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Major Revisions in Netherlands Law: Adoption of New Civil Code and Implementation of EC Directives

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In 1992, a number of major revisions of Netherlands law entered into force. As a Member State of the European Communities (EC), the Netherlands is required to implement a large number of EC directives into its national legislation. In addition, as of January 1, 1992, a major revision of the Dutch Civil Code became effective.[1] Below is a general overview of the main new developments in Netherlands law. With the exception of the Convention on the Law Applicable to Contractual Obligations, which is briefly discussed in part V.B. below, the revisions apply only to the continental European territory of the Kingdom of the Netherlands, thus excluding the overseas territories: the Netherlands Antilles and Aruba. This article does not address the numerous amendments and proposed amendments to Netherlands tax law, whether as a consequence of EC directives, tax treaties, or otherwise.

The revision of the Dutch Civil Code, which started in 1947,[2] has finally been concluded: on January 1, 1992, a new and wholly rewritten Civil Code entered

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1. Koninklijk Besluit [KB] (Royal Decree) (Feb. 20, 1990), *reprinted in Landelijke Contactcommmissie Jurisdisch PAO, in* BASISCURSUS NBW iii (W.Th. Braams et al. eds., 1990) [hereinafter Braams].

2. KB, *supra* note 1, at v-vi.

into force in the Netherlands.[3] In a number of fields the new Civil Code merely codifies existing law, based on the provisions of the old Civil Code as further developed by the courts. However, the new Civil Code also contains a number of important changes from existing law, especially in the areas of the laws of contracts and secured transactions. In this article, a selected number of these changes are briefly discussed.

In its continuing efforts to further the formation of a common market by the end of the year 1992, the EC has adopted a large number of directives that aim at the harmonization of specific areas of the laws of the EC Member States. Generally, directives contain a deadline for implementation in the national laws of the EC Member States. The areas of law covered by directives include: corporations, securities, banking supervision, the environment, and product liability. This article gives a brief overview of the most important new regulations and other developments in these areas of Dutch law.

In addition to the changes incorporated in the new Civil Code or required by EC directives, the Netherlands' Legislature has adopted (or is expected to adopt in the near future) a number of new laws, some of which are included in the discussion below. With respect to Dutch competition law, the Netherlands Government has announced that it will develop a new policy of active enforcement of the formerly dormant rules of Dutch competition law.

I. Corporations

Changes in applicable Dutch law mandate that each Dutch company and each owner of all the shares of a Dutch company, including foreign parent companies, take certain additional corporate action.

A. Wholly Owned Subsidiaries

A new law came into effect on March 16, 1992, requiring wholly owned Dutch companies to give notice of this fact to the Trade Register. Notice was to be given prior to July 1, 1992, if the share holding dated from before March 16, 1992. If the company only became wholly owned after the implementation of this new law, notice has to be given within one week.[4] The required notice is simply the registered name and address of the shareholder. Failure to give this notice constitutes an *economisch delict,* or economic crime, and may subject the company to fines and, at least theoretically, its director to imprisonment.[5]

3. For a full Staatsblad [Stb.] (Statute Book) citation of the Civil Code, including all amendments since May 31, 1893, see Cremers, *Burgerlijk Wetboek* [BW].

4. BW art. 2:91a; Handelsregisterwet, Stb. (1984) 353, *as amended,* art. 4(3); Wet Houdende Aanpassing Twaalfde Richtlijn van de Raad van de Europeese Gemeenschappen Inzake het Vennootschapsrecht, art. IV., Stb. (1991) 710.

5. Wet op de Economische Delicten [WED], Stb. (1950) 258, *as amended,* art. 1.

B. Parent-Subsidiary Transactions

The new law further requires that certain transactions between the sole shareholder and its subsidiary be properly documented. Transactions that are not evidenced by written documents may be declared null and void.[6]

C. Shareholders Resolutions

As of March 16, 1992, this new law also requires all Netherlands companies to keep written records of all shareholders resolutions. These written records must be kept available for inspection by shareholders at the main office of the company.[7]

D. Powers of Attorney

As discussed in more detail below (part V.E.), the new Civil Code includes a set of rules dealing specifically with powers of attorney. These new rules apply equally to powers of attorney granted by a corporation.

E. Annual Reports

As of March 16, 1992, all Netherlands corporations are required to disclose in their annual reports the names and locations of each foreign subsidiary, branch office, or other business location, as well as any locally used trade name or names that differ from those used in the Netherlands.[8]

II. Securities

A. New Act on the Supervision of Securities Transactions

New legislation has been adopted that will replace the regulations of, inter alia, the current Securities Trading Act *(Wet Effectenhandel)*.[9] This new legislation, the Act on the Supervision of Securities Transactions *(Wet Toezicht Effectenverkeer)*,[10] is expected to enter into force in 1992.[11] It is intended to clarify

6. BW arts. 2:137 and 2:247.

7. Wet van 19 December 1991, Houdende Aanpassing van de Wetgeving aan de Twaalfde Richtlijn Van de Raad van de Europeese Gemeenschappen Inzake het Vennootschapsrecht, Stb. (1991) 710; BW art. 2:120(4).

8. BW art. 2:392 (1)(h); Wet op de Economische Delicten art. 1. This requirement is an implementation of the 11th EC Directive, Concerning Disclosure Requirements in Respect of Branches Opened in a Member State by Certain Types of Companies Governed by the Law of Another State (Dec. 21, 1989), 1989 O.J. (L 395) 36.

9. Law of Oct. 30, 1985, Stb. (1985) 570.

10. Law of March 7, 1991, Stb. (1991) 141. A new Act on the Supervision of Investment Institutions (*Wet Toezicht Beleggingsinstellingen*), Law of June 26, 1990, Stb. (1990), 380, entered into force in October 1990.

11. At the time of writing of this article, the *Wet Toezicht Effectenverkeer* was expected to enter into force on June 15, 1992. Staatscourant No. 64 (Mar. 31, 1992).

certain provisions of the current securities regulations and close a number of loopholes. The law will not materially affect the general system of licensing and prospectus requirements; however, pursuant to the new law, more extensive information will need to be provided in a prospectus.[12]

B. Notice Requirements

1. *Public Companies*

Every investor holding or controlling 5 percent or more of the voting rights of a Dutch company[13] whose shares are listed on the Amsterdam Stock Exchange, or any other official stock exchange in the EC, is required to notify the Securities Board of the Netherlands (*Stichting Toezicht Effectenverkeer*), roughly the Dutch equivalent of the SEC in the United States, and the issuer. The issuer then has to make the information public.

Investors are required to make a notification if their voting rights or equity interests, or both, reach, fall below, or exceed 5, 10, 25, 50, or 66 ⅔ percent. This new requirement entered into force on February 1, 1992, (the effective date) and applies equally to Dutch and foreign shareholders.[14] Investors meeting or exceeding the 5 percent threshold before the effective date were to provide such notice within thirty days of the effective date. Now investors have to give notice immediately after the event that triggers the notice requirement.

Noncompliance is an economic crime, and may be punished with fines of up to Dfl. 25,000 (approximately $12,500) for individual persons or Dfl. 100,000 (approximately $50,000) for legal entities, plus a maximum imprisonment of two years.[15] Furthermore, a Dutch court may take certain additional measures, such as temporarily prohibiting the exercise of the voting rights of the noncomplying investor, if the issuer or the investors who, in the aggregate, hold at least 5 percent of the voting rights of the issuer so request.[16]

Banks and securities firms are exempted from this requirement if they hold or otherwise control the relevant shares for trading purposes only, without the intention of exercising their voting rights.[17]

12. Kamerstuk No. 21 038 (legislative history); M.R. Mok, TVVS 155-56 (1990); E. de Wind, De NV 91-98, 96 (1991).

13. This law is applicable to Dutch companies only; foreign companies, including Netherlands Antilles and Aruba companies, appear to be excluded. However, the amended Rules Relating to Securities (*Fondsenreglement*) of the Amsterdam Stock Exchange requires foreign companies listed in Amsterdam to give notice of such equity interest, to the extent the company has knowledge thereof.

14. Wet Melding Zeggenschap in ter Beurze Genoteerde Vennootschappen, Stb. [Wet Melding] (1991) 748. This new law is an implementation of an EC Directive dated December 12, 1988 that should have been implemented by national legislation prior to January 1, 1991. 1988 O.J. (L 348) 62.

15. WED, *supra* note 5, art. 1; Wet Melding, *supra* note 14, art. 18.

16. Wet Melding, *supra* note 14, art. 13.

17. *Id.* art. 7.

2. *Private Companies*

See part I.A., above, for a description of registration requirements for owners of wholly owned Dutch companies.

C. Antitakeover Devices[18]

The proposed thirteenth EC Directive would require legislation curtailing the use of many current antitakeover devices. Whether the thirteenth EC Directive will be adopted in its current form and by what date it will be adopted is unclear. Before its enactment and implementation, a modest restraint on antitakeover devices may result from discussions between the Amsterdam Stock Exchange, the Association of Securities Issuers (*Vereniging van Effectenuitgevende Ondernemingen*), and the Ministry of Finance.[19] It is proposed, inter alia, that the Rules Relating to Securities (*Fondsenreglement*) of the Amsterdam Stock Exchange will be amended to limit the use of one specific takeover defense widely used by Dutch public companies. Certain other highly effective antitakeover devices that are generally applied by Dutch companies would remain unaffected by the amendment.

Currently, a potential target company can issue preferred shares to a *stichting* (roughly similar to a trust) friendly to management. The amendment of the *Fondsenreglement* would include provisions that the number of preferred shares issued may not exceed the number of ordinary shares outstanding. Two years after issuance of the preferred shares, the issuer would be under the obligation either to redeem the preferred shares or to obtain shareholder approval not to make the redemption.

Additionally, the amendment would provide that if the number of preferred shares issued exceeds 50 percent of the number of ordinary shares outstanding, then the preferred shares may be issued to an independent trust only, and not to one controlled by the management of the issuer. If the number of preferred shares issued is less than 50 percent of the ordinary shares outstanding, issuance may be made to a partly independent trust. The terms "independent" and "partly independent" would be defined with reference to the number and voting powers of representatives of management in the trust.[20]

D. Dutch Finance Companies

The Netherlands Central Bank has announced a new policy towards certain aspects of lending in the international financial markets through Dutch finance companies. See part VI.A., below.

18. P. Roos, *Wijzigingen Vennootschapsrecht in Werking getreden*, Het Financieele Dagblad, Jan. 7, 1992.

19. *See Beurs Akkoord met VEUO over Regels Bescherming, in* Het Financieele Dagblad, Apr. 25, 1992, at 1, 3.

20. *Id.*

III. Secured Transactions

A. Mortgages[21]

In the new Civil Code, the law applicable to mortgages has been modernized to address certain practical and theoretical problems. However, the new law has been criticized for leaving a variety of uncertainties and loopholes.[22]

1. *Foreclosure Rights*

Pursuant to the new law, each mortgage holder may foreclose on the collateral in the event of a default by the debtor.[23] However, junior parties may be forced to relinquish this right in favor of higher ranked secured parties.

Prior to foreclosure, a secured party must notify each senior secured party of its intention to foreclose. A senior secured party has fourteen days after receipt of such notice to claim its priority right to foreclose. In the event that a senior secured party claims such priority right, but unduly delays foreclosure, the president of the district court can set a deadline after which the junior secured party may foreclose. The new law permits public and private sales of collateral. However, the terms of a private sale must be approved in advance by the president of the district court.

The new law permits more complete mortgage deeds, including provisions that all movable property closely related to the real estate, such as spare parts and tools, will be subject to a nonpossessory pledge, which may be foreclosed together with the real estate. This change could be particularly helpful in aircraft financing transactions, where the mortgage and foreclosure rights can cover the aircraft and its spare parts.[24] Unfortunately, since the provision of the new law refers to real estate, which would technically not include aircraft, the application of the provision to aircraft is unclear.

2. *Line of Credit Secured by a Mortgage*

The new law specifically permits the granting of a mortgage as security for a line of credit and recognizes that such mortgage will remain outstanding as long as the line of credit is outstanding. Under the previous law, it was uncertain whether a mortgage could be granted as security for a line of credit.

B. The Old Regime: Fiduciary Transfer[25]

A common form of security interest under the previous law was the fiduciary transfer of ownership, particularly for granting security interests in machinery

21. BW arts. 3:227, 3:260; A.A. van Velten, *Hypotheek, in* Braams, *supra* note 1, at 289.
22. *Id.* at 290.
23. BW art. 3:268.
24. A.A. Van Velten, *Hypotheek, in* Braams, *supra* note 1, at 296.
25. BW art. 3:84.

and inventory, as well as receivables and shares. The new Civil Code does not permit fiduciary transfers of title. Commentators fear that the prohibition of fiduciary transfers of title may affect the validity of sale and leaseback arrangements, factoring agreements, and certain securitization of assets structures.[26]

Existing security interests in movable property, in the form of a fiduciary transfer, were transformed on January 1, 1992, by operation of law into nonpossessory pledges.[27] Existing security interests in real estate arising under fiduciary transfers of title became regular title to such real estate. However, Dutch courts may not always respect such a transfer of title if it results in the unjust enrichment of the secured party.[28]

To protect fully against the claims of other creditors and the bankruptcy of the debtor, it would be prudent to enter each nonpossessory pledge in the pledge register as soon as possible, though it is not technically required for nonpossessory pledges created by operation of law. Without such registration it is not clear how a secured party can prove the date of the pledge and, hence, its priority over subsequent security interests. As a rule, registration is a requirement for the validity of security interests in the form of a nonpossessory pledge created after January 1, 1992 (see subpart D, below).

Prior to the new Civil Code, a Court of Appeals of the Netherlands (*Hof*) held that a security interest created under the laws of the State of Georgia in the United States, regarding collateral in the Netherlands, should be treated as a fiduciary transfer.[29] It was generally assumed that an analogous interpretation applied for security interests under New York law and the laws of other states in the United States. With the introduction of the new Civil Code, the treatment that the Netherlands courts will give to security interests in collateral created under U.S. laws is unclear. Most likely, security interests vested in movable property (not real estate) will be treated analogously to a nonpossessory pledge.

C. Pledges[30]

Applicable Dutch law permits the creation of possessory pledges of movables, securities, bonds and other financial instruments, receivables, and intangibles such as patents.[31] The new Civil Code explicitly permits collateral to be pledged more than once, thus creating junior interests. Such multiple pledging of collateral was uncertain under the previous law. How the Dutch courts will interpret

26. *See* M.A. Goudswaard, *NBW Brengt Banken Aangepast Regime voor Zekerheden*, Het Financieele Dagblad, Dec. 27, 1990; *see also* below, part IV.

27. Overgangswet Nieuw Burgerlijk Wetboek art. 86.

28. W.M. Kleijn, *Zakelijke Zekerheidscrechten, in* Totstandkoming en Waarde van Zekerheidsrechten naar NBW, Kluwer Juridische Opleidingen, Utrecht, Seminar Jan. 24, 1992.

29. Judgment of Apr. 28, 1978, NJ (1978) 16 (Hof 1978).

30. BW arts. 3:227, 3:236; F.H.J. Mijnssen, *Voorrechten, Stil Pandrecht en Nieuw Beslagrecht, in* Braams, *supra* note 1, at 275.

31. BW art. 3:236.

some of these new provisions is unclear. However, the secured party can protect its interests by including a number of specific clauses in the pledge agreement that clearly describe the purposes and intentions of the pledge.

The interests of secured parties have recently been affected by changes in the rules governing the priorities of tax authorities. These changes may be particularly significant in bankruptcy or work-out situations involving the pledgor of the collateral. For instance, in case of bankruptcy the tax authorities have an automatic priority over pledges with respect to collateral located on the property of the debtor. Depending on the circumstances, if the pledgee has removed its collateral from the debtor's property prior to the bankruptcy, the priority of the tax authorities does not extend to such collateral.[32]

D. Nonpossessory Pledges[33]

The new Civil Code introduced the nonpossessory pledge as an alternative for the now prohibited fiduciary transfer. The object of the nonpossessory pledge may be movables, securities, bonds and other financial instruments, receivables, or intangibles. The new Civil Code does not permit the creation of such a pledge on real estate.

A nonpossessory pledge must be registered to be valid, unless the pledge agreement is made in notarial form and executed by a civil law notary. The nonpossessory pledge is effective as of the date of registration or execution of the deed by the civil law notary, as the case may be. Registration of a pledge agreement is an inexpensive, but cumbersome, administrative procedure. Execution by a civil law notary in notarial form may be much more expensive.

A pledgor may also pledge collateral, title to which it will only obtain on a later date. Such an anticipatory pledge becomes effective only as of the date that the pledgor obtains title to the collateral, but the pledge agreement or deed may be registered and executed prior to such date. However, if the pledgor is declared bankrupt prior to such date, the pledge will not become valid.

IV. Structured Finance

A. Factoring

It is uncertain under the new Civil Code whether a factoring transaction, in which receivables are transferred to a specialized financial institution (often a bank) that administers and collects such receivables, qualifies as a true sale. Arguably, the transaction should be viewed as a power of attorney to the insti-

32. *See* Wet op de Invordering van 's Rijks Directe Belastingen, Stb. (1990) 221, *as amended*, arts. 21, 22; T.J. Dorhout-Mees, Nederlands Handels en Faillissementsrecht 92-93 (8th ed. 1988).

33. BW art. 3:237.

tution for the collection of the receivables. Therefore, regardless of the wording in the sales agreement, no true sale would actually occur.

If title is truly transferred to the institution, arguably, such transfer was made solely to provide the institution with security for advances to the seller. This would constitute a fiduciary transfer and would thereby be invalid as a consequence of the new Civil Code (see part III.B., above). Commentators believe that these issues will have to be answered by the courts.[34] In the meantime, factoring transactions should be structured by taking a nonpossessory pledge in the receivables.

B. Securitization of Assets[35]

The uncertainties noted above also apply to the securitization of receivables. However, in this instance taking a nonpossessory pledge may not provide a satisfactory alternative. There remains uncertainty over whether a nonpossessory pledge could qualify as a true sale for accounting purposes and, consequently, whether the receivables can be financed off balance sheet. Moreover, the nonpossessory pledge of future receivables may be invalid in the event of a bankruptcy by the pledgor prior to such receivables becoming due and payable.

Under certain circumstances, it may be possible to structure the transaction under foreign law, for instance, Netherlands Antilles law. This may be an attractive alternative since many of the reasons to select the Netherlands as the jurisdiction of the issuer of asset-backed securities apply equally to the Netherlands Antilles. The Netherlands Antilles has very low corporate taxes, does not levy withholding taxes on interest payments to foreign parties, and securities regulation hardly exists. However, the tax treaty network of the Netherlands Antilles is not as extensive as that of the Netherlands.

C. Sale and Leaseback Transactions

Sale and leaseback transactions may not be enforceable under the new Civil Code (see part III.B., above). Again, the alternative commonly suggested is the nonpossessory pledge.[36] Further analysis would be required to determine whether a nonpossessory pledge structure can accomplish the same tax and accounting efficiencies provided in a sale and leaseback structure.

Sale and leaseback transactions concluded prior to January 1, 1992, should, pursuant to the new Civil Code, either be viewed as granting full ownership to

34. M.A. Goudswaard, *supra* note 26.

35. Securitization of assets is still a relatively unknown phenomenon in the Netherlands. To the knowledge of the authors, at the moment of writing of this article there are no publications that specifically discuss consequences of the introduction of the new Civil Code for securitization of assets transactions in the Netherlands. On securitization of assets in Europe generally, see P. Rivett & P. Speak, The Financial Jungle—A Guide to Financial Instruments 204 (2d ed. 1991).

36. M.A. Goudswaard, *supra* note 26.

the lessor, or (if the sale and leaseback is seen as a fiduciary transfer under the former law) as creating a nonpossessory pledge held by the lessor. In the latter case, it may be prudent to register the documentation to increase protection against other creditors and to limit the bankruptcy risk.[37]

V. Contracts

A. Assignment of Receivables[38]

The new Civil Code contains provisions that will make a variety of transactions involving receivables more costly and less commercially attractive. The old Civil Code permitted a valid assignment of receivables without notice to the account debtor under the receivables. As a result of certain provisions in the new Civil Code, the transfer of a receivable, including a future receivable, only becomes effective upon, inter alia, the delivery of notice to the debtor under the receivable. Notice may be given prior to, simultaneously with, or subsequent to the execution of the applicable assignment agreement. An exception applies in circumstances in which the debtor under the receivables is unknown at the time of execution of the assignment agreement (for instance, in the case of receivables that arise based on liability for a wrongful act by an unknown third party). However, under these circumstances, notice to the debtor must be given as soon as its identity becomes known to the parties to the assignment agreement.

B. Choice of Law

The EC Convention on the Law Applicable to Contractual Obligations,[39] (Convention) entered into force in the Kingdom of the Netherlands (that is, the Netherlands as well as its overseas territories, the Netherlands Antilles and Aruba) on September 1, 1991. In principle, the Convention permits parties the complete freedom to choose the law applicable to their contract. Furthermore, if a contract does not have a choice of law clause, the Convention determines which law should apply. Nonetheless, this freedom of choice may be limited by Dutch courts to international contracts (that is, contracts involving more than one jurisdiction).[40] Finally, Dutch courts may apply Dutch law regardless of the law contractually agreed upon in matters of "public order" (*ordre public*).[41]

37. On the registration requirement, see *supra* part III.D.

38. *See* J. Hijma & M.M. Olthof, Compendium van het Nederlands Vermogensrecht ¶¶ 129, 130, 141 (4th ed. 1990).

39. Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1; Council, Council communication, 1991 O.J. (C 294) 1.

40. *See* Judgment of May 13, 1966, NJ (1967) 3 (HR 1966) (Supreme Court); 1966 Schip en Schade 50 (review); 50 Ned. Tydschr. Int'l Recht 82 (1968) (review); 56 Revue Critique de Droit International Privé 522 (1967); 96 Journal du Droit International [J. du Droit Int'l] 1010 (1969); 105 J. du Droit Int'l 340 (1978).

41. *See* J.G. Sauveplanne, Elementair Internationaal Privaatrecht 95-97 (9th ed. 1989); L. Strikwerda, Inleiding tot het Nederlandse Internationaal Privaatrecht 164-67 (2d ed. 1990).

C. Sale of Goods[42]

The new Civil Code contains provisions applicable to contracts relating to the purchase and sale of goods.[43] As a result of these new provisions, a sales offer can be accepted and become binding in the absence of an agreement on price; the buyer is then held to pay a reasonable price. The new Civil Code does not define the term "reasonable price" but refers to general market conditions.

The new Civil Code distinguishes sales contracts between professional parties and sales contracts between a seller acting in a professional capacity and a buyer acting in a nonprofessional capacity (Consumer Sales Contract).[44] Applicability of the special protective provisions to Consumer Sales Contracts cannot be contractually excluded.[45] These provisions protect the consumer against the risk of loss of the purchased goods before delivery, unexpected additions to the purchase price, such as delivery costs and administrative costs, and costs of repair of defective goods. In addition, these provisions permit the buyer to invoke against the seller any public statements made by a manufacturer or importer with respect to the quality and features of the goods.

D. Standard Conditions[46]

The new Civil Code also contains specific provisions with respect to standard conditions.[47] By their terms, these provisions apply to contracts between professionals and consumers, as well as to contracts solely between professionals. As of January 1, 1992, all newly drafted standard conditions are required to comply with these provisions. Existing standard conditions must be modified to meet these provisions by January 1, 1993.

The new provisions permit the courts to annul specific clauses in the standard conditions if it finds that such clauses are unreasonably prejudicial to a party to the contract. Annulment of a clause of the standard conditions does not automatically invalidate the remaining provisions.

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42. *See* M. van Delft-Baas, *Koop, in* Braams, *supra* note 1, at 129; G.J. Rijken, *Overeenkomst en Algemene Voorwaarden, in* Compact Cursus Nieuw BW (Hartkamp et al. eds., 1991); W.M W. M. Kleijn, *Koop en Verkoop, in* Compact Cursus Nieuw BW, (Hartkamp et al. eds., 1991); Hijma & Olthof, *supra* note 38, ¶¶ 535-553; A.S. Hartkamp, Compendium van het Vermogensrecht Volgens het Nieuwe Burgerlijk Wetboek ¶¶ 366a-366g, 395-406 (1990).

43. These provisions are inspired in part by the Vienna Convention on the International Sale of Goods and its predecessors. The Netherlands intends to ratify the Vienna Convention in due course. On the convention, see generally John Honnold, Uniform Law for International Sales Under the 1980 United Nations Convention (1987); John Honnold, Documentary History of the Uniform Law for International Sales (1989).

44. BW art. 7:5.

45. BW art. 7:6.

46. *See generally* Rijken, *supra* note 42; Hijma & Olthof, *supra* note 38, ¶¶ 483-489.

47. Standard conditions are defined as written contractual provisions that have been drafted for use in a number of agreements, with the exception of provisions that describe the essence of specific contractual obligations. BW art. 6:231.

Stricter rules apply in the area of Consumer Sales Contracts. Certain standard conditions are blacklisted: the Civil Code provides that they are unreasonably prejudicial per se.[48] In addition to the black list, the Civil Code lists a number of standard conditions to a Consumer Sales Contract that are presumed to be unreasonably prejudicial: the gray list.[49] Unless it can be proven that these provisions are not unreasonably prejudicial, they may be annulled.

It has been suggested that courts may also apply the stricter provisions relating to Consumer Sales Contracts to contracts between two professional parties, where the ordinary course of business of one party has no or little relation to the contract involved. Arguably, in these circumstances such a party should not be considered more sophisticated than a consumer.[50]

Finally, the EC is expected to adopt a directive on standard conditions. Once adopted, this directive may require further amendments to Dutch law in this respect.

E. Powers of Attorney[51]

Under Netherlands law, a power of attorney may be given by a simple written or oral statement to the attorney-in-fact.[52] For a number of specific purposes, a certain written form may be required and the power of attorney may have to be notarized or legalized. In international transactions, such legalization may be subject to the provisions of the Apostille Treaty.[53]

Previously, Netherlands law did not contain specific provisions regarding powers of attorney, which used to be governed by general rules of contract law and case law. The new Civil Code provides that, as a rule, and unless specifically provided otherwise in the power of attorney, the following applies: (1) the attorney-in-fact does not have the power of substitution; (2) a power of attorney granted to two or more persons authorizes each of the attorneys severally to act on behalf of the principal; and (3) the attorney-in-fact may only act as the counterparty of the principal in certain transactions, if the power of attorney is sufficiently specific and if no conflict of interest can exist.

In a transaction with a third party entered into by an attorney-in-fact on behalf of a principal, the attorney-in-fact is liable to the third party for any defect in, incompleteness of, or invalidity of, the power of attorney, by which the alleged

48. The black list includes, for instance, provisions that authorize the seller to increase the price after the purchase contract has been concluded, and provisions regarding automatic renewal of contracts for a period of more than one year. BW art. 6:236.

49. The gray list includes, for instance, provisions relating to limitation of liabilities of the seller with respect to goods sold to a consumer. BW art. 6:237.

50. Rijken, *supra* note 42, at 11.

51. *See generally* Hijma & Olthof, *supra* note 38, ¶¶ 71-85.

52. BW art. 3:61.

53. Convention (with Annex) Abolishing the Requirements of Legalization for Foreign Public Documents, Oct. 5, 1961, T.I.A.S. No. 10,072, 527 U.N.T.S. 189.

principal appointed the attorney-in-fact. Acting as attorney-in-fact implies that the attorney-in-fact warrants towards the third party that he does not exceed his power of attorney. An irrevocable power of attorney can only be given for a specific and clearly described act or set of related acts.

VI. Banking Supervision

A. Dutch Finance Companies

On September 27, 1991, the Netherlands Central Bank (*De Nederlandsche Bank N.V.*, hereinafter the Central Bank), announced a new policy towards Dutch finance companies (DFCs).[54] DFCs are mostly used as a conduit for fund-raising by U.S., Japanese, and European multinational companies in the international financial markets.

The Central Bank has noted a recent trend towards diversification of the activities of DFCs, including raising funds for purposes other than the financing of their parent company's enterprise, such as lending to third parties and portfolio investment. DFCs see a need for this diversification in order to remain a credible market party and to be able to operate in a cost-effective manner. However, the diversification of activities arguably could bring DFCs within the scope of the Central Bank's supervision of banks and other credit institutions. DFCs would then be required to comply with the requirements of the Act on the Supervision of the Credit System (*Wet Toezicht Kredietwezen*).[55] The Central Bank would have the power to declare transactions entered into by the DFCs null and void if the DFCs failed to meet these requirements.

The Central Bank has now issued a *circulaire* that clearly marks the boundaries within which a DFC is free to operate without subjecting itself to Central Bank supervision. The main provisions of the Central Bank's new policy can be outlined as follows:

(1) DFCs may raise short-, medium-, or long-term funds, both from the public and from professional investors, provided at least 95 percent of the proceeds from such loans are used for funding of the enterprise of which the DFC is a subsidiary or affiliate.

(2) DFCs may use the proceeds of short-, medium-, or long-term funds for loans to unrelated professional market parties or for investments in securities that are quoted on recognized stock exchanges in the European Communities, the United States, Canada, Switzerland, Japan, and certain other sufficiently

54. Circulaire, De Nederlandsche Bank, Sept. 27, 1991; W. Buys, *Green Light for Holland's Finance Companies*, Int'l Fin. L. Rev., Nov. 1991, at 8.

55. Wet Toezicht Kredietwezen, Stb. (1978) 255, *as amended*. On Sept. 27, 1991, the Dutch Government announced proposals for a complete revision of the *Wet Toezicht Kredietwezen* in order to implement EC Directives. The revised *Wet Toezicht Kredietwezen* would enter into force on Jan. 1, 1993. Staatscourant No. 189 (Sept. 30, 1991).

regulated stock exchanges. To the extent DFCs issue bearer notes, certain prescribed selling restrictions should be printed on the face of the notes. The latter requirement does not apply to bearer notes with a denomination of Dfl. 1 million (approximately $500,000) or more.

(3) DFCs are required to obtain a guarantee or "keep-well" agreement from its creditworthy parent company covering its obligations.

(4) DFCs may only raise funds from the public on the condition that, pursuant to the terms of the loan, the minimum initial investment of individual lenders is at least Dfl. 100,000 (approximately $50,000).

B. EC Directive on Supervision by Central Banks

On December 16, 1991, the Council of Ministers of the EC agreed on a proposal for a directive requiring an amendment of regulations on banking supervision by the central banks of the Member States.[56] This directive is a consequence of the anticipated opening of the EC-wide common market for banking services on January 1, 1993.[57] In this common market, banks located in one Member State will be permitted to operate in all EC Member States. As of the same date, supervision by central banks will no longer be limited to the specific institution, but will cover the entire group of financial institutions to which a specific financial institution belongs. Supervision will, inter alia, focus on solvency and debt-equity ratios of the entire financial group.

VII. Competition Law

A. EC Competition Law

Rules of EC competition law are directly applicable in the Netherlands and, in case of a conflict, prevail over national laws.[58] A discussion of recent developments in EC competition law falls outside the scope of this article.

B. National Competition Law

National rules of competition law are based on the 1956 Act on Economic Competition (*Wet Economische Mededinging*, hereinafter the Act).[59] Enforcement of the Act is entrusted with the Dutch Ministry of Economic Affairs

56. Commission, Amended proposal for a Council Directive relating to the supervision of credit institutions on a consolidated basis, 1991 O.J. (C 332) 6.

57. The opening of the EC-wide common market for banking services would require an amendment of the Dutch Act on the Supervision of the Credit System (*Wet Toezicht Kredietwezen*). *See supra* note 55.

58. *See* the Costa-ENEL jurisprudence of the European Court of Justice, *in* J.G. Brouwer, Verdragsrecht in Nederland, Tjeenk Willink (1992); Grw. Ned. (Constitution of the Kingdom of the Netherlands) art. 94.

59. Wet Economische Mededinging, Stb. (1958) 413, *as amended.*

(MEA), with the assistance of the Economic Competition Committee. The Act regulates both restrictive practices and abuse of a dominant position. In contrast to EC law, restrictive practices and abuse of a dominant position are not condemned outright. Certain practices are prohibited only where competent authorities have taken formal measures. The test applied by the authorities before taking any measures is whether the practice is detrimental to the public interest.

Although the Act has been in force for more than thirty years, the MEA has rarely exercised its powers pursuant to the Act. However, the MEA recently announced that it intends to change to a less permissive policy and to enforce the Act more vigorously. On October 31, 1991, the MEA announced that six civil engineering contractors paid a total of Dfl. 2.2 million (approximately $1.1 million) in penalties for offenses under the Act in an out-of-court settlement with the Arnhem district attorney.[60] This case is generally seen as a first move by the MEA to intensify control on compliance with fair competition rules.

VIII. Product Liability[61]

A. Product Liability

The new Civil Code incorporates an EC Directive of July 25, 1985, regarding product liability.[62] The new section applies only to damage resulting from death or personal injury and damage exceeding 500 ECU (roughly $650) to any item of property that is ordinarily intended, and in fact is used, as a consumer product.[63]

The new section imposes strict liability on the manufacturer of a defective product.[64] The term "producer" is defined broadly to include the manufacturer or producer of the finished product, raw material or a component part, as well as the party importing the product into the EC in the course of its business. Liability can also be extended to the supplier of the product if the producer remains unknown. Products include all movable goods (with the exception of agricultural products and game), even when incorporated into another movable or immovable good. A product is defective when it does not provide the safety that a person is

60. *See Contractors penalized for cartel agreements, in* Het Financieele Dagblad, Nov. 1, 1991.

61. *See* Hijma & Olthof, *supra* note 38, ¶¶ 433a, 436a-d; K.W. Brevet, *Product Liability, in* Dutch Business Law (Steven R. Schuit et al. eds.) (Dec. 1991).

62. BW arts. 6:185-:193. The contents of this Directive was also part of the old Civil Code as of November 1, 1990.

63. The new section applies to products put into circulation after November 1, 1990 only. Damage caused by a defective product to nonconsumer property, or caused by products put into circulation before November 1, 1990, as well as claims against a distributor who is not himself the producer of the product, have to be addressed through general tort law (*see infra* part VIII.B.). In addition, the new section does not affect any rights that an injured person may have according to the rules of law existing on July 30, 1985. *See* Brevet, *supra* note 61, at 22-25.

64. Under the old Civil Code the producer could always prove that there was no unlawful act or fault on its part.

entitled to expect, taking into account all circumstances, including the presentation of the product, the use to which the product could reasonably be expected to be put, and the time when the product was put into circulation. The injured person must prove the damage, the defect, and the causal relationship between the two. The producer may then escape liability only by raising one or more of a limited number of defenses. For example, a producer will not be liable if it can prove that the state of scientific and technical knowledge at the time it put the product into circulation was inadequate to enable the discovery of the defect. Contractual limitations or exclusions of liability are invalid.

B. TORT

In the situations mentioned above, where the special provisions do not find application, liability of the producer has to be based on the general tort provisions in the new Civil Code.[65] The new Civil Code defines a tort as a wrongful act, which can be attributed to a person or legal entity. A wrongful act is: (1) a violation of the rights of others; (2) a breach of a statutory duty; or (3) an act or omission contrary to the standard of care owed in society. A wrongful act is attributable to a person or legal entity if it is caused by its fault, or by an event that as a matter of law, or according to prevailing standards in society, should be attributed to it.

The tort law of the new Civil Code does not constitute a material change from the old Civil Code. The new Civil Code does contain a novelty concerning damage caused by a movable object, if such object is known to present a special danger for persons or property. If damage is caused, the possessor of the object is strictly liable for the resulting damage, unless the manufacturer can be held liable under general product liability provisions.[66]

IX. The Environment[67]

Liability for environmental damage can arise under several Dutch statutes, including general tort law. Three recent developments in Dutch environmental law warrant attention. First, a bill regarding strict liability for hazardous substances has been submitted for adoption by the Dutch parliament (Hazardous Substances Bill). Second, the EC has proposed a directive on civil liability for damage caused by waste products (Directive on Waste Damage), which may be

65. BW art. 6:162 provides that the party who commits a wrongful act against another that can be attributed to it, has a duty to repair the resulting damage.

66. BW art. 6:173.

67. *See* MILIEURECHT (Brussard et al. eds., 2d ed. 1991); N. de Munnik, *Practical Implications of Environmental Law in the European Community, the Netherlands*, presented to the ABA Section of Natural Resources and Environmental Law, Apr. 1991.

adopted in the near future.[68] Finally, an amendment to the Soil Protection Act (*Wet Bodembescherming*)[69] has been proposed (Soil Protection Bill).

A. The Hazardous Substances Bill

The Hazardous Substances Bill would amend the new Civil Code[70] and impose strict liability on: (1) the possessor (that is, not necessarily the owner) of substances that are known to be particularly dangerous to persons or property; (2) the operator of a dumping ground when air, water, or soil are polluted by dumped substances; and (3) the operator of a drilling facility if minerals pour out of the facility.[71]

The Hazardous Substances Bill would also impose strict liability on parties who transport dangerous substances by ship, train, or truck. An exception to this strict liability would apply if (1) the transporter was not (and was under no obligation to be) aware of the hazardous nature of the substances transported, or (2) the transporter was not involved in the loading or discharging of the substances. The Hazardous Substances Bill gives no clear definition of hazardous substances. However, substances that can explode, oxidize, or are inflammable are generally considered to be within its scope.[72]

B. The Directive on Waste Damage

The EC Directive on Waste Damage would impose strict liability on the producer of waste products that cause damage to individuals, property, and the environment. The liability would terminate upon the transfer of the waste to a licensed waste treatment, storage, or disposal facility. The proposed Directive on Waste Damage does not extend liability to require the cleanup of contamination caused prior to the directive's implementation.

C. The Soil Protection Bill

The present Soil Clean-Up Interim Act[73] permits the government to recover the costs of cleaning up soil contamination caused by unlawful acts from the

68. Commission, Proposal for a council directive on civil liability for damage caused by waste, 1989 O.J. (C 251) 3; Commission, Amended proposal for a council directive on civil liability for damage caused by waste, 1991 O.J. (C 192) 6.

69. Wet Bodembescherming, Stb. (1986) 374.

70. The Hazardous Substances Bill is intended to be inserted in the Civil Code as arts. 6:175-:177.

71. *See* W. Th. Braams, *Risico-aansprakelijkheid voor Milieuschade, in* Vereniging voor Milieurecht, 1991-93, ch. 1.

72. *See* N. de Munnik, *supra* note 67.

73. *Interimwet Bodemsanering,* Stb. (1982) 763.

polluter or, in the case of unjust enrichment, from the present owner or user.[74] The amendment will give the government an additional cause of action in the case of contamination that, at the time it occurred, did not violate any rule of law. The liability standard of the amendment would be close to strict liability.[75]

X. Conclusion

Recent revisions of Netherlands law require a review of existing transactions governed by Netherlands law or involving parties that are subject to Netherlands law for compatibility with the new Civil Code and other new laws. Similarly, the new laws should be considered for all future transactions governed by Netherlands law or involving parties that are subject to Netherlands law. Businesses that are located in the Netherlands, have subsidiaries, branches, or other operations in the Netherlands, or that are involved in transactions governed by Netherlands law, should carefully review the consequences of the revisions of Netherlands law.

74. Under the current act the State of the Netherlands has sued the multinational oil company, *Royal Dutch Shell*, for the costs of cleaning up a contaminated area, which are estimated at some Dfl. 110 million (approximately $55 million). HET FINANCIEELE DAGBLAD, Feb. 16, 1991.

75. *See* Kamerstuk 21156, no. 8 (legislative history).