BELGIAN REAL PROPERTY LAW

1. Real Property Law – Introduction

1.1 General Features and Short History

In Belgium, the articles related to real property are spread out throughout the Belgian Civil Code (hereafter described as the '**BCC**'), some special civil law acts (i.e Long Lease Act of 1824), tax law and regulatory and environmental law.

The BCC has been founded on the French Civil Code of Napoleon and was introduced in the year of the Belgian independence of 1831. Save some minor modifications of the BCC in particular with regard to the lease agreements, the main reforms of real estate law have been laid down in special civil law acts.

The most relevant sources of the real estate law are the following:

I. CIVIL LAW

- *BCC:*

  The articles related to real property law are spread out throughout different chapters in our BCC i.e.:
  - Marriage: articles 215, 217, 223 and 224 of the BCC
  - Divorce: articles 302, 311 of the BCC
  - Parental authority: article 367 of the BCC
  - Immovable property, the definition of ownership and the different ways to obtain ownership: articles 516 until 577 of the BCC
  - Joint-ownership: articles 577-2 § 1 until 577-14 of the BCC
  - Usufruct and right of use: articles 578 until 636 of the BCC
  - Servitudes: articles 637 until 710bis of the BCC
  - Division of immovable property and attribution: articles 815 until 892 of the BCC
  - Gifts: article 893 of the BCC

  - Wills: article 967 of the BCC
  - Law of obligations[1]: articles 1101 until 1369 of the BCC
  - Patrimonial Family Law: articles 1417 and 1418 of the BCC
  - Sale: articles 1582 until 1685 of the BCC
  - Exchange: articles 1702 until 1707 of the BCC
  - Lease: articles 1708 until 1762bis of the BCC (*normal lease, residential lease and the commercial lease)*
  - Farm lease
  - Securities and Mortgages (Mortgage Act dated 1851)

- **Specific Civil law acts such as[2]:**
  - Long Lease Act dated 10 January 1824
  - Building Right Act dated 10 January 1824
  - Mortgage Credit Act dated 4 August 1992
  - Act "Breyne" for the sale of a house or an apartment in construction

II. TAX LAW

The main articles can be found in the Tax Code related to the income of immovable property, the Registration Duty Code related to the transfer taxes and the VAT code for the sale of a new building.

III. REGULATORY AND ENVIRONMENTAL LAW

These matters (environmental matters, town planning, soil remediation and rights of pre-emption) have been quite recently regulated (as from 1962) and have been object to of lot of modifications throughout the last decades.

As from the nineties, the power to regulate town planning, zoning and environmental matters has been assigned to the Regions (the Flemish Region, the Walloon Region and the Brussels Area). Consequently, the applicable regulations vary depending on the location of the construction site.

A detailed legislation on the remediation of soil and groundwater pollution only exists in the Flemish region. In the Walloon Region, a decree has recently been enacted but has not yet entered into force. In the Brussels region, such detailed and integrated legislation does not yet exist, but is expected to be enacted in the near future.

- Property law is uniform for the whole Belgian country except for transfer taxes and regulatory (administrative) and environmental matters
- Our real property law is based upon the principles of the French Code Napoleon and defends the right of each person or legal entity to have its

[1] The general dispositions of the Belgian law of obligations apply on all contracts (also real estate contracts) save if a specific rule derogates from it.
[2] We have only enumerated the most important ones.

own private property. In Belgium, we have a civil law concept of property. This philosophy has not been changed the last decades except the obligation to have an equilibrated contract pursuant to the European Directive on the unfair dispositions[3] and the significant restrictions enacted the last years by the administrative and environmental law.

- There are no plans in Belgium to change the real property law save the European project to establish a unified contract law.

1.2 Property and Estates

1.2.1 Estate versus Property

- In Belgium, it is not possible for several persons to be "owners" of the same real property other than in the form of joint-ownership. We ignore the system of feudal rights. Pursuant to articles 552 – 564 of the BCC, the ownership of real property is governed by three principles:
    - Ownership of land includes ownership of the ground and subsoil
    - Ownership of land includes all the proceeds and income deriving there from
    - Ownership of land includes ownership of all that is attached to it.

      According to this principle of accession, an owner of a plot of land normally has the property of all that is attached to it. The owner of a plot of land becomes thus the owner of any construction erected on his plot of land and of any improvement or transformation made to the building, regardless of the identity of the person that erected the building and/or the ownership of the building materials.
- The status of joint ownership ("*copropriété/medeeigendom*") is applicable to real property divided between several people in different entities, each comprising a private part, plus a share into the common parts of the divided property. The basis deed (composed out of the statutes of the building and the rules of joint ownership) determine which parts are common and which are private and how they are managed. The joint owners form together an association that has legal personality and is able consequently to represent the joint-owners towards 3rd parties (Article 577-5 of the BCC).

- Although, we have different types of real rights that establish different kinds of "*ownerships/enjoyments*" on real property i.e.:

    (i) Long Lease:

[3] Introduced in the Belgium by law dated 3 April 1997

A long lease *("emphytéose/erfpacht")* is a right *in rem* that confers on its holder enjoyment of a real property belonging to the granter (lessor) in consideration for a yearly charge, named "*canon*". This is essentially a temporary right: it must be contracted for a period of from 27 to 99 years. The holder of the long lease right (lessee) may exercise all the rights attaching to the enjoyment of the real property to which they pertain, provided that he does not reduce its value (e.g. he may rent the property out, or he may also plant or build, etc.). He can also burden the estate with a charge for the duration of his right. The holder of a long lease right may transfer his right; he may also mortgage it, but only for the relevant duration.

(i) Building Right:

A building right *('opstalrecht/superficie')* is a right *in rem* of a maximum duration of 50 years (renewable) allowing its holder to own buildings, works or plantings erected on land belonging to another party. For the duration of his right, the holder is the sole owner of such assets: he may use, enjoy or demolish them provided that he returns the land in the condition in which he received it. At the expiry of his right, the holder is entitled to claim recompense for the actual value of the plantings, works or buildings he erected.

The holder may transfer, mortgage or grant an usufruct over his building right.

(ii) Usufruct:

A usufruct *("usufruit/vruchtgebruik")* is a right *in rem* that confers on its holder enjoyment of a real property belonging to the naked owner with the obligation to maintain the property in its original state. Legal entities can only beneficiate to a usufruct for a maximum term of 30 years. He can burden the estate with a charge for the duration of his right. The holder may also mortgage its right, but only for the relevant duration.

- A Long Lease and a building right are often used for tax purposes, but also to take advantages of the contractual freedom of both systems. The only imperative rule with regard to a building right is that its duration cannot exceed 50 years and a Long Lease on the other hand shall imperatively have a duration of minimum 27 years until 99 years. So these long terms agreements can be determined as to correspond to the expected economic duration of the project.

1.2.2 Superficies solo cedit

- In Belgium, the ownership of a plot of land comprises also the ownership of all buildings erected on the land (the so-called '*principle of accession*'). According to the principle of accession as set forth in article 553 of the BCC, an owner of a plot of land normally has the property of all that is attached to it. The owner of a plot of land becomes thus the owner of any construction erected on his plot of land and of any improvement or

transformation made to the building, regardless of the identity of the person that erected the building and/or the ownership of the building materials.

- In Belgium, an owner of a plot of land can waive his right of accession. According to a decision of the Supreme Court dated 19 May 1988[4], a waiver of the right of accession is considered as a building right. As mentioned above, a building right is a right *in rem* (i.e. a real right) of a maximum duration of 50 years (renewable) allowing its holder to own buildings, works or plantings erected on land belonging to another party.

- No statistics are known on the percentage of isolate ownership of buildings.

1.3 Interests in land

1.3.1 Numerus clausus

In Belgium, we have a numerus clausus of the different types of real rights. Only real rights as enacted by Law can be established.

1.3.2 Systems of Interests in land and *numerus clausus*

The following real rights can be established on property:

- Right of ownership [5]
- Long Lease
- Building Right
- Usufruct
- Right to use and habitation

Besides the abovementioned real rights, there exists accessory real rights such as the mortgage and the pledge on immovable property.

1.3.3.1 Easements

Under Belgian law, an easement is a right enjoyed by the owner of a land over the land of another such as rights of way, rights of light, rights to a flow of water, etc. as set forth in Article 637 of the BCC. An easement exists for the accommodation and better enjoyment of the land to which it is annexed. It is a charge on someone's land for the use of another man's land. The dominant tenement is the land owned by the possessor of the easement, and the servient tenement is the land over which the right is enjoyed.

[4] Cass. 19 May 1988, *Arr.Cass.*, 1987-88, 1230

[5] According to article 544 of the BCC, the right of ownership confers to the owner the absolute right to enjoy a property and to dispose thereof in conformity with the law.

An easement does not confer any property rights on its beneficiary. It consists either in a right to do something on a land belonging to another person or in a restriction of the use of the land of the servient tenement. However, an easement does not constitute for the owner of the servient tenement an obligation to do something. Such obligations can only be established by a personal obligation (see further the House Regulations).

An easement is a real right (i.e. a right in rem); it can be exercised "*erga omnes*" and is thus enforceable vis-à-vis third parties. The owner of a real right can recover his property from the wrongful possessor. A real right is also automatically transferred in the event the underlying property is transferred.

An easement is an accessory real right; it has no autonomous character. This means that it can only be transferred if the annexed land is transferred. The agreed easements are described in the property title or in a separate deed of establishment of easements.

If a separate deed exists, the existence of the easements will be mentioned on the Mortgage Register excerpt.

Easements can also be a charge inherent to a site or a legal curtailment of ownership, i.e. town planning regulations, certain level not to be exceeded by structures, …

1.3.4 Mortgages and Rent Charges

- In Belgium, we have only one type of mortgage i.e. an accessory mortgage *('hypothèque/hypotheek')*: this mortgage depends on the existence of a debt to be secured. A mortgage has therefore to be considered as an accessory real right.
- Mortgage Act dated 16 December 1851
- There exists also the possibility to grant a pledge on an immovable property (Article 2072 of the BCC). However, currently this type of security is not used anymore.
- In Belgium, the bank usually requires the establishment of a mortgage as security for financing the purchase of real estate.
- A mortgage guarantees the repayment of a debt (Article 41, 1st paragraph of the Belgian Mortgage Act of 22 December 1851). In the event of non-payment, the creditor is entitled to sell the encumbered property.
- A mortgage can also be vested on a right of usufruct, a building right and a long lease right during its term
- A mortgage has to be vested by a notarial deed and shall only be enforceable towards 3rd parties as from the moment of its registration at the competent Mortgage Registry Office. If the grantor of the mortgage cannot be present at the signature of the notarial deed, he can only be represented by a notarial proxy
- The costs of the establishment of a mortgage are high. A registration duty of 1 % on the sum secured by mortgage will be due (Article 92 of the Belgian Registration Duties Code). In addition, fees for the services of the

notary must be paid. This notarial fee is proportional, progressive and calculated on the sum of the debt secured by mortgage. Costs relating to the execution of the notarial deed (e.g. stamp duties, postage etc.) will also be due.

- In order to avoid these high costs and all the formalities to be fulfilled in the event of a mortgage being established, the debtor can make a mortgage promise. The mortgage promise is suitable for the debtor, as only a fixed registration duty of EUR 24.78 (BEF 1,000) will be due. In addition, the applicable notarial fees are more or less a quarter of the notarial fees due for the establishment of a mortgage and no costs relating to the services of the Mortgage Registry Office have to be taken into account. Finally, no publicity (e.g. in the Mortgage Register, in the annual accounts etc.) is given to the mortgage promise.

1.3.5 Rights in rem to acquire real property

[Real property can be acquired by law (principle of accession), by deed, by will, by gift and by inheritance.]

1.3.6 Other interests in land

No, there exist a *numerus clausus* in Belgium.

1.4 Apartment Ownerships

In Belgium, the applicable rules related to an appartment joint-ownership can be found in the Articles 577-3 until 577-14 of the BCC. These articles were introduced in the BCC by a Law dated 30 June 1994 and are imperative.

The apartment joint ownership ("*copropriété/medeeigendom*") is applicable to buildings divided between several people having each a private part (i.e. an apartment) and a share into the common parts including the land of the building. In the event of joint-ownership a basis deed (composed out of the statutes of the building and the rules of joint ownership) shall be drawn by a public notary and shall be registered with the Mortgage Registry Office. This deed determines which parts of the building are common and which parts are private and how they are managed. The joint owners form together an association that has legal personality and that is able to represent the joint-owners towards 3rd parties (Article 577-5 of the BCC). Each joint owner shall have a voting right in the general meeting to be held at least once a year. A manager shall be appointed by the general meeting to represent the joint-ownership towards 3rd parties.

Normally, the basis deed shall provide if a restaurant can be held by one of the joint-owners. Pursuant to article 577-7 § 2 of the BCC, each modification of the destination of the good shall be taken by the majority of 4/5 of the joint-owners. The same majority shall be required to modify the distribution of the shared costs. For the prohibition of pets into the building, only a normal majority shall be necessary.

The owner of an apartment can be freely mortgaged by its owner without the consent of the other joint owners. Further, the effects of the mortgage are exactly identical to those on a property held individually including in the event that it is destroyed. The proceeds received from the insurance company shall be used to rebuild the building.

1.5 Building Lease

As mentioned above, in Belgium we have two types of building leases:

1/ Long lease ("emphytéose/erfpacht") (Long lease Act dated 10 January 1824)

A long lease is a right *in rem* that confers on its holder enjoyment of a real property belonging to the granter (lessor) in consideration for a yearly charge, named "*canon*". This is essentially a temporary right: it must be contracted for a period of from 27 to 99 years. The long lease holder shall be the full owner of a building erected on a leased plot of land.

2/ Building right ('opstalrecht/superficie') (Building Right Act dated 10 January 1824)

A building right is a right *in rem* of a maximum duration of 50 years (renewable) allowing its holder to own buildings, works or plantings erected on land belonging to another party.

1.6 The public Law Context of real property transactions

- In Belgium there exists a wide range of right of pre-emptions in favour of all kind of public authorities (for example the right of pre-emption in favour of the Harbour Company for all goods situated in the port of Antwerp). In the event of a sale, the notary public shall check these rights of pre-emptions on the internet site www.rechtvanvoorkoop.be. The preliminary agreement shall be signed under precedent condition that the holder of the right of pre-emption does not exercise its right. The notary public shall notify the planned sale to the authority and they shall have in principle 2 months to exercise their right.

- In Belgium exists public subsidies to a certain extent for families that are buying their homes

1.7 Real Property law in Action

- For the time being, there exists a great interest to invest in Belgium real property in particular in Brussels taking into account its central situation in Europe and the presence of the European institutions. Moreover, the prices are not as high as in other main European cities. Many foreign investors are currently investing in Brussels. The top area

in Brussels is the Leopold District were top rents are achieved of approximately EUR 229/m² per year.
- Mortgages are very often used by Belgian residents to acquire real property
- In most of the cases, a real estate agent shall be used for the sale of a house
- According to Belgian law, the notary is the person officially competent in real estate matters. Public authority has been delegated to him by the State empowering him to give an added value equivalent to that of a judgement to the deeds that he receives. The notary may carry out real estate negotiations, without however neglecting his duty of impartiality. He may also intervene, from the stage of the preliminary contract, in his capacity as a counsel and as the officer who will subsequently draw up the final deed.The client is free to choose his notary. The seller or his estate agent will generally propose their notary, but the buyer remains completely free to appoint a notary of his choice.
- In the event of a transfer of an office building encompassing a certain m², a real estate lawyer shall often be involved to perform a due diligence of the building and to negotiate the contracts.
- In Belgium, a legal procedure can take about 2 or 3 years. An appeal can be introduced within one month after a judgment. It is advised to make an amicable settlement in the event of a dispute.
- In the past, each party had to bear the legal fees of his lawyer. A recent judgment rendered by the Supreme Court dated 2 September 2004 has however decided that the successful party can recover these fees.
- The normal courts (court of the situation of the good) shall be competent. If a petition has been filed with the court, the court shall appoint in most of the cases a court expert to investigate the technical details of the dispute (e.g. dispute between principal and an architect)

1.8 Foreign investments

- As a consequence of article 191 of the Constitution and Article 11 of the BCC, a foreigner enjoys the same rights as a Belgian national, unless statutory provisions state the contrary.

- There are no specific legal restrictions on the right of foreigners to invest in real estate in Belgium.

- Besides, the registration duties to be paid on the sale of a house/building, a capital gain of 16,5 % shall be paid on the increase in value of a property acquired subject to payment and resold within 5 years of its purchase. When the seller does not reside in Belgium, this tax on capital gain shall be collected by the public notary on the day of resale.

2. Land Registration

2.1 Organisation

2.1.1 Statutory basis

- What is the statutory basis for Land Registration?

Pursuant to Article 1 of the Mortgage Act dated 16 December 1851 (hereafter described as the "Mortgage Act"), all deeds related to the transfer of real property, the lease agreements with a term that exceeds 9 years or the designation of all kind of real rights shall be transcribed in their totality in the Mortgage Registry Office ('*Bureau d'Hypothèque/hypotheekkantoor*') where the goods are situated. If a deed is not transcribed it shall not be enforceable against 3rd parties who are of good faith.

- Is there a different system in a part of your country?

No, the Mortgage Act is a national (federal) law that applies for the entire country.

2.1.2 Relevant institutions

- Which institutions deal with the registration of land in your country? What are their basic competences?

1/ Land Registry Office ('*Cadastre/kadaster*'):

The entire country is divided into different plots of land having its own land register number with identification of their surface (for example a good situated at 1000 Brussels, Avenue Marnix 23 registered with the Land Registry Office at Brussels (1st Division), Section A number 504/B with a total surface of 10a 56 ca). The Land Registry Office shall also determine the cadastral income of a building. The Land Registry Office is an administrative authority and depends of the Minister of Finance.

If you ignore the owner of a building, you can check at the Land Registry Office with the exact address of the building and eventually with its land register number to whom a certain building belongs.

(see attached example)

2/ Mortgage Registry Office

Under Belgian law, the Mortgage Registry evidences towards third parties the properties of land and building.

The Mortgage Register shows, in addition to the ownership of a land and/or building, also whether there are any mortgage, rights *in rem*, co-ownerships, legal actions or sentences regarding the land and/or building, easements, attachments and leases for a duration of more than nine years.

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Before the signature of a deed with regard to real property, the notary public has to accomplish a large number of formalities, such as obtaining a land register excerpt and obtaining a mortgage register excerpt.

(see attached example)

2.1.3 Land register/registre foncier/Grundbuch

In Belgium, the Mortgage Registry Offices (per arrondissement) are an administrative authority and depends from the Minister of Finance.

The registration and inscriptions (mortgages) with the Mortgage Registry Office are made by registrars who do not have a general law degree. The Mortgage Registry Office is a public officer. He has a passive role; he can only check if a deed has the right form and cannot verify the legality of a certain transaction. The registration of deeds is executed in a very archaic way: each deed registered is entirely transcribed in its registers.

In Belgium, the publicity related to real property is classified upon the owners/holders of real rights (persons/legal entities) contrary to a "grundbuck"system. All research has to be done via the owner of a property or its holder of a real right.

2.1.4 Is all real property registered?

In Belgium, all ownership of land and/or building, mortgages, rights *in rem*, co-ownerships etc. should be registered with the Mortgage Registry Office. If not, it is not enforceable towards 3rd parties.

In Belgium, almost all real property is registered

2.2 Contents of Registration

2.2.1 Which data are registered?

1/ Land Registry Office:

- name of the owner of the property and its address or registered seat
- address of the property
- land register number of the property
- surface of the property
- cadastral income for the calculation of the yearly real estate taxes

2/ Mortgage Registry Office:
- all deeds executed with regard to the property (sale, merger, building right etc)
- existence of a joint-ownership
- mortgages
- sentences or legal actions
- easements (‘*servitudes/erfdienstbaarheden*’)
- attachments
- lease agreements for a duration that exceeds 9 years

2.2.2 Sample of registration

[see example attached**]**

2.3 Registration Procedure

2.3.1 Application for Registration

- Is there any form required for the application for registration:

All notarial deeds, deeds executed by a Public Officer[6] or sentences with regard to real property shall be registered within 2 months after their execution by the notary public (Article 2 of the Mortgage Act), Public Officer or judge. They shall send one certified copy to the Mortgage Registry Office. After registration in the books, the Mortgage Registry Office shall send the certified copy back to the notary public, Public Officer or judge with the data of registration (number of registration and its date).

- Is it usually a lawyer or a notary public who applies for the registration on behalf of the parties?

In principle, as only notarial deeds, deeds executed by a Public Officer and sentences can be registered, it shall in most of the cases be the notaries public, the Public Officers or the judges that applies for registration.

However, each person can request for a registration.

2.3.2 Duties of the Registrar

- What does the registrar control?

- See mentioned above passive role/only controls the form of the deeds
- No check of legality of the transaction

[6] A deed related to real property can be executed by a Pubic Officer if one of the parties is a public authority for example if the Belgian State is selling or purchasing a good. The notary public has not a monopole to execute an authentic deed.

- How are the applicants informed about the registration?

The Mortgage Registry Office shall transmit a certificate proving the transcription or inscription.

2.4 Access to information

- Is the registration done on paper or electronically?

On paper

- How can you get access to the register? Is it a in the public domain or is the access restricted?

As the Mortgage Register is a pubic register, **everybody** can request a mortgage register certificate against payment (Article 127 of the Mortgage Act) at the Mortgage Registry Office. This request can be done by letter, by fax or at the office itself. Such a request takes in principle 2 or 3 weeks.

Before the transfer of real estate and the signing of its notarial deed, the notary public is obliged to request such a certificate.

- Can you search for information by address, by registration number of land and/or by holders of right on it?

- research by holders of right

If you request a mortgage certificate, the real estate shall be described *in extenso* i.e. the exact address and its registration number (old and new one) and the identification of its current and former owners (for a physical person: first name and name, date and place of birth – for a legal entity: name, registered office and date of incorporation)

2.5 Substantive Effects to the Registration

- What are the substantive effects of the registration?

While the notarial deed creates or transfers the right, is the registration with the Mortgage Registry Office necessary for its enforceability against 3rd parties.

If for example a house is sold twice, whoever that registers 1st becomes the new owner of the house. The other purchaser can only claim an indemnity of the seller.

- Is the reliance in good faith on the register protected ?

Yes, but you have to request a mortgage certificate as closest to the signature of the notarial deed to prevent a registration just before your registration.

2.6 Rank and Priority Notice

2.6.1 Rank

- How is the rank of registrations determined?

Pursuant to article 123 of the Mortgage Act, the rank of the registration of a title - if more titles are registered at the same date - is determined on the basis of the received number.

However, the mortgages that have been registered the same date shall all have the same rank save their received number (Article 81 of the Mortgage Act).

- Case: Owner grants first a mortgage to A and then to B. Afterwards, C has a 3rd mortgage registered in an execution procedure. The time of registration is as follows: 1st B, then C and then A

If the mortgages are registered on a different date, the rank will be: B, C and A.

However, if the mortgages are registered at the same date, they will all have the same rank.

2.6.2 Priority notice

- Is there any possibility to secure a future registration (or at least its rank)?

No, in Belgium we do not have such a possibility to secure a registration.

3. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

- *The principle of "consensual acting" ('consensualisme')'*

In Belgium, the sale is realised between the seller and the buyer as soon as an agreement is reached between them on the sales object and the price (Article 1583 Civil Code). However, in order to prove said sale, a written agreement should be entered into, dated and signed by both parties, called the preliminary sales agreement ('*Koopovereenkomst'/Compromis de vente*').

Whilst the preliminary sales agreement exists as soon as there is an agreement on the sales object and the price, such an agreement is only enforceable

towards third parties as from the date on which the agreement has been registered with the competent mortgage registry office (‘*Hypotheekkantoor/Bureau des Hypothèques*’). Since only notarial deeds (‘*notariële akte*’/’*acte notarié*’) can be registered with the mortgage registry office, the involvement of a notary public is mandatory in any acquisition of real property (Article 1 of the Mortgage Act of 16 December 1851 (hereafter described as the “Mortgage Act”)) **(save exception authentic deed by public officer)**.

- *The negotiations*

The negotiations entered into between the seller and the buyer prior to the signature of a preliminary sales agreement can be terminated at any moment (except for the termination done in an inappropriate way without any legitimate reason). In that case, the defaulting party could incur pre-contractual liability (‘*pre-contractuele aansprakelijkheid*’/’*la responsabilité pré-contractuelle*’) (Article 1382 Civil Code), which could entail the payment of an indemnity to the other party. Before the starting of the negotiations, a “letter of intent” (‘*intentieverklaring*’/’*lettre d’intention*’) is often signed between the seller and the buyer to grant the latter the exclusivity during a certain period during which it should perform a due diligence and during which the seller is not entitled to negotiate with other interested parties.

- *The preliminary sales agreement*

The preliminary sales agreement is a private agreement that states among others the agreement between the parties on the sales object and the price. Save otherwise provided for, the preliminary sales agreement is final and binding.

- *The notarial deed*

After the signature of the preliminary agreement, a notarial deed shall be signed within 4 months. Before

3.1.1 Main steps of a real estate sale

In most of the cases, the seller uses the services of a real estate agent in order to find a buyer.

As mentioned above, when the seller has found a buyer, the sale is realised between the seller and the buyer as soon as an agreement is reached between them on the sales object and the price (Article 1583 Civil Code). However, in order to prove said sale, a written agreement should be entered into, dated and signed by both parties, called the preliminary sales agreement (‘*Koopovereenkomst*’/*Compromis de vente*’). This preliminary sales agreement is a private agreement that states among others the agreement between the parties on the sales object and the price. Save otherwise provided for, the preliminary sales agreement is final and binding.

The preliminary sales agreement shall be drafted in most of the cases by a real estate agent or a lawyer (if the sale concerns a significant building or an

industrial complex). In some cases, the preliminary sales agreement shall be drafted by the notary public of the purchaser.

Whilst the preliminary sales agreement exists as soon as there is an agreement on the sales object and the price, such an agreement is only enforceable towards third parties as from the date on which the agreement has been registered with the competent Mortgage Registry Office ('*Hypotheekkantoor/Bureau des Hypothèques*'). Since only notarial deeds ('*notariële akte*'/'*acte notarié*') can be registered with the Mortgage Registry Office, the involvement of a notary public is mandatory in any acquisition of real property (Article 1 of the Mortgage.

After the signature of the preliminary sales agreement, the notarial deed has to be executed within a period of 4 months. This delay is the consequence of the obligation to pay the transfer taxes (10 % in Flanders, 12,5 % in Brussels and in the Walloon region) at the latest 4 months after the execution of the preliminary sales agreement (Article 32 (4) of the Registration Duties Code). Both parties are liable for the payment of these transfer taxes even if it is generally the buyer who bears them.

Before the signature of its deed, the notary public has to accomplish a large number of formalities, such as:

- Obtaining a land register certificate
- Obtaining a mortgage register certificate
- Obtaining a town planning certificate with the concerned municipality
- Obtaining a soil certificate if required (only in the Flemish Region)
- Notifying the relevant tax authorities (e.g. the direct tax collector and the VAT- collector if the company is subject to VAT) at least 12 days before the signature of the sales deed
- Verifying the property titles of the assets to check whether they contain any transfer restrictions e.g. a pre-emption right in favour of a tenant in the event of a sale that implies that the latter should have the possibility to buy first, a pre-emption right in favour of a public authority etc.

These formalities and verifications can normally be fulfilled by the notary public within a minimum period of time of 2 months up to a maximum period of time of 4 months.

3.1.2 Time frame

- How long do those steps normally take in your country ?

As mentioned above, it takes normally as from 2 up to 4 months to sign the notarial deed.

3.2 Real Estate Sales Contract

3.2.1 Form

- Is there any form required by law – either for the sales contract or for the transfer of ownership?

In Belgium, the sale is realized between the seller and the buyer as soon as an agreement is reached between them on the sales object and the price (Article 1583 of the Belgian Civil Code). However, in order to prove said sale, a written agreement should be entered into, dated and signed by both parties, called the preliminary sales agreement (‘*Koopovereenkomst’/Compromis de vente*’). Such an agreement is only enforceable towards third parties as from the date on which the agreement has been registered with the competent Mortgage Registry Office (‘*Hypotheekkantoor/Bureau des Hypothèques*’). Since only notarial deeds (‘*notariële akte’/’acte notarié*’) can be registered with the Mortgage Registry Office, the involvement of a notary public is mandatory in any acquisition of real property (Article 1 of the Mortgage Act).

- What are the consequences if the contract does not meet the formal requirements?

The sales agreements shall – however binding between the parties - not be enforceable towards 3rd parties of good faith. Only the buyer who has a registered notarial deed (with the competent Mortgage Registry Office) shall be considered as the real owner.

3.2.2 Who drafts the contract for a real estate sale normally?

The notary public of the buyer drafts in principle the sales deed save in the event of an apartment sold under the system of the Breyne Act where it is the notary public of the seller that drafts the deed.

3.2.3 Preliminary contract

- Is there a preliminary contract?

Yes, in most of the cases a preliminary sales contract shall be drawn by a real estate agent, a lawyer or the notary public itself.

- What legal effects does it have?

It proofs a sale between a purchaser and a buyer and it makes the sale binding between them. The notarial deed shall copy all the dispositions as set out at the preliminary sales agreement.

3.2.4 Typical Real Estate Sales Contract

- Is there any standard form?

No, all law firms or notary publics have their own standard form within the office.

(See attached a copy of a sales contract).

3.3 Transfer of Ownership and Payment

3.3.1 Requirements for Transfer of Ownership

- What are the requirements for the transfer of ownership ?

In principle, the ownership shall be transferred at the moment that the sale is concluded (normally at the signature of the preliminary sales contract) but shall in most of the cases be deferred until the signing of the notarial deed. It is keenly advised to provide for such a clause. Since the buyer does not generally take possession of the property on the day the preliminary contract is signed, the seller is the one who will remain responsible for the condition of the property being sold, will take out a fire insurance, and will pay the taxes rates as well as the charges until the day of the signing of the authentic deed of sale.

3.3.2 Payment due

- How do you manage to make the payment and the transfer of ownership happen at the same time – or at least to minimize risks for both seller and buyer?

As explained above, the transfer of ownership shall be deferred until the signature of the notarial deed. At the notarial deed, the balance of the purchase price shall be paid.

- When is the payment due under a typical contractual agreement ?

In principle, a down payment of 10 % of the purchase price has to be done at the moment of the signature of the preliminary sales contract. The balance shall be paid at the signature of the notarial deed.

As for the price and method of payment, the notary will mention the selling price agreed between the parties and will specify any down payment made prior to the deed. The notary will record the payment of the price to the seller and the receipt given to the latter. The price will be paid in cash, generally by means of a certified bank cheque.

- Is the payment effectuated via an escrow account or directly among the parties ?

In most of the cases, the down payment of 10 % shall be paid at a blocked account at the notary public. (dangerous to pat directly to the seller). At the signature of the notarial deed, the balance shall in most of the cases be paid with a certified bank cheque.

- Is an insurance for risks inherent to the payment and the transfer of property possible, usual or even obligatory?

If the down payment of the 10 % of the purchase price is done at a blocked account at the notary public, the money will be reimbursed to the purchaser if any problem occurs with the sale.

(also insurance for accidental death: if the preliminary sales agreement has been drafted by a notary public)

3.3.3 Ways of the seller to enforce the payment

- How can the seller enforce the payment (e.g. by execution)?

In principle, the preliminary sales contract provides for a clause that if the notarial deed is not executed within 4 months by fault of the purchaser, the seller shall be entitled to either (i) terminate the agreement or (ii) to require the execution of the sales agreement. In case of termination of the sale, the down payment of 10 % shall remain in the hands of the seller as an indemnity.

At the signature of the notarial deed, the payment of the balance (90 % of the purchase price) shall be paid. In principle, the notarial deed shall not be signed if the purchaser does not have the balance of the payment with him.

If the notarial deed provides for a disposition that defers the payment to an other date, this obligation shall be directly enforceable without a previous judgement.

3.3.4 Transfer of possession to the buyer

- How, on the other hand, may the buyer be sure to get possession when he pays the purchase price?

In the event of a sale of a building, the delivery will be accomplished by the handing over of the keys by the seller to the buyer.

In the event of a sale of a plot of land, the delivery will be accomplished by the handing over of the property title by the seller to the buyer (Article 1605 BCC).

3.4 Seller's Title

3.4.1. Title search: Ascertaining the seller's title

- Which facts does the buyer have to ascertain before he can be sure that the seller has a valid title?

He has to check whether his title has been registered with the Mortgage Registry Office and if it is the last registered title. He shall ask a recent Mortgage Registry certificate.

(explain transfer by will, gifts or inheritance)

3.4.2. Title search: Absence of Encumbrances

- How does the buyer ascertain that he will acquire the property without encumbrances?

If the real property is encumbered with mortgages or other charges, either the buyer takes over the mortgage or other charges or he purchases the real property free from all mortgages or other charges. In that case, the purchase price shall be used for the repayment of the mortgage or other charges. In the preliminary sales agreement, the sale will then be made subject to the condition precedent that the purchase price is sufficient to repay the mortgage or other charges.

3.4.3. Title Insurance or Liability

- Why did your system develop title insurance (or why is title insurance not necessary in your system?) In which cases is it used?

In Belgium, we have no system of title insurance. The mortgage registry certificate ascertains if a person or a legal entity has a valid title of ownership.

3.4.4. Leases

- How does the buyer make sure that there are no leases on the sold property?

In the preliminary sales agreement shall be stipulated if the property is rented out. Leases will be described and handed over to the buyer.

The seller can also check the situation personally when visiting the premises.

- What are the consequences for the buyer if such a contract exists?

The consequences shall depend upon the type of the lease contract and its duration:

(i) *Residential lease* (the tenant has its principal residence in the premises):

  - Lease of 9 years

If the lease has a certain date (i.e. by registration of the lease agreement with the competent registration office) the purchaser shall respect the lease even if the lease agreement provides for an expulsion clause (Article 9 of the Act related to the Residential lease). The purchaser shall collect the rent charges as from the signature of the notarial deed.

If the lease has not a certain date before the signature of the notarial purchase deed:

a) the purchaser shall respect the lease agreement, if the tenant has been more than 6 months in the leased object. The purchaser can however terminate the lease with a 3 months' prior notice to be notified within 3 months after the signature of the notarial deed, if he wants to use the leased object itself or for its family, if he wants to renovate or refurbish the good or without any reason save if the lease agreement provides for the respect of the lease by an eventual purchaser.
b) the purchaser has not to respect the lease agreement, if the tenant rents the leased object less than 6 months.

- Lease of > 9 years

Leases of more than 9 years shall be executed in a notarial deed and be registered with the Mortgage Registry Office to be enforceable towards 3rd parties. If not, the lease shall only be enforceable for a duration of 9 years.

If the lease agreement has been registered with the Mortgage Registry Office, the purchaser shall respect it. If not, the lease is only enforceable for 9 years and the same system as described above (for leases of 9 years) shall apply.

- Lease of < 9 years

The purchaser shall respect the existing lease agreement save if it is not registered and the tenant is not more than 6 months renting the premises.

(ii) *Normal lease*:

The purchaser shall respect the lease agreement if it is a notarial lease or a registered lease save if the lease agreements provides for an expulsion clause (Article 1743 BCC).

If not, the purchaser can terminate the lease agreement save if the notarial purchase deed obliges the purchaser to respect the existing lease agreement.

(iii) *Commercial lease*:

If the lease has been executed in a notarial deed or if the lease has a certain date, the purchaser can not expulse the tenant save if the lease agreement provides for the possibility of expulsion if the leased object is transferred (Article 12 of the Commercial Lease Act).

If a lease exists, it should also be verified if the tenant has not a pre-emption right on the property in the event of a sale.

3.5 Defects and Warranties

3.5.1 Legal rules

The notary will check the identity of the parties, the exact situation of the good with the land registry office, the mortgage status with the mortgage registry office, possible leases, town planning status, etc. After these inquiries, he will give a legal framework to the agreement. The drawing up of the authenticated deed requires the use of a terminology borrowed from legal vocabulary and sometimes not very familiar to the public. The notary drawing up the document must be able to refer to the stipulations contained in the preliminary contract. This shows the importance of a well drawn up and complete preliminary contract.

What are the buyer's legal rights against the seller, intermediaries (real estate agents) and/or notaries ?

- concerning a defect of title

The notary public shall be responsible as he had to check the validity of the property title with the competent Mortgage Registry Office.

- Concerning defects affecting the quality of the property

The seller has to hold the buyer harmless against the hidden defects (*'verborgen gebreken'/'vices cachés'*) of the buildings (Article 1641 Civil Code). A claim with regard to the hidden defects must be filed with the competent court within a limited period of time after the discovery of such a defect. However, in general, the preliminary sales agreement and the notarial deed contain a clause discharging the seller from any obligation arising from hidden defects. Even so, the seller shall only be discharged if it was not aware of the hidden defects. In the event of a sale, the guarantee for hidden defects will be transferred from the seller to the buyer.

In the event of the construction of a building, the architect and the contractor will be held liable during 10 years as from the date of the provisional completion (*'voorlopige oplevering'/'réception provisoire'*) for substantial defects of the building (Articles 1792 and 2270 Civil Code). In the event of a sale of such a building, the 10-year guarantee (*'10-jarige aansprakelijkheid/'garantie décennale'*) towards the architect and the contractor will be transferred from the seller to the buyer.

- Concerning restrictions by zoning law, environmental law and other administrative regulations, which have not been considered in the contract ?

The notary public shall obtain a town planning certificate with the concerned municipality to check the zoning law and other administrative regulations. He shall also check whether any rights of pre-emptions are encumbering the property. The internetsite of the existing pre-emption rights is the following: www.voorkooprechten.be. The notary public shall be held responsible if he fails to do so.

If a property is sold in Flanders, the notary public shall request a soil certificate to check if the ground is not contaminated. The notary public shall be held responsible if he fails to do so.

[explain soil contamination if nothing is mentioned on the soil certificate]

3.5.2 Typical contractual clauses: the scope of *caveat emptor*

- What kind of contractual clauses on warranties are typically agreed upon in a real estate sale among private persons?

The seller(s) must be identified by their surname, first names, professions, domicile. The buyers must be identified in the same way. If the buyers are married, it is advisable to indicate whether the real estate is bought in the name of both husband and wife, as part of joint estate, or if the property is being bought in the name of only one partner. It is also advisable to indicate whether there is a marriage settlement between husband and wife.

Identification of the property being sold
The real estate must be accurately located and its area described so as to avoid any confusion. Land registry data are to be mentioned. However, the area mentioned in the land registry in the land registry data is only given as an indication. When the area of the property being sold is imprecise, it is advisable to hire the services of a surveyor to obtain an accurate measurement. It is also advisable to mention accessories such as the equipment with which the property is provided, as well as the fixed objects, whether built-in or not, and which form a part of the sale: fitted kitchen, household appliances, built-in cupboards, stair carpet, non-fitted carpet; etc.

Conditions of the property
If the property shows signs of maintenance or more significant defects, it is advisable to point them out. The buyer purchases the property in the state in which it is found when the preliminary contract is signed. If damage should therefore be caused to the property, between the signing of the preliminary contract and the drawing up of the authentic deed, the seller is bound to carry out the repairs, since he must hand over the property in the state in which it was found when the preliminary sales agreement was signed.

The seller cannot claim an indemnity even in the surface of the sold object is 1/20 less of the surface pointed out in the deed.

Easements

All easements encumbering the property being sold and known to the seller or stipulated in the title deed for the property, are to be mentioned in the preliminary sales agreement. But in most cases, a copy of the seller's notarial deed (referred to as "property title"/ *"titre de propriété"*) will be attached to the preliminary contract. The detailed examination of easements is left to the notary who will check whether any actually exists as well as their extent and will provide a description of them in the authentic deed.

Hidden defects

Generally speaking, the preliminary contract contains a clause discharging the seller from any obligation arising from hidden defects. This discharge could seem surprising to some buyers. The problem, however, ought to be put into perspective.

Hidden defects are to be understood as being defects unknown to the seller and not detectable by a close examination of the object being sold, which are likely to make it unfit for the purpose for which it is intended. If the seller was aware of the defects of the object, he will be declared as being dishonest and, in that case, will not be able to be discharged from the obligation to refund the price and to further compensate the buyer from any damage he might have suffered.

Transfer of ownership and entering into possession

The transfer of ownership takes place, in principle, as soon as the preliminary contract has been signed. The parties may however stipulate in the preliminary contract that the transfer of ownership will only take place on the day the authentic deed is signed.

Occupation of the property

If the property is not vacant, the preliminary contract will stipulate the conditions under which the property is occupied. Leases will be described and handed over to the buyer.

Fire insurance

The Seller will declare in the preliminary contract that the property being sold is insured against fire and related dangers and will remain insured until the date of the signing of the authentic deed. From that same date, the buyer shall insure the property with a company of his choice.

Mortgage freedom of the property

The property is being sold free from all mortgage or other charges. This does not mean that the property being sold is not entailed with a mortgage or another charge.

That is why the sale will be made subject to the precedent condition that the price is sufficient to refund mortgages and distraining parties. The payment of an appreciable down payment at the time of the signing of the preliminary contract may prove dangerous when that down payment is handed to the seller. It might actually occur that the balance of the price to be paid on the day of the

signing of the authenticated deed no longer allows the seller's creditors to be paid off. The buyer is therefore advised to have this down payment placed in the hands of the notary who will only refund it to the seller after having checked the mortgage status of the property.

Prices and methods of payment

The price must be fixed in a definite way. In most cases, the price is stipulated as payable on the day the authentic deed is to be signed.

However, it is specified that a down payment will be made at the time the preliminary contract is signed, in order to avoid an inconsiderate withdrawal by the buyer. This down payment is in principle ten or fifteen per cent of the total selling price.

Costs, duties and fees

The buyer, with some rare exceptions, is the one who will bear the costs, duties and fees of the sale. The duties concern the tax levied by the State for the registration of the deed of sale. As for the costs, they concern a set of formalities and duties to be accomplished by the notary prior to the signing of the authentic deed and after signing (such as land registry office, registration of mortgages, stamp duties, postage duties, etc.) The fees concern the payment of the services of the notary who draws up the authenticated deed. These fees are proportional, degressive and calculated on the selling price. They are laid down by law.

In general, registration duties and fees may be fixed definitively; other costs are calculated provisionally.

Costs, duties and fees are only payable when the authenticated deed is signed. It may however happen, but that is exceptional, that the selling price is stipulated "deed in hand", that means that the price includes both the selling price of the property as well as the costs, duties and fees of the deed.

Town planning regulations

The preliminary sales agreement will contain general clauses relating to the compliance of buildings and their intended purposes with legislation in force and with legislation concerning town and country planning.

Furthermore, the seller will not make any commitment as to whether it will be possible to carry out work on the property requiring authorisations to be obtained from the authorities concerned.

A more detailed summary of the urbanism relating matters is given in a separate chapter hereafter.

[eventual soil contamination dispositions]

- Is it possible to exclude the remedies of the buyer ? Does it make a difference if the seller or the buyer acts in the course of his trade, business or profession?

- Hidden defects
- Only if seller is honest
- Professional seller shall be judged more severally about is honesty

- To what degree do court exercise control over the fairness of such clauses?

[judge has to appreciate]

3.5.3 Liability of the Buyer for Debts of the Seller

Is the buyer liable for arrears of the seller, regarding in particular

- Real estate taxes

For the tax authorities, the real estate taxes shall be due by the owner of the property on the 1st of January of each year.

In principle, if a property is sold in the middle of the year, the real estate taxes shall be divided between the seller and the purchaser pro rata. A settlement will be made at the signature of the notarial deed.

- Other taxes e.g. related to buildings on the property on the business of the seller conducted on the property

The same rule applies as above for the real estate taxes

- Charges for garbage collection, water and gas delivery

All costs will be borne by the purchaser as from the moment of the signature of the notarial deed.

- Charges for the administration of condominium apartments

All charges will be born by the purchaser as from the moment of the signature of the notarial deed. [explain further the different capitals]

3.6 Administrative Permits and Restrictions

3.6.1 Standard Requirements

In a typical conveyance of a residential estate:

- Which permits are required?

The rules are different for the 3 Regions (the Walloon Region, the Flanders Region and Brussels)

In general, a building can only be deemed to be in conformity with the urban planning and zoning legislation if:

- it is covered by a valid Building or Urban Planning Permit, and
- its use or destination complies with the use and destination requirements prevailing at the time of issuing of the Building or Urban Planning Permit.

In some events, an environmental permit shall be required i.e. storage of fuel, a high number of parking spaces etc. This shall in most of the cases not be required in the event of a residential sale.

- Does the draft person check the building permit, zoning ordinances and/or environmental issues ?

(i) the notary public shall check whether a building permit exist for the property being sold and shall refer to it in its deed. In the same deed, the notary public shall stipulate the applicable legislation (different for the 3 Regions).

(ii) The notary public shall check at the competent Municipality of there are any zoning restrictions etc. and shall copy their letter in its integrality in its deed. The Belgian territory is subject to general and particular plans that lay down all town planning status of real estate and determine the purposes for which it is intended. As an example, some towns, with the aim of checking depopulation, do not allow offices to be set up in some districts. The buyer must be informed or failing that, make inquiries himself about the regulations concerning the property for sale.

(iii) If a property is located in the Flanders Region, the notary public shall obtain a soil certificate with the Public Waste Company of Flanders ("Openbare Vlaamse Afvalstoffenmaatschappij" or OVAM). The content of this certificate has to be taken down in the notarial deed regarding the transfer. Moreover, if a "risk activity or operation" is located on the land, an exploratory soil investigation has to be carried out prior to the transaction. These obligations are imposed by the Flemish Decree on Soil Decontamination, a full legislative framework passed on 22nd February 1995 by the Flemish Region regarding the detection and the remediation of soil pollution. At present no similar legislation applies in the Brussels and the Walloon Region.

- Are there any statutory pre-emption rights for public authorities?

There are many pre-emption rights for public authorities in Belgium i.e. for the harbor company if the property is located at a harbor, Exchange division '*Ruilverkaveling*' (Act 22 July 1970), VEN- Flemish Ecological network Decree Flemish government 21 October 1997 etc.

In principle, these administrative authorities have a period of 2 months after the notification of the sale to exercise its right of pre-emption.

Soil remediation

- In Belgium, detailed legislation on the remediation of soil and groundwater pollution only exists in the Flemish region. In the Walloon Region, a decree has recently been enacted but has not yet entered into force. In the Brussels region, such detailed and integrated legislation does not yet exist, but is expected to be enacted in the near future.
- On 22 February 1995 the Flemish region has adopted a full legal framework regarding the detection and remediation of soil pollution, below the 'Soil Remediation Decree', implemented by the 'Flemish Regulation on Soil Remediation' or Vlarebo Decree of 5 March 1996. The relevant authority for soil contamination and remediation in the Flemish Region is OVAM (the Public Waste Agency of Flanders).
- Pursuant to the Soil Remediation Decree, a transfer of land is subject to a specific procedure. Prior to the conclusion of the transfer agreement, a soil certificate must be obtained from OVAM for each plot of land that will be transferred. Such certificate can be obtained within one month. The notion of 'transfer of land' is quite broad and covers most real estate transactions. The take-over of the shares of a company is not to be considered as a 'transfer of land'. If the 'transfer of land' is related to a 'risk soil', an exploratory soil investigation must be conducted and the soil certificate is obtained based on the result of the investigation. 'Risk land' is all real estate on which a potentially soil contaminating activity takes place or has taken place. The Flemish government has adopted a list of these activities ('Vlarebo list'). If the exploratory investigation reveals soil pollution, OVAM is entitled to submit the transfer to the fulfilment of a descriptive soil investigation and, possibly, the setting-up of financial guarantees and the drawing-up by a recognised expert of a soil decontamination plan.

  The timing for the procedure can be estimated as follows:

1	**Exploratory soil investigation**	4 to 8 weeks
	Evaluation OVAM	60 days
2	**Descriptive soil investigation**	4 to ? weeks (possibly several months)
	Evaluation OVAM	60 days
3	**Soil decontamination plan**	+/- 4 weeks
	Set up of financial guarantee	2-3 weeks

	Declaration of conformity by OVAM	90 days as from the receipt of the clean up works schedule
Soil certificate = transfer of land		
4	**Decontamination works**	?
5	**Control and monitoring by OVAM**	During the clean up works
6	**Final investigation**	4 weeks

- Beside the obligations imposed in case of a transfer, the Flemish legislation provides also that the operator of a risk activity performs periodical soil investigations. Eastman is held to perform such periodical soil investigation every five years.

Regarding the extent of the clean-up obligation, the Soil Remediation Decree makes an essential distinction between historical soil pollution (pollution originated before the entry into force of the Soil Remediation Decree, i.e. October 1995) and new soil pollution (pollution originated after the entry into force of the Decree). Clean-up of new pollution is ordered if the soil standards or intervention values for soil clean-up are exceeded. The same rule applies to mix pollution, i.e. historical pollution mixed with new pollution. With respect to historic pollution, OVAM appreciates if clean-up is required, taking into account the actual danger to man and environment produced by the pollution.

Environmental permit

- The regulation of the protection of the environment falls within the jurisdiction of the regions. Each of the 3 regions – the Flemish, the Walloon and the Brussels region – has adopted legislation requiring the operators of activities that are considered to be harmful to the environment to obtain an "environmental permit". Below, we only analyse the Flemish legislation in further detail since Kallo is located in the Flemish region.

- The Flemish Act regarding the environmental permit was adopted on 28 June 1985. It entered into force only on 1 September 1991, through the Executive Decree, called "Vlarem 1". "Vlarem 1" provides for the procedures to be complied with and a list of activities that are considered to be harmful to the environment. These activities are ranged in 3 groups or "classes". Every operator of group 1 and 2 activities must obtain an environmental permit before the activities start. Less important activities listed in group 3 must only be notified to the authorities before starting up.

  Another Executive Decree, "Vlarem 2", has listed general and sector conditions that must be fulfilled by the operators of listed activities. These conditions must secure that the activities do not harm the environment nor people and other activities. General conditions apply to all operators, no matter what their activities are. Sector conditions are specifically related to the sector to which the activity belongs. Finally the authority that delivers the permit is

allowed to determine specific conditions through the permit. Those conditions are conditions that apply only to the operator who has applied for the permit and of whom the authority feels that he should ensure that there is no harm to the environment and surrounding people and other activities.

- The legislation describes the procedure that must be followed to obtain the permit and provides for appeal procedures. Operating a listed activity and/or installation without or in breach with the environmental permit is subject to criminal and administrative sanctions in the 3 regions.
- The Flemish legislator has given important control-tasks to specialized civil servants. These officials are allowed to draft reports ("processen-verbaal") concerning breaches of the conditions of the environmental permit or environmental law in general. Another important task has been given to the mayor of the municipality where listed activities or installations are located. He or she is allowed to order the termination of activities operated without or in violation of the environmental permit or environmental law in general.
- Different procedures are provided for the modification of the conditions, the transfer and the renewal of the environmental permit.
- An extension and/or a modification of the activities and/or installations require(s) a modification of the permit.
- An environmental permit is delivered for a maximum duration of 20 years. The renewal of the permit has to be applied for between the 18th-month and the 12th-month before the end of the current permit. However the application for a permit renewal can be submitted before that period in case of a significant expansion or modification.
- <u>The change of operator does no affect the validity duration of the environmental permit. The Flemish legislation provides that an environmental permit remains valid for the duration for which it has been delivered. However the Flemish legislation provides that the change of operator is also submitted to a prior notification to the authority that has delivered the permit. A specific form must be used for this notification. There is no specific sanction if the change of operator is not notified. However if the change of operator is not notified the former operator could be held liable towards the administration for any infringement of the permit and the environmental legislation.</u>
- The Flemish region has also adopted legislation concerning the pollution of surface waters, which supplies a levy for the consumption of water and the discharge of industrial wastewater.

[explain Brussels and Walloon Region]

Building Permit

Flanders:

- For the immovable goods located in the Flemish region, the procedure regarding the delivery of a building permit is set forth in the Flemish Act of 18 May 1999 regarding town planning.
- The application for building permits must be filed with the municipality where the immovable good concerned is located. If the permit relates to a public person/public works the relevant authority is the Flemish Government. The relevant authority examines if the application is complete. If not, the procedure is suspended until the file has been completed. During the procedure, the application could be submitted to public inquiry during 30 days. The Flemish government has established a list of works of small importance that are not submitted to public inquiry. The public inquiry essentially relates to the neighbourhoods, which can communicate their remarks and objections regarding the project. The application can also be submitted to several administrative authorities for advice. The application can also be submitted to several administrative authorities for advice. The application related to some kind of projects listed by the Flemish Government are also subject to an environmental impact assessment study.
- The relevant authority has to take a decision within a specific term. The absence of decision is considered as a refusal of the requested building permit. The applicable terms provided by law are summarized in the table hereafter. If the permit is refused (even tacitly)/granted, an appeal can be lodged with the higher administrative authorities. If a permit is granted, interested third parties can challenge the permit before the Council of State.

  The procedure and timing for the delivery of a building permit can be summarized as follows.

Step	**Timing**
Application with the municipality or the Flemish Government	
Examination of application file and acknowledgment of receipt if the file is complete	14 days

Public inquiry	30 days
Decision[7] • by municipality • by Flemish government	75 days + 30 (if public inquiry) 90 days + 30 (if further inquiry)

(explain Walloon Region and Brussels Region):

3.6.2 Requirements for certain types of real estate sales only

- Please state briefly the additional administrative permits and restrictions for other typical cases e.g. the sale of agricultural or industrial land

agricultural land: explain pre-emption right of the farmer

industrial land: see above – environmental permit !!!

3.6.3 Control of administrative permits and restrictions

- Is the control of administrative permits and restrictions left to the buyer's own responsibility, or is it carried out by the notary or another lawyer ?

By notary and eventually lawyer

3.7 Transfer Costs

3.7.1 Contract and Registration

3.7.2 Transfer taxes

- How high are taxes on the transfer of real property? On what is the tax based?

10 % in the Flanders Region
12,5 % in Brussels and Walloon Region

The tax collector concerned will levy a duty of 10%/12,5% calculated on the price and the costs of the sale, without the basis of tax assessment being less than the market value of the property (Belgian registration duty Code, Art. 44).

[7] The delivery term is calculated as from the submission of the application

If the authenticated deed doesn't take place within the 4 months of the signing of the preliminary sales agreement, registration duty of 10%/12,5% will be levied at the last four month after the signing of the private agreement. Then, the registration duty won't be levied, when the authenticated deed will be presented to the formality of the registration.

- Is the due payment of the taxes a requirement for the registration of the transfer of a property?

The authenticated deed of sale must be registered within fifteen days of its signing by the public notary drawing up the deed.

- Does the notary public collaborate in the collection of the tax?

Yes, the notary public will before the signature of a sale deed send a statement of its fees, costs and the registration duties to be paid. He will not sign his deed if all these costs are not paid to him.

3.7.3 Real Estate Agents

- How often is a real estate agent involved in the sale of residential property among private persons?

50-75 %

- How much is the agent's fee?

Normally, the agent shall collect a fee of 3 % of the sales price

- Who usually pays the agent – the seller or the buyer?

The seller shall pay the fees of an agent.

3.8 Buyer's Mortgage

- In order to finance the purchase price, buyers usually have to mortgage the house. Under which conditions and modalities is it possible?

[explain Mortage credit Act]

The bank shall usually not grant a loan for 100 % of the purchase price of the house. Normally, it shall grant a loan up till 70 % of the value of the house/apartment. The bank shall request a salary state of the lenders because it shall not give a loan for more than a 3rd of someone's salary.

4. Special problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

In Belgium, the sale is realised between the seller and the buyer as soon as an agreement is reached between them on the sales object and the price (Article 1583 Civil Code). However, in order to prove said sale, a written agreement should be entered into, dated and signed by both parties, called the preliminary sales agreement ('*Koopovereenkomst'/Compromis de vente*').

Whilst the preliminary sales agreement exists as soon as there is an agreement on the sales object and the price, such an agreement only is enforceable towards third parties as from the date on which the agreement has been registered with the competent mortgage registry office ('*Hypotheekkantoor/Bureau des Hypothèques*'). Since only notarial deeds ('*notariële akte'/'acte notarié*') can be registered with the mortgage registry office, the involvement of a notary public is mandatory in any acquisition of real property (Article 1 of the Mortgage Act of 16 December 1851 (hereafter described as the "Mortgage Act")).

4.2 Seller's title

4.2.1 Consequences of an invalid sales contract

a) because it lacked the required form

B cannot sell it to C as he shall not be considered as the valid owner

b) because A did not possess legal capacity

[explain particular/company]

c) because an administrative permit required for the contract has never applied for

[explain possibility annulment]

[May C go ahead with the contract and acquire the property validly?]

4.2.2 The seller is not the owner

- How is B protected?

In principle, the notary public had to check the property title of A. The notary public will be responsible?

- May he retain the property?

No, he can just demand an indemnity.

- How is the buyer protected if, already during the transaction, it turns out that the seller is not the owner?

He can demand an indemnity [during negotiations]

4.2.3 Execution against the Seller

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgment against the latter.

- Are there risks for the buyer (e.g. to loose his payment)?

[indemnity]

- How may the buyer be protected ?

[to register asap]

4.3 Payment

The buyer pays late. What are the seller's remedies?

In principle, the notarial deed shall not be executed if the purchase price is not deposit on a blocked account.

- May the seller rescind the contract ?

If the purchaser does not want to sign the notarial deed within a certain period of time, the seller may request its termination before the Court.

- Does the buyer have to pay a (statutory) penalty or is he liable for damages?

Normally, he shall lose his down payment of 10 % as an indemnity.

4.4 Defects and Warranties

4.4.1 Misrepresentations

- Half a year after the buyer has moved in, a water pipe breaks and flood parts of the house. The water pipe was put in when the house was built some decades ago

Normally, the building is sold in the state in which the buyer has found the house and the seller discharges itself from any obligation arising from hidden defects. However, if the seller was aware of the defect, he will be declared as being dishonest and will have to pay an indemnity. In the case at hand, this cannot be case as the house was built some decades ago.

- In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring

The buyer shall have to prove that the seller was dishonest and that he knew the hidden defect. In that event, the seller has to refund the price and to compensate the buyer from any damage that he has suffered.

- An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

[verify deed - indemnity]

4.4.2 Destruction of the house

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

- May the buyer rescind the contract or does he have to pay the purchase price?

In principle, the private sales agreement provides for that the transfer of the risks and the property are deferred to the signature of the notarial deed. If the house burns down before the signature of the notarial deed, the buyer is entitled to rescind the contract and the seller shall refund him the down payment as the seller is not able anymore to deliver the house any more to the buyer. He can also claim the rebuilding of the house with the proceeds of the insurance against fire

- May the seller rescind the contract? Is he liable for damages? Is there a voluntary or mandatory insurance for these cases?

The property being sold remains at the risks of the seller until signature of the notarial deed. He shall maintain the insurance against fire until 5 days after the signature of the notarial deed.

5. Sale of a house or apartment by the building company (vente d’immeuble à construire)

- explain **difference** sale of an apartment building to be erected and construction by contractor and architect on a bought plot of land/ contracts.
- Application Breyne Act
- Principle of transfer of ownership – transfer of risks

  1. sale of an apartment: As from the date of the signature of the preliminary agreement (to be followed by a notarial deed within a period of 4 months), the buyer shall become the owner (i) as to any and all constructions already erected by the vendor and (ii) as to any and all constructions still to be erected by the vendor, as soon as the materials are implemented and incorporated. The works shall however remain at the vendor's risk until the date of the establishment of a provisional completion certificate as the transfer of risks take only place at that date.

  2. sale of a construction:the principal becomes owner as soon as the materials are implemented and incorporated

- Principle of transfer of risks: construction will pass to the principal upon the delivery (provisional completion)

The buyer shall have the enjoyment and free usage of the new house/apartment as from the date of the provisional completion certificate.

5.1 Statutory Basis

5.1.1 National law

Do any special rules (e.g. on consumer protection) apply if the seller also constructs the house which he is selling? When do these rules apply?

The Law "Breyne" dated 9 July 1971 (hereafter described as the "Law") shall apply to the sale to non professionals of private houses and/or apartments before or during the course of their erection.

According to article 1 of the Law, it applies to agreements related to the sale of a house or an apartment before or during the course of his erection as well as to agreements by which Seller or Contractor undertakes to erect, to make erect or to provide a house or an apartment. The Law applies provided that the buyer is obliged to make one or several down payment before the completion of the works.

In the event of the construction of an e.g. office building, these rules shall not apply.

5.1.2 Influences of EU law

[to be verified]

5.2 Procedure in general

5.2.1 Single houses

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The contract shall be governed by the Breyne Act as described here above if the constructor sells the houses before or during the course of their erection and the buyer is obliged to make one or several down payment before the completion of the works.

-

At the signature of the preliminary sales contract, a down payment of 5 % of the purchase price can be requested (Article 10 par 2) by the seller.

At the signature of the notarial deed, the seller can request the payment of the plot of land and the value of the state of the building. This value of the state of the house shall be approved by an architect. Its opinion and approval shall be attached to the notarial deed. The balance of the purchase price shall be paid in *tranches* according to the advancement of the construction. (i.e 10 % after the instalment of the walls etc).

-

The architect and the contractor of the house will be held liable during 10 years as from the date of the provisional completion (*'voorlopige oplevering'/'réception provisoire'*) for substantial defects of the building (Articles 1792 and 2270 Civil Code).

5.2.2 Condominiums

See above

5.2.3 Renovations

[yes]

5.3 Conclusion of the Contract

- Difference sale of construction and appartement

5.4 Payment

5.4.1

-

At the signature of the preliminary sales contract, a down payment of 5 % of the purchase price can be requested (Article 10 par 2) by the seller.

At the signature of the notarial deed, the seller can request the payment of the plot of land and the value of the state of the building. This value of the state of the house shall be approved by an architect. Its opinion and approval shall be attached to the notarial deed. The balance of the purchase price shall be paid in instalments according to the state of progress of the construction. (i.e. 10 % after the instalment of the walls 10 % at the construction of the frontage etc).

-

It should also be noted that the price may be revised, but the method for revising of the construction price is strictly controlled.

-

The sale shall be executed by a notarial deed directly enforceable without the intervention of a court.

Or

[see principle of accession]

5.4.2

A bank guarantee for the good execution of its obligations shall be established by the building company.

5.4.3

- The notarial sale deed will provide for that the buyer only has to pay according to the advancement of the construction.
- The notarial sale deed will provide for a disposition that the building will be sold free from any mortgages or liens.

5.4.4

See point 5.4.1

5.4.5

The buyer can vest a mortgage on the construction to be build as from the moment if the signature of the notarial deed.

His mortgage shall have a 1st rank as the new building will be sold free from all existing mortgages.

No, the bank shall have a right to be paid out of the selling price of the new building.

5.5

5.5.1

(i) sale of a new built house by a building company

The construction/architect agreement shall describe in detail the house to be built and shall attach the plans.

(ii) *sale of an apartment in a new appartment building*

The notarial sale deed shall describe the plot of land in detail whereon the building shall be constructed and reference shall be made to the basis deed.

A basis deed shall be established by the building company that describes in detail all the floors with its common (such as the elevator, an entrance, a corridor etc.) and private parts (the apartments itself).

Normally, this description is sufficient.

5.5.2

The contract normally provides for an exact delay for the termination of the building. Usually, this delay is set at a certain number of working days after conclusion of the contract (e.g. 100 working days after conclusion of the contract)

It is advisable to insert a disposition in the sales contract that provides for a penalty if this delay is not respected.

5.5.3

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After the completion of the house/apartment by the building company, a meeting shall be scheduled between the buyer and the seller/building company to visit the new construction and to draft a provisional completion certificate. In Belgium, this moment is called the provisional completion of the new house/building *("voorlopige oplevering / réception provisoire")*. The building/house shall be fully completed in compliance with the terms and conditions of the sales/construction agreement i.e. the house/apartment is ready to be used in accordance with its destination, subject to the repair of

some minor defects to be mentioned in a snagging list attached to the provisional completion certificate. At the provisional completion all the claims that can be made for apparent defects shall extinguish. However, this exemption from liability shall be limited to the defects that can be stated by mere visual examination. This exemption for liability shall not refer to defects which could only be noticed when using the new apartment/house (e.g. defects relating to waterproof, heating and air conditioning installations, and all those which are evidenced through normal usage).

(If Breyne Act is applicable) One year after the provisional completion, a final completion of the house/apartment shall be done. This means that the constructions are fully completed in compliance with the terms and conditions of the sales/construction agreement and that all minor defects and any and all defects and/or irregularities that appeared during this year have been repaired. The reason why there has to be 1 year between the provisional and final completion is to allow the new owner to check his house/apartment at least during the winter. After the final completion certificate, only a claim related to the hidden defects can be introduced.

- According to articles 1792 and 2270 of the BCC, the architect and the constructor remain liable for any substantial defects to the building for a period of 10 years. The starting date of the 10 year liability shall usually be the date of the provisional completion of the house/apartment. The buyer shall not have directly a claim against the companies commissioned by the builder. In the event of a substantial defect, the buyer shall introduce a claim against the constructor/architect who shall their self introduce a claim against their subcontractors. These articles are imperative !
- The architect and the contractor are also liable for "minor" hidden defects i.e. those not covered by the 10 year liability. This liability has to be invoked within "a reasonable period of time". The starting point and the duration of the reasonable period of time are questions of fact left to the discretion of the courts. The duration of the reasonable period usually comprises between 6 months and 2 years. This liability can be adapted (excluded, limited or increased) by contract, pursuant to the normal legal rules on liability and exoneration clauses.
- The building company/seller shall at his expense during (insurance "All Risk"/*"Tous Risques Chantier/Alle Risico's Bouwplaats")* and after (insurance related to the 10 year- liability) completion of the works procure and maintain an adequate insurance

5.6 Builder's Insolvency

5.6.1

The builder has to establish a bank guarantee at the beginning of the construction that covers the full completion of the construction. If the builder is

bankrupt during the construction, the amount guaranteed by the bank shall be used for the completion of the works. In this case, usually the new contractor shall not comply with the delay for the completion of the house/apartment.

5.6.2

If an unregistered contractor (explain) is used, the bank guarantee (that covers 100 % of the execution of works) shall be released for 100 % at the provisional completion.

If a registered contractor (explain) is used, the bank guarantee (that only covers 5 % of the execution of the works) shall be released for 50 % at the provisional completion and for 50 % at the final completion.

So, if there are to many defects to the good, the buyer shall not grant the provisional completion and the bank guarantee shall not be released.

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6. Private International Law

- Real property: Lex rei sitae
- Mortgages: lex rei sitae

7. Mortgages

[to be completed]