt's business, which is only permissible if this would not be to the detriment of the collective creditors.

If the business activities are not continued, the trustee may sell the assets, provided that this does not contravene any special security interests of a creditor.

Claims must be submitted to the trustee in time and in the form of a written statement setting out the nature and the amount of the claim, accompanied by documentary evidence and a statement as to whether or not a priority right, pledge, mortgage or right of retention is claimed.

In most cases, a creditors' meeting is held only when the proceeds of the assets exceed the preferred claims of the tax and social security authorities. A creditors' meeting is chaired by the bankruptcy judge and attended by the trustee and the bankrupt party. All creditors are entitled, although not required, to attend the meeting. The purpose of the meeting is to either admit or dispute the claims and to classify them as secured or unsecured. All creditors, the bankrupt party and the trustee may dispute a claim. The undisputed claims are put on a list of creditors whose claims have been admitted and this list is included in the minutes of the meeting. The admission of a claim recorded in the minutes of the meeting is final. If a claim is disputed and the bankruptcy judge is unable to reconcile the parties, the bankruptcy judge refers the matter to the court for verification proceedings.

9.5 Creditors' Rights

9.5.1 Introduction

As mentioned above, the general principle of Dutch bankruptcy law is what is termed *paritas creditorum* which means that all creditors have an equal right to payment and that the proceeds of the bankrupt's estate will be distributed in proportion to the size of their claims. However, there are two groups of preferred creditors to whom this principle of *paritas creditorum* does not apply, namely:

- (i) Creditors who hold a secured interest, and
- (ii) Creditors who have a preference by virtue of bankruptcy and other laws.

Therefore, the *paritas creditorum* refers only to the unsecured creditors; they share pro rata parte in the balance available to them.

9.5.2 Secured creditors

Creditors who hold a secured interest may exclude the collateral from the debtor's estate and foreclose their security; the creditor is entitled to initiate foreclosure even if the debtor has been adjudicated bankrupt. However, the court may, for a period of two months with a

possible extension of two months, order a general stay (cool down period) of all creditors' actions by secured creditors, who are entitled to prompt foreclosure in specific circumstances.

The Bankruptcy Act refers to only two types of secured creditors: the mortgagee and the pledgee. Certain other secured interests, such as the right to retain property, also entitle the creditor to initiate foreclosure in specific circumstances.

After, or in the absence of, a possible cool down period, a secured creditor may therefore act as if there were no bankruptcy. As a result, the trustee is not entitled to retain the encumbered property. Because the secured creditor obtains payment of his claims by enforcing the security, he cannot be charged with bankruptcy costs. The automatic stay of all actions against the debtor which results from an adjudication of bankruptcy does not apply to secured creditors.

Creditors who hold a mortgage or a right of pledge are entitled to auction off the collateral without the cooperation of the bankruptcy trustee. A private sale with the consent of the court is also possible to enforce these security rights. Any excess proceeds are handed over to the trustee. Appropriation of the collateral is prohibited. However, the creditor may request the court to grant permission to foreclosure by taking possession of the collateral, in which case the court will determine the price.

The trustee is entitled at all times to release the collateral underlying a mortgage or a pledge by paying the mortgagee or the pledgee the amount owed by the bankrupt.

9.5.3 Preferred creditors

Unlike secured creditors, preferred creditors are not entitled to initiate foreclosure proceedings. Preferred creditors are required to present their claims to the trustee and are thereby charged a pro rata share in the costs of the bankruptcy.

There are several categories of preferred creditors:

- (i) Creditors with statutory priority;
- (ii) Creditors with non-statutory priority, and
- (iii) Estate creditors.

9.5.4 Unsecured creditors

As explained, the equality of all creditors (*paritas creditorum*) is an underlying principle of Dutch bankruptcy law. Unsecured creditors are *paritas creditorum* creditors, with the

exception of any pre-agreed subordination. Unsecured creditors do not have priority and will therefore only be paid if any proceeds of the estate remain after all other creditors have received payment. Unsecured creditors are required to present their claims to the trustee.

9.6 Termination of the Bankruptcy and Distribution of the Proceeds

9.6.1 Introduction

There are four ways in which a bankruptcy can terminate:

- (i) Cancellation;
- (ii) Liquidation;
- (iii) Closing, and
- (iv) Composition.

9.6.2 Cancellation

A bankruptcy can be cancelled by the court through successful opposition by the debtor, a creditor or an interested party. However, cancellation does not affect the validity of actions taken by the trustee, which remain binding on the debtor.

9.6.3 Liquidation

The purpose of liquidation is to distribute the assets of the estate. In practice, a bankruptcy will be liquidated only if unsecured creditors receive at least some payment.

In the case of a liquidation (or a composition, see below), a creditors' meeting will be held. Within 14 days of the order of declaration, the bankruptcy judge will summon a meeting of creditors to be held on a date appointed by the judge. The purpose of the meeting is to list and classify all claims. Claims can either be allowed or challenged. Dutch law does not recognize a strict proof of claim procedure. If the trustee and a creditor whose claim is challenged do not settle their dispute, the bankruptcy judge will order that legal proceedings be initiated to determine whether the claim should be allowed. The reality is that the 14-day period is never complied with and a trustee will usually first investigate extensively whether any payment to unsecured creditors can be made. He will take all action necessary to enforce the assets of the bankrupt and only then will a decision be made, whether or not a creditors' meeting can be held. Consequently, any disputed claim will remain in abeyance for as long as the meeting of creditors has not taken place. Only if and when this occurs can a court action against the bankrupt on the disputed claim be pursued.

After the lists of allowed claims are finalized, the trustee prepares a plan of distribution that shows the net worth of the estate and indicates which percentage of the claims will be paid to the creditors. This plan must be approved by the bankruptcy judge. Upon approval, the plan is filed with the court and may be examined by the creditors within the 10-day period following the filing of the plan.

Creditors may oppose the plan by filing a reasoned petition. The judge will then order a hearing in which the trustee and the creditors are heard. The court will render its decision on the day of the hearing or as soon as possible thereafter.

If no creditors oppose the plan, the bankruptcy terminates 10 days after the plan is filed. If there is opposition, the bankruptcy terminates immediately after the court's decision. This decision, however, is subject to appeal.

9.6.4 Closing

Almost all bankruptcies are closed. Closing procedures follow in cases in which there are little or no assets. Bankruptcies are closed at the request of the bankruptcy judge in the event there are insufficient assets to pay the bankruptcy costs and the estate creditors.

If the trustee concludes that the bankruptcy should be closed, he will advise the judge accordingly. The judge may then advise the court to close the bankruptcy.

9.6.5 Composition

During bankruptcy or moratorium a debtor and his creditors may enter into a composition. This is an agreement which seeks to provide for full or at least partial satisfaction of the creditors' claims and it is for that reason that creditors will be inclined to discuss a composition with their debtor. If such composition is accepted, the debtor's estate will not be liquidated. The debtor can make a proposal to the creditors for a composition only once; if it is not accepted, there will not be an opportunity to make any further proposals.

9.7 Suspension of Payments (Legal Moratorium)

As mentioned earlier, a court-ordered suspension of payments is, to a certain degree, comparable to relief under Chapter 11 of the US Bankruptcy Reform Act. A suspension of payments affects unsecured debts only; secured and preferred creditors may exercise their rights as if no such moratorium existed (subject to a possible cool down period, see below). A moratorium will be provisionally granted by the court at the request of the debtor without the necessity of a further investigation, provided that all formalities are met.

In its judgment in granting the petition for moratorium, the court appoints a moratorium trustee (bewindvoerder) who is usually a member of the local bar. The court may also appoint a judge who renders advice to the trustee on request.

The court is empowered to grant a definitive suspension of payments unless:

- (i) Objections are raised by unsecured creditors representing either more than one-quarter of the total amount of unsecured claims present at a court hearing, for which all creditors received notice, or more than one-third of the total number of creditors entitled to vote;
- (ii) There is a serious suspicion that the debtor will prejudice the rights of creditors during the moratorium, or
- (iii) By lack of prospect that the debtor will ultimately be able to satisfy his creditors, either partially, by way of a settlement (composition), or in full.

If the definitive moratorium is not granted, the court is entitled to, and in practice often does, order the commencement of bankruptcy proceedings. The decision of the court is subject to appeal, either by the debtor if the moratorium has been refused, or by a creditor who raised the objection at the court hearing where the moratorium was granted.

A suspension of payments may be granted by the court for a maximum period of 1.5 years, and may be extended an unlimited number of times for 1.5-year periods at the request of the debtor.

Throughout the course of a suspension of payments, the debtor may no longer administer or dispose of his assets without the authorization or assistance of the moratorium trustee.

The rights of unsecured creditors to pursue their claims are affected by the moratorium. If unsecured claims are concerned, foreclosures on the debtor's assets are suspended by the moratorium and attachments on such assets are lifted as soon as a definitive suspension of payments has been granted. Although secured and privileged creditors may still exercise their rights, they are in practice often prepared to grant the debtor an opportunity to reorganize his financial position.

Furthermore, as in bankruptcy proceedings, the court may, for a period of two months with a possible extension of (maximum) another two months, order a general stay (cool down period) of all creditors' actions, including foreclosure by secured and preferred creditors.

A suspension of payments may be terminated by the court in three instances:

- (i) At the request of the debtor, in the event he has recovered his ability to pay his debts;
- (ii) In the event of a composition (see paragraph 9.6.5 above); or
- (iii) At the request of the judge, the moratorium trustee or a creditor, in instances where it is clear that the debtor will ultimately be unable to satisfy his creditors. The debtor may then be declared bankrupt. When a suspension of payments is followed by a bankruptcy, the holders of debts incurred during the moratorium period qualify as estate creditors in the bankruptcy.

9.8 Fraudulent Conveyance (Actio Pauliana)

9.8.1 *Fraudulent conveyance in or prior to bankruptcy*

The Bankruptcy Act contains provisions that invalidate transactions between the debtor and a third party, which the debtor is not obligated by contract or by law to perform, i.e., those which are voluntarily undertaken by the debtor. In the United States, the power to avoid such preferences is referred to as 'preferential transfers' or voidable preferences.

In the Netherlands, the trustee is empowered to void voluntarily executed transactions, provided he can establish that both parties to the transaction knew or should have known that the transaction would have the effect of decreasing the amount the other creditors would receive, had the transaction not been executed.

Knowledge that the transaction has prejudiced the debtor's creditors is presumed by law for all transactions performed within one year of an adjudication of bankruptcy, provided it can also be established that the transaction falls within one of the following categories:

- (i) Transactions in which the debtor received substantially less than the estimated value;
- (ii) Payment or granting of security for debts that are not yet due;
- (iii) Transactions entered into by the debtor with certain relatives;
- (iv) Transactions entered into by the debtor corporation with its managing director, a member of the board (supervisory director), certain relatives of those directors or certain shareholders;
- (v) Transactions by the debtor corporation with an affiliated legal entity, or transactions by the debtor corporation with a subsidiary or affiliated company.

Nullity may only be invoked by the trustee. The trustee may reclaim any assets transferred by the debtor. If the other party cannot produce the assets sought to be reclaimed, it must indemnify the estate. In the above instances, the presumption of knowledge of prejudice to the other creditors may be overcome by the creditor involved in the transaction demonstrating his lack of such knowledge.

Any transaction entered into by the debtor pursuant to an existing obligation can only be voided if the trustee (a) proves that the debtor and the counterparty to the transaction conspired to favor this counterparty to the detriment of the other creditors; and/or (b) proves that the counterparty that entered into the transaction at the time was aware of the bankruptcy petition having been filed.

If the debtor's counterpart in the transaction gave either no or obvious inadequate consideration, the trustee will only have to establish that the debtor knew or should have known he had caused prejudice to his creditors. Donations made within one year prior to the bankruptcy adjudication are statutorily presumed to have been made with knowledge that creditors' rights would be prejudiced.

9.8.2 Fraudulent conveyance outside of bankruptcy

Outside a bankruptcy situation, legal acts entered into without a prior legal obligation to do so can be voided by a creditor if the creditor can prove that both parties knew or should have known that the act would prejudice the recourse possibilities of one or more creditors. Knowledge that the transaction has prejudiced the creditors is presumed by law for all transactions performed within one year before the voidance is invoked, provided it can also be established that the transaction falls within one of the categories described above. A transaction without consideration can be voided by a creditor if it is established that the debtor knew or should have known he had caused prejudice to his creditors. However, the transaction in favor of a party who neither knew nor should have known that it would prejudice the interests of other creditors may only be nullified to the extent of any advantage received by such party.

9.8.3 The insolvency regulation

On 31 May 2002, the European Insolvency Regulation entered into force. The Regulation applies to all EU countries at the time of enforcement, with the exception of Denmark. Under the Regulation, the courts of the country in which a company has its "centre of main interest" are authorized to declare a company bankrupt. The statutory seat/registered office of the company qualifies as the centre of main interest under the Regulation, unless other circumstances would lead to a different conclusion. The declaration of such a bankruptcy is, in principle, recognized in every EU country. In general, the law applicable to insolvency proceedings and their effect is that of the EU country within the territory of which such proceedings are opened.

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