



Fall | 18



# INTERNATIONAL LAWYERS NETWORK



**PLASBOSSINADE ADVOCATEN NOTARISSEN**  
Buying and Selling Real Estate in the Netherlands

**ILN REAL ESTATE GROUP**

This guide offers an overview of legal aspects of buying and selling real estate in the requisite jurisdictions. It is meant as an introduction to these market places and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this guide in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This guide describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

Each contributing law firm is the owner of the copyright in its contribution. All rights reserved.

## KEY FACTS OF REAL ESTATE ACQUISITIONS UNDER DUTCH LAW

### Introduction

The purchase of an immovable property is a mutual agreement.

Neither the seller nor the buyer has the obligation to make use of the services of a real estate agent. In practice, one often sees that the seller instructs a real estate agent to act as an intermediary. A purchase agreement cannot be effected by the real estate agent himself: he is merely the intermediary. Should the seller engage a real estate agent, the seller must also pay the charges arising from the use of his services.

A real estate purchase agreement is often preceded by a pre-contractual stage. If the parties have agreed upon essential conditions, a purchase agreement has been achieved.

Generally, no formal requirements need to be observed, which means that a *written* purchase agreement is not necessary. This requirement only applies in the event of consumer sale i.e. that a residence is purchased by a natural person. In case of a consumer sale a so-called reflection period applies. Within three days after signing the purchase agreement, the consumer buyer has the right to dissolve the agreement without having to give reasons and without consequences.

### Conformity – examination

The Dutch Civil Code (article 7:17) stipulates that a seller is obligated to supply the buyer with an immovable property that must be in conformity with the agreement. The immovable property is not in conformity with the agreement if it does not have the characteristics that the buyer, given its nature and the statements of the seller about it, could have expected on the basis of the agreement. The buyer may expect that the immovable

property has the characteristics necessary for a normal use and on the presence of which he did not need to doubt, and also that it has the characteristics necessary for a particular use which was foreseen in the agreement.

The parties can derogate from this statutory main rule at the time of the purchase agreement. This is often done by giving substance to the duty of disclosure and examination and laying down the outcome in the agreement.

### Elements purchase agreement

The following items require attention during the negotiations and in the purchase agreement:

- object description
- purchase price
- transfer of ownership by means of a notarial deed of delivery
- costs and taxes
- current agreements with regard to the immovable property
- transfer and transmission of claims
- guarantees seller
- oversize/undersize
- environmental regulations
- risk transfer of damage
- notice of default/omission/dissolution/penalty
- energy performance certificate
- registration in the public records
- Municipalities Preferential Rights Act
- suspensive or dissolving conditions

## Various types of registered immovable property rights

The Dutch Civil Code distinguishes four main immovable property rights which confer full ownership or a limited right in rem to the purchaser. These rights are:

### Property right

The property right (ownership right) is the most comprehensive immovable property right one may acquire, free and unencumbered with any limited right belonging to other (third) parties. The owner of the immovable property is in the position to sell and dispose of the immovable property, to encumber the immovable property with limited rights in rem such as leasehold or mortgage.

### Leasehold

Leasehold ("erfpacht") is a limited immovable property right in rem and provides the leaseholder the right to hold and use the immovable property which is owned by another person or legal entity. The rights and obligations of the leaseholder are generally limited by law and can be specifically limited by the leasehold conditions which are concluded between the owner and the leaseholder.

The following items are usually determined by the leasehold conditions:

- duration of the lease (temporary, permanent or perpetual);
- ground rent ("erfpachtcanon");
- designated use;
- (conditional) right of transfer;
- (conditional) right of sub-leasehold.

The leaseholder is entitled to mortgage the leasehold without the consent of the owner. Therefore, in case the leaseholder requires the written consent of the owner under the

leasehold conditions to transfer the leasehold, the mortgagee is not bound by this condition in a situation of a forced sale. However, after the execution sale the new leaseholder is again fully bound by the leasehold conditions.

### Apartment right

The apartment right is a distinct share in an immovable property with its appurtenances, giving entitlement to the sole use of a certain part of the immovable property. The immovable property is divided into apartment rights by way of a notarial division deed, containing a division plan and rights and obligations of the owners of the apartment rights. The application of apartment rights is widely used as to legally structuring immovable property, whether residential or commercial or otherwise.

The notarial division deed contains, as required by law, the establishment of an owner association. All apartment right owners are members of this owner association by operation of law. The objects of the owner association are to manage the immovable property and the general interests of the joint owners directly relating to the immovable property.

An apartment right may be encumbered with limited rights in rem such as leasehold or mortgage.

### Right of superficies

The right of superficies ("opstalrecht") is a limited right in rem and provides the holder the right to own or to acquire constructions and structures in, on or above immovable property which is owned by a third party. The right of superficies may generally be compared with leasehold, but a distinctive contrast is that the leaseholder may use and hold the immovable property itself while the holder of the right of superficies has the ownership and use of constructions and



structures *in, on or above* a third party's immovable property.

A second difference between leasehold and the right of superficies is that leasehold is an independent right while the right of superficies may be an independent right or a right dependent on another agreement between the owner and the holder, such as a lease agreement. In such case, ending of the lease agreement would mean the end of the right of superficies.

The rights and obligations of the holder of the right of superficies are generally limited by law and can be specifically limited by the conditions which are concluded between the owner and the right's holder, equal to leasehold conditions.

An independent right of superficies can be transferred and encumbered by a limited right in rem such as mortgage. Since the dependent right of superficies depends on another agreement, such right cannot be transferred nor be encumbered with a limited right in rem.

The right of superficies is widely used for pipelines, cable networks and other valuable structures or equipment.

The property right, leasehold, apartment right and right of superficies can all be leased to a third party.

### **Non-registered immovable property rights (economic ownership)**

Economic ownership can be defined as the separation of full ownership in legal ownership and economic ownership. It is based on obligations between involved parties by means of contracting. The economic owner is usually entitled to the value and profits of the real estate. The legal owner is registered at the Land Registry but does not necessarily hold any economic or financial interest of the real estate. For third parties only, the legal owner is known due to registration.

### **The role of Dutch civil-law notaries in immovable property transactions, payment procedure and the Public Registers**

Under Dutch law, a notarial deed is compulsory in order to transfer title to immovable property or to establish limited rights in rem, such as a mortgage. Notarial deeds are conclusive proof of the transactions laid down therein.

Dutch civil-law notaries are impartial legal professionals appointed by the Government. In his capacity, the civil-law notary must take into account the interests of all parties involved in a transaction regardless who pays the notary's fee. Also, in general, the interests of third parties who are affected by a transaction must be taken into account. The civil-law notary advises the parties and oversees the transaction.

The notarial deed containing the transfer of ownership or the establishment of the limited right in rem are recorded by the notary with the designated Public Registers, kept by the Land Registry "Kadaster"), by way of filing a certified copy (or an excerpt) of the deed. These Public Registers are accessible to everyone. The civil-law notary is the custodian of the original deed and therefore, it remains with the notary. Parties entitled to it will receive a certified copy or, when required, an authenticated copy.

In an immovable property transaction, the purchase price (or secured loan amount) must be deposited with the (impartial) civil-law notary prior to the closing of the transaction. This has the meaning that at the time of the transfer of ownership of the transaction, the purchase price is in place, but out of the hands of the Buyer and Seller alike. After the transfer of ownership has been completed (by way of recording the deed of transfer in the designated public registers and checks of various other registers), the civil-law notary releases the funds to the Seller. Each civil-law notary is obliged to keep a special account in

his name with a bank acknowledged by the Dutch authorities, stating his capacity; this/these account(s) is/are exclusively intended for funds the civil-law notary retains in relation to his activities in that capacity.

The aforementioned statutory provision further implies that the funds in this special account, which is called a third-party account, do not belong to the civil-law notary, but to the parties entitled to them. This means that the balances in this account cannot be attached by the civil-law notary's creditors and that, should the civil-law notary get into financial difficulties or go into involuntary liquidation, the balances in the account cannot be involved in the financial difficulties or the liquidation.

The above has been included in the law to protect the interests of the civil-law notary's clients who need to be able to rely on the fact that the funds they have deposited with the civil-law notary will reach the parties they are intended for. The civil-law notary is the only party who can dispose of this account.

### **Tax issues**

#### Value added tax (VAT)

In general, acquisition of real estate is not subject to VAT (21%), except for newbuilding and/or building sites. In case VAT is applicable, there is usually an exemption from Transfer tax. Newbuilding is considered newbuilding in the building phase, when it is completed and occupied, up until two years after occupation.

In the event newbuilding is purchased within two years after occupation and the seller is subject to VAT, VAT and Transfer tax are both applicable. Depending on the tax status from buyer for VAT purposes, VAT can be reclaimed in the VAT tax return. When a natural person – not subject to VAT - is selling newbuilding within two years of occupation only Transfer tax is applicable.

In case seller and buyer are both subject to VAT and buyer will use the real estate for 90% or more for VAT business activities, they can opt for a transfer of real estate with VAT. Transfer tax is also payable. VAT can be reclaimed by buyer in the VAT return. A revision period is applicable for 1/10 of the initially reclaimed VAT in the following nine years. When buyer in any year performs less than 90% business activities for VAT, the buyer has the obligation to partially pay back VAT.

Research on the tax history of real estate between a tax advisor and a civil-law notary is highly recommended especially with regard to commercial real estate.

#### Transfer tax

Transfer tax is imposed on the acquisition of existing, used immovable property and limited rights in rem thereto (not security rights such as mortgage). The tax rate is 2% for residential properties and 6% for commercial and all other properties. The taxable base is the purchase price or the fair market value of the real estate when this value exceeds the purchase price.

Subject to Transfer tax is the transfer of:

- I. Real estate including rights derived from real estate such as leasehold, right of superficies and apartment right.
- II. An economic ownership in real estate. The economic ownership includes the risks of change of value of the real estate. Participation rights in real estate investment funds are exempt when acquiring interests below one-third in the fund, interests above one-third are subject to transfer tax (including interests already held).
- III. So-called fictitious real estate, to be distinguished as follows:

- a. Shares in a (separate) real estate entity, which possessions mainly consist from real estate (acquisition of one/third or more of shares, including interests already held).
- b. Rights on memberships of association or cooperation in case the rights include the (exclusive) right to use of a building or a part from that building that is meant to be used separately.

Several acquisitions of real estate are under conditions tax exempt for Transfer tax among which:

- the acquisition of newbuilding and/or building sites in the phase before occupation (subject to VAT 21%);
- acquisitions under the scope of business/family succession;
- acquisitions in the event of mergers, restructuring and division of corporate entities.

#### Corporate income tax

A Dutch corporate entity investing in leased real estate is subject to Corporate income tax. Real estate held by foreign corporate entities is considered as a permanent establishment for Corporate income tax purposes.

Taxable income is profit (rental income, realized capital gains) minus costs and depreciation. Depreciation is limited to 100% of the determined value of the leased real estate of for the purposes of the Valuation of Immovable Property Act. Depreciation of real estate that is used by the corporate entity itself, is limited to 50% of the determined value of for the purposes of the Valuation of Immovable Property Act. Transfer tax is not deductible as costs from taxable profit and is part of the cost price of the

real estate on the balance sheet. Interest on loans is in general deductible from profit.

The Corporate income tax rates for 2018:

20% for taxable income between € 0 - € 200.000;  
25% for taxable income exceeding € 200.000.

According to the plans of the government (September 2018), Corporate income tax will be reduced to 19% as from 2019 (taxable income between € 0 - € 200.000) and 25% (taxable income exceeding € 200.000). As from 2020, further reductions of corporate income tax will enter into effect (2020/2021 16,5%/15% (taxable income between € 0 - € 200.000) and 22,55%/20,50% (taxable income exceeding €200.000)).

#### Income tax

Real estate (not the residence/permanent home in the Netherlands) can be taxed with (personal) Income tax within three categories (Box 1, 2 and 3).

Real estate which is part of a personal business (including partnerships that qualify as business) is subject to Box 1 progressive income tax rates with a maximum rate of 52%. Box 1 can be applicable for personally held real estate leased to certain affiliated companies. Net income from real estate may also fall under the scope of Box 1 in case the owner performs active real estate management in order to make more return on investment compared to passive real estate management.

Box 2 is a flat rate of 25% for owners of more than 5% of the shares in a corporate entity (a substantial interest). Income from real estate from the corporate entity is not directly taxed by the shareholder, but with the entity itself with Corporate income tax. Valuation of the real estate held by the entity is directly related to the value of the shares held by the shareholder. In

case the shareholder sells shares in the real estate entity, a rate of 25% is applicable in case capital gain on the value of the shares is realized.

According to the plans of the government (September 2018), the Box 2 flat rate of 25% will apply in 2019. The flat rate will be increased to 26,25% as from 2020 (and 26,90% as from 2021).

Individually held real estate with passive asset management, including investment in real estate funds and partnerships is taxed under the regime of Box 3, wealth tax. Per 1 January of each year, the market value of real estate minus debts related thereto is subject to a notional annual income of 0,36%-5,38% (2018, as from 2019: 0,13% - 5,60%). The notional annual income calculated is taxed with 30%.

The abovementioned Boxes are also applicable for non-resident investors subject to Dutch income tax. They are considered as non-resident taxpayers for Dutch Income tax purposes. The Netherlands have an extensive network of tax treaties with other countries in which the effects of double taxation are mutually arranged, with regard to Box 1, 2 and 3. The right to levy Dutch income tax on income, gains and assets of non-residents may be therefore limited.

#### Capital gains on real estate or shares in a Dutch corporate entity holding real estate

Capital gains made by a Dutch corporate entity and a foreign corporate entity (also by means of a partnership) are subject to Dutch Corporate income tax. Capital gains made by individuals under the regime of Box 1 of Income tax are progressively taxed.

In case there is an intention to reinvest a capital gain, profit from selling real estate can be reserved in a fiscal reserve up until three years after selling. Within these three years reinvestment has to take place. If not, the capital

gain is taxed in the third year after selling, at the latest.

Capital gains on the sale of shares in a corporate entity by a Dutch corporate entity is in general exempt from Corporate income tax. The Corporate income tax act provides for a participation exemption on dividends and capital gains for Dutch and foreign held shares by Dutch corporate entities under the following conditions:

- at least 5% of the shares is held by the Dutch corporate entity;
- the shares are not held as an investment;
- the participation is subject to a corporate tax with a realistic tax rate compared to Dutch tax rates; or
- less than 50% of the assets of the participation consists from low tax rated investments (surplus liquidities, assets related to passive financing of group companies, or assets that are placed at the disposal of group companies).

#### Dividend withholding tax

The Dutch government has withdrawn the plan to abolish the Dividend withholding tax. Below the current Dividend withholding tax rules for the following categories:

- dividends paid to shareholders (natural persons) with a substantial interest;
- dividends paid to shareholders (natural persons) without substantial interest;
- dividends paid to a resident corporate entity;
- dividends paid to a non-resident corporate entity.

Dividends paid to shareholders (natural persons) with a substantial interest (5% or more of the



shares) are subject to 15% Dividend withholding tax. Dividend withholding tax is an advance levy before Box 2 flat rate of 25% in Income tax. In case the shareholder with a substantial interest is a non-resident, the same rules in principle apply. The non-residential shareholder is considered as a non-resident taxpayer for Dutch income tax purposes. Dutch tax regulations and tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder.

Dividends paid to resident shareholders without substantial interest are subject to 15% Dividend tax. Dividend withheld tax is refundable and/or can be settled with due Income tax. Non-resident shareholders without substantial interest are also subject to 15% Dutch withholding Dividend tax. Dutch tax rates may be overruled and/or adjusted in case a tax treaty is applicable with the country of residence of the non-resident shareholder. On request, the Dutch tax authorities will refund Dividend tax entirely or partly, depending on the applicable treaty.

Dividends paid by a Dutch corporate entity to another Dutch resident corporate entity are exempt from withholding Dividend tax in case the participation exemption of the Corporate income tax applies. The participation exemption applies in case a corporate entity holds 5% or more of the shares in another corporate entity. Dividend tax withheld in other situations will be refunded and/or settled with Dutch Corporate income tax.

Dividends paid by a Dutch corporate entity to a non-resident corporate entity are subject to 15% Dividend withholding tax unless the non-resident corporate entity holds more than 5% of the shares and the EU Parent Subsidiary is applicable. In other cases, the 15% Dividend tax rate may be adjusted due to the applicable tax treaty with the country of residence of the non-resident corporate entity, depending on conditions.