



## **FRANCHISING: a very successful trading concept !**

The amount of enterprises using the franchise concept is still increasing: worldwide and also in The Netherlands. Franchise can be described – in short – as a contract under which the franchisor grants the franchisee the right to conduct a business using the franchisor's business method and intellectual property rights, like a trade name. The purpose is to supply products. The franchisee pays for the use of these rights.

Franchises may be subject to any form of business entity existing under Dutch law, in particular:

- ✓ private limited liability companies;
- ✓ public companies;
- ✓ sole proprietorships;
- ✓ general partnerships; and
- ✓ limited partnerships.

### **No Dutch Franchise Act**

In The Netherlands there is no Dutch Franchise Act. The laws of The Netherlands do not contain a specific act with respect to franchise and distribution agreements. Hence, a franchise agreement under Dutch law is governed by the rules of general civil law, together with specific rules that are applicable to specific parts of the contract.

### **The licensed rights**

The licensed rights can include the licensed right to use:

- ✓ trademark names;
- ✓ secret commercial know-how
- ✓ and other distinguishing features, in the sale of products or services.

The use of franchise agreements is widely spread in The Netherlands, but beware that specific arrangements can be prohibited by EU and national competition law.

Registered trademarks are protected by the Benelux Treaty for Intellectual Property. The registrant of a Benelux trademark has exclusive rights for specific classes of goods or services in Belgium,

the Netherlands and Luxembourg if a trademark is registered in the public trademark registry of the Benelux Office for Intellectual Property (BOIP). In addition, the registrant has exclusive rights for specific classes of goods or services in the European Union if a trademark is registered as a community trademark in the public trademark registry of the Office for Harmonisation of the Internal Market (OHIM) of the European Union. A preliminary trademark search can be conducted on the BOIP website.

Please note, know-how is not protected by any intellectual property right. However, know-how may be protected under the general provisions of Dutch unfair competition law (including civil tort). Know-how could be contractually protected by including confidentiality (non-disclosure) obligations in an agreement (for example, a franchise agreement). Confidentiality covenants in franchise agreements are enforceable. The franchisee typically commits itself, for the duration of the contract as well as following its termination, to keeping all details of the franchisor's business operations confidential. This will typically extend to non-patented know-how materials. Franchising contracts in the Netherlands may include a financial penalty provision that can be invoked in the event of the other party violating the confidentiality clause. The courts shall have the right to mitigate such penalties. This mitigation right cannot be contractually excluded.

### **Reasonableness and fairness**

There is a general legal obligation on parties to deal with each other in good faith. In the Netherlands, general civil law is governed by the principles of reasonableness and fairness. Franchise agreements are therefore also governed by reasonableness and fairness. Freedom of contract dictates that parties may agree to draw up contracts in whichever language they choose. However, on the basis of the principle of reasonableness and fairness one could argue that disclosure documents and agreements should be made available in a language that the other party understands. Therefore most of the time the documents are in English language.

### **Franchise agreement**

A franchise agreement is a contract by which the franchisor licenses its trade name and/or business system and practices for a fee to an independent company (the franchisee).

It is very important to review the terms and conditions set forth in franchise documents such as:

- ✓ financial obligations;
- ✓ the length/term of the agreement;
- ✓ choice of venue and choice of law with respect to disputes;
- ✓ renewal rights;
- ✓ territorial exclusivity;
- ✓ requirements for remodelling or refurbishing the location;
- ✓ the goodwill associated with the franchisor's trademarks;

- ✓ restrictions on transfer;
- ✓ default/termination provisions.

*January 2016*