

## Chapter 28

### The Netherlands

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#### § 28:1 Introduction to the legal system

The Dutch legal system is mainly based on codified law. The most important part of this legislation consists of formal law, which is enacted by the Government (ministers and the Queen) following parliamentary approbation.

These laws come under the competence of the national

courts. There are two separate types of jurisdiction: ordinary courts handle all civil and criminal cases, and in administrative judicial proceedings judges decide disputes between administrative bodies and natural and legal persons on matters of administrative law and regulations. These judicial decisions are important for the interpretation of statutory law, but the doctrine of precedent does not exist. No court is bound by a previous decision, even if pronounced by a higher court. In practice, however, the decisions of the Supreme Court (*Hoge Raad*) are usually followed.

The general judicial hierarchy consists of three different types of court, which deal with three instances. Proceedings at first instance are handled by the district courts (*Rechtbank*).

Second instance consists of appeals on points of fact and law. Appeals from district court judgments are decided by a court of appeal (*Gerechtshof*). Final appeals are before the Supreme Court (*Hoge Raad*), which reviews points of law and ensures compliance with essential formalities. In the Netherlands, no laymen participate in the proceedings. The number of judges varies from one (minor cases and preliminary relief proceedings) to five (Supreme Court).

In urgent civil cases the sometimes time-consuming first instance procedure can be avoided by using a quick, informal action, known as preliminary relief proceedings (*kort geding*). In very urgent cases it is even possible to obtain a judgment within one day and even without the other party being heard (comparable to the US *ex parte* applications). Such cases are handled by the president of a district court, who pronounces a preliminary decision. This judgment cannot prejudice any rights in later proceedings, which, in practice, hardly ever follow. Appeals against such a decision are to a court of appeal and subsequently to the Supreme Court.

The TRIPS-Agreement came into force on January 1, 1996. Article 50(6) of this Agreement requires that, once provisional measures have been instituted, proceedings leading to a decision on the merits of the case have to be initiated within a reasonable period. Otherwise the provisional measures shall, upon request by defendant, be revoked or otherwise cease to have effect. This provision has now been implemented into the article 1019i of Dutch Code of Civil Procedure.

### § 28:2 Trade secrets as defined by statute or case law

No definition of trade secrets or know-how can be found

in statutes in the Netherlands; there are almost no statutory provisions even dealing with this subject. Recently, however, courts have cautiously started to define, or at least describe, trade secrets. In a decision of July 16, 2009, the district court in Alkmaar described trade secrets as “data, knowledge and information the confidentiality of which is essential to the employer in relation to his or her competitive struggle.”<sup>1</sup> Similarly, the court of appeals in Arnhem confirmed a lower court’s definition that “trade secrets must relate to company-specific sensitive/confidential information, which will cause injury if it is (made) known outside the company.”<sup>2</sup> And although article 39 of the TRIPS-Agreement provides that members shall, under certain conditions, ensure effective protection of undisclosed information, the Netherlands government still has no plans to enact new and specific legislation in this field. However, in a decision of the court of appeal in The Hague of March 29, 2011, the court referred to a judgment of the European Court of Justice of December 14, 2000 in C-300/98 (Dior/Tuk) and C-392/98 (Assco c.s./Layher c.s.), in which the ECJ held that, if the subject of the dispute concerns an area to which the TRIPS-Agreement applies and which the EU did not specifically regulate, then Community law neither requires nor forbids that the legal order of a member state entitles private individuals to call upon the direct applicability of a—clear, precise and unconditional—provision of the TRIPS-Agreement. Thus, the court of appeal concluded that, whether article 39 of the TRIPS-Agreement is a “clear, precise and unconditional” provision or not which allows for direct applicability, the purpose of this provision may be considered as having been incorporated in article 6:162 of the Dutch CC.<sup>3</sup> This decision may be interpreted as saying that no new and specific legislation in this field is needed. Dutch Penal Code art. 273 makes it a criminal offense for a person to make known “specific information related to a commercial, industrial, or service organization in which he is or has been employed,”<sup>4</sup> usually referred to as the betrayal of trade secrets. Apart from contractual protection, under civil law the field of protection of trade secrets

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**[Section 28:2]**

<sup>1</sup>LJN: BJ278.

<sup>2</sup>March 29, 2010, LJN: BL6871.

<sup>3</sup>The Hague Court of Appeal, March 27, 2011: GBT/AJINOMOTO (LJN: BP9490).

<sup>4</sup>The Dutch Penal Code, Fred B. Rothman & Co., Littleton, CO USA, 1997.

and know-how is covered by the law of tort: anyone who commits an unlawful act (being the violation of a right, or an act or omission violating a statutory duty or a rule of unwritten law pertaining to duty of care owed by members of society to each other) toward another which can be attributed to him, must repair the damage which the other person suffers as a consequence thereof.<sup>5</sup> The abuse of know-how and trade secrets falls into the category of unfair competition, which is a branch of the law of tort. As long as article 39 TRIPS-Agreement has not been implemented, it is expected that in judging trade secret cases, courts will apply the principles of article 39 TRIPS-Agreement to assess whether there is a tort, just as the court of appeal recently did in the above-referenced decision.

The terms “know-how” and “trade secret” are usually used interchangeably. Although the word know-how is used more regularly than trade secret, the definition of know-how is also more controversial. There is some (albeit very little) case law, and recently a few courts have provided a definition, or at least description, of trade secret or know-how.<sup>6</sup> Only a few of the limited number of authors who have written on this subject have tried to distinguish between these two terms. But they do not even agree on whether know-how is limited to technical knowledge (generally non-patentable<sup>7</sup> technical knowledge, but in the broadest definition even including patented technical knowledge<sup>8</sup>) or whether it has to be secret or not; some talk of secret knowledge, some of exclusive knowledge and others of all knowledge and experience relating to an enterprise.<sup>9</sup> Idenburg opines<sup>10</sup> that know-how is a species of the genus trade secret. According to this theory, know-how refers to the secret knowledge which can be applied to the production and distribution of products or to the rendering of services by an enterprise and which leads to

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<sup>5</sup>art. 6:162 CC

<sup>6</sup>See cases referenced above.

<sup>7</sup>Van Nieuwenhoven Helbach, *Industriële eigendom* (2002), V.1.3; Verkade, *Ongeoorloofde mededinging* (1986), p. 175.

<sup>8</sup>Cohen Jehoram (ed.), *The Protection of know-how in 13 countries* (1972), p. 70.

<sup>9</sup>Idenburg, *Kennis van zaken* (diss., 1979), p. 19ff, 30–31 and 33ff and the literature mentioned there; Cohen Jehoram (ed.), *The Protection of know-how in 13 countries* (1972), pp. 69–71; Verkade, *Ongeoorloofde mededinging* (1986), p. 175.

<sup>10</sup>See Idenburg, who has written a dissertation on this subject, pp. 36–38.

a practical result; it can also be transferred. The other species of the genus trade secret consists of confidential information, and isolated facts about the enterprise not suitable for practical application nor for transfer, such as secrets about customer and supplier lists, the sale of products, and the pricing and financial information about the firm. Gielen<sup>11</sup> believes that this distinction is not useful and that one can better use the terminology of art 39 TRIPS-Agreement.

### § 28:3 Criminal law and the protection of trade secrets

As mentioned above in § 28:2, there is one article in the Criminal Code which treats the deliberate betrayal of trade secrets to any third person as an offense (art. 273). The maximum penalty for this offense is a six-month term of imprisonment or a fine of EUR 19,000—. Only the management of the undertaking, including a sole proprietor, can file a complaint to have the offender prosecuted.<sup>1</sup> This statute is interpreted to mean that the offender can be an employee of the firm, or, e.g., an independent contractor who became acquainted with facts about the undertaking while carrying out repairs.<sup>2</sup>

In 1935 the Supreme Court decided that any fact that the employer intends to be kept secret falls within the scope of art. 273 of the Criminal Code.<sup>3</sup> In this decision, the Supreme Court subscribed largely to the position defended by a number of legal writers that the protected facts need not be objectively secret, but may include facts that the employer does not wish to have talked about openly by his employees, even though the competitor could discover these facts by other means with a little more effort.<sup>4</sup> A more realistic theory is that the facts should be treated as secret if they are known only to one or a few

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<sup>11</sup>Bescherming van bedrijfsgeheimen (1999) p. 4 and 5.

#### [Section 28:3]

<sup>1</sup>art. 273(3).

<sup>2</sup>Noyon—Langemeijer—Rommelink, *Het Wetboek van Strafrecht* (loose-leaf, Gouda Quint 1988) art. 273, nr. 2–3, Cohen Jehoram (ed.), *The Protection of know-how in 13 countries* (1972), p. 72, Idenburg, *Kennis van zaken* (diss., 1979), p. 76.

<sup>3</sup>Supreme Court, January 14, 1935, *Nederlandse Jurisprudentie* (NJ) 1935, 430.

<sup>4</sup>Sannes, *Nederlands Juristenblad* (NJB) 1932, p. 559 ff. *See* Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), p. 139, Cohen Jehoram (ed.), *The Protection of*

persons and if it is intended that they be disclosed only by the undertaking itself.<sup>5</sup>

Although art. 273 speaks about obligations of secrecy, there are various opinions in the legal literature as to whether the employer has to take specific action in order to keep the facts secret, or whether the secrecy requirement can be derived from the circumstances.<sup>6</sup> The courts have not yet ruled on this question. There is hardly any case law (and no recent case law) on this article.

A competitor who induces an employee to betray a trade secret is also guilty of a criminal offense.<sup>7</sup>

Anyone who knows or reasonably should have known that he has (had) to keep something secret because of his office or occupation or of a previous office or occupation or any statutory provision, and who betrays this secret, is, according to art. 272 of the Penal Code, liable to imprisonment for a term not exceeding one year or to a fine not exceeding EUR 19,000.

Finally, it should be mentioned that in 1993, the Penal Code was amended by the addition of several provisions dealing with computer crime. In order to protect computer files containing confidential information against break-ins, the hacking (with the help of false signals, or a false key or code) of computers has been made a criminal offense, but only on the condition that the computer has been secured against such action: enterprises using computers are themselves responsible for providing a security barrier against hackers. The barrier need not be water-tight, but must be recognizable to unauthorized persons.<sup>8</sup>

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know-how in 13 countries (1972), pp. 72–73 and Idenburg, *Kennis van zaken* (diss., 1979), p. 75.

<sup>5</sup>Noyon—Langemeijer—Remmelink, *Het Wetboek van Strafrecht* (loose-leaf, Gouda Quint 1988) art. 273, nr. 4, Idenburg, *Kennis van zaken* (diss., 1979), p. 75.

<sup>6</sup>See Idenburg, *Kennis van zaken* (diss., 1979), p. 76 and Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), pp. 139–140 and the literature mentioned there.

<sup>7</sup>art. 47 Penal Code.

<sup>8</sup>Act of December 23, 1992, *Staatsblad* 1993, 33.

**§ 28:4 Civil law and the protection of trade secrets—Civil statutes**

Under civil law the simple use of trade secrets by third persons does not necessarily fall under the law of tort,<sup>1</sup> but is dependent on the way in which the secret information was obtained. Anyone who by way of his own proper investigations, for example by reverse engineering, finds out what his competitor wanted to keep secret, can freely use this knowledge. If this information, however, was not obtained in accordance with the standards of decency applicable in society towards competitors, e.g., by spying on or bribing employees, the party injured by the use of this information can recover damages and may also obtain an injunction against the further use of such information.<sup>2</sup> If a competitor uses information obtained from an employee who betrayed a trade secret and was found guilty under art. 273 of the Penal Code, the competitor may also be found liable for the harm suffered by the employer.<sup>3</sup>

If it can be proven that the defendant used trade secrets in an improper way, an injunction can be obtained against the further use of such secrets. Also, damages can be obtained. The courts are often very reluctant to rule that the production in question could only be realized by the application of the secret knowledge the employee was forbidden from using elsewhere.<sup>4</sup>

Since the introduction of a new Civil Code in the Netherlands on January 1, 1992, it has been possible to obtain damages on the ground of unjust enrichment.<sup>5</sup> This action can be combined with a general action in tort. A person who has been unjustly enriched at the expense of another must repair the damage suffered up to the amount of his enrichment. A causal relationship between the enrichment and the damage must exist and the enrichment must lack any reasonable ground. Thus far, the pro-

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**[Section 28:4]**

<sup>1</sup>art. 6:162 Civil Code.

<sup>2</sup>Court of Appeal Amsterdam, November 4, 1971, *Bijblad bij De Industriële Eigendom* 1973, p. 81.

<sup>3</sup>Supreme Court, January 31, 1919, NJ 1919, p. 161 (Lindenbaum/Cohen).

<sup>4</sup>Supreme Court, November 12, 1965, NJ 1966, 59; *id.* December 1, 1972, NJ 1973, 111. Otherwise: President Court Breda, April 11, 1986, Kort Geding (KG) 1986, 214; President Court's-Gravenhage, October 31, 1986, KG 1986, 514; Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), p. 147.

<sup>5</sup>art. 6:212 Civil Code.

vision in the CC on unjust enrichment has only once been applied in this area of law. In this case, in which the court ultimately did not find unjust enrichment, defendant started a new company after he had left the plaintiff's business. The plaintiff claimed that the defendant had taken over an important part of plaintiff's company without paying for it now that many of his employees had left as well and started working for defendant's company. But the court held that the starting of a new company, even if employees, customers or distributors of the former employer went to the new company, could not be regarded as the taking over of an independent division of another company but as lawful competition.<sup>6</sup>

### § 28:5 Civil law and the protection of trade secrets—Contract law

A special category of problems related to the unauthorized use of knowledge by competitors results from precontractual relationships which are broken off, but only after a significant amount of information was exchanged between the parties or received by only one of the parties. If the negotiations do not result in an agreement and either of the parties makes use of information acquired during the negotiations, this violates the duty of good faith that governs the special legal relationship between the parties involved in negotiations.<sup>1</sup> This means that a party who makes use of information that he should have realized was given to him in the course of confidential negotiations and for that purpose only, may be liable in tort for the resulting damage.<sup>2</sup>

And what about information that is received in the course of a joint venture, or any other type of cooperative undertaking, which is either terminated or terminated prematurely? In the first place, the contract on which the cooperation was based has to be examined. If this does not provide an answer, art. 6:162 of the Civil Code on the basis of the breach of trust has to be relied on.<sup>3</sup>

A nondisclosure clause should always be included in a

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<sup>6</sup>District Court Rotterdam, September 30, 2010, LJN: BN880.

#### [Section 28:5]

<sup>1</sup>Supreme Court, November 15, 1957, NJ 1958, 67; Idenburg, *Kennis van zaken* (diss., 1979), pp. 92–93. Court of Appeal, The Hague, January 8, 1998, BIE 1999, No. 23, p. 76 (O'Expert 2000).

<sup>2</sup>Verkade, *Ongeoorloofde mededinging* (1986), pp. 182–183.

<sup>3</sup>Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), pp. 147–148.

cooperation agreement and even in the case of negotiations it is advisable to enter into a preliminary agreement imposing a secrecy obligation on the parties. Such a nondisclosure clause may survive the rest of the agreement. It may not, however, remain valid for eternity but only for a fixed period of time after termination of the agreement. Also, in license agreements it is common to provide for nondisclosure, e.g., by limiting the circle of persons who may be given access to the knowledge and by the licensee's undertaking to handle the descriptions, drawings and other materials relating to the knowledge with the utmost discretion. This can be done by clauses incorporated into the license or by a specific nondisclosure contract. It is wise to add a nonuse obligation, since nondisclosure does not necessarily mean that the party obliged not to disclose particular trade secrets will also not use such trade secrets.

It has not yet been decided whether a third person who takes advantage of another's violation of a contractual duty of secrecy has acted unlawfully. In any event, there must at least be some additional circumstances, such as the awareness that a trade secret was involved, that the offender was in default or had acted tortiously, and awareness of the loss the injured party suffered.<sup>4</sup>

**§ 28:6 Civil law and the protection of trade secrets—Equitable doctrines that create implied obligations of confidentiality**

Not applicable.

**§ 28:7 Civil law and the protection of trade secrets—Employer-employee relationship—General**

Most of the case law regarding trade secrets and know-how revolves around the relationship between the employer and his employee, and in particular the situation after termination of this relationship.

It is generally accepted that in this relationship—contrary to art. 273 of the Penal Code—it is not necessary that secrecy be explicitly requested. The secrecy should, however, involve facts that the employee could understand

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<sup>4</sup>Drion—Martens, *Onrechtmatige daad* (loose-leaf, Kluwer), VI nr. 124, Idenburg, *Kennis van zaken* (diss., 1979), p. 93, Verkade, *Ongeoorloofde mededinging* (1986), pp. 178–181.

would cause injury to the employer if betrayed.<sup>1</sup> Thus, if an employer fails to insert an obligation of nondisclosure in the labor contract, this does not mean that he cannot sue his employee for damages. Nevertheless, it is always advisable to insert such a clause in a contract in order to prevent most of these problems from arising. It is also wise to include next to a nondisclosure obligation an obligation by the employee not to use the secret information for himself or for third parties.

According to art. 7:678, 2 sub i of the Civil Code, an employee commits a breach against his employer if he reveals trade secrets regarding the firm; this constitutes grounds for dismissal. This means that there are three ways of dealing with such an employee: under the law of tort (paying damages), criminal law (imprisonment or a fine) or labor law (dismissal). An action in tort can be combined with one of the other two actions.

**§ 28:8 Civil law and the protection of trade secrets—Employer-employee relationship—Covenants not to compete**

After termination of a labor contract, a former employee is allowed to work for a competitor or to start his own competing firm unless he is bound by special contractual clauses, such as covenants not to compete.<sup>1</sup> The same applies to the use of knowledge gained in his previous employment, in favor of his new employment, unless prohibited by nondisclosure obligations. Covenants not to compete are restricted by art. 7:653 of the Civil Code. Such a covenant is only valid if it is entered into in writing with an employee of full age. A court may nullify such a clause if it is unreasonable toward the employee in relation to the employer's interests. Another possibility is that the employer has to pay compensation if the clause constitutes a considerable obstacle to the employee's finding other employment. Again, a new employer commits a tort against the former employer of the employee concerned, if he induces or encourages the employee to violate his contractual obligation not to compete or his obligation of nondisclosure.

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**[Section 28:7]**

<sup>1</sup>Cohen Jehoram (ed.), *The Protection of know-how in 13 countries* (1972), p. 75.

**[Section 28:8]**

<sup>1</sup>See for an extensive study about this covenants: P.'t Hart, *Het concurrentiebeding. Concurrentie door de werknemer en de ex-werknemer* (diss. 1977).

If a covenant not to compete is declared null and void by the court, the employee may still be held liable under art. 6:162 (tort).<sup>2</sup>

If no covenant not to compete is laid down in the labor contract, the employee is free to compete against his former employer, unless additional circumstances cause the competition to fall within the law of tort. This is the case when the former employee misuses confidential information received in his previous employment. This constitutes a breach of confidence which may result in tort liability if the former employer was thereby injured.<sup>3</sup>

The former employer has to prove that the employee could only have acquired his knowledge in his prior employment, and this is often hard to prove. If the new employer of this employee could have obtained the knowledge equally well in another way, he has not acted illegally, since he is in the same position as the other competitors.

In answering the question whether competition from a former employee is illegal, one has to take into account the employee's post-contractual duty of care toward the former employer. In determining the scope of the duty of care, the fact that there was a contractual relationship still plays a role.<sup>4</sup> This means that a former employee is expected to be more careful in his conduct vis-à-vis his former employer than other competitors of this employer.<sup>5</sup>

**§ 28:9 Civil law and the protection of trade secrets—Employer-employee relationship—Ownership of employee inventions**

Ownership of employee inventions is regulated for patented inventions by the Dutch Patent Act. Under this Act, the employee's invention will belong to the employer if the making of an invention forms part of the employee's employment obligations. It is not necessary that the employer gives the employee the explicit assignment to apply his special knowledge to the making of inventions;

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<sup>2</sup>Supreme Court, March 9, 1955, NJ 1955, p. 353; Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), pp. 142–143.

<sup>3</sup>Cohen Jehoram (ed.), *The Protection of know-how in 13 countries* (1972), pp. 77–78; Ulmer—Baeumer—Van Manen, *Het recht inzake oneerlijke mededinging II*, 2 (1974), pp. 145–146.

<sup>4</sup>Supreme Court, December 9, 1955, NJ 1956, 157. Verkade, *Ongeoorloofde mededinging* (1986), p. 174; Drion—Martens, *Onrechtmatige daad* (loose-leaf, Kluwer), VI, nr. 74.2.

<sup>5</sup>Verkade, *Ongeoorloofde mededinging* (1986), p. 174.

the nature of the employment relation is decisive. Nor does it matter whether the invention is made during or after working hours.

In the case of inventions which can be protected by copyright or models and design law, art. 7 of the Dutch Copyright Act and art. 3.8 of the Benelux Treaty on Intellectual Property likewise provide that if the function of an employee entails the production of works protected by copyright or design right, the intellectual property rights on such works will belong to the employer unless agreed otherwise.

**§ 28:10 Governmental regulation related to the licensing and other commercialization of trade secrets**

The Competition Act that entered into force on January 1, 1998, is, to a large extent, based on European competition law. If a secrecy agreement or a know-how license agreement results in a restriction of competition on the Dutch market, the agreement may be null and void under the new rules. Further, it is prohibited to abuse a dominant position. If no exemption is granted by the Dutch Competition Authority for an agreement which restricts competition, penalties up to 10% of the relevant company's annual turnover may be imposed. Violations of the Act may lead to proceedings before the Authority (complaints, raids of companies, injunctive orders) as well as to proceedings between companies before the courts. Void arrangements are not enforceable: a party to an agreement may ignore a clause which may restrict competition. The Act applies to new as well as to existing agreements.

**§ 28:11 Maintaining the confidentiality of trade secrets during review by government agencies and litigation**

Every public official who is entrusted with the authority to investigate—leading him to possibly confidential or secret information—is bound by a nondisclosure obligation which is usually prescribed by the law that grants him the authority. In addition, art. 272 of the Criminal Code makes it a criminal offense to deliberately betray a secret which the offender knows, or reasonably should have known, he was bound to keep in view of his office or occupation or a previous office or occupation or any legal provision. Such offense is punishable by imprisonment for a term not exceeding one year or by a fine not exceeding EUR 19,000.

Under Dutch law, hearings are, in principle, public, but the court may, under certain circumstances, order that a hearing takes place behind closed doors. One such circumstance is where the requirements of due observance of privacy so dictate, which, in the context of legal entities, means the protection of confidentiality.<sup>1</sup> In order to prevent the litigants that are present during a hearing behind closed doors from disclosing information to third parties that are not present, there is a statutory rule prohibiting the litigants from disclosing such information to anyone.<sup>2</sup> It is generally felt that a similar obligation also applies to other persons who are present at the hearing, such as experts.<sup>3</sup> Furthermore, the court has the power to prohibit the disclosure of any information from legal proceedings (such as documents filed in the proceedings, the content of witness statements, etc.).<sup>4</sup> Such a prohibition can be reinforced by the imposition of a penalty in the event the court's order is violated.

Since the implementation of the so called European Enforcement Directive,<sup>5</sup> Dutch procedural law contains a number of provisions concerning the enforcement of IP-rights in which the safeguarding of secret information is provided. It concerns Article 843a in conjunction with Article 1019a Dutch Code of Civil Procedure providing for means to obtain evidence. Article 843a has been depicted as providing for a type of "Dutch discovery."<sup>6</sup> In fact it provides for a powerful tool on the basis of which any particular piece of evidence in the hands of a third party can be obtained or inspected further to a request filed with the court. Such a request can be filed by anyone who has a legitimate interest in obtaining the evidence, where such evidence is of relevance in determining the legal relationship between the requesting party (or his legal predecessors) and another party. The third party can be any party that has the evidence at his disposal or in his possession. Article 1019a, recently introduced on the basis of the

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**[Section 28:11]**

<sup>1</sup>Art. 27 Dutch Code of Civil Procedure.

<sup>2</sup>Art. 29(1)(a) Dutch Code of Civil Procedure.

<sup>3</sup>See Beijer, *Tekst & Commentaar, Burgerlijke Rechtsvordering*.

<sup>4</sup>Art. 29(1)(b) Dutch Code of Civil Procedure.

<sup>5</sup>Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *Official Journal* L 157/45.

<sup>6</sup>See Winter in annotation under District Court of Rotterdam 3 October 1996, *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 1997, p. 55.

Enforcement Directive, makes it clear that a legal relationship as referred to in Article 843a can be the result of an infringement of an IP right. Article 1019a(3) provides that the protection of confidential information should be ensured.<sup>7</sup>

Following the Enforcement Directive, Art. 1019b-d of the Dutch Code on Civil Procedure now provides for provisional measures for the preservation of relevant evidence in respect of an alleged infringement. Such measures may include a detailed description of the infringing goods (with or without the taking of samples), the physical seizure of the goods and/or, in appropriate cases, the seizure of materials and implements used in the production and/or distribution of these goods as well as the documents relating thereto, subject to the protection of confidential information.<sup>8</sup> Once a court decides that specific evidence should be submitted for inspection or that copies should be made available, the question is how due account should be taken of the protection of such confidentiality. As an example, I refer to a case on the alleged infringement of a right to a trade name. The owner of the trade name rights wanted to secure evidence concerning the infringement and requested that all the books and records of the defendant—including computer files, correspondence, and diaries—be seized and put under legal custody. The defendant argued that establishing the alleged infringement did not necessitate the seizure of all of its books and records. The Court of Appeal decided that it was true that there was no need to inspect all of the books and records in order to establish infringement of the trade name rights, but that the books and records could reveal the extent of the infringement and would provide evidence as to damages. The court then dealt with the issue of the safeguarding of trade secrets. This was done by ordering that the seized goods be put in the custody of a third party and prohibiting this third party from giving any informa-

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<sup>7</sup>The aspect of confidentiality played a role in a case where the owner of a copyright regarding software seized data carriers containing the allegedly infringing software. In order to safeguard confidentiality, the President of the District Court authorised inspection of these carriers only by a third party who would check the software to see whether it was of an infringing nature and then report on his findings without disclosing any other information to the owner. The third party was bound to secrecy about the information. President District Court of Breda 25 October 2006, *Bijblad bij de Industriële Eigendom* 2007, p. 437 (*SLC/Valar Groep*).

<sup>8</sup>This is now provided for in Art.1019b Dutch Code of Civil Procedure.

tion about the contents of the seized goods to the applicant or any other party until the President of the District Court ruled on the way in which the evidence was to be used in light of the due protection of trade secrets.<sup>9</sup>

In legal proceedings regarding the infringement of intellectual property rights, the infringer is often ordered to produce supplier or customer lists to enable the plaintiff to control the return of the infringing products, to ascertain the identity of the manufacturer of the products, etc. Such an obligation follows from art. 8 Enforcement Directive and has been implemented in art. 1019f Code of Civil Procedure. The usual defense is that this information is confidential and that it would give the other party an advantage. This defense is rarely honored. The solution is to give the information to the plaintiff's lawyer or an independent person such as an auditor.<sup>10</sup>

A plaintiff who wishes to obtain information about a defendant's products (e.g., to determine if a product he is manufacturing infringes the plaintiff's patent right), some of which may be categorized as trade secrets, may seek to have some of the defendant's employees examined in a so-called "examination of witnesses." Such a request may be denied on the grounds of "abuse of justice." If such a request means that the employees have to violate their nondisclosure obligation, the judge will weigh the interests of the plaintiff against those of the employees and their employer.<sup>11</sup>

Finally, reference is made to some other provisions that may result in the disclosure of confidential information during litigation. Under Dutch law,<sup>12</sup> the principle is that the litigants are obliged to present all facts that are relevant for the decision in a complete and truthful way. If they do not, the court can draw whatever conclusion it deems expedient. Hiding facts because they are confidential seems to be in conflict with this principle. However, a party can invoke protection against the disclosure of trade secrets. The protection of trade secrets is also covered by another procedural provision, namely Article 22 Dutch Code of Civil Procedure, which states that the court can in

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<sup>9</sup>Court of Appeal of Den Bosch 30 May 2007, *Praktijkids* 2007, no. 104 (*EBM/ESQ*).

<sup>10</sup>Supreme Court, November 27, 1987, NJ 1988, 722 (Chloe/Peters), and Supreme Court, February 23, 1990, NJ 1990, 664 (Hameco/Smith Kline).

<sup>11</sup>Supreme Court, March 29, 1985, NJ 1986, 242 (Enka/Dupont), and Court of Appeals-Gravenhage, September 6, 1990, NJ 1992, 288.

<sup>12</sup>Art. 19 Dutch Code of Civil Procedure.

all cases and at any time during litigation request one or more of the litigants to file particular documents. The relevant party can refuse to do so if there are compelling grounds not to file the document(s) in question. The legislative history shows that the protection of confidential information constitutes compelling grounds as referred to above. It is up to the court to decide how in such a case the information may be disclosed, on the one hand, and due regard given to its confidentiality, on the other.<sup>13</sup> The latter can be achieved in different ways, for example by imposing an obligation of confidentiality on the parties, by not mentioning the information in the judgment or by holding the hearing behind closed doors.<sup>14</sup>

**§ 28:12 Taxation and trade secrets—Withholding and other taxes on royalties paid to licensors**

Netherlands tax law does not provide for withholding tax or other similar tax on royalty payments. Royalties paid by a Netherlands licensee are therefore not subject to withholding tax.

**§ 28:13 Taxation and trade secrets—Deductibility and amortization of R&D costs**

As a general rule, Netherlands tax law provides that the annual taxable profit is determined on the basis of the guiding principle “sound business practice.” According to “sound business practice,” R&D costs will normally be deductible in the fiscal year in which the expenses are actually incurred. If, however, the R&D costs result in the creation of what may be characterized as a business asset (such as an invention), “sound business practice” allows such costs to be capitalized. In this case an investment tax allowance may be available. This will in particular be the case if patent rights have been or could have been applied for. Capitalized R&D costs can be amortized for tax

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<sup>13</sup>There is a further provision in the Dutch Code of Civil Procedure, namely Art. 162, which provides that the court can, in the course of litigation, order one or more of the parties to open the books and records or documents that they are legally required to keep. This provision elaborates on Art. 22 and does not seem to have much of an independent value. In contrast to Art.22, Art.162 does not state that a party is entitled to refuse such an order if there are compelling grounds for doing so. However, it is generally felt that such a right exists also in relation to Art.162; *see* Van der Korst, *Bedrijfsgeheimen en transparantieplichten*, Kluwer 2007, par. 6.4.

<sup>14</sup>*See* Van der Korst, *Bedrijfsgeheimen en transparantieplichten*, Kluwer 2007, par. 6.4.

purposes. The amortization period is not fixed in tax law but should be determined on the basis of sound business practice.

## **APPENDIX 28A**

### **Translations of relevant statutes and regulations**

#### **Art. 6:162 Civil Code:<sup>1</sup>**

1. A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.

2. Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.

3. An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.

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<sup>1</sup>Translation: P.P.C. Haanappel and Ejan Mackaay, *The Netherlands Civil Code, Patrimonial Law* (Kluwer 1990).

## APPENDIX 28B

### Model nondisclosure agreements (employee and third party)

The undersigned:

1. ABC, a limited liability company under the laws of the Netherlands, established and having its place of business at \_\_\_\_\_, validly represented by \_\_\_\_\_, hereinafter to be called “the Disclosing Party,”

party on the one part,

and

2. XYZ, having its place of business at \_\_\_\_\_, validly represented by \_\_\_\_\_, living in \_\_\_\_\_, hereinafter to be called “the Receiving Party,”

party on the other part,

WHEREAS:

a. The Disclosing Party is the owner of all rights, title and interest in certain technical and commercial knowledge, know-how and confidential and proprietary information concerning the manufacture of the Product, hereinafter to be called “Know-how”;

b. The Receiving Party is interested in obtaining from the Disclosing Party a license with regard to the Know-how;

c. The Receiving Party acknowledges that in order to obtain a license, the Disclosing Party will have to disclose information with regard to the Know-how, which is of a strictly confidential nature and the Receiving Party is prepared to preserve aforementioned confidentiality;

d. The disclosure of information regarding the Know-how by the Disclosing Party to the Receiving Party shall be subject to the following terms and conditions.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

#### Article 1

1.1. The Receiving Party agrees to keep the Know-how as defined in Schedule I, which forms part of this Agreement, together with the Know-how to be transferred orally to the Receiving Party or its personnel, in confidence and not to disclose any part thereof to any

person, including persons employed by the Receiving Party, with the exception of persons having signed a nondisclosure agreement with the Disclosing Party.

1.2. This restriction upon disclosure of the Know-how mentioned under 1.1 shall not apply to any part of the information comprising the Know-how which:

- a. the Receiving Party proves he already knew prior to the date hereof;
- b. the Receiving Party proves to be in, or at any time to have come into, the public domain otherwise than through default on the part of the Receiving Party;
- c. the Receiving Party proves he has lawfully acquired from a third party with good legal title hereto;
- d. is independently developed by the Receiving Party without use, directly or indirectly, of the Know-how.

**Article 2**

Any documents and/or copies thereof provided by the Disclosing Party to the Receiving Party directly or indirectly related to the business of the Disclosing Party and the Know-how, shall be kept by the Receiving Party in a secure place for as long as these documents are in its possession and the Receiving Party shall upon the first oral or written request of the Disclosing Party return all such documents immediately and in any event within two days from the date of the request to the Disclosing Party by registered mail.

**Article 3**

3.1. Disclosures of the Know-how shall not be made to any agents or independent contractors of the Receiving Party, unless it has been shown by the Receiving Party to the Disclosing Party that they are directly involved in the decision regarding the sale of the Product or license of the Know-how and therefore have a specific need to know such information and prior to any disclosure of the Know-how have signed a nondisclosure agreement with the Disclosing Party in a form substantially the same as this Agreement.

3.2. The Receiving Party undertakes to limit access to the Know-how to those of its employees and to persons who reasonably require such access in view of the purposes specified hereabove and will inform each employee to whom Know-how is disclosed of the restrictions as to the use and the disclosure contained herein

and will ensure that each of such employees shall undertake in writing to faithfully observe such restrictions.

3.3. Any infringement of the secrecy obligation by the Receiving Party's personnel shall be considered as a secrecy infringement by the Receiving Party and the Receiving Party shall be liable for any damage resulting therefrom.

#### **Article 4**

In the event of the Receiving Party visiting any of the establishments of the Disclosing Party, the Receiving Party will undertake that any further information relating to the business of the Disclosing Party which may come to its knowledge as a result of any such visit, shall be kept strictly confidential and that any such information will not be divulged to any third party and will not be used otherwise than provided above.

#### **Article 5**

5.1. This Agreement shall take effect on the \_\_\_\_\_ day of \_\_\_\_\_

5.2. The secrecy obligation and other obligations set forth herein shall continue and be maintained by the Receiving Party at any and all times.

5.3. The Receiving Party hereby waives its rights to rescind or terminate the present agreement under any applicable legal provisions.

#### **Article 6**

The Receiving Party agrees to pay the Disclosing Party a penalty of €\_\_\_\_\_, for each and any failure to keep secret the Know-how or any other breach of this Agreement. This does not exclude the right of the Disclosing Party to claim compensation for all damages and/or losses suffered because of the Receiving Party's breach of this Agreement and shall be without prejudice to the obligation of the Receiving Party to observe the present Agreement.

#### **Article 7**

7.1. No modifications to this Agreement or waiver of any of its terms will be effective unless set forth in writing and signed by the party against whom it is sought to be enforced.

7.2. If any provision of this Agreement should be or become fully or partly invalid or unenforceable for any reason whatsoever or should violate any applicable law, this Agreement is to be considered divisible as to such

provision and such provision is to be deemed deleted from this Agreement, and the remainder of this Agreement shall be valid and binding as if such provisions were not included herein. In that case, there shall be substituted for any such provision deemed to be deleted a suitable provision which, as far as legally possible, comes nearest to what the parties desired or would have desired according to the sense and purpose of this Agreement, had they considered the point when concluding this Agreement and which shall be acceptable to both parties.

**Article 8**

The schedules to this Agreement shall be an integral part of this Agreement.

**Article 9**

This Agreement shall be read and construed in all respects in accordance with the laws of The Netherlands. This English text shall be authentic.

**Article 10**

All disputes arising out of or connected with this Agreement shall be submitted to the exclusive jurisdiction of the District Court of Amsterdam (*Rechtbank* in Amsterdam), The Netherlands.

Thus agreed upon and made up in duplicate and signed at \_\_\_\_\_

\_\_\_\_\_ on

\_\_\_\_\_ 1993.

\_\_\_\_\_  
The Disclosing Party

\_\_\_\_\_  
The Receiving Party

## APPENDIX 28C

### Model license agreement

The undersigned:

1. ABC, a limited liability company under the laws of \_\_\_\_\_, established and having its place of business at \_\_\_\_\_, validly represented by \_\_\_\_\_, hereinafter to be called “Licensor”

party on the one part,

and

2. XYZ, a limited liability company under the laws of \_\_\_\_\_, established and having its place of business at \_\_\_\_\_, hereinafter to be called “Licensee,”

party on the other part,

WHEREAS:

a. Licensor has developed and is the owner of all rights, title and interest in certain technical and commercial knowledge, know-how and confidential and proprietary information concerning the manufacture of \_\_\_\_\_, hereinafter to be called “Know-how”;

b. Licensee wishes to acquire from Licensor the right to use the Know-how, the rights to manufacture and sell the same on the terms and conditions referred to hereinafter.

NOW THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

#### *Article 1—Definitions*

*Know-how*: all technical knowledge, know-how and confidential and proprietary information supplied by Licensor and defined in Schedule I, which forms part of this Agreement, relative to the Product, together with the know-how to be transferred orally to Licensee or its personnel, as well as the improvements indicated under Article 7 of this Agreement.

*Product*: as defined under Schedule II, and all varieties thereof, for which the Know-how is usable or used.

*Territory*: as defined under Schedule III.

#### *Article 2*

2.1. Licensor hereby grants to Licensee and Licensee herewith accepts the (nonexclusive, nontransferable)

right to use the Know-how to manufacture, use and sell the Product within the Territory.

2.2. Licensee shall not grant sublicenses without the written consent of Licensor which shall, however, not be unreasonably withheld. In the case of a written consent to sublicense, Licensor and Licensee will come to an agreement settling the provisions applicable to this sublicense.

### *Article 3*

3.1. Within thirty (30) days after the effective date of this Agreement Licensor shall furnish to Licensee all Know-how it has available which is necessary and/or useful to enable Licensee to manufacture, use and sell the Product. The said Know-how is contained in Schedule I.

3.2. Licensor shall at the cost of Licensee provide Licensee with the services of skilled personnel for the purpose of instruction in Licensor's methods of manufacturing on the following terms and conditions:

a. Licensor will invoice Licensee monthly and the Licensee shall pay the following within thirty (30) days after the invoice date:

- for personnel the pending hourly or daily rate
- costs of board, lodging, travelling and insurance of said personnel;

b. The number, qualification and period of time of said services shall mutually be agreed upon.

3.3. Any information mentioned under 3.1 may not be used for purposes other than the performance of the Agreement without specific written approval by Licensor.

### *Article 4*

Licensee shall use its best endeavors and exert its best effort in promoting, popularizing and exploiting the Product throughout the Territory so as to procure the increasing use thereof.

### *Article 5*

5.1. Licensee acknowledges that the Know-how as referred to in Schedule I and the Know-how to be orally transferred by Licensor is not in the public domain, unless proof to the contrary is provided by Licensee in conformance with article 5.3. under a), b), or c) hereof.

5.2. Licensee agrees to keep the Know-how in confidence and not to disclose any part thereof to any third parties during the term of this Agreement as well as for a period of \_\_\_\_\_ years from the termination or expiration of this Agreement.

5.3. This restriction upon disclosure of the Know-how mentioned under 5.2. shall not apply to any part of the information comprising the Know-how which:

- a. Licensee proves to already have known prior to the date hereof;
- b. Licensee proves to be in or at any time to have come into the public domain otherwise than through default on the part of Licensee;
- c. Licensee proves to have lawfully acquired from a third party with good legal title hereto;
- d. Is independently developed by Licensee without use, directly or indirectly, of the Know-how.

5.4. Licensee undertakes to impose the same secrecy obligation on its personnel.

5.5. Any infringement of the secrecy obligation by Licensee's personnel shall be considered as an infringement of Licensee and Licensee shall be liable for any damages resulting therefrom.

#### *Article 6*

6.1. Licensor has made all reasonable efforts to ascertain that the Know-how and the Product do not infringe the intellectual property rights of any third party.

6.2. Licensee shall notify Licensor of any third party claims relative to alleged infringement of intellectual property rights. Licensor undertakes to supply Licensee with evidence and any other assistance which it has available to assist Licensee in the defense against such claims.

6.3. Without the consent of Licensor no settlement may be agreed by Licensee with third parties concerning disputes on intellectual property rights relative to the Know-how.

6.4. Licensor cannot be held liable for damage suffered by Licensee and damages or royalties payable by Licensee in connection with third party claims above the amount of any down payment and any royalty paid as per the date of the alleged infringement.

#### *Article 7*

7.1. If either party makes any improvement to the Know-how, it shall promptly disclose this improvement to the other party. Such improvement shall be considered to form part of the Know-how. Licensee shall have the right to grant non-exclusive licenses to third persons with regard to the improvements Licensee has made, provided that these licenses will not disclose the Know-how as defined in Schedule I.

7.2. If any such improvement is patentable, the party who has made the improvement shall have the right to apply for and obtain patent protection in respect thereof and he shall grant the other party a license under such patent following this Agreement.

*Article 8*

If during the continuance of this Agreement Licensee manufactures and/or sells any Product, which is of a formulation similar to the Product mentioned under art. 1 of this Agreement, Licensor will have the right to terminate this Agreement or to terminate the exclusivity of this Agreement and to terminate the grant of licenses regarding improvements as mentioned in Article 7.

*Article 9*

9.1. Licensee shall pay to Licensor a royalty in consideration of the Know-how made up of a lump sum payment and a periodic payment.

9.2. The lump sum payment amounts to NFL \_\_\_\_\_, payable:

- thirty percent (30%) within fifteen (15) days from the execution date of this Agreement;
- forty percent (40%) within thirty (30) days after the supply of the technical information contained in Schedule I;
- thirty percent (30%) within thirty (30) days after the first trial run.

9.3. Licensee shall be entitled to reclaim the lump sum amount paid up only in the event Licensor fails to comply with its obligations under article 3 hereof, such failure to comply not having been remedied within sixty (60) days after written notice thereof has been served by Licensee to Licensor.

9.4. In addition, Licensee shall pay to Licensor a net royalty of five percent (5%) of the net sales invoice value of the Product manufactured by Licensee. This royalty shall be calculated every three months of each calendar year, payable within sixty (60) days after each such three-month period.

9.5. Licensee shall within three (3) months after the end of each calendar year supply Licensor with a statement certified by a chartered accountant or independent auditor, showing the sales of the Product made by Licensee over the preceding calendar year. Licensor is entitled at its expense, to have such statement checked by a chartered accountant of its choice, who will be given access at normal business hours to the administration

of Licensee relative to the Product. The expense thus incurred by Licensor may be recovered from Licensee if such check reveals substantial errors made by Licensee.

*Article 10*

Licensee shall mark all Products made under license and supplied to his customers with serial numbers and type numbers as indicated by Licensor and shall affix to such Products a plaque of a format as indicated by Licensor inscribed "Made under license of from . . ."

*Article 11*

11.1. Licensee shall manufacture the Product to the same quality as it is manufactured by Licensor.

11.2. Licensor shall be entitled to inspect whether the Product manufactured under license is of the required quality and to forbid the sale of a Product of inferior quality.

*Article 12*

12.1. Licensor undertakes no responsibility whatsoever with respect to the manufacture, sale or use of the Product and/or use of its name by Licensee, or with respect to any resale or use of the Product by any of Licensee's purchasers or their own customers.

12.2. Subject to having furnished all the documents and assistance provided for in the above clauses, Licensor undertakes no responsibility for the risks of technical realization, which are assumed solely by Licensee. Licensee shall be deemed to understand the subject matter of the license and shall undertake its technical realization.

12.3. Licensor does not warrant that the Product under license is capable of commercial exploitation. The risks of such exploitation shall be assumed solely by Licensee.

*Article 13*

This Agreement shall take effect on the \_\_\_\_\_ day of \_\_\_\_\_ and shall continue for a period of ten (10) years thereafter. Prior to the expiration date of this Agreement the parties shall consult with one another as to the possibilities and conditions for full or partial renewal of this Agreement, without any one party being obliged to enter into a further Agreement.

*Article 14*

14.1. Without prejudice to the right to claim damages either party shall be entitled to cancel this Agreement with immediate effect if the other party fails to comply

with any obligation under this Agreement, such failure not having been remedied within sixty (60) days of written notice thereof served by the other party upon the party in default.

14.2. Licensor may terminate this Agreement forthwith in the event of one or more of the following situations:

- a. appointment of a trustee or receiver for all or any part of the assets of Licensee;
- b. insolvency or bankruptcy of Licensee;
- c. assignment of Licensee for the benefit of the creditor;
- d. attachment of the assets of Licensee;
- e. expropriation of the business or assets of Licensee;
- f. dissolution or liquidation of Licensee.

14.3. If Licensee is involved in any of the events enumerated in Paragraph a through f above, Licensee shall notify Licensor immediately, in writing, of the occurrence of such event.

14.4. Cancellation and termination shall not release Licensee from its obligation to pay royalties on sales that occurred prior to the effective date of termination.

#### *Article 15*

15.1. Upon expiration or termination of this Agreement for whatever reason, Licensee shall be entitled to fulfill orders for the Product, accepted prior to the date of such expiration or termination and shall be entitled to sell such Product as well as the remaining stock of Product, against payment of the royalty percentages as agreed above.

15.2. Without prejudice to the provision under article 15.1, Licensee shall, upon expiration or termination of this Agreement, immediately and permanently cease and desist from manufacturing, selling or in any way using the Know-how (as long as the Know-how is not in the public domain), the Product or parts thereof and render the Know-how and Schedule I to Licensor.

#### *Article 16*

If any provision of this Agreement should be or become fully or partly invalid or unenforceable for any reason whatsoever or should violate any applicable law, this Agreement is to be considered divisible as to such provision and such provision is to be deemed deleted from this Agreement, and the remainder of this Agreement shall be valid and binding as if such provisions were not included

herein. In that case, there shall be substituted for any such provision deemed to be deleted a suitable provision which, as far as legally possible, comes nearest to what the parties desired or would have desired according to the sense and purpose of this Agreement, had they considered the point when concluding this Agreement and which shall be acceptable to both parties.

*Article 17*

No modifications to this Agreement or waiver of any of its terms will be effective unless set forth in writing signed by the party against whom it is sought to be enforced.

*Article 18*

The schedules to this Agreement shall be an integral part of this Agreement.

*Article 19*

This Agreement shall be read and construed in all respects in accordance with the laws of The Netherlands. This English text shall be authentic.

*Article 20*

All disputes arising out of or connected with this Agreement shall be submitted to the exclusive jurisdiction of the District Court of Amsterdam (*Rechtbank* in Amsterdam), The Netherlands.

Thus agreed upon and made up in duplicate and signed at \_\_\_\_\_

\_\_\_\_\_ on

\_\_\_\_\_ 2005.

\_\_\_\_\_  
Licensor

\_\_\_\_\_  
Licensee