contracts and IT related litigation. He has extensive experience in advising on outsourcing and electronic commerce legal issues within the context of IP, IT and Telecommunications law.

Mr. Gijrath is guest lecturer at the University of Tilburg, regularly speaks at national and international seminars on information technology law issues, and provides training courses in IT law and telecommunications law to legal and business professionals.

Part II

Software License Agreements and Software Distribution Agreements "The Dutch Way"

Preliminary remarks

The purpose of this contribution is to provide you with practical comments on the standard Software License Agreement and the standard Software Distribution Agreement from a Dutch law point of view. To keep it as practical as possible, I have decided not to elaborate on all possible exceptions that may arise. Therefore, do not regard this article as exhaustive advice on these two standard agreements. Consult a Dutch lawyer if you will be licensing and/or distributing software in the Netherlands.

Introduction

The Dutch Way

Those who are already experienced in doing business in the Netherlands will have encountered the Dutch approach: keep it short and simple. I am not only referring to the Dutch interpretation of a business lunch—a cheese sandwich and a glass of milk, finished within the hour—but also to the manner in which an average Dutch agreement is laid out.

Dutch agreements are usually quite brief, especially compared with agreements of Anglo-American origin. This finds its source in the Dutch legal system. The Dutch Civil Code (*Burgerlijk Wetboek*) provides a solid, though flexible, basis for contracting parties. The principle of good faith

which is enshrined in the Dutch Civil Code serves as an additional safety net.

For a good understanding of the comments made on and suggestions made to the contents of the software license agreement and the software distribution agreement, it is necessary to briefly explain the above mentioned pillars of the Dutch legal system.

Furthermore, as a final paragraph of this introduction, I will address the issue of general terms and conditions (GT&Cs) now that GT&C's (more specifically the FENIT conditions and BiZa models) are frequently used in the Netherlands.

The Dutch Civil Code

In general, under Dutch law, both the formation and form of an agreement are not subject to any mandatory requirements. This provides the contracting parties with a lot of freedom.

The Dutch Civil Code (Book 6) contains provisions that regulate the relationship between contracting parties and the consequences of agreements. Most provisions have an additional effect. Some provisions however are mandatory; mostly when regulating the relationship between commercial parties and consumers.

Among the Issues dealt with in the Dutch Civil Code are performance and the consequences of non-performance, suspension, statutory interest, force majeure, obligations to compensate for damages, and the applicability of GT&Cs. Now that most provisions are reasonably balanced, it is not necessary to include clauses in the contract regarding issues that are already included in the Dutch Civil Code, unless parties explicitly want to differ from the statutory provisions.

Good Faith

Articles 6:2 and 6:248 of the Dutch Civil Code provide that the principle of good faith plays a role in the relationship between creditors and debtors,

namely that this principle is implied in agreements. Please note that the term "good faith" is not being used in said articles; the text of both articles refers to the principle of reasonableness and fairness. "Good faith" in the current Dutch Civil Code is reserved for describing what someone knows or should reasonably have known given the specific circumstances of a situation (Article 3:11 of the Dutch Civil Code). For brevity's sake, however, I will use the term "good faith" in this contribution to refer to the principle of reasonableness and fairness as laid down in Articles 6:2 and 6:248 of the Dutch Civil Code.

The principle of good faith has both an additional and a derogatory effect. In addition, now an agreement according to Article 6:248 of the Dutch Civil Code not only has the legal consequences agreed upon between the contracting parties, but also such legal consequences as may arise out of the principle of good faith. Knowing this will help you understand why Dutch contracting parties do not feel the need to lay out all the tiny details in writing in an agreement but tend to rely on the principle of good faith as set forth in the Civil Code.

The principle of good faith could also affect the validity of contractual terms in a way that the parties never contemplated or intended at the time they entered into the contract. Subsection 2 of Article 6:248 of the Dutch Civil Code provides that a contractual clause will not apply, if under the given circumstances according to good faith such would be unacceptable. Although the Dutch Courts observe reticence in this respect, it is important to realize that due to this limiting effect of good faith, under Dutch law, not every agreed contractual clause may be as solid in its effect as it may appear.

Influence of American IT Contracts

Because American companies have played a leading role in the technology-driven 1980s and 1990s in the Netherlands, American-style clauses in IT contracts have found their way into Dutch IT contracts. It is not unusual to find clauses in Dutch contracts that are copied from American contracts, e.g. "fitness for use" and "fitness for purpose" clauses as well as the "as is" warranty.

Please be aware that these familiar clauses do not form part of the Dutch law of obligations; the meaning of these terms is not laid down in the Civil Code or any case law, but needs to be interpreted by a court. Furthermore, clauses that are enforceable under American law may very well be void or may be nullified under Dutch law, because of the principle of good faith, as described above. I therefore advise not to rely too easily on the familiar look and feel of American contractual clauses in Dutch contracts. It is better to have a Dutch lawyer review the terms of the contract in order to determine whether they are enforceable under Dutch law.

"Standard" Structure of a Dutch IT Contract

As stated above, parties are free to determine the form and formation of their contracts. However, the following structure is generally applied in IT contracts:

- Parties;
- Considerations;
- Definitions;
- Object of the agreement;
- Payment and payment terms;
- Warranties;
- Liability;
- Transfer of the agreement, third parties;
- Applicable law and jurisdiction.

General Terms and Conditions (GT&Cs)

Under Dutch law, general terms and conditions are frequently used in IT agreements. According to the Dutch Civil Code (Article 6:231), GT&Cs are written provisions meant to be included in a number of agreements, with the exception of provisions that lay down the substance of the performances.

Most standard licenses and standard distribution agreements will fall under the scope of this definition of GT&Cs and may therefore qualify as GT&Cs themselves within the meaning of the Dutch Civil Code. This is very

important to consider, now that the Dutch Civil Code contains some mandatory provisions with regard to the applicability and enforceability of GT&Cs, especially when entering into contracts with consumers or small businesses (less than fifty employees). Please note that there are more mandatory regulations protecting consumers (and small businesses) in the Netherlands which I, for brevity's sake, will not address in this article.

In general GT&Cs need to be handed to the other party before or ultimately concurrent with the execution of an agreement. If this is not observed, the GT&Cs may be nullified.

It is generally accepted that shrink wrap or click wrap licenses may lead to legally valid agreements, provided, however, that the other party has been sufficiently notified of the existence of the license conditions and has had the possibility to take notice of the conditions before purchasing the licensed product. Besides this, when applying a click wrap license, the regulations concerning e-commerce, and distance selling—which I will not discuss since this falls outside the scope of this contribution—also need to be observed.

Article 6:237 of the Dutch Civil Code contains a so-called grey list of provisions in GT&Cs that are presumed to be unreasonably onerous. As a result, such provisions may be nullified. The grey list includes clauses excluding or limiting a statutory right to settlement, or excluding or limiting a statutory obligation to pay damages. Article 6:236 of the Dutch Civil Code contains a black list of provisions that are considered to be unreasonably onerous. Such provisions—for example, the clause limiting a statutory term of prescription or expiration to less than one year, or the clause stipulating that the licensor has obtained licensee's permission in advance to transfer its obligation to a third party (with some exceptions)—may also be nullified.

Both the grey and the black lists are an elaboration of the general Article 6:233 subsection of the Dutch Civil Code; clauses that are not included in one of said lists may however be nullified, by invoking the general rule laid down in this article.

In the Netherlands, two specific sets of GT&Cs are frequently used. The IT trade association FENIT has issued GT&Cs (known as the *FENIT voorwaarden*) that are written from an IT supplier's point of view. A counterpart of the FENIT GT&Cs are the model contracts of the Ministry of Home Affairs (known as the *BiZa contracten*). This is a volume of different standard IT agreements, written from the perspective of a (large) purchaser. Both sets form an interesting contrast. When negotiating with Dutch parties, you may wish to review either the FENIT voorwaarden or the BiZa contracten, since these GT&Cs will be familiar to your Dutch counterparty and therefore easier for them to accept.

The Standard License Agreement ("SLA")

The following comments refer to the ABC License Agreement.

Introduction

Software license agreements (SLAs) are the most common IT contracts. Under Dutch law, it is important to lay down the 'who-what-where.' Who is/are entitled to make use of the software? What is the intended purpose of the use? And where—in a technical but also geographical sense—can the software be used?

The intended use provision is an important issue since this plays a central role in the Dutch Copyright Act with regard to software. Please note that the Dutch Copyright Act that implements EC Directive (91/250 of 14 May 1991) on software protection contains mandatory provisions regarding the legitimate use of software. Therefore, restrictions that may be valid in the US may be void under the Dutch Copyright Act.

Heading

Contracting Parties

The heading of the SLA suggests that the licensee can either be a private person (consumer) or a corporation or other legal entity. Please note, as explained in the paragraph above on GT&Cs, that when entering into

contracts with consumers or small businesses, mandatory law on consumer protection applies, which limits the licensor's freedom of contract. Therefore, parties that do business with all kind of parties, sometimes choose to work with two different sets of SLAs: one specifically for consumers and small businesses, drafted in accordance with the mandatory laws, and one specifically for the larger companies, without such restrictions.

When entering into an SLA with a corporation or other legal entity, you need to verify if the person signing the SLA on behalf of such legal entity is authorized to do so. In the Trade Register of the Chambers of Commerce you can see whether a certain person is authorized to represent a legal entity and also if there are certain limitations in this respect. Persons that are not registered in the Trade Register as an authorized representative may be able to represent a legal entity on the basis of a power of attorney (POA). It is advisable to ask for a copy or other form of confirmation of such POA, to prevent ending up in discussions about authorized representation of the legal entity concerned.

Form of SLA

From the heading of the ABC License Agreement I understand that the SLA can be entered into as a shrink wrap or click wrap agreement. As follows from the paragraph above on GT&Cs, such forms are legally valid under Dutch law, provided of course that you take into consideration the requirements as laid down in said paragraph. Additionally you should organize your contract administration in such a way that you can provide sufficient proof of the existence and contents of a shrink wrap or click wrap SLA.

License

The second paragraph of the heading contains some license conditions as well as definitions. Although it is possible to include the license conditions and definitions in the heading (as a sort of considerations), from a technical-legal perspective, it is better to include the license conditions in the article on license grant and to make a separate article for the definitions

used in the SLA, especially now that the definitions are spread all over the SLA (and some words are not even properly defined).

Article 1 License Grant

Perpetual License

According to article 1, a perpetual license is being granted, except as provided for in article 12 (Termination). In this respect, it might be clearer to stipulate that the license is being granted for the term of the SLA.

Purpose of the License, Intended Use

As set forth above, the intended use is a central concept in the provisions on software of the Dutch Copyright Act. It is advisable to describe the intended use as detailed as possible, in order to limit the possibility of a broader interpretation by the courts.

Different License Forms

Article 1 includes different license forms. I assume that in the actual SLAs it is clearly indicated which license form is being purchased, in order to avoid any misunderstandings.

Article 2 Transfers

The standard article is in compliance with Dutch law. However, please be aware that in the event all or substantially all of the licensee's assets will be transferred, it may be contrary to good faith if the licensor would withhold its consent for the transfer of the LA.

Article 3 Support and Maintenance

Starting Date Support

According to article 3, the starting date of the support will be the date of delivery of the software. This is a valid provision; however, it will be more

in line with the principle of good faith to start the support after the warranty period instead of during such warranty period, as follows from case law.

Increase of Support Fees

Article 3 provides that the annual support fees may have a maximum increase of 5 percent per year. Please note that Article 6:236 sub i of the Dutch Civil Code stipulates that clauses granting the right to increase prices within three months after entering into an agreement, are regarded as unreasonably onerous, unless the other party will be entitled to dissolve the agreement.

Maintenance Releases

I advise to more specifically lay down which releases are being regarded as Maintenance Releases, now that the current clause is open to several interpretations.

Continuation of Support

In specific situations it may be contrary to the principle of good faith to discontinue support for certain (older) versions of the software. Whether this will be the case depends on the specific circumstances, such as the release policy and the expected service life of the software.

Article 4 Payment

Interest

The Dutch Civil Code (Articles 6:119 and 6:120) stipulates that in the event of overdue payments, the creditor is entitled to the statutory interest over the period the payment was due. Compound interest will be charged on interest amounts that are outstanding for more than one year. Parties are

free to agree on a higher interest rate, or to agree that compound interest will also be charged within a year.

Collection Costs

Collection costs may be claimed on the basis of Article 6:96 subsection c of the Dutch Civil Code, provided, however, that the costs relating to the legal proceedings for the collection of the debt will be determined by the court on the basis of a fixed schedule. This usually results in a lower amount than the actual costs for such legal proceedings. The extrajudicial costs however may be claimed on the basis of the actual costs made. In order to have a solid basis for such claim, describe in the SLA which costs will be regarded as extrajudicial costs (for instance costs made by the licensor itself, as well as costs for external parties).

Auditor

The provision to be able to send an auditor for inspection seems excessive, now that there are also other less burdensome measures to verify licensee's compliance with its obligations under the SLA, more specifically its payment obligations. This clause is therefore likely to be regarded as a clause that is contrary to the principle of good faith. A less onerous clause could be to request the licensee to provide a yearly statement of its own certified auditor.

Article 5 Delivery and Installation

Damaged Shipment

It seems reasonable, since the software will be delivered "Carriage Paid To" as specified in the INCOTERMS of the ICC, to stipulate that any damaged shipments will be replaced at the costs of the media.

Transfer of Title

The clause stipulating that title to the software media will be transferred to licensee when, in the event of delivery by electronic access, the software will

be made available by licensor, seems strange. The medium the software will be downloaded to will assumingly already belong to licensee; from a judicial-technical point of view it might be better to stipulate that—in the event of electronic delivery, licensee is entitled to download the software on its own media, as indicated in the order.

Article 6 Software Warranty

Warranty Period

The definition "Order" is not specified in the SLA. Assuming that a purchase order is meant, it seems strange to connect the warranty period to the Order; it would be better to connect the warranty period to the date of delivery of the software or, even better, to the installation date (provided that the software will be installed within, for instance, five days after the delivery date).

The warranty period itself seems a bit short, however, there is no mandatory law regarding the term of warranty periods. Again, the principle of good faith will play a role in determining what will be a reasonable length.

Case law suggests that a licensor could be required to extend the warranty period if during such warranty period many defects occurred, thus consuming the entire warranty period.

Warranty Contents

The principle of good faith may demand that in the event licensor terminates the SLA because it cannot cure any defects during the warranty period, licensee must be compensated for damages suffered, such as investments made on hardware or because of the delay. Furthermore, I am of the opinion that all prepaid Maintenance Fees in such event will have to be refunded to licensee; it will not be reasonable to withhold part of the Maintenance Fees in a situation where licensor apparently is not able to have the software meet with the agreed (technical) specifications.

Article 7 Infringement Indemnity

The infringement indemnity clause is rather standard and will in my opinion be enforceable under Dutch law. However, the provision limiting the refund of the license fee, prorated over a five-year lifespan and the provision stipulating that licensor may, without being in breach of the SLA, decline to make further deliveries of software that is subject to a claim of infringement, could be considered, depending on the specific circumstances, unreasonably onerous.

Article 8 Warranty Disclaimer

Capitals

Under Dutch law, the use of capitals for disclaimers and limitation of liability clauses is not required and I would therefore advise not to apply such capitalized provisions in a Dutch contract.

Terms

Terms as express or implied warranties and fitness for a particular purpose, as already explained in the Introduction, need to be explained, since they do not form part of the Dutch law of obligations.

Article 9 Limitation of Liability

Capitals

See above; the use of capitals is not required and I advise to leave it out of any Dutch contract.

Contents

The terms "direct" and "indirect loss" need to be explained, since they do not form part of the Dutch law of obligations. In Dutch contracts, usually one of those terms will be explained, and the other one will be defined as the remaining part.

In the current limitation of liability clause, the licensor's liability is limited to the fees paid by licensee under the SLA. No other ceiling is being applied, so in the event this limitation is considered to be contrary to the principle of good faith in a specific situation, there is no other safety net that limits the licensor's liability. Therefore it is advisable in Dutch contract to include two or three levels of limitation of liability. A good example is the limitation of liability clause of the FENIT voorwaarden.

Case law suggests that contracting parties cannot by agreement exclude their liability in the event of willful intent or gross negligence by the contracting party itself or its executives. See in this respect article 10.4 of the FENIT voorwaarden. Liability in the event of willful intent or gross negligence by employees can be excluded or limited.

Article 10 Restrictions

Copies, Reverse Engineering, and Decompiling

According to the Dutch Copyright Act, the legitimate user of software is allowed to make a backup copy, if necessary for the intended use of the software (Article 45k of the Dutch Copyright Act).

Furthermore, the legitimate user is allowed to study the ideas and principles on which the software is based (Article 45l of the Dutch Copyright Act) and to decompile the software for reasons of interoperability, provided that there is no other, easier, and quicker way to get the necessary information (Article 45m of the Dutch Copyright Act).

As follows from the European Directive, the above mentioned provisions are mandatory law, although the Dutch Copyright Act, due to an omission of the legislature is not clear on this.

Sub (d) and sub (g) are in accordance with the above-mentioned mandatory regulations.

The other restrictions in my opinion are also in accordance with Dutch law. Please note, however, that the reference made to the regulations of the

United States could better be changed into a reference to the regulations of the Netherlands.

Article 11 Government Restricted Rights

This clause does not seem to be relevant for a Dutch contract, so I advise to delete this entire article.

Article 12 Termination

Breach of Agreement

According to the Dutch Civil Code, a notice of default should state a reasonable period to remedy such default. I advise to adjust the current clause in this respect; thirty days may be reasonable in some specific situations, but could be unreasonable in other situations.

Other Possibilities for Termination

The SLA is entered into for an indefinite term. I therefore would advise to include the possibility to terminate the agreement by giving written notice and taking into consideration a certain notice period.
Furthermore, it is customary in Dutch contracts to provide that the contract can be terminated, without being liable, in the event of (provisional) moratorium of payments, bankruptcy, or in similar situations. See article 9 of the FENIT voorwaarden as an example.

Article 13 General

Governing Law and Jurisdiction

The current clause is in accordance with Dutch law, however, I would advise not to use the term "venue," since this will not be familiar to many Dutch contracting parties; rather stipulate that "any and all disputes arising out of this SLA will be exclusively brought before the competent courts in Amsterdam."

Headings and Captions; Information Provided

As follows from the Introduction, under Dutch law all parts of agreements may be interpreted as a consequence of the principle of good faith. Therefore, it is likely that headings and captions may also be used for such interpretation, even when it is stipulated that it cannot be used in such manner.

The same applies to the information and other documentation provided; under Dutch law it is hard to imagine that such information and documentation cannot be used for any interpretation with regard to other aspects than those mentioned in the current article.

Article 14 Y2K Compliance

I would suggest deleting this entire article, now that it is kind of outdated at this moment.

Article 15 Feedback

This article aims for accomplishing that parties will provide each other with relevant feedback. Now that this article also stipulates that feedback will not be regarded as confidential, unless a separate written agreement has been entered into, from my point of view this may have the risk of discouraging parties to share information. I would advise to either leave this specific stipulation out of the article, or delete the entire article, in order to stimulate giving feedback in an informal manner.

Wanda van Kerkvoorden (1968) studied law at the University of Nijmegen, where she graduated in 1994; she wrote a thesis concerning the protection of semiconductor chips. She is one of the founders of SOLV, the premier Netherlands law firm that provides services for the technology, media and communications sectors. Ms. van Kerkvoorden was admitted to the bar in 1994. She specializes in complicated ICT contracts and disputes, e-commerce, biotech licences as well as copyright and trademark law, especially with regard to the Internet and e-business. Her special interest lies in technological (IT/ICT) developments. She likes to work closely with clients, preferably from the start of any IT

project. Thus, her input on the legal aspects forms a logical part of any project, instead of a delaying factor afterwards.

In 1998 Ms. van Kerkvoorden successfully (cum laude) *finalized the post doctorate program for ICT law at the Grotius Academy, after which she was admitted to the prestigious Dutch Association of ICT Lawyers (Vereniging Informaticarecht Advocaten (VIRA)), of which she is a board member since February 2005. Besides her work as an attorney, she is a frequent speaker at workshops and seminars. She is furthermore a guest lecturer at the University of Leiden.*