Contract Formation and Enforcement in the Netherlands: Overview

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A Q&A guide to general contract formation and enforcement in the Netherlands.

The Q&A gives a high-level overview of key concepts of contract law, including contract formation with general information on authority and capacity, formal legal requirements, preliminary agreements and pre-contract considerations, formalities for execution, deeds, notarisation, legalisation and registration requirements, electronic signatures and remote execution, and powers of attorney. The Q&A also considers contract content requirements, variation, assignment and waiver of contracts, enforcement and remedies, and cross-border issues.

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Formation of Contracts

Authority and Capacity

1. What are the authority/capacity rules for entering contracts?

Individuals

Dutch law distinguishes between individuals, who are referred to as natural persons, and entities (such as companies, associations, and so on), which are known as legal persons.

Under the Dutch Civil Code 1992 (*Burgerlijk Wetboek*) (DCC), any natural person has the capacity to carry out legal acts (which includes the capacity to enter into contracts) unless the law provides otherwise (Article 32, paragraph 1, Book 3, DCC). A minor is a natural person who has not yet reached the age of 18 or has not been declared an adult under Article 1:235a of the DCC (Article 1:233, DCC). In principle, a minor has the capacity to carry out legal acts if they have the permission of their legal representatives (for example, parents or legal guardians) (Article 1:234, paragraph 1, DCC). A minor female of 16 years who wishes to care for and bring up her child can request the court to declare her an adult (Article 1:253a, paragraph 1, DCC).

A natural person who has been declared by the court to lack capacity cannot carry out legal acts (Article 1:381, paragraph 2, DCC). A court can declare that a natural person lacks capacity on the grounds listed in Article 1:378 of the DCC, including for individuals who:

- Temporarily or permanently cannot look after their interests.
- Endanger their own safety or the safety of others due to a physical or mental condition or due to drug or alcohol abuse.

Companies

A legal person is treated in the same way as a natural person under the law of obligations (Article 2:5, DCC). Private legal persons include associations, cooperatives, public limited companies, private companies with limited liability, and foundations (Article 2:3, DCC). Public limited companies and private companies with limited liability (the two types of company that exist under Dutch law) always have the capacity to enter into contracts, unless the law provides otherwise (Articles 2:3, 2:5, and 3:32, DCC).

Foreign Companies

Under Dutch private international law, whether a company is a legal person (that is, a person capable of entering into legal relationships) is assessed by reference to the company's law of incorporation. Therefore, a Dutch party that contracts with a foreign company will have to research foreign law to find out if that company has the capacity to contract.

General Partnerships

A partnership is a contract under which two or more persons bind themselves to bring something into communal property with the intention to share the profits resulting from that communal property. A partnership is not a legal person. However, it is a legal subject and has the capacity to enter into contracts. A partnership can enter into contracts with third parties through one or more of its partners, who contract for and on behalf of the other partners.

Limited Liability Partnerships (LLPs)

LLPs do not exist under Dutch law.

Trustees

Trustees do not exist under Dutch law.

Charities

Charities do not exist under Dutch law. Under Dutch law, a charity is generally organised as a foundation, which is a legal person (see above, *Companies*).

Public Bodies and Local Authorities

Public bodies and local authorities (including the state, provinces, councils, water authorities, and so on) are legal persons (Article 2:3, DCC). Public legal persons have the capacity to enter into contracts, unless the law provides otherwise (Articles 2:3, 2:5, and 3:32, DCC).

Agencies

Under Dutch law, an agent has a contractual relationship with the principal (Article 7:428, DCC). An agent can be a natural person or a legal person. The agent's capacity to enter into a contract for a principal depends on the terms of the contract between them. The agency contract defines the agent's authority to act for the principal and the conditions attached to the exercise of this authority (Articles 7:428-7:445, DCC).

Formal Legal Requirements

2. What are the essential requirements to create a legally enforceable contract?

The legal requirements to create a contract under Dutch law are:

- Offer.
- Acceptance.
- Intention to create legal consequences.

Both the offer and acceptance are deemed to be "legal acts." Legal acts are not defined under Dutch statutory law, but require the will, expressed in a statement, to create legal consequences (Article 3:33, DCC). The statement can be express, implied, or inferred from a party's conduct. The statement is usually not subject to formal requirements. The English law concept of consideration is unknown in Dutch law.

An offer can be withdrawn before acceptance (Article 6:219, paragraph 2, DCC).

There is a difference between an offer with the intention of being legally bound and an invitation to participate in negotiations. The term "offer" is not defined in Dutch law. However, it is accepted in the literature that a proposal to conclude an agreement, aimed at one or more specific persons, that is sufficiently specific and makes clear that the person making the offer intends to be bound by it if accepted, is an offer.

The Supreme Court of the Netherlands has held that an advertisement in which specific goods are offered for sale for a specific price is merely an invitation to enter into negotiations (Supreme Court, 10 April 1981, NJ 1981/532).

If the offer and the acceptance each refer to competing terms and conditions ("battle of the forms"), the terms and conditions mentioned in the acceptance will only be effective if that acceptance explicitly rejects the general conditions referred to in the offer. If the acceptance explicitly rejects the general conditions contained in the offer, the acceptance can either be considered to be a rejection of the original offer and a new counter-offer, or, in some cases, the agreement will be deemed effective and governed by the general conditions mentioned in the acceptance.

3.Which types of contracts, if any, must be in writing to be valid and enforceable? Under what circumstances are oral contracts valid and enforceable?

The general rule is that contracts can be concluded in any form. Statements can be made in any form and can be implied from a party's conduct (Article 3:37, paragraph 1, DCC). Therefore, oral contracts are valid and enforceable. Oral contracts are very common in practice.

However, certain agreements must be in writing, including:

- Hire-purchase agreements.
- Agreements for the purchase of immovable property.
- Construction agreements for residential buildings.
- Collective labour agreements.
- Various clauses in employment contracts.

Written contracts need not be signed to be valid.

4. Are there language requirements for the validity of contracts? Is translation into the language of your jurisdiction required? If so, when is this required?

Dutch law does not require contracts to be made in any specific language and no translations are required.

5. Are contracts in electronic form (email, web-based or otherwise) legally enforceable?

Contracts in electronic form are enforceable if they comply with the applicable requirements. Electronic agreements are subject to the same requirements as other types of agreements (see *Question 2*). However, for an electronic agreement to be valid, receipt of the offer and acceptance must both be confirmed (Article 6:227c, paragraph 2, DCC). If this is not done, the other party can rescind the agreement.

An electronic agreement is deemed to be a written agreement if the following requirements are met:

- The person who will need to use the document as evidence must be able to store it in such a manner that it can be accessible for future use.
- It must be possible to store the document during a period that is suitable for the purpose of that document.
- The method of storage must allow for the unchanged reproduction of the document.

(Article 156a, Dutch Code of Civil Procedure (*Wetboek van burgerlijke rechtsvordering*) (DCCP).)

There are no special evidential requirements when producing digital material in court.

Preliminary Agreements and Pre-Contract Considerations

6. Which types of preliminary agreements are most frequently used and for which types of transactions? Are preliminary agreements presumed to be non-binding?

It is common in M&A transactions to use letters of intent during contractual negotiations. These letters are used to express the parties' intention to enter into an agreement if all the terms and conditions of the agreement are agreed during negotiations. In the construction industry, letters of intent are also used to give a party authority to start works and incur costs up to a pre-agreed level pending the signing of the agreement. In the shipping industry, the owner of a vessel can agree under a letter of intent to hold the vessel available for the prospective charterer pending the outcome of negotiations before a pre-agreed date. After that date, the owner of the vessel will no longer be obliged to hold the vessel available for the contract under negotiation.

Other preliminary agreements commonly used in M&A transactions include confidentiality or non-disclosure agreements, heads of agreements, and term sheets.

Preliminary agreements only become binding once the conditions to which they are subject are met. Before then, the parties have an obligation to make reasonable efforts to ensure that these conditions are met.

7. Are there limitations on the use of exclusivity or lock-out provisions in preliminary agreements under local law?

Exclusivity provisions are enforceable. However, like all contract terms, they must be reasonable and fair given all the circumstances of the case. For example, a non-compete clause in an employment agreement may be voidable if it is not proportionate to the employer's interest that it is intended to protect, to the unfair disadvantage of the employee (Article 7:653(3)(b), DCC).

8. What are the principles and rules (if any) on pre-contractual liability?

The leading principle of Dutch contract law is that of freedom of contract, which implies the right to break off negotiations (Supreme Court, 12 August 2005, NJ 2005/467 (CBB v JPO)). However, a party may be liable for breaking off negotiations in the following circumstances:

- **During the "second phase" of negotiations.** At this stage, it is considered unreasonable and unfair to break off negotiations without offering to reimburse the costs incurred by the other parties during the negotiations (Supreme Court, 18 June 1982, NJ 1983/723 (Plas v Valburg)). In practice, it is extremely unclear to determine when the second phase of negotiations has been reached, and this depends on the circumstances of the case. Legal precedents offer no clear guidance in this respect.
- **During the "third phase" of negotiations.** Breaking off negotiations at this stage is considered unacceptable. The third phase is reached if, based on the negotiations and other circumstances of the case, the other party reasonably believed that an agreement would be reached. The party that broke off negotiations may be liable for damages for the other party's loss of profit. However, the courts rarely impose liability for loss of profit in these circumstances.

9. Can negotiations become legally binding in any circumstances?

Negotiations can become legally binding if the requirements for a valid contract are met (see *Question 2*). Additionally, the parties may incur liability for breaking off negotiations in certain circumstances (see *Question 8*).

10. Is the concept of "good faith" in negotiations recognised and applied? If so, how?

The concept of good faith in negotiations is recognised under Dutch law. The concept is based on Article 6:2, paragraph 1, of DCC, which states that creditors (*schuldeiser*) and debtors (*schuldenaar*) must behave towards each other in accordance with reasonableness and fairness requirements.

While the parties are entitled to preserve their own interests during negotiations, they are also required to consider the justified interests of the other party to a certain extent (Supreme Court, 15 November 1957, NJ 1958/67 (Baris v Riezenkamp)).

Formalities for Execution

11. What formalities are required for a contract to be considered validly executed?

See *Question 3*. There are no formalities for the execution of contracts. In principle, contracts can be concluded in any form.

Deeds

12. Are deeds (or equivalent) recognised and used? If yes, when are deeds (or equivalent) required?

Deeds are recognised and used. Deeds, which are usually executed by notaries, are required for the following acts and transactions (among others):

- Pre-nuptial agreements.
- Division of communal property, in certain circumstances.
- Incorporation of most legal persons (limited liability companies, foundations, and so on).
- Transfers of real property.

- Transfers of title to ships.
- Transfers of company shares.

13. What are the legal formalities for creating and executing a valid deed (or equivalent)?

Deeds are documents drafted in the required format by civil servants with legal authority to draft such deeds relating to their observations or their acts (Article 156, paragraph 2, DCCP). These civil servants include notaries, court bailiffs and civil servants responsible for the registration of births, deaths, and marriages (Article 156, DCCP). The formal requirements for deeds are set out in various laws. For example, Book 1 of the DCC regulates the format of deeds to be drawn up for the registration of births, deaths, and marriages and there is a specific law governing deeds executed by notaries. For example, Article 39 of the Notaries Act (Act of 3 April 1999 containing the statutory rules governing the office of notary) (*Wet-en regelgeving notariaat*) requires the notary to identify the persons who appear before them and to state the form and number of the ID document in the deed. Article 40 of that statute requires the notary to state the:

- Names, date, and place of birth and address of the individual(s) for whom the deed is intended.
- Place, date, and year of the deed.

Notarisation, Legalisation, and Registration

14. When is notarisation required in your jurisdiction?

Notarisation is not required for contracts. However, certain contracts require a notary deed (see *Question 12*).

15. When is an apostille or legalisation required for contracts in your jurisdiction and how is it carried out?

Apostilling or legalisation is not generally required for contracts.

Apostille

Apostilling is used for Dutch documents to be used in countries that are party to the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Apostille Convention).

An apostille can be requested from any of the 11 district courts in the Netherlands. Each court has its own procedure. For example, an apostille can be requested in person from the District Court of Rotterdam. The apostille will authenticate signatures that have been deposited at the court. Signatures of local notaries can be deposited at the competent local district court. If a signature is not deposited at court, the person whose signature needs to be apostilled can consult a notary. The notary will confirm the person's identity and signature, and write a declaration on the document that the signature is the true signature of that person. The notary's signature will then be apostilled by the court. Obtaining an apostille is a very quick and informal process.

Legalisation

The legalisation procedure must be followed for documents that require legalisation for use in countries that are not party to the Apostille Convention. The competent district court is responsible for the legalisation of signatures on contracts. The court will only legalise documents that are signed by:

- Notaries.
- Sworn translators and interpreters.
- Sworn court civil servants.

If a contract needs to be legalised, the parties' signatures will first need to be confirmed by a notary (see above, *Apostille*). The notary's signature will then be legalised by one of the district courts. Each district court has its own legalisation procedure. For example, at the District Court of Den Bosch, the President of the Court must first sign the document, after which the document must be signed by the Minister of Justice and the Minister of Internal Affairs. The party who applied for legalisation must obtain the signature of these ministers itself.

16. If registration is required, which contracts require registration and where?

No contracts require registration.

Electronic Signatures

17. Can contracts and deeds (or equivalent) be validly executed with an electronic signature in your jurisdiction?

An electronic signature that meets certain requirements has the same effect as a written signature (Article 3:15a, DCC). An electronic signature and advanced electronic signature, within the meaning of Article 3(10), and 3(11) of the Electronic Identification Regulation (910/2014) (eIADS), have the same binding force as a qualified electronic signature within the meaning of Article 3(12) of eIADS if the method that is used for signing is sufficiently trustworthy, considering the purpose for which the signature is intended and all the other circumstances of the case.

Contracts that legally require the intervention of a judge, a government body, or a professional practitioner performing a public task cannot be executed electronically. For example, these include contracts that create rights over real estate (except tenancy rights).

Remote Document Execution

18. Is remote execution of documents valid and common practice?

There are no formalities for the execution of documents. Remote execution is valid and commonplace (for example by exchanging signed documents by email). Execution by counterparts does not need to be specified in a contract to be valid, but it is advisable to do so for evidentiary purposes.

Powers of Attorney

19. What are the main types of powers of attorney in your jurisdiction?

A power of attorney is the power that a proxy grantor grants to another person, the authorised representative, to perform legal acts in its name (Article 3:60, paragraph 1, DCC) A power of attorney can be granted explicitly or can be implied (Article 3:61, paragraph 1, DCC). The types of powers of attorney regulated by law are:

- **General powers of attorney.** A general power of attorney gives the attorney the authority to carry out the acts that are stated in the power of attorney. For example, a power of attorney can give a person authority to carry out all and any acts, or certain specific acts only. In all cases, a general power only includes the right to dispose of property if this right is explicitly included in writing in the power of attorney.
- **Special powers of attorney.** This gives the attorney power only to do things relating to a specific purpose. A special power only includes the right to dispose of property if this right is explicitly included in writing in the power of attorney, unless acts of management and disposition of property are necessary to achieve the specific purpose.

(Article 3:62, DCC.)

A person who enters into an agreement in the name of an undisclosed proxy grantor must disclose the proxy grantor's name within a time period stated in the law, the agreement, or within a customary time. If the attorney does not disclose the proxy grantor's name within that time, they will be deemed to have entered into the agreement for themselves, unless the agreement provides otherwise (Article 3:67, DCC).

20. What are the main transactions when powers of attorney are used?

Powers of attorney can be used for any transactions, such as M&A transactions, insurance transactions, sale and purchase agreements, tax matters, incorporation of legal persons, and so on.

21. What are the key provisions in a power of attorney?

The parties are free to agree on the terms of a power of attorney. Examples of provisions include the following:

- Attorney's own costs.
- Permission requirements to sign agreements.
- Limitation of liability (including liability for consequential loss).
- Indemnities.
- Duration of the power of attorney.
- Right to terminate the power of attorney.

22. What are the legal requirements and formalities for the execution of a power of attorney?

There are no special legal requirements and formalities for the execution of a power of attorney. The general rules on contract formation apply (see *Question 2*).

23. Are foreign powers of attorney recognised in your jurisdiction? If so, must a foreign power of attorney comply with legal requirements and formalities to be effective?

Foreign powers of attorney are recognised in the Netherlands. There are no special requirements for foreign powers of attorney to be effective. A party relying on a foreign power of attorney should ensure that the power of attorney has been validly signed, as would be the case for Dutch powers of attorney.

Content of Contracts

24. What are the main types of contractual terms in your jurisdiction?

Dutch law does not distinguish between representations, conditions, and warranties. One specific type of term that Dutch law recognises is a guarantee. If a party "guarantees" that it will perform an obligation, it cannot rely on force majeure to excuse non-performance of the obligation. Dutch law also distinguishes between general contract conditions and key stipulations (Article 6:231(a), DCC). General contract conditions are non-contract specific standard conditions intended to be used in a wide variety of contracts (for example, name of the parties, consideration, object of the agreement, liability, duration of the agreement, and termination clause). Key stipulations are contract-specific provisions. The provisions of the DCC that apply to general conditions do not apply to key stipulations.

25. Can contract terms be implied from the conduct of the parties or incorporated by reference?

An agreement has the legal effects agreed by the parties and those that can be inferred from the nature of the agreement, the law, common practice, and the standards of reasonableness and fairness (Article 6:248, DCC). A contractual term will not be applicable if, in the specific circumstances of the case, it would be unacceptable according to the standards of reasonableness and fairness.

The leading authority on the interpretation of contracts under Dutch law is the *Haviltex* decision of the Supreme Court of the Netherlands (Supreme Court, 13 March 1981, NJ 1981, 635). In this case, the Supreme Court held that, if there is a gap in the contract, the relationship between the parties cannot be inferred from a mere grammatical construction of the contract. Relevant factors that can be taken into account to interpret a contract include the:

- Meaning, in the specific circumstances, that each of the parties could reasonably give to the provisions and what they could reasonably expect from each other in that respect.
- Social class of the parties.
- Legal knowledge that can be expected of the parties.

The application of the above rule can lead to any terms being implied into a contract, if deemed appropriate in the circumstances of the case.

Contract terms can be incorporated by reference. This is often done by reference to general terms and conditions that are not specifically included in the contract (see, for example, Article 6:232 of the DCC).

26. Which mandatory terms and standards are implied into a contract by operation of law?

There are mandatory rules that parties cannot contract out of. These are not deemed to be implied into the contract. Rather, they apply to the extent that the contract contradicts the mandatory terms. There are numerous mandatory rules applicable to specific types of contracts. Many of these mandatory rules are intended to protect consumers or parties that are deemed to be in a weaker bargaining position, such as tenants and employees. Most mandatory rules of contract law are set out in book 7 of the DCC, which includes rules governing specific types of contracts.

Examples of mandatory rules include the following:

- Article 7:18 of the DCC contains mandatory rules of evidence for proving whether goods that were sold to a consumer comply with the contract of sale.
- Articles 7:765 to 7:769 of the DCC contain mandatory rules that apply to consumers that enter into a contract for the construction of a home.
- Article 7:265 of the DCC specifies the permitted level of rent that can be charged.
- Article 7:653 of the DCC contains a mandatory rule relating to the validity of non-compete clauses in employment contracts.

Examples of contracts that are governed by various provisions of mandatory law are:

- Contracts for the sale of goods to consumers.
- Tenancy agreements.
- Employment contracts.

27. Is the concept of "reasonable," "commercial," or "best" endeavours or efforts legally recognised?

Dutch contract law recognises two types of obligations: obligations to achieve an agreed result (*resultaatsverbintenis*) and obligations to use best endeavours to reach a result (*inspanningsverbintenis*). For example, a contractor's obligation to paint a house is an obligation to achieve a result while a doctor's obligation to cure their patient is an obligation to use best endeavours. The parties can freely agree that an obligation will be an obligation of means or result.

28. Does local law require that special notice be given of any contract terms for them to be effectively incorporated in a contract?

Generally, special need not be given of any contract terms for them to be effectively incorporated in a contract. However, financial institutions have an obligation to warn consumers of the risks of certain financial transactions such as investment risks (Article 4:24(2), Law on financial supervision (*wet op het financieel toezicht*)).

29. Are there commonly used contract clauses in your jurisdiction that are not usually included in contracts from other jurisdictions?

Not applicable.

30. Are there contract clauses from other jurisdictions that are ineffective or not standard practice in your jurisdiction?

The Dutch rules of contract construction may render certain clauses ineffective (see *Question 25*). For example, the Supreme Court has held that the meaning of an entire agreement clause depends on the facts and circumstances of the case, including the wording of the contract, the nature, the contents, and the thoroughness of the contract, and the way in which the entire agreement clause was agreed on. Therefore, an entire agreement clause may not automatically have the effect it has under English or US laws. (See Supreme Court, 5 April 2013, NJ 2007/575 (Lundiform B.V. v Mexx Europe B.V.).)

Variation, Assignment, and Waiver

31. How can the parties vary the contract terms agreed between them?

Parties are free to amend a contract by mutual agreement. This can be done in writing, verbally, or by conduct. Consideration is not a requirement for contract formation or amendment under Dutch law.

If only one party wishes to vary the contract terms, it can apply to the court to amend the contract or dissolve the agreement in full or in part if there are unforeseen circumstances of such a nature that the party, according to standards of reasonableness and fairness, cannot expect the agreement to remain unchanged. The court can modify or dissolve the agreement with retroactive effect. The court cannot modify or dissolve an agreement if the applicant should bear the effects of unforeseen circumstances because of the nature of the agreement or generally accepted views in society (Article 6:258, DCC).

32. What are the main ways to transfer contractual rights and obligations to a third party?

The two main ways to transfer contractual rights are assignment and novation.

Assignment is governed by Article 3:94 of the DCC, which provides that:

- The rights to be exercised against one or more specific persons can be transferred under a contract drawn up for that purpose.
- The assignor or assignee must give notice of the assignment to those persons.

An assignment requires:

- An authentic or non-authentic deed of assignment.
- Notification of the assignment to the debtor.

(Article 3:94(1), DCC).

Notification to the debtor is not required if, at the time of the assignment, the rights already exist or will arise directly from an existing legal relationship (Article 3(93(3), DCC).

In principle, all rights are transferrable unless the law or the nature of the right prevents their transfer (Article 3:83(1), DCC). For example, the right to use something and the right to live somewhere cannot be transferred (Article 3:226(4), DCC). The parties can also contractually agree that certain rights are not transferrable (Article 3:83(2), DCC).

Novation is governed by Article 6:159 of the DCC, which provides that:

- A party to an agreement can, with the agreement of the other party, transfer its legal relationship with that party to a third party by means of a private or notarial deed drawn up for this purpose between itself and the third party.
- As a result of the transfer, all the rights and obligations of the transferor that have arisen or will arise from the agreement pass to the third party, provided that the parties have not agreed otherwise with regard to secondary (minor) or due and demandable rights or obligations.

Novation requires the agreement of the continuing party (Article 6:156(1), DCC). If a party to the original contract does not co-operate with the novation, any attempted transfer of the legal relationship is null and void (Supreme Court, 5 March 2004, NJ 2004/316 (Vagobel v Geldnet)).

33. What are the rules relating to waiver of contractual rights?

Contractual obligations can be waived by agreement between the creditor and debtor under which the creditor waives its rights to claim performance (Article 6:160, DCC). A waiver does need not to be express, and can also be implied (Article. 3:35, DCC).

Enforcement and Remedies

Invalid and Voidable Contracts

34. What makes a contract void, voidable, or invalid?

Circumstances that can lead to invalidity of a contract are threat, fraud, abuse of circumstances, and mistake. Mistake is governed by Article 6:228 of the DCC.

Threat, Fraud, and Abuse of Circumstances

Threat, fraud, and abuse of circumstances are governed by Article 3:44 of the DCC.

A legal act can be set aside when it has come into existence under the influence of a threat, fraud, or an abuse of circumstances.

There is threat when a person induces another to perform a legal act by unlawfully threatening to harm their or a third party's person or property. The threat must be such that a reasonable person could have been influenced by it in a similar way.

There is fraud when a person induces another person to carry out a legal act by:

- Intentionally making an incorrect statement.
- Deliberately remaining silent about a fact that they should have disclosed.
- Using any other artifice.

General untrue praises do not constitute fraud.

There is abuse of circumstances when a person, who knows or should have known that another person may be induced to perform a juridical act because of particular circumstances (such as a state of emergency, dependency, thoughtlessness, a mental condition, or inexperience), induces that person to perform the legal act.

Threat, fraud, or abuse of circumstances committed by a third party cannot be invoked against a party to the contract, if that party had no reason to assume that the defect existed.

Mistake

Mistake (*dwaling*) is governed by Article 6:228 of the DCC.

It is possible to set aside an agreement entered into under the influence of a mistake if the mistaken party would not have concluded the agreement if they had had a correct view of the situation, and any of the following applies:

- The mistake is attributable to information given by the counterparty, unless that counterparty could assume that the agreement would be concluded without this information.
- The counterparty, in view of what they knew or ought to have known about the mistake, should have disclosed information to the mistaken party.
- The counterparty relied on the same incorrect assumption at the time of entering into the agreement unless, if they had a correct knowledge of the fact, they would not have been expected to understand that the mistaken party would not enter into the agreement had they known of the mistake.

An agreement cannot be set aside based solely on either a:

- Mistake relating to a future circumstance.

- Mistake for which the mistaken party is responsible, in light of the type of agreement, the views existing in society, or the circumstances of the case.

Discharging Contracts

35. On what basis can a party be discharged from performing its contractual obligations at law?

Contracts are discharged by performance or by filing a claim for damages for breach of contract. The parties are also free to discharge a contract by agreement.

Further, a party is excused from non-performance that is the result of force majeure. Force majeure is defined as a shortcoming that cannot be attributed to the debtor because:

- It is not due the debtor's fault.
- It is not attributable to the debtor by operation of law.
- It is not attributable to the debtor according to generally accepted standards.

(Article 6:75, DCC.)

36. On what basis does a party have the right to terminate the contract?

Any failure by a party to perform an obligation entitles the other party to terminate the contract (see *Question 40, Termination*). This applies even if the contract is silent about termination. The terminating party must give a reasonable period to the other party to remedy the breach.

In practice, contracts often limit the parties' right to terminate the contract for breach.

Contracts often contain a term giving a party the right to terminate the contract on the other party's insolvency.

Contract Liability and Exclusion of Liability

37. What are the key rules on privity of contract and third party rights?

The principle of privity of contract applies in the Netherlands (that is, a contract only binds the parties to the contract). However, the parties can agree to create third party rights, so that a third party can claim performance of the contract or a specific obligation from one of the parties. To create third party rights, a contract must contain a specific clause to that effect and the third party must accept the clause (Article 6:253, DCC). Such a clause can be withdrawn by the parties until it has been accepted. Acceptance and withdrawal of the clause must be done in a statement addressed to the parties.

38. What are the main rules relating to excluding and limiting contractual liability?

Parties are free to include exclusion/limitation of liability provisions. An exclusion clause will be null and void if it is contrary to moral values or the public order (Article 3:40, paragraph 1, DCC). An exclusion clause will be declared inapplicable if, in the circumstances of the case, its consequences are deemed to be unacceptable under the principles of reasonableness and fairness (Article 6:248, paragraph 2, DCC). Exclusions of liability for wilful misconduct or gross negligence are deemed unacceptable (Article 6:248, DCC). It is possible to exclude liability for wilful misconduct or gross negligence of non-management level personnel, but not that of management-level personnel. Under Dutch law, gross negligence is a level of negligence that is far higher than normal negligence, and almost equivalent to wilful misconduct.

39. What are the main defences to breach of contract claims?

Defences to breach of contract claims include:

- Exception of non-performance (Article 6:262, DCC) (see *Question 40, Suspension (exceptio non adimpleti contractus)*).
- Statutory force majeure (Article 6:75, DCC).
- Unforeseen circumstances (Article 6:258, DCC).

- Mistake (Article 6:228, DCC)
- Contractual defences.

Contract Remedies

40. What are the main remedies available for breach of contract?

The main contractual remedies are termination, suspension, damages, and specific performance.

Termination

Under Dutch law, the threshold for claiming termination is lower than in other legal systems. Any failure by a party in the performance of its obligations gives the other party the right to wholly or partially terminate the agreement, unless the failure does not justify termination due to its specific nature or minor importance (Article 6:265, paragraph 1, DCC). To defend against termination, the other party must invoke the exception in Article 6:265, paragraph 1 of the DCC (that is, argue that the failure does not justify termination due to its specific nature or minor importance).

Suspension (*exceptio non adimpleti contractus*)

A party is entitled to suspend the performance of its obligations in the event of:

- Non-performance of its obligations by the other party.
- Partial or improper performance of its obligations by the other party, provided that this justifies the suspension.

(Article 6:262, DCC.)

Suspension is often used by contractors against employers who fail to comply with their payment obligations.

Damages

A debtor is liable for damages arising from any failure to perform an obligation that can be attributed to them. Dutch law distinguishes between two types of damages, financial loss and other damages, provided that statutory law allows compensation for such other damages (Article 3:95, DCC). Examples of "other damages" include personal injury, damage to a person's honour or good name, or any other harm to a person. Under Dutch law, the judge assesses the quantum of damages in the manner that is most suited to the type of damages. If the judge cannot assess the amount

of damages, they can make an estimate (Article 6:97, DCC). In principle, damages are paid in money, but the victim can also request the judge to order damages to be paid in a different form (Article 6:103, DCC).

Dutch law does not recognise the concept of punitive damages. However, contractual penalty clauses are valid (Article 6:91, DCC) (see *Question 41*).

Specific Performance

On request of a party, the court can order specific performance from another party who is obliged to give something, do something, or refrain from doing something, unless otherwise provided by law, the nature of the obligation, or a legal act (Article 3:296, paragraph 1, DCC). The innocent party will usually request the court to impose a penalty for each day or part of day that the other party fails to comply with the court order.

> 41. Are clauses setting out a fixed or ascertainable amount of compensation/damages valid in your jurisdiction? Are these clauses subject to any limitation?

Penalty clauses are valid and are regulated by Articles 6:91 to 6:94 of the DCC. The parties can agree that penalties can be claimed in addition to actual damages. If the contract is silent, the creditor cannot claim both the penalty and damages. The debtor can apply to the court to reduce the penalty amount (Article 6:94, paragraph 1, DCC). The court can reduce the penalty amount if reasonableness and fairness evidently require a reduction. The judge must exercise restraint when using this power. The parties cannot exclude the debtor's right to apply for a reduction of the penalty amount.

Enforcement and Cross-Border Issues

Choice of Law

> 42. Is the choice of a foreign law in a contract upheld by local courts?

In principle, the local courts must respect the choice of law in a contract, whether it is a foreign law or Dutch law. However, certain mandatory national laws override the law chosen by the parties. For example:

- In maritime cases, a carrier's right to exercise a lien on goods is governed by the law of the country where the goods are discharged, regardless of the law that governs the contract (Article 10:163, DCC).
- Who has title to sue and who can be sued in claims under bills of lading is governed by the law of the country where the goods are discharged, regardless of the law that governs the contract (Article 10:162, DCC).

The courts must comply with the Rome I Regulation (*593/2008*).

Jurisdiction

43.Is the choice of a foreign jurisdiction in a contract upheld by local courts and/or arbitration tribunals?

Choice of jurisdiction clauses are governed by the Recast Brussels Regulation (*1215/2012*). In principle, the courts must respect a jurisdiction clause if it is sufficiently clear and has been agreed between the parties. This applies to both jurisdiction clauses designating foreign courts and those designating Dutch courts. However, there are some exceptions to this rule. For example, a jurisdiction clause in an employment agreement does not prevent an employee from litigating a case before a Dutch court if that court has jurisdiction under the law. In addition, jurisdiction clauses do not apply in cases concerning legal relationships that do not depend on the free will of the parties, such as family law matters.

Enforcement of Foreign Judgments and Awards

44. How are foreign judgments and arbitration awards recognised and enforced in your jurisdiction?

Foreign Judgments

Foreign judgments can be enforced in the Netherlands under the following instruments:

- The Recast Brussels Regulation, which is directly applicable in the Netherlands. A judgment issued in an EU member state that is enforceable in that member state is also enforceable in the Netherlands without any declaration of enforceability being required.
- The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 2007 (Lugano Convention). A judgment issued in a state party to the Lugano Convention and enforceable in that state can be enforced in the Netherlands when it has been declared enforceable on the application of any interested party.
- Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 (Hague Foreign Judgments Convention). A decision issued in one of the contracting states is entitled to recognition and enforcement in the Netherlands if the decision:
    - was given by a court considered to have jurisdiction under the Convention;
    - is no longer subject to ordinary forms of review in the state of origin; and
    - is enforceable in the state of origin.

To obtain a decision of enforceability in The Netherlands under the Lugano Convention or Hague Foreign Judgments Convention, a party must make an application to the injunction judge of the district court of the place where the judgment is to be enforced. The procedure is ex parte and takes two weeks.

If there is no treaty regarding enforcement, the case can be brought before a Dutch court (Article 431, paragraph 2, DCCP). The Supreme Court has held that a foreign judgment will in principle be recognised if the following conditions are met:

- The jurisdiction of the foreign judge was based on a jurisdiction principle that is recognised internationally.
- The foreign judgment was issued in legal proceedings that were fair and proper.
- The foreign judgment does not conflict with Dutch public order.
- The foreign judgment is not incompatible with a Dutch judgment rendered between the same parties, or with an earlier decision rendered by a foreign judge between the same parties regarding the same matter, if that earlier judgment can be recognised in the Netherlands.

(Supreme Court, 26 September 2014, ECLI:NL:HR:2014:2838 (Gazprom).)

Foreign Arbitration Awards

The Netherlands is party to the following international conventions and agreements on the enforcement of arbitral awards:

- UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention).
- ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965.
- Bilateral treaties, such as the Agreement between the Netherlands and Belgium Concerning the Enforcement of Judgments, Arbitral Awards and Authentic Deeds 1925.

Leave for enforcement of an arbitral award must be sought by making an application to the preliminary relief judge of the district court of the place where the applicant is domiciled or, if the applicant is not domiciled in the Netherlands, the district court of The Hague.

Other Key Issues

45. Are there additional and important issues of law and practice relating to contracts, negotiation and enforcement that are not otherwise addressed in this Q&A?

Not applicable.

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