

Stricter rules on payment terms as of 1 July 2017 in the Netherlands

Stricter rules on payment terms under Dutch law – market update

On 1 July 2017 the Dutch act dealing with payment terms of maximum sixty days for large companies (*Wet uiterste betaaltermijnen van zestig dagen voor grote ondernemingen*) has entered into force (the “Act”). As a consequence, it is now prohibited for large companies (as debtor) to agree upon payment terms of more than 60 days when entering into commercial contracts with small and medium sized enterprises (SMEs) or independent entrepreneurs (as creditor).

The situation before 1 July 2017

Before the new Act entered into force, all parties (irrespective of type) could agree upon a payment term of maximum 60 days, or even longer if this is not “apparently unreasonable” towards the creditor.

Reasons for introducing the new Act

In practice large companies often apply payment terms of more than 60 days when concluding commercial contracts with SMEs and independent entrepreneurs. This is amongst others the case within the construction sector. Research carried out in 2015 by EIM-Panteia at the request of the Netherlands Construction Federation (*Aannemersfederatie Nederland*) shows that 53% of all SME contractors and specialized contractors deal with payment terms of longer than 60 days.

The Dutch legislator deems such practice to be undesirable as such practice leads to: (i) a detriment of the liquidity position of the involved SMEs and the independent entrepreneurs, (ii) a snowball effect whereby other companies within the same chain are also forced to use such longer payment terms, and (iii) a negative impact on the economy as a whole. This justifies, according to the legislator, the underlying new Act.

Changes under the new Act

With the introduction of the new Act the standard of “apparently unreasonable” will no longer be applicable to commercial contracts concluded between large companies (as debtors) and SMEs and independent entrepreneurs (as creditors). Agreeing upon a payments term of longer than 60 days in such situations will simply be forbidden.

Agreeing, nevertheless, upon such longer payment term, leads to the nullity of the agreed payment term and to the conversion thereof (by operation of law) into a payment term of 30 days. As a consequence, the large company must then pay the applicable statutory interest in respect of the term that exceeds the payment term of 30 days. A notice of default is not required. The statutory interest is already due immediately as soon as the final payment term has lapsed. This, in combination with the fact that a claim in respect of the statutory interest can be invoked for a period of 5 years and that compound interest is calculated, can lead to a substantial increase of the amount due.

Parties can however – and this was also the case before 1 July 2017 – deviate from the applicable statutory interest (which is around 8% at this moment) by agreeing upon a higher or lower interest rate. In the construction sector several administrative conditions (UAV 2012 and the UAV-GC 2005) have used this possibility and allow – in certain circumstances – for an increase of 2 of the statutory interest. Further, the UAV 2012 and the UAV-GC 2005 have excluded the compounding of interest.

To whom is the Act applicable?

The new Act is applicable to large companies (as debtor) who enter into commercial contracts with SMEs or independent contractors (as creditor).

An entity qualifies as a large company in the event that it has not met – during two consecutive financial years – two of the three criteria mentioned in the table below. An entity qualifies as an SME in the event that it has met – during two consecutive financial years – at least two of the three criteria. To the amounts mentioned in the table below, the value of the assets, the net revenue and the amount of employees of group entities that have to be consolidated in the event that the company will have to draw up a consolidated annual account, should be added.

Criteria	
Asset value on the balance sheet	maximum EUR 20,000,000
Net turnover during a financial year	maximum EUR 40,000,000
Average amount of employees in a financial year	less than 250

An independent entrepreneur, as referred to in this article, is a natural person acting in course of his professional practice or business.

The prohibition to agree upon a payment term of longer than 60 days does not apply to: (i) situations where the large company is the creditor and the SME or independent entrepreneur is the debtor and to (ii) commercial relationships concluded between companies which are considered to be equal or almost equal by the legislator (e.g. contracts concluded between two large companies or between two SMEs).

As of when will the new Act apply?

The new Act shall apply as of 1 July 2017 for all new agreements. For existing agreements the new Act shall apply as of 1 July 2018.

Practical consequences of the new Act

As a consequence of the new Act large companies should be (even more) aware of the characteristics of their counterparty and should verify whether their counterparty qualifies as a SME or an independent entrepreneur. Vigilance in this respect is not only relevant when concluding an agreement, but also during the execution thereof.

In addition, large companies should amend their (model) agreements. This does not only relate to the duration of the payment term but also to adding protection mechanisms into the agreements in order to mitigate the impact of the new Act (e.g. adding arrangements in respect of the applicable interest rate, applicable information obligations etc.).

For SMEs and independent contractors the new Act leads – or at least this is the underlying idea and expectation of the legislator – to a stronger legal position. Where under the current act such parties may have had restraints to initiate proceedings due to the lack of clarity on when a payment term that exceeds 60 days qualifies as “apparently unreasonable”, the legislator hopes to have eliminated such hurdle by introducing the new Act.

What we offer

As a consequence of the new Act several legal questions can arise, especially for (international) large companies. Simmons & Simmons can offer a further understanding of the concrete impact of this new Act on your Dutch business and provide you with tailor made advice in respect of questions such as:

- What is the impact of the new Act on commercial contracts governed by foreign law while having a Dutch component (i.e. international private law issues)?
- How to deal with claims and relationships that are transferred through different legal concepts from a SME as creditor to a large company as creditor (e.g. via factoring)?
- How to deal with contracts concluded by special purpose vehicles with diverse shareholders (i.e. SMEs and large companies combined)?
- What are the consequences if the nature of your contractor changes from large company to SME or from an SME to a large company, during the course of a contract?
- To which extent strict procedural invoicing requirements are admissible?
- Which mitigation/protection measures can be taken?

This elexica article is an abbreviated and translated version of the contribution to the online construction newsletter [Actualiteiten Bouwrecht](#) of the Dutch Institute of Construction Law.

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