Legal Aspects of Doing Business in the United States for Dutch Companies

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Contact	Ton Durieux T +31 88 602 87 63 F +31 88 602 90 26 ton.durieux@agentschapnl.nl NL EVD Internationaal Juliana van Stolberglaan 148 | 2595 CL Den Haag P.O. Box 20105 | 2500 EC Den Haag
Author	Jan J.H. Joosten T +1 212 837 6802 F +1 212 422 4726 joosten@hugheshubbard.com Hughes Hubbard & Reed LLP One Battery Park Plaza New York, NY 10004-1482 www.hugheshubbard.com

© August 2011

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1 Introduction

This booklet provides an overview of legal issues that a Dutch company is likely to encounter when doing business in the United States. Dutch companies are sometimes apprehensive about entering the U.S. market because of fears associated with U.S. litigation, including pre-trial "discovery" procedures and high damage awards. Some of these fears are well-founded, but others are not.

Indeed, business goes on every day in the United States despite the reality that lawsuits and potentially large verdicts are a fact of life. Dutch companies should not let the fear of such lawsuits prevent them from taking advantage of the substantial opportunities that the U.S. market offers.

This booklet is designed to help Dutch companies develop a better understanding of U.S. law and to provide some guidance on how to avoid its pitfalls. The booklet does not attempt to address all issues, and necessarily simplifies those issues it does address. It cannot be taken as a statement of law in any particular U.S. jurisdiction, and cannot substitute for legal advice from an attorney. But our hope is that there is enough in the pages that follow to help Dutch businesses get off to a good start by asking the right questions when starting to do business in the United States.

2 Doing Business in the U.S.

2.1 Largest Economy in the World

The United States has the largest economy in the world with a per capita gross domestic product of approximately $47,000. It has a population of more than 300 million, composed of a wide range of ethnicities and origins. Its 50 states spread across six different time zones. English is spoken by a vast majority of the people. There is also a large Spanish-speaking community, prompting many private companies as well as some government agencies to provide services in Spanish in addition to English.

2.2 The U.S. Government

The United States has a dual-sovereign system, which means that there are two levels of sovereignty: the federal government and the governments of the fifty individual states. The powers of the federal government are limited to those enumerated in the U.S. Constitution. All powers not granted to the federal government are reserved for the state governments. States enact their own laws and regulations. When there is a conflict, federal law generally prevails. Federal law covers such matters as offerings of securities and bankruptcy. Typical matters of state law are contract law and corporate law. These areas of law differ from state to state. A contract is never subject to "U.S. law," but for example to New York law. The court system is similarly divided into federal courts and state courts, which operate independently of each other. Figuring out in which court to bring your claim can be quite a complex exercise.

2.3 Business Climate

2.3.1 Negotiations and Contracts

Dutch business persons should not underestimate the differences that exist between their negotiating style and strategies, and those of their U.S. counterparts. For example, American contracts are often extensively negotiated and will generally be significantly longer than comparable Dutch contracts. One explanation for this is that, in the Netherlands, parties can rely on the civil code (*burgerlijk wetboek*) to fill in gaps that are not covered by the agreement. In the U.S., in the absence of a codified body of private law, many of those issues are addressed in the contract itself. Lack of a common background and a society characterized by individualism have lead to a readiness to resort to the court system to resolve disputes. Particularly when sophisticated business entities are involved on both sides of a transaction, U.S. courts tend to enforce contracts "as written" and to place less emphasis on "good faith" (*goede trouw*) and reasonableness and fairness (*redelijkheid en billijkheid*) than a Dutch court might.

2.3.2 Use of Law Firms

As a general matter, lawyers become involved in business transactions much more often and earlier in the process than in the Netherlands. U.S. companies are accustomed to getting legal advice from the beginning of a business transaction, that is, during negotiations and drafting of agreements. In a legal climate that is characterized by substantially more litigation than the Dutch legal climate, it is advisable to obtain U.S. counsel early in the process in order to avoid problems later on.

Many U.S. companies, even if they are not based in New York, elect to have their contracts governed by New York law, because of its well-developed case law in commercial matters.

Lawyers may only practice law in those states in which they are admitted to the bar (*balie*). Most U.S. attorneys will also advise on the corporate law of the State of Delaware.

2.3.3 Choosing your Business Partner

Dutch companies would be well-advised to investigate carefully the background of their proposed business partner. Many Dutch companies have been disappointed by their U.S. business partners (or worse), only to find out afterwards that they missed several warning signs.

2.4 Finding Support

The Dutch government offers extensive support to Dutch companies looking to explore business opportunities in the United States.

2.4.1 The Embassy and Consulates

The Dutch embassy and Consulates-General can be very helpful in providing information on sector developments, legislation, opportunities for subsidies and useful contacts in the United States. The Dutch embassy is located in Washington, D.C. There are Consulates-General in New York, San Francisco, Miami and Chicago. See dc.the-netherlands.org.

2.4.2 NL Agency/EVD International

A part of the Dutch Ministry of Economic Affairs, Agriculture and Innovation, NL Agency/EVD International is a government agency that assists Dutch entrepreneurs in doing business abroad. Mainly focusing on small and medium-sized enterprises, the agency provides information about economic and trade conditions and legislation. In an effort to assist start-up companies to succeed in the United States, the agency can assist in obtaining financing and accessing local professionals. See www.agentschapnl.nl.

2.4.3 Netherlands Business Support Offices

Catering to technology companies and bio-tech firms, the Netherlands Business Support Office ("NBSO") in San Francisco offers services for Dutch companies looking to establish or expand their presence in the United States. Another NBSO recently opened in Houston, Texas. Their respective websites can be found at www.nbso-california.com and www.nbso-texas.com.

NBSOs will be able to help Dutch companies find a U.S. business partner and provide information about business trends and important legal issues. In addition, NBSOs give access to their extensive local networks of professional service providers such as lawyers, accountants and venture capital investors.

3 Setting up a Business Entity

3.1 Selecting the Legal Form

When entering the U.S. market, a Dutch company may want to set up a separate legal entity through which to conduct business. Among its choices are:

- A corporation (sometimes referred to as an "Inc.").
- A limited liability company (an "LLC").
- A branch (which is not a separate legal entity).

3.2 Corporation

Corporations can be formed under the laws of one of the 50 states of the U.S. While each state has its own corporation laws, the statutes are generally similar. Shareholders enjoy limited liability, meaning they are liable only up to the amount of their capital contribution. Shares of stock are easily transferable. The corporation will be treated as a U.S. tax payer. A U.S. corporation offers more flexibility than a Dutch *B.V.* (*besloten vennootschap*) or *N.V.* (*naamloze vennootschap*). In many states, a corporation can be set up easily and inexpensively, and can be formed within a day. In most states, there are no minimum capital requirements.

3.2.1 Choosing a State

Companies are free to decide in which state to incorporate. The state of incorporation is not necessarily the state in which the company's main operations will take place. The choice is usually narrowed down to two states. The first option, which is very popular, is to incorporate in the state of Delaware, and to subsequently register the corporation as a "foreign corporation" in the state where it will be active. The second option is to incorporate in the state where the business will have its main office or main operations.

Delaware's popularity can be attributed to several factors. The Delaware legislature is committed to maintaining its current status by giving high priority to business law matters. The Delaware General Corporation Law is advanced and flexible. The Delaware courts have developed a vast body of case law and possess great expertise in corporate matters. Prestige and reputation have become associated with Delaware corporate law, attracting the best lawyers to serve as judges in this jurisdiction. Another factor is that many attorneys and corporate executives throughout the U.S. are familiar with Delaware law. Finally, because the law is so thoroughly developed, it offers the advantage of being predictable.

3.2.2 Forming the Corporation

The first step in forming a corporation is to prepare a certificate of incorporation, and to file the same with the state. This is usually done by a U.S. attorney, who acts as incorporator (*oprichter*). The certificate of incorporation is generally a short document that includes the corporation's name, address, its purpose, the authorized number of shares, and the name and address of the incorporator and the registered agent. A registered agent is a person designated to receive service of process and is located in the state of incorporation. Typically, a professional company is hired to act as registered agent. The certificate of incorporation is a public document.

The incorporator will also adopt the initial bylaws. The bylaws are an internal document which governs the internal functioning of the corporation, such as procedures for election of directors, powers of officers and procedures for shareholders' meetings.

The corporation's name may not be too similar to the name of a company already registered in the state. It must usually include a word such as "corporation" or "incorporated" (or an abbreviation thereof, such as "Corp." or "Inc.").

3.2.3 Registering in Other States

If a corporation "does business" in a state other than its state of incorporation, it may be required to qualify as a foreign corporation in that state (foreign meaning from another U.S. state or country). Legal counsel can advise on what exactly constitutes "doing business" in a particular state.

3.2.4 Board of Directors

The board of directors is initially appointed by the incorporator, but will thereafter be elected by the shareholders.

The board of directors is responsible for managing the business and affairs of the corporation (unless otherwise provided in the certificate of incorporation). The board of directors has the power and the duty to decide what operations the corporation will pursue, which officers will run those operations, where and how they will run the business and how the corporation will organize itself to benefit the shareholders.

The board of directors appoints the officers (such as the Chief Executive Officer, President, Secretary and Treasurer). The officers are responsible for the day-to-day operations of a corporation.

Only individuals may serve as directors and officers of a corporation. Unlike in the Netherlands, a legal entity may not serve as a director or officer. An individual may serve simultaneously as a director and an officer.

Directors of a Delaware corporation have certain legal duties to the corporation and its shareholders. The most important of these duties are the duty of care and the duty of loyalty. We will discuss these duties as well as the business judgment rule below.

3.2.5 Duty of Care

The duty of care requires that directors inform themselves, prior to making a business decision, of all material information reasonably available to them. This duty also includes a requirement that they reasonably inform themselves of alternatives. The more significant the subject matter of the decision, the greater the requirement to probe and consider alternatives. Having become so informed, they must then act with requisite care in the discharge of their duties. Here are a few practical tips that should assist directors in satisfying their obligations under the duty of care:

- *Time Commitment and Regular Attendance*. Directors are expected to attend and participate in board meetings. In this regard, Delaware law is very flexible in that (i) it allows boards to hold meetings and have offices outside the state of Delaware; and (ii) board members may participate in meetings by teleconference, as long as all the board members can hear each other.
- *The Need to Be Informed*. Management should supply directors with sufficient and accurate information to keep them properly informed about the business affairs of the corporation. In discharging their duties, directors are entitled to rely upon records of the corporation and opinions, reports or statements made by the corporation's employees and outside advisors. The board of directors should see to it that an effective system is in place for periodic and timely reporting to the board on material issues.
- *The Need to Make Inquiries*. Directors should make inquiries into potential problems or issues when alerted by circumstances or events which indicate that board attention is appropriate.

3.2.6 Duty of Loyalty

In general terms, the duty of loyalty requires that a director abstain from self-dealing. The duty of loyalty requires that corporate fiduciaries not place their own interests ahead of corporate interests. In the most basic form, the duty of loyalty is breached when a director uses his or her corporate office or control to promote, advance or effectuate a transaction between the corporation and the director (or an entity in which the director has a substantial interest, directly or indirectly).

3.2.7 Business Judgment Rule

The Delaware courts afford substantial deference to the business decisions made by corporate directors under the "business judgment rule." As long as directors act in good faith, on an informed basis, and not for a self-interested purpose, the Delaware courts will defer to the decisions of the board.

3.2.8 *Director Liability*

Neither the board of directors of a corporation nor the individual members of the board normally have any personal liability for the acts or obligations of the corporation, but all of them are responsible for their own actions. As a practical matter, members of the board of directors tend to be sued only by shareholders of the corporation. Such suits typically allege that the directors have breached either their duty of care or their duty of loyalty.

If the U.S. subsidiary of the Dutch company will not have American public shareholders, it should have little concern about directors' liability. It is nevertheless common for corporate bylaws to provide that the corporation will indemnify the directors against any legal action to the maximum extent permitted by law, and for corporations to obtain directors and officers ("D&O") insurance.

3.2.9 *Piercing the Corporate Veil*

In general, Delaware law respects the separate identity of corporations and the principle of corporate limited liability. The chief conditions upon which a shareholder enjoys corporate limited liability are:

- The shareholder respects the separate corporate identity of the corporation; and
- The shareholder does not abuse it.

The principle of corporate limited liability is important in several situations: (i) where the corporation lacks sufficient assets to meet its obligations or to pay a judgment; (ii) where an adversary in litigation seeks to obtain personal jurisdiction over a parent based upon the presence in the U.S. of the subsidiary; (iii) where a litigation adversary of a subsidiary seeks information from its parent through the process of civil discovery; (iv) where an adversary seeks to bind a parent to a judgment against a subsidiary; and (v) where an adversary seeks to recover punitive damages scaled to the assets of the parent, rather than just those of the subsidiary. It is in these situations that an adversary will attempt to penetrate the limited liability of a corporation to obtain the assets of the shareholders through a process known as "piercing the corporate veil."

Courts consider the piercing of the corporate veil to be an extreme step that is taken rarely and reluctantly. At a minimum, courts almost always require that such a plaintiff show two elements. The first is an exercise by the parent of such a high degree of control over the affairs of the subsidiary that the subsidiary is reduced to a "mere agency or instrumentality" of the parent, comparable to a division. The second is a use by the parent of the subsidiary for an improper purpose that amounts to an abuse of the privilege of carrying on business as a corporation. Alternatively, the plaintiff can show the absence of corporate formalities to establish that the corporation has no legal substance.

A parent of a U.S. subsidiary can and should take precautions to protect itself from the liabilities of the subsidiary, both to avoid providing any basis for piercing the corporate veil and to guard against unnecessary interference in the affairs of the subsidiary that could give rise to direct liability. These precautions include:

- To the extent possible, the affairs of the subsidiary should be dealt with by personnel on the payroll of the subsidiary.
- Allowing the subsidiary to make decisions by a process that follows normal corporate structures of decision-making.
- Keeping the subsidiary's funds separate from those of the parent.
- Properly capitalizing the subsidiary. A subsidiary should have (or have access to) enough capital to carry on its business and meet its normal obligations.
- Insuring the subsidiary adequately.

- Properly identifying the subsidiary. Business cards, contracts and correspondence should make it clear what corporation is engaging in any particular piece of business.
- Keeping proper records of corporate decision-making.

3.3 Limited Liability Company

An LLC is formed by registering its certificate of formation with the Secretary of State of the state in which it is to be formed, which again is often Delaware. The participants in the LLC are referred to as members (equivalent to shareholders). The members will enter into a limited liability company agreement, which governs the operation of the entity.

The main advantage of the LLC is that it enjoys a great deal of flexibility. Dutch companies with particular objectives have the option of tailoring the entity to their needs. Specifically:

- There are very few rules regarding the governance structure of an LLC.
- There are very few rules regarding the financial management of an LLC.
- An LLC has the option to be taxed either as a corporation or as a pass-through entity (*fiscaal transparant lichaam*).
- LLC membership interests may be expressed either as a percentage interest in the entity or as units (analogous to shares).

The members may set up the entity's governance structure in any way they prefer. Some companies choose to assume the structure of a corporation, which means the LLC is managed by officers and directors. In other cases, the member or members prefer to operate the company directly. Such an LLC would be called a "member-managed LLC." An LLC can essentially be customized according to needs of each business.

3.4 Branch

A Dutch company could also conduct business in the U.S. through a branch. A branch is not a separate legal entity. A branch exposes the Dutch company to significant disadvantages with respect to tax treatment and liability. In many cases, therefore, operating through a corporation or LLC is a better option when doing business in the U.S.

4 Transactions

4.1 Overview

When entering the U.S. market, a Dutch company will often enter into a transaction with a U.S. counterpart. This chapter will discuss the following transactions:

- Mergers and acquisitions.
- Joint ventures.
- Distribution agreements.
- Agency agreements.
- Direct sales.

4.2 Mergers and Acquisitions

Entering the U.S. market can be accomplished by acquiring an existing U.S. business. There are several ways to structure an acquisition: through an acquisition of shares, an acquisition of assets or a statutory merger. The structure of any particular transaction can depend on a variety of business, legal or tax reasons.

4.2.1 Acquisition of Shares

Privately-owned corporations are often acquired through a purchase of the target corporation's shares (or, in the case of a limited liability company, its membership interests) directly from the shareholders (or members). In the case of publicly listed companies, the shares may also be acquired on the exchange where it is traded, or through a public tender offer (*openbaar bod*). Strict federal securities laws apply to the acquisition of a public company.

4.2.2 Asset Acquisition

In an asset transaction, instead of buying the shares, the buyer purchases all or part of the assets of the target company. Advantages to this type of transaction include:

- Liabilities of the target company are not transferred. Those liabilities generally stay with the target company unless they are assumed by the buyer.
- The buyer can choose (or "cherry pick") the specific assets that it wants to acquire, and leave the unwanted assets with the target company.

4.2.3 Statutory Merger

A third way to acquire a U.S. company is through a statutory merger (*juridische fusie*). A Dutch company would first need to form a U.S. subsidiary (which can be done very quickly). This entity could then merge with the target company. As a matter of law, the surviving entity assumes all the assets, rights and liabilities of the disappearing entity. A disadvantage of this structure is that the surviving entity may assume unknown or undisclosed liabilities.

4.3 Joint Ventures

A joint venture is the cooperation of two or more unaffiliated companies for any business purpose. An international joint venture is typically used in three situations:

- *Distribution.* A joint venture is often utilized for selling and distributing a Dutch company's products in the United States. The U.S. joint venture partner will typically bring marketing knowledge, a sales force, administrative services and management services to the table. The Dutch joint venture partner may contribute access to products, intellectual property and capital.
- *Production*. A joint venture may be used to manufacture or assemble products to resell on the U.S. market. The products can be supplied by the U.S. party, but typically they would be contributed by the Dutch party.
- *Research & Development.* A joint venture may be used to cooperate in research and development.

A joint venture can be set up as legal entity or as a contractual arrangement.

- *Legal entity*. A joint venture may be structured in the form of a legal entity. Generally a corporation, LLC, general partnership or limited partnership is used. Which type of entity is chosen is generally dictated by parties' financial and tax considerations.

- *Contractual joint venture*. In a contractual joint venture, the collaboration is based on an agreement between the joint venture partners. A joint venture to develop new products, for example, might be structured as a collaborative research and development agreement.

A disadvantage of the contractual joint venture is that it could be considered to be a general partnership under U.S. law, which would expose the Dutch partner to certain liabilities, such as:

- Unlimited liability for the debts and obligations of the joint venture.

- Exposure to jurisdiction of U.S. courts.

- Exposure to U.S. federal income tax.

A joint venture in the form of a legal entity can take a considerable amount of time to structure, negotiate and implement. Creating a joint venture is frequently much more expensive and time-consuming than an acquisition or doing business through a wholly-owned U.S. subsidiary. An experienced U.S. lawyer should be involved in negotiating and drafting the joint venture agreements, which could include license, distribution, service, loan and employment agreements, as well as a shareholders' agreement.

4.4 Distribution Agreements

Many Dutch companies sell their products in the U.S. through a U.S. distributor. A distributor will purchase the goods from the Dutch supplier and resell them on the U.S. market on its own terms, and in its own name. The parties will enter into a distribution agreement. The agreement sometimes grants exclusivity to the distributor in its territory. The agreement will often include a non-competition clause, barring the distributor from selling competing products. Further, the distributor is often bound to purchase a minimum quantity of products from the Dutch supplier. An alternative is to include a target quantity in the agreement, which is not a firm commitment of the distributor and would not give rise to a termination right or claim for damages if the target is not reached.

These provisions should be carefully drafted so as to limit any anti-competitive effects. U.S. antitrust laws may be applicable to a distribution agreement between a Dutch supplier and U.S. distributor. Restrictions on the distributor's freedom that are harmful to competition could expose parties to legal action.

It may be difficult for parties to reach agreement on choice of law and choice of forum. Dutch suppliers are inclined to prefer Netherlands law and courts, whereas the U.S. distributor may prefer the laws and courts of its home state. In such cases, the parties may choose New York law to govern the distribution agreement and provide for arbitration as dispute resolution mechanism. See Section 11.8 for a sample arbitration clause.

While U.S. law generally provides for fewer protections for distributors as compared to Netherlands and European Union law, Dutch suppliers should be careful to ensure that the distributorship does not qualify as a franchise under applicable state law. Franchising is highly regulated. A distribution agreement that is characterized as a franchise under state law has to comply with requirements of state franchise laws, irrespective of the fact that parties did not intend to create a franchise relationship.

4.5 Agents

A sales agent will sell the Dutch company's products in the name of the Dutch company. In return, the agent receives a commission for his services. The agent never holds title to the goods and merely acts as intermediary. A sales agency agreement governs the relationship between agent and supplier. This agreement should be drafted carefully in order to avoid unintended consequences. For example, the agreement should state that the sales agent is not authorized to accept or decline purchase orders. An agent that exercises the authority to accept or decline orders could cause the Dutch company to have a "permanent establishment" under U.S. law, which could lead to unnecessary tax liabilities. Second, careful drafting can prevent the agent from being considered an employee of the supplier. Characterization of the agent as an employee would invoke obligations under U.S. employment laws and would incur additional tax liabilities.

State law may have regulations applicable to the agency relationship. These statutes generally aim to protect the sales agent, requiring for example a signed written agreement and timely payment of commissions. Violation of state regulations could lead to penalties.

While the Dutch supplier is under a duty to act in good faith towards the sales agent, the supplier generally may include conditions in the agreement pertaining to exclusivity, territorial limitations and price restrictions. The agent has a duty to act diligently and faithfully on behalf of the supplier. The agent has to comply with the supplier's instructions and may not act outside the scope of the agency.

A disadvantage of using a sales agent is that the agent is not necessarily incentivized to create a market for the Dutch company's product. Promoting a new product requires a considerable amount of time and effort. A sales agent who handles a number of different products may rather focus his efforts on those that he believes will earn him a commission sooner. Because the relationship with the sales agent can often be terminated on short notice, the agent is primarily focused on achieving short term results.

4.6 Direct Sales

Alternatively, a Dutch company may sell goods in the U.S. by entering into agreements with customers in the U.S. directly. Direct selling is a straightforward concept. The Dutch seller enters into an agreement with the U.S. customer. A benefit of such arrangement is not having to share profits with a middleman. The Dutch company is also not bound to a contract with a distributor or joint venture partner, offering flexibility to change direction in the future. Direct sales may, however, turn out to be expensive. It may be burdensome to provide after-sales support from the Dutch company's distant location. International agreements such as these may be complicated to draft due to distinct differences between U.S. and Dutch contract law. These are a few examples of issues that may arise:

- The parties may have difficulty agreeing on what law should govern the contract. A Dutch company may prefer Netherlands law, but its U.S. customer may prefer the law of its home state. In our experience, parties often compromise on New York law.

- The parties may have difficulty agreeing on a dispute resolution mechanism. Each party generally prefers to litigate in its "home court." Arbitration is often a good alternative. See Section 11.8 for a sample arbitration clause.

- Under Dutch law, a party would generally be entitled to specific performance (*nakoming*) in the event his counterpart is in breach of the contract. In the U.S., specific performance in contractual disputes is only granted in limited circumstances and normally money damages are the only available remedy. See Section 11.6.

- Application of Dutch general terms and conditions (*algemene voorwaarden*) may not have the intended effect in the U.S. A good example is the concept of *eigendomsvoorbehoud* (retention of title), which is an effective security instrument in the Netherlands but does not have the same effect in the U.S. without taking additional steps to perfect the security interest. A U.S. alternative for the Dutch *eigendomsvoorbehoud* may be a purchase money security interest ("PMSI"). A PMSI secures the buyer's obligation to pay the purchase price. Upon default, the seller may take possession of the asset and sell it in order to recover his loss. If the proceeds of the sale are not enough to cover the loss, the seller may obtain a deficiency judgment. An important benefit of a PMSI is that its holder has priority over other secured creditors that have rights in the same asset. The seller must comply with the applicable rules on creation of a PMSI, which can be found in Article 9 of the Uniform Commercial Code ("UCC"). It typically involves the filing of a UCC financing statement. See also Section 15.1 for a discussion of the creation of security interests.

- A "battle of the forms" may arise in a situation where the purchase documentation of the U.S. buyer conflicts with the sale documentation of the Dutch seller because both parties argue their general terms and conditions apply.
- Under the UCC, certain warranties are created when a Dutch company sells goods to a U.S. purchaser . Any promises or statements the seller makes about the qualities of a good create an enforceable "express warranty." At the same time, an "implied warranty" is created, regardless of whether it is stated in the contract. The implied warranty assures that the good is of an acceptable quality and generally fit for its ordinary purpose. A Dutch seller would be well advised to disclaim these implied warranties.

4.7 General Tips for Contracting with U.S. Companies

To complement some of the issues discussed in the preceding chapters, the below provides an overview of general tips and guidelines that may prove useful to a Dutch company preparing to enter into contract negotiations with a U.S. counterpart.

- *Maintain the drafting initiative*. The party that prepares the first draft has the advantage of starting off negotiations with a draft that is favorable to its position, or his "end of the spectrum." It is advisable to maintain the drafting initiative as much as possible throughout the negotiations.

- *Hire an experienced U.S. lawyer*. A U.S. attorney with experience in negotiating commercial contracts will know how to add value to the agreement: by avoiding pitfalls, spotting potential issues and foreseeing undesirable consequences. See Section 2.3.2.

- *Start with a term sheet*. A term sheet is a preliminary document that reflects the principal intentions of the parties. It outlines the main business points and serves as a framework for drafting the agreement. A term sheet creates jumping-off point to start negotiations. Most term sheets provide that they are not binding (except for certain specified provisions).

- *Draft carefully*. Contracts are strictly enforced in the U.S. If the contract appears unambiguous on its face, U.S. courts will give words their plain and ordinary meaning. There is little room for reasonableness and fairness (*redelijkheid en billijkheid*) to mitigate "unfair" provisions, especially when both parties are business entities that presumably enjoy some level of sophistication. Attention to detail is therefore crucial. See Section 2.3.1.

- *Put everything in the contract*. The rule of civil procedure known as the "parol evidence rule" will render inadmissible any evidence in existence prior to or during conclusion of the contract. This means that emails that explain the meaning of certain disputed provisions, or that reflect promises made by the other party that are not otherwise included in the contract, will generally not be taken into consideration in court. Interpretation is limited to the "four corners of the contract." See Section 11.3.6.

- *Carefully read the contract*. It is essential to carefully read the contract before signing it. During negotiations provisions may be changed and edited numerous times. Make sure to carefully review the final draft.

- *Be careful using Dutch general terms and conditions*. A Dutch company's general terms and conditions are drafted under the expectation that Dutch law is applicable. If parties end up choosing U.S. law to govern the agreement, the Dutch company cannot trust those provisions to have their intended effect due to differences in contract law and interpretation.
    - An excellent example is are penalty clauses (*boetebedingen*), which are common in Dutch agreements but are not enforceable in the U.S. Parties can instead include a "liquidated damages" clause, which is enforceable when damages resulting from a breach are difficult to determine and an amount can be reasonably estimated.
    - Another example is the absence of a *force majeure* (*overmacht*) provision in Dutch general terms and conditions. The concept of *force majeure* is, unlike in the Netherlands, not defined in U.S. law and should be included in the contract to protect parties from major unforeseeable risks.
    - The concept of retention of title (*eigendomsvoorbehoud*) is commonly used in the Netherlands. In the U.S., such a provision would be characterized as creation of a security interest for which a financing statement needs to be filed before it has effect against third parties. See sections 4.6 and 15.1.
- *Negotiate boiler-plate provisions.* It is common in the Netherlands to accept another party's general terms and conditions without challenging (or in some cases even reading) them. The same is not true in the U.S. Everything is negotiable. Even provisions that are referred to as "boiler-plate" should be carefully read and, if necessary, negotiated. See Section 2.3.1.

- *Don't expect specific performance* (nakoming) *as a remedy*. Under most circumstances, specific performance will not be available as a remedy for breach of contract. Courts will award specific performance only when monetary damages will not make the injured party whole. See Section 11.6.

- *Consider arbitration*. Appointing Netherlands courts to resolve contractual disputes is not always the best option as there is no treaty between the Netherlands and the U.S. providing for the enforcement of judgments. Arbitration may be a good alternative. See Section 11.8 for a sample arbitration clause.

- *Understand U.S. corporate governance.* A board of directors of a U.S. corporation should not be compared to a Dutch *raad van bestuur.* They do not share the same rights and duties. Whereas a Dutch *directeur* is in charge of day-to-day operations of a company, a U.S. director has a supervisory role. A Dutch *directeur* is more like a U.S. officer (e.g. the Chief Executive Officer) while a Dutch *commissaris* somewhat resembles a U.S. director. Comparisons are not possible. See Section 3.2.

5 Product Liability

5.1 Introduction

Product liability is a type of tort liability (*onrechtmatige daad*) faced by product manufacturers and other parties in the chain of production, including distributors, wholesalers, retailers and sometimes parent companies. It is an area of law governing injuries caused by products. There is no federal product liability law in the U.S. Some states have statutory product liability law, most states have judge-made product liability law and some states have adopted the Model Uniform Product Liability Act. People who can sue for a product liability claim include the injured product user, the product user's spouse and children, the estate of a product user who has died as a result of using the product, and an injured bystander. Plaintiffs generally bring a product liability action under one of three different theories:

- Strict liability.
- Negligence.
- Breach of warranty.

5.2 Strict Liability

Many product liability cases fall under the theory of strict liability. Strict liability allows a plaintiff to recover for an injury caused by a product without proving wrongdoing on the part of the defendant. The plaintiff need only prove injury by a defective product that the defendant either manufactured or sold. There are three types of product defects:

- *Design Defects*. Design defects occur when a product's foreseeable risks could have been avoided by a reasonable alternative design.
- *Manufacturing Defects*. Manufacturing defects arise when the product does not meet its intended design as a result of faulty manufacturing.

- *Failure to Warn*. Failure to warn defects occur when the absence of adequate warnings about the risks associated with a product's foreseeable use and misuse make the product unreasonably dangerous.

5.3 Negligence

The negligence theory requires the plaintiff to establish that the defendant failed to follow the standard of care that a reasonable person or company would follow, causing injury to the plaintiff. Courts will sometimes apply lower standards of negligence (negligence *per se* or *res ipsa loquitur*).

5.4 Breach of Warranty

To recover under breach of warranty, a plaintiff must establish that the defendant failed to warn the plaintiff of the product's dangers. There are two types of warranties given by a manufacturer or seller:

- *Express Warranties*. Express warranties are statements in the product's literature or statements made by the manufacturer's marketing and sales force.

- *Implied Warranties*. Implied warranties are promises that the law implies in the sale of a product, including promises that a product is suitable for its ordinary purpose and the promise that it will not be unreasonably unsafe.

5.5 Damages

The main types of damages in product liability cases are compensatory damages and punitive damages.

- *Compensatory Damages*. Compensatory damages are intended to compensate the injured person, and cover items like income lost due to the injury, reasonable healthcare costs, past pain and suffering, and emotional distress. The rule of joint and several liability (*hoofdelijke aansprakelijkheid*) allows the plaintiff to collect the full award of compensatory damages from any defendant found liable. Some states have eliminated joint and several liability where the defendant is less than 50% at fault.

- *Punitive Damages*. Punitive damages are awarded to punish the defendant and to deter future wrongful behavior. In many states, plaintiffs have to prove malice to receive punitive damages. The amount of punitive damages is a question of fact usually decided by juries. Punitive damages in product liability cases have historically been higher than damages in the Netherlands and other European countries and have led to inconsistent outcomes in similar cases. Multi-million-dollar punitive damage awards are not unusual. Several states have enacted punitive damage reform to limit the amounts of such damages.

5.6 Lawsuit Process

A plaintiff can bring a suit in the court of his choice, but it may be dismissed if the court finds that it lacks jurisdiction. Generally, if a company plans to have its products enter the U.S. market or a particular state's market and its product allegedly causes an injury in a state, that state's courts will have jurisdiction to hear the case. Since there is no national product liability law, the law of the state where the alleged injury occurred will apply to the case. If the plaintiff loses, he does not have to bear the costs of the defendant, although a few states have started to change this rule. Also, the plaintiff will usually be in a contingency fee ("no cure, no pay") arrangement where his lawyer receives a percentage of an award from a successful verdict, or else nothing. Dutch companies should be prepared to meet the challenge of "discovery" in the event a lawsuit arises. Discovery is the process by which the parties request from and produce to each other information that may be relevant to the lawsuit. Discovery in product liability suits can be very extensive. Once a company is sued (or, in many states, when it reasonably expects that it may be sued), it should retain counsel, preserve anything that could be evidence, identify which insurance policies might cover the claim, and determine what it can do to move the litigation to a more defendant-friendly court. Federal courts are usually preferable to state courts for defendants.

5.7 How to Reduce Risk

Dutch companies can reduce their exposure to product liability suits in the U.S. by developing plans to address product safety concerns and by obtaining adequate insurance coverage. Product safety plans can consist of review programs assessing the adequacy of product warnings and the product design and manufacturing processes. Appointing a product safety officer or committee can reduce the risk that a plaintiff will prove a defect resulted from a company's failure to follow a safety recommendation. Additionally, manufacturers should be sure to adequately test the product, evaluate alternative designs, recommend safety devices, and provide product clear warnings.

5.8 Product Liability Insurance

Obtaining adequate product liability insurance is crucial to limit a company's exposure. It is important for a company to find insurance that will cover product liability claims arising in the U.S. Dutch companies should be particularly careful in this regard, as many product liability policies sold in the Netherlands claim to provide "worldwide coverage" but in fact exclude coverage for U.S. claims.

A related form of insurance whose use has increased in recent years is product recall insurance, either as a stand-alone policy or additional coverage. Standard product liability insurance typically does not cover costs beyond injury to third parties. Product recall insurance covers costs incurred proactively by a company to prevent injury or damage, including communicating the recall to consumers, replacing unsalable products, public relations, crisis management, consultants' fees, and other costs associated with the recall.

An alternative, but significantly less attractive, approach would be for the Dutch company to arrange to be named as an additional insured on the insurance policy of another company, e.g., the insurance policy of the Dutch company's distributor in the U.S. Also, a Dutch company could enter into an indemnification agreement with, e.g., its U.S. distributor providing for indemnification by the distributor. The advantages and disadvantages of any such alternative arrangement should be carefully evaluated.

6 Labor and Employment

6.1 Employment "At-Will"

Contrary to the Netherlands, most employment in the United States is "at-will," meaning there is no contractual agreement between employer and employee. Either party can terminate the relationship at any time, without showing cause and without incurring any liability. There are, however, some important exceptions to the at-will doctrine:

- Collective bargaining agreements negotiated by labor unions.
- Employment contracts which are occasionally used for high-level employees.
- Termination involving unlawful discrimination or violation of public policy.
- Retaliatory terminations for exercising statutory rights.
- Companies with written internal policies or employee handbooks that confer broader rights to employees, such as notice periods and severance.

It is often advisable to use employment contracts with key, high-level employees. A well-drafted employment contract will specify the term of the employment, the circumstances under which it may be terminated, what notice periods will apply, whether (and how much) severance will be payable, etc.

6.2 Federal Labor Laws

There are extensive U.S. federal laws that regulate employment and labor matters. One major area of federal regulation is anti-discrimination legislation. Federal law prohibits discrimination against workers based on, among other things, age, sex, national origin, citizenship, race, color, religion, disability and pregnancy. Most states as well as some local governmental entities have anti-discrimination laws that mirror or exceed federal law.

Dutch companies should be aware that, contrary to Dutch law, the U.S. rules prohibiting discrimination based on age make it illegal to require employees to retire at a particular age.

The Worker Adjustment and Retraining Notification Act ("WARN") offers protection to employees by requiring 60-days' advance written notice of plant closings and mass layoffs. Generally, employers who have 100 employees or more are covered by this Act. This requirement forms an exception to the general rule that no advance notice of termination is required. An employer who fails to provide notice under WARN may be subject to civil penalties. Several states have laws requiring notice of plant closings and mass layoffs that mirror or exceed the WARN requirements.

Employers are generally not obligated to provide retirement and health benefits to their employees, but when they choose to do so, there are certain legal requirements which must be adhered to under the Employee Retirement Income Security Act.

The Occupational Safety and Health Act ("OSHA") requires employers to furnish workplaces that are free from hazards that cause or are likely to cause death or serious physical harm to employees. The Act also created a federal government agency which sets workplace safety standards and conducts inspections to ensure that employers are providing safe workplaces. The Act prohibits retaliation against an employee who complains about hazardous conditions in the workplace. Both civil and criminal penalties may be imposed for violations of OSHA.

See www.dol.gov/elaws for information on federal labor laws.

6.3 Dutch and Other Foreign Employees

All employees must be formally authorized to work in the United States. The employer is responsible for verifying that information by reviewing any new employee's work authorization documents.

Because of the strict anti-discrimination laws, it can sometimes be a problem for Dutch companies to hire only Dutch nationals to manage their U.S. operations on a rotating basis. Dutch companies often want to send employees directly from their headquarters to work in the U.S. subsidiary for a limited period of time, after which the foreign headquarters sends replacement staff. The problem with this approach is that it may expose the company to claims of discrimination from U.S. employees based on national origin. One approach to counter such claims may be to claim applicability of a specific exemption from these rules, which is available when national origin is a "bona fide occupational qualification" that is necessary to operate the company. Another approach may be to rely on the bilateral Friendship, Commerce and Navigation treaty ("FCN Treaty") entered into by the Netherlands and the U.S. The FCN Treaty may be interpreted as allowing U.S. subsidiaries of Dutch companies to give preferential treatment to their expatriate employees, thereby escaping liability for some employment discrimination claims from U.S. employees.

6.4 Practical Aspects

6.4.1 Posting Requirements

Federal laws require employers to keep posters and notices in obvious locations in the workplace to inform their employees of various laws and regulations.

For example, employers must display posters regarding the federal discrimination laws. Employers must also display minimum wage and overtime requirements, OSHA requirements and a poster explaining the prohibition on use of a lie detector on employees. Individual states often impose additional notice requirements. The required posters can be obtained from related government agencies, but are also available from private companies that sell posters combining all required notices in one document.

6.4.2 Hiring and Termination

The employer should keep in mind that U.S. discrimination laws have certain implications with respect to the hiring process. For example, asking questions regarding a job applicant's age, sex, race, national origin or citizenship is not advisable.

Employment agreements often include a non-competition clause, preventing the employee from working for competitors during the term of the employment and for a specified period of time thereafter. Non-competition clauses that cover the period after the employment relationship has ended are not always enforceable. Rules regarding the enforceability of non-competes vary from state to state.

Local labor and employment counsel should generally be consulted prior to letting go of an employee, drafting employment or confidentiality agreements or preparing an internal handbook which sets out company policies and procedures. Many of these documents can minimize liability exposure when carefully drafted.

6.4.3 Records

Employers are required to keep detailed personnel files regarding their employees, which should include applications, payroll records, evaluations and various other records. Most of these documents need to be kept for several years.

6.5 Employee Compensation and Benefits

Minimum wage and overtime pay requirements for certain employees are provided by the Federal Labor Standards Act and various state laws. In addition, all 50 states have workers compensation laws that provide employees who are injured on the job with medical care and monetary awards for lost wages. State unemployment insurance programs provide unemployment insurance benefits to eligible workers who are unemployed through no fault of their own (as determined by state law), and meet other eligibility requirements. Foreign employers need to be wary of the labor regulations, particularly when dealing with temporary employees or independent contractors, who may or may not be considered "employees" of the company. The applicability of many labor laws is dependent on what constitutes an employee, the definition of which may vary depending on the applicable jurisdiction and legislation. Care must be taken to ensure that the U.S. employer is in compliance with these compensation and benefits requirements in order to prevent fines and litigation.

7 Intellectual Property

7.1 Overview of U.S. Intellectual Property Law

Intellectual property (*intellectuele eigendom*) often comprises the most valuable assets of any business. Therefore, it is important to make sure that these rights are properly protected prior to commencing business in the United States. Intellectual property is sometimes called "intangible property" because it refers to creations of the mind, such as literary and artistic works, inventions, instruments of branding used in commerce, and the secrets of a company that provide it with an economic advantage over its competitors.

There are four main areas of U.S. intellectual property law:

- Copyright.
- Patents.
- Trademarks.
- Trade secrets.

Aside from trade secrets, this area is primarily governed by federal law.

7.2 Copyright

Copyright law is governed by the federal Copyright Act. Among other things, that law provides copyright holders with exclusive rights in and to original works of authorship that are expressed in a tangible medium, including the exclusive right to reproduce, distribute, display and create copies and derivative works of each original work. The protection covers the expression of an idea, but not the idea itself. For example, if a book is written about an original topic, other authors cannot copy the book, but they are generally free to write about the topic or the idea that provides the subject matter for the book.

7.2.1 Requirements of Copyright

One of the first requirements of a copyrightable work is originality. In order to meet this standard, a work cannot be copied from another work and there must be a minimal degree of creativity involved. A famous example of the originality requirement comes from a United States Supreme Court case about phonebooks. The Court held that a phonebook that merely listed names and phone numbers in alphabetical order was not copyrightable because it was only a collection of facts and did not involve any creativity in the way the facts were selected, arranged and compiled. However, if another phonebook selected and arranged the listings in a creative way, the creative elements of that phonebook could be copyrightable. Other authors would be free to copy the phone numbers from the book, but they could not copy the way they were selected, arranged and compiled. A work does not need to be entirely original in order to be copyrightable. A book that copied sections from Shakespeare's *Romeo and Juliet* might still be copyrightable, but the copyright would only protect the original, un-copied portions of the book.

Another requirement of copyright is that the work needs to be fixed in a "tangible medium of expression." A work is fixed in a tangible medium if it is embodied in a form that is sufficiently permanent to allow the work to be "perceived, reproduced or otherwise communicated," either directly by the author or with the use of a machine.

7.2.2 Protecting a Copyrightable Work

A work is automatically protected by copyright the first time the author fixes the work in a tangible medium. However, in order to enjoy the full protection afforded by the Copyright Act (which provides for certain defined statutory remedies for infringement), it is important to register the work with the U.S. Copyright Office. Registration is accomplished through a relatively simple filing with the Copyright Office, which would include a sample of the work covered by the registration. See www.copyright.gov.

7.2.3 The "Fair Use" Doctrine

The "fair use" doctrine creates certain limitations on the author's rights under copyright law. Fair use is a legal doctrine which permits certain uses of a copyrighted work without the copyright holder's permission. Traditionally recognized fair uses of a copyrighted work include criticism, comment, teaching, news reporting and scholarship, but a wide variety of uses have been held to constitute fair use. There are no presumptively fair uses. Courts determine whether a particular use is protected on a case-by-case basis. Some of the factors the court will consider are: (i) the purpose of the use, (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (iv) the effect of the use on the potential market or value of the underlying copyrighted work.

7.3 Patents

Patent law provides an inventor with a limited monopoly in exchange for the public disclosure of that invention. There are three types of patents: design patents, utility patents and plant patents. Each conveys to the owner a legal remedy (such as monetary damages or an injunction) against others who make, use, offer for sale, sell or import the patented invention. The general term for a U.S. patent is 20 years from filing for a utility patent or 14 years from issuance for a design patent.

7.3.1 Requirements for Obtaining a Patent

In order to protect an invention in the United States, the inventor must file a patent application with the U.S. Patent and Trademark Office ("USPTO"). The requirements differ slightly depending on the type of patent sought. However, for all three types of patents, the inventor must prove that the invention is novel and non-obvious. An invention is novel if the patent applicant was the first to invent a product, apparatus, composition or process that is different from all others in existence at the time of invention. The invention must meet the statutory requirements that assess whether it was novel when invented and whether anything has happened between invention and filing for a patent that would have caused the inventor to lose his right to a patent. In order to satisfy the "non-obvious" requirement, the patent applicant must show that the invention is not an obvious improvement on already existing products, apparatuses, compositions or processes. For a utility patent, the applicant also has to prove that the invention is useful. The bar for usefulness is not high. The applicant only needs to show that the invention provides an identifiable benefit. For a design patent, the applicant must prove that the design is ornamental, which means that the design is not dictated by functional purposes or considerations. See www.uspto.gov for additional information.

7.4 Trademarks

A trademark is a word, symbol, name or device that is used in commerce to distinguish goods or services in the marketplace and to indicate their source of origin. Shapes, sounds and colors can also be protected under trademark law if they function like a trademark. A mark is granted protection as soon as it is used in interstate commerce. Even without registering it, the owner will generally have rights to prevent others from using confusingly similar marks. However, there are many benefits to registering a mark with the USPTO, including a legal presumption of ownership and the exclusive right to use the trademark throughout the U.S. in connection with the goods and services listed in the registration. Federal registration lasts ten years, but unlike the other intellectual property rights, a company can protect its marks indefinitely by renewing the registration so long as those marks are still being used in commerce.

7.5 Trade Secrets

Trade secrets are protected under state law that varies from state to state. Generally, a trade secret is any confidential or proprietary information that gives the owner an advantage over its competitors. One of the most famous trade secrets is the recipe for Coca-Cola. To qualify as a trade secret, the information must actually be secret, meaning that it is not readily known or ascertainable to others that would profit from the knowledge. Some statutes specify that the trade secret must gain economic value from the fact that it is not widely known. The measures taken to protect the secrecy of the information can also be an important factor in determining whether information qualifies as a trade secret. A company that has a valid trade secret will have remedies under state law against those who improperly acquire or seek to use the trade secret.

7.6 Internet Domain Names

Registering an Internet domain name gives the registrant the exclusive right to use that domain name as an Internet address for use in connection with its business. Domain names are controlled globally by a not-for-profit organization called Internet Corporation for Assigned Names and Numbers (ICANN). The ICANN website contains a directory of approved companies that can be used to register a domain name. However, it is important to make sure that the domain name does not violate another's trademark. Even if a domain name is properly registered, the registration might be lost if another party has registered the domain name as a mark, or has superior rights to the mark under state common law.

7.7 Licensing

One way of monetizing intellectual property is through licensing. A license is a contract giving another party the right to use or exploit intellectual property rights. Unlike an assignment, where the owner of the intellectual property essentially sells its rights in the intellectual property, a licensor retains ownership of the intellectual property and the licensee's rights end when the license ends. A license can be exclusive or non-exclusive. An exclusive license means that the licensor will not license anyone else the right to use the intellectual property for the term of the license. In contrast, a licensor can grant as many non-exclusive licenses as it chooses to. A license can also be limited in scope. For example, a licensor might give one party the exclusive right to use its patented invention in one type of product, and give another party the right to use it in another product. As with all contracts, licenses can be drafted to suit a number of different arrangements. However, because intellectual property is treated like any other form of property under U.S. law, it is important to consider antitrust issues when structuring a license and avoid arrangements that might create anticompetitive effects.

8 Antitrust Law

8.1 Overview

U.S. antitrust laws (*mededingingsrecht*) apply to any conduct that directly affects U.S. commerce, regardless of where that conduct occurs. U.S. antitrust laws apply to all legal entities and individuals at every level of the distribution chain. Compliance with the antitrust laws is essential to the success of a company, as violations can cause major financial loss. The primary federal antitrust statutes, the Sherman Act and the Clayton Act, prohibit monopolization, attempted monopolization, agreements that unreasonably restrain trade and certain other activities (e.g., mergers and acquisitions) that may tend to substantially lessen competition. Generally, the antitrust statutes work together and not independently of each other. The Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") are the primary federal agencies charged with civil enforcement of the federal antitrust laws. The DOJ also has sole jurisdiction to criminally enforce the Sherman Act, while the FTC has additional authority under the Federal Trade Commission Act to civilly prosecute claims for unfair competition. State attorneys general have the authority to enforce state antitrust statutes. In general, state antitrust laws are not pre-empted by the federal antitrust laws; thus, a state can challenge conduct that has been cleared or ignored by the federal agencies, with certain exceptions. Private parties have power to enforce the Clayton Act, which entitles successful parties to an award of treble damages; however, private parties must have antitrust standing to pursue their claims and have suffered actual injury of the type the antitrust laws were intended to prevent. Private parties may also bring actions under state antitrust laws, where the measure of damages and the prerequisites for standing vary considerably from federal law. See also www.ftc.gov/bc/antitrust.

8.2 Cartel Conduct

Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade and applies to all sectors of the economy. A court's analysis focuses on the existence of an agreement or common scheme between two or more independent entities that unreasonably restrains trade. Such conduct may be either *per se* illegal or analyzed under the "rule of reason" test, which requires the plaintiff to prove that the anti-competitive effects of the challenged conduct outweigh the pro-competitive benefits. Conduct is *per se* unlawful if, on its face, it appears to be conduct that almost always restricts competition and decreases output. If conduct is *per se* unlawful, there is no further inquiry into the actual harm caused. Conduct that is not *per se* unlawful is evaluated under the rule of reason, which weighs a variety of anti-competitive and pro-competitive factors, including ability to raise prices above what they would be in a competitive market, the purpose for the restraint and whether the restraint is reasonably necessary to achieve its purpose.

8.2.1 Horizontal Restraints of Trade

Horizontal restraints of trade involve concerted action among actual or potential competitors. Examples of *per se* unlawful conduct include agreements among competitors to control price, limit output, divide markets or allocate customers and rig bids. Price controls that are *per se* unlawful are those agreements among competitors to set prices, which includes raising, lowering and stabilizing prices. Price controls that are ancillary to the pro-competitive nature of a restraint are generally evaluated using the rule of reason analysis. Group boycotts, which are concerted refusals to deal, are typically analyzed under the rule of reason, but sometimes they are *per se* unlawful if the boycott is used to enforce conduct that is itself *per se* unlawful (like a price-fixing arrangement). Agreements to rig bids can take the form of bid comparisons prior to submission, noncompetitive bidding and agreements to refrain from bidding.

8.2.2 Vertical Restraints of Trade

Vertical restraints of trade are agreements between different levels of the distribution chain that limit resale or purchase conditions. Some types of vertical restraints include resale price maintenance, tying arrangements and distribution restraints. Vertical restraints are generally analyzed under the rule of reason, and are seldom considered unlawful *per se* under federal law.

8.2.2.1 Resale Price Maintenance

When a manufacturer and a distributor or seller make an agreement to establish a minimum or maximum resale price, federal courts will analyze this conduct under the rule of reason. Minimum resale price maintenance is considered to be *per se* illegal under many state laws, one of the few areas where federal and state law substantially diverge. Under both federal and state law, it is generally lawful for manufacturers to suggest resale prices to distributors or sellers, unless the distributor is compelled to adhere to the manufacturer's prices.

8.2.2.2 Tying Arrangements

A tying arrangement is a type of vertical restraint on trade. It is an agreement to sell a product or service ("tying product") conditioned on the purchase of another product or service ("tied product"). Tying arrangements are generally evaluated under the rule of reason, but that view is not held consistently across jurisdictions. Some courts, on both the federal and state level, continue to find tying conduct to be *per se* unlawful because such conduct denies competitors free access to the market for the tied product. For a tying arrangement to be unlawful under the rule of reason, the party challenging the agreement must generally provide proof of coercion making purchase of the tied product the only viable economic option. Other factors courts use to determine the legality of a tying arrangement include the seller's market power, the amount of commerce in the tied product, and the competitive effect in the relevant market for the tied product. Tying arrangements may be challenged under Section 1 of the Sherman Act or Section 3 of the Clayton

Act, and used as support for a monopolization claim under Section 2 of the Sherman Act.

8.2.2.3 Distribution Restraints and Exclusive Dealing

Distribution restraints, including exclusive distributorship, territorial restrictions and location clauses, are generally analyzed under the rule of reason. An exclusive distributorship is an agreement between the manufacturer and the distributor granting the distributor the right to be the sole distributor in a given geographic area. Territorial restrictions limit the distributor's freedom. When evaluating a territorial restriction, courts consider the purpose for the restriction, its effect on limiting competition and the market share of the supplier imposing the restraint. Location clauses, which establish a distributor's business site, are typically upheld under the rule of reason.

Exclusive dealing agreements requiring a buyer to purchase all products or services from one supplier foreclose competing suppliers from marketing those products to the buyer, thereby harming competition. Courts generally analyze exclusive dealing agreements under the rule of reason, considering factors including the portion of the relevant market foreclosed to competitors by the challenged agreement, the harm to competition, the agreement's duration and the pro-competitive effects.

8.2.3 Enforcement

Violations of the Sherman Act are subject to criminal and civil enforcement by the DOJ and civil enforcement by the FTC. Private damage actions can also be brought against violators, and injured parties may seek treble damages or injunctive orders. Companies charged with violating federal or state antitrust laws should consult a lawyer to determine applicable defenses, as the analysis is fact specific.

8.3 Monopolization and Dominant Firm Conduct

Section 2 of the Sherman Act prohibits monopolization, attempted monopolization and conspiracy to monopolize. The crux of claims under Section 2 are the unlawful possession or attempted possession of market power, defined as a company's ability to, by acting alone, control prices or exclude rivals and harm competition. In measuring market power, a court will first define the relevant product and geographic market at issue, and then determine whether the company has the power to control prices or exclude competition in that market. Although a company's share in the relevant market is an important factor in determining market power, other factors considered include the ease with which competitors may enter the market, strength of demand, pricing trends, and the size and strength of competing companies. If a company is found to possess market power, courts will consider whether the company has unlawfully acquired or maintained that monopoly power through exclusionary conduct, which generally requires proof that the conduct has injured competition.

8.3.1 Acquisition and Misuse of Monopoly Power

Evidence of market power is usually circumstantial. A market share of over 70% in the relevant product and geographic market is generally prima facie evidence of market power. When a company's market share is between 50% and 70%, courts often consider additional factors such as barriers to entry, exclusivity arrangements, ability to price discriminate and market performance. A company with less than 50% market share generally will not be deemed to possess market power.

8.3.2 Market Exclusion and Predatory Pricing

Claims of market exclusion require proof that the competitive process itself has been harmed. Courts will examine the company's intent and business justification and the effect of the conduct on competition, rather than on competitors. Some forms of exclusionary conduct that may support a monopolization claim include restrictions limiting access to supplies or markets, exclusive dealing and tying arrangements. Predatory pricing occurs when a company prices below an appropriate measure of cost to eliminate competitors and has a dangerous probability of recouping its investment through above-market prices.

8.3.3 Enforcement

The FTC and DOJ have civil jurisdiction to investigate and prosecute suspected violations of Section 2 of the Sherman Act. Likewise, state attorneys general can under state law pursue claims on behalf of state agencies, consumers and the public interest. Private parties can also enforce antitrust laws. A private party injured by conduct violative of Section 2 can bring a cause of action for damages or injunctive relief under of the Clayton Act.

8.4 Joint Ventures

Antitrust laws may also apply to joint ventures. Joint ventures are generally analyzed under the rule of reason, unless they involve collaborative activity so harmful to competition that the joint venture would not achieve any pro-competitive benefits. In a rule of reason analysis for joint ventures, courts consider whether the agreement will increase the company's ability to raise prices or reduce output beyond its ability without the joint venture. Joint ventures among horizontal competitors that substantially lessen competition are generally found unlawful. Joint venture agreements that contain price-setting clauses can be *per se* unlawful, unless the price-setting arrangement is central to the business purpose of the joint venture.

8.5 The Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act" or "HSR") requires parties to certain proposed mergers, acquisitions and joint ventures to file notifications with both the FTC and DOJ before completion. Companies that meet certain criteria must file an HSR form with both agencies, pay a filing fee, and wait the statutory waiting period before transferring beneficial ownership of the assets, voting securities, partnership interests or limited liability company interests in question. The amount of the filing fee depends on the value of the shares, assets or company interests of the acquired person that the acquiring person will hold following closing of the transaction. During the waiting period, either the FTC or the DOJ will review the filings to determine whether a more in-depth investigation is warranted. The initial statutory waiting period is 30 days for most transactions and 15 days for cash tender offers or certain acquisitions out of bankruptcy proceedings. If the FTC or DOJ requests additional information, commonly known as a "second request," the waiting period is stayed and reset to begin to run following the parties' certification of substantial compliance with the second request. The parties may request early termination of the waiting period for transactions that do not raise any competitive concerns. The vast majority of transactions notified receive early termination within the first two weeks of the first waiting period. Very few transactions are actively investigated and fewer still receive second requests, which are generally issued in only the most problematic transactions.

Some transactions requiring an HSR filing include: acquisitions of voting securities, assets or interests in partnerships and limited liability companies when control is obtained; transactions where the value and/or parties meet or exceed a specified size ("size-of-transaction" and "size-of-person" tests); and transactions where there is no applicable statutory or regulatory exemption. The size-of-transaction and size-of-person tests are jurisdictional tests to show that either party is engaged in commerce in the U.S. or any activity affecting U.S. commerce and that the transactions and parties involved are of a certain size. The size-of-transaction test is satisfied if, as a result of the acquisition, the acquiring party will hold assets or voting securities in excess of $66.0 million. The size-of-person test is usually satisfied in the case of a typical public company. Transactions with a value of more than $263.8 million are required to file under the HSR Act regardless of the size-of-person. For transactions below that amount, the size-of-person test is generally met when a parent entity on one side of the transaction has sales or assets of at least $131.9 million and the parent entity on the other side has sales or assets of at least $13.2 million. No filing is required for a transaction that fails to meet the size-of-transaction test regardless of whether it meets the size-of-person test. (The thresholds noted in this paragraph are effective as of the writing of this booklet.)

There are several exemptions from HSR filings, including intra-person transactions, acquisitions of goods in the ordinary course of business, acquisitions of real property and investment rental property assets, acquisitions of non-voting shares or convertible securities, acquisitions solely for the purpose of investment and acquisitions of foreign assets and voting securities of foreign issuers.

The HSR rules are complex. Companies should consult HSR counsel to determine if their transactions are subject to HSR filing requirements or if they fall under an exemption.

9 Environmental Law

9.1 Overview

The United States has a complex body of environmental laws affecting businesses and individuals. At the federal level, the Environmental Protection Agency ("EPA") is in charge of enforcing all federal environmental legislation, with over 30 major regulatory acts and hundreds of accompanying regulations and other laws (see www.epa.gov). Some of the major acts include:

- The Clean Air Act.
- The Resource Conservation and Recovery Act.
- The Clean Water Act.

In addition to federal laws, all states and many local governments have enacted their own environmental statutes and regulations, which may vary and conflict from state to state.

9.2 The Clean Air Act

The Clean Air Act ("CAA") is one of the major pieces of federal legislation dealing with air pollution. The EPA is in charge of implementing the CAA's many provisions and sets national air quality standards. Each state government must implement a plan to bring its air quality into compliance with the national standard. The broad language of the CAA means that states have significant flexibility in the measures they choose and, as a result, air quality legislation may differ widely from state to state. Emissions trading programs are becoming an increasingly common way of using economic incentives to help businesses meet their emissions quotas. A facility is given an emissions credit if it lowers its emissions below the quota. It can keep this credit for its own later use or sell it to other facilities that face higher costs of reducing emissions to help them meet their own quotas more efficiently.

9.3 The Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act ("RCRA") regulates the treatment of hazardous waste in the U.S. from "cradle to grave" -- from waste generation through final disposal. Specifically, the RCRA focuses on three different types of activity: generation of hazardous waste; transportation of hazardous waste; and storage, treatment or disposal of hazardous waste in waste facilities. Individuals involved in any of these activities must get a permit from the EPA. Significant record-keeping requirements have been imposed that help the EPA track waste until that waste arrives at a disposal or storage facility, in order to make sure none is lost or unaccounted for along the way. Owners and operators of hazardous waste facilities face strict rules designed to ensure that no hazardous waste is released into the environment. Penalties for non-conformance with these regulations are severe, and can range up to $27,500 per day/per violation. Furthermore, RCRA authorizes civil suits to enforce the provisions of the act.

9.4 The Clean Water Act

The Clean Water Act ("CWA") regulates the pollution of U.S. waters and establishes water quality standards for navigable surface waters. Under the CWA, it is illegal to discharge pollutants into such waters from discrete point sources without a permit. A point source is defined as a "discrete conveyance," which has been broadly interpreted to include everything from pipes, ditches and containers to floating crafts, such as ships, that may emit pollutants. For the most part, the permit program is administered by state agencies, and companies should contact their applicable state agencies in order to obtain the necessary permits.

10 U.S. Taxation

10.1 Introduction

Entities doing business in the U.S. are subject to taxation at federal, state and local levels. The most prominent of such taxes is the federal income tax, although entities should always evaluate potential liability for state and local income, sales and use taxes as well. The Internal Revenue Service ("IRS"), a division of the U.S. Treasury Department, oversees compliance with the federal income tax (see www.irs.gov).

10.2 Entity Choice

As discussed briefly above in Chapter 3, when establishing a business enterprise in the U.S., the type of entity chosen can have an important influence on the overall amount of federal income tax and other taxes assessed. The federal tax system treats corporations as distinct legal entities that owe taxes on the income they receive during the year, independent from income taxes owed by their owners. Thus, double taxation generally will apply to businesses conducted in corporate form because shareholders generally will be subject to tax on distributions to them of the corporation's earnings in the form of dividends. Limited liability companies and partnerships, on the other hand, are pass-through entities for tax purposes and generally are not subject to tax at the entity level, unless they make so-called "check the box" elections to be treated as corporations. However, owners of an LLC or partnership are generally required for file tax returns in the U.S. with respect to their interest in a pass-through entity conducting a U.S. business. The choice of entity should also be made with awareness of other differing characteristics of the entities relevant to flexibility, limited liability and management. The remainder of this discussion is limited to the U.S. tax treatment of activities conducted through a corporate entity.

10.3 Taxation of U.S. Corporations

A Dutch business may choose to conduct its U.S. activities through a U.S. corporation, i.e., a corporation organized under the laws of a U.S. state. U.S. corporations generally are taxed on their worldwide income, wherever sourced, at graduated rates ranging from 15% to 35%. Capital gains of U.S. corporations are taxed at the same rates as ordinary income.

Corporations are entitled to deduct from taxable income "ordinary and necessary" expenses paid or accrued in connection with the operation of a trade or business, to depreciate the cost of tangible property used in a trade or business or used in the production of income, and to amortize the cost of intangible property so used. To the extent a corporation has a net operating loss in any taxable year, it generally may carry such loss back for two years and forward for twenty years. Corporations generally may not offset ordinary income with capital losses. Corporate taxpayers generally may carry a capital loss back three years and forward for five years. A corporation generally is entitled to a credit against its tax liability for income taxes paid to foreign governments (but only to the extent of the pre-credit U.S. tax on foreign income), thereby eliminating double taxation.

An affiliated group comprised of multiple U.S. corporations that satisfy certain ownership tests may elect to file a consolidated return and be taxed as a single unit. In order to be eligible to file a consolidated return (i) the U.S. corporations must be connected through share ownership by a common parent corporation that owns 80% or more of the voting power and value of all outstanding shares of at least one of the corporations, and (ii) 80% or more of the voting power and value of all outstanding shares of each corporation other than the parent must be directly owned by one or more of the other corporations. Electing to file as a consolidated group has the potential advantage of eliminating (or deferring) intercompany gains and losses and allows members' losses to offset other members' income, although by making such election each member of the group becomes severally liable for the group's entire income tax liability.

In addition to the tax on the profits of the business in the U.S., an additional U.S. withholding tax applies to the U.S. corporation's income when paid out in the form of dividends, interest or royalties unless an exception applies or the withholding tax is eliminated through the Tax Convention with the Netherlands (the "Tax Convention") as discussed below. U.S. withholding tax generally applies at a flat rate of 30%.

The withholding tax is minimized or eliminated, however, on payments to Dutch persons that qualify for benefits under the Tax Convention. The Tax Convention provides for an exemption from withholding tax on payments of interest and royalties, and withholding tax rates on dividends that differ depending on the percentage interest in the U.S. corporation the Dutch recipient holds. Specifically, (i) no withholding applies on dividends paid by a U.S. corporation to a Dutch company that owns an 80% or greater beneficial interest and satisfies certain other tests regarding its holding period and the identity of its beneficial owners and the ultimate recipients of its income, (ii) a 5% withholding rate applies on dividends paid by a U.S. corporation to a Dutch company that owns a 10-79.9% beneficial interest in the U.S. corporation, and (iii) a 15% withholding rate applies to all other dividends paid by a U.S. corporation to a Dutch resident. Accordingly, a Dutch company doing business in the U.S. through an 80% or greater owned subsidiary may be exempt from withholding tax on dividends provided such company qualifies for benefits, and satisfies certain tests, under the Tax Convention.

10.4 Taxation of Foreign Corporations

Except as otherwise provided under an income tax treaty as discussed in more detail below, foreign corporations doing business in the U.S. typically are subject to U.S. tax on income that is "effectively connected" to their conduct of a trade or business in the U.S., which very generally refers to active business income rather than income from passive investment activities. Effectively connected income of a foreign corporation generally is taxed in the same manner and at the same graduated rates as the income of a domestic corporation, subject to certain exceptions such as (i) a limitation on the foreign corporation's deductible expenses to those connected with its U.S. trade or business income, (ii) the inability of the foreign corporation to join a consolidated return, and (iii) limitations on the foreign corporation's ability to deduct interest paid to its foreign owners or related persons under the "earnings stripping rules."

In addition to the tax on effectively-connected income received by the foreign corporation, the U.S. generally imposes a branch profits tax on the remitted business profits of a foreign corporation's U.S. branch at a rate of 30%. The branch profits tax is generally intended to equalize the consequences of investing in the U.S. through a foreign corporation and a U.S. corporation (the remittance of profits of which are generally subject to withholding tax).

Other types of U.S. source income received by a foreign corporation, such as passive investment income, generally are taxed through withholding at a 30% rate. There is an exception to the withholding tax pursuant to the "portfolio interest" rules, under which interest payments to a foreign person (other than a bank) that holds less than 10% of the debtor's equity generally are exempt from withholding. Foreign corporations generally are not subject to U.S. tax with respect to gain realized upon the sale of investment assets (including shares of U.S. corporations), unless the sale is subject to the Foreign Interest in Real Property Tax Act ("FIRPTA") which applies to sales of interests in U.S. real property and shares in U.S. corporations whose assets consist largely of U.S. real property.

The U.S. tax regime applicable to a Dutch corporation that qualifies for benefits under the Tax Convention is substantially more limited. Specifically, rather than being taxed on any income effectively connected with a U.S. trade or business, an eligible Dutch company generally would only be taxed on income attributable to a so-called "permanent establishment" located in the U.S. The term permanent establishment generally refers to a fixed place of business through which activities are carried on, such as a branch, factory, office or mine. Thus, Dutch companies may be able to limit their exposure to U.S. income tax by avoiding the use of a permanent establishment, operating in the U.S. through the use of an independent agent, and/or limiting the purposes for which any permanent establishment is used. In addition to the permanent establishment regime, the Tax Convention effectively eliminates the imposition of the branch profits tax for Dutch persons that satisfy certain requirements under the Tax Convention and lowers the branch profits rate to 5% in the case of other Dutch companies that qualify for benefits under the Tax Convention. As discussed above in Section 10.3, the Tax Convention also provides for withholding tax exemption on payments of interest and royalties to Dutch persons that qualify under the Tax Convention, and an exemption from or reduced withholding tax rates on dividends paid to Dutch persons that differ depending on the percentage interest in the U.S. corporation the Dutch recipient holds and the Dutch recipient's ability to satisfy certain other tests under the Tax Convention.

10.5 Qualification under the Tax Convention

In order to be eligible for benefits under the Tax Convention, a Dutch person must generally satisfy the so-called "limitation on benefits" provision of the Tax Convention. Dutch individual tax residents, governmental entities and certain tax exempt entities and pension plans are generally eligible for benefits under the treaty. Whether and to what extent a Dutch company is eligible for benefits under the Tax Convention generally will depend on whether it satisfies certain tests relating to its beneficial ownership, whether it is publicly traded or owned by a publicly traded entity, whether its presence in the Netherlands is substantial, where it is managed and controlled, whether its income is paid on to non-qualified persons, what type of business it conducts, and certain other factors. These tests are intended to prevent so-called "treaty shopping" by persons who invest in the U.S. through a Dutch entity for the purposes of reducing U.S. taxes. The determination of whether a Dutch person satisfies the limitation on benefits provisions, and what benefits it is eligible for under the Tax Convention, is a complicated exercise. Taxpayers are advised to consult with tax advisors regarding whether, and to what extent, they qualify for benefits under the Tax Convention.

10.6 Transfer Pricing

Affiliated entities often have an incentive to transfer income to jurisdictions with low tax rates and expenses to those with high rates. Thus, to prevent tax avoidance, the IRS is empowered to recast transactions and reallocate deductions and credits to accurately represent the income of the parties. The prices charged in transactions between affiliated entities generally are required to reflect the pricing that would have resulted if the transaction were between unrelated parties dealing at arm's length. In order to avoid tax penalties, taxpayers should always identify and document proper pricing in writing or enter into an "advanced pricing agreement" with the IRS.

11 Litigation and Alternative Dispute Resolution

11.1 Introduction to U.S. Court System

Unlike the civil law tradition of the Netherlands and the other continental European countries, the U.S. legal system is a common law adversarial system that relies heavily on judge-made case law and respect for precedent (*stare decisis*). Case law develops over time to interpret and apply the U.S. Constitution, state constitutions and applicable federal or state statutes.

11.2 Federal and State Courts

The U.S. court system includes a federal court system and 50 different state court systems. Federal district courts, circuit courts of appeal and the United States Supreme Court make up the federal court system. Contrary to what many people believe, it is not the case that state courts hear matters of state law and federal courts hear matters of federal law. The U.S. Constitution authorizes the federal courts to hear only certain types of cases, referred to as the court's subject matter jurisdiction. Federal courts also have what is called diversity jurisdiction, in addition to their subject matter jurisdiction, for cases where the parties are citizens of different states or countries. Each of the 50 states has its own state court system, which has jurisdiction in all matters that are not appointed exclusively to the federal court. Similar to the federal structure, most states have a three-tiered court system – a trial court, an intermediate appellate court, and the highest court of the state. The appellate courts review the decisions of the lower trial courts.

11.3 The Anatomy of a Lawsuit

Lawsuits are governed by federal and state rules of civil procedure, which set forth rules for conduct of each step in the litigation. It is important for foreign litigants to understand the relevant rules of civil procedure, as they vary from state to state and from court to court (and sometimes even from judge to judge) within the same jurisdiction. If litigants do not follow the rules, they may not be successful at trial or the lawsuit may be dismissed. A lawsuit consists of several parts, including a complaint, a summons and an answer. If the lawsuit is not settled by the parties or dismissed by the court at an early stage, there will likely be pre-trial discovery followed by a trial. Most lawsuits in the U.S. are dismissed or settled out of court before they reach trial.

11.3.1 Complaint

A lawsuit begins when the plaintiff files a complaint, stating the reasons for the dispute and the recovery sought. Individuals may sometimes bring a lawsuit on behalf of a class of persons that have been similarly injured by the same defendant, known as a class action lawsuit. Class actions can be particularly worrisome to defendants, since they aggregate individual claims and thus can result in larger damage awards. Individuals who are shareholders of a corporation can bring derivative lawsuits on behalf of the corporation against directors or officers of that corporation who may have breached their fiduciary duties.

11.3.2 Summons

After the plaintiff files the complaint, the court issues a summons. The purpose of the summons is to notify the defendant of the lawsuit. The summons must be properly served on the defendant to start the time in which the defendant must file its answer to the complaint.

11.3.3 Answer

Once the defendant is served with the summons, it may file an answer within a given time frame determined by the relevant rules of civil procedure. The answer responds to the plaintiff's allegations and sets forth the defendant's defenses. The defendant can also bring a counterclaim against the plaintiff in its answer.

11.3.4 Motion to Dismiss

Instead of filing an answer, a defendant can file a motion to dismiss, which asks the court to dismiss the complaint.

The motion to dismiss can assert either that the plaintiff did not state a valid cause of action, or that the court does not have the requisite jurisdiction to hear the case.

11.3.5 Jury versus Bench Trial

There are two different types of trials in the U.S. legal system – jury trials and bench trials. Either party can request a jury trial, but if neither side makes that request, the trial will be a bench trial. In jury trials, a jury of six to twelve members of the community decides issues of fact while the trial judge decides issues of law. The jury selection process varies depending on the jurisdiction, but parties can generally eliminate some jurors who may be biased through a process known as *voir dire*. Many U.S. jurisdictions also allow the parties to eliminate a limited number of jurors without any showing of bias. In a bench trial, a single judge decides both issues of fact and law.

11.3.6 Parol Evidence Rule

The parol evidence rule is an important rule in litigation that influences the manner in which contracts are drafted. The rule prohibits prior or contemporaneous evidence from serving as evidence when a disputed agreement is in writing. That means that other written materials, such as emails, are not admissible. The presumption is that parties have included all material terms in the written agreement. Courts will interpret the agreement between parties within "the four corners of the contract." Dutch parties should therefore not rely on oral assurances or pre-contractual emails that reflect parties' intentions.

11.4 Statute of Limitations

Unlike in the Netherlands, one cannot stop (or "toll") the running of a limitations period (*verjaringstermijn*) by means of an informal claim letter (*stuiting*). Rather, the party wishing to avoid the time-bar of a statute of limitations must either (i) execute a formal agreement with the putative defendant to toll the limitations period, or (ii) commence a formal legal action. Whereas in the Netherlands the statute of limitations for contractual claims is five years, it ranges from two to ten years in the U.S., depending on the state.

11.5 Pre-Trial Discovery

The process known as "pre-trial discovery" is an important and costly part of litigation in the U.S. court system. Its purpose is to clarify the factual and legal issues in the case and to avoid unfair surprise at trial. Once a lawsuit is initiated, each party may ask the other party for information that may be relevant and material to the lawsuit, or reasonably considered to lead to the discovery of such evidence. The parties are required to produce this information, which could include any documents such as e-mails, correspondence, drafts, memoranda, notes, statements, etc. While there are limits on the scope of the discovery, such as confidential attorney-client communications, the tendency is toward full disclosure. Most U.S. courts have ruled that the discovery rules are also applicable to materials located outside the U.S., and have declined to recognize foreign privacy statutes, such as those in the Netherlands, as a basis for refusing to produce such foreign materials.

Three tools that are often used for discovery include oral depositions under oath, requests to produce documents and written interrogatories.

11.6 Remedies

Remedies in a civil trial may include money damages, injunctive relief or an equitable remedy. In most breach-of-contract cases, recovery (if any) will be limited to money damages. An equitable remedy, such as specific performance (*nakoming*) or rescission (*ontbinding*), will be granted only when money damages would not make the injured party whole.

Money damages include compensatory and punitive damages. Compensatory damages aim to compensate the plaintiff for its loss or injuries suffered, while punitive damages aim to punish the defendant and deter future wrongdoing.

11.7 Scope of U.S. Jurisdiction

Courts must have personal jurisdiction over parties to a lawsuit in order to hear and determine their claims. Persons who do not have any type of contacts with the

U.S. will not be subject to jurisdiction of a U.S. court. It is, however, fairly easy to establish such contacts and thereby assert personal jurisdiction. The scope of personal jurisdiction in the U.S. is very broad.

- *General jurisdiction.* A person who is a regular participant in the market place of a U.S. state will become subject to general personal jurisdiction. This person may be sued in the state for any type of matter.
- *Specific jurisdiction.* Specific jurisdiction may be asserted when there is a connection between the disputed transaction and the particular U.S. state, e.g., title passes in the state, the defendant has a sales agent or distributor working in the state, or has brought goods into the stream of commerce there. Specific jurisdiction only extends to the particular transaction.

11.8 Alternative Dispute Resolution

Litigation in the United States is expensive and time-consuming. Arbitration and mediation are two alternative forms of dispute resolution that are sometimes less costly and less time-consuming than litigation. Parties present their case in front of a neutral third party for resolution.

11.8.1 Arbitration

The Federal Arbitration Act is the main source of U.S. arbitration law. Arbitration is often used in international disputes and in commercial contexts. Parties are bound to arbitrate only if they agree to do so. This agreement often takes the form of an arbitration clause in a contract; it may also be an agreement signed after the dispute has arisen. An arbitration clause may be desirable because it can be designed to fit the specific circumstances of the transaction. An arbitration clause should contain the following basic elements:

- Agreement to arbitrate.
- Nature of disputes that will be arbitrated.
- Rules governing the arbitration.

- Institution administering the arbitration.
- Place and language of the arbitration.
- Applicable procedural law.
- Number of arbitrators.
- Agreement that judgment may be entered on the award.
- Applicable law if not provided elsewhere in the agreement.

Some arbitration clauses also include optional provisions to increase efficiency and economy, such as:

- Mediation.
- Interim relief.
- Claims against parents or affiliates.
- Limitations on discovery.
- Limitations on the arbitrators' authority to award punitive damages.

Below is a sample arbitration clause incorporating the basic and some of the optional provisions:

> *(a) If any dispute arises out of or relates to this contract or the breach thereof, including any dispute involving the parent company, subsidiaries, or affiliates under common control of any party (a "Dispute"), and if said Dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the Dispute by mediation under the International Mediation Rules of the International Centre for Dispute Resolution ("ICDR"), before resorting to arbitration.*
>
> *(b) Any Dispute that cannot be resolved by mediation within 30 days shall be finally resolved by arbitration administered by the ICDR under its International Arbitration Rules, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The arbitration will be conducted in the English*

> *language in the City of New York, New York, in accordance with the U.S. Federal Arbitration Act. There shall be three arbitrators, named in accordance with such rules.*

After the parties agree to arbitration, they choose an arbitrator or a panel of arbitrators. As with a trial, the parties can present documents and witnesses. However, arbitrations generally have simpler, more flexible rules of evidence than litigation. In their decision, the arbitrators may award money damages, injunctive or equitable relief. Arbitration is legally binding on the parties, with very limited grounds for appeal.

The New York Convention permits enforcement of arbitral awards in all member countries, which include the U.S. and the Netherlands. By contrast, there is no treaty between the U.S. and the Netherlands regarding the enforcement of court judgments, which makes arbitration an attractive alternative to the regular court system. For example, a choice of forum clause providing for Dutch courts may result in a Dutch judgment. If the adversary's assets are located in the United States, however, the judgment will need to be enforced through a U.S. court proceeding.

11.8.2 Mediation

Mediation is a more flexible form of alternative dispute resolution than arbitration. Mediation involves a neutral third-party mediator who facilitates negotiation between the parties in an attempt to help them agree upon a solution. The mediator's opinions are neither binding nor final, but the parties themselves can reach a binding agreement.

12 Real Estate

12.1 Introduction

Dutch companies will likely encounter issues relating to real estate (or real property) (*onroerend goed*) when doing business in the U.S. The Dutch company may, for example, want to buy or lease office space or a production facility. Real property law is mainly a matter of state law, and therefore varies from state to state.

There are generally no restrictions on foreign entities owning non-government lands, with the exception of a few states that place certain requirements on non-citizens. Such requirements could be that the foreign owner of real property must acquire U.S. citizenship within a certain period of time, or is limited in the amount of land that he or she may own. Prior to purchasing real estate, it is important to check whether there are such restrictions in the particular state. Most government-owned lands, on the other hand, may not be leased or sold to foreign entities.

12.2 Owning Real Property

Agreements for the sale of real estate are governed by general principles of contract law. The contract must be in writing to be enforceable. There is usually a period between signing and closing of the transaction, during which the buyer can investigate the property. There is no person who fulfills the role of a Dutch notary (*notaris*). Instead, each party will typically hire its own lawyer. Buyers usually engage a title insurance company or attorney to ensure that the property is free of third-party interests, or has "marketable" title. The title insurance company will run a title search in the public records, which will reveal any interests, restrictions or liens on the property. It is generally recommended to obtain a title insurance policy, which will insure clear title, subject to the exceptions listed on the policy. Legal title is transferred by a deed, which should be recorded with the appropriate local filing office.

Prior to acquiring any property, a purchaser should investigate whether local zoning laws, building codes or environmental regulations permit the intended use of the property. A buyer may also wish to obtain a survey and an environmental audit.

12.3 Leasing Real Property

Lease agreements for real property cover the allocation of risks and costs between landlord and tenant. Commercial property leases typically last for multiple years, sometimes up to 25 years. Because of the considerable duration, the tenant will usually want to have the right to assign the lease or sublet the premises in order to preserve flexibility.

Provisions regarding the rent vary, but often there is a fixed base rent and some type of variable rent, depending on an economic index, for example. Percentage rents, where the landlord is entitled to a percentage of tenant's revenue, are mainly used in shopping centers.

There are a number of ways to provide for remedies for the landlord if the tenant defaults. Sometimes an acceleration clause is included, which will cause all future rent payments to be immediately due and payable in an event of default. Some states impose restrictions on damage or acceleration clauses, by obligating the landlord to mitigate his losses by reletting the property.

Some form of credit support, such as a third-party guarantee or letter of credit, is typically required by the landlord. Further, a lease will often require the tenant to maintain property and liability insurance.

12.4 Mortgages

Obtaining a mortgage loan is often a practical way to finance the acquisition of real estate. Conversely, a mortgage on real property can provide excellent security from the perspective of the creditor in any type of transaction.

Most commonly, a mortgage is granted by an owner of real property to a lender in order to secure a loan. The mortgage must be recorded at the local filing office. In the event the debtor defaults on the loan, the lender has the right to foreclose on the property. The foreclosure process varies by state, but often involves a petition to the court for the right to sell the property.

Lender's rights are different in the case the debtor has initiated a bankruptcy proceeding, such as a liquidation under Chapter 7 of the U.S. Bankruptcy Code or a reorganization under Chapter 11 of the U.S. Bankruptcy Code. In U.S. bankruptcy, all creditors, including secured creditors such as the lender-mortgagee, are subject to an automatic stay (*afkoelingsperiode*). Unlike in the Netherlands, the duration of the automatic stay is not limited to a specific period of time. The mortgage holder is barred from exercising his rights while the bankruptcy proceeding is pending. Instead, it has to file a claim in the proceeding and wait for relief of the automatic stay. Although the lender's claim has a high priority in the proceeding, it could take a considerable amount of time before it recovers the amount owed, especially if the debtor is in a Chapter 11 reorganization proceeding.

13 Regulation of International Investment and Trade

13.1 Restrictions on Foreign Investment

There are traditionally few limitations on foreign investment in the United States, which generally welcomes such investment. However, certain industries, such as defense, insurance, banking, securities and utilities, are highly regulated and may require government consents or are subject to reporting requirements. There are some additional exceptions which are discussed below and are important to keep in mind when contemplating a transaction in the U.S.

13.1.1 National Security Review (CFIUS)

Certain acquisitions of U.S. businesses by foreign entities can be prevented by the President for reasons of national security, based on the Exon-Florio provisions of the Defense Production Act of 1950. Acquisitions that could pose national security concerns may be investigated by the interagency Committee on Foreign Investment in the U.S. ("CFIUS"). Companies usually voluntarily notify CFIUS of a planned acquisition. It is generally wise to do so, because transactions otherwise indefinitely remain subject to possible review and divestiture.

Only "covered transactions" may be subject to review, which is defined to mean any transaction that results in a foreign person acquiring the ability to "control" a U.S. business.

After notification, CFIUS has 30 days to determine whether or not to investigate the transaction. The focus is on areas such as technology and telecommunication, but any transaction that results in control by a foreign person over a U.S. person which may have some bearing on national security is at risk. The review process is highly discretionary and not subject to judicial review. There is also no definition of "national security," which makes the process even more opaque.

A notification includes providing information such as the names of the parties to the transaction and the nature thereof, the foreign ownership involved, the U.S. business activities that will be acquired and the nature of the foreign acquirer's business. Information provided to CFIUS will remain confidential.

13.1.2 Reporting Requirements

There are a number of reporting requirements with respect to foreign investments in the United States.

The International Investment and Trade in Services Survey Act requires that any transaction that results in a 10% or greater voting interest in a U.S. business enterprise by a foreign party, either by acquisition or establishment of a new entity, must be reported to the Bureau of Economic Analysis of the U.S. Commerce Department within 45 days of the investment, unless an exemption applies. The identity and ownership structure of the U.S. enterprise, the name and country of origin of the "ultimate beneficial owner" of the foreign party and financial and operating information are among the items that must be disclosed. After initial reporting, quarterly and annual reports are required for larger businesses as well.

Under the Agricultural Foreign Investment Disclosure Act of 1978, a foreign person that acquires or transfers an interest in U.S. agricultural land must report the transaction to the Agricultural Stabilization and Conservation Service of the U.S. Agriculture Department.

In addition, many states have foreign reporting statutes affecting foreign investment. Failure to comply with these reporting requirements can result in significant fines.

13.2 Exporting to the U.S.

All goods imported into the U.S. must enter the country via a designated port of entry, where an import duty on the foreign goods may be charged. The rate of import duty varies depending on the type of goods and the country of origin. Goods from developing countries, for example, are often charged lower rates or nothing at all. Under the North American Free Trade Agreement, goods produced in and traded among the U.S., Canada and Mexico receive preferential tariff treatment as well.

13.2.1 Foreign Trade Zones

Foreign Trade Zones ("FTZs") are areas established in or adjacent to U.S. ports of entry, in which goods remain free of import duties and taxes. FTZs are legally outside the customs territory of the U.S. An FTZ can be valuable for importers for purposes of keeping goods until they are sold to a consumer, thereby avoiding paying import taxes on goods until such a time as they may be sold. Also, goods may be further processed in the FTZ so that the importer can obtain the benefit of a lower tariff rate on the resulting good. The FTZs were created to promote international trade and are widely used.

13.2.2 Antidumping Laws

Antidumping laws address the "dumping" of goods in the U.S. market, which occurs when (i) a foreign person sells products in the U.S. at "less than fair value" (generally a lower price than the foreign person charges in his domestic market), and (ii) the products cause or threaten material injury to a U.S. industry. U.S. antidumping laws impose an antidumping duty in such cases, which is equal to the amount of the price discrimination between markets, making it more difficult to sell the product in the U.S. market.

13.2.3 Countervailing Duty Laws

The countervailing duty laws address subsidization by foreign governments. Where the U.S. government determines that imports have benefitted from subsidies and these imports cause or threaten material injury to a U.S. industry, countervailing duties are imposed on the imports equal to the calculated amount of the subsidy.

13.2.4 Exclusion of Unfairly Traded Imports

Section 337 of the Tariff Act addresses certain types of unfair competition regarding articles imported into the U.S., such as violations of patents, copyrights and trademarks, and unfair practices such as copying of "trade dress," "passing off," deceptive packaging and deceptive advertising. No finding of injury is required when the cause of action is based on a patent, copyright or trademark, but there must be a finding that there is a U.S. domestic industry relating to the products at issue. With respect to the other types of Section 337 cases, there must be a finding of injury. The remedy in Section 337 cases is an exclusion order prohibiting importation of the involved articles or cease-and-desist orders, or both.

13.3 Investment Incentives

Despite some restrictions, the U.S. continues to be an attractive environment for business and investment.

There are quite a few programs and services, on both state and federal levels, that promote foreign investment in the U.S. Some of these programs provide grants, loans, loan guarantees, and tax incentives. They are often industry-specific. See www.selectusa.gov to search a database of government programs available to Dutch companies.

The Small Business Administration ("SBA") provides financial and managerial assistance to small businesses. For example, the SBA may facilitate a loan with a third party lender by acting as guarantor. Access to venture capital may be available in the form of private debt or equity investments by investment companies that are regulated by the SBA. See www.sba.gov for more information about these and other resources offered to small businesses.

14 Immigration Law

14.1 Temporary and Permanent Residence Visas

When establishing operations in the U.S., many Dutch companies wish to transfer one or more of their Dutch employees to their U.S. business. Before transferring a Dutch employee to the United States, the employer must obtain a valid visa for the employee. The rules regarding visas are quite complex. It is advisable to retain an experienced U.S. immigration lawyer early on in the process.

There are two principal categories of visas:

- *Immigrant Visas*. Immigrant visas allow the employee to live in the U.S. permanently. Successful applicants will receive a "green card" and are considered U.S. residents for tax purposes. Oftentimes, applicants first obtain a certain temporary visa before becoming eligible to apply for a green card.
- *Nonimmigrant Visas*. Nonimmigrant visas are much more common for foreign employees. These allow the employee to reside in the U.S. on a temporary basis.

Visa petitions in the United States are handled by U.S. Citizenship and Immigration Services ("USCIS"), a government agency that is part of the Department of Homeland Security ("DHS"). However, the Department of State ("DOS") is responsible for visa applications that are filed abroad with a U.S. embassy or consulate. There are many categories of nonimmigrant visas, each with very specific criteria. It is important to ensure that an applicant meets the criteria for the specific visa sought. The visas most commonly used by Dutch companies are the L-1 visa for intra-company transferees, the E-1 and E-2 treaty trader or investor visa and the H-1B specialty occupation visa.

14.1.1 L-1 Intra-Company Transferee

The L-1 visa is available to "executives," "managers" and "persons of specialized knowledge" (all defined terms in U.S. immigration law) who are sent by their foreign employer to work for the U.S. subsidiary. The visa is often granted for a period of three years, but may be extended for up to a maximum of 7 years for executives and managers and 5 years for persons with specialized knowledge. For start-up companies, the visa is often granted for just one year. An extension will only be granted after USCIS determines that the U.S. company has shown it engages in "substantial business."

The employee must have worked for the non-U.S. employer for a continuous period of at least one year within the preceding three years to qualify. The petition for the L-1 visa is filed by the employer and involves a large amount of paperwork. After the petition is granted, the employee may apply for the visa at the local U.S. embassy or consulate. L-2 visas are available to the employee's spouse and children. An additional application is required if the spouse wants to work in the U.S. Under the L-1 visa, the employee may only work for the U.S. employer for which the visa was issued.

14.1.2 E-1 and E-2 Treaty Trader or Investor

The E visa category is available to nationals of those countries that have entered into a particular bilateral treaty with the U.S. regulating commerce between the countries. The Netherlands is a party to such treaty and therefore E visas may be available to Dutch nationals who otherwise meet the eligibility criteria.

The jurisdiction for these applications lies both with the DHS and DOS. Therefore, a company would first need to register at the U.S. embassy or consulate in the Netherlands as an organization eligible for issuance of E visas. This process may take 9 to 12 weeks. Once successfully registered, the company's employees have the option of applying for an E-1 or E-2 temporary visa.

To qualify, the E-1 or E-2 applicant must be an executive, manager or employee with specialized knowledge or skills that are essential to the company.

- The E-1 visa, known as the treaty trader visa, is available to Dutch nationals who are employed by a company which engages in substantial trade between the U.S. and the Netherlands.
- The E-2 visa, known as the treaty investor visa, is available to Dutch employees of a company which has considerable operations in the United States. The Dutch parent must make a substantial investment in its U.S. operation and be directly involved in its development.

14.1.3 H-1B Specialty Occupation

Persons with a "specialty occupation" may be eligible for an H-1B visa. The employee must have an occupation that, at a minimum, requires a bachelor's degree and specialized knowledge. Examples include architects, engineers and physicians. If the occupation requires a license in the state where the employee desires to work, he or she must first obtain such license in order to become eligible for the H-1B visa. The employer is required to sponsor the employee's visa. The petition for the H-1B is filed by the company as opposed to the employee. The holder of an H-1B visa may work only for the petitioning employer and only in the activities described in the petition. The visa is initially granted for three years, but may be renewed for an additional three years. The number of H1-B petitions granted is subject to an annual cap. This limit is typically reached, but the time span in which that occurs often depends on the state of the economy and has thus varied greatly in recent years.

14.1.4 Visa Waiver Program

Pursuant to the visa waiver program, citizens of the Netherlands do not need to obtain a visa to travel to the U.S. for a period of up to 90 days. It is not permitted to earn a salary from a U.S. source under this program. The visa waiver program can be used when the purpose of the trip is, for example, to attend a seminar or convention, engage in business negotiations or to sell products for a foreign employer. A person entering under the visa waiver program is not allowed to change his or her status, nor is such a person entitled to any protections under U.S.

immigration law. More information about obtaining visas can be found at thehague.usembassy.gov.

14.2 Immigration Law Compliance

If the U.S. subsidiary of a Dutch company hires Dutch or other non-U.S. citizens, it will need to comply with the Immigration Reform and Control Act of 1986 ("IRCA"). Under this law, it is prohibited to knowingly hire persons who are not authorized to work in the United States. Hiring employers must verify that the prospective employee may work in the U.S., by inspecting and keeping copies of his work authorization documents. Within three days of the start of the employment, the employer and employee must complete a Form I-9. The employer is obligated to keep this form with his records and surrender it in the event of a government inspection. Failure to comply with IRCA may lead to civil and criminal penalties.

15 Financing and Securities Regulation

15.1 Debt Financing

Financing a U.S. operation with debt may be as simple as getting a basic term loan from a local bank, or as complex as a public bond offering. A myriad of lending options is available to any international company, and how the financing will be structured will depend on the type of business of the debtor and the preferences of the investors. Each type of financing may trigger different legal issues.

It is generally advisable to provide that only the U.S. subsidiary is responsible for the debt. A potential disadvantage is that this could translate into a higher interest rate, however, whereas a loan guaranteed by the Dutch parent company could have more beneficial terms.

Debt financing will often involve providing a security interest (*zekerheidsrecht*) in all or some of the assets of the business. It is useful to be aware of the basic workings of Article 9 of the Uniform Commercial Code, which governs the creation of security interests. Importantly, in order to create a security interest that is valid and enforceable against third parties, it must be "perfected." Rules regarding perfection vary, depending on the nature of the underlying asset and the jurisdiction. Most commonly, it requires filing a financing statement in a local filing office. This is a very simple procedure. Contrary to the Netherlands, these filings are public. It is of crucial importance to the lender that it has first priority in the collateral, so that it has the strongest rights in the event the borrower defaults on the loan or a bankruptcy proceeding is filed.

If the assets have already been subjected to a security interest in favor of a third party, the lender will probably require that third party to release its interest, or require it to enter into a subordination agreement with the lender.

15.2 Entering the U.S. Capital Markets

The U.S. capital markets are highly liquid and efficient, attracting many international companies looking to finance their operations. However, companies may be overwhelmed when confronted with the vast array of stringent and complex regulations that govern these markets. For this reason, private placements and over-the-counter transactions have become increasingly popular among international companies. These transactions are exempt from most of the obligations imposed by the U.S. securities laws.

15.3 Securities Offerings

Capital can be raised through a public offering of securities on the U.S. capital markets. Because public offerings involve considerable cost and subject the issuer to ongoing compliance obligations, they are generally reserved for large companies that are looking to raise a significant amount of capital. Private offerings (or "private placements") are a popular alternative for international companies, because they are structured to be exempt from many of the burdensome federal securities laws. Private placements make use of statutory exemptions such as Rule 144A, Regulation D or Section 4(2) of the Securities Act of 1933 (the "Securities Act").

The offering and sale of securities is regulated and enforced on the federal level by the Securities and Exchange Commission ("SEC"). The individual states each have their own securities laws, known as "blue sky" laws. Any issuance of securities has to comply with the rules on both levels, keeping in mind that an exemption on one level does not necessarily constitute an exemption on the other. See www.sec.gov.

15.3.1 The Securities Act

The Securities Act regulates the offering of securities to the public. Most importantly, it requires that a registration statement be filed with the SEC, unless an exemption applies. Filing a registration statement can be a time-consuming and expensive process, which is why many foreign issuers choose the route of the private placement.

15.3.2 *The Exchange Act*

The Securities Exchange Act of 1934 (the "Exchange Act") regulates secondary trading and ongoing reporting obligations of public companies. Once a company has entered the Exchange Act reporting system, it is subject to elaborate disclosure requirements. The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 were the most recent modifications of these reporting obligations.

15.3.3 *Private Placements*

In the most common private placements, securities are issued and sold to a limited number of sophisticated investors, such as pension funds or private equity groups, without any general solicitation. The foreign issuer will usually engage an investment banking firm to assist in structuring and marketing the offering. Section 4(2) of the Securities Act offers a general exemption from registration for offers and sales by the issuer that do not involve a *public* offering. Offerings that have the following characteristics are normally not deemed to involve a public offering:

- Securities are only sold to sophisticated investors. The theory is that a sophisticated investor does not need the protection of the federal securities laws because it is able to evaluate the risks of the investment on the basis of the information provided to it. Sophisticated investors could include banks, registered broker-dealers, insurance companies, pension funds and certain high net-worth individuals.
- The number of investors is limited. There is no set maximum. General solicitation or advertising is, however, not permitted.
- Investors do not buy the securities with the intent to resell immediately.

Although not legally required, investors usually receive a private placement memorandum, which discloses material information about the issuer and the offering.

The meaning of "public offering" is not narrowly defined and the application of the Section 4(2) exemption is therefore subject to interpretation. In order to obtain additional assurance that the contemplated transaction is exempt from registration, many companies choose to comply with the requirements of Regulation D which provides "safe harbor" guidelines.

Regulation D establishes three alternative safe harbors. Compliance with these rules will ensure the availability of an exemption from registration.

- Rule 504 permits offerings of up to $1 million per year by non-reporting companies. There is no limit on the categories of investors that may purchase the securities. There is no requirement to provide information.
- Rule 505 permits offerings of up to $5 million per year. This rule is available for sales to "accredited investors" and not more than 35 non-accredited investors.
- Rule 506 permits offerings of any size to accredited investors and not more than 35 non-accredited investors. Each non-accredited investor must be sophisticated enough to evaluate the merits and risks of the investment.

15.3.4 Restricted Securities

Securities sold in a private placement are so-called restricted securities, which means that they cannot be resold without registration or reliance on an exemption. Rule 144A is such an exemption specifically for resales of restricted securities to "qualified institutional buyers," which are mainly institutional investors. The Rule is important because it substantially enhances the liquidity of privately placed securities. There is a broad market of institutional investors that qualify for trading under Rule 144A. To cater to this market, the NASDAQ exchange has established the PORTAL Alliance, tailored to over-the-counter trading in privately placed securities.

As a general rule, offerings and sales that occur outside the United States are not required to be registered under the Securities Act. Regulation S contains rules relating to such offshore transactions. Importantly, it permits resales of restricted securities as long as:

- The sale is made in an offshore transaction; and
- There were no "directed selling efforts" in the U.S.

Directed selling efforts are activities that are intended to or could be expected to "condition the market" in the U.S. for the securities. Such activities include advertisements and press releases in the U.S. regarding the forthcoming offering. The SEC has broadly construed the concept of directed selling efforts, and foreign issuers must be particularly careful in this area.

15.4 American Depositary Receipts

A foreign private issuer seeking to access the U.S. capital markets for its shares which are already publicly-listed in its home market can establish an American Depositary Receipts ("ADR") program. An ADR is a transferable certificate representing ownership in the foreign private issuer's equity securities. The ADR is issued in the United States by a bank or trust company (or "depositary"), which holds the underlying securities. U.S. investors can easily trade in the foreign shares by transferring the ADRs. Trading and payment of dividends occur in U.S. dollars.

There are several types of ADR programs, but it goes beyond the scope of this publication to go into the details of each. The simplest ADR program to establish, which avoids registration with the SEC, is an over-the-counter program pursuant to Rule 12g3-2b.

It is important to note, however, that it is possible for a depositary to establish so-called unsponsored programs, meaning without the consent or cooperation of the foreign private issuer. One of several significant disadvantages of the establishment of an unsponsored program is that it is prohibited to have a sponsored ADR program coexist with an unsponsored program, meaning that a foreign company looking to establish a U.S. investor base through ADRs will face the additional cost of buying out the unsponsored program. Another disadvantage is that the foreign private issuer may involuntarily become subject to Exchange Act reporting requirements. These situations can be prevented by establishing a sponsored program.

In a sponsored ADR program, the foreign private issuer will negotiate a deposit agreement with a U.S. bank of his choosing. This way, the issuer can ensure continued exemption from registration under the Exchange Act and exert control over its presence in the United States.

16 About Hughes Hubbard & Reed LLP and the Authors

16.1 Hughes Hubbard & Reed LLP

16.1.1 *Firm*

With offices in New York, Washington, D.C., Los Angeles, Miami, Jersey City, Paris and Tokyo, Hughes Hubbard & Reed LLP offers expertise in a wide-range of practice areas. Hughes Hubbard has more than 340 experienced practitioners working in over 30 specialized practices, from mergers and acquisitions, public offerings, corporate reorganization, real estate and cross-border transactions to securities litigation, arbitration, product liability, antitrust, intellectual property, labor, employee benefits and tax, as well as niche practices such as art law and a credit card practice. The firm has a strong track record in representing Dutch and other non-U.S. companies that do business in the United States. Additional information about Hughes Hubbard can be found at www.hugheshubbard.com.

16.1.2 *Dutch Clients*

Hughes Hubbard is uniquely situated to help Dutch companies that do business in the U.S. Hughes Hubbard is the only U.S. law firm with two Dutch attorneys who practice U.S. law. Both are fully integrated in our regular practice, but were born and raised in the Netherlands. They hold law degrees from both Dutch and U.S. law schools. These attorneys, as well as other attorneys in the firm, have a broad experience in assisting Dutch companies that do business in the United States. We have extensive knowledge of the pitfalls that Dutch companies encounter when doing business in the U.S. In addition, we have intimate knowledge of Dutch business practices, decision-making procedures and culture. Our attorneys regularly visit the Netherlands to foster strong working relationships with our clients. In working with Dutch clients, we emphasize building long-term relationships in which the client feels comfortable consulting us about any U.S. legal matters. We believe our experience in representing Dutch companies, combined with our firm's long history and superior experience in representing U.S. and international clients in a broad range of areas, makes us the natural place to turn to when Dutch companies need U.S. legal advice.

16.2 Authors

16.2.1 Jan J.H. Joosten

Jan J.H. Joosten is a partner in the New York office of Hughes Hubbard. Born in the Netherlands, Mr. Joosten received a Master of Civil Law and a Master of Tax Law from the University of Leiden in the Netherlands in 1991. He received an LL.M. from Harvard Law School in 1992. Mr. Joosten specializes in corporate transactions, including capital markets transactions, joint ventures and mergers and acquisitions. In addition, Mr. Joosten has extensive experience in representing Dutch and other European companies that do business in the United States in a broad range of matters. He serves as a director of The Netherland-America Foundation and Leiden University Fund (U.S.A.), Inc. Mr. Joosten has lectured extensively on topics such as legal pitfalls for foreign companies doing business in the U.S., mergers and acquisitions in the U.S. by Dutch companies and the Sarbanes-Oxley Act of 2002. Mr. Joosten is fluent in English and Dutch, and has a working knowledge of French and German. He is recognized by *Chambers Global* 2011 as a Regional Expert in Corporate M&A. Mr. Joosten is a member of the New York bar.

16.2.2 Christine C. Lamsvelt

Christine C. Lamsvelt is an associate in the New York office of Hughes Hubbard. Born in the Netherlands, Ms. Lamsvelt received an LL.M. in Private Law from the University of Amsterdam in the Netherlands in 2009. She received an LL.M. from Columbia Law School in 2010. Ms. Lamsvelt is fluent in English and Dutch. She is a member of the New York bar.

16.2.3 Immigration Law - David Asser

David Asser, who wrote the chapter on immigration law (Chapter 14), has been the managing partner of Asser Law Group, PC since 2004. Mr. Asser has worked in the field of immigration law for over 13 years and is regarded a super litigator in Arizona. From 1996 until 1999, he served as the Press Secretary and Spokesperson of the Justice Department of the Netherlands in The Hague. Mr. Asser lectures nationwide at CLE conferences on Immigration Law and has been an Associate Professor at California State University and Yavapai College, where he taught Immigration and Nationality Law. He provided services as an independent advisor to the International Organization for Migration, a Non-Governmental Organization. He served on the Congressional Committee of the Northern California Chapter of AILA. He received an award for his outstanding pro bono work from the Contra Costa County Bar Association for his services as a pro bono attorney with the Pacheco Immigration Project. He also provides pro bono services to the Immigration Hearing Project of the Executive Office of Immigration Review.

16.3 Acknowledgements

This booklet was a collaborative effort by lawyers at our firm. We must thank our colleagues Alexander Anderson, Ned Bassen, Reuben Borman, Andy Braiterman, Susan Campbell, Sarah Cave, Amanda DeBusk, Christine Fitzgerald, Lynn Kamarck, Ethan Litwin, Ted Mayer, Natasha Reed, Dan Schnapp, Peter Sullivan, Sam Sultanik, Eduardo Vidal and Dan Weiner, who reviewed various portions of the booklet and provided invaluable comments. In addition, we thank Kyle Leingang, Robyn Morris, and Kathleen O'Donnell for their able assistance in research and writing various topics. Finally, we are especially grateful to David Asser, who wrote the chapter on immigration law (Chapter 14).

17 Contact Information

Jan J.H. Joosten
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, New York 10004
Phone: +1 212 837 6802
Fax: +1 212 422 4726
Email: joosten@hugheshubbard.com
www.hugheshubbard.com

For immigration law:

David Asser
Asser Law Group, PC
3420 E. Shea Boulevard, Suite 145
Phoenix, Arizona 85028
Phone: +1 602 228 9773
Fax: +1 602 449 7935
E-mail: david@asserlaw.com
www.asserlaw.com