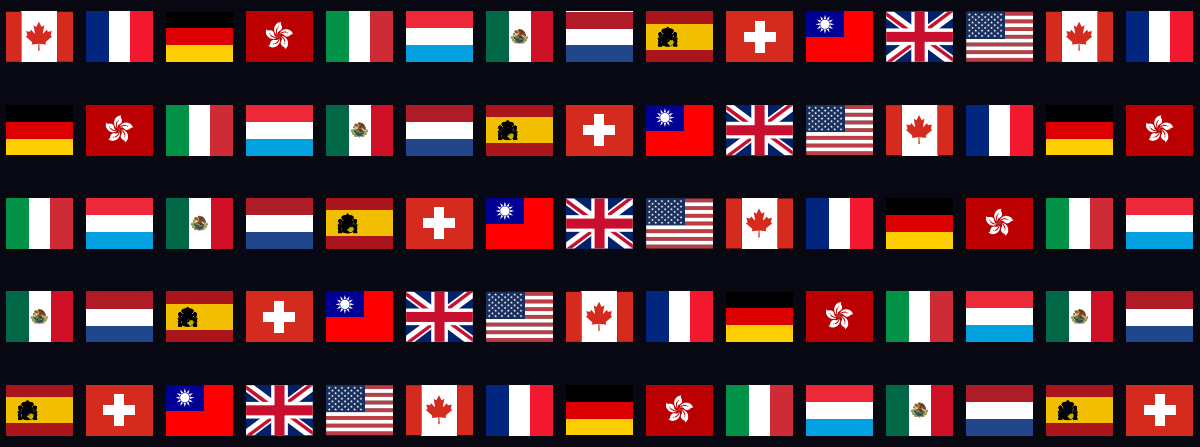
LUXURY & FASHION

Netherlands



LEXOLOGY
Getting The Deal Through

Consulting editor
Hogan Lovells

Luxury & Fashion

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Hogan Lovells

Quick reference guide enabling side-by-side comparison of local insights, including into the state of the local market; manufacture and distribution; online retail; intellectual property issues; data privacy and security; advertising and marketing; product regulation and consumer protection; M&A and competition; employment and labour issues; and recent trends.

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MARKET SPOTLIGHT

State of the market

What is the current state of the luxury fashion market in your jurisdiction?

The Netherlands is home to the European headquarters of several leading international fashion brands, such as Tommy Hilfiger, Calvin Klein, Patagonia, Karl Lagerfeld, Nike and Asics. Combined with the many Dutch-origin companies also present on the scene – such as Scotch and Soda, Suitsupply, G-Star and Hunkemöller – this makes for a vibrant luxury and fashion market in the Netherlands with an international, creative workforce. Amsterdam even prides itself in having the world's highest concentration of denim brands.

Topics such as sustainability, the circular economy, second-hand and re-commerce are becoming ever more important in the Dutch market.

The revenue of the Dutch apparel market is expected to amount to US$18 billion in 2023, and the footwear market brings in several billion a year as well. In 2021, the Dutch population bought 77 per cent of its apparel and 88 per cent of its shoes and lifestyle articles online. This peak of online sales due to the covid-19 pandemic has since passed, but it is predicted that online channels will remain an important part of fashion retail turnover in the coming years, with figures stabilizing at around 44 per cent in 2026.

Law stated - 30 January 2022

MANUFACTURE AND DISTRIBUTION

Manufacture and supply chain

What legal framework governs the development, manufacture and supply chain for fashion goods? What are the usual contractual arrangements for these relationships? (What initiatives are you seeing from a legal perspective to address global supply chain issues?)

The development, manufacture and supply chain for fashion goods are governed by commercial and contract law, including sales law, as generally set out in the Dutch Civil Code (the DCC) and related case law. In the Netherlands, a general freedom of contract applies. However, under Dutch law, any commercial contract is subject to a reasonableness and fairness test. The concept of reasonableness and fairness may, in specific circumstances, set aside or imply certain contract clauses.

The contractual arrangements regarding the development and manufacturing of fashion goods are often included in dedicated development or manufacturing agreements. As regards the supply chain, companies usually sell their products through a network of vertical agreements (eg, through distribution, franchise and agency agreements). There are no Dutch statutory provisions specifically governing distribution agreements. Mandatory statutory rules apply to franchise and agency agreements respectively. For example, for franchisees established in the Netherlands the provisions of the Dutch Franchise Act cannot be derogated from to their detriment. Also, non-competition and goodwill clauses contrary to the requirements under the Dutch Franchise Act are null and void. This applies irrespective of the law that governs the franchise agreement with such franchisees.

Law stated - 30 January 2022

Distribution and agency agreements

What legal framework governs distribution and agency agreements for fashion goods?

The distribution agreement has no specific statutory basis in Dutch law. Distribution agreements are, generally, governed by Dutch contract law, including sales law, as generally set out in the DCC and the general principles of Dutch contract law. Because the distribution agreement is commonly used in the Netherlands, several specific subjects related to distribution relationships – for example, the termination of distribution agreements – have been clarified in case law.

The agency agreement has a statutory basis in Dutch law and is regulated in Title 7.7.4 of the Dutch Civil Code. The relevant legislation is, inter alia, based on the Council Directive of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (Directive 86/653/EEC).

Law stated - 30 January 2022

What are the most commonly used distribution and agency structures for fashion goods, and what contractual terms and provisions usually apply?

Agency and distribution agreements for fashion goods are often framework agreements that provide the terms that govern separate purchase agreements or orders.

Agency and distribution agreements for fashion goods are often concluded for a specific territory, such as a country (Netherlands) or a group of countries (Benelux). Agents and distributors are, further, usually appointed on an exclusive or non-exclusive basis.

Relevant contractual terms and provisions to include in agency and distribution agreements for fashion goods are, inter alia, stipulations regarding the duration of the relationship, applicable minimum purchasing obligations (subject to competition law requirements), relevant sales targets, marketing efforts, renumeration, recalls, and protection of intellectual property rights.

In addition to the above, it is important to keep in mind the luxury fashion sector specifics when drafting more 'standard' contractual clauses. It will, inter alia, be relevant to consider the seasonality of fashion when agreeing on possible (premature) termination options, including notice periods and any termination fees.

Law stated - 30 January 2022

Import and export

Do any special import and export rules and restrictions apply to fashion goods?

As a starting point, it is very helpful to assess and determine the correct origin and commodity code of the relevant fashion good being imported or exported. This will enable fashion companies not only to determine the customs duty impact, but also to better identify the applicable rules and restrictions – such as whether upon import or export a product needs a permit or stamp under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Some examples of import and export rules and restrictions are as follows:

- fashion goods containing certain fur or leather or other parts from endangered species are subject to prohibitions or specific licensing requirements;
- seal-related fashion goods are subject to prohibitions. Seal products entail all products, either processed or unprocessed, deriving or obtained from seals;
- jeans originating from the United States attract additional customs duties upon importation into the EU and need

to be taken into account;

- the Netherlands has rules regarding labels on clothing and other textile products. For example: the materials of which the product is made must be shown on the label and only textile fibre names from the list pursuant to Annex 1 of Regulation (EU) 1007/2011 may be used on the label;
- the Netherlands has rules on the use of formaldehyde in clothing and textiles and also sets fire safety requirements;
- fashion and luxury goods made subject to EU sanction regimes:
  - the EU sanctions against North Korea, prohibiting the sale, supply, transfer or export of luxury goods to North Korea as well as the import, purchase or transfer from North Korea of luxury goods;
  - the EU sanctions against Russia, prohibiting the sale, supply, transfer or export of luxury goods (with a value – in most cases – exceeding €300); and
  - fashion goods being regarded as economic resources subject to export prohibition to any EU sanctioned parties.

In practice, it is recommended to gain insight into the customs duty impact as well as all relevant import and export rules and restrictions at an early stage, in view of being able to possibly mitigate the customs duty impact as well as apply for and obtain any required licences or certifications enabling business operations and the related supply chain to run smoothly.

Law stated - 30 January 2022

Corporate social responsibility and sustainability

What are the requirements and disclosure obligations in relation to corporate social responsibility and sustainability for fashion and luxury brands in your jurisdiction? What due diligence in this regard is advised or required?

An increasing number of companies must comply with an increasing number of environmental, social and governence-related annual reporting requirements. Generally, large listed companies have to report on a number of non-financial aspects in their annual report. Information to be provided on corporate social responsibility should in any event touch on policies relating to (1) environmental, social and personnel matters, (2) respect for human rights and (3) the tackling of corruption and bribery. Companies are given a large amount of freedom in their reporting, through mostly non-binding guidelines. Sustainability is more often put as a separate discussion item on the agenda of the general meeting and it is sufficient to include a statement in the management report; a separate, more detailed sustainability report is not mandatory.

On 16 December 2022, the European Parliament published the Corporate Sustainability Reporting Directive (CSRD) as a result of their review of the Non-Financial Reporting Directive. The CSRD must be implemented by Member States within the following 18 months. The CSRD introduces a great number of general reporting obligations on sustainability matters. In addition, the Sustainability Reporting Standards (ESRS) is in development which provides a number of specific reporting requirements.

Who must report under the CSRD and ESRS? Companies with an EU listing, or companies without an EU listing if considered large or with sufficient turnover gained in the EU.

What must be reported under the CSRD? In summary, in scope companies must report on their impact, risk and opportunities relating to environmental, social and human rights (eg, impact on climate change, value chain information, etc). This also includes a description of sustainability related inhouse expertise, incentive schemes, but also how sustainability information is identified within the company's organisation. The disclosures must relate to

short-, medium- and long-term horizons and must include forward-looking, retrospective, qualitative and quantitative information based on conclusive scientific evidence where possible. Non-financial information should be connected to financial statements where possible. Intellectual capital, intellectual property, know-how or the results of innovation that would qualify as trade secrets are excluded from reporting obligations.

The ESRS provides more concrete reporting requirements on environmental standards, social standards and governance standards. These standards will be expanded by sector-specific standards by mid-2024.

For making sustainability claims, there are also specific Guidelines from the Dutch Authority for Consumers and Markets (ACM). These Guidelines include five rules of thumb for sustainability claims, on the basis of which companies can make sure that sustainability claims are clear, correct and will not mislead consumers. Pursuant to the Guidelines, companies should: (1) make clear what sustainability benefit(s) a product offers when making such claims; (2) substantiate any sustainability claims with facts. Any comparisons with other products, services or companies, (3) must be fair, (4) be honest and specific about their efforts regarding sustainability and (5) make sure that visual claims and labels are clear and useful to consumers.

In the Guidelines, specific references to the fashion market are made. The ACM clarifies, for example, that for each piece of clothing that is claimed to be a 'sustainable choice', the specific sustainability benefits must be stated. During the preliminary study into misleading sustainability claims, the ACM looked at specific industries, including the fashion and cosmetics industry. The ACM clarified that the Guidelines serve as basis for enforcement of the rules on unfair commercial practices (articles 6:193a to 6:193j, Dutch Civil Code) and (comparative) advertising (advertising (articles 6:194 to 6:196, Dutch Civil Code). Misleading or incorrect sustainability claims will be regarded as an unfair commercial practice for which the ACM can impose fines up to €900,000 or 1 per cent of the company's annual turnover.

The Guidelines on Sustainability Claims are available online in English .

In addition to enforcement by the Dutch Authority for Consumers and Markets, also the Dutch Advertising Code Committee deals with sustainability claims on the basis of complaints made by consumers or businesses (such as competitors). The Dutch Advertising Code Committee enforces the Dutch Environmental Advertising Code. It follows from recent decisions of the Dutch Advertising Code Committee in relation to sustainability claims, that the Committee looks very strictly at sustainability claims, especially at absolute sustainability claims. Absolute claims are only considered acceptable when substantiated with sufficient evidence.

New EU legislation regarding (the substantiation of) sustainability claims is currently being drafted.

The Dutch textile industry is currently also working on the implementation of the Extended Producer Responsibility (EPR) legislation that is set to enter into force over the course of 2023. This new EPR legislation will make manufacturers and importers of textiles in the Netherlands responsible for the recycling and reuse of textiles that they put on the market, and amongst others obliges manufacturers to fulfil certain reporting requirements on the kilos of textiles they manufacture or import, and to make financial contributions to the recycling process.

Law stated - 30 January 2022

What occupational health and safety laws should fashion companies be aware of across their supply chains?

The Dutch health and safety laws focus on industrial accidents and occupational diseases (risque professionnel) and on sickness and absenteeism of workers in general (risque sociale). The employer must provide a safe workplace, identify possible hazards and risks, take action where needed and inform employees about the risks and prevention. Furthermore, employers are obliged to report accidents and seek advice from occupational health experts on the risk inventory and assessment. The employer is further obliged to have a contract with an occupational safety and health service or an occupational physician, whose advice or guidance must be sought in the case of long-term sickness.

The main Dutch regulations regarding health and safety are:

- the Working Conditions Act, which contains general provisions for employers and employees on how to deal with occupational safety and health; for example, to have a written occupational health and safety policy and a risk inventory;
- the Working Conditions Decree, which covers a wide range of specific occupational health and safety topics, such as provisions on workplaces, working from home, dangerous substances, noise and vibration;
- the Working Conditions Regulation, which contains very specific provisions that are changing relatively fast; for example, rules for working with computer screens, and the occupational exposure limit for dangerous substances;
- the Major Accidents Decree and Regulation, which deal with legislation in the field of major accidents related to dangerous substances;
- the Working Hours legislation, covering, inter alia, maximum working hours and minimum rest periods and the obligation to properly register working hours (exemptions apply); and
- The Collective Labour Agreement Retail Non-Food, which provides for, inter alia, specific provisions for employers and employees on how to deal with working hours and working conditions. The current collective labour agreement will remain in force up to and including 31 December 2023.

The Labour Inspectorate monitors compliance with occupational safety and health legislation and regulations.

Law stated - 30 January 2022

ONLINE RETAIL

Launch

What legal framework governs the launch of an online fashion marketplace or store?

Online marketplaces and online stores are regulated by e-commerce legislation, primarily included in the Dutch Civil Code. The legislation relevant for online marketplaces or online stores is mostly the Dutch implementation of the relevant EU regulations and directives. In 2022, the Dutch Civil Code has been amended on the basis of three new EU directives (the Digital Content and Digital Services Directive (EU 2019/770), the Sale of Goods Directive (EU 2019/771) and the Omnibus Directive (EU 2019/2161)). New and amended e-commerce rules have been introduced in the Netherlands, inter alia, in relation to statutory and commercial warranties, information obligations, price reductions, online reviews and contracts for the purchase of digital content and services.

Websites must comply with applicable e-commerce and platform legislation, including (pre-contractual) information obligations, the right of withdrawal, obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Also, during the sales process, unfair commercial practices towards consumers must be avoided.

Online marketplaces and online stores must, furthermore, comply with applicable contract law, including business-to-consumer contracting legislation. New (pre-contractual) information requirements for online marketplaces have been introduced in Dutch law following the implementation of the EU Omnibus Directive. The new rules, inter alia, include an obligation to provide the consumer with information about the legal status of the trader (consumer or business) and the related possible applicability of consumer law. These rules apply to traders that provide (parts of) websites or applications (or both) that allow consumers to conclude distance contracts with other traders or consumers.

Law stated - 30 January 2022

Sourcing and distribution

How does e-commerce implicate retailers' sourcing and distribution arrangements (or other contractual arrangements) in your jurisdiction?

E-commerce brings the retailers' sourcing and distribution arrangements within the framework of the e-commerce legislation as contained in the Dutch Civil Code. This means, inter alia, that retailers must comply with (pre-contractual) information obligations, the right of withdrawal, obtaining prior consent of the website user before placing cookies (if needed) and complying with geo-blocking restrictions pertaining to the accessibility of the website by customers that reside in another EU member state. Furthermore, sometimes a model of 'drop-shipping' is used. This is a form of e-commerce where the merchant, in fact the intermediate party, offers products in its online store that are not in stock. The producer, wholesaler or supplier delivers the products directly to the end user (ie, the customer).

Law stated - 30 January 2022

Terms and conditions

What special considerations would you take into account when drafting online terms and conditions for customers (or updating existing terms and conditions) when launching an e-commerce website in your jurisdiction? Have there been any recent developments with respect to enforceability of online contracts that implicate e-commerce sites?

Online terms and conditions must comply with the Dutch legislation concerning general terms and conditions. This legislation is included in Title 6.5.3 of the Dutch Civil Code and is based on the Council Directive of 5 April 1993 on unfair terms in consumer contracts (Directive 93/13/EEC).

Online terms and conditions should not be 'unreasonably onerous' for the customer (ie, consumers or small and medium-sized businesses). Whether a clause is unreasonably onerous depends on the circumstances of the specific case. Clauses that are considered unreasonably onerous in all circumstances are included in an exhaustive list (the 'black list'). The Dutch Civil Code also contains a list of clauses that are presumed to be unreasonably onerous for consumers (the 'grey list'). Such clauses are not automatically void, but if found unreasonable in the given circumstances, the clause can be set aside. The relevant articles also regulate the applicability and use of general terms and conditions in contracts with consumers or small to medium businesses.

In addition, also the rules on unfair commercial practices (Title 6.3.3A of the Dutch Civil Code) and the rules regarding precontractual information obligations (Title 6.5.2B of the Dutch Civil Code) should be taken into account. These rules, inter alia, require traders to provide certain pre-contractual information before the contract is concluded. Some of this information must also be provided to the customer after the purchase has been made. Often, this information is included in the general terms and conditions. Information that should be provided to a customer, inter alia, includes information about the right to withdraw from the contract, without providing reasons, within 14 calendar days from the day the consumer received the goods and a reminder of the consumer's statutory warranty rights (ie, the right to a product that conforms to the contract of sale).

Updating existing terms and conditions is, generally, only possible if the terms and conditions include a clause that makes such updates possible, which clause should preferably include the relevant circumstances that could trigger an update. In some cases, amendments of the terms and conditions could require that the consumer is provided with a right to terminate the agreement, for example if the amended performance differs substantially from the agreed performance.

Law stated - 30 January 2022

Tax

Are online sales taxed differently than sales in retail stores in your jurisdiction?

For a start, sales in retail stores are in principle taxed with the standard local value added tax (VAT) rate (currently 21 per cent).

Online sales in the Netherlands where both the seller and the buyer are based in the Netherlands (domestic sales) are in principle taxed with the same VAT rate. This is the default for services. Goods should also be shipped within the Netherlands only to qualify as domestic sales.

For online sales by buyers in the Netherlands not involving a domestic sale, the VAT rate treatment is based on certain factors, such as where the seller is based (other EU member state or outside the EU) and the location from where the fashion products are being shipped. The same goes for returns of goods sold online, especially if these are not shipped back to the ship-from country as part of an omnichannel strategy.

New VAT e-commerce rules have been applicable in the EU since 1 July 2021. Online sales from sellers based in other EU member states ('intra-EU distance sales') are taxed either at the regular Dutch VAT rate for domestic sales, or at the VAT rate of the EU member state where the seller is based in the event that a sales volume of €10,000 is not exceeded. The new €10,000 threshold replaces the various national intra-EU distance sales thresholds (varying from €35,000 to €100,000) previously existing. This may require businesses to VAT register and implement VAT management covering multiple EU jurisdictions.

Under the new rules, amongst others, the following transactions are covered:

- online marketplaces facilitating the B2C supply of imported 'low value' goods not exceeding €150, either being sold and shipped by an EU or a non-EU supplier;
- intra-EU B2C supplies of goods by EU or non-EU suppliers, or by online marketplaces facilitating those supplies for non-EU suppliers (intra-EU distance sales);
- domestic B2C sales of goods by online marketplaces facilitating those sales for non-EU suppliers; and
- supplies of certain B2C services by EU or non-EU suppliers if the consumer is located in another EU member state.

Online marketplaces

Online marketplaces such as platforms or portals that facilitate covered supplies of goods as intermediary may become 'deemed suppliers' that are deemed to have received and supplied the goods for VAT purposes. This means that two separate transactions are conducted for VAT purposes:

- a deemed supply, from the supplier to the online marketplace – VAT exempt for the purposes of the new VAT e-commerce rules; and
- a supply from the online marketplace to the consumer – taxed at the applicable local VAT rate of the ship-to-country (where the EU consumer is located).

Online marketplaces may (be deemed to) receive and supply goods and/or services by virtue of other VAT rules as well, such as the default EU VAT commissionaire regime.

Furthermore, on 8 December 2022 the European Commission announced significant reforms to the EU VAT system following its VAT in the Digital Age initiative (ViDA). This includes, amongst others, proposals to expand the deemed

supplier regime for facilitating B2C sales of goods in the EU by non-EU suppliers to all sales of goods B2B and B2C within the EU per 1 January 2025, regardless where the supplier is established.

Imported goods and IOSS

In the case of imported goods, import VAT is due. The declarant for customs purposes (usually the EU consumer or carrier) is liable for EU import VAT unless the Import One Stop Shop (IOSS) is used by the supplier or online marketplace to cover the imported consignment. In the event that the import is covered by IOSS – possible only for 'low value' goods not exceeding €150 – the import is exempt from import VAT.

EU and non-EU suppliers and online marketplaces that make use of IOSS are required to charge EU consumers with local VAT and account for this VAT through the monthly IOSS return in the EU member state of establishment and/or registration.

The abovementioned ViDA initiative also includes proposals to make IOSS mandatory per 1 January 2025 for platforms facilitating non-EU distance sales of goods not exceeding €150 for low value consignments.

One Stop Shop scheme (OSS)

The OSS is another simplification that can be used by EU companies and non-EU companies when supplying:

- certain B2C services – previously limited to electronically supplied services only;
- intra-EU distance sales; and
- domestic B2C sales of goods by online marketplaces facilitated for non-EU suppliers.

Through OSS, a company can register itself in only one EU member state, submit one electronic OSS return and make one payment for all eligible sales of goods and services in the EU.

The abovementioned ViDA initiative also includes proposals to expand OSS per 1 January 2025 amongst others to add B2C domestic sales of goods in EU Member States where suppliers are not VAT registered.

Law stated - 30 January 2022

INTELLECTUAL PROPERTY

Design protection

Which IP rights are applicable to fashion designs? What rules and procedures apply to obtaining protection?

Fashion designs may be protected by a wide range of IP rights in the Netherlands, which can in part also overlap.

Dutch courts easily accept copyright protection for works of applied art, including fashion designs. As there is no registration requirement, this offers a straightforward way for fashion designs to be protected. An added benefit is that Dutch courts will in certain cases accept a pan-European injunction on the basis of copyright in the event of a copyright infringement. It must, however, be ensured that the copyright is vested in the right party and that the design process is properly documented. While copyright will automatically accrue to the employer where a work is created within the framework of the employment, provided no other agreements are in place, the copyright in commissioned works created by freelancers or outside agencies will remain with the author (ie, the freelancer or agency) unless a written deed of copyright transfer is executed.

Fashion designs may also be protected through registered and unregistered design rights. Registered design rights are available at either the Benelux or EU level, while unregistered design rights are only granted at an EU level pursuant to the EU Design Regulation, the latter only giving a short period of protection of three years. Neither a Benelux design right application nor an EU design right application is subject to a substantive check on novelty and individual character before registration, so a registered right is relatively easy to obtain but at the same time not guaranteed to be valid. Having a registered right may be beneficial in enforcement activities.

Fashion designs may in some circumstances also be registered as a trademark. There is the option of going for a Benelux trademark or for an EU trademark. However, contrary to design rights, trademarks are substantively examined before registration and it also possible for third parties to file an opposition within two months (for a Benelux trademark) or within three months (for an EU trademark) from publication. Fashion designs often run into issues concerning a lack of distinctiveness, technical features or the fact that they add substantial value to the goods, which can all preclude them from being registered as a trademark.

Nowadays, with the increasing prevalence of fashion tech, even patents will be relevant for fashion designs. Although it is possible to file a Dutch patent application, most parties would use the European patent system instead.

Finally, additional protection may be found in the doctrine of slavish imitation, a part of unfair competition. This prevents against copying the look of a product, where that product has its own position on the market (as compared to the design of other similar products), there is a risk of confusion, and the copycat could have designed its product differently without detracting from the soundness and usefulness of the product.

Law stated - 30 January 2022

What difficulties arise in obtaining IP protection for fashion goods?

One difficulty that can arise is that fashion goods often also contain technical features. Such features cannot be protected under either copyright, design rights, trademarks or unfair competition. Yet they are usually not sufficiently inventive to merit patent protection either.

In terms of copyright and unfair competition, common style elements are also excluded from protection. Although a specific interpretation of a general style can be protected under copyright, it is sometimes difficult to draw a strict line between a general style and a specific interpretation. In the case Broeren v Duijsens (2013), the Dutch Supreme Court held that where it concerns a common style that is not protected under copyright law, no further protection will be offered under the doctrine of slavish imitation (unfair competition) either.

Several difficulties may also arise when trying to protect the appearance of fashion goods through trademark law.

First, a trademark must be distinctive. In terms of word marks, this requirement is fairly simple and merely requires the proprietor not to pick a descriptive term. In relation to shape marks and other 2D representations of (parts of) goods, EU case law has consistently held that the average consumer is not accustomed to recognising such signs as an indication of origin where they coincide with the appearance of (part of) the product. These trademarks will therefore only be distinctive ab initio where they depart significantly from the norm or the customs in the sector at the time of filing. A mere variation of what is already on the market is not sufficient. If this cannot be shown, then the trademark applicant will need to provide evidence of the trademark having acquired distinctiveness through use in either the entire Benelux (for a Benelux trademark) or the entire EU (for an EU trademark).

Second, EU and Benelux trademark law also excludes protection for signs that consist of a shape or other characteristic that gives substantial value to the goods. Briefly put, if the consumer buys the goods because of their appealing look, then trademark law cannot provide protection for that look. Furthermore, also technical features or features that result from the nature of the goods are excluded from trademark protection. These three exceptions cannot be overcome by showing acquired distinctive character.

Law stated - 30 January 2022

Brand protection

How are luxury and fashion brands legally protected in your jurisdiction?

Word and device marks may be protected through filing either a Benelux trademark application or an EU trademark application. Furthermore, the trade name of a company is separately protected under Dutch law as a trade name right, provided that it has been used externally in the course of trade. Whether any trade name rights exist depends on the use of the trade name, not on the registration thereof with the Dutch Chamber of Commerce. The registration of a domain name as such does not create any rights but may under certain circumstances contribute to establishing use of a trade name. There is no recognition of unregistered trademarks under Dutch or Benelux law, except for the recognition of well-known marks according to article 6bis of the Paris Convention.

Law stated - 30 January 2022

Licensing

What rules, restrictions and best practices apply to IP licensing in the fashion industry?

Rules governing IP licensing are distributed over the various acts relating to each type of IP right.

The Dutch Copyright Act provides that a licence can be granted for the whole or part of the copyright. An exclusive licence can only be granted by way of a written deed.

Both the Benelux Convention on Intellectual Property Rights (BCIP) and the EU Trademark Regulation provide that a licence to a trademark can be granted for all or part of the goods and for all or part of the territory. To invoke a licence against third parties, it should be recorded in the register. For fashion businesses, trademark licence agreements especially require special attention, given that sales contrary to the provisions of the licence agreement may still lead to exhaustion of trademark rights. In that case, the trademark owner will only have a claim against the licensee for breach of contract but will not be able to stop third parties from further marketing the goods in question. The owner can only rely on its trademark rights when the licensee has acted contrary to licence provisions regarding the (1) duration of the licence, (2) form in which the trademark may be used, (3) goods covered by the licence, (4) territory and (5) quality of the goods and services. It is, therefore, essential to include clear arrangements on these points, especially concerning the quality and supervision requirements that the licensee must meet.

The BCIP and Community Design Regulation contain similar provisions as compared to those set out above for trademark licensing.

Law stated - 30 January 2022

Enforcement

What options do rights holders have when enforcing their IP rights? Are there options for protecting IP rights through enforcement at the borders of your jurisdiction?

IP rights can be enforced in the Netherlands through preliminary injunction proceedings or proceedings on the merits. Where a case is particularly urgent and the infringement is clear cut, an injunction may also be obtained through ex parte proceedings without prior hearing of the defendant, particularly where delay would cause irreparable harm.

The Netherlands can be a particularly favourable jurisdiction for copyright holders, as Dutch courts readily grant copyright protection to works of applied art and furthermore under certain circumstances assume jurisdiction to grant

pan-European injunction on the basis of copyright against Dutch defendants and any co-defendant sued in the same action with a Dutch defendant where there is a close connection between the cases.

Dutch customs are also active in stopping counterfeit and other infringing goods from entering the EU via the Netherlands through their specialised IP team in Groningen. Customs may stop suspected infringing goods ex officio and will then contact the rights owner and the addressee of the goods, but it is also possible to submit a customs request asking customs to proactively monitor for any suspected infringements. In the latter case it may be recommendable to organise training sessions with customs to properly identify counterfeit.

Finally, rights holders can also take action against the registration of any conflicting trademark applications through filing oppositions, cancellations and revocations at the Benelux Office for Intellectual Property and the European Union Intellectual Property Office.

Law stated - 30 January 2022

DATA PRIVACY AND SECURITY

Legislation

What data privacy and security laws are most relevant to fashion and luxury companies?

The EU General Data Protection Regulation 2016/679 (GDPR), the Dutch GDPR Implementation Act and articles 11.7 and 11.7a of the Dutch Telecommunications Act implementing the spam and cookie obligations under the EU ePrivacy Directive (2002/58/EC, as amended 2009/136/EC).

Law stated - 30 January 2022

Compliance challenges

What challenges do data privacy and security laws present to luxury and fashion companies and their business models?

Generally, the luxury and fashion industries face challenges with regard to data security. Companies operating in these industries are most often public facing and well-known brands for whom negative publicity about security incidents could seriously damage the reputation of their brand. This is all the more relevant because most administrative fines imposed under the GDPR are related to security, data breaches and a lack of technical and organisational security measures to safeguard personal data.

Furthermore, as a consumer-focused industry, the retail fashion industry will face various challenges in the field of spam, cookies and other forms of direct marketing. For example, there are continued developments around new legislation for direct marketing, on both the Dutch and European levels, as illustrated by new rules on telemarketing in the Netherlands as well as the current negotiations within the EU regarding adoption of the ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Notably, the French data protection authority (CNIL) issued various large fines in December 2022 to Microsoft (€60 million), and in December 2021 to Google (€150 million) and Facebook (€60 million) for alleged cookie violations. The Belgian and Spanish data protection authorities have also issued cookie specific fines and various other EU data protection authorities have carried out or are carrying out audits in this field. This is a good indication of what could also be expected in the Netherlands. Companies such as retail fashion companies operating in these areas are advised to keep a close watch on these developments.

Law stated - 30 January 2022

Innovative technologies

What data privacy and security concerns must luxury and fashion retailers consider when deploying innovative technologies in association with the marketing of goods and services to consumers?

Some new technologies can be quite invasive and intrusive to the privacy of individuals. When use of such technologies involves the processing of personal data, it must adhere to the general principles of necessity and proportionality. In short, these requirements together ensure that the most effective and least intrusive way (ie, also in consideration of alternatives that are less intrusive) to process personal data is chosen and that the interference in the privacy of individuals is proportionate in consideration of the objectives of the retail fashion company.

Especially with more invasive innovative technologies such as facial recognition, it could be that the use of such technologies does not meet the requirements of necessity and proportionality when deployed. Companies wishing to apply such technologies are advised (and sometimes required) to perform a data protection impact assessment (DPIA), which will, inter alia, allow them to assess how to meet these requirements.

Furthermore, most EU countries have specific national rules for the processing of special category data such as biometric data. In the Netherlands, for example, the use of biometrics (including fingerprints and facial recognition) is restricted by law to specific purposes.

Law stated - 30 January 2022

Content personalisation and targeted advertising

What legal and regulatory challenges must luxury and fashion companies address to support personalisation of online content and targeted advertising based on data-driven inferences regarding consumer behaviour?

With regard to both advertising techniques there are a lot of developments ongoing on the legal spectrum, both in the Netherlands as well as in Europe. The trend appears to shift towards a stricter interpretation and use of advertising techniques, but it is currently unclear where the boundaries will fall and for which technologies they will apply.

For example, there are continued developments around new legislation for direct marketing, on both the Dutch and European levels, as illustrated by new rules on telemarketing in the Netherlands and current negotiations within the EU regarding the adoption of the ePrivacy Regulation. Further to this, in the absence of the aforementioned ePrivacy Regulation, more and more European regulators have issued guidelines and started enforcement proceedings on direct marketing topics, often using the GDPR as a way to justify a stricter interpretation of direct marketing rules. Companies such as retail fashion companies operating in these areas are advised to keep a close watch on these developments.

In the Netherlands, certain forms of profiling or personalisation could trigger the need for a DPIA.

Law stated - 30 January 2022

ADVERTISING AND MARKETING

Law and regulation

What laws, regulations and industry codes are applicable to advertising and marketing communications by luxury and fashion companies?

Advertising and marketing communications are firstly covered by the rules on unfair commercial practices (articles 6:193a to 6:193j, Dutch Civil Code) and misleading and comparative advertising (articles 6:194 to 6:196, Dutch Civil Code). Advertising on TV and via video platforms is also subject to the Dutch Media Act.

There is also a self-regulatory framework called the Dutch Advertising Code. This Code applies to all types of advertising and may be enforced through recommendations from the Dutch Advertising Code Committee and naming and shaming for parties who do not comply. Particularly relevant for luxury and fashion companies are the specialised codes on social media and influencer marketing and on cosmetics.

Furthermore, particularly in relation to sustainability claims, the Dutch Authority for Consumers and Markets (ACM) introduced Guidelines for sustainability claims in January 2021. The Guidelines on Sustainability Claims are available online in English . The ACM has announced that the fashion sector is one of its three focus areas, and it is actively pursuing investigations regarding several Dutch and foreign apparel companies.

Law stated - 30 January 2022

Online marketing and social media

What particular rules and regulations govern online marketing activities and how are such rules enforced?

The rules for online marketing – in particular influencers and vloggers – are mainly based on two types of self-regulation:

- Advertising on social media is covered by the Dutch Advertising Code Social Media & Influencer Marketing (RSM), which is enforced by submitting a complaint to the Dutch Advertising Code Committee, who can issue a warning and who keep a naming-and-shaming list for parties who do not comply. The main requirements of the RSM are:
  - ads must be identified as such where there has been any compensation in cash or in kind;
  - children under 12 years old may not be directly encouraged to advertise products or services on social media; and
  - the advertiser is responsible for ensuring that the influencer follows these rules.
- Several YouTube vloggers have created De Social Code, which provides guidance on when and how to identify that a video has been sponsored. There are no sanctions for non-compliance.

In addition, online video platforms are also covered by the Media Act and can be subject to the same substantial fines imposed by the Dutch Media Authority as apply to advertising on TV. The main requirements of the Media Act are that a video platform provider must have a code of conduct, advertising must be clearly recognisable as such, the identity of the video uploader must be clear, and minors should be protected against harmful content. The Media Act furthermore contains a requirement for commercial on-demand media services to be registered with the Dutch Media Authority and to sign up to the Dutch Advertising Code Committee, which can in certain cases also include, for instance, YouTube channels.

Law stated - 30 January 2022

PRODUCT REGULATION AND CONSUMER PROTECTION

Product safety rules and standards

What product safety rules and standards apply to luxury and fashion goods?

In the Netherlands, the relevant product safety rules and standards are included in the Dutch Commodities Act, including underlying legislation, such as the General Product Safety (Commodities Act) Decree. This legislation mainly includes safety requirements and labelling and packaging requirements.

Specifically for luxury and fashion goods, the Textile Articles (Commodities Act) Decree will also be relevant. This is the Dutch implementation of EU Regulation No. 1007/2011. This Decree, inter alia, contains the obligation to label goods that consist of over 80 per cent textile. Rules regarding the fire safety of fashion and, in particular, nightwear are, inter alia, included in enforcement agreements on fire safety of clothing.

Law stated - 30 January 2022

Product liability

What regime governs product liability for luxury and fashion goods? Has there been any notable recent product liability litigation or enforcement action in the sector?

The regime that governs product liability is included in Title 6.3.3 of the Dutch Civil Code. This is the Dutch implementation of the European Product Liability Directive (Directive 85/374/EEC). The rules on product liability protect consumers against damage or injury caused by defective products.

Product liability is, in principle, a strict liability under the Dutch tort regime and cannot be excluded in a contract. In principle, the producer is liable for damage caused by a defect in his or her product.

Law stated - 30 January 2022

M&A AND COMPETITION ISSUES

M&A and joint ventures

Are there any special considerations for M&A or joint venture transactions that companies should bear in mind when preparing, negotiating or entering into a deal in the luxury fashion industry?

As with M&A transactions in any sector, one should consider what would be the preferred deal structure (ie, whether the transaction should be structured as a share sale or a sale of all or part of the assets of the target company). Generally speaking, intellectual property and brand protection are key components in M&A transactions in the luxury fashion industry, which is reflected in the due diligence investigations as well as in the transaction documentation (notably the representations and warranties). In addition, retention of key persons (such as designers) as well as restrictive covenants are often points of attention.

Technological innovations are also becoming increasingly important in the luxury fashion industry. Many fashion companies have (in one way or another) an online sales and marketing presence, which triggers all sorts of potential legal issues (eg, privacy and cybersecurity issues) that are often part of the scope of due diligence and transaction documentation.

Law stated - 30 January 2022

Competition

What competition law provisions are particularly relevant for the luxury and fashion industry?

Competition law plays a role in the luxury and fashion industry in relation to all forms of distribution and online sales, particularly when it concerns exclusive arrangements, selective distribution, pricing arrangements, customer allocation, etc. Articles 6 and 24 of the Dutch Competition Act (DCA) are the cornerstones of the Dutch competition law framework. Article 6 DCA corresponds to article 101 of the Treaty on the Functioning of the European Union (TFEU) – prohibition of restrictive agreements and concerted practices. Article 24 DCA corresponds to article 102 TFEU – prohibition of abuse of dominance. The Dutch Authority for Consumers and Markets (ACM) generally follows the European Commission's policy regarding the application of the competition rules in relation to the Dutch equivalents.

The EU competition law regime for 'vertical agreements' applies directly to the distribution of luxury and fashion products in the Netherlands. The notion of vertical agreements covers all types of distribution or re-selling of products or services, except agency agreements under which the agent bears no commercial or financial risk for the products or services delivered (other than its own commission). This EU regime has been thoroughly reviewed by the EU Commission, resulting in the issuance of a new Vertical Block Exemption Regulation (VBER) No. 2022/720 and accompanying Guidelines on the application of article 101(3) TFEU to vertical agreements, per 1 June 2022. The new VBER has effect for a period of 12 years, so until 2034. For an overview of the main changes, please find our analysis here .

Recently, e-commerce agreements are under more scrutiny as the European Commission is stepping up enforcement on e-commerce agreements (following its Digital Single Market objectives). As the Commission notes in its recent ecommerce sector inquiry, there is an uptake in selective distribution as this enables suppliers of (luxury) brand products to get more control over the quality of distribution of their products. The new VBER gives stronger protection to selective distribution systems by giving more room to combine and protect exclusive and selective distribution in different territories within the EU.

In the new Guidelines, the Commission accepts that dual pricing for goods sold online or offline may be justified under article 101(3) TFEU. Thus, the supplier may ask a different price (or grant lower discounts) for products that will be sold online (eg, if the costs for offline reselling are significantly higher compared to the online sale). It seems that this will also be accepted by the Commission in its new regime for vertical agreements, provided that it can be justified in view of the different costs involved and not have an unduly restrictive effect on online reselling.

While recommending resale prices to distributors and retailers is generally allowed under the regime for vertical agreements, it is considered illegal to restrict a distributor's freedom to determine its resale price with the exception of maximum resale prices. Similarly, restrictions of online sales, restrictions on reselling and absolute territorial protection (passive sales bans) are generally prohibited. In 2021, the ACM imposed a fine of nearly €40 million on Samsung for unlawful price pressure on its resellers; this fine was upheld in 2022 by the ACM following administrative review. The case is now under appeal before the Rotterdam District Court. In 2022, the ACM launched a campaign to warn suppliers that resellers must be free to determine their resale prices and any direct or indirect influencing to maintain recommended prices, margins or certain price levels are considered to violate competition rules.

The ACM also published its own Guidance on Agreements between suppliers and buyers in July 2022, providing a practical and SME-focussed summary of the Commission's new regime for vertical agreements.

Law stated - 30 January 2022

EMPLOYMENT AND LABOUR

Managing employment relationships

What employment law provisions should fashion companies be particularly aware of when managing relationships with employees? What are the usual contractual arrangements for these relationships?

Because the fashion industry particularly works with a lot of freelancers and external creative experts, there is always a risk that the arrangement with a contingency worker will be requalified as an employment agreement, if challenged by the contingency worker. The contingency worker may be inclined to do so, for example, in case of sickness (claiming statutory continued payment of sickness) or upon the termination of the relationship at the initiative of the employer. The test to be applied by the court will include many elements (it is holistic), the most important one being the question whether the employer exercises supervision and control over the contingency worker and whether the contingency worker performs a role similar to a role performed by genuine employees. The court will apply a 'substance over form' test, whereby the parties' intention is not relevant. Without going into detail, in essence there are only two relevant types of contract for contingency workers:

- a services agreement for the provision of well-defined services, whereby the recipient of those services (the fashion company) will not exercise supervision and control over the service provider (or individual worker who will be engaged in the provision of the services) or the individual contractor; and
- a supply of personnel agreement, pursuant to which the supplier will supply the individual worker to the fashion company to perform work for the benefit and under supervision and control of the fashion company.

The likeliness of the above-mentioned risks on requalification materialising will largely depend on the chosen contracting structure, but also on the actual performance (compliance with the structure parameters).

Another common contractual arrangement in the fashion industry relates to interns: provided that the individual is truly engaged as an intern, whereby the focus of the internship is on gaining knowledge and experience by the intern (ie, no employment; no real work contribution; no real work obligation; preferably still registered at university; no salary, just a moderate allowance), the risk of requalification in this respect will be limited. However, if the internship agreement is requalified as an employment agreement (at the initiative of the intern), the time spent will count towards continuous service. Under Dutch law, this would count as an initial fixed-term employment agreement, meaning the following contract will count as the second employment agreement (which, under certain circumstances, may lead to the employment agreement being considered permanent).

Law stated - 30 January 2022

Trade unions

Are there any special legal or regulatory considerations for fashion companies when dealing with trade unions or works councils?

Trade union

Collective labour agreements are rather common in the Netherlands, either at the company or industry level. In principle, the collective labour agreement binds the parties and their members. In some sectors, however, (parts of) a collective labour agreement can be binding by law for all employers and employees working in a specific sector. The Collective Labour Agreement Retail Non-Food has a long history of being binding by law, and this will, most likely, also be the case for the Current Collective Labour Agreement (until 31 December 2023).

Trade unions mainly play a role in negotiating collective labour agreements and in situations involving mass redundancies.

Works council

This section is especially relevant for larger fashion companies that, for instance, have their headquarters in the Netherlands. Under Dutch law, each company with normally at least 50 workers (not specifically limited to employees) should install a works council. In addition to the right to information, the main rights of the works council are the right to provide advice and the right of prior consent.

Works councils have a legal right to provide advice on a number of legally prescribed important topics. This advice should be sought at a time when the works council can still materially influence the decision of the company. If the company does not respect the advice of the works council, the works council can petition a special chamber of the Court of Appeal of Amsterdam.

Works councils also have a legal right to provide consent prior to a decision to introduce, amend or abolish a regulation on a number of legally prescribed topics. If a works council does not consent to a proposed decision and the company wants to continue with the decision, the company should seek consent from a cantonal judge. If the company continues with the decision where neither the works council gave its prior consent nor the company obtained prior approval of a cantonal judge, the works council can annul the decision.

The costs reasonably necessary for the performance of the duties of the works council shall be borne by the employer (eg, travel expenses and/or reasonable costs of attendance of external trainings in support of the work's council's tasks).

Law stated - 30 January 2022

Immigration

Are there any special immigration law considerations for fashion companies seeking to move staff across borders or hire and retain talent?

Because a large number of international fashion companies have their headquarters in the Netherlands and these companies are often run by an international workforce, immigration law can be an important topic in the industry. Employees from the European Union, European Economic Area (EEA) or Switzerland do not have to obtain a valid work permit from the Immigration and Naturalisation Service before starting work.

A work permit will in principle (ie, unless an exception applies) only be granted to the employer of nationals from outside the EU, EEA or Switzerland if no potential worker can be found within the EU, EEA or Switzerland. The work permit must be obtained prior to the foreign worker performing any work. If an employee will work or stay in the Netherlands for a period longer than 90 days, the employee must obtain a combined work and residence permit.

Several exceptions apply to the requirement to obtain a work permit. Some examples are where:

- the foreign worker performs certain types of work and occasionally works in the Netherlands for a short period (examples include business trips, preparation of fashion shows or the launch of a new store);
- the foreign worker is a 'highly skilled migrant';
- the foreign worker holds a residence permit that states 'permitted to work';
- the foreign national holds a residence permit allowing self-employment for the type of work concerned; and
- the foreign national has attained at least a master's degree in the Netherlands. In that scenario, the foreign worker can obtain a residence permit for a maximum of one year to find a job as a highly skilled migrant or to

start an innovative company.

Law stated - 30 January 2022

UPDATE AND TRENDS

Trends and developments

What are the current trends and future prospects for the luxury fashion industry in your jurisdiction? Have there been any notable recent market, legal or regulatory developments in the sector? What changes in law, regulation, or enforcement should luxury and fashion companies be preparing for?

Like other luxury and fashion sectors around the world, increasing sustainability and moving towards a circular economy is currently one of the focus points of the Dutch fashion market. Not only consumers, but also the Dutch Authority for Consumers and Markets (ACM) has been actively following these developments and has named the fashion industry one of the key sectors to monitor in connection with its Guidelines on Sustainability Claims (available online in English). While these are guidelines, they serve as the basis for enforcement of the rules on unfair commercial practices, violation of which can result in hefty fines, and the ACM has already obtained undertakings from several fashion companies.

Another prospect surrounding sustainability will be the introduction of the Extended Producer Responsibility legislation for the textile sector, which is set to enter into force over the course of 2023 and will make producers and importers of textiles in the Netherlands responsible for the recycling and reuse of the textiles they put onto the market.

Other developments include the implementation of new e-consumer legislation in 2022, and the expected reforms to the EU VAT system through the EU's VAT in the Digital Age Initiative.

Law stated - 30 January 2022

Jurisdictions

Canada	McCarthy Tétrault LLP
France	Hogan Lovells
Germany	Hogan Lovells
Hong Kong	Hogan Lovells
Italy	Hogan Lovells
Luxembourg	Arendt & Medernach
Mexico	Creel García-Cuéllar Aiza y Enriquez SC
Netherlands	Bird & Bird LLP
Spain	Hogan Lovells
Switzerland	Kellerhals Carrard
Taiwan	Formosa Transnational Attorneys at Law
United Kingdom	Hogan Lovells
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