



International Distribution Institute

## **Consignment Stock & Franchisees in financial troubles**

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## Introduction

- Rationale for consignment
- Models
- Risks
- Legal context
- What happens if franchisee gets into financial problems?
- Important contractual provisions

# Consignment





- Franchisor places goods with franchisee, receiving payment once the goods are sold to end-customers
- Ownership, title (and risk?) of the products placed in possession of franchisee until the products are sold
- Franchisee will never become owner of the products; cf. ROT
- Title /ownership passes directly from franchisor to end-customer

## Why?

### **Finance**

- Facilitate the access to the network to financially weaker franchisees

### **Reduce inventory risks**

- Enable the franchisee to have a trial period
- Enable the franchisor to sell the goods
- Enable the franchisor to control the destiny of unsold stock
- Reduce franchisor's warehousing costs

### **Security**

- Franchisor has the security of revindication

## Risks

- Franchisee fails to pay the franchisor the agreed price after franchisee makes sales
- Some of the consignment goods in the franchisee's possession go 'missing'
- Franchisee refuses to return remaining goods when agreed or contract ends
- Attacks from franchisee's creditors on the consignment stock

## Dutch Law

### Consignment stock

- Title to products remains with seller until stock has been sold to end-users
- Depending on durable basis, intermediary role, 'commissionaire'

### Netherlands

→ Not in civil code:

- If contracts are not in the name of the franchisee/ commissionaire 'commercial agency'
- Legal framework of bailment (*bewaargaving*), retention of title (*eigendomsvoorbehoud*) and mandate (*lastgeving*) may be applicable



## **The Importance of a solid contract: Liabilities**

- Who is liable for risk of theft, damages etc?
- Expressly stipulate that risk in the goods passes to the franchisee upon delivery
- Or agree in writing that franchisee will be under a duty of care with respect to the goods
- Franchisee accepts obligation to insure stock; discuss/ check insurance coverage



## EU Competition Law

- Concept of 'genuine agency'
- Franchisee cannot bear any or insignificant financial or commercial risks (for stock, showroom, after sales service, credit collection) → normally a franchisee invests in shop, design, marketing etc.
- When franchisee bears no risks → Franchisor is free to determine resale price etc.
- Complications

## When sales are disappointing

- When sales are disappointing franchisee will apply prices as low as necessary
- Franchisor has limited scope to avoid unwanted discounts, if it is not a genuine agency agreement
- Commercial solution for non genuine agency agreements
  - Return policy: franchisee will be inclined to return all stock for which the resale price drops below its purchase price



## Late or no payments

- What if stock is sold to end-users but franchisee fails to pay franchisor?
  1. Franchisor can revindicate products if they are in franchisee's warehouse
  2. This is not possible when end-users already possess the products
  3. Solution is advance payment or security

## **If the franchisee becomes insolvent**

- If title/ownership remained with franchisor the receiver should respect this
- 'cooling off period'
- Attachment by Dutch tax authorities excludes stock because it is only 'temporary' there
- International complications
- Discussion?



## Important contractual provisions

- The credit or references of your consignee
- Having a written consignment agreement that spells out the inventory being consigned, risk, duty of care
- The retail price (and other terms) the goods will be sold for (Competition law!)
- The consignee's obligations (to market/sell)
- The consignee's fees
- Defective products, warranties
- Control of stock levels, mark & keep separate
- Return of products
- Who organizes and pays for shipping
- The type and amount of insurance that the consignee will carry to protect your goods
- When and how the arrangement will terminate
- Applicable law and dispute resolution