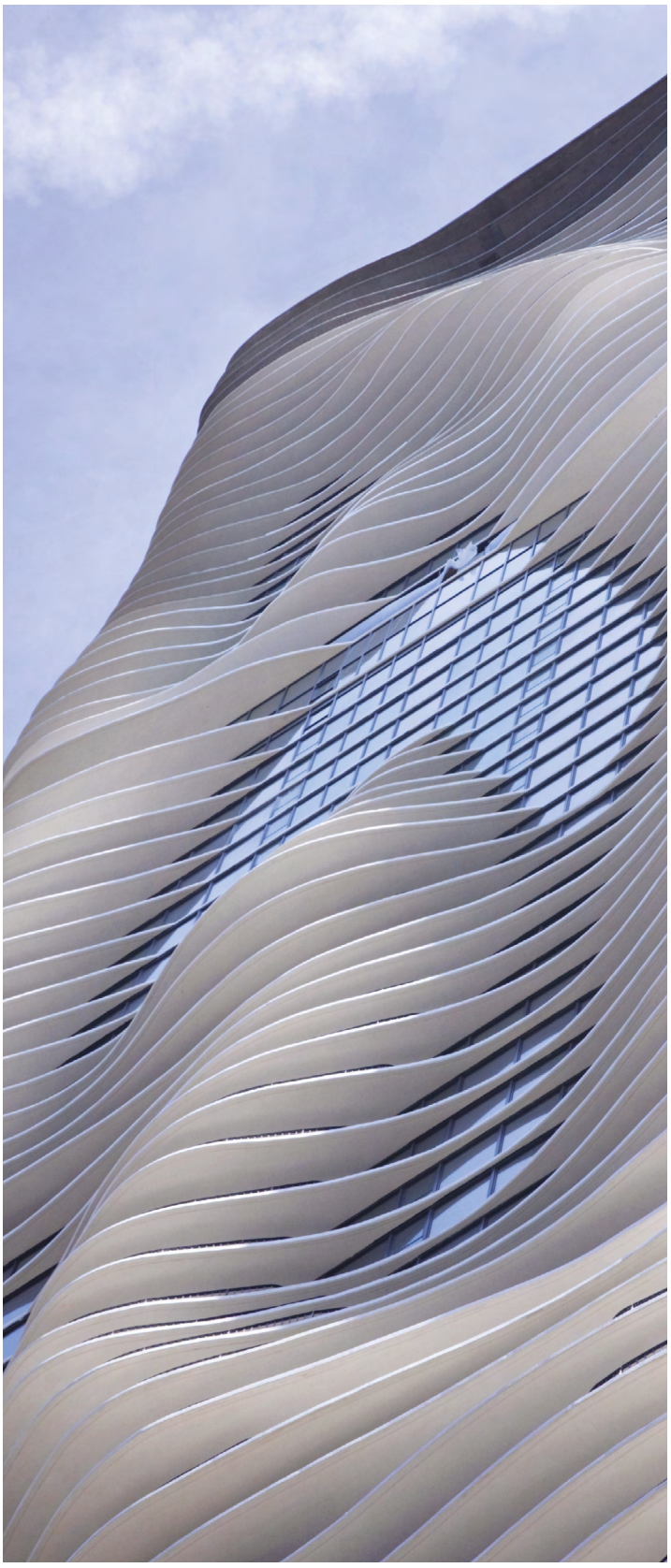
Real Estate Investment in the Netherlands

THE LEGAL PERSPECTIVE

DLA PIPER



Introduction

Foreign companies have always viewed the Netherlands as a highly attractive destination for investment. The country is known for its low rate of inflation, stable political structure and sound government finances, good infrastructure, and highly educated employees. It provides the main entry point to Europe through Schiphol airport and the port of Rotterdam, each of which benefit from the world's most sophisticated standards of logistics and distribution services. In addition, the high quality of life in an open and tolerant society contributes to making the Netherlands appealing for investors and a good choice for companies who wish to establish a place of business. Furthermore, the Dutch tax climate is favorable for foreign entrepreneurs which means that intermediate holdings in the Netherlands are often used in international corporate structures.

The DLA Piper Real Estate Sector team in Amsterdam, the Netherlands consists of about 25 lawyers (*advocaten*) and civil law notaries (*notarissen*) working together as one integrated team. We serve a large number of Dutch and international (institutional) investors, and advise on the type of legal structure which would be best suited for proposed real estate transactions, joint ventures or exit strategies. We also deliver innovative finance solutions including equity and acquisition financing (in relation to both asset and share transactions) and also a wide range of capital markets products. Our team has been involved in the acquisition and sale of (portfolios of) office buildings, shopping malls, warehouses and logistics and distribution centers. These projects often require a multidisciplinary approach involving regulatory, tax and corporate know-how.

Finally, if disputes arise, we will assist in the search for amicable settlements or, if needed, dedicated real estate litigators will defend the investor's rights and lodge claims through the Dutch or international judiciary system.

This investment guide provides you with an overview of the important legal issues you need to know about when investing in the Netherlands.

Contents

1. Ownership of real estate

1.1 Full ownership (*eigendom*)

There are several forms of real estate ownership in the Netherlands, from absolute or full ownership to leasehold. All forms of ownership are registered with the Land Registry and may be transferred or mortgaged (and such transfers or mortgages will also be registered). The Land Registry is a public register and provides notice to third parties of the registered deed and information about the land ownership.

Full ownership is permanent absolute ownership. Full ownership of land includes ownership of all its constituent parts, i.e. everything above and beneath the surface (the right of accession; *natrekking*). This includes all buildings and underground structures, with the exception of underground cables and pipelines. The right of superficies, leasehold and apartment rights are exceptions to the rule that full ownership includes the land above and beneath the surface. In those situations, full ownership is often not recommended or even possible.

Private and legal persons can co-own real estate. In principle, a co-owner can dispose of its share in the property. This right is usually restricted by an agreement between the co-owners and may be restricted by the court on the request of a co-owner. Such restrictions do not apply, however, where a co-owner's creditor or bank sells that co-owner's share in the property following a breach of contract by the co-owner.

1.2 Leasehold (*erfpacht*)

Leasehold takes the form of a long lease – it is a very common way of holding property. This right entitles the lease holder power to hold and use real property owned by another party in the same way a full owner can. A leasehold right is therefore the second most extensive right one can have to a property after full ownership. A leasehold right usually comprises a long lease with a term of 50 or 100 years, or it can be perpetual. A leasehold right is often used by land owning municipalities.

1.3 Right of superficies (*opstalrecht*)

A right of superficies is a right to have, hold and maintain buildings, works or plant in, on or above land owned by another party. The right of superficies deviates from a Dutch property law principle, the right of accession (i.e. the principle that full ownership includes everything above and beneath the surface – see paragraph 1.1). Accession can be prevented by establishing a right of superficies resulting in the party with this right being the rightful owner.

1.4 Apartment right (*appartementsrecht*)

The ownership of apartment rights is the ownership of a part of a property, or co-ownership of the property, entitling the holder to an undivided share in the ownership of a building (or a parcel of land). Apartment rights include the exclusive right of use of an apartment plus shared rights and obligations in relation to communal areas (this can be the lobby, hallways, shared external space). The apartment right owners are jointly financially responsible for the maintenance of the communal areas.

1.5 Restrictions on ownership by foreigners

There are no restrictions on ownership of real estate by foreigners in the Netherlands.

2. Acquisition of ownership

2.1 Formal requirements

the acquisition of any form of ownership requires the purchase and transfer of the right to the property. The purchase is effected by a sale and purchase agreement (SPA). Ownership of the property is not transferred by the SPA but by the execution of a notarial deed of transfer. A real estate transfer is completed once a certified copy of the transfer deed is registered with the Land Registry. It is impossible to transfer property without registration.

In the Netherlands, the Land Registry records all important information concerning real estate. All property has its own specific reference in the Land Registry, which is available online to everyone.

Both prior to and after signing the notarial transfer deed, the Dutch civil law notary will do extensive checks, including whether the seller is still registered with the Land Registry as the owner of the property, whether any new mortgages or other encumbrances have been established/levied on the property, the insolvency of seller and purchaser, and so forth.

After signing the transfer deed, the notary submits a true copy of the deed to the Land Registry – this registration is the actual moment of delivery and transfer of the real estate.

A notary generally arranges the financial completion of a property transaction. Because the Dutch civil law notary is at the heart of the financial arrangements, this notary will not sign any deed before they are certain that the entire purchase price (plus other costs and taxes payable) has been transferred to their bank account. The purchase price (and other amounts to be paid to the seller or the seller's bank) is not paid to the seller until the notary has confirmed that the property is not encumbered with any mortgages or encumbrances, other than those that were disclosed when the transfer deed was signed.

A notary will assess other legal technicalities necessary for the transaction to succeed. For example, depending on the articles of association of a company, the management board of a private limited company (*de besloten vennootschap met beperkte aansprakelijkheid,* or BV) or a public limited company (*de naamloze vennootschap*, or NV) may need the permission of the supervisory board for certain transactions.

The registration process and the involvement of a notary offers the purchaser an appropriate level of security. Therefore, no title insurance exists. Nevertheless, registration of title to real estate and encumbrances thereon does not give conclusive evidence as to ownership of land. For example, ownership can be acquired by prescription, and beneficial ownership is not registered.

2.2 Corporate vehicles

Two types of corporate vehicles are commonly used for (foreign) real estate investments in the Netherlands: a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid,* or BV and a public limited company (*naamloze vennootschap,* or NV).

These two entities can qualify as fiscal investment vehicles in order to benefit from a special tax regime.

Another vehicle often used to make an indirect investment in the Netherlands is the limited partnership (*commanditaire vennootschap*).

2.3 Asset deals

The property can be acquired directly (asset deal) by the purchaser from the owner. Not many statutory requirements apply to a purchase agreement for property, but in general a professional purchase agreement should contain all the terms and conditions relevant for the transaction. The purchase agreement is normally in a written form, but does not necessarily have to be in the form of a notarial deed. Purchase agreements are drafted and concluded both by specialized real estate lawyers or by civil-law notaries. In the Dutch office of DLA Piper, real estate lawyers and civil-law notaries are integrated together in the Real Estate practice group.

It is explicitly advisable (even if not necessary) to conduct a cadastral search of the property, before entering into a purchase agreement.

The property due diligence should cover:

- all legal aspects such as proper title to property (please note, however, that a title opinion will normally not be necessary, as the (online available) cadastral information can legally be relied upon), easements, agreements with neighboring owners, environmental aspects, zoning law aspects, building law, previous contracts, lease agreements – this should be carried out by the lawyers;
- a review of particular environmental aspects should be undertaken by specialist environmental investigators, in particular soil pollution and asbestos; and
- a review of the technical state of existing buildings and any permissible future developments – this should be undertaken by architects from specialized engineering companies.

Memorandums of understanding, letters of intent and heads of terms can be binding upon the parties, depending on their exact wording. It should also be noted that Dutch law applies the notion of pre-contractual breach, meaning that (even oral) negotiations may reach a stage (e.g. agreement on price, object and date of delivery) where it is no longer lawful to terminate the negotiations (without paying damages). In order to regulate the negotiation process, negotiations are normally preceded by non-disclosure agreements, heads of terms, or letters of intent, covering issues such as exclusivity and confidentiality, time frame for the negotiations, ways to terminate or proceed and the costs of the negotiations.

Although every purchaser of a property should undertake its own survey and due diligence, the seller may not withhold important information regarding the property. Under Dutch law, the seller of a property is obliged to disclose information to the prospective purchaser on any important matter which would have a negative impact on the value of the property – matters which, had the purchaser known about them, it is reasonable to assume that they would not have agreed on the purchase price. Such information may, for example, include construction work undertaken without the appropriate permit, public orders, issues with the tenant, technical defects, etc. Any breach by the seller to disclose this information overrides any waiver of liability that the purchase agreement may contain, and may result in claims for compensation or even rescission of the purchase contract.

Typically, in a property transaction, the ability to complete the transfer of the property by registration will be protected by a prior registration of the signed purchase agreement at the land registry, in order to protect the transaction against double sale, additional mortgages, liens and encumbrances etc.

The actual legal transfer of the property is effected by signing a notarial deed of conveyance, on the agreed date of delivery (the transaction date), followed by registering this deed with the land registry. The civil-law notary will normally take care of the transfer of funds as part of this process (through a secured third-party account of the notary) as well as the termination of existing mortgages that are not transferred to the purchaser. The notary is also the officer responsible for collecting and paying to the tax authorities any real estate transfer tax (RETT) or value added tax (VAT) payable pursuant to the transaction.

Finally, it is common to authorize the notary to make all necessary applications and declarations in order to effect the transfer of property.

Notaries are free to agree with their client the amount of fees that they consider appropriate. The notarial fees are normally paid to the notary on the day of legal transfer of the property, together with the payment of the purchase price.

Real estate transfer tax (RETT) is currently 2% for residential and 6% for commercial and other properties. This excludes costs incurred in respect of due diligence and the involvement of attorneys and technical experts.

2.4 Share deals

Another way to acquire real estate is to purchase the shares or interest in the legal entity which owns the property.

In order to transfer the shares (or participation/interest) of the property-owning company from the seller to the purchaser, the parties have to execute a share purchase agreement. Where shares in a Dutch limited liability company BV are to be transferred, statutory law requires the share purchase agreement for the shares to be notarized. Again, it is customary to negotiate and sign a written share purchase agreement with regular lawyers, followed by signing a notarial deed of transfer for the shares at the date of delivery.

In share deals, the notary will often not arrange for the transfer of funds. Instead this is organized directly between the parties or with the help of escrow agents (banks).

A company with a balance sheet consisting of 50% or more of real estate assets is considered to be a real estate company. This means that the transfer of the shares will also trigger real estate transfer tax (RETT). In addition, it is important to look at the book value of the property in the company that is being acquired. When taking the property out of the company, corporate income tax must be paid on the difference between the book value and the actual value. Where such a contingent tax liability arises due to a low book value, the parties typically agree a reduction in the purchase price.

The transfer of interests of partnerships does not, in principle, need to be notarized.

Due diligence prior to a share deal should, in addition to the points mentioned above concerning the property itself, cover the following:

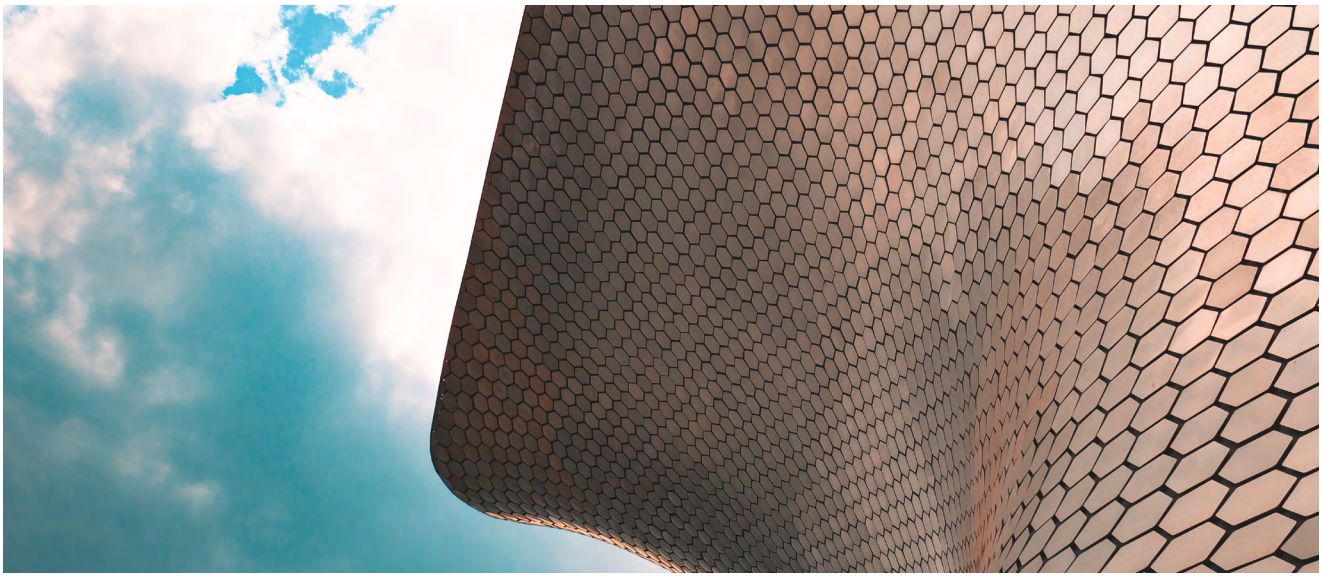
- full investigation of the shares in the company owning the property, such as pre-emption rights, encumbrances etc.;
- whether the authorized share capital has been contributed completely and correctly and whether it still exists;
- annual accounts of the company;
- debt and risks; and
- whether the property company has employees and the liabilities in relation thereto.

Furthermore, it is not uncommon for the company's articles of association to contain certain restrictions regarding the transfer of shares. For example, the transfer of shares often requires the prior approval of a certain majority of the existing shareholders, or the existing shareholders may have rights of pre-emption.

The share purchase agreement to be entered into by the seller and the purchaser must include certain mandatory information such as the parties, the denomination of the shares that are being transferred and the purchase price.

In addition to this mandatory information, the parties frequently agree on various other matters such as calculation methods for the purchase price, conditions subsequent, warranties and remedies in case of breach of warranty.

The transfer of shares becomes (unless otherwise agreed in the agreement) immediately effective upon execution of the notarial deed of transfer.



3. Other rights to property

3.1 Introduction

Other rights to property are divided into property rights or restricted rights (*beperkte rechten*) and personal rights. Mortgages and easements are restricted rights. Pre-emption rights are personal rights.

The creation, transfer and waiver of restricted rights (*beperkte rechten*) relating to real estate require registration at the Land Registry in order to take effect.

3.2 Mortgages (*hypotheek*)

Immoveable property may be encumbered with a mortgage. A mortgage is a limited security interest intended to provide recourse against the immoveable property for a claim for payment of a sum of money, with preference over other lenders. The financing of property with a mortgage as security interest for the financier is customary with regard to the property of both private individuals and businesses. A mortgage right is created by a notarial deed recorded in the public registers.

A mortgage right has three important characteristics. First, it is an absolute right that may be invoked against any other party. Should a mortgagor dispose of any property, the mortgage right on the property remains. Because the mortgage right is evident from the public registers, there is no room for protection for a third party. Second, the mortgagee has the right to summary execution. If the mortgagor defaults in the settlement of that for which the mortgage serves as guarantee, the mortgagee is entitled to sell the property. Third, should the mortgagor go into liquidation, the mortgagee is a secured creditor. The mortgagee can exercise its right as though there were no liquidation.

The procedure regarding the foreclosure by the mortgagee contains safeguards to prevent abuse of the right to summary execution and to maximize the proceeds in the interest of the mortgagor and any other lenders. In principle, the foreclosure must take place in the form of a public auction in the presence of a civil law notary. At the request of the mortgagee or the mortgagor and with court approval, a private sale under execution may also be held. As of January 1, 2015, sale under execution of property is possible via the internet. This makes the sale under execution accessible to the wider public and aims to generate higher execution proceeds.

The mortgage right depends on the claim that the mortgage serves to guarantee. Should this claim be transferred, the acquirer also acquires the security interest pertaining to it. Another consequence of the mortgage right's dependent character is that the right is extinguished once the claim is settled. Bank mortgages are an exception to this rule. A bank mortgage involves the granting of security on all claims that the mortgagee has in respect of the mortgagor either now or at any time and for whatever reason. Therefore, it may even be created prior to the mortgagee having a claim against the mortgagor.

As well as being created on the debts of the mortgagor, a mortgage may also be created on the debts of third parties. Such cases are referred to as third-party mortgages; the owner and not the borrower is then the mortgagor. Group company financing often involves third-party mortgages. A bank extends a credit facility to the parent company, on the basis of which a mortgage on the property of the operating companies is provided as security.

Normally the mortgagee is also the financier. If a banking syndicate performs as financier, it is not practical for all the banks to become mortgagees, considering the foreclosure process. By means of a parallel debt structure, an agent may be appointed as mortgagee, whom the parties agree has an equal claim to those of the combined banks. Such a structure is not contrary to the dependent character of the mortgage right.

3.3 Easements (*erfdienstbaarheden*)

An easement is the right for the owner of premises to require the owner of other premises to tolerate or refrain from certain activities or behavior. Rights and obligations will be granted and reserved between two premises. The rights and obligations are linked to ownership, not to persons.

The most common easement is a right of way (*recht van overpad*): the right of one owner to cross land adjacent to his or her own.

The premises encumbered with an easement need not border one another.

3.4 Pre-emption rights (*voorkeursrechten*)

Agricultural tenants have pre-emption rights.

Local authorities can impose pre-emption rights on a property under the Municipalities Preferential Rights Act.

It is also possible to agree to pre-emption rights.

4. Zoning and planning law building permits

Dutch zoning law designates a specific use to a property. This means that any use which conflicts with the specific designation is in principle illegal, unless an exception applies – for example, zoning law exemption permissions or exemptions otherwise granted by the competent authorities concerned.

Zoning law violations are committed by the users of a specific property. Administrative and (in some cases) criminal law enforcement actions are therefore instigated against the users of the specific property.

However, a zoning violation and any subsequent enforcement actions put a landlord at risk as well, since the enforcement actions may, in a worst case scenario, result in the tenant no longer being able to pay the rent. Also, zoning law violations may entitle the landlord to terminate a contract pursuant to the lease contract provisions.

The obligation to publish new municipal zoning plans (*bestemmingsplannen*) and other zoning law plans at a designated publicly available online database (www.ruimtelijkeplannen.nl) has only been in effect since 2010. Since zoning plans have to be reviewed and revised every ten years, a number of zoning plans still in effect may not necessarily be available online, nor are they required to be. In these cases, copies of the zoning plans may have to be requested from the relevant authorities, which takes additional time.

5. Environmental liability

5.1 Introduction

Environmental liability covers a broad range of topics. We will focus on the two major environmental issues, namely (i) asbestos and (ii) soil and/or groundwater contamination.

5.2 Asbestos

The use of asbestos as construction material was prohibited after 1993. However, in many properties constructed before 1993, asbestos may still be present. Where structural alterations are required to such properties, the asbestos that may be disturbed by the alterations has to be removed in accordance with strict removal protocols which may only be carried out by trained and certified professionals. In principle, the owner of the property is required to pay for the asbestos removal.

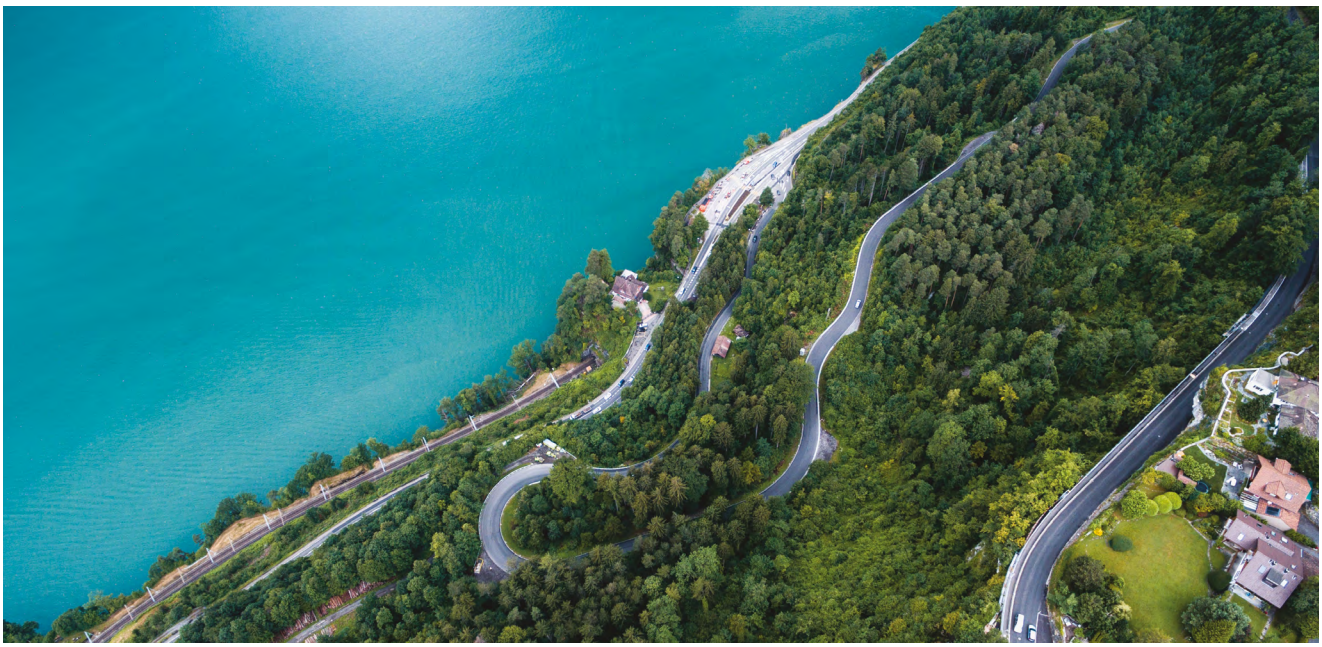
A reference to asbestos is sometimes included in the title deed for a property based on a declaration of the seller. However, a reference in the title deed does not guarantee the presence or absence of asbestos. For detailed information as to whether asbestos is present, technical due diligence needs to be carried out by an expert.

5.3 Soil/groundwater contamination

Past or present activities at a property (or other circumstances) may result in soil and/or groundwater contamination or present a risk of such contamination occurring. Where contamination is caused by specific harmful substances at the premises above a certain threshold, remediation may be required in order to mitigate or remove the contamination. Contamination risks may be higher where the property has been used for industrial activities or where there are (or were) subterranean storage tanks which may leak contents into the surrounding soil.

A reference to soil and/or groundwater contamination is sometimes included on the title deed for a property based on a declaration of the seller. However, a reference in the title deed does not guarantee the presence or absence of such contamination.
For detailed information as to whether there is possible soil and/or groundwater contamination, technical due diligence needs to be carried out by an expert.

In addition, leases may contain provisions requiring soil/groundwater contamination inspections to be carried out before the term commencement date of the lease and following termination of the lease, particularly for leases of industrial properties, in order to assess and identify contaminations which may have occurred during the tenant's occupation of the property.



6. Leases

6.1 Introduction

Many (commercial) leases in the Netherlands are based on the standard form prepared by the Dutch Council for Real Estate (*Raad voor Onroerende Zaken* or ROZ). This lease is a standard form of contract with standard general conditions. It includes the main rights and obligations of both the landlord and the tenant. These standard conditions tend to favor the landlord, while statutory lease law favors the tenant.

Dutch lease legislation distinguishes the following categories of lease:

- private housing lease (residences);
- retail lease (a lease of commercial space to be used for retail, hotels, restaurants etc., that is open to the public); and
- commercial space and industrial lease (e.g. office space, factories, warehouses, banks, etc.).

The applicable statutory regime differs for each type of lease. The primary use of the premises usually determines the category. In addition to general provisions, statutory lease law contains specific provisions which apply to the various types of lease.

6.2 Duration

Leases of all types of real estate can be entered into for a fixed period or an indefinite period. The parties to leases of industrial or office premises are free to decide the applicable lease term. However, between five years and ten years is common. Leases often include one or two renewal periods.

Where statutory rules apply, retail leases are required to be entered into for an initial term of at least five years. Without giving notice of termination or mutual consent, the lease will, upon expiry of the initial term, automatically be continued up to a total period of ten years. Subsequently, without a termination, the lease will automatically extend for an indefinite period of time, unless the parties agreed otherwise. Leases agreed for terms of less than two years are not subject to the mandatory provisions applicable to retail leases.

Regarding private housing, parties are free to agree a fixed term, but it is more usual to agree an indefinite term. After the first definite period, the lease will be extended for an indefinite period by law. It should be noted that the statutory provisions regarding private housing are very strict and the legal protection of tenants is strong.

6.3 Rent

Parties are free to agree rent. For housing under a certain comfort level, however, a rent-control ceiling applies (*liberalisatiegrens*). Usually, the rent is paid monthly or quarterly (save for housing leases), and is usually payable in advance.

6.4 Rent review

Parties usually agree to a rent subject to annual reviews. In the case of industrial leases or other types of commercial space, parties are free to agree the terms of any interim adjustment of the rent (aligned to market conditions). Standard review procedures are often included.

As regards retail leases, the tenant and the landlord are entitled to request that the court assesses and adjusts the rent in line with the rent of comparable local retail space based on an average of five years if the landlord and the tenant disagree on a new rent. This will be carried out at the end of the lease term, in the case of renewal, or every five years after the previous rent review, in the case of a retail lease which has been entered into for an indefinite period.

There are specific mandatory rules regarding the review of rent for housing leases.

6.5 Use

If the tenant does not use the leased premises in accordance with the purpose stipulated in the lease agreement, the tenant will be in default unless the landlord has approved a change of use. Such default by the tenant entitles the landlord to request the court to terminate the lease agreement.

If the tenant does not use the leased premises in accordance with the applicable zoning plan, the local authorities may order the tenant and/or the landlord to stop the unauthorized use and impose penalties and administrative enforcement procedures in case of non-compliance. The costs of the administrative enforcement procedures must be met by the offender.

6.6 Operating expenses

Under Dutch law, the tenant is responsible for minor maintenance and day-to-day repairs and the landlord is responsible for more extensive maintenance and major repairs. However, as this is not mandatory law, the parties may agree alternative repair obligations in the lease.

In general, the landlord is responsible for the remediation of defects that prevent or interrupt quiet enjoyment under the lease agreement. In that situation, the tenant can claim a reduction in rent and damages. The tenant is obliged to report the defect promptly.

The landlord cannot exclude its responsibility for existing defects of which the landlord was, or should have been, aware of. Parties can, however, agree to exclude the responsibility of the landlord for defects arising after commencement of the lease.

The landlord is liable for damage caused by defects in the leased premises, if (i) the defects occurred after the commencement of the lease and are attributable to the landlord; and (ii) the defects existed at the commencement of the lease and the landlord was aware or should have been aware of those defects.

Based on the standard ROZ model lease, the landlord is obliged to repair defects but the tenant is not permitted to claim a reduction in rent or damages.

For housing leases, deviating from statutory tenant protection against defects is difficult.

6.7 Maintenance, repair and renovation at end of lease

ALTERATIONS

A tenant is not permitted to alter the fixtures and fittings of the leased premises without the written approval of the landlord. If alterations are carried out with the landlord's approval, the parties are free to decide whether or not the tenant will be obliged to remove the alterations upon termination of the lease.

REINSTATEMENT OBLIGATIONS

The tenant is obliged, upon termination of the lease, to deliver the leased premises back 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 premises must be delivered in a good state of repair, clean, vacant, and free from rights of occupation.

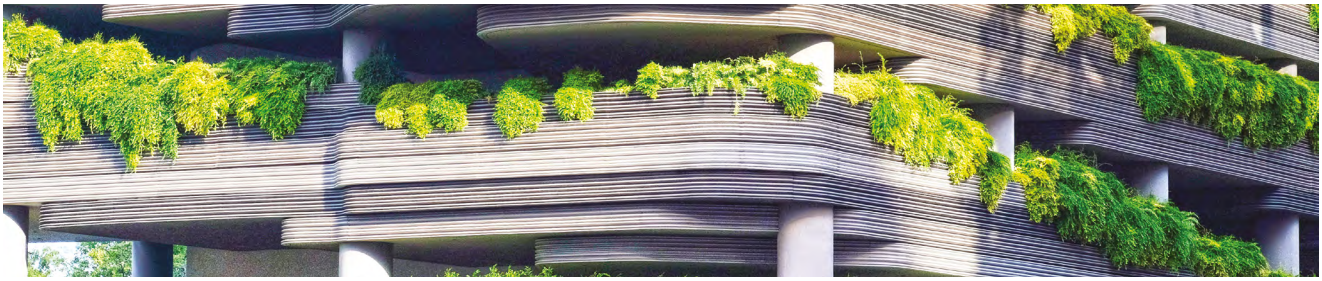
6.8 Assignments/ transfers/subletting

Both of the parties are entitled to assign the lease with the cooperation of the other party, unless agreed otherwise in the lease. The right to assign can be limited to assignment to a group company. The tenant of retail space is able to request the substitution of a third party as tenant under the lease, if the tenant intends to transfer its business to the third party and the landlord withholds its consent. The court may decide whether or not to approve such a request. For private housing mandatory law applies regarding co-tenancy and house exchange.

6.9 Subleases

Regarding commercial leases and rental leases, a tenant may sublet the leased premises in whole or in part to a third party, unless it has reason to believe that the landlord has reasonable objections to the subletting. As this is not mandatory law, the parties may deviate contractually. The tenant of a housing lease may not sublet the whole leased premises to another party (by law). This is mandatory law.

The ROZ model lease stipulates that the tenant may not sublease without prior written permission from the landlord. However, the overall principles of reasonableness and fairness of Dutch contract law plays a role in every contractual relationship. This usually means that the landlord cannot unreasonably withhold its consent to a sublease.



6.10 Termination

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 (with the exception of termination by mutual consent). It will only be possible for the tenant or 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 of time (at least three months). In that case, the competent court can be requested to terminate the lease.

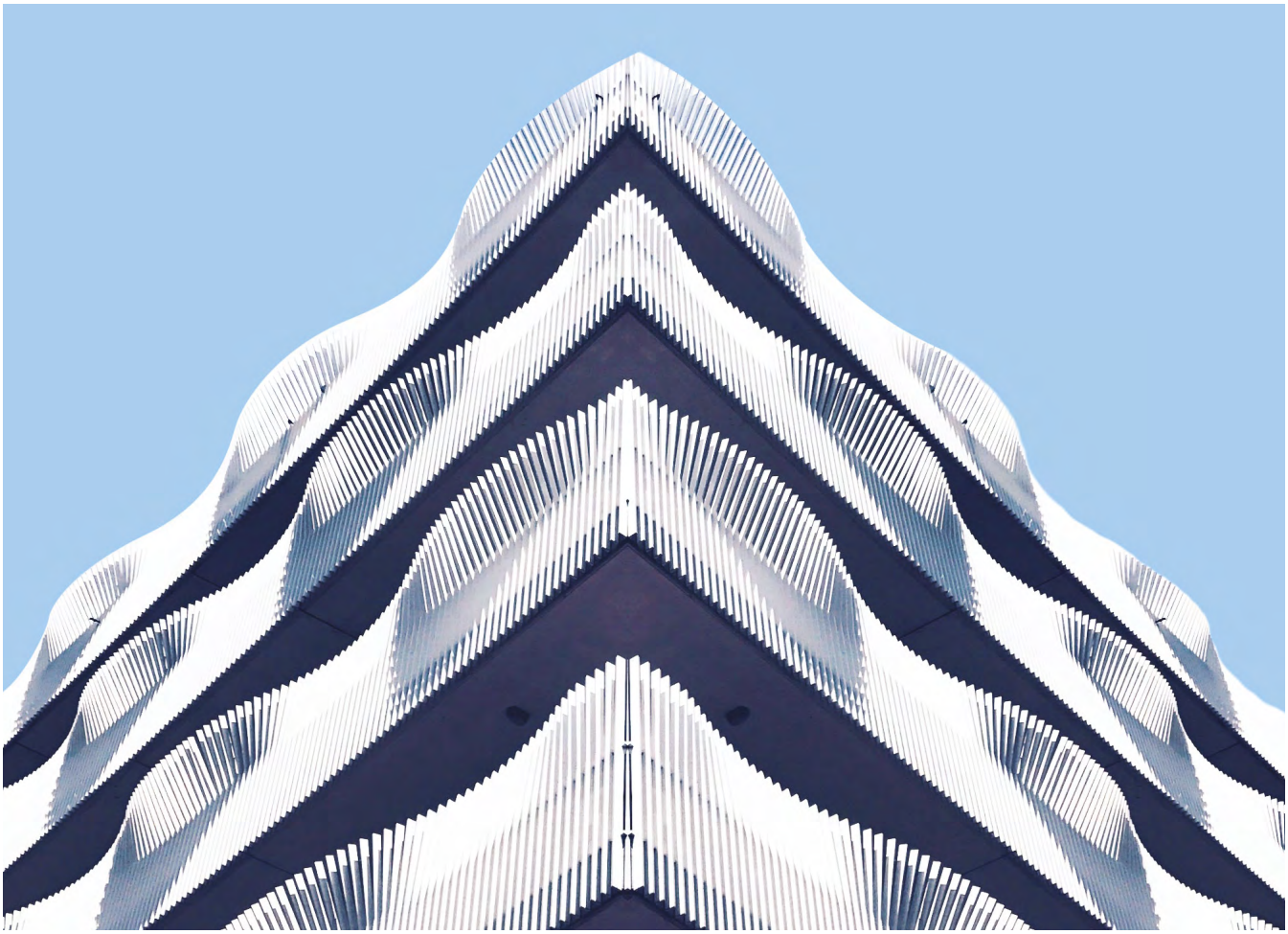
If a lease is entered into for an indefinite period, both the tenant and the landlord may, with due observance of the applicable provisions, terminate the lease at any moment by giving notice of termination. Both the tenant and the landlord must observe the agreed notice period. In the case of retail space, a notice period of at least one year is required by law. In case of housing, the notice period has to be between three to six months (depending on the (length) of the agreement).

In case of retail leases and housing, the landlord can only terminate the lease if it can establish a legal ground set out in law. This applies to leases for an indefinite period as well as fixed period leases (saving leases for a fixed period of two years or less). It is not easy to terminate a retail lease. It is very difficult to terminate a housing lease. The landlord does not need a legal ground to terminate a commercial lease, but the tenant will have legal rights which protect it from eviction.

If the tenant becomes bankrupt, both the bankruptcy trustee and the landlord may terminate the lease, in which case a notice period of three months will be sufficient. If a moratorium (*surséance*) is granted, only the tenant may terminate the lease. Again, a notice period of three months will in any case be sufficient.

6.11 Sale of leased property

The sale of the leased premises by the landlord does not affect an existing lease of the premises. The transfer of the ownership of the premises will result, by operation of law, in the purchaser becoming the landlord. No special legal action is required. However, the tenant is to be informed as soon as possible about the transfer of ownership, because terms only then apply.



7.Tax

7.1 Taxes

The following indirect taxes may apply where the real estate is acquired directly (an asset deal):

- VAT (*belasting toegevoegde waarde*, or BTW);
- Real estate transfer tax (*overdrachtsbelasting*): Transfer Tax.

Further charges (kadastrale rechten) can be levied by the Land Registry.

7.2 Transfer tax (*overdrachtsbelasting*)

In the Netherlands, Transfer Tax of 6% (2% residential) is levied in respect of the acquisition of the legal and/or beneficial ownership of:

- real property located in the Netherlands (Dutch Real Property) or certain rights concerning such Dutch Real Property, for example, the rights of usufruct and long leases;
- under certain circumstances, shares (Qualified Shares) of real property entities, or certain rights concerning existing Qualified Shares of real property entities; and/or
- under certain circumstances, Membership Rights (Membership Rights) in associations or Dutch co-operations, if such rights represent exclusive usage rights of Dutch Real Property.

The Transfer Tax is payable by the purchaser of Dutch Real Property, Qualified Shares or Membership Rights, as the case may be. A party acquiring Dutch Real Property is liable to pay Transfer Tax whether such party is a private individual or a legal entity and regardless of whether such party is a resident or non-resident of the Netherlands.

The Transfer Tax is based on the higher of the fair market value of the applicable Dutch Real Property or the purchase price paid for such property. Any indebtedness secured by the property will not be deducted from the fair market value of the property for the purposes of calculating the Transfer Tax. If there is no exemption, a party will be required to pay the Transfer Tax upon the acquisition of legal and/or beneficial ownership of Dutch Real Property, and/or, under certain circumstances, Qualified Shares or Membership Rights.

The Dutch civil law notary will receive the transfer tax payable from the purchaser and will formalize the tax debt with the Dutch Tax Authorities and transfer the tax to the authorities.

7.3 Value added tax (BTW)

In general, the acquisition of real estate property will be exempt from value added tax (VAT). There are some exceptions to this general rule, in which VAT of (currently) 21% applies.

If newly-built real estate or vacant land is purchased, VAT applies by law. In regular real estate transfers, the purchaser will pay most of the costs, including taxes. In the case of newly built property, however, costs are normally paid by the seller. A property is considered newly-built until two years after the property is first occupied and therefore exempt from transfer tax. Both transfer tax and VAT are payable in the event that the new property has been used as an operating asset and the purchaser is a business under the Dutch VAT act.

If both seller and purchaser are businesses under the Dutch VAT Act, and the purchaser will use the property for business activities (90% or more of the property) which are subject to VAT, parties can opt for a transfer subject to VAT. If parties opt for VAT at a rate of 21%, both VAT and transfer tax of 6% will be payable. VAT can usually be offset against VAT received or reclaimed from the tax office.

7.4 Corporate income tax (CIT)

When investing in real estate in the Netherlands through a Dutch corporate entity, corporate income tax (CIT) applies. The ownership of real estate by a foreign investor is deemed to create a permanent establishment (PE) in the Netherlands. Any profit attributable to the PE is also subject to Dutch corporate income tax (CIT).

CIT rates are:

- 20% on the first EUR200,000; and
- 25% on the excess.

In a coalition agreement, the current Dutch government has embraced the objective to gradually reduce these CIT rates over a period of three years. In that respect, the rates are expected to be amended as follows:

- 2019: 19% and 24%;
- 2020: 17.5% and 22.5%; and
- 2021: 16% and 21%.

Taxable income for CIT purposes is net income after the deduction of expenses, depreciation and amortization. Apart from some particular exceptions, costs relating to the activities of the PE, including interest payments, can generally

be deducted from the income to the extent that these costs and expenses are at arm's length. Tax losses (if any) can be offset against taxable profits. These losses can be carried forward for a period of nine fiscal years. Carry back is restricted to one fiscal year. According to the coalition agreement, the aforementioned carry forward is to be restricted to six fiscal years as from the January 1, 2019. Real estate transfer tax is not deductible for CIT purposes. Depreciation on real estate is possible, yet some limitations apply.

Under certain circumstances, with a loan of an appropriate size which is entered into at arm's length conditions, the taxable income for CIT purposes can be mitigated significantly. As part of recent European anti-abuse initiatives the Dutch government is to introduce anti-earnings-stripping rules as of January 1, 2019. At this stage, no legislation or draft legislation is available yet and no specific comments have been made with respect to application of these envisioned measures to Dutch permanent establishments. However, it is generally expected that these rules should also apply in these cases. Legislative proposals are anticipated to be published this summer and should be monitored.

7.5 Personal income tax

If the investor is an individual, the net income from letting (i.e. after deduction of the interest on loans) can potentially be taxed with personal income tax at tiered rates up to a maximum of 51.95% (so-called Box I) provided that these activities can be qualified as conducting an enterprise. However, if the investor is an individual investor simply holding a real estate portfolio, the actual income from lettings is not taxed. Instead, such individual will be taxed at a flat rate of 30% on a deemed yield from savings and investments (*sparen en beleggen*) within the meaning of the Income Tax Act. This deemed yield amounts to 0.36% for the first yield basis (*Rendementsgrondslag*) and 5.38% for the second yield basis at the beginning of the calendar year, divided into three brackets, insofar as the individual's yield basis exceeds a certain exempt amount. A tax-free allowance of EUR30,000 applies in 2018.

Under certain defined circumstances, a real estate portfolio that is leased to certain related companies or individuals may still be subject to progressive income tax rates with a maximum rate of 51.95%.

7.6 Taxation of rental income from real estate

Net rental income from real estate in the Netherlands is subject to the ordinary CIT rates as described above. Dutch corporate entities, non-resident corporate entities and partnerships owning Dutch real estate are in principle allowed to deduct interest expenses on loans from banks and/or affiliated companies that are attributable to the real estate, unless a specific interest deduction limitation rule applies. A condition to the deductibility of interest expenses is that the financing of the principal amount relates to the Dutch real estate and the other terms and conditions thereto are entered into on an arm's length basis. Furthermore, it should be verified whether limitations to the deduction of interest expenses apply (e.g. the anticipated anti-earnings stripping rules referred to in 7.4).

7.7 Taxation of shareholder of a company owning real estate

DISTRIBUTION OF DIVIDENDS TO SHAREHOLDERS

Once the corporate vehicle has paid taxes on letting income, and on any capital gains, it can distribute dividends to shareholders. Such distribution should not lead to withholding tax charges, provided the corporate shareholder is a corporate resident in the Netherlands for tax purposes and said shareholder holds at least 5% of the nominal share capital of the distributing entity. Tax residency is determined by a variety of factors; however, once an entity is incorporated under Dutch law, it is deemed to be resident in the Netherlands for corporate income tax purposes.

If the shareholding is held by a non-tax-resident entity or individual, in principle withholding tax must be withheld when the dividend distribution is made at a rate of 15%, unless:

- the investor is a corporate EU-resident shareholder with a share interest of at least 5%, and the requirements of the rules implementing the EU Parent-Subsidiary Directive into Dutch tax law can be met, in which case there should be no withholding tax;

- the investor is a corporate shareholder with tax residency in a jurisdiction that has concluded a tax treaty with the Netherlands, in which case – subject to meeting certain conditions – there should be no withholding tax; or
- a relevant tax treaty reduces withholding tax. Under the OECD Model Convention, withholding tax is reduced to between 0% and 15% depending on the shareholder's degree of participation in the company.

If withholding tax is due, this often results in a tax credit in the shareholder's country of residence. It should be noted that the Dutch government intends to abolish the Dutch dividend withholding tax act as per 2020, while simultaneously introducing new withholding taxes applicable to dividend distributions to low-tax and black-listed jurisdictions and in artificial structures. It is strongly advised to monitor the effects of the anticipated legislation on envisioned structures. These new rules may provide some additional hurdles, or may also provide new opportunities.

TAXATION AT THE LEVEL OF THE SHAREHOLDER

If a Dutch resident corporate shareholder receives dividends, these dividends are subject to taxation at the level of the shareholder. This may be avoided, however, where the participation exemption applies – that is where (in addition to meeting several requirements) a corporate shareholder owns 5% or more of the paid-in share capital of the distributing company. It is also possible to avoid additional taxation at the shareholder level by opting for tax consolidation of the corporate vehicle – by means of establishing a fiscal unity – with the Dutch shareholder. Please note that following recent international developments the Dutch fiscal unity regime will be amended to align the fiscal unity regime with European law. The Dutch State Secretary of Finance presented draft legislation on June 6, 2018 which comprises of changes to the current regime that are meant to patch these regulations for the time being. A larger overhaul of the Dutch fiscal unity regime is currently in the making.

Non-resident individuals who (individually, or together with their partner) own 5% or more of the shares in a Dutch entity will be considered the holder of a substantial interest and will be considered a non-resident tax payer for Dutch personal income tax purposes and may be taxed on their income derived on/through the shares in said Dutch entity.

Non-resident corporate entities may, under certain conditions, also be subject to Dutch CIT on their Dutch income from so-called substantial interests within the meaning of the Dutch Personal Income Tax Act. Non-resident entities are subject to Dutch CIT if the following conditions are cumulatively met:

1. the non-resident entity has a 'substantial interest' in a company with its residence in the Netherlands, i.e. generally being a shareholding of 5% or more of the issued share capital of a company or profit rights entitling to at least 5% of the annual profits; and
2. the substantial interest is held in a Dutch resident company, not being a tax-exempt investment institution; and
3. the substantial interest is (i) held with the main purpose (or one of the main purposes) to avoid Dutch personal income tax due by another person/company (i.e. the subjective test); and (ii) is part of an artificial arrangement or series of artificial arrangements (i.e. the objective test).

Dividends may be taxed in the shareholder's country of residence as well if no local participation exemption is available. A relevant tax treaty may limit the right to levy taxes on income and gains by one of the treaty jurisdictions with respect to the shares in the Dutch entity.

INDIRECT INVESTMENT THROUGH A PARTNERSHIP

In the case of investment through a tax transparent partnership, the question arises whether such partnership is qualified as being transparent from a Dutch tax perspective. If this question can be answered affirmatively (generally based on the provisions in the partnership agreement) the partners are taxed directly according to their individual circumstances. In that case, income can be distributed to the partners and no additional taxation is levied on the partnership.

7.8 Taxation of capital gains on real estate

Capital gains (i.e. the difference between the sale proceeds and the tax book value) made by a foreign corporate entity on the direct sale of real estate are subject to Dutch corporate income tax. Capital gains made by individuals, who qualify as an entrepreneur with respect to the real estate, are subject to personal income tax at tiered rates of up to 51.95%. Capital gains are classified as the difference between the book value of the property at the date of sale (after deductions for depreciation) and the agreed purchase price. In some circumstances, it is possible to re-invest the profit into a re-investment reserve, in which case the capital gains are not

taxed. A replacement investment must be made within three years (i.e. taxation can be postponed).

In the case of individuals who simply qualify as portfolio investors, no capital gains tax applies.

7.9 Taxation of capital gains from the disposal of shares/interests in a company owning real estate

In the case of a resident corporate shareholder, the participation exemption normally applies if the shareholder owns at least 5% of the company's paid-in share capital.

For resident individual shareholders, conducting an enterprise to which the real estate can be attributed, capital gains are subject to personal income tax at tiered rates of up to 51.95%. No capital gains tax applies to resident individual shareholders who simply hold a real estate investment portfolio.

Depending on whether a foreign corporate shareholder qualifies as a non-resident tax payer (see 7.7), capital gains tax may be levied on capital gains resulting from the disposal of shares in a Dutch company owning real estate. If such foreign shareholder is a resident of a jurisdiction that has concluded a tax treaty with the Netherlands, in most cases treaty protection should be available if certain requirements are met.

Dutch legislation provides for a full participation exemption (on both dividends and capital gains) for domestic and foreign shareholdings held by Dutch corporate entities. This applies if the participation meets all of the following conditions:

- at least 5% of the nominal paid up capital is held in the participation; and
- at least one of the following applies.

(i) The holding in the subsidiary is not held with an investment motive, (ii) the participation's assets on a consolidated basis do not consist for more than 50% of low-taxed portfolio investments; or the profits of the subsidiary are subject to realistic taxation by Dutch standards.

7.10 Taxation of gain on disposal of partnership interest in a partnership owning real estate

From a Dutch tax perspective, a Dutch partnership is considered a transparent entity if (among several other requirements), based on the partnership agreement, the admission and replacement of the partners is subject to the prior written approval of all other partners.

As a result of the transparency of the Dutch partnership, the partners of the partnership are subject to Dutch corporate income tax or personal income tax depending on whether the partner is a corporate entity or individual.

A Dutch resident entity which holds an interest in a transparent partnership holding Dutch real estate is subject to taxation on all income realized by the partnership as far as it is attributable to its share in the partnership. Consequently, rental income (i.e. gross rental income minus costs and depreciation) and capital gains realized which are attributable to the Dutch resident entity are subject to corporate tax at the ordinary corporate tax rate.

Likewise, the Dutch taxable income of a non-resident company attributable to its interest in a partnership, is subject to the ordinary Dutch corporate tax regime and tax rates.

In principle, individuals (resident or non-resident) holding an interest in a partnership holding Dutch real estate as a passive investment, will be considered passive investors and will be subject to the capital yield tax (Box III) on the value of capital assets, which is attributable to their share in the partnership.

7.11 Real estate investment trusts

In general, the concept of a trust is unknown under Dutch law (although Dutch law recognizes trusts which are validly established according to the laws of a foreign state). However, the concept of economic ownership is recognized under Dutch law. The key characteristic of economic ownership is that it allows legal ownership and beneficial interest to be separated. The legal owner is the owner of the property as far as third parties are concerned; the real property is therefore registered at the Land Registry in the name of the legal owner. By way of a contractual arrangement, the economic ownership may be separated from the legal ownership by granting the economic owner (or beneficiary) various economic rights regarding the property, for example, the right to receive the profits related to the property. Detailed contractual arrangements can be made between the legal owner and the economic owner dealing with all of the rights and obligations relating to the property, including insurance and rental income.

7.12 Real estate funds

Real estate is a popular asset class for Dutch investment funds. Since the summer of 2013 the AIFM directive has been implemented in Dutch regulatory law. This had a substantial influence on all alternative investment fund managers' offerings in the Netherlands. As from that date, fund managers needed to

apply for an AIFMD license unless they qualified for the so-called light regime.

The light regime is applicable if the AIFM falls below the AIFMD's application threshold (assets under management fall below EUR100 million, or EUR500 million respectively). If AIFMs depend on these asset under management exemptions, the AIFMs must still be registered with the AFM and certain notifications are required.

In addition to the asset under management thresholds the following requirements are to be satisfied in order to make use of the light regime: (i) offers are made to fewer than 150 persons; and/or (ii) units in AIFs can only be acquired for a value of at least EUR100,000 per investor; or (iii) the units in the AIF have a nominal value of at least EUR100,000 per unit. However, these restrictions on the amount of persons or EUR do not apply to AIFMs that offer units in AIFs exclusively to professional investors (as defined in the FSA).

If the AIF cannot make use of the light regime, a full AIFMD license needs to be applied for with the Dutch regulator. This is a time-consuming and costly exercise. It has a big impact on the way each of the AIF and the manager is organised and it involves, inter alia, capability checks for policy makers.

7.13 Taxation on the creation of security

A securitization by means of a pledge of the shares in a real estate entity should in principle not adversely affect the application of the participation exemption regime (defined in paragraph 7.7), assuming that the conditions for the participation exemption regime are otherwise satisfied. In principle, the same goes for the fiscal unity regime (also defined in paragraph 7.7), assuming that the conditions for fiscal unity are otherwise satisfied. As such, a pledge of the shares of a Dutch real estate entity should not adversely affect the fiscal unity regime for corporate income tax purposes between Dutch entities holding real estate (except for specific transfers of voting rights).

8. Real estate finance

Real estate finance involves financing or refinancing the acquisition and/or development of real property. The principal debt is generally secured by the capital value of the property and the debt is serviced from the income generated by the occupation of the property.

8.1 Interest rate risks

Commercial property financing is possible with long-term and short-term loans. In both cases, there is a risk of rising interest-rates unless fixed interest periods are agreed. However, the risk of interest rate fluctuation still exists at the time of the extension of a loan or upon the conclusion of follow-up financing. This can be hedged against by derivatives, particularly interest rate swaps.

An interest rate swap is made available through the lending institution itself or a third-party financial institution. Within the scope of the interest rate swap the borrower agrees to pay a fixed rate to the counterparty, while receiving a floating rate indexed to a reference rate (e.g. three-month Euribor). With the money received by the counterparty the floating loan-interests are paid to the lending institution. In this way the borrower eliminates the risk of rising interest-rates but, at the same time, loses the potential advantage of any fall in interest-rates – such potential advantage now lies with the counterparty.

8.2 Assets held as security

Real estate includes the land, buildings erected on it, and fixtures which form part of those buildings. Financing is principally secured by establishing a mortgage (*hypotheekrecht*) over real estate.

A mortgage can only be established by a notarial deed, which must be registered with the Land Registry.

8.3 Other collateral (*agreements*)

In addition to a mortgage, borrowers often create a pledge over the rental income arising from real estate. This can take the form of a disclosed pledge, whereby the tenants may be directed to pay the rental income to the lender directly so that the rental income does not pass through the hands of the borrower (which is beneficial for the pledgee because any bankruptcy of the pledgor will not then interfere with the rights of the pledgee). A notification to the tenants is required to perfect the security. A pledge can be created by means of a separate deed of pledge, but it is more commonly contained in the mortgage deed. If there are various continuously changing tenants, an undisclosed pledge over the rental income can be used instead. Submitting the deed of pledge to the tax authority is required to perfect the security.

It is also possible to take security over fittings, furniture and moveable objects by creating a pledge. Such a pledge can only be created in relation to transferable nonregistered property (i.e. property which does not need to be registered in order to complete the transfer of that property).

Furthermore, it is also possible to secure certain receivables from real estate (e.g. insurance, trade debtors or intercompany receivables). This can be done by a disclosed pledge. A notification to these debtors is required to perfect the security. With regard to trade debtors, it is common in the Netherlands to secure these by an undisclosed pledge (basically to avoid causing negative sentiment in the market). Submitting the deed of pledge to the tax authority is required to perfect the security.

Share Pledges can also be used as collateral for loan claims. The Pledge of Shares in a private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) requires notarization before a Dutch notary. Furthermore, it is important to check that Share Pledges are not prohibited by the articles of association of the relevant company.

Bank Account Pledges as collateral are possible over bank account receivables run by the lending institution itself (lending bank) or a third party (account bank). A notification of the account bank is required for to perfect the security. It should be noted that the account bank usually has a first ranking pledge under its general business terms. A release of the pledge is needed if the lending bank wants a first ranking security. It should also be noted that account banks in the Netherlands usually prohibit the ability to pledge the bank account receivables in their general business terms (*onoverdraagbaarheidsbeding*) which may have proprietary effect (*goederenrechtelijk* effect) which would mean that claims against the account bank cannot be pledged. Prior consent from the account bank to pledge the bank accounts will in that case be required to validly pledge the bank account receivables.

Glossary

TERM	EQUIVALENT
Appartementsrecht	Condominium (Apartment right)/Membership right
Besloten vennootschap (B.V.)	Private Limited Company
Beperkt recht	Restricted right
BTW	VAT
Eigendom	Full ownership
Erfdienstbaarheid	Easement
Erfpacht	Leasehold
Huur	Lease
Hypotheek	Mortgage
Indeplaatsstelling	Assignment/Substitution
Naamloze vennootschap (N.V.)	Public Limited Company
Natrekking	Right of accession
Omzetbelasting	VAT
Onderhuur	Sublease
Opstalrecht	Right of superficies
Overdrachtsbelasting	Real estate transfer tax (RETT)
Recht van overpad	Easement of way

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This guide was updated in June 2018. Subsequent changes in law are therefore not taken into account.

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