

Benchmarking of existing national legal e-business practices

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Country report – The Netherlands

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The Netherlands

1. General information on the national legal system

The Netherlands is a constitutional monarchy, consisting of the Netherlands, the Dutch Antilles and the island of Aruba. Apart from sharing the Supreme Court, there is no single unified substantive law, and only the part of the Netherlands which is located in Europe is a Member of the European Union¹.

The usual way to implement an EU Directive in the Netherlands, regulating a new legislative field, is to change the existing legislation. In some cases, a separate statutory instrument is created.

The Dutch legal system adheres to the civil law tradition. The Civil Code consists of eight different parts, indicated as Books. Books 3, 6 and 7 of the Civil Code contain the main set of rules for (*inter alia*) contract law.

According to the Dutch tradition of civil law, written legislation is the most important legal source. Court decisions are also considered important sources of law, but courts are not required to follow previous precedence even if it originates from a court placed higher in the judiciary system. The Dutch court system is inspired by the traditions of continental Europe, and especially France.

The administration of justice in the Netherlands is mainly regulated by the Code of Civil Procedure. Decisions from the cantonal courts and district courts may be appealed to the courts of appeal. Decisions from the appeal courts may be appealed to the Supreme Court, but only on points of law, not on points of fact.

Commercial disputes are typically dealt with by the district courts, unless the value of the claim is less than EUR 5,000, in which case it is dealt with by the cantonal court.

In civil law court cases, there are two basic principles for dealing with evidence: 1) The parties of the dispute choose the evidence they wish to bring before the court (though the court has some instruments to oblige a party to submit certain crucial documents) and 2) The court's assessment of the evidence is free in the sense that it is not bound by law, unless the law determines that a certain type of evidence must be accepted as evidence, such as a notarial deed.

The courts in the Netherlands have the power to re-balance the contractual rights and obligations of the parties based on the principle of reasonableness and fairness².

¹ The Netherlands has been a member of the European Community since its foundation.

² Artikel 6:248 Burgerlijk Wetboek.

In all types of court proceedings, except for (a) cantonal court proceedings and (b) the defendant in summary relief proceedings in first instance, parties must be represented by an *advocaat*. Each of the parties bears its own costs for such representation. Courts generally award only a limited amount to the winning party, which generally covers only a small part of the actual cost.

The parties to a contract are also free to choose arbitration for settlement of a dispute, if arbitration has been agreed to in a written document prior to or after the dispute arises³. The Netherlands Arbitration Institute⁴ is frequently used in mostly international disputes. Unlike regular court proceedings, many arbitration proceedings conducted in the Netherlands are conducted in English.

Mediation is gaining importance as an alternative form of dispute resolution⁵. Another form of dispute resolution is 'binding advice', which is in fact a form of dispute resolution under the supervision of a third party, generally a consumer complaints body. The advice of the third party has the status of a settlement agreement⁶. The settlement agreement is therefore not an executable judgement and can be contested in court by either party.

2. Electronic signatures

2.1 National legislation and administrative practices

The Netherlands has implemented Directive 1999/93/EC of a Community framework for electronic signatures (hereinafter the "Signatures Directive") by the Electronic Signature Act⁷. The act is accompanied by a governmental decree to implement Annex II⁸ (Requirements for certification-service-providers issuing qualified certificates) and III (Requirements for secure signature-creation devices), and a ministerial regulation to implement Annex I (Requirements for qualified certificates).

The Netherlands implemented the Signatures Directive in the Civil Code and the Telecommunications Act. With the implementation, Dutch law now distinguishes between electronic signatures with and without the same legal effect of a handwritten signature. Article 15a paragraph 1 Civil Code implements article 5 paragraph 1a of the Signatures Directive. It confirms that a signature in electronic form

³ Artt. 1020-1076 Wetboek van Burgerlijke Rechtsvordering.

⁴ <http://www.nai-nl.org/english/> (in English).

⁵ <http://www.nmi-mediation.nl> (with English version).

⁶ Artt. 7:900-904 Burgerlijk Wetboek.

⁷ Wet Elektronische Handtekeningen 27 743 (Stb.2003, 199), which entered into force on 21 May 2003.

⁸ Besluit Elektronische Handtekeningen (Stb. 2003, 200) which entered into force on 21 May 2003.

has the same legal effect as a handwritten signature, provided that the method for authentication is basically secure. A qualified electronic signature as defined by the Directive satisfies this requirement, according to the Explanatory Memorandum for the Electronic Signatures Act. Article 5 paragraph 1b has not been implemented in the Code of Civil Procedure. An electronic signature is admissible as evidence in court, though not as binding evidence⁹. In Dutch law of civil procedure, most types of evidence (such as written documents and oral testimonies) are non-binding, the most relevant exception being notarial deeds.

Article 5 paragraph 2 has been partly implemented, namely that an electronic signature cannot be deemed unreliable for the mere reason that it is not based on a qualified certificate, not based on a certificate issued by a TTP, and/or if it has not been created using a secure device.

The Electronic Signatures Act provides that a certification-service-provider is liable for damage caused to a person if he had reasonably relied on a so-called qualified certificate according to the rules set out by the Signatures Directive. The Explanatory Memorandum to the Electronic Signatures Act explains that, in accordance with recital 16 of the Signatures Directive, private parties may deviate in agreements among themselves from the statutory regime¹⁰.

The governmental decree for the Electronic Signatures Act lays down that a certificate-service-provider is to check the identity of a person by means of visual inspection before issuing a qualified certificate. This could be one of the reasons for the limited use of qualified certificates in the Netherlands.

We are not aware of any case law regarding electronic signatures, even from lower courts. Dutch courts generally take a liberal approach in accepting electronic communication, including e-mail correspondence, as evidence. Consequently, the business community has not started as of yet to use electronic signatures at a large scale.

In contrast to the very modest use of electronic signatures in business relationships, electronic signatures are increasingly used as an identification mechanism in e-government services. Since 1 January 2005 Dutch residents can make use of DigiD, a system with of unique (invisible) codes for correspondence with Dutch government authorities such as social security institutions, tax authorities and municipalities¹¹. Recently, the aggregate number citizens using DigiD has surpassed one million out of a total number of 16 million citizens. DigiD is used as a form of secure correspondence; it will not replace the current system of unique social-fiscal numbers (SoFi number) given to each citizen.

⁹ Tjon Tjin Tai, *De elektronische handtekening in de praktijk*, NbBW juli / augustus 2004 p. 118.

¹⁰ As confirmed in article 15a paragraph 6 Book 3 Civil Code.

¹¹ See www.digid.nl (no English version available).

2.2 Cross border regulatory issues

In principle all qualified certificates have the same validity and legal recognition and can be used for electronic signatures, regardless of their country of origin. However in case a certificate issued to the public by a certification-service-provider domiciled in a country outside of the European Economic Area, the provider is to fulfil the requirements laid down in the Signatures Directive, e.g. has been accredited according the voluntary accrediting scheme of a member state or a certification-service-provider in the EEA has agreed to act as surety¹².

3. General elements of electronic contract law

Directive 1997/7/EC on the Protection of Consumers in Respect of Distance Contracts has been implemented in Book 7 of the Civil Code in 2001¹³.

Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees has been implemented in 2004 in Book 7 of the Civil Code in 2003¹⁴. The national law provides protection in line with the requirements of Article 2 of the Directive. Article 23 paragraph 2 Book 7 Civil Code contains a 2-year limitation period in which the seller can be held liable for the non-conformity. The Netherlands has transposed Article 5, paragraph 2 of the Directive which stipulates that the buyer must inform the seller of the lack of conformity within a period of two months from the date on which he detected such a lack of conformity.

Directive 1998/6/EC on Price Indications has been implemented in 2002¹⁵.

Directive 2000/31/EC on information society services, in particular electronic commerce has been implemented into articles 15d Book 3 and articles 227a – 227d Book 6 Civil Code¹⁶. The country of origin principle has not been expressly implemented.

¹² There have been no publications on whether such accrediting scheme is already in place in the Netherlands.

¹³ Wet Verkoop op Afstand no. 26 861 (Stb. 2001, 24) which entered into force as per 1 February 2001.

¹⁴ Wet verkoop en garantie consumptiegoederen no. 27 809 (Stb. 2003, 151) which entered into force as per 1 May 2003.

¹⁵ Wijziging van de Prijzenwet no. 28 184 (Stb. 2002, 217), which entered into force as per 17 May 2002.

¹⁶ Aanpassingswet Richtlijn Elektronische Handel 2000/31/EC (Stb. 2004, 210) which entered into force on 30 June 2004.

Directive 2002/65/EC on distant financial services has been implemented in 2005¹⁷.

In 2004, 10% of all sales by Dutch companies was generated via online sales, up from 4% in 2000¹⁸. The main growth was achieved by companies with more than 50 employees. Only 20% of all Dutch companies use e-commerce for purchasing, whereas only 14% receives online orders¹⁹. From all companies that have a website but do not sell goods online, only 8 percent indicate to be reluctant because of legal issues and payment issues. Once companies start with electronic transactions, costs, legal issues and payment issues do become relevant when asked about the main problems relating to doing business online²⁰.

3.1 National legal and administrative practices

The regulatory framework for all contracts including electronic contracts is laid down in Books 3 and 6 of the Civil Code, which contain the basic principles of Dutch contract law.

It can be derived from the Civil Code that conclusion of contracts is not subject to formal requirements unless directly stated in a specific law²¹. This principle has been recognised and accepted in numerous court decisions. A written document is not required, as such, to form a contract, which also means that electronic contracts are considered to be just as valid as traditional paper contracts.

There are no formal definitions of the concepts of offer/acceptance and contracts in the Dutch Civil Code. Both offers and acceptances are considered valid and binding for the submitting party if they express a will to be bound in accordance with the content of the manifestation, and the manifestation creates an expectation by the receiver of the manifestation that the obligation is established²².

The requirement to the certainty of the manifested will vary according to a number of factors including, for instance, the content of the expressed will (a promise of a gift of 1.000.000 € requires greater certainty than a promise to enter into a contract between regular business partners), the customs in the area, the status of the parties (consumer/business), etc.

¹⁷ Wet Financiële Dienstverlening (Stb. 2005, 330) which entered into force as per 1 January 2006.

¹⁸ Webmagazine www.cbs.nl, 3 April 2006.

¹⁹ Webmagazine www.cbs.nl, 13 February 2006.

²⁰ Centraal Bureau voor de Statistiek, *Belemmeringen e-commerce*, February 2003 (www.cbs.nl).

²¹ Example: Article 2 of the Copyright Act (Auteurswet 1912) states that an assignment of copyright is only valid if laid down in a written document.

²² The fact that offers are considered binding, means that offers cannot be revoked by the party submitting the offer before the end of the acceptance period, if the offer has been noticed by the party receiving the offer.

A contractual obligation will, however, only be enforced by the courts, if the party claiming the existence of the obligation can prove before the courts that the parties have actually entered into a valid contract. The practical question of documentation (evidence) of what really is agreed is consequently very important. A signed contract is the best type of evidence to prove the existence of a contractual obligation.

If it can be demonstrated before the court that a contract exists between the parties, it should be noted that the courts are free to interpret the contract and that the courts may "fill" in obligations if the area of the dispute is unregulated in the contract. Again, this is based on the intention of the parties and their mutual acts and expressions when entering into the contract.

As it may be clear from the above, a contractual obligation may arise, when the will thereto has been expressed, even though the parties to the contract have only agreed orally on the most essential elements of the contractual obligations. The same applies for if the contract is in an electronic format that carries the will to enter into a contractual obligation.

There has been no specific transposition of Art 9 (2) of Directive 2000/31/EC that excludes specific types of contracts to be concluded electronically. However, several Dutch existing Dutch laws within the field covered by Article 9 (2) require the use of written documents, especially notarial deeds such as last wills or assignments of real estate, but also consumer credit agreements²³. In certain specific cases, a written contract may also be the only form of evidence. Insurance agreements can be validly concluded orally, but if the existence is disputed, the only form of proof is a written document confirming the agreement²⁴.

3.1.1 Electronic invitation to make an offer and submission of an offer

As there are no formal requirements needed for the assumption of a contractual obligation, there is, of course, no legal requirement to use electronic signatures in the conclusion of electronic contracts. Some service providers use electronic signatures, however, as an extra security mechanism to prove that the contract has been accepted and entered into by the customer.

One of the core elements of Dutch contract law is, as described above, that contractual obligations arise from the manifestation of a will to be bound. Offering goods or services for a specific price can, under circumstances, be deemed an invitation to submit an offer. This is equally true in an online environment. As in the offline world, a clear mistake (such as the offer to buy a new car for EUR 25 where the offeror meant EUR 25,000) can not be accepted for that amount

²³ Art. 30 lid 1 Wet op het Consumentenkrediet.

²⁴ Art. 251 Wetboek van Koophandel.

as the other party should be deemed to understand that there is no will to be bound.

Our research has not revealed particular issues with regard to offer and compliance in an online environment. In one case, the purchaser of a house via an online auction site sued the seller for refusing to accept his bid as per the site's conditions of sale. The court decided that no valid agreement had been reached, but this was caused by the fact that the seller successfully argued that his spouse had not agreed to the sale as required by the law of matrimonial property. The issue of offer and acceptance as such was not discussed by the Court²⁵.

3.1.2 *Electronic acceptance*

Acceptances are binding in Dutch law when they are received by the legal person who has made an offer within the acceptance period (if any)²⁶. Acceptance communications which are not in compliance with the offer are deemed a rejection of the original offer, and constitute a new offer which requires acceptance by the original offeror²⁷.

The main problem pertaining to electronic acceptances in Dutch law has been the question of when (i.e. at what point in time) electronic contracts are actually concluded. As mentioned above, the Civil Code requires an expression of will (in this case: the acceptance of an offer) to be received by the other party. It has now been solved with the implementation of Article 11 (2) of Directive 2000/31. The acceptance is considered to have reached the offeror, when he or she has access to the acceptance, i.e. when it has arrived at the recipient's computer, disregarding the question whether or not the recipient has read the acceptance.

3.1.2.1 Information obligations in relation to electronic contract conclusion

In 2005, consumer spending in the Netherlands via the internet increased by 32% to 2.21 billion Euros²⁸. The average amount spent per consumer and per purchase also rose. This indicates a clear increase in consumer confidence regarding online contracting.

The legislation in the Netherlands complies with the requirements laid down in Article 5 of Directive 2000/31/EC on electronic commerce and Articles 4 and 5 of Directive 97/7/EC on distance contracts, regarding the information that must be given to the consumer before and after the order is placed. The Dutch legislation does not specify stricter rules.

In a press release published in August 2006, the Chambers of Commerce reported that many web shops do not comply with the

²⁵ President District Court Den Haag 19 December 2001, LJN [AD7498](#).

²⁶ Art. 6:219 Burgerlijk Wetboek.

²⁷ Art. 6:225 Burgerlijk Wetboek.

²⁸ Research conducted by [www.thuiswinkel.org](#); reported in [www.webwereld.nl/articles/40728](#).

basic rules such as the mentioning of VAT number and chamber of commerce registration number. No numbers or percentages of such non-compliance have been mentioned²⁹. Only 350 out of a total number of 10,000 web shops are a member of the industry organisation Thuiswinkel.org which does check compliance of its members.

There have been two very recent cases where a court applied the cancellation possibilities in view of a breach of the information requirements. An internet company sued consumers for failing to pay subscription fees. The consumers had applied for a temporary subscription of erotic content and disputed that an agreement for a long term subscription had been concluded. In both cases, the internet company had failed to prove that it had confirmed the long term agreement, as a consequence of which the consumer was entitled to cancel the agreement³⁰.

3.1.2.2 Standard terms and unfair clauses

The use of standard terms has given rise to various questions in the Netherlands. Firstly, on what conditions standard terms can be considered an agreed part of the contract, and secondly, whether individual clauses of an unfair or otherwise burdensome nature in the standard terms are valid.

Standard terms are only considered a part of the contractual agreement, when the party accepting the standard terms has had a chance to read the terms prior to the conclusion of the contract. Dutch law requires that standard terms should be handed to the other party, unless it is not practically feasible to hand the terms (i.e. when buying a train ticket, the train company can simply refer to the terms rather than handing over a set of terms each time a train ticket is sold). In an online environment, it is impossible from a practical viewpoint to physically hand over standard terms before entering into a contract. This does not prevent companies from using such terms when contracting online. It is generally believed among scholars and practitioners that standard terms should be easily accessible and downloadable in order to prove that the terms were 'handed over' electronically to the other party³¹. A lower court recently confirmed the applicability of general conditions of UPS which were printed on the order form and published on the web site of UPS³². Before the implementation of the E-commerce Directive, another lower court had indicated that a professional customer was bound by general terms and conditions that had been accessible via a hyperlink on the seller's website³³.

²⁹ <http://www.parool.nl/media/2006/AUG/081806-webwinkels.html>.

³⁰ District Court Haarlem (cantonal sector) 6 October 2005, LJN AV2652; District Court Rotterdam (cantonal sector) 19 January 2006, LJN AU9939.

³¹ Noorda, *Online contracteren*, in: *Onderneming en ICT*, Tjeenk Willink: Deventer 2000, p. 103.

³² District Court Haarlem (cantonal sector) 22 June 2005.

³³ President District Court Rotterdam 5 December 2002, LJN AF2059, JAVI 2003 p. 18.

Standard terms sent with an invoice or order confirmation will, as a general rule, not be considered part of the contractual agreement regardless of whether the contract is a business or a consumer contract. If the party being bound by the standard terms knows that the terms will be applied (for instance from previous contracts) it is, however, likely that such previously agreed standard terms will be considered agreed³⁴. This would be true at least for B2B contracts.

Standard terms accepted by a point-and-click acceptance are generally considered agreed between the parties. The technical solution shall be such that the recipient must work through the terms of the contract in order to proceed on the conclusion of the contract. This can be done by the consumer "passing" and "confirming" a page with contract terms before the contract is concluded, possible by the terms appearing in full text on the page and the consumer confirming that he/she has seen it by scrolling down over the page and clicking on a confirmation button.

Under Dutch law, unfair contracts (both B2C and B2B) are covered by the general clause in article 248 Book 6 Civil Code. Under this article, the courts can amend or override a contract or other legal act, either fully or in part, if its application would be unfair or unreasonable.

Articles 236-238 Book 6 Civil Code contain special rules applicable to consumer contracts. These clauses implement Directive 93/13/EEC on unfair terms in consumer contracts. We refer to paragraph 4.1 about payment terms in standard terms and conditions. If one clause of a certain set of standard terms is deemed inadmissible, this has no particular effect on the validity of the other clauses.

Many industry associations have their own consumer complaint and dispute resolution bodies. There are more than 30 different consumer complaint bodies. Most of them operate on the basis of providing a binding advice to the parties³⁵. This form of dispute resolution is deemed adequate by consumers³⁶.

3.1.3 *Choice of law and forum*

The Netherlands has ratified the Rome Convention on the law applicable to contractual obligations³⁷.

The Netherlands has ratified the Brussels³⁸ and Lugano Conventions³⁹ on Jurisdiction and the Enforcement of Judgments in Civil and

³⁴ Supreme Court 1 October 1999, NJ 2000/207.

³⁵ See chapter 1 above.

³⁶ Hondius, *Geschillencommissies*, in: Hondius et al., *Consumentenrecht*, Paris: Zutphen 2006, p. 471-491.

³⁷ Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.

³⁸ 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

Commercial Matters. Within the EU, these only have relevance vis-à-vis Denmark. Council Regulation (EC) No 44/2001⁴⁰ that replaces the Brussels and Lugano Conventions in the other Member States countries is applicable in the Netherlands.

The Netherlands has ratified the United Nations Convention on the International Sale of Goods (CISG)⁴¹.

Choice-of-law/forum selection is not considered as being a specific barrier for e-business in B2B transactions in the Netherlands. The challenge for e-business in this area is the same as for traditional business relations. A choice of forum which differs from the consumer's residence can be deemed invalid, unless (a) it has been agreed after the dispute arose, or (b) the consumer instigates an action before the chosen forum.

The Rome Convention provides that consumers may sue enterprises from other Member States at their own forum using Dutch law. Enterprises from other Member States may equally only sue Dutch consumers at Dutch courts.

Directive 2000/31/EC on electronic commerce is based on the country of origin principle, which provides that information society services are only required to comply with the requirements of the Member State in which the service provider is located. Though the country of origin principle has not been transposed as such, it is expected that the courts will apply the principle when interpreting legal aspects of a cross-border transaction.

3.2 Cross border regulatory issues

During the research, no specific court rulings on the use of electronic contracts in cross-border trade between enterprises have been identified. However, it seems reasonable to assume that especially small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from another Member State. This could be an obstacle to cross-border use of electronic contracts.

³⁹ 16 September 1988 Convention on jurisdiction and the enforcement of judgments in civil and commercial matters

⁴⁰ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

⁴¹ Trb 1981, 184 and 1986, 61. The Netherlands has signed, but not ratified The Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods.

4. Electronic invoicing, payment and other matters related to execution of electronic contracts

4.1 National legislation and administrative practices

Articles 236 and 237 Book 6 Civil Code contain a list of unfair terms in consumer contracts to implement the indicative list of unfair terms as mentioned in the Annex to Directive 93/13 EC. It is not a literal transposition of the indicative list – it contains many more terms – but it does cover the main terms generally assumed to be unfair.

Directive 2001/115/EC on invoicing and VAT has been implemented in the Dutch Turnover Tax Act in 2003⁴². The main change to the existing situation was the requirement to mention the VAT numbers of the seller and the purchaser on the invoice.

A national system on electronic invoicing was already in place prior to the implementation of the Directive. The requirement of a prior permit, which was laid down in a national regulation of 1997, had already been abolished. The implementation of the Directive therefore lead to minor adjustments only. No additional requirements have been introduced.

The obligation to pay for goods and services in B2B and B2C transactions does not differ from the obligation to pay in traditional off-line business relationships. The Civil Code stipulates that if no extension of time has been granted by either party, the seller is not bound to deliver the goods against the simultaneous payment of the price, and the buyer is not bound to pay the price unless the goods are being simultaneously placed at his disposal.

In 2005, the Court of Appeal in The Hague ruled that the standard terms of Dell Computers were invalid where Dell required its customers (private persons) to pay the full purchase price before actual delivery of the goods⁴³. Dell subsequently adapted its standard terms to enable consumers to pay upon delivery by credit card.

Means of payment and the obligation of the parties regarding the use of certain payment instruments

Directive 97/7 EC has been implemented correctly. Pursuant to Article 46g Book 7 Civil Code, the consumer is entitled to a full compensation if his payment card has been misused in an online purchase. This provision is in accordance with Article 8 of Directive 97/7/EC (for B2C contracts on goods) and Articles 7 and 8 of Directive 2002/65/EC (for contracts on financial services). The article only applies to credit cards and payment cards and not to other forms of online payment, such as bank transfers, mobile phones or e-wallets.

⁴² Wetswijziging Wet op de Omzetbelasting (Stb. 2003, 530) which entered into force as per 18 December 2003.

⁴³ The Hague Court of Appeal 22 March 2005.

If a consumer uses a traditional bank transfer when ordering goods or services online, the consumer is not entitled to a refund from the payment issuer if the payee (e.g. the online vendor enterprise) fails to deliver as agreed.

No major practical problems in relation to online payment have been reported. In spite of clear legislative protection, some consumers however still feel reluctant to use their payment card online due to fear of misuse. A survey under 381 internet consumers indicated that 25% of those consumers prefer Dutch web stores over foreign web stores⁴⁴. In view of this reluctance, the major banks have introduced an easily usable online bank transfer system under the name iDeal⁴⁵. This is in fact no more than a system whereby the user, when proceeding to payment in a web shop, is directed to the login page of his internet bank account to pay for the goods in a few clicks without the need to fill out credit card details.

4.1.1 *Delivery of the good or provision of services ordered electronically and withdrawal period*

4.1.1.1 Non-performance of the obligation to deliver and late delivery

The general non-performance and late delivery rules are contained in the Civil Code.

In all types of transactions, the purchaser of goods or of services is granted the following remedies in case of non-delivery:

- specific performance;
- damages
- suspension of his own performance (i.e. payment);
- dissolution of the agreement.

In principle, the purchaser is free in his choice to demand either specific performance or damages, but he should act reasonably. The purchaser will usually be entitled to damages if the goods are not delivered at the agreed time, but he must first send a notice of non-performance giving a reasonable term to perform.

The purchaser can invoke the consequences of non-delivery if the seller indicates that he will not perform, or if it can be derived from other circumstances that performance is impossible. Sending a notice would be useless in such an event.

4.1.1.2 Right of withdrawal from the contract in B2C transactions and return of the good

The right of withdrawal for contracts governed by Directive 97/7/EC in respect of distance contracts is seven calendar days. According to

⁴⁴ www.webwereld.nl/articles/31348.

⁴⁵ www.ideal.nl (no English version available).

article 40 of the Financial Services Act⁴⁶, implementing Directive 2002/65/EC, for contracts concerning financial services the cooling-off period is 14 calendar days.

4.1.1.3 Delivery of a good not in conformity with the contract

In accordance with Directive 1999/44/EC, the seller must deliver goods to the consumer which are in conformity with the contract of sale.

In the lack of conformity the consumer shall (by his choice) be entitled to either have the goods brought into conformity free of charge, have the goods replaced (delivery of substitute goods), have an appropriate reduction made in the price or have the contract rescinded.

The consumer's rights as described above must be asserted within a two year period.

If a dispute arises in connection with a cross-border transaction, the consumer is able to contact the Foundation on the Consumer Information Point, the Dutch contact point of the Consumer Europe network⁴⁷. The site contains the standard European complaints form. The existence of this system is not widely known among the public. There is no report on how the complaining system actually works.

This will change upon the new Consumer Authority starting its operations as of 1 January 2007. The Consumer Authority was established by the recent Act on the Enforcement of Consumer Protection⁴⁸. A comparable government body did not exist as of yet. Consumer issues were dealt with by the Consumer Association, a private foundation supported by private individuals⁴⁹. The Act has been approved by the Lower House of Parliament in July 2006 and is expected to be approved by the Upper House of Parliament (Senate) shortly. The Consumer Authority shall be the liaison office and competent authority in the Netherlands for cross-border consumer issues as meant in Directive 2006/2004. It can enforce consumer rights via civil proceedings or administrative sanctions, including fines and penalties.

All information on legal aspects of B2C transactions, whether online or offline, shall be concentrated at the Consumer Authority's website ConsuWijzer which is already in operation⁵⁰.

The Financial Markets Authority, a separate authority established several years ago, shall be the liaison office and competent authority for cross-border consumer issues to the extent that those issues relate to financial services. Likewise, it can enforce consumer rights

⁴⁶ Wet Financiële Dienstverlening (Stb. 2005, 339) which entered into force on 1 January 2006.

⁴⁷ www.consumenteninformatiepunt.nl/

⁴⁸ Wet handhaving consumentenbescherming, no 30 411.

⁴⁹ www.consumentenbond.nl (no English version available).

⁵⁰ www.consuwijzer.nl (no English version available).

via civil proceedings or administrative sanctions, including fines and penalties.

4.2 Cross border regulatory issues

Electronic invoices are valid in the Netherlands if in conformity with Directive 2001/115/EC as implemented. There are no court rulings on electronic invoicing or payment related to execution of cross-border electronic contracts.

Regulation 2560/2001 on cross-border payments has been welcomed by consumer organisations and industry associations alike. We are not aware of reports or statistics on cross-border bank transfers which indicate any significant change since the entry into force of the Regulation. Enterprises are well aware of the possibility to use a BIC or IBAN code for cross-border transactions.

5. General assessment of national legislation and administrative practices in the fields of e-signatures, e-contracts and e-invoicing

5.1 Main legal and administrative barriers to e-business

The following main legal and administrative barriers to e-business in the Netherlands have been identified:

1. No awareness of Consumer Europe Network

The Consumer Europe Network is practically unknown among consumers. We are not aware of any campaigns to increase the awareness among consumers, nor has it been a subject of discussion in legal literature. In combination with the reluctance among a large group of consumers to use a credit card for online transactions, this may influence cross-border transactions. We assume that awareness of consumer rights, including those in cross-border transactions, will increase as per 1 January 2007 when the Consumer Authority will start operating.

2. Legal and administrative barriers to cross-border exchange of electronic signatures, electronic contracts and electronic invoices

Like consumers, small and medium-sized enterprises are unaware of the specific legal status of electronic contracts agreed with trade partners from another Member State. Statistics show that small and medium-sized enterprises are still reluctant to do business online, compared to some other EU countries.

3. The legislation offers limited protection for smaller businesses in electronic commerce

While consumers are relatively well protected by the Dutch legislation and the courts, enterprises are offered a very low level of protection by the legislation based on the rationale that commerce between companies are a transaction between two equal partners. However, in the case of small companies buying online, this can be a barrier to conducting business online.

4. Limited awareness of Regulation 2560/2001

Apart from some newspaper publications in the first half of 2003, Regulation 2560/2001 has received little attention in the Netherlands and has certainly not been actively promoted by the commercial banks. Though we are unaware of any statistical research in this area, it is likely that many consumers are not aware of the benefits of the Regulation.

5.2 Awareness about national authorities in charge of solving legal problems in e-business

In relation to consumer awareness, it could be argued that the fact that many consumers remain reluctant to use their credit card for payment over the Internet despite the safeguards offered to them, could be taken as a sign of lack of awareness about national authorities in charge of solving legal problems in e-business, in particular the Ministry of Economic Affairs. We assume that the Consumer Authority, in its capacity as liaison office for cross-border consumer issue, will act as an information source and as a sort of Ombudsman, increasing consumer confidence in online and cross-border transactions. The major banks have taken steps to offer alternative means of payment by electronic bank transfer.

5.3 Legal and administrative best practices in e-business

The following legal and administrative best practices in the Netherlands are:

1. Self regulation in B2C and B2B sectors

For many years, a large number of consumer complaint bodies has been in operation, which has led to many disputes being resolved without the need to go to court. A trust mark for safe shopping on the internet has been issued by consumer retail websites and is widely used in B2C environments⁵¹. It has been drafted in close cooperation with the national consumer association.

The government platform for e-business, www.ecp.nl, has published a code of conduct for doing business electronically in

⁵¹ See www.thuiswinkel.org.

2001. The actual use of this latter code in B2B environments is unknown.

2. Implementation into Civil Code leads to true integration within general legal system

Unlike other EU countries, the e-commerce directive and the distance selling directive have been implemented in the Civil Code. By doing so, electronic contracts are integrated with the general system of the Civil Code, which increases the awareness. The Civil Code did not require major amendments for the validity of contracting online as such.

3. Strict enforcement of information obligations in B2C transactions

The case law on B2C transactions so far, though still few in number, indicate that courts strictly apply the consumers right to rescind an agreement if the seller has failed to comply with the information requirements.

ANNEX 1: E-business national legislation

The main legislation on e-commerce can be found in:

1. Book 3 Civil Code⁵²
2. Book 6 Civil Code⁵³
3. Book 7 Civil Code⁵⁴
4. Decree on Electronic Signatures⁵⁵
5. Ministerial Regulation on Electronic Signatures⁵⁶
6. Financial Services Act⁵⁷
7. Turnover Tax Act⁵⁸
8. Prices Act⁵⁹

⁵² Burgerlijk Wetboek, www.wetten.nl (no deeplink available)

⁵³ Burgerlijk Wetboek, www.wetten.nl (no deeplink available)

⁵⁴ Burgerlijk Wetboek, www.wetten.nl (no deeplink available)

⁵⁵ Besluit Elektronische handtekeningen, www.wetten.nl (no deeplink available)

⁵⁶ Regeling Elektronische handtekeningen, www.wetten.nl (no deeplink available)

⁵⁷ Wet Financiële Dienstverlening, www.wetten.nl (no deeplink available)

⁵⁸ Wet op de Omzetbelasting 1968, www.wetten.nl (no deeplink available)

⁵⁹ Prijzenwet, www.wetten.nl (no deeplink available)