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GENERAL OVERVIEW OF DUTCH LEGAL ASPECTS REGARDING LEGAL TITLE TO REAL ESTATE

1 INTRODUCTION

This schedule discusses the main aspects of civil law applying to real estate located in the Netherlands that is acquired as an investment object.

The territory of the Netherlands is divided into plots of land, known as land registry parcels or cadastral plots (*kadastrale percelen*), each of which is recorded separately in the public registers of the Dutch Land Registry (*Kadaster*; **Land Registry**). In respect of each of the cadastral plots, the public registers contain the names of the subjects with an entitlement to such cadastral plots. Those subjects may be individuals, legal entities governed by public law, such as municipalities (*gemeenten*) and provinces (*provincies*), and legal entities governed by private law, such as public and private limited liability companies (*naamloze vennootschappen en besloten vennootschappen met beperkte aansprakelijkheid*). Foreign subjects can also be entitled to Dutch real estate. The Land Registry also records the nature of the entitlement, legal restrictions that apply to the entitlement, amongst which limited rights (*beperkte rechten*), and whether the plot is subject to an attachment (*beslag*) or a right of mortgage (*hypotheek*).

2 IMMOVABLE VERSUS MOVABLE PROPERTY

Real estate is 'immovable property'. The Dutch Civil Code (*Burgerlijk Wetboek*; **DCC**) defines 'immovable' as: the land, the unextracted minerals therein, the plants and shrubs attached to the land, as well as the buildings and works permanently attached to the land be it directly or by attachment to other buildings or works. Everything else is deemed 'movable'.

A building or construction can be deemed permanently attached to the land if

(a) it is attached to the land; and

(b) by its nature and design it is intended to be a permanent fixture.

A ‘floating dwelling’ (*waterwoning*), for example, that is not (directly or indirectly) attached to the land is considered movable under Dutch law. Whether or not a fixture is intended to be permanent can sometimes be difficult to say, for instance in case of a ‘portakabin’. The answer depends on many different aspects, such as whether or not it is connected to utilities.

Whether property is movable or immovable can also have tax implications. The acquisition of an immovable property is, in principle, subject to transfer tax. This distinction also determines the formalities applicable to, for example, the transfer and encumbrance of ownership. The role played by Dutch civil law notaries in the establishment of rights and transfer of title to real estate in the Netherlands is also highlighted in this schedule.

3 TYPES OF ENTITLEMENT TO REAL ESTATE

3.1 Rights in rem versus rights in personam

The rights vested in real estate can be either a 'right in rem' (*zakelijk recht*) or a 'personal right' (*persoonlijk recht*). The rights in rem are absolute: they apply to all persons and entities holding legal rights and the vesting of a right in rem is recorded in the public registers of the Land Registry. Not only the establishment of a right in rem, but also the transfer of such right to another party, is recorded in these public registers. In furtherance of the entitlements being accurately reflected by the public registers, the legislature has determined that the establishment or transfer of such rights must be effected by a public (notarial) deed executed before a Dutch civil law notary, and is perfected by the subsequent registration of a certified copy thereof in the public registers of the Land Registry. The civil law notary takes care of the registration on behalf of the parties involved. Nonetheless, the public registers of the Land Registry can lack complete and reliable information. Situations can arise in which a right in rem is originated or is acquired by another party without there being a legal requirement that a notarial deed be recorded in the public registers of the Land Registry. This could be the case, inter alia, where such right is acquired by prescription, by legal merger or by fulfilment of a condition subsequent. In such case, it might well be in the interest of the entitled party to have this acquisition registered in the public registers of the Land Registry. In certain circumstances, failure to register (for example, the fulfilment of a condition subsequent) can lead to a situation in which a party is unable to invoke its rights against a third party who deems it has acquired a right on the real estate and has registered the acquisition. This promotes a situation in which it is in the interests of the parties concerned to ensure that the relevant public registers correspond with reality. Moreover, by imposing strict duties on the Dutch civil law notaries and by implementation of modern technology, the public registers of the Land Registry are reliable.

Dutch law draws a distinction between ownership and various types of rights in rem. The most comprehensive right to real estate is the (unencumbered) right of ownership, which can relate to movable and to immovable property. Other rights (in rem) regarding real estate, as described hereafter, are derived from, or share significant features

with, the right of ownership: the right of leasehold (also commonly referred to as ground lease), the right of superficies, the apartment right, the right created by virtue of easement, the right of usufruct and the right of mortgage.

Personal rights have only relative effect: they can only be exercised against one or several specific persons. They are not as strong as rights in rem. A personal right with respect to real estate can, for instance, be entitlement to a transfer arising from a purchase agreement or the right of beneficial ownership of real estate. The right to tenancy on the basis of a contractual lease is also a personal right, although it has certain features of an absolute right: the tenant can exercise its right against the subsequent owners (and vice versa). Under certain circumstances specific obligations in relation to real estate can have some limited absolute effect; this is the case when in a transaction, parties agree that a certain obligation is labelled as a qualitative obligation (within the meaning of article 6:252 DCC). However, qualitative obligations should consist of the obligation 'to tolerate' or 'to refrain from certain actions' with respect to the real estate. Active performance cannot, therefore, be secured for the benefit of subsequent owners by way of qualitative obligation.

3.2 Ownership

As stated above, ownership (*eigendom*) is the most comprehensive right to real estate. The owner has exclusive right of use and may dispose of or encumber the real estate at its sole discretion. According to Dutch law, ownership to real estate can be divided into ownership of land (with all that is permanently attached to it) and ownership of a network of cables, pipes and suchlike; for example, ownership of a data network in another person's real estate.

With regard to the ownership of these networks, the Dutch legal principle of vertical accession (*verticale natrekking*), according to which everything that is permanently attached to the land is owned by the owner of the land, has been overridden. A network, existing of one or more cables or pipelines which are used for transporting fixed, liquid or gaseous substances, energy or information, which are or will be installed in, on or above the land of others, belongs to the person who has lawfully installed them or to his legal successors.

Public law contains limitations to the legal power of the owner of real estate with regard to the right of use, such as physical environment plan conditions, environmental legislation, building regulations and tolerance obligations in connection with maintenance of public underground cables, pipes and suchlike, registrations or preferential rights under

or pursuant to the Environment and Planning Act (*Omgevingswet*) (or it predecessors, such as but not limited to the Soil Protection Act (*Wet bodembescherming*). At the sale of real estate, a municipality, a province or the state may hold a right of first refusal pursuant to such preferential right under the Environment and Planning Act. Under certain circumstances, the government can expropriate the owner. Furthermore, the right of ownership is limited by the general rule of private law that an owner may not use its property contrary to the rights of others. Most of these limitations to the right of ownership may also apply to the limited rights to real estate derived from the right of ownership. Since the implementation of the Act on transparency of public law restrictions on property (*Wet kenbaarheid publiekrechtelijke beperkingen*), the government is obliged to register, inter alia, the aforementioned limitations in the public registers of the Land Registry, this in order to inform third parties about the public limitations regarding specific real estate.

3.3 Common ownership

Common ownership (*mandeligheid*) is a special form of joint ownership of real estate which serves two or more parcels of land. The right is created if an immovable property is held in joint ownership and is designated by the owners for common use by means of a public (notarial) deed executed before a Dutch civil law notary, followed by the registration of a certified copy of such deed in the public registers of the Land Registry. Common ownership can be applied in cases where there is a need for a common arrangement that is interrelated with the quality of ownership of an immovable property; for example the common ownership of parking places, parks with footpaths, green strips and fencing. In principle, partition cannot be unilaterally claimed. Furthermore, the right is of a dependent nature given that, in principle, it cannot be separated from ownership. Common ownership can also be created on the basis of law. The dividing wall which two buildings or works that belong to different owners have in common is also held in common ownership.

3.4 Right of leasehold

A right of leasehold (*erfpacht*), also commonly referred to as ground lease, is the right in rem to hold and (exclusively) use the real estate owned by another party, usually against payment of a periodic remuneration called the ground rent (*canon*), which may also be paid in advance for a specific period or in perpetuity. A right of leasehold may be established on a right of ownership, but also on another right of leasehold (subleasehold) or on an apartment right. The establishment of a right of leasehold is effected by registering a certified copy of the relevant public (notarial) deed, executed before a Dutch civil law notary, in the public registers of the Land Registry. A right of leasehold is a right

in rem and is to be distinguished from a lease (*huur*), which is a personal right.

The right of use of the leaseholder is not only valid for the land but for all that the land comprises according to Dutch law such as, inter alia, the buildings and works that are permanently attached to the land. The leaseholder does not legally own the buildings and works it constructs in or on the land. The owner of the land is the legal owner of any such building as a result of the Dutch legal principle of vertical accession. In many cases however, on termination of the right of leasehold, the leaseholder is entitled to remuneration by the landowner for any buildings the leaseholder has constructed or even for the value of the right of leasehold itself.

A right of leasehold itself may be established temporarily (i.e. for a certain period of time) or perpetually. In addition, it is not uncommon that the conditions which apply to the right of leasehold (for example, the amount of the ground rent) are adjusted from time to time. In practice, many leasehold rights include that the terms and conditions (such as the amount of ground rent due) can be adjusted every 30, 50 or 100 years.

The content of a specific leasehold is mainly defined by the leasehold conditions (*erfpachtvoorwaarden*), which are defined in the deed of issuance. Moreover, the DCC provides regulations with respect to the leasehold. Leasehold is often used by local government authorities as a means of enforcing policy on zoning and environmental matters. The local government authority retains ownership of the property so that it can control the purposes for which the property is used by imposing certain standard leasehold conditions on the leaseholder. These conditions may state quite specifically which kind of use of the land is allowed. If a leaseholder wants to change this way of use or if he wants to alter the building on the land, a prior consent of the landowner is necessary.

As indicated, the leaseholder is generally obliged to pay ground rent to the owner of the land. The amount of ground rent may vary (generally it is a percentage of the ground value) and the landowner and the leaseholder can agree to review the ground rent periodically. It is common that the landowner stipulates a review of the ground rent when, for instance, a change of the permitted use of the land and buildings is granted. It is not uncommon that the ground rent is bought-off for a certain period of time (for example for 50 years) or even in perpetuity. Buying-off the ground rent protects the leaseholder from interim increases of the ground rent during the period concerned. However, the owner is still entitled to additional payments during that period if the activities of the leaseholder that are not allowed without prior permission, are authorized. If ground rent has been paid-off for a certain period of time, the ground rent shall be reviewed

at the commencement of a new term. The new ground rent shall be determined by the landowner on the basis of the ground value as recalculated at that time and a new percentage. A certain period of time (that varies from 1 to 3 years) prior to the commencement of the adjustments, the landowner will give notice to the leaseholder concerning the new conditions, the new ground value and the new percentage.

The leasehold conditions may state that a transfer, encumbrance with limited rights of or division (into apartment rights) requires the prior written consent of the landowner. If this consent is unreasonably withheld, it can be replaced by means of an authorisation of the subdistrict court (*kantonrechter*). Irrespective of the fact whether consent is required, the landowner should receive a certified copy of a deed of transfer/vesting of a right in rem/mortgage, if and when executed, within a certain period of time after signing such deed (in some cases penalty).

The DCC provides that leasehold can be terminated by the landowner unilaterally in the event the leaseholder acts in breach of its obligation to pay the ground rent during a period of two years, or in the event he acts in breach of any other of its obligations pursuant to the ground lease conditions. If a landowner is a municipal authority, the landowner also has the right to terminate the leasehold when this is in the public interest.

As mentioned above, in many cases, the leaseholder is entitled to remuneration by the landowner, for the value of the leasehold right or – depending on the circumstances – of any buildings the leaseholder has constructed, upon termination of the right of leasehold. However, the applicable leasehold conditions may include a different kind of remuneration or state that no remuneration for the value of the buildings is to be received.

3.5 Right of superficies

The right of superficies (*recht van opstal*) is the right to own buildings, works or plants in, on or above another person's real estate. The right of superficies therefore breaks the vertical accession described in paragraph 3.2 that normally applies to buildings constructed on another party's land. The right of superficies may be established for a defined period or perpetually whereby the conditions which apply to the right of superficies (for example the amount of the retribution (annual payment)) may be adjusted from time to time. A right of superficies can be established as an independent right or a dependent right to, inter alia, another limited right (for example a right of leasehold) or even to a contractual lease. A right of superficies can be established on a right of ownership, but also on an apartment right; a right of superficies cannot be established on a right of leasehold. The establishment of a right of superficies is effected by registering a certified copy of the relevant public (notarial)

deed, executed before a Dutch civil law notary, in the public registers of the Land Registry. On termination of the right of superficies, the owner of the land becomes the owner of the buildings, works and plants, constructed or created by the holder of the right of superficies, by the aforementioned principle of vertical accession. In such cases, the party entitled to the right of superficies has, in principle, the right to remove the contributions it has made; otherwise remuneration will be applicable in most cases.

3.6 Apartment right

In cities such as Amsterdam, for example, large old warehouses are often split up into apartments for residential use. However, commercial real estate properties may also be divided into apartment rights; for example, a multifunctional building can be designed to contain residential apartments, shops, offices and parking facilities. A right of ownership, right of leasehold or right of superficies can be divided into a number of apartment rights (*appartementsrechten*). A leaseholder or a party entitled to a right of superficies can only divide its right into separate apartment rights with the permission of the owner of the land. An apartment right itself can, in principle, also be subdivided into apartment rights. Pursuant to public law, a division of residential property into apartment rights may require a licence issued by the municipality. The division is established by registering a certified copy of the relevant public (notarial) deed, executed before a Dutch civil law notary, in the public registers of the Land Registry.

An apartment right gives entitlement to a share in the divided - jointly owned - real estate, with the right of exclusive use of a certain part thereof as indicated on a special drawing which is attached to the deed of division and included in the public registers of the Land Registry. Certain parts can also be designated for communal use by the collective owners of the apartment rights. Each such apartment owner is, by operation of law, a member of the association of apartment owners (*vereniging van eigenaars*) which manages the common ownership. The apartment owners usually pay a monthly contribution to the association for, inter alia, the costs of maintenance of the communal areas and insurance for the entire building.

3.7 Easements

An easement (*erfdienstbaarheid*) is a burden with which an immovable property (the servient land: *dienend erf*) is encumbered for the benefit of another immovable property (the dominant land: *heersend erf*). It is a dependent right that passes with the ownership of the real estate and cannot be disposed of separately from that real estate. The owner of an apartment right, leaseholder, superficiary and usufructuary may also, under certain conditions, encumber the property with an easement. The encumbrance should consist of the

obligation 'to tolerate' or 'to refrain from certain actions' although it can also pertain to supporting maintenance or construction obligations. Easements can be created by establishment and by prescription. Establishment is effected by registering a certified copy of a public (notarial) deed, executed before a Dutch civil law notary, in the public registers of the Land Registry.

3.8 Right of usufruct

The right of usufruct (*vruchtgebruik*) gives the right to use goods or properties that belong to another and to enjoy the benefits (fruits) of such. If an immovable property is not let out at the moment of establishing the usufruct, the usufructuary may not let out this property without the prior permission of the owner of the property or the authorisation of the Court, unless such authorisation for that purpose is granted at the establishing of the right of usufruct. Usufruct of an immovable property is established by a public (notarial) deed, executed before a Dutch civil law notary, a certified copy of which is registered in the public registers of the Land Registry. In special cases, a right of usufruct can be created by prescription. A special form of the right of usufruct is the right of use and occupation (*recht van gebruik en bewoning*), which only entitles a person to occupy and make use of another person’s property; this right cannot be transferred.

3.9 Right of mortgage

The right of mortgage acts as security against the fulfilment of a debtor's financial obligations towards a creditor. The right of mortgage entitles the creditor/mortgagee to dispose of the real estate on which it has been granted such right by public sale (auction), and to exercise a preferred claim over other creditors to the proceeds thereof in the event of the debtor failing to meet its obligations. Such public sale may be held without any court order. This is known as a right of summary execution (*recht van parate executie*). With the consent of the Court and with due observance of some other regulations in that respect, a sale by the mortgagee can also take place privately. The right of mortgage is usually required by banks financing real estate transactions in accordance with their specific conditions. The right of mortgage is not separately transferable; it is related to the debtor's payment obligation. The right of mortgage is established by registering a certified copy of the relevant public (notarial) deed, executed before a Dutch civil law notary, in the public registers of the Land Registry.

4 DUE DILIGENCE, SALE AND PURCHASE

According to Dutch law, a seller is obliged to provide information to a prospective purchaser concerning the legal aspects and actual condition of the real estate; at the same time, however, a purchaser may not simply rely on the extent

of information provided by the seller and, consequently, it is in the purchaser's interest to verify this information and to examine whether further enquiries are to be made. Therefore, it is common practice that before entering into a sale and purchase agreement, a due diligence investigation is conducted by the purchaser's legal and tax advisers with respect to the legal and tax aspects of the relevant real estate, amongst which the entitlement, leases, zoning aspects, permits and environmental issues. The outcome of this review is recorded in a due diligence report. After this due diligence period, the sale and purchase agreement can be drawn up.

The parties may agree that the agreement will be concluded subject to conditions subsequent. It could, for example, be in the interest of the purchaser to be able to terminate the purchase in the event the financing of the transaction cannot be arranged or arranged in time. In addition, it is common practice to specify in the agreement who is liable for the various costs of the transfer, e.g. taxes, notarial and land registry costs. It is also very common for the seller to submit a number of statements regarding matters such as the state of maintenance of the real estate, any contamination of the soil and clean-up obligations, etcetera. If the real estate is leased, the seller should inform the purchaser about the contents of present leases. The seller's rights and obligations vis-à-vis tenants arising from these agreements pass automatically to the purchaser when the transfer of ownership is effected. An arrangement to cover the risk of loss of value between the moment of the sale and the moment of transfer of the real estate is also included in the agreement. Normally, this risk passes to the purchaser at the moment of execution of the deed of transfer. It is therefore important for the purchaser that the seller continues to insure the real estate adequately until the transfer takes place. In the event of serious damage to the real estate before the transfer date, it is usually agreed that the sale and purchase agreement will be automatically dissolved. If the damage is less serious, a purchaser may, for example, require that the purchase price be reduced.

According to Dutch law, the sale and purchase agreement can be registered in the public registers of the Land Registry. Due to this registration, inter alia, attachments or a sale to a third party by the seller within a time frame of six months, starting from the date of registration of the sale and purchase agreement, cannot affect the pre-recorded right of the purchaser. Therefore, for a short period of time, this provides the purchaser some additional security. The sale and purchase agreement stipulates the terms and conditions under which the seller and the purchaser agree on the sale and transfer of the real estate. The first thing parties to a real estate transaction usually agree on, besides the purchase price, is a final date of legal transfer. Failure of the purchaser

to pay for the real estate or of the seller to deliver on the date of transfer constitutes a breach of agreement which may result in liability for damages incurred by the other party as a result of such breach. A penalty clause is usually incorporated in the sale and purchase agreement to cover such situations. To protect the seller's interests, it is common practice that, prior to the transfer, the purchaser deposits a certain percentage (usually 10%) of the purchase price into the civil law notary's third party account (*kwaliteitsrekening*), or provides a bank guarantee in that amount.

5 TRANSFER AND PAYMENT OF THE PURCHASE PRICE

In most cases, the closing of a real estate transaction in the Netherlands will take place sometime after the sale and purchase agreement has been signed and finalised by the parties.

Real estate is transferred by means of registering a certified copy of the relevant public (notarial) deed of transfer in the public registers of the Land Registry. This deed is drawn up and executed by the Dutch civil law notary specified in the sale and purchase agreement. The Dutch civil law notary involved in the transaction always conducts a search into the seller's entitlement to dispose of the real estate and the legal status of the real estate.

Before the day of the actual closing and transfer of the real property, all suspensive conditions and conditions subsequent which might have been agreed on must be fulfilled or terminated, the necessary consents have to be received by the civil law notary and all amounts due from the purchaser – or its financier – have to be paid into the civil law notary's third party account. The purchaser is obliged to pay not only the purchase price to the civil law notary before the execution of the deed of transfer but also, inter alia, the transfer tax; this is necessary due to the fact that the civil law notary is, in principle, personally liable towards the tax authorities for the transfer tax payable on the transaction. The civil law notary arranges for payment of this tax once transfer of ownership has been effected. There are cases where the acquisition of real estate is exempted from transfer tax, for instance, if value added tax is payable on a transfer of new build real estate which is not taken into use. Details of liability for transfer tax and value added tax are provided in the General overview of Dutch VAT and RETT rules.

Once all amounts have been received by the civil law notary and all pre-closing steps have been complied with, the civil law notary can finalise the transfer of the real estate to the purchaser. In general, the civil law notary is responsible for ensuring that:

(a) the deed of transfer is executed by the parties (or their representatives) and the civil law notary;

(b) the deed of mortgage, insofar as applicable, is executed by the parties (or their representatives) and the civil law notary; and

(c) on behalf of the seller and the purchaser, a certified copy of the deed of transfer and the deed of mortgage for registration purposes is (if applicable) filed with the Land Registry.

Once these steps have been taken, the transfer has been completed. However, payment of the amounts to the seller will only take place once the real estate has been transferred, unencumbered, to the purchaser, in other words: not subject to any unknown attachment or mortgage. Therefore, on the second working day (or insofar as legally possible, the first working day) after the date on which a certified copy of the deeds has been filed with the Land Registry, the civil law notary will, inter alia, verify with the Land Registry whether the real estate has been placed in name of the purchaser; whether the right of mortgage on the real estate has been registered properly; and that no unknown prior encumbrance, attachment or other limited rights, with the exception of those mentioned in the deed of transfer and/or the deed of mortgage, have been established. The civil law notary will also request confirmation from the bankruptcy clerk's office (*faillissementsgriffie*) of the relevant Courts of the Netherlands and, insofar as applicable, the international bankruptcy clerk's office (*internationale faillissementsgriffie*) of the Court of The Hague that the seller has not been granted suspension of payments (*surseance van betaling*) or been declared bankrupt (*failliet verklaard*). Only on completion of these investigations by the civil law notary will the purchase price be paid out to the seller. The position of the civil law notary in the Netherlands is thus essential for a transfer of real estate, and protects the interests of the purchaser, its financer and the seller (with its financers). Accordingly, the timely engagement of a Dutch civil law notary in the event of a real estate transaction is absolutely essential.