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Webinar: Legal proceedings, general conditions and insolvencies : Dutch & French perspectives

French Desk Bierens Law, December 8, 2020

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Agenda

1. Terms & conditions
 - a. Netherlands
 - b. France
2. Legal Proceedings
 - a. Netherlands
 - b. France
3. Insolvencies
 - a. Netherlands
 - b. France

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Terms & conditions

Poll 1 : From your Dutch flower bulb company you have been in contact with a company in France that was interested in buying 100,000 flower bulbs. You have drawn up an agreement in which, among other things, reference is made to the general terms and conditions. The general terms and conditions have been sent with the agreement by email to the French company. The agreement states that half of the purchase price must be paid down and the other half must be paid after delivery. The French buyer has paid half of the purchase price.

The contract has been concluded. The only question is, do the terms and conditions apply? Yes or no?



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Terms & conditions - Netherlands

- What are terms and conditions
 - General arrangements (6:231 BW)
 - Limiting risks
 - Non-payment
 - Procedures
 - Insolvencies



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Terms & conditions - Netherlands

- To ensure that you can rely on it
 - Applicability
 - Quite easy
 - Acceptance
 - explicitly
 - tacitly
 - Information
 - Hand over
 - Proof



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Refer correctly

• The general terms and conditions of Lentebloemen B.V. (version 2020) apply to this agreement. The general terms and conditions are attached to this agreement and available at www.lentebloemen.com/algemeenevoorwaarden. By accepting this agreement, the client states that (s)he has read, understood and accepted (the content of) the general terms and conditions of Lentebloemen B.V. (version 2020).



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Terms & conditions

- What you can arrange in the general terms and conditions
 - Competent court
 - Applicable law
 - Interest (1-1,5% per month)
 - (Collection) Costs (up to 15% of outstanding amount)
 - Retention of Title
 - Limitation of liability
 - Force majeure

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Terms & conditions - Netherlands

- What you can arrange in the general terms and conditions
 - Competent court
 - Benefits
 - Distance
 - Language
 - Costs
 - Duration
 - Interpretation
 - Applicable law
 - Benefits
 - Knowledge
 - Interpretation



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Terms & conditions - France

- What are Terms and conditions?
 - A unilateral contract established by the seller to regulate contractual relations.
 - B2B: article L.444-1 du Code de commerce
 - Mandatory or not?
 - Yes if the client is a consumer (Article L.111-1 and following of Code de la consommation)



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Terms & conditions - France

- How to make sure you can rely on it
 - No form required by law
 - However, a verbal information is not sufficient.
 - Take into consideration whether you have a contract with the buyer for the legal act e.g. the sell or not.
 - Make sure they are known by the debtor before the sell itself

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Terms & conditions – France

- How to make sure you can rely on it (B2B): the communication of the T&C
 - GTC need to be accepted by the debtor
 - Expressly = safest option
 - There can be exception e.g. long commercial relationship
 - Burden of proof rests with the party claiming the opposability of the GTC.
 - E.g. the seller will have to prove that he has handed over the T&C to the buyer (registered post, at the back of the order)

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Terms & conditions - France

- Focus on
 - Indemnité forfaitaire (debt collection costs) : 40Euros per invoice
 - Penalty for late payment : interest rate. If not mentioned : ECB interest rate + 10 points. In practice 10% annual interest rate (ECB rate is 0% since march 2016).

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Terms & conditions- comparison

Netherlands

- Easy applicability
- Easy acceptance (explicitly and tacitly)
- Before or together with the agreement

France

- Proof of knowledge and acceptance of the GTC's is required.
- In some cases it can be implicit (long business relations, GTC on the back of a paid invoice ...)
- Before the agreement
- Strict conditions for applicability.

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Answer poll 1



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And international law?

- Vienna Sales Convention (CISG)
- European Directive
- Battle of forms ?

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Procedures

Poll 2:

The Dutch flower bulb company has a dispute with the French company. Where do you think the court fees are lowest, the Netherlands or France?

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Procedures - Netherlands

- Subpoena procedure (dagvaardingsprocedure)
 - Control via Terms & conditions
 - Court fees vary (€ 124 – € 5.584)
- Seizure (beslag)
 - Partially control via terms & conditions
 - Court fees € 656,00
- Bankruptcy procedure (faillissementsaanvraag)
 - No control via Terms & conditions
 - Court fees 656,00



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Procedures - Netherlands

- Compensation of procedural costs
 - Actual compensation for bailiff and court fees
 - Fixed fee for lawyer costs (depending on the amount of the claim)

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Procedures - France

- Order of payment (*injonction de payer*)
- Fast track procedure (*Référé provision*)
- Proceedings on the merits (*Procédure au fond*)
- Summons for bankruptcy proceedings (*Assignment en redressement/liquidation judiciaire*)



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Procedures – France

- Compensation of procedural costs
 - Article 700 : It is an article that allows the judge to decide freely how much money the losing party should pay to the winning one. It is often used to punish those who start a procedure without trying to solve the problem out of court. For really disputed cases it is often symbolic. Made to compensate lawyers fee (usually between 1500 and 2500 €)
 - *Dépens* : These are the costs paid to the court. In France it is almost free to start a judicial procedure (costs vary between 30 and 80 € depending on the procedure and the court)

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Procedures - comparison

Netherlands

- Oral or in writing
- Administrative procedure
- Lawyers and parties are heard
- Much higher court fees



France

- Oral procedure
- Court hearing for every step
- Only the lawyers are heard by the court (not the parties)
- Almost no court fees



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Answer poll 2

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Insolvency

Poll 3:

You have unpaid invoices. After 3 months you find out that the person to whom you have delivered is declared bankrupt. Are you still in time to lodge your claim?

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Insolvencies - Netherlands

- Types of insolvencies
 - Bankruptcy
 - WSNP
 - Surseance van betaling
- Publication of bankruptcies
 - <https://insolventies.rechtspraak.nl/#/zoeken/index>
- Lodge the claim
 - Terms



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Insolvency – creditors

- Boedelschuldeisers – estate creditors
- Receivables after bankruptcy
- Preferente schuldeisers - preferred creditors
- Statutory rules of priority (bankruptcy petition, salary, tax authorities)
- Concurrente schuldeisers – competitive creditors
- Bank, suppliers of goods/services, prepaid funds

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Insolvency - Netherlands

- What if my supplier or customer goes (almost) bankrupt?
 - Alternative supplier?
 - Financial consequences
- Contractual
 - Insolvency clause
 - Damage clause
 - Guarantees (bank, group, personal)
 - Collateral clause
 - Unbind and pick up?

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Insolvency – eigendomsvoorbehoud (Retention of title) Netherlands

- Retention of title
 - Owner till full payment – action in terms and conditions needed
 - Contractual agreement (in advance)
- General Terms and conditions
 - Applicable
 - Destructable
- Only for delivered goods
 - Limited
 - Extended

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Insolvency – recht van reclame

- Non-contractual
- 6 weeks after the deadline for payment or
- within 60 days of the transfer of ownership of the goods



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Insolvencies – France

- Type of insolvencies procedure
 - *Procédure de sauvegarde judiciaire* : company not in bankruptcy but wishes to prevent further debts.
 - *Procédure de redressement judiciaire* : company is in bankruptcy but wishes to set up a payment plan for creditors in order to survive (plans can last for up to 10 years, sometimes shorter if creditors accept to reduce their claim).
 - *Procédure de liquidation judiciaire* : company is bankrupt and will not continue its activity, everything is done to pay as much of the debt as possible before dissolving it.
- Publication of bankruptcy
 - <https://www.bodacc.fr/annonce/liste>

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Insolvencies – France

- What to do if my customer goes bankrupt ?
 - Publication of the bankruptcy on BODACC
 - The debtor is forbidden to pay any debt dating before the opening of the bankruptcy proceedings (Art L 622.7 French Commercial code)
 - Register the claim (2 months for a french to french company – 4 months for a company established outside France)



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Insolvency – Creditors

- Order of the creditors
 1. Creditors with a retention of title
 2. Creditors prior to the opening of the insolvency proceedings
 3. Creditor post opening of the insolvency proceedings

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Insolvency - Retention of title – *Clause de réserve de propriété*

- Why is a retention of title clause in the terms and conditions relevant
 - Debtor is forbidden to pay. However, retention of title can lead to a right of reclamation – *droit de revendication*
 - Clause needs to be agreed by the parties in writing at the latest during the delivery of the goods (L 624-16 French commercial code).
 - This clause can be in the Terms and conditions (Cass com, 2 november 2016; n°14-18898) and be sufficiently obvious (Cour d'appel de Caen, 12 septembre 1996, n°1996-056826)

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Insolvency – Retention of title – *Reserve de propriété*

- Terms of the action for retention of title
 - Creditor has 3 months to act from the publication in BODACC to the curator
 - Failure to meet the deadline: inopposability of the right of revendication to the insolvency proceedings (Cass. Com 15 décembre 2015, n°13-25566).
 - After the request is sent to the curator this one has 1 month delay to send his answer.
 - If no answer or refusal, creditor has 1 month to ask the judge to decide.

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Insolvencies - comparison

Netherlands

- Publication day after;
- Lodge claim, no specific terms;
- Rights
 - Retention of title
 - Recht van reclame
 - Contractual solutions
- Takes up to a couple of years

France

- The publication of the judgment takes place 15 days after on average (can be longer or shorter)
- Very strict delays :
 - 2 months registration of claim (extra 2 for foreign creditors).
 - 6 months to ask tribunal for an extension of 1 month (need to explain reasons why delay was missed).
- From 6 to 18 months (in the case of liquidation)

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Answer poll 3

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Questions?

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