LOYENS & LOEFF
Law & Tax

GENERAL OVERVIEW OF DUTCH LEASE LAW

1 GENERAL REMARKS

On 1 August 2003, new Dutch legislation on commercial leases came into force. This legislation is incorporated in articles 7:201 up to and including 7:310 DCC. The new lease legislation applies to already existing leases at the time of enforcement as well as to leases concluded after 1 August 2003. Already existing claims and pending legal proceedings regarding leases at the time of enforcement of the new Dutch lease legislation remain subject to the former Rent Act 1950 (*Huurwet 1950*).

According to Dutch law, a lease is a contract with the following elements:

(a) the landlord provides the tenant with the use of (the leased space in) its property; and

(b) the tenant pays a consideration for that use.

A lease can be made up in any kind of form, written or verbal. The fact that there is no signed lease does not mean that the lease does not exist. The existence of a lease is presumed if one party (the tenant) pays the rent regularly and the other (the landlord) accepts the occupational lease. With respect to the terms and conditions of such a presumed lease, certain mandatory provisions may be applicable. If for instance, it concerns the lease of commercial/retail space, the DCC provides for some (semi) mandatory terms and conditions, such as the duration of the lease and the termination thereof.

Leases are classified as agreements that constitute personal rights only. A lease does not provide or constitute any right in rem. Comparable to German law on leases, Dutch lease legislation does not permit the use of lease interests as a third-party security. Rights of a tenant under a lease cannot be encumbered, pledged or assigned.

Many commercial leases are based on the standard template of the Dutch Council for Real Estate (*Raad voor Onroerende Zaken*) (**ROZ**). This template (a standard form of contract with standard conditions) addresses the main rights and obligations of both the landlord and the tenant, although the standard conditions do tend to favour the landlord. Although the ROZ templates are considered market practice, parties are entitled to use tailor-made agreements, or tailor-made amendments to the ROZ general terms and conditions. Please note that there are different versions of the ROZ general terms and conditions per applicable lease regime, the latest versions are ROZ Office Space 2015, ROZ Retail Space 2022 and ROZ Residential Space 2017.

2 CATEGORIES OF PROPERTY LEASE

The Dutch lease legislation distinguishes three types of lease regimes:

(a) leases for office space, industrial space or other type of commercial space that do not qualify as retail or private housing (article 7:230a DCC);

(b) leases for retail space, intended to be used as i.e. retail shop, hotel, restaurant and that are open to the public (article 7:290 DCC); and

(c) leases for residential space (article 7:232 DCC).

The applicable mandatory regime differs for each type of lease. The primary designated use of the leased space usually determines the category.

Articles 7:201 up to and including 7:231 DCC contain general provisions that apply to all leases. In addition to the general provisions, the DCC contains specific provisions, which apply to the various type of leases.

3 KEY ITEMS OF DUTCH COMMERCIAL LEASE LAW

3.1 Term of lease

Leases with respect to commercial real estate (i.e. retail and office/industrial space) can be entered into for a fixed period or for an indefinite period.

Regarding leases with respect to office/industrial space, the parties are free to decide the lease period. However, a five-year to a ten-year lease period is common. Leases often include one or two renewal periods (for example of each 5 years).

According to mandatory provisions, leases for retail space are entered into for an initial duration of at least five years. Upon expiry of the initial term, the lease will automatically be continued up to a total period of ten years. Leases agreed for a (and with an actual) duration of less than two years, are not subject to the mandatory provisions 7:291 up to and including 7:300 DCC (inter alia the provisions regarding the duration of the commercial lease).

3.2 Rent

Parties are free to agree upon the rent. Usually, the rent is paid monthly or quarterly, usually prior to commencement of the specific payment period.

3.3 Revision of rent

Parties usually agree to a rent subject to annual indexation, by way of the consumer price index (CPI). The parties can agree upon a cap on this indexation.

Furthermore, regarding leases with respect to retail space, the law provides for a possibility of market rent review (see paragraph 6.1). The law does not provide for this possibility for the lease of office/industrial space, but the parties to such lease are free to contract on such market rent review (see paragraph 5.1).

3.4 Security for rent

It is common practice, although not mandatory, that the tenant provides a (bank) guarantee or a deposit in the value of three months' rent payment, which is valid up to six months after the end of the lease. The ROZ template bank guarantee is often used. This template contains a bankruptcy provision and provides that the guarantee will be transferred to the new landlord/owner in case of a transfer of the leased property. In the case the bank guarantee does not contain a provision on the transfer of the rights thereof to the new landlord/owner of the leased property, Dutch law does not provide for such a transfer. In that case, the new landlord must demand from the tenant to issue a new bank guarantee. Furthermore, parties could agree that the tenant provides security to the landlord by

means of a parent guarantee or a so-called '403-statement' issued by the parent company, see paragraph 7.

3.5 Remedy for non-payment of rent

In the case of default by a party, the other party may request proper fulfilment or termination of the lease by court order. Most bank guarantees provide a right for the landlord to invoke the guarantee in case the tenant does not duly pay the rent. Furthermore, it is not uncommon that parties agree on a penalty per day if the tenant does not fulfil its obligations under the lease.

3.6 Termination of leases in general

If a lease is entered into for a fixed period, it will not be possible for the tenant or the landlord to terminate the lease prematurely (except for termination by mutual consent). It will only be possible for both the tenant and the landlord to terminate a lease prematurely if one of the parties is in serious breach of its obligations under the lease, for example non-payment of the rent for a considerable period (at least three months). In that case, the competent court can be requested to dissolve the lease.

If a lease is entered into for an indefinite period, both the tenant and the landlord may, with due observance of the applicable provisions, terminate the lease at any moment by giving notice of termination. Both the tenant and the landlord must, however, observe the agreed notice period. In the case of retail space, a notice period of at least one year is required by law.

If the tenant goes bankrupt, both the bankruptcy trustee and the landlord may terminate the lease, whereby a notice period of three months will in all events be sufficient. If the tenant is granted a suspension of payments only the tenant may terminate the lease, whereby a notice period of three months will in all events be sufficient.

3.7 Permitted use

In the event the tenant does not use the leased space in accordance with the designated use agreed upon in the lease and the lease stipulates that the leased space should be used exclusively for this designated use, the tenant is in default, unless the landlord has approved a change of use. Under circumstances such a default of the tenant may lead to an action for dissolvement of the lease by the landlord.

If the tenant does not use the leased space in accordance with the applicable zoning plan, the local authorities may order the tenant and/or the landlord to terminate this use, imposing a daily basis penalty in the case of non-compliance, or by administrative enforcement. The penalty and/or the costs of the administrative enforcement are for the account of the offender.

3.8 Sublease

A tenant may sublease the leased space in whole or in part to a third party, unless it has reason to assume that the landlord has reasonable objections to the sublease. As this is not mandatory law, the parties may deviate contractually. The ROZ general terms and conditions stipulate that the tenant may not sublease without prior written approval from the landlord. However, the overall principles of reasonableness and fairness of Dutch contract law play a role in every contractual relationship. This usually implies that the landlord cannot unreasonably withhold its permission for sublease.

3.9 Maintenance & repair

According to Dutch law, the tenant is obliged to take care of minor maintenance and day-to-day repairs. The landlord is obliged to perform extensive and constructive maintenance and major repairs. As this is not mandatory law, the parties may deviate contractually.

4 MANDATORY PROVISIONS APPLICABLE

4.1 Defects

According to article 7:204 DCC, the landlord is responsible for the remediation of defects that obstruct quiet enjoyment under the lease and the tenant can claim an interim rent reduction and damages. The tenant is obliged to report the defect in time. Parties can agree to exclude foreseeable or existing defects. The landlord cannot exclude its responsibility for existing defects of which the landlord was, or should have been, aware and failed to inform the tenant prior to the commencement of the lease. Furthermore, parties can agree to exclude the responsibility of the landlord for defects arising after commencement of the lease.

4.2 Alterations

A tenant is not permitted to change the fixtures and fittings of the leased space without the written approval of the landlord. If modifications have been made with approval of the landlord, the tenant is not obliged to remove any results of modifications upon termination of the lease.

4.3 Urgent works & renovations

The tenant is obliged to co-operate with the execution of urgent maintenance works in respect of the leased space. Under certain circumstances the tenant is also obliged to co-operate with a necessary renovation of the leased space. The fact that the tenant is obliged to co-operate does not affect the liability of the landlord to provide quiet enjoyment under the lease. Thus, the tenant may claim a reduction of the rent, or other compensation.

4.4 Reinstatement obligations

The tenant is obliged, upon termination of the lease, to redeliver the leased space to the landlord in the original condition, usually the condition as set out in a certified description drawn up at the commencement of the lease. In the absence of such description, the leased space should be redelivered in a good state of repair, clean, entirely vacated, and free of use or rights of use.

4.5 Assignment

With respect to leases for office/industrial space, the parties involved are not entitled to assign the lease, unless agreed otherwise in the lease or with permission of the other party. The right to assign can be limited to assignment to a group company.

With respect to leases for retail space, the DCC contains a mandatory provision enabling the tenant to demand substitution of a third party as tenant under the lease if the tenant intends to transfer its business to the third party. The court may decide

whether to sustain such a demand, see paragraph 6.3.

4.6 Damages caused by defects

The landlord is liable for the damages caused by defects of the leased space, if:

(a) the defects occurred after the commencement of the lease and are attributable to the landlord; and

(b) the defects existed at the commencement of the lease and the landlord was aware or should have been aware of those defects.

This is a rule of mandatory law and, therefore, there may be no derogation to the detriment of the tenant. However, damages with respect to defects which were unknown to the landlord at the commencement date of the lease, and defects which occur thereafter and are not attributable to the landlord, can be excluded. The ROZ general terms and conditions exclude all liability of the landlord with respect to damages caused by defects of the leased space. The relevant clause in the ROZ general terms and conditions is therefore partly void.

4.7 Transfer of ownership

The sale of the property does not affect an existing lease agreement. No special legal action is required if the lease agreement is entered into by the owner of the property (or one of its legal predecessors). In that event, the transfer of the ownership of the property will result, by operation of law, in the position of the landlord also passing to the new owner. If the lease agreement is entered into by another party, we recommend assessing whether an additional legal action is required (such as a contract takeover).

5 LEASES FOR OFFICE SPACE, INDUSTRIAL SPACE OR OTHER TYPES OF COMMERCIAL SPACE

Leases for office space, industrial space or other type of commercial space that do not qualify as retail or private housing are subject to the mandatory provision of article 7:230a DCC and to the mandatory provisions of articles 7:201 up to and including 7:231 DCC. Regarding leases for office/industrial space, Dutch law contains no provisions concerning the term of the lease, the notice periods for termination or for rent revision. Arrangements on these matters may be made at the discretion of the landlord and the tenant.

5.1 Rent (review)

The landlord and tenant are free to agree on the amount of rent payable. Dutch law contains no provision on this subject. This also means that the parties should contractually provide for a means of rent review and the time at which such review will take place. In absence of such a provision, neither party can request a rent review.

5.2 Lease renewal

Unless the lease contains an option to renew the lease or a provision for an extension of the lease period, the tenant has no automatic right to renew the lease. If parties continue the lease after the expiry date, it will be considered extended for an indefinite period. The lease for an indefinite period can be terminated with due observance of at least the period of a rent payment.

5.3 Parking space and space for the installation of an antenna

In general, a parking space that forms part of the leased building and is leased to the tenant of that same building is subject to the same provisions as set out above. This also applies to a part of the building (mostly a part of the roof) that is leased for the installation of an antenna.

5.4 Vacation protection

Article 7:230a DCC only contains mandatory provisions with regard to vacation protection for the tenant at the end of the lease. The lease terminates in the case one of the parties has given notice of termination of the lease. In order to effect the vacation of the leased space by the tenant, the landlord must also give notice of vacation to the tenant. The obligation of the tenant to vacate the leased space is suspended for a period of two months by force of law as from the date of vacation specified in the notice of vacation.

There is no tenant entitlement to a suspension of the obligation to vacate if the tenant

(a) has given notice of termination on its own behalf;

(b) has explicitly agreed to termination of the lease; or

(c) was ordered to vacate the leased space by court order because of default.

Within the two-month period in which the tenant is entitled to a suspension of the obligation to vacate, it may request the court to extend the term of suspension to a period of one year. By filing this request, the obligation to vacate is further suspended until the court has given a judgement. As the tenant is entitled to repeat this request two more times, the tenant can - in theory - suspend the obligation to vacate the leased space by a maximum of three years.

When deciding on the request of the tenant, the court will first weigh the interests of the tenant in staying in the leased space against the interests of the landlord in having the premises vacated. The tenant's request will be rejected by the court if, for example, the tenant has made improper use of the leased space. The case law on this subject is very casuistic.

The court will determine a compensation to be paid by the tenant to the landlord, for the period of suspension. If the landlord and the tenant do not agree on the amount of such compensation, the court will determine the compensation on the basis of the local rent level, if necessary, further to the advice of an expert.

6 LEASES FOR RETAIL SPACE

The leases concerning retail space are subject to the mandatory provision of article 7:290 up to and including 7:310 DCC and to the mandatory provisions of articles 7:201 up to and including 7:231 DCC. The articles 7:290 up to and including 7:310 DCC are semi mandatory provisions meaning that there may be no derogation to the detriment of the tenant.

6.1 Rent (review)

The landlord and the tenant are free to agree on the rent payable. The tenant and the landlord are entitled to request the court to adjust and assess the rent in accordance with the rent of comparable local retail space, as per the end of the lease period (in the case of renewal), or, if the retail lease has been entered into for an indefinite period, every five consecutive years after adjustment of the rent by the parties, or every five consecutive years after adjustment by the court. The tenant and the landlord must first try to reach mutual agreement on a new adjusted rent. If the parties fail, they must seek expert advice. If the parties cannot reach agreement on the expert to be appointed, the court can appoint an expert. As the advice of the expert is not binding, either party is entitled to request that the rent be adjusted by the court.

The adjustment of the rent is based on the average of rents of comparable local retail space during the last five years.

6.2 Lease renewal

Unless the lease has been entered into for a term of less than two years, the tenant has a legal right to renew the lease for a total term of ten years. As parties usually enter into a first term of five years, the second term will also be five years. If parties in fact continue the lease after the expiry date, it can be considered extended for an indefinite period. The lease for an indefinite period can be terminated by giving notice of termination with due observance of a period of at least one year.

6.3 Assignment

If the tenant of retail space transfers the business it conducts in the leased space (personnel, movable property, stock, goodwill, etc.) to a purchaser, the tenant can also transfer its position as tenant of the retail space to this purchaser by means of assignment. This is a rule of mandatory law, which means that this right of the tenant cannot be limited or otherwise infringed in the lease. If necessary, assignment can be claimed by court order. The court may sustain such a demand if the tenant has relevant arguments in favour of the transfer. The court may deny the demand if the third party cannot provide guarantees that it will fulfil the obligations under the agreement, and that it will act as a 'good tenant'. The court may make the assignment subject to charges and/or conditions. Such charges and/or

conditions will usually relate to the security the new tenant offers the landlord. No assignment of the lease is possible if the leased space are vacant.

A very narrow formulated contractual designated use in the lease, such as 'Supermarket based on the X formula', can give rise to complications. On that ground the landlord might object to the proposed assignment, claiming that the new tenant will not be able to comply with the contractually permitted use and that assignment is therefore unacceptable or not allowed. The Dutch Supreme Court has not yet ruled on this issue. However, it seems likely that such an objection from the landlord would qualify as an unlawful - and therefore invalid - limitation of the tenant's statutory right of assignment.

6.4 Termination

If the lease is entered into for a fixed period, neither the tenant nor the landlord can terminate the lease prematurely (with the exception of termination by mutual consent). The lease can only be terminated against the end of the current period by giving written notice of termination.

If the lease runs for an indefinite period, both the tenant and the landlord can, with due observance of the applicable provisions, terminate the lease at any moment by giving notice of termination. Both the tenant and the landlord must, however, observe the mandatory notice period of at least one year.

The tenant is not obliged to state any grounds for the termination. The landlord cannot refuse; it must accept the termination of the tenant.

The landlord is obliged to state a mandatory ground for the termination. The most important grounds are:

(a) that the tenant has not acted as a good tenant should have acted; or

(b) that the landlord urgently needs the leased space for its own use.

Upon the expiration of a period of at least ten years, the landlord has, by operation of law, an additional ground for termination: a general weighing of interests. This means that the landlord may state any ground for the termination as long as its interest by termination must be considered more important than the interests of the tenant to continue the lease.

The tenant is not obliged to accept a termination of the lease by the landlord. If the tenant disagrees with the termination, the landlord must ask the court to terminate the lease. As can be derived from Dutch case law, the tenant is well protected against termination.

7 THE 403-STATEMENT

7.1 General

Article 2:403 DCC exempts a Dutch legal entity (*rechtspersoon*) from the obligation to draw up and publish financial statements pursuant to Chapter 2.9 DCC (the **403-exemption**). If article 2:403 DCC is applied by a legal entity, such legal entity (**Exempted Company**) is exempted from the obligation to draw up its annual accounts in the way prescribed by Chapter 2.9 DCC. Consequently, the Exempted Company is, amongst others, exempted from the requirements:

(a) to draw up a directors' report (*jaarverslag*);

(b) to provide supplementary information in the accounts;

(c) to have its (unconsolidated) accounts audited pursuant to article 2:393 DCC; and

(d) to have its accounts filed with the Chamber of Commerce where the Exempted Company is registered (article 2:403 paragraph 3 DCC).

7.2 Requirements for application

To make use of the 403-exemption, the requirements of paragraph 1 of article 2:403 DCC should all be met. The first condition is that a statement of liability (**Statement of Liability**) is issued by a consolidating parent company that is part of the same group as the Exempted Company and which is subject to EU-law (i.e. incorporated under the laws of a EU member state) (**Consolidating Company**), in which the Consolidating Company assumes joint and several liability for obligations arising from legal acts of the Exempted Company. As a result, the Consolidating Company is jointly and severally liable (next to the Exempted Company itself) vis-à-vis the creditors of the Exempted Company for in relation to obligations arising from legal acts performed by the Exempted Company. Furthermore, several administrative conditions apply in order to validly make use of the 403-exemption, such as language and publication, some of them which have to be done on an annual basis (such as, but not limited to, the filing a declaration of consent by the direct shareholders of the Exempted Company)

7.3 Scope of liability/ Statement of Liability

The question arises for which claims the Consolidating Company has to assume liability through the issuance of the aforementioned Statement of Liability in order to receive the benefit of exemption for the Exempted Company.

7.3.1 The nature of claims

The creditors of an Exempted Company can hold the Consolidating Company liable for their unsatisfied claims arising from legal acts performed by the Exempted Company. Article 2:403 DCC does not require assumption of liability for

tort, tax and social security claims against the Exempted Company.

7.3.2 The period of claims

Article 2:403 DCC does not require the Statement of Liability to explicitly refer to any scope in time. A statement, in which the Consolidating Company assumes liability in accordance with article 2:403 paragraph 1 under f DCC and/or to repeat its exact wording, is sufficient.

A majority of authors in Dutch legal literature hold that the Consolidating Company's liability ex article 2:403 DCC extends to:
claims (of the said nature) against the Exempted Company that already exist at the moment the liability is assumed; and
claims (of the said nature) against the Exempted Company pursuant to legal acts performed during the period the 403-statement was in force but which arise after the moment the 403-statement is revoked. The latter is also referred to as 'remaining liability' (*overblijvende aansprakelijkheid*).
The foregoing is in line with Dutch case law. Please note that there is no absolute legal certainty on this point as decisive legislation remains absent. It is therefore uncertain whether including an end or start date in the 403-declaration meets the requirements of article 2:403 DCC.

7.3.3 Withdrawal of statement of liability

Pursuant to article 2:404 DCC, a Statement of Liability may be withdrawn at any time by filing a statement of withdrawal of the Statement of Liability (*verklaring tot intrekking van aansprakelijkstelling*) with the Dutch Chamber of Commerce. In respect of a BV (a private limited liability company) and NV (a public limited liability company), the Chamber of Commerce has to publish the filing of the statement of withdrawal in the Netherlands Government Gazette (*Staatscourant*).

7.3.4 Consequences of withdrawal

The consequence of the filing of the statement of withdrawal is that the Consolidating Company is released from its liability for claims against the Exempted Company arising from legal acts performed after the date of such filing or publication (only having effect against third parties after the withdrawal has been published in the Netherlands Government Gazette).
Although the Consolidating Company is released from its liability for claims against the Exempted Company arising from legal acts performed after the date of filing or publication of the statement of withdrawal, it will remain liable in respect of obligations which arise from legal acts performed by the Exempted Company before the filing of the statement of withdrawal (the **Remaining Liability**).

As mentioned under paragraph 7.3.2 above, the question whether liability exists for claims that arise after revocation and claims existing prior to the issuance of a 403-statement is

subject to discussion.

7.3.5 Remaining liability

The Remaining Liability exists in respect of claims existing at the moment of filing or publication, including claims with respect to new instalments under existing continuing performance contracts (*duurovereenkomsten*) (e.g., leases etc).

The Consolidating Company's Remaining Liability can only be terminated if each of the following conditions is met:

(a) the Exempted Company no longer forms part of the group of the Consolidating Company;

(b) a statement of withdrawal of remaining liability has been filed with the Chamber of Commerce and has been available for inspection by the public (i.e. publicly accessible) for at least two months;

(c) at least two months have lapsed after the publication of an announcement in a national newspaper, wherein it is announced that the statement of withdrawal in respect of the remaining liability is filed for public inspection and where it is filed; and

(d) the existing creditors either have not opposed to the withdrawal statement of withdrawal of remaining liability within two months after the publication in a national newspaper or such opposition has been withdrawn or dismissed by a final and conclusive judgement of the court (*onherroepelijke rechterlijke uitspraak*).

Opposition by existing creditors should be made by way of an application to the competent court within the jurisdiction where the Exempted Company is located. At the request of a creditor, the Consolidating Company must provide security or another safeguard for the satisfaction of its claims, unless the parent can demonstrate that - in view of the Exempted Company's financial position or other circumstances - the creditor has sufficient assurance that its claims will be paid by the Exempted Company after termination of liability.

If the Consolidating Company does not provide security in the form and within the period designated by the court, the court must declare the opposition against the withdrawal of liability by the creditor well-founded.